

Practice & Law

REX FEATURES

A NEW MODEL FOR SPEEDING UP LETTINGS

The Model Commercial Lease A new form of lease is now available. As Peter Williams explains, it is intended to become a familiar starting point for most commercial letting transactions

Why does every landlord and every law firm use a different form of lease? The construction industry and the banking industry use standard documents, so why can't the property industry?

Landlords and their lawyers have been increasingly hearing this sort of comment and there have been attempts over the past 20 years to create a standard lease. Indeed, there have been some successes: the Law Society publishes two forms of business lease and the RICS has published a lease for short-term lettings of shops, linked to the government's plan to invigorate high streets. But generally landlords, encouraged by their lawyers, have preferred to rely on what they are used to.

This is about to change. Back in 2011, the BPF commercial committee decided it was time to review the commercial leasing process in England and Wales. Many major landlords produce fairer terms as a first draft than they did 25 years ago, but a lack of standardisation in both lease structure and content means that commercial lettings still take longer to conclude than is justified.

A working group of property lawyers and landlord representatives was set up to find a solution. Their remit was to produce a modern document that could be used as a fair starting point for most commercial letting transactions.

As part of the process, the working group consulted informally with most of

the major law firms in England and Wales, and consulted more formally with a number of BPF members.

MCL documents

After over three years' work, the Model Commercial Lease (MCL) is now available. The MCL comprises a family of templates for commercial leases and associated documents. Different versions of MCL leases are available to suit different types of commercial buildings, such as offices, shops, shopping centre units and industrial/logistics units (see box, right).

Bolt-on provisions, such as an offer-back clause and a turnover rent clause, are also available. The asset management documents include a rent deposit deed and

MCL DOCUMENTS

LEASES

Office – whole and part
Office on a retail park – whole and part
Retail premises – whole and part
Retail premises on a retail park – whole and part
Shopping centre unit (with optional turnover rent provision)
Industrial/logistics unit
Unit on an industrial park

BOLT-ON CLAUSES

Turnover rent clause
Offer-back clause
A3/A4/A5 use clauses
Index-linked rent review
Option to renew
Service charge cap

ASSET MANAGEMENT DOCUMENTS

Rent deposit deed
Licences to assign, underlet, change use and alter
Licences allowing undertenant to assign, underlet, change use and alter

various types of licence.

The MCL is intended to avoid much of the unnecessary negotiation on most routine letting transactions by representing a fair starting point for both parties, and in many cases a fair end point as well. The aim has been to remove the “ritual dance” at the start of a transaction, so effectively rendering unnecessary the first round of the parties’ amendments. The parties are therefore freed up to discuss the issues that are specific to their deal, and those that actually matter to them.

The working group intends to keep the MCL under review to ensure it remains up to date. Successive versions of every document – the current version and all previous versions – will be available for anyone to view and download free of charge on the MCL website.

Will it work?

This is, of course, not the first time that a standard lease has been proposed. In the past, there has been little industry and professional support for such a project. The concept may be more successful on this occasion because:

- the concept of standardised documents is now accepted by the property industry;
- the initiative on this occasion came from the property industry, not from lawyers (although lawyers, especially when on fixed fees, are mainly supportive of the idea);
- after decades of negotiating the same points, mostly to reach the same end, lawyers feel life is too short to argue points that have little or no benefit for the parties in practice;
- rather than a one-size-fits-all document, the MCL is intended to be a fair starting point for the production of the draft document – the parties are free to customise it as they wish; and
- perhaps most importantly, the landlord-tenant relationship is now less confrontational than in the past, and many experienced counterparties do not relish unnecessary conflict, especially at the start of the relationship.

No one is expecting the MCL to be used in every transaction instantly. While new projects could start with the MCL immediately, moving to the MCL in, for example, an existing shopping centre, could take many years, as new tenants move in to fill vacant units.

Speeding up transactions

The MCL has the potential to speed up (and lower the cost of) transactions other than lease negotiations. Once it is in common use, it should also enable investment and financing transactions to become simpler and cheaper. Lawyers and their clients will be familiar with the MCL documents, making it simpler to identify issues that need to be reported on to buyers and funders.

The increasing popularity of on-line document storage systems means it will be possible to retain electronic versions of leases and other documents, enabling them to be checked against the current version of the MCL to spot where there might be deficiencies.

A protocol is being drawn up to ensure that a document comparing a lease against the relevant MCL template at the time is kept with the deeds electronically or in hard copy, for future reference purposes.

Peter Williams is a writer and lecturer at Falco Legal Training. This article is written on behalf of the MCL working group, of which he is a member.

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ONLINE THIS WEEK

LAW REPORT The Estates Gazette Law Reports are now available exclusively on EGi each week and in bound volume three times a year. This week we report *West v Ian Finlay & Associates (a firm)*.

Introducing the MCL

New lease of life Alan Riley provides a brief critique of the Model Commercial Lease

Commercial property lawyers have benefited from the Standard Commercial Property Conditions since 1999 and the Commercial Property Standard Enquiries since 2002, but have never had anything approaching a standard form of commercial lease. The Model Commercial Lease (“MCL”) is about to bridge the gap.

Where the MCL stands out is that it both looks like an institutional form of lease, and is an institutional form of lease. Although it is a BPF-initiated project and is largely compliant with the Code for Leasing Business Premises, it is pitched evenly between the parties, and is palatable to both. It does not have the aggressive landlord bias of some firms’ institutional forms, but is not excessively fair to the tenant. Its aim is to avoid unnecessary negotiation and should suit both parties.

As an institutional lease, the MCL includes a full-form service charge schedule (with a not-unreasonable obligation to “take into consideration” the RICS *Code of Practice for Service Charges in Commercial Property*), institutionally standard insurance provisions (including uninsured damage protection clauses for tenants included without the need for the tenant to ask for them), a typical upwards-only market rent/hypothetical lease rent review clause, and an expected assignment provision which allows assignment of the whole, with consent, but gives the landlord the right to stipulate for a range of security conditions (authorised guarantees, guarantees of authorised guarantees, new guarantees for assignees and rent deposits).

Following *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2011] EWCA Civ 904; [2011] 32 EG 56, an assignment of the lease to the tenant’s current guarantor is prohibited.

The MCL’s tenant’s break clause is distinctly Code-compliant, conditional only on up-to-date main rent payments and a return of the premises free from occupation (and an optional break premium payment condition). To deal with the problem of tenants paying rent in advance for the period falling after a break date (see *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2014] EWCA Civ 603; [2014] PLSCS 150) there is an express repayment clause.

There are a number of key features with which the user will need to be familiar:

Tenant’s works: the MCL includes the usual controls on alterations. However, in order to streamline drafting, and to legislate for the terms of any later licence to alter, the MCL sets out in a schedule the conditions applicable to the carrying out of any tenant’s works.

Reinstatement: a simple terminal obligation to remove fixtures, signage and permitted alterations is included. By service of a notice, the tenant is able to prompt the landlord to specify which alterations are to be removed, and unless the landlord responds, the obligation to remove will not apply.

Underletting: a streamlined drafting approach is taken to underletting. The main body of the lease requires the tenant to comply with underletting obligations set out in a separate schedule. The schedule defines an “Approved Underlease” and who

will qualify as an “Approved Underlessee”. Underletting is restricted unless both the form of underlease and the intended underlessee are “approved”, and landlord’s consent is obtained.

A wider range of interpretation

provisions: the MCL has more interpretation clauses than other leases. The user will need to become familiar with them, especially when customising the MCL. For example, references to:

- notifying a party means not only notifying that party in writing, but also service on it in accordance with the MCL service provisions;
- approvals or consents mean prior written approvals or consents which are not to be unreasonably withheld;
- any costs to be paid requires the costs to be reasonable and proper; and
- any request, requirement or stipulation made by the landlord must be reasonably imposed, unless the lease stipulates that the landlord has an absolute discretion.

Modernity: the MCL is a modern lease written in plain English (obligations are a “must”, and the only “shall” is one imposed by the Land Registry’s Prescribed Clauses). It is up to date, dealing with modern issues of electronic communications, the Community Infrastructure Levy, energy efficiency, the Carbon Reduction Commitment, EPCs and sustainability. It can operate as a green lease if the parties agree to comply with the obligations in one of the schedules that sets out a lease code for sustainability to promote the building’s environmental performance.

Lawyers can be conservative creatures, preferring to stick with what they know. This is understandable, as there is always an element of uncertainty in moving a client from one leasing model to another. Whether the MCL is able to assert itself as the industry-standard model form of lease, only time will tell, but the initiative is a significant step in the right direction.

Alan Riley is a property law consultant

SELECTED FAQs FROM THE MCL WEBSITE

How do I access the MCL documents?

They can be downloaded, free of charge, from the MCL website at <http://www.modelcommerciallease.co.uk>

Are the MCL documents drafted in favour of landlords?

The MCL is intended to avoid unnecessary negotiation on most routine letting transactions by representing a fair starting (and, in many cases, end) point for both parties. However, having said that, they have been prepared for use by landlords, not by tenants.

Do I have to pay to use MCL documents?

No. They are free for everyone to use subject to the conditions of use on the MCL website.

Can I copy the MCL documents onto my own computer system?

Yes, although you will need to ensure that you keep them up to date to reflect changes made to the documents on the MCL website.

Can I use the MCL documents as the starting point for my own precedent

documents, and amend or delete the wording in places?

Yes

Can I use the text from the MCL documents within automated document drafting systems?

Yes

What do I do if I want to comment on one of the MCL documents?

Feedback is welcomed from users and can be left by using the Feedback page on the MCL website.