

GUIDANCE IN RESPECT OF HEADS OF TERMS FOR AGREEMENT AND LEASE

PCPF

This Guidance is published by the Primary Care Premises Forum (**PCPF**) in conjunction with the second edition of the PCPF Medical Centre Heads of Terms (**Heads**). The first edition of the Heads has now assumed general acceptance across the public and private sector and is in general use. The second edition updates but in addition includes suggestions on changes from both a practical and legal perspective.

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(A) AGREEMENT

NHS FUNDING

References in this document to the “**Directions**” are to the National Health Service (General Medical Services - Premises Costs) (England) Directions 2004 or to comparable replacement regulations and to “**NHS Funding**” is either to funding pursuant to the Directions or in the case of PMS practices to comparable funding under the practice’s local contract.

NHS GUIDANCE

References in this document to “**NHS Guidance**” are to [http:// www. www.spaceforhealth.nhs.uk/](http://www.spaceforhealth.nhs.uk/) [http:// www.pcc.nhs.uk/planning-and-design-guidance.php](http://www.pcc.nhs.uk/planning-and-design-guidance.php), HBN 11 and the Valuation Office Guidance for Building and Engineering Works for Primary Care Developments (Issue 0/2008) and the Primary and Social Care Premises Planning and Design Guidance as current at the date of these Heads

TENANT

This may be a corporate entity or individual GP, and often a Primary Care Trust where it has decided to take a Lease direct of a building or part of a building. In the case of a corporate entity, it is usual that guarantors will be considered. In the case of individuals, and often these are GPs, up to four in number (under the current legal position) might be added as a Tenant. Beyond that, it may be appropriate to consider guarantees from other GP partners.

AREA

GIA is to be calculated (and the Agreement for Lease should so provide) in accordance with the RICS Code of Measuring Practice Sixth Edition. If Net Internal Area (NIA) has relevance for any purpose under the Heads, the current standard for calculating this is Valuation Guidance Note on Medical Centre and Surgery Premises.

DEMISE

This section of the Heads notes a number of more usual scenarios. However if a different scenario exists, then this should be adapted and worded appropriately. For example the Heads could be for the provision of premises by way of a sub-letting or a letting in conjunction with other users (eg a pharmacy). On internal repairing (IR) leases the demise will usually refer to the internal shell of the property excluding any structural parts.

PLANS AND SPECIFICATION

It is sometimes the case that the final package of plans and specifications is not settled at the point of Agreement for Lease. In that circumstance, a process for design development

would be usual in the Agreement for Lease, and by reference to a general statement of intent. This often occurs in the case of Room Data Sheet (RDS) where general principles are agreed, but design development thereafter is provided for subject to qualified rights of approval between Landlord and Tenant.

VARIATION

Agreements for Lease will usually allow Landlords to decline approval (in their absolute discretion) for alteration requests which affect the building structure or the value of the underlying investment. In considering a request for alterations, Landlords/Developers will have regard to various value related facts including delays which might arise as a consequence of implementing change. Tenants should also be aware that aside from the impact that variations may have on rent, delays may have a practical affect on their timing to move from existing to new premises and they should liaise closely with their reimbursing authority (where rental is reimbursed pursuant to the Directions) on the impact of that.

Once notified by the Landlord/ Developer, Tenants should in turn notify the reimbursing authority, so that the reimbursing authority may liaise with the District Valuer or their appointed Valuer (DV) on the financial effect of the changes. Alternatively, and if that route of communication then exists, Tenants should consider contacting the DV direct.

PRACTICAL COMPLETION

The Landlord/Developer should take appropriate advice on how to ensure that its employer's agent or other monitoring surveyor is capable of insisting that the appointed building contractor fulfil the specific requirements noted here prior to issuing a Certificate or Statement of Practical Completion. Specific advice must be taken, but it may be by way of a suitable inclusion in the Landlord's/Developer's employer's requirement document.

It should be noted that the bullets in this section are a selective list and often seen as specific elements essential for the use of the premises for healthcare purposes and where non-satisfactory completion would prevent occupation (i.e. they are not suitable for inclusion with any minor snagging list). Landlords/Developers and often Tenants may wish to negotiate this in more detail dependent on the circumstances and that discussion is likely to involve the DV. The consequence of that negotiation may be to either increase or decrease the list and/or change particular items.

WARRANTIES

The exact warranty package- which may include product guarantees and/or sub contractor warranties for example in the case of lift and major plant - will need specific negotiation on a case by case basis. This section of the Heads of Terms needs to make clear the agreement reached in relation to that package.

RENT

The Agreement for Lease will generally contain arrangements for the agreement of the NIA at practical completion and the way in which the rental will reduce if the floor area or car parking spaces delivered is less than the original specified area and/or spaces. It may also contain arrangements for adjustment in the case of Tenant requested variations and, in exceptional cases only, may prescribe a review of rent immediately prior to the grant of the Lease. However, such a review, termed a day one review, should be expressly agreed with the reimbursement authority, and would be uncommon save for agreements where there is projected to be a very long period between exchange and delivery of the completed building.

RENT COMMENCEMENT DATE

As good practice, Tenants should inspect prior to the projected date of Practical Completion and be informed through this of the practicalities of ensuring they can start business immediately on taking up occupation.

OTHER PROVISIONS

- **VAT**

There may be special circumstances when the parties may agree VAT is either not chargeable or is to be absorbed by the Landlord/Developer. However, it would generally be the case that where VAT is chargeable on rents, the Landlord/Developer will require, as noted in the Heads, to charge the same through to Tenants.

- **Agreement personal to the Tenant**

The Agreement for Lease will usually provide that the Lease is to go to named Tenants, or only those successors who have been approved by the Landlord/Developer under the terms of the Agreement for Lease.

- **Agreement personal to the Landlord**

As it will be the Tenant, and not the reimbursing authority, who are in contract with the Landlord/Developer, it is the Tenants' consent which is required for an assignment of the Landlord's interest. However, before providing consent the Tenant should consult with their reimbursing authority and as appropriate seek their approval in turn to giving an assignment approval to the Developer/Landlord.

- **A long-stop date for termination**

The Landlord/Developer together with their funders will be making significant financial commitments in delivery of the building. They will secure insurance to cover burn downs and similar, but it is usual that such insurance provides only the costs of reinstatement and not of a return of funds (and profit) to the Landlord and its funders should the deal terminate. So it is usual for a long-stop period to take account of this by acknowledging that there could be more than one insurable event on the life of the development. As with all other provisions, there may be specific negotiations on this point.

(B) LEASE

TERM

Heads of Terms allow the period of the lease to vary from 15 to 25 years but the party should be aware that alterations to the term can vary the rent. The majority of leases on Primary Care Premises are for 20 years and increasing the term to 25 years would tend to reduce the rent whereas decreasing the term to 15 years would tend to increase the rent. Leases may be granted with security of tenure (within the 1954 Act) or such protection can be expressly excluded. Leases in this sector are usually within the 1954 Act and if they are to be outside, that requirement needs to be specifically stated in the Heads of Terms .

RENT REVIEWS

Alternate style rent review clauses are available for surgery/healthcare premises as noted in the Heads of Terms. However, it should be noted that the different clauses will have a material affect on the level of the initial rent. Dependent upon market conditions, a fixed or index linked rent will tend to reduce the initial rent whereas clauses that allow a reduction at review will tend to increase the initial rent.

Commercial leases will generally include a provision whereby reviews run from a set date even though the review process may not be completed until sometime later (and may also not be commenced straight away after that date). Any increase in rent is paid from the earlier date and also commercial leases would generally include a clause whereby interest on outstandings becomes payable once the review is concluded.

Such clauses are often included within surgery/healthcare premises' leases as well but it is important the parties agree their position through the negotiations. As an example, it may not be the case that PCTs will reimburse GPs for interest on outstanding rents from the original review date up to the date when the review is completed and the arrears paid. Whilst removing the interest clause would benefit the Tenant in this case, it would also prejudice the Landlord's investment value. If as part of the negotiations it is agreed the interest clause is removed or restricted, it is suggested there should be a declaration in the Lease that in respect of the review procedure the parties must use all reasonable endeavours to complete the rent review procedures and timetables as specified in the Lease.

The parties to the Lease may also need to discuss protections for the Tenant where a notice served by the Landlord to commence the review is not served for an extended period after the date of that review. In general, the Tenant will be concerned to ensure that they are not unreasonably prejudiced by such late service.

As a final point, the proviso noted in the Heads of Terms which links the Lease Rent to rent reimbursement can also be used for PMS practices where they have agreed in their contract with PCT to adopt GMS principles and procedures for premises matters.

MAINTENANCE DECORATION AND INSURANCE

Introduction

The current market rent (CMR) set out in the DV's report is based on the assumption of Tenant's Internal Repairing (TIR) lease where the rent includes a repair/insurance uplift typically set at 5% of the Full Repairing and Insuring (FRI) rent but may increase or decrease with the repairing and insuring nature of the buildings. The repair/insurance uplift will normally include hard landscaping (as noted in paragraph 1(b) below). There may be occasions where the Landlord is to take on the responsibility of soft landscaping and thus a further adjustment will be needed.

There are two main forms of Lease repairing covenant;

1 FRI with or without a Service Charge:

- (a) **(Without Service Charge)** The tenant is responsible for the repair, maintenance, decoration and replacement of all buildings, plant and machinery within the demised premises (which includes car parks, landscaping and boundary fences. The landlord is responsible for maintaining in place an insurance policy for the full replacement value, 3 years loss of rent

(and where available on reasonable terms terrorism cover) and he can recover the annual premiums and the other costs (typically a triennial revaluation) of insurance from the tenant; OR

- (b) **(With Service Charge)** The landlord, or more usually his appointed agent, manages the repair, maintenance, external decoration and replacement of all buildings, plant and machinery within the demised premises and insurance (which includes car parks, landscaping and boundary fences). The landlord is responsible for maintaining in place an insurance policy for the full replacement value, 3 years loss of rent (and where available on reasonable terms terrorism cover) and recovers the costs of so doing, including a managing agents fee, from the tenant via an annual service charge (usually payable as rent quarterly in advance). The tenant retains direct responsibility for internal decoration and the repair and insurance of his fittings and equipment. The external decorating, repair and insurance obligations of the Tenant should be covered by the repair/insurance uplift.

2 Tenants Internal Repairing (TIR)

The tenant is responsible for the repair, maintenance and decoration of the interior of the premises, doors/windows (internal surface, glazing and cleaning), plant and machinery and external soft landscaping. The landlord retains responsibility for the structure of the building (foundations, walls and roof), external repair and decoration, replacement of plant and machinery and external hard landscaping, including boundary fences.

The division of responsibilities is principally achieved through the definitions of the tenant demise (see (A) Agreement - Demise), with the tenant accepting responsibility for the repair and maintenance of all items therein. The landlord will require covenants relating to the frequency of maintenance plant and machinery. The tenant retains direct responsibility for internal decoration and the repair and insurance of his fittings and equipment.

Buildings and Loss of Rent insurance cover (on reasonable terms) is maintained by the landlord and the costs are not recoverable from the tenant. If there is an "excess" payment in relation to claims this will be payable by the claimant.

3 Hybrid Arrangements

There may be variations to the two main forms noted above. For example, for a multi-occupied building there will be common internal parts which may include, but are not limited to, entrance ways, corridors, waiting areas, toilets and conference rooms. These areas can be managed by;

- (a) A service charge arrangement managed by the landlord or his appointed agent; or
- (b) One tenant taking responsibility and recovering proportionate shares of the costs from the other tenants.

Note: For both TIR and FRI leases the costs of managing these common areas are borne by the tenant.

4 Insurance

Where the premises become unfit for use due to an insured risk, the Tenant will necessarily need to take up temporary accommodation. Therefore the Tenant needs to make sure that they have arrangements in place to pay for that temporary accommodation. This may be effected via a Landlord's obligation (and the Landlord's insurance policy) but more usually cover is provided via the Tenant's business interruption insurance. It is important that a Tenant takes specific advice from their insurance advisers in relation to insurance matters.

USER CLAUSE

The Landlord and Tenant need to consider the inclusion, or not, of the bracketed words under this heading in the Heads of Terms . These will provide some commitment on the part of the Landlord to agree changes away from the health specified user. The issue here is that this can affect a Landlord's funding of the development as prospectively at some point in the term it could lead to a less valuable user being agreed. Alternatively, tenants particularly if they are PCTs, may want some ability to change the user to changing needs. A commercial discussion is needed on this point and the position made clear in the Heads of Terms ie exclude or include the bracketed words or some variation on that.