

CRACKING THE COMMERCIAL LEASE CODE

The Code for Leasing Business Premises in England and Wales 2007 (“the Lease Code”) was launched on 28 March 2007 by Yvette Cooper, the Minister for Housing and Planning. It was published by The Joint Working Group on Commercial Leases comprised of Government, business and legal organisations.

The Lease Code has three elements:

- The Landlord Code
- The Occupier Guide
- Model Heads of Terms

Copies of these documents are available at www.commercialleasecode.co.uk

The Lease Code aims to promote flexible leasing arrangements, efficiency and fairness. It is intended to influence the conduct of landlords and tenants during negotiations and throughout the term of the lease.

The 2007 Lease Code was preceded by the Codes of Practice for Commercial Leases in 1995 and 2002. These Codes of Practice had very little impact. The Government has indicated that it will allow two or three years for the Lease Code to take effect, failing which it will legislate. For now, the Lease Code is voluntary.



Some of the issues covered by the Landlord Code are:

Lease Negotiations

Under the Lease Code landlords are required to make written offers stating the main terms of the lease. They must promote flexibility and if the tenant requests, the landlord must state whether alternative terms are available and propose different rents for different terms. There are some difficulties with the requirement to price different lease terms. The landlord who owns only one or a few properties may not have the expertise to deal with this. Setting a price for a particular lease term could create a precedent which might be used in lease renewals under the Landlord and Tenant Act 1954. This is unlikely to be what either party intends. If landlords are obliged to offer priced alternatives there is a risk that they will simply increase the price of the option which they least prefer.

Rent Review

The Lease Code does not rule out the upwards only rent review. Instead, it requires landlords to offer alternatives if a prospective tenant asks them to do so. Those alternatives might include an upwards/downwards review subject to a minimum equal to the initial rent or a review by reference to indexation. The landlord must state its reasons if it cannot offer alternatives.

Concerns about having upwards/downwards rent reviews imposed on the market will have abated due to the trend towards shorter leases which either review rent by reference to the Retail Prices Index or do not contain a rent review. 65% of leases granted in 2005-2006 were for five years or less. Stamp Duty Land Tax has contributed to this trend given that the duty on leases for terms of 10 years or more is disproportionately expensive.

Repairs

A tenant's obligation to repair should be appropriate to the length of term and the condition of the premises. The Lease

Code provides that unless expressly stated in heads of terms, tenants should only be required to give back the premises in the same condition as existed at the start of the term. This is a significant departure from current practice and is likely to make the use of schedules of condition more common.

Insurance

The Lease Code addresses the issue of damage by uninsured risks. It requires a rent suspension whether the premises are damaged by an insured risk or an uninsured risk. The only exception to this is where the damage is caused by the deliberate act of the tenant. If the lease limits the rent suspension to the period covered by loss of rent insurance either party should be able to terminate the lease if reinstatement has not taken place within that period.

Conclusion

The Lease Code represents best practice and could lead to quicker, cheaper negotiations. All the issues are brought out into the open at the start of a negotiation. This should mean that the parties have realistic expectations of their relationship as landlord and tenant. There are undoubtedly some problems achieving compliance with the Lease Code when dealing with 1954 Act lease renewals or the grant of leases which need to be consistent with other leases of adjoining premises. However, even in those circumstances, observing the spirit of the Lease Code could be helpful.

The Government has indicated that it has already identified the legislation it would put in place if the Lease Code is not put into practice. Legislation could lead to inflexibility which is the very thing that the Lease Code seeks to avoid.



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