

Business Leasing Code for Landlords & Tenants



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Business Leasing Code for Landlords and Tenants

Introduction

A business lease is a legally binding contract between the legal owner (landlord) and the occupier (tenant). The objective of this Code is to create a document which is clear, concise, user friendly and authoritative for both parties. This Code has been adapted using The Code for Leasing Business Premises in England and Wales 2007 which was published by RICS to reflect Irish market practices and regulations.

It is intended that the leasing Code will provide a framework for negotiations before the grant of a lease, lease renewals and extensions. Both parties should be transparent about any departures from the Code in a particular case and the reasons for them.

To that end, model outline Heads of Terms have been provided, with this document, with the objective of making the Code easily accessible to both landlords and tenants. The Heads of Terms will explain in clear language the commitments, in general terms, both sides are making.

The wider objective is to encourage retail and professional bodies, lenders and government (at all levels) to adopt the Code and ensure that all are made aware of it and the advisory pages which accompany it. The Code applies to new leases, however, we would promote its use in helping to resolve disputes on existing leases between parties which may act as a reference in the event of confirming what was actually agreed.

In this document the following terms have been used:

Landlord: This is the legal owner of the property or the person owning a legal superior interest in the property such as a head lease.

Tenant: This is the lawful occupier of the property or the person paying rent to a landlord.

Heads of Terms: This is a structured summary of the agreement between the parties and is used to instruct lawyers to produce the formal lease. Both the lease and the Heads of Terms should comply with the recommendations of the Lease Code but the Heads of Terms will be superseded once the formal lease has been granted.



1. Property Demised

Parties should seek to agree from the outset on the extent of the property being demised.

Tip 1

The offer letter should clearly outline the extent of the premises and the provision of floor plans which clearly outline the boundaries is strongly recommended. Floor areas using the International Property Measurement Standards (IPMS) basis of measurement should be noted. All means of access and any common areas should be identified. Limitations on hours of use, rights of way, user restrictions, legal or planning limitations or any obligations that come with the property should be included.

Landlords should consider flexibility, stating whether alternative lease terms are available and propose rent variations for different lease terms. Tenants might consider, where appropriate, alternative arrangements such as turnover based rents, performance related rent reviews etc.

It is recommended in accordance with best practice that the landlord circulates the final agreed Heads of Terms to all parties concerned.

Tip 2

All parties should ensure that prior to instructing their legal representatives that the final agreed Heads of Terms are set down clearly in writing. This will be invaluable in terms of giving a legal team a clear framework and will help avoid any confusion further into the transaction.

2. Lease Negotiations

Landlords should make offers in writing which clearly state the rent, the length of the lease term and any rights including the options and mechanisms to terminate the lease. Any offers should also state whether or not the tenant will have security of tenure, rent review arrangements as well as the tenant's rights to assign, sublet and share the premises. Repairing obligations and the VAT status of the premises should also be noted. Any negotiations should be confirmed in writing as either party may need to rely upon them at some future date. At this stage parties may enter into an agreement to lease where it is proposed that either party will carry out works, and/or secure statutory permissions and third party consents prior to issuing the formal lease.

It is worth noting by both landlords and tenants that during the term of the lease either party can dispose of their interest. Therefore any terms agreed and any lease contract signed should reflect everything that the landlord and tenant will rely on to conduct and safeguard their interests or businesses as the case may be.

Tip 3

Make sure the offer sets out clearly who the landlord and tenant are. Other interested parties such as a superior landlord etc. should also be identified.



3. Financial Matters, Rent Deposits and Guarantees

The lease terms should state clearly any rent deposit proposals, including the amount, who holds the deposit, for how long and the arrangements for paying or accruing interest at a proper rate. Tenants should be protected against the default or insolvency of the landlord in relation to deposits held by the landlord. Landlords should state clearly the conditions for releasing rent deposits and guarantees.

Tenants should receive full details of the expected obligations and costs involved in leasing the property. This should include all personal or company guarantees, security deposits or other bank guarantees. Not all costs will be fixed at the time of agreeing the lease but both parties should clearly set out the means by which they are calculated to safeguard both the business and the tenancy.

Tip 4

Tenants should ask the landlord to be explicit about costs and obligations in the lease.

Tip 5

In the case of paying a deposit, the account where the deposit is held should be agreed. The deposit should ideally be held in an escrow or stakeholder account to protect the tenant against landlord insolvency. The rate of interest should be agreed and to whom any interest accrued is to be paid. Ensure that any deposit paid to a landlord is transferred in the event of a disposal of their interest.

If a personal guarantee is being provided both parties should understand when and how the landlord may call on the guarantee and what the guarantee specifically covers. It should be clearly established how many parties will be subject to the guarantee and whether the guarantee falls away after a certain period of time or is subject to the tenant achieving a level of turnover/profit for a defined period. A rent deposit might be considered acceptable as an alternative guarantee. Landlords should detail clearly the circumstances under which the deposit might be returned prior to lease expiry.

Tip 6

Both parties should treat the guarantee as if it WILL be called upon on the first day of the lease. Landlords and tenants should consider the consequences of a guarantee.



4. Length of Term, Break Clauses and Renewal Rights

The length of term should be clear. In the case of break clauses, notice provisions should also be clear together with the importance of adherence to deadline dates.

The pre-conditions to tenants exercising any break clauses should be clearly stated (see Heads of Terms). Basic conditions would include being up to date with the contracted or agreed rent and to give vacant possession with no continuing subleases. Disputes about the state of the premises, or what has been left behind or removed, should be settled later and should not be used as a mechanism to frustrate the exercising of the break clause.

The default position under the Landlord and Tenant (Amendment) Act 1980 is that business tenants have rights to renew their lease if they are in occupation for 5 years or more. However there are exceptions to this general rule such as in the case where a landlord has planning permission for development. Also the Civil Law (Miscellaneous Provisions) Act 2008 allows landlords to opt out of the obligation to grant a new lease if the tenant signs a Deed of Renunciation. Tenants should familiarise themselves with the implications of signing a Deed of Renunciation and it is a condition within the Act that they must seek professional advice in relation to same.



5. Rent Reviews

Leases may contain a provision allowing either party to initiate a rent review. The rules by which the rent can be changed should be clear and understandable. The basis of a rent review should be the market rent unless clearly stated otherwise. If any increases/decreases are fixed to an index the basis should be a published, independent and authoritative source.

If there is a market rent provision, it should specifically exclude (or disregard) any improvements the tenant makes (other than as part of an explicit obligation) or any value arising from the tenants business. There should be provisions in the event of any disagreements which will be referred to an independent expert or arbitrator to determine.

Tip 7

Parties should understand the basis on which the rent can be changed, that it can go up or down, is fixed for a longer/shorter period, is linked to CPI or RPI.

Both parties should think very carefully before deciding whether or not to initiate the rent review.

Tip 8

Rent review clauses in modern leases allow for the rent to be revised either upwards or downwards depending on the determined market rent. Where the passing rent continues to be paid beyond the rent review date, prior to the determination of the market rent, resulting in either an over payment or under payment of rent in the interim, both landlords and tenants where applicable, should be entitled to receive an interest payment on the difference.

Tip 9

Try to avoid a situation where the interest rate on the difference is higher than the bank base rate. Consideration should be given to introducing a provision whereby either party forfeits their right to interest on the difference in rent paid after the review date if there is delay in initiating the rent review process.

Tip 10

Avoid strict time limits in the rent review clause (other than that referred to in Tip 9) – these could result in either party losing the ability to negotiate.

6. Assignment and Subletting

Leases generally should:

- Allow tenants to assign the entire premises with the landlord's consent, which should not to be unreasonably withheld or delayed.
- Not refer to any specific circumstances for refusal, although a lease would still be compliant with this Code, if it requires that any group/company taking an assignment, when assessed together with any proposed guarantor, must be of at least equivalent financial standing to the assignor.
- Seek, where relevant, to agree circumstances where parties can sublet part of the building to group companies.

Tip 11

Tenants need to consider provisions where they are required to sublet at the same or higher rent than they pay. This will negatively impact them when trying to sublet the premises in a situation where market conditions have deteriorated since they took occupation.

Tip 12

Landlords should be required to give consent within a defined period of time. All relevant documentation should be provided to the landlord at the time of the application. Consent can only be withheld on reasonable grounds.

7. Service Charges

Landlord should be explicit in their offer about any service charges, including how these costs are calculated, what they cover (and don't cover) and the extent to which they will be obliged to pay towards any capital improvements and long-term repairs or replacements of structure, fabric, machinery and equipment.

During negotiations landlords must provide best estimates of service charges, insurance payments and any other outgoings that tenants will incur under their lease and provide details including contact details of any management company where appropriate. Tenants should expect landlords to be transparent in terms of these costs and how they are calculated. Furthermore, tenants should be aware of any imminent capital improvements, long term repairs, replacements or changes

in fabric, machinery and equipment which will incur additional capital costs over and above the existing service charge.

Landlords must disclose known irregular events that would have a significant impact on the amount of future service charges and any provisions regarding the sinking fund.

Landlords should be aware that the Society of Chartered Surveyors Ireland (SCSI) have updated Professional Guidance for Chartered Surveyors in the area of service charges in commercial property entitled SCSI Service Charge Code for Commercial Property 3rd edition. Members of the SCSI will be aware of guidance relating to service charges and the implications of the MUD Act. This Professional Guidance outlines best practice in terms of transparency and equity when dealing with service charges and budgets. Landlords should ascertain whether their agent is conforming to this industry best practice and if they observe its guidance in drafting new leases.

8. Repairs

Tenant's repairing obligations should be appropriate to the length of term and the condition of the premises at the outset.

Unless expressly stated in the Heads of Terms, on expiration, tenants should only be obliged to give the premises back in the same condition as when they took occupation. In some cases normal wear and tear is accepted. A photographic Schedule of Condition is advised in this instance. In the case of older buildings a detailed written report outlining any potential defects is strongly advised. Both the Schedule of Condition and the written report should be attached to the lease.

Tenants should be aware when acquiring an existing lease that the condition of the property may have disimproved from the beginning of the lease. It is important to identify whether a lease assignee is required to put the property back into its original state.

9. Alterations and Permitted Use

Leases invariably limit the use of the property to a specific purpose. As a general rule landlords control over alterations and use should not be more restrictive than is necessary to protect the value of the premises and should not prevent the tenant from carrying out their business successfully. Both parties should also be aware of provisions in terms of internal alterations.

Tip 13

Both parties should ensure that the proposed use complies with the relevant planning regulations.

Tip 14

Check what is required to make it suitable to trade. Landlords and tenants should agree, in writing, any changes intended to be made to the property prior to signing the lease. Are any of these alterations to be reinstated on expiration?

The landlord should be required to give his/her consent within a reasonable time period (say 21 days) and should not refuse any proposed alterations without good reason.

10. Insurance

Landlords will usually have the obligation to insure the property. The insurance policy terms should be fair and reasonable and represent value for money, and be placed with regulated insurers. Tenants may be required to reimburse the landlord for the insurance premiums.

Landlords must always disclose any commission they are receiving and must provide full insurance details on request.

Rent suspension should apply if the premises are damaged by an insured risk/ uninsured risk, other than where caused by a deliberate act of the tenant. If rent suspension is limited to the period for which loss of rent is insured, leases should allow landlords or tenants to terminate their leases if reinstatement is not completed within that period.

If there are any material changes to the use of the property the insurer should be notified.

If the whole of the premises are damaged by an uninsured risk to the point where occupation for the tenant's business is impractical, the tenant should be allowed to terminate the lease, unless the landlord agrees to rebuild at their own cost and within a reasonable time frame.



Tip 15

Tenant should be entitled to ask for a copy of the landlord's insurance policy before signing the lease. Tenants may want to check with alternative insurers that they are getting value for money for the given level of premium and that the insurance company is reputable. It is prudent for tenants to confirm that the landlord has no intention of changing the scope (and, therefore, the cost and nature) of the insurance cover.

The lease should provide for the landlords policy to be used to repair or rebuild the property unless the insurance is invalidated because of some action (or inaction) on the part of the tenant, in which case they may be liable for the reinstatement.

Tip 16

Tenants should remember to inform the landlord and the insurer if they intend to change the way they use the property. For example, tenants should inform the landlord if they are storing any hazardous chemicals in the context of their business or if they propose to leave the property vacant and unattended for an extended period of time. Tenants should request the landlord to ensure inclusion of such activities in the insurance policy and to consult them over any changes in the insurance policy terms.

Tip 17

Both parties should ensure that proposed alterations or improvements would be covered under the insurance policy.

11. Ongoing Management, Tenant Defaults and Applications for Consent.

Landlords should handle all defaults promptly and deal with tenants and any guarantors in an open and constructive way.

The landlord and tenant should, ideally, engage in discussions concerning any potential building dilapidation issues well in advance of the lease expiry date or earlier termination.

It is standard practise that the landlords reasonable cost incurred with dealing with tenant applications are reimbursed. When receiving applications for consents landlords should where practicable give tenants an estimate of the costs involved.

Landlords should normally request any additional information they require from tenants within 10 working days of receiving the application. Landlords should consider at an early stage what other consents they will require (for example, from superior landlord or mortgagees) and then seek these. Landlords should make decisions on consents for alterations within 15 working days of receiving full information.

Default

The lease forms a legal contract between the landlord and the tenant. Any breach of contract may have serious consequences for both parties and care should be taken to understand each party's obligations and any actions the landlord/tenant may take against either side and, if applicable, the guarantors, including court action.

The laws relating to default in the context of landlord and tenant relationships are complex and both parties should seek professional advice so as to clarify their obligations and rights.

Tip 18

A provision should be included whereby either party can notify the other stating that they are in breach and give a reasonable opportunity to remedy the breach before taking legal action.

A tenant or landlord may discover that they have failed or forgotten to carry out some obligations under the lease. It may be better sometimes for the landlord/tenant to negotiate a reasonable payment to rectify the breach of obligation, for example in an instance where the lease has expired.

The remedy for a breach of the agreement may range from the landlord registering a judgement which may result in the arrival of the sheriff, who may seize goods to the value of the breach, to the landlord taking back the property or the tenant handing back the keys ('Forfeiture'). It should be noted that this would not be the tenant's liability to pay for the arrears.

In certain circumstances landlords have tried to forfeit the lease by locking the tenant out of the property or by obtaining a court order. In either case tenants can apply to the court in order to have time granted to put matters right or to pay what is owed.

Tip 19

Landlords should confirm in writing that the property complies with all regulations (some of which are "Statutory Instruments") before entering into the lease.

12. Building Performance Clauses

The European Energy Performance of Buildings Directive Recast (EPBD) and Energy Efficiency Directive, required all new buildings to be NZEB by the 31st December 2020 and all buildings acquired by public bodies from the 31st December 2018.

The Irish Government, to comply, moved directly to NZEB (Near Zero Energy Building) standard through its Part L regulations. This means that under the Technical Guidance Document which came into force in 2019, buildings are required to use 40% to 60% less energy, as a minimum, than previously.

Surveyors should be aware that new leases, particularly in larger developments, may contain clauses designed to maintain the energy rating or certification (LEED, BREAM, WELL etc.) of the building.

13. PSRA Statutory Obligations

This Code seeks to promote full compliance by tenants of their statutory obligation to return the PSRA (Property Services Regulatory Authority) specified form (PSRA/CL1-13) within 30 days of receiving the stamped certificate from the Revenue Commissioners.



Model Heads of Terms

1.0	Initial Information	
1.1	Property Address	
1.2	Property Demised	
1.3	Property Measurement	
1.4	Landlord	
1.5	Tenant	
1.6	Rent Add Payment dates (e.g. monthly, yearly)	€
1.7	Rent free period (and other incentives) Insert where appropriate	
1.8	Type of lease	
1.9	Landlords Initial Works (Including timing) Insert where appropriate	
1.10	Tenants Initial Works (Including timing) Insert where appropriate	
2.0	Guarantor/ rent deposits	
3.0	Lease length, breaks, extensions and rights	

3.1	Lease length and start date			
3.2	Break clauses or renewal rights			
3.3	Waiver of Tenancy Renewal Rights (Deed of Renunciation)			
3.4	Rights			
4.0	Rent Reviews			
5.0	Assignments and Subletting See check box >	Prohibited	If not prohibited prohibited is CNUW	Permitted without consent
		Assignment		
		Sub-lease Whole		
		Sub-lease part		
		Sub-sub-lease		
		Concession		
		Concession		
		Group Sharing		
6.0	Services and Service Charges			
7.0	Repairing Obligations			
7.1	FRI and schedule of condition			
7.2	Collateral Warranties			
8.0	Insurance			

9.0	Alterations and use	
9.1	Alterations	
9.2	Permitted use	
10.0	Lease management	
11.0	Other Issues	
11.1	Rates and Utilities	
11.2	VAT	
11.3	Legal Costs	
11.4	Conditions	
11.5	General (Items that might be included)	
11.6	Landlord's Solicitors	

11.7	Tenant's Solicitors	
11.8	Timing and other matters	
11.9	Standard Contract	
11.10	Landlord's agents(s)	
11.11	Tenant's agent(s)	

Useful Websites

Society of Chartered Surveyors Ireland
www.scsi.ie

Law Society
www.lawsociety.ie

Property Service Regulatory Authority (PSRA)
www.psr.ie

Small Firms Association
www.sfa.ie

Chambers Ireland
www.chambers.ie

Department of Jobs, Enterprise and Innovation
www.enterprise.gov.ie

Enterprise Ireland
www.enterprise-ireland.com

IDA
www.idaireland.com

ISME
isme.ie

Irish Green Building Council
igbc.ie

Useful Downloads

[A Guide to a Chartered Commercial Surveyor](#)

[A Guide to Property for SMEs](#)

[Consumer Guide to the New Building Regulations](#)



Chartered property,
land and construction
surveyors

Dating back to 1895, the Society of Chartered Surveyors Ireland is the independent professional body for Chartered Surveyors working and practicing in Ireland.

Working in partnership with RICS, the pre-eminent Chartered professional body for the construction, land and property sectors around the world, the Society and RICS act in the public interest: setting and maintaining the highest standards of competence and integrity among the profession; and providing impartial, authoritative advice on key issues for business, society and governments worldwide.

Advancing standards in construction, land and property, the Chartered Surveyor professional qualification is the world's leading qualification when it comes to professional standards. In a world where more and more people, governments, banks and commercial organisations demand greater certainty of professional standards and ethics, attaining the Chartered Surveyor qualification is the recognised mark of property professionalism.

Members of the profession are typically employed in the construction, land and property markets through private practice, in central and local government, in state agencies, in academic institutions, in business organisations and in non-governmental organisations.

Members' services are diverse and can include offering strategic advice on the economics, valuation, law, technology, finance and management in all aspects of the construction, land and property industry.

All aspects of the profession, from education through to qualification and the continuing maintenance of the highest professional standards are regulated and overseen through the partnership of the Society of Chartered Surveyors Ireland and RICS, in the public interest.

This valuable partnership with RICS enables access to a worldwide network of research, experience and advice.

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