

## GN/CPSE.4 (version 1.0) Guidance notes on CPSE.4 Supplemental pre-contract enquiries for commercial leasehold property on the assignment of the lease

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Standard document: CPSE.4 (version 1.0) Supplemental pre-contract enquiries for commercial leasehold property on the assignment of the lease.

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The CPSE.4 enquiries should be raised in addition to the CPSE.1 enquiries where the Property is leasehold and the Transaction involves the sale (assignment) of the Lease. The Seller is the current tenant and the Buyer is the party to whom it is intended to assign the Lease.

These guidance notes:

- Enable the enquiries to be presented in a concise form without the need for illustrative examples.
- Are intended to help the legal advisers, the Buyer and the Seller to understand why individual enquiries are raised, how the enquiry should be answered and what may need to be done depending on the nature of the reply.

The Buyer may wish to keep a set of the guidance notes with the Seller's replies to the enquiries to assist the Buyer in understanding and using the information in the replies both during the period of the Buyer's ownership and later on a subsequent sale of the Property.

The enquiries stand on their own and do not depend on the guidance notes for interpretation.

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## GUIDANCE NOTES

### 1. LEASE

The Buyer needs to know the identities of the parties whose consent may be needed for the assignment. The Buyer also needs to be certain that there have been no variations to the terms of the Tenancy Documents. Not all variations will be apparent from the title documents.

### 2. CONSENTS

It is usual for a lease to impose restrictions on the tenant's ability to assign the lease, grant underleases, charge the lease, change the use of and make alterations to the Property. These restrictions enable the landlord, and indirectly any superior landlord, to control the identity of the tenant, and to control what is done at and to the Property, and so protect the investment.

**Enquiry 2.1** The Buyer needs to be satisfied that all requisite consents were obtained for all past assignments, alterations, additions and changes of use. This enquiry does not ask about consents to the grant of underleases and occupational licences as these are dealt with in CSPE.2 Supplemental pre-contract enquiries for commercial property subject to tenancies). The Buyer needs to make sure that it will not become liable for any past breach of tenant's covenant and cannot be required to remove any alterations or additions. In relation to alterations, the Buyer will also be concerned to establish that there are no alterations which, because they were unauthorised, can be rentalised by the landlord at the next rent review, so increasing the rent.

**Enquiry 2.2** The past refusal of a consent is relevant because it will give the Buyer an indication of the likely attitude of the landlord towards applications for consent, both generally and for particular applications.

**Enquiry 2.3** The information which the Buyer receives in reply to this enquiry will assist it in deciding whether the contract should provide for the Buyer having any involvement or control in any current applications for consent.

### 3. LANDLORD LIABILITY

A landlord under a lease which is a 'new tenancy' under the 1995 Act remains liable as landlord even after it has sold its interest in the lease unless and until it has been released. The 1995 Act provides a procedure to obtain a release: the landlord must, within the prescribed time limits, serve a notice requesting release. The landlord is released if the tenant expressly agrees to the release or fails within the prescribed time limits to respond to the request for release. If the tenant opposes the release, the landlord may apply to the court but if the court does not then grant a release, the former landlord remains liable as landlord together with the current landlord. On the next assignment of the lease, however, the former landlord can make a new application for release. As there is no formal record of release, the Buyer must ask the Seller about past and pending applications. Where possible the Seller should supply a copy of any application for release made by any previous landlord, whether addressed to the Seller or to a previous tenant, and a copy of all responses and any court applications and papers.

### 4. SCOPE OF DEMISE

The information requested in reply to enquiry 4 is information which the Buyer will not always be able to obtain either from the Lease or from the Land Registry.

**Enquiry 4.1** This information might be relevant in assessing definitions in the Lease about the extent of the landlord's estate. For management purposes the landlord may choose to manage the Development of which the Property forms part with another neighbouring development of which it is also the owner. The information may also indicate to what extent facilities used by the Development are or could be used by a neighbouring development.

**Enquiries 4.2 and 4.3** These enquiries are concerned with car parking and other facilities that are not expressly granted by the Lease. This may have been because the landlord did not want the tenant to have a formal right to use the facilities or the facilities were not available at the time the Lease was granted. The Buyer will need to know before committing to the Transaction whether it must make special arrangements with the landlord for the continued use of those facilities.

### 5. HISTORY OF THE LEASE

Part II of the 1954 Act gives business tenants rights to stay in business premises after the end of the lease and the right to renew the lease in certain circumstances. Landlords have only limited grounds on which to refuse to renew the lease. The most important of these grounds are an intention on the part of the landlord to redevelop the premises and an intention on the part of the landlord to occupy the premises for its own purposes. Where one of these grounds is established, the landlord is not required to renew the lease but is required to pay the tenant compensation. The replies to this enquiry should give the Buyer the information it will need to make a claim for a new lease or for compensation.

**Enquiry 5.1** Where a landlord establishes a ground to refuse to renew the tenant's lease, the amount of compensation which the tenant can claim depends on the length of time the tenant has occupied the premises and whether the premises were occupied by a former tenant but for the purposes of the same business.

**Enquiry 5.2** If the tenant exercises the right to renew the Lease, the parties may agree the terms or refer the decision to the court. In deciding what rent should be paid, the court will disregard improvements made by the tenant, even if the improvements were made before the grant of the current lease, provided the improvements were made not more than 21 years before the date when the application for the new lease was made and provided the tenant was not under any obligation to the landlord to carry out the works.

**Enquiry 5.5** Even if the Lease is not renewed, the tenant may be entitled to compensation at the end of the term for improvements which it made and which added to the value of the Property. The right to this compensation arises under the Landlord and Tenant Act 1927, and is dependent on the tenant having served the landlord with notices before carrying out the improvements, and having given the landlord the opportunity to do the works at the landlord's expense and to rentalise the cost. The compensation will not be greater than the increase in the value of the Property attributable to the improvements or (if lower) the cost of the works at the end of the Lease term.

### 6. RENT AND RENT REVIEW

**Enquiry 6.2** There is a presumption that where a rent review clause stipulates that certain parts of the rent review procedure must be completed by a specified time, time is not 'of the essence' and therefore a failure to observe those time limits does not have any consequence. The following are exceptions to this rule and illustrates where time will be of the essence and the time limits will be binding on the parties:

- Where the rent review clause expressly provides that time is to be of the essence;
- In certain circumstances where the clause states the consequence of not complying with the time stipulation;

- In certain circumstances where a party serves a notice making time of the essence;
- Where the clause structure demonstrates an intention that time should be of the essence; and
- Where the relationship between the rent review clause and another provision in the lease (such as a break clause) by implication makes time of the essence.

The Buyer will need to review the rent review terms in the light of what has happened in practice.

## 7. SERVICE CHARGE

The Buyer will want some indication of the amount of service charges it is likely to have to pay under the lease. If the Property is part of a relatively new development, the Seller should obtain estimates from the landlord. If past accounts are available, the Seller should supply copies for the Buyer.

## 8. MANAGEMENT

**Enquiry 8.1** The Buyer is interested in the involvement of managing agents in the management of the Property and any Development of which the Property forms part.

**Enquiry 8.2** The Seller should give the Buyer a copy of any regulations.

## 9. ARREARS

**Enquiry 9.1** The Seller will remain liable for all arrears of rent due up until the assignment when the Lease is transferred to the Buyer and this is so whether or not the Lease is a new tenancy under the 1995 Act. The Buyer's interest in whether there are any current arrears does not stem, therefore, from a concern that it will inherit a liability for the arrears: it will not. The potential problem for the Buyer is that after the assignment the landlord can still forfeit the Lease for non-payment of those arrears even though the Buyer, as the current tenant, is not liable to pay them. This will not be the case, however, if the landlord has waived the right to forfeit for those debts by, for example, granting a licence to assign. In practice, once the Buyer knows the position the parties should come to some arrangement with the landlord before the licence to assign is granted.

**Enquiry 9.2** Section 17 of the 1995 Act limits the right of the landlord to recover arrears of payments due under the lease from a former tenant or its guarantor. Former tenants and their guarantors under pre-1995 Act tenancies and former tenants under new tenancies who have entered into authorised guarantee agreements, must be served with notice of liability in a prescribed form within six months after the payment becoming due, or the landlord loses the right to recover that payment from them.

## 10. INSURANCE

**Enquiry 10.2** If a tenant does something which gives rise to a claim on the landlord's insurance, then as it is the landlord rather than the tenant who is the insured, the insurance company may pursue its own claim against the tenant who caused the loss, to recover the amount of the insurance claim. This is known as the insurance company's right of subrogation. It is considered to be unfair to the tenant if at the same time the cost of the insurance premiums is paid by the tenant. A tenant will usually therefore try to negotiate that the insurance company waives its rights of subrogation. In practice that is believed to be the common law position where the tenant pays the insurance premium, following the case of *Mark Rowlands Ltd v Berni Inns Ltd* [1986] QB 211, but the position is not free from doubt.

## 11. BREACHES, COMPLAINTS AND ENFORCEMENT

It is essential that the Buyer finds out whether the Lease may be liable to forfeiture because of some breach of covenant by the Seller; that is why the specific confirmations requested must be obtained. Any problems revealed must be taken up with the landlord, otherwise it may not be safe for the Buyer to proceed with the Transaction.

### Resource information

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### Related content

## Topics

Contracts and Transfers: Land and Buildings (<http://uk.practicallaw.com/topic4-103-1310>)

Conveyancing Procedure (<http://uk.practicallaw.com/topic8-103-2082>)

## Practice notes

Landlord's consent for dealings with a lease and the Landlord and Tenant Act 1988 (<http://uk.practicallaw.com/topic5-107-3899>)

Legal requirements for creating and assigning leases (<http://uk.practicallaw.com/topic3-107-4055>)

## Standard documents

CPSE.1 (version 1.0) General pre-contract enquiries for all commercial property transactions (<http://uk.practicallaw.com/topic0-107-4698>)

CPSE.2 (version 1.0) Supplemental pre-contract enquiries for commercial property subject to tenancies (<http://uk.practicallaw.com/topic8-107-4699>)

CPSE.3 (version 1.0) Supplemental pre-contract enquiries for commercial property on the grant of a new lease. (<http://uk.practicallaw.com/topic3-107-4890>)

CPSE.4 (version 1.0) Supplemental pre-contract enquiries for commercial leasehold property on the assignment of the lease. (<http://uk.practicallaw.com/topic5-107-4399>)

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STER (version 1.0) Solicitor's title and exchange requirements (<http://uk.practicallaw.com/topic1-107-4749>)

## Drafting notes

GN/CPSE (version 1.0) Guidance notes on the Commercial Property Standard Enquiries (<http://uk.practicallaw.com/topic1-107-4693>)

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GN/STER (version 1.0) Guidance notes on STER Solicitor's title and exchange requirements (<http://uk.practicallaw.com/topic9-107-4750>)

## Article

When will a tenancy be a 'new tenancy'? (<http://uk.practicallaw.com/topic2-107-3792>)

## Legal update: archive

Landlord estopped from establishing persistent failure to pay rent (<http://uk.practicallaw.com/topic4-101-6338>)

## External resource

British Property Federation (<http://uk.practicallaw.com/topic9-106-4398>)

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