

NHS LIFT: LEASE PLUS AGREEMENT

GUIDANCE FOR GPs

INTRODUCTION AND PURPOSE OF COMMENTARY

1.1 Purpose of Commentary

This commentary is aimed at General Practitioners and other practitioners providing GMS or PMS services in England who are considering agreeing to enter into occupation of premises built or refurbished under an NHS LIFT Project. The commentary aims to give an overview of the way in which the NHS LIFT process operates, but focuses on the Lease Plus Agreement (“LPA”) – the standard form of Lease to govern occupation of NHS LIFT premises developed by Partnerships For Health Limited (“PfH”). Of particular relevance, therefore, is Section 3 below, which lists some of the advantages of this new Lease Plus Agreement over traditional forms of lease. Other issues, such as whether an investment in LIFTco should be considered, will also arise for GPs but do not fall within the scope of this commentary.

1.2 Contents

This commentary is set out as follows:

Section 2 places NHS LIFT in the context of other primary care developments.

Section 3 illustrates some of the key benefits of the LPA over traditional leases.

Section 4 explains the structure of NHS LIFT and where the LPA fits into that structure.

Section 5 summarises the principal provisions in the LPA.

Section 6 outlines how matters will be dealt with up until the Works are completed.

Section 7 deals with the payment mechanism aspect of the LPA.

Section 8 sets out how the building will operate after the Works have been completed.

Section 9 sets out the Landlord’s obligations.

Section 10 sets out the Tenant’s obligations.

Section 11 touches on the need to obtain professional advice.

Section 12 deals with a number of miscellaneous issues affecting the Tenant.

There are three appendices to this commentary which are in the course of being prepared and will be issued following the issue of this commentary.

Appendix 1 will deal with issues surrounding any existing properties that a GP, considering entering into a new LPA, may already own. This Appendix will not be relevant for all prospective GP Tenants under LIFT as not all GPs currently practise from their own premises, and those that do may not wish to dispose of them through LIFT.

Appendix 2 will deal with some issues regarding the new GP contract.

Appendix 3 will deal with the Scheme Planning Process.

1.3 Scope of Commentary

This commentary has been prepared in good faith by PfH and the General Practice Committee of the British Medical Association from a GP's standpoint in the context of the LIFT initiative. The commentary does not purport to be an all-inclusive and comprehensive summary of the LPA or the LIFT initiative as a whole and there may well be other issues, which are relevant to consider before entering into an LPA. None of PfH, the BMA or their advisers accept any liability or responsibility for its accuracy or completeness, nor do they make any representation or warranty, expressed or implied, with respect to the information contained in this commentary. Nevertheless, subject to the above comments, it is intended that GPs and their advisors will use the commentary to provide a general review of the LPA.

1.4 Investment Issues

The commentary should not be considered as an investment recommendation to GPs made by PfH, the BMA or their advisers to enter into NHS LIFT and an LPA. Each GP reading this commentary must make his/her own independent assessment of NHS LIFT and the LPA after making such investigations and taking such professional advice, (including legal advice), as they deem necessary.

1.5 Legal Advice for Individual Circumstances

Please note that this commentary is, by its very nature, generic and cannot take into account the particular issues that will apply to any GP seeking to apply this commentary to any individual circumstances. **TRANSFER TO AN LPA ARRANGEMENT, AS WITH ANY PRACTICE PREMISES REPROVISION, IS LIKELY TO BE ONE OF THE MOST SIGNIFICANT DECISIONS FOR A**

GP PRACTICE IN THE PROFESSIONAL LIFETIME OF THE CURRENT PARTNERS AND SHOULD ONLY BE EMBARKED UPON FOLLOWING A FULL OPTION ASSESSMENT AND AFTER RECEIPT OF SPECIALIST PROFESSIONAL ADVICE. For guidance on obtaining suitable legal and other professional advice, please see section 11.

Please note that PfH have reserved the right to alter the form of the LPA. Readers of this commentary should check with PfH to ensure that the LPA has not been amended since the date of this commentary. This commentary is based on the LPA draft May 2003.

2 FUNDING OF GP PREMISES:

GPs should be aware that although LIFTco is offered an exclusive right to provide primary care premises within the locality identified as being part of the LIFT Scheme, this exclusive right extends to practise developments identified by the local stakeholders under the SSDP. GPs should note, however, that there is no compulsion for GPs to enter into LPA arrangements under a LIFT Scheme within an area covered by a LIFT Scheme and GPs remain at liberty to fund and re-provide practice premises under the current mechanisms available under present GMS regulations.

This paper identifies advantages and disadvantages of premises provided through NHS LIFT which provides an additional method of delivering new or refurbished practice premises; it is not a substitute for existing mechanisms. GPs should consider the proposed benefits of involvement with a LIFT Scheme against the other available options.

3 ADVANTAGES OF LEASE PLUS AGREEMENTS OVER MORE TRADITIONAL LEASES

Most traditional leases are drafted by the landlord and are therefore inevitably weighted in favour of the landlord. This includes most (though not all) leases granted by landlords in connection with primary care developments funded through the current mechanisms available under the Red Book.

The Lease Plus Agreement is different because it was drafted on behalf of the public sector and GPs. This means that there are a number of advantages for a Tenant entering into an LPA over a traditional lease. The principal advantages are summarised in this section and referred to in more detail elsewhere in this commentary.

It should also, however, be noted that the LPA is intended to strike a fair balance between the necessary protections for the Tenant and the reasonable commercial requirements of the Landlord. In addition, the LPA adopts a new approach to that encountered in traditional primary care development schemes, by granting the LPA to the Tenant before the building works have been completed. Consideration should therefore be given to the comments in section 5 below.

The principal advantages include:

1. Non-payment for non-availability - to the extent parts of the premises cannot be occupied, the Tenant may make deductions from the rent payable. The benefit of such deductions will have to be agreed with the PCT and will depend on the particular circumstances.
2. Clear standards in terms of service delivery and certainty in terms of liability for these services - this is as opposed to leasehold regimes where the landlord may interpret much more subjectively its obligations in terms of servicing the building and the costs to the Tenant are unpredictable, varying from year to year depending upon what the Landlord does.
3. Tenants enjoy rights of self help and the right to deduct the cost of this from the rent where premises are available but the Landlord is not performing to the required standard.
4. Lease Plus imposes a whole life costings regime and clear responsibilities in terms of external and internal repair and maintenance so that (in addition to above points) the Tenant does not face a potentially significant dilapidations claim at the end of the LPA.
5. The Landlord is obliged to source the utilities from the supplier providing best value to the Tenant.
6. Some of the insurance cost risk remains with the Landlord rather than all insurance costs being passed to the Tenant.
7. Tenants have greater rights in terms of monitoring and the sign-off of the Works.
8. The Landlord has continuing liability in relation to the Works throughout the lease term.
9. The risk of increased costs arising from general changes in law during the lease term is shared between the parties, rather than being something which will be loaded onto the Service Charge by the Landlord. (An example of a general change of law was, for example, the statute that required all non-residential buildings to be DDA compliant. If a similar Act is passed in the future this will principally be a cost for the Landlord.)

10. The Tenant has the ability to request changes to the service delivery during the lease term.
11. The Tenant may be able to terminate its LPA if it relocates to another of the Landlord's premises.
12. There are rights in favour of the Tenant to suspend rental payment and to terminate the lease in the event of Force Majeure or uninsured risks occurring. This might include damage caused by terrorism.
13. Repeated or serious poor performance by the Landlord may trigger remedies in the other LIFT documents, including forced removal of an underperforming service provider or forced sale of the majority shareholders shares.
14. A helpdesk facility will be available for Tenants to log faults.
15. The Landlord will be required to respond/rectify the faults within specific periods.
16. There is a right for the main public sector tenant in the building to purchase the Landlord's interest. This will never be at more than open market value. Where the Landlord's original pre-estimate of the value of the building at the end of the lease term is significantly lower than the actual value then there will be a "sharing" of the difference in value by way of a deduction from the open market value.

However, the disadvantages are that the scheme could in some circumstances be less bespoke than 3PD lease development schemes and that overall the rent is higher – which doesn't matter to the Tenant so long as the Lease Payment is fully reimbursable via the Red Book (or equivalent). If, however, it ever ceases to be so reimbursed the liability will remain with the Tenant to pay it and to the extent the premises are more sophisticated generally, the actual payment due is likely to be greater than for other GP premises of a comparable size. Furthermore, GPs will want to be reassured that the professional fees they incur in agreeing to work up the scheme are reimbursed.

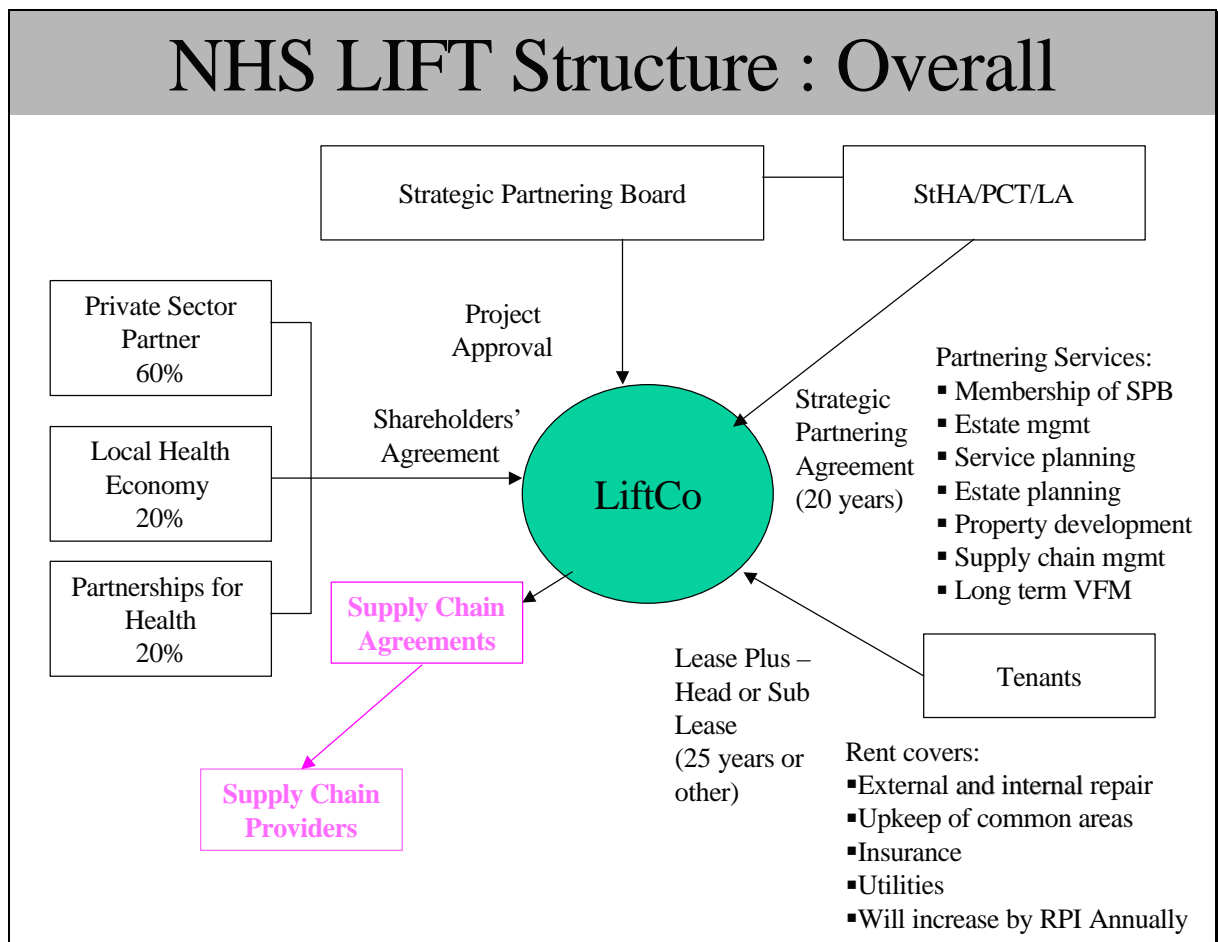
4 HOW NHS LIFT WORKS

4.1 Background

NHS LIFT is a central Government initiative to revitalise primary care premises, focused primarily on areas where traditional mechanisms for funding GP premises have proved unsuccessful. NHS LIFT is, from a GP's perspective, a lease of practice premises. In most cases this will be a practice premises co-located with other primary care providers, local authority functions, pharmacists, opticians, dentists, Trust staff, etc. in a healthy living centre type environment.

4.2 The Structure

The overall structure of NHS LIFT is not the subject for this commentary. However the diagram below sets out in diagrammatical form the interrelation of different parties. LIFTco is a public private partnership set up specifically to develop and maintain primary care premises in the area of the LIFT Scheme. It will be a private company limited by shares. The majority of the shares will be owned by a private sector partner. The local health and social care bodies will also invest in the company, along with investment from Pfh. LIFTco is the landlord under any LPA.



4.3 Standard Form Documentation

PfH have drawn up standard documentation nationally to govern the relationships between each of the parties involved in a LIFT scheme. The standard form documentation (including the LPA) are available via the Department of Health website www.info.doh.gov.uk/doh/nhslift.nsf/main?readform

4.4 GP Related Issues

From the GP's perspective there are a number of characteristics to be noted.

4.4.1 Standardisation

The LPA has been drawn up in a standard national format. The LIFT process assumes that there will be little variation from the standard form, the rationale being that this will minimise transaction costs and hence rent levels to the local health economy and all tenants.

The private sector partner for the LIFTco is selected on the basis of proposals put forward for schemes on an overall value for money basis. GPs are not bound to accept the terms of the LPA, but it is likely that if they wish to participate in LIFT developments, their scope for unilateral negotiation will be limited.

In such circumstances it is important that GPs are fully appraised of the balance of risk set out in the LPA. The LPA, as described in this commentary, is a new form of leasehold occupancy agreement improving upon standard third party developer leases or other conventional leases in many respects. This has a number of advantages as well as some disadvantages of which GPs should be fully appraised. This commentary is intended to provide an introduction, but it is essential independent professional advice should be taken by each practice considering entering into an LPA.

4.4.2 Remedies for Poor Performance

The LIFT structure means that in addition to the remedies contained within the LPA (see section 7 below) for poor performance by LIFTco, the Strategic Partnering Agreement (SPA) also contains levers to apply pressure and sanctions should LIFTco's performance not be satisfactory. This is a greater level of protection than provided by any traditional lease.

4.4.3 Selection of the PSP

In practice most individual GP practices will have little direct involvement in the selection of the PSP (the Private Sector Partner who will be the major shareholder in LIFTco). PCTs are the main organisation selecting the PSP, and to the extent that GPs are involved with PCTs (e.g. as PCT Board members) then they have a significant influence over the PSP selection. There is also at least one GP as part of every evaluation team. Further, the DoH have now provided funding for PCTs to engage a local GP Champion to become involved in the local LIFT. The Strategic Partnering Board (“SPB”) will conduct the initial procurement process, short listing of bidders and evaluation of bids. Once the local LiftCo is established between the PSP, the local health economy and Pfh it will have exclusive right in the designated LIFT area for 20 years for LIFT projects but will have no right of compulsion over any primary care providers who require premises from which to make services available.

For schemes occurring in a LIFT area after the initial tranche of developments prospective GP tenants will be able to assess the past performance of LIFTco before reaching their decision to proceed under LIFT or otherwise.

4.4.4 GP Investment in NHS LIFT

The method of occupation offered by LIFT is leasehold (likely to be up to a 25 year term). The LPA therefore provides no prospect of a capital investment return. Opportunities exist, however, to invest as a shareholder in LIFTco, which would offer a stake in local primary care developments. Investment opportunities for GPs are not the subject of this commentary. Mechanisms enabling investment through a structure named a “GP Incentive Trust” have been proposed. Further guidance on proposals in this area may be obtained from Pfh. Expert financial and tax advice should be sought on participation in any such investment.

5 THE LEASE PLUS AGREEMENT EXPLAINED

5.1 What is a Lease?

A Lease is a contract between the Landlord and the Tenant. As such, it may not be varied in the future (ie. throughout the term of the Lease) without the mutual consent of both parties at the same time. On the assumption that this is not likely to happen, it

is essential that all negotiation relating to the terms of the LPA are entered into to the GP's satisfaction before it is signed.

The Lease "demises" to the Tenant a specific area of land which "belongs" to the Tenant (ie. the Tenant has an "interest" in the land albeit with no capital value attached). The Lease also grants to the Tenant certain rights it will require in order to access and use that land but reserves to the Landlord other rights ("benefits") in return.

The Lease then sets out a series of obligations on the part of the Tenant (otherwise known as "Tenant's covenants") and on the part of the Landlord (otherwise known as "Landlord's covenants").

The Lease runs for a term of years ("the Term") and may not be brought to an end without the mutual agreement of both parties. This is unlikely to be forthcoming in normal circumstances, given that the structure of LIFT is based upon there being a guaranteed income stream from the premises for a minimum number of years. However, one advantage available under LIFT which does not exist under a traditional lease is that the tenant has the opportunity to ask for the lease to be terminated if the premises are no longer appropriate to the health services being required, subject to the local health economy commissioning an alternative facility to provide for the new services from the Landlord and certain other conditions.

It will be appreciated that individual GP Tenants may not wish to remain a Tenant for the duration of the Term. It is possible to have shorter terms in some circumstances, for example, where the Premises are refurbished rather than newly constructed. See also the Put Option referred to below. On this basis, it is essential that there are suitable arrangements to allow practitioners to easily divest their LPA interest.

Some GPs and other tenants may be able to benefit, from what is generally referred to within LIFT as the "Put Option". Under this arrangement the GP tenant enters into a 25 year LPA but at the same time enters into a "Put Option" Agreement with the PCT. Under this Put Option Agreement the GP tenant can require the PCT to take the LPA over in certain defined circumstances.

This risk of the LPA being terminated if the Put Option Agreement is exercised could make LiftCo's financial proposals more expensive. Accordingly, the types of GP practices who should benefit from the Put Option Agreement, and the circumstances in which the LPA can be "put" onto the PCT will be restricted. Typically, Put Option

Agreements will only be offered to single-handed GPs and can be exercised only if that GP retires (or dies). Other circumstances may be agreed locally.

5.2 Proposed Lease Structures

Essentially there are two proposed Lease structures:-

5.2.1 The Direct Lease Option

Where the GPs take a lease direct from LIFTco and LIFTco owes duties directly to the Tenant and the Tenant has duties directly to LIFTco.

5.2.2 The PCT Headlease

LIFTco first grants a headlease to the PCT which in turn grants an underlease to the GPs. In this case, the GPs would normally have no direct contractual relationship with LiftCo. Rather LiftCo and the PCT would have a direct contractual relationship with the PCT as Landlord to the GP and responsible for ensuring the performance of services etc (notwithstanding the fact in practice, these may well be performed by LIFTco). The Tenant would have a duty direct to the PCT to comply with the Tenant's covenants ("Tenant's Obligations").

The circumstances of each individual case will need to be considered to determine which of the above schemes is appropriate overall.

Direct Lease Option

LIFTco

PCT

GPs

LA

Other

Third

Parties

PCT Headlease Option

LIFTco

PCT

LA

Other

Third

Parties

GPs

5.3 How Lease Plus Agreement differs from a conventional Lease

In addition to the essential elements of a Lease as discussed above, the other significant differences are as follows:-

5.3.1 Timing of Commitment

The Tenant is required to enter into the LPA prior to the commencement of the development phase. This is unusual in that most other development schemes (e.g.. 3PD Schemes) the Tenant enters into only an Agreement for Lease prior to the development and does not take the lease (i.e. the interest in land) until the development has been completed.

Either way, the Tenant is committed to the lease for the duration of the development phase as clearly the Landlord (in this case, LIFTco) would not wish to enter into the commitment of undertaking the development (and the funders supporting the Landlord would not wish to advance the funds) unless there was the security of a “locked in” Tenant at the end of the development phase. However, where the Tenant has entered into an Agreement for Lease only, and thus not taken an interest in land, it may be considered there is less exposure to the Tenant than in the present scenario.

There are significant factors to be taken into account in this respect:

(a) Limited Link with Site

Notwithstanding the Tenant has an interest in the land, its “link” with the site at that stage is still somewhat remote as it has not taken up occupation. This, in itself, may serve to limit the extent of any claim against the Tenant in the event of “something going wrong” resulting in liability.

(b) Insurance Protection

The liability may be covered by insurance in any event.

(c) Landlord’s Indemnity

The Tenant has the benefit of an indemnity from its Landlord (LIFTco) which it can call upon (see Part H Clause 45). However, it will be noted that:-

- It is limited to direct losses (and not indirect losses which are further defined in Clause 45.6)
- It does not directly cover the Tenant for losses of the development phase
- In any event, it will be limited to the assets of that particular LIFTco
- Depending upon the nature and extent of any liability arising against the Tenant (and thus any claim made) the protections identified above may or may not be adequate in the circumstances.

***For example:** If a claim for contamination arises during the development phase, it may be significant in terms of the extent of the liability accruing. The combination of the above factors may mean there is inadequate funding available to give the Tenant a 100% guarantee that it will not face a loss as a result of a claim. However, it has to be acknowledged that such an example is remote and in these circumstances Liftco would have a claim against the PI insurance of the survey company engaged to undertake the ground surveys before design and construction.*

5.3.2 Responsibilities of the Landlord

Under a conventional Lease, the Landlord's obligations are likely to be limited to:-

- Allowing quiet enjoyment to the Tenant
- Insuring the premises
- Maintaining the structure and exterior of the premises.

Under the LPA, the Landlord's obligations to the Tenant amount more or less to maintaining a complete serviced building subject to the payment of the Tenant by the Lease Payment.

Furthermore, whereas, under a conventional lease, the Tenant's remedies against the Landlord for failure to deliver its (albeit limited) obligations are very limited under the LPA, the Tenant has considerably greater exercise of control over the Landlord in the event of the Landlord's failure to perform, largely through deductions to be made against the Lease Payment.

5.3.3 The Tenant's Obligations

The mirror image is true of the Tenant's obligations because, for the reasons compared with the usual Tenant's Covenants recited above, they inevitably represent a slimmed down version given that the Landlord has taken on many of the responsibilities which would otherwise lie with the Tenant (in return for payment of the Lease Payment). As a result, for example, the Tenant's exposure to dilapidations is virtually eliminated.

6 AFTER SIGNATURE THE LEASE PLUS AGREEMENT: ESSENTIAL CLAUSES EXPLAINED

The Development Phase

The LPA is based on the assumption that at the time of signature there will be basic design and specification available for approval by the parties but that further detail of the scheme will be worked up after signature. The reason behind this is to minimise LIFTco's exposure to costs before GPs have signed up, which is understandable. However, GPs should

appreciate that the effect of this is that they may not be absolutely sure what will be delivered to them at the conclusion of the development.

The Tenant will be bound to appoint its own “Tenant’s Representative” who will assist the Tenant in the presentation of the “Tenant’s Requirements” (to be incorporated under Schedule 3) *prior to* the completion of the LPA and who will also play a crucial part in completing the design detail and monitoring the construction.

The Landlord’s Proposals are incorporated under Schedule 4 of the LPA but it should be noted that whilst there is the opportunity for the Landlord to modify the scheme after the commencement of construction, the same is not true of the Tenants. Indeed, if the Tenants do anything which may cause a delay, e.g. through seeking to introduce a modification, this can result in liability. GP Tenants should appreciate therefore that the Landlord needs to be able to control its costs exposure and essentially that the Tenant should not assume it can make any modification to the scheme after the LPA has been signed. The Tenant’s Representative should be asked to undertake a review if the Landlord exercises its own right to do so.

Whilst the anticipated Completion Date is set from the outset, the Project Programme is not delivered to the Tenant until after completion of the LPA and this may be varied throughout the construction phase. An Independent Certifier is called in to verify completion has taken place.

If there has been a delay beyond the anticipated Completion Date the Tenant may require compensation. Although there are a number of legitimate excuses why the Landlord may not complete the work by the Completion Date, if these are not justifiable then the Tenant may be entitled to a payment of liquidated damages (“LAD”) at a rate specified per day for each day that the work remains uncompleted. This may be crucial if, for example, the Tenant incurs a liability for additional costs as a consequence of having arranged to give up occupation of its existing accommodation by that time. However, it will be appreciated that even with the provision of the payment of LAD the situation is not totally cost free to the Tenant.

Ultimately, if the Landlord fails to complete the works within a period of twelve months after the specified Completion Date, then this will be treated as a “Landlord Event of Default” which would entitle the Tenant to terminate the LPA with an option for the principal public sector tenant at the site to purchase the site on the pre-agreed terms set out in the LPA.

Following completion, there is provision for snagging works to be undertaken followed by a 12 month defects period.

7 LEASE PLUS AGREEMENT : UNDERSTANDING THE PAYMENT MECHANISM

7.1 The Lease Payment

The Lease Payment consists of 2 elements:

- The Payment (which relates to the occupation of the managed accommodation and the provision of Services)
- The Pass Through Costs (which relate to the supply of the Utilities, Insurance and Rates).

The Lease Payment is set at the outset of the LPA, and the Payment element of it is indexed every year in accordance with the increase in the retail prices index for the relevant year. Payment of the annual sum is made on a pro rated monthly basis - the “Lease Payment for a Contract Month”.

The Lease Payment does not become due until the Payment Commencement Date, which essentially is the date on which the premises are signed off as having been completed. However, there is a provision for a “rent free period” of up to two weeks to allow the GP Tenant to move in and start practising (and thus be entitled to receive rent reimbursement) on the same day.

Furthermore care should be taken to ensure there is agreement that only an apportioned Lease Payment will be due in the event of occupation being taken up (or determining at the end of the Lease term) part way through a calendar month. Once again, the GP will only be entitled to receive rent reimbursement for the actual days in which he is in occupation of the premises and providing a service to the patients.

7.2 Pass Through Costs

The costs of insurance, statutory charges, and utility costs are met by the Landlord and “passed through” to be paid by the Tenant monthly. There is no profit element made by the Landlord in this respect.

7.3 Deductions for Unavailability

In order to incentivise performance by the Landlord, the amount GPs will actually pay in any month depends on how well the Landlord manages the premises. The Payment element of the

Lease Payment for a month is susceptible to a number of deductions by the Tenant as a result of poor performance by LIFTco. These deductions are linked to whether a particular area within the premises is available or not. Availability is determined by whether the area is reasonably accessible, free from risk to any person's health, safety or welfare and whether it can be used without undue inconvenience or discomfort for the purpose for which it was intended. Each area within the premises is categorised and weighted as to how important it is that that area remains available.

If an area is unavailable then a deduction may be made against the Lease Payment for that month. The deduction is calculated using the number of hours that the area was "unavailable" multiplied by the weighting (expressed as a percentage). There will also be a minimum deduction to ensure that LiftCo is incentivised to sort out problems in smaller rooms where the calculated deduction may not be very high.

***For example:** through no fault of the Tenant, one of treatment rooms in a GP surgery suffers a leaking roof. Notification is immediately given to the Landlord that a pool of water is forming on the floor and so it will be unsafe to use that room.*

If this is a breach of the "Safety Condition" then the Landlord does not have the benefit of any rectification times. (If the breach had been as a result of a breach of the "Use Condition" or the "Accessibility Condition" then the Landlord would have 2 hours to rectify the problem. Please note that this rectification time is different to the rectification times listed in Schedule 9 of the LPA and referred to in paragraphs 7.5 and 7.6 below which only apply where a breach of Schedule 9 does not (unlike this example) lead to unavailability).

The Landlord was not able to mend the leaking roof until the twelfth day after the Landlord was first notified of the "unavailability".

As the repairs were only made on the twelfth day the Lease Payment for the contract month will suffer a deduction for the twelve days of "unavailability". This will be calculated by taking the Lease Payment for the year and dividing it by 365 to identify the pro rated notional daily payment. As the room was a treatment room and perhaps less critical than losing the main waiting area in a GP surgery, it has been apportioned a weighting of 11% (as it represents 11% of the space in the Premises). If the Lease Payment was £100 per day then the Tenant would be entitled to deduct £11 for every day that the treatment room was

“unavailable”. In this example this would be £132.

It is intended that by this method a Landlord will be incentivised to make repairs to an area as soon as possible so that it does not remain “unavailable” for any significant length of time because for that time the Landlord will not be receiving its full Lease Payment. This sort of mechanism should produce a more responsive maintenance service from the Landlord than may be the case under a conventional lease, where the landlord’s rental is not jeopardised by poor response times. Deductions from the Lease Payment also provide an immediate remedy for Landlord defaults. This contrasts favourably with mechanisms of redress available under conventional leases. The payment mechanism is intended to incentivise the service provider, and is not intended to provide a ‘windfall’ gain to the Tenant.

7.4 Temporary Alternative Accommodation

As an interim measure the Landlord may (as referred to above) offer the Tenant (at no additional cost or charge by way of Lease Payment), temporary alternative accommodation that is appropriate and readily available. The Tenant may reject an offer of temporary alternative accommodation for a number of reasons including that it is not in a suitable location and that the duration of the occupancy of the temporary alternative accommodation is unsatisfactory. In the latter case the Tenant has to act reasonably. The impact on the deductions is that no deduction will be made for the original unavailable area whilst the Tenant is in temporary alternative accommodation. However, should the temporary alternative accommodation become “unavailable” then a deduction may be made for the rent of the unavailable area.

Should the original area not become available again by the date agreed with the Landlord then the Tenant may make a 50% deduction from the Lease Payment in respect of the relevant area and should the area not become available by a long stop date then the Tenant will thereafter be entitled to deduct 100% of its Lease Payment in respect of that relevant area until the day on which the Tenant can relocate back to that area.

7.5 Self Help

The Tenant in addition becomes entitled to take action itself and make repairs so that an area remains available as long as such action can be undertaken without a material affect on the structure of the premises. This remedy is called a Self Help Event. Any costs or expenses which the Tenant incurs in doing this will be deducted from the Lease Payment upon

production of evidence to demonstrate such costs and expenses. This remedy is likely to be most useful in the case of minor defaults by LIFTco. If a default leads to unavailability (discussed in paragraph 7.3 above) then the Tenant’s principal remedy will be to make deductions for unavailability. If the unavailability continues for 7 days then the Tenant can exercise self-help and make deductions but the amount of deductions the Tenant can make will be capped at a sum equal to the deductions that have already been made. So, for example, in the example given in paragraph 7.3, the Tenant would be able to incur and deduct £132 self-help costs in addition to the £132 unavailability deduction.

Again, this remedy provides an immediate remedy to ensure continuity of satisfactory accommodation for the practice which would not be available under a conventional lease.

The Self Help may not be undertaken until after the expiry of the Rectification Times set out in Schedule 9 of the LPA and before deciding to exercise this right the GP Tenant will no doubt also want to bear in mind the effect of the indemnity it will automatically have to give to the Landlord under Schedule 10 Paragraph 4.3. On this basis, it would almost certainly be unwise for a GP Tenant to seek to undertake anything other than relatively minor Self Help.

***For example:** a toilet seat is cracked. If the toilet is still safe and useable then this is likely to be classed as a routine failure, giving the Landlord until the commencement of the 5th Working Day to replace the toilet seat. If the Landlord fails to do so it will be open to the GP to replace the toilet seat himself or to engage a contractor to do so. If receipts are kept and a record made then these can be deducted from the Lease Payment for the contract month accordingly.*

There are other provisions in the LPA which deal with common parts in which case the costs and expenses are apportioned. However, only one Tenant can undertake a Self Help event with regard to such areas, as the Landlord does not want to run the risk of there being an obligation to compensate more than one Tenant for the same Self Help Event.

7.6 Rectification Periods for Service Failures that do not lead to Unavailability

Where a Service Failure by the Landlord occurs it will be categorised under the LPA as a Breach Failure, Emergency Failure, Priority Failure or Routine Failure on the following basis:

| Category | Definition |
|----------|------------|
| | |

| | |
|-------------------|--|
| Breach Failure | Any Service Failure which shall be caused (in whole or in part and whether directly or indirectly) by a breach of the obligations of the Landlord in clauses 8, 10, 13 or paragraph 3.4.1 of Schedule 9 of the LPA or by failure by the Landlord to carry out Programmed Maintenance. |
| Emergency Failure | Any Service Failure which is not a Breach Failure and is either: <ul style="list-style-type: none"> • life threatening; or • serious enough to cause significant damage; or • likely to become one of the above if not attended to quickly. |
| Priority Failure | Any Service Failure that is not a Breach Failure or an Emergency Failure and either: <ul style="list-style-type: none"> • has the effect that the premises, or any part of the premises is not available; or • is likely to have that effect if not attended to quickly. |
| Routine Failure | Any Service Failure that is neither a Breach Failure, Emergency Failure nor a Priority Failure. |

The relevant Rectification Times for each category of breach could, for example, be as follows:

| Category | Rectification Time |
|-------------------|--|
| Breach Failure | No rectification time. |
| Emergency Failure | Four hours after notification of the Emergency Failure to the Landlord's Helpdesk. |
| Priority Failure | 24 hours after notification of the Priority Failure to the Landlord's Helpdesk. |
| Routine | By the commencement of the fifth Working Day after the notification of the Routine Failure to the Landlord's Helpdesk. |

| | |
|---------|--|
| Failure | |
|---------|--|

7.7 No right to Terminate

Other than for failure to complete the Works on time (see the Development Phase at Section 6 above) there is no right for a Tenant to terminate the LPA for poor performance by the Landlord in respect of area “unavailability” or for other services failures. Similarly a Tenant would not under a standard lease have the ability to terminate for poor maintenance performance by the Landlord. There is, however, the option for the health and social care stakeholders to apply sanctions to LIFTco under the Strategic Partnering Agreement where the poor performance extends across a number of premises. If LiftCo continues to fail then they lose the exclusive right to develop local premises. If they further continue to fail the private sector partner in the LiftCo can be forced to sell its shares in the company and a new partner be brought in by the public sector shareholders.

7.8 Summary

The structure of the calculation of the Lease Payment is clearly designed to ensure that the Landlord performs and to give the Tenant more control than would be the case in other types of lease. However, it will be appreciated that if Tenants are to be able to realise the advantages to be gained from such a system, they will have to be proactive tenants. This will require administrative arrangements in place behind the scenes to keep adequate records, as well as potentially enabling self-help works to be undertaken. These arrangements could be put in place for a number of LIFT and other premises in the area.

There is, of course, a cost associated with the Landlord being required to provide the more extensive service under the LPA which is reflected in the rent.

8 MANAGEMENT OF THE OPERATIONAL PHASE (i.e. Post Completion)

8.1 Tenant’s Representative

GPs will need to appoint a representative (from the commencement of the LPA) to act as a point of contact with LIFTco, the Landlord. In the LPA the representative is called the

“Tenant’s Representative”. Where there is more than one tenant in the LIFT facility, (for example other GP practices, other primary health care professionals, a PCT etc) the LPA requires the Tenant’s Representative to be a joint appointment. This has the virtue that the Landlord will only have to deal with one representative. There is the possibility that there may be dissent between tenants as to the appropriate approach to take with the Landlord on an issue, but this can arise in any building with more than one tenant, and there is much to be said for this being resolved between the tenants themselves, rather than giving the Landlord confused messages. In practice there is likely to be a commonality of interest between each of the tenants as each tenant will wish to have a properly functioning and maintained building to occupy. It is intended that the PCT will resource the appointment of the Tenant’s Representative.

8.2 Maintenance Planning

The Tenant’s Representative will have a number of ongoing responsibilities during the operational phase. These include the agreement of the annual schedule of programmed maintenance. The ability of the Tenant’s Representative to negotiate the nature and timing of the programmed works is limited by a stated set of principles. The Tenant’s Representative will also have the same degree of limited input into the programming of unprogrammed maintenance works. The overriding principle is that programmed maintenance will not disrupt the Tenant’s operations. If unprogrammed maintenance is required during working hours then the principles require disruption to be kept to a minimum.

The Landlord is also obliged to produce a rolling five year maintenance plan (updated annually). The Tenant has no input into the content of a five year maintenance plan. The Tenant will, however, have notice of ongoing up and coming works via this mechanism and will be able to plan accordingly. The annual schedule of programme maintenance that implements the five year maintenance plan will be subject to review by the Tenant’s Representative, (as discussed above), albeit under the Development phase, the Tenant’s Representative may require a different set of skills and a new appointment.

8.3 Method Statements

The LPA will set out a Method Statement produced by the Landlord describing how LIFTco will provide the services. This will give the Tenant some certainty, (at any one time) about the likely impact of any maintenance activity, and how the Landlord’s obligations will be fulfilled.

However, the Tenant is unlikely to have a great degree of input into the Method Statements, which will be produced (for initial schemes) as part of the bidding process and will be integral to the PSP's costings. For this reason, it would be prudent for the Tenant to take independent advice on the adequacy of the proposed Method Statement *prior* to signing the LPA.

The Tenant can control variations to the method statement if the variation would be a variation from accepted industry practice or would adversely affect the Tenant, or change the service. Otherwise the Landlord has, in effect, freedom to vary the methods by which the services are provided.

8.4 Monitoring Arrangements

The LPA's intention is to place monitoring responsibilities on the Landlord i.e. self-regulation. The payment mechanism relies on deductions for availability failures and this in turn relies on a series of reports being produced monthly ("the Performance Monitoring Report"). The Performance Monitoring Report details the availability failures and service failures that have occurred in the month just ended. The Landlord must produce and adhere to a performance monitoring programme. The Tenant may in addition supplement these monitoring arrangements with its own monitoring and spot checks to verify the findings of LIFTco.

If the Landlord materially breaks its obligations the Tenant has a right to undertake monitoring itself (i.e. the reporting and recording of areas that are available or not and services that are provided or not). If this happens then the Tenant is entitled to recover such reasonable costs of doing so (i.e. employing someone to monitor) as part of "Self Help Costs" which can also be deducted from the Lease Payment. It would no doubt be prudent for the Tenant to maintain its own records of the Landlord over the term of the LPA. This will provide an ongoing record should consideration need to be given to changing the service provider.

9 RESPONSIBILITIES OF LANDLORD/THE LANDLORD'S OBLIGATIONS

9.1 General

These are summarised in Part E of the LPA and incorporate the following:-

- Quiet enjoyment

- Agreement limitation of use of other parts of the facilities (to be agreed in any given set of circumstances)
- Provision of services
- Maintenance – both programmed and unprogrammed together with the preparation of a five year maintenance plan
- Monitoring of its own performance.

These should be read in conjunction with Schedule 9 of the LPA. It is essential this is considered very carefully with regard to the requirements of the specific case and may require some amendment as a result. Issues arising under the provision of services and maintenance have been dealt with in connection with the explanation of the Lease Payment mechanism.

9.2 Insurances

Various insurances are effected through the construction and through the operational phases of the LPA in order to provide a degree of “comfort” to the appropriate party, be it Landlord or Tenant, who would otherwise potentially incur liability. Clause 37 sets out the requirements imposed on the Landlord in this respect to effect various insurances and this should be read in conjunction with Schedule 8 which sets out the details of the insurances proposed.

It is intended that the Tenant should not have to bear the costs of any of the insurances effected throughout the development phase. However, as the Tenant has by this time an “interest in land” it is essential that the Tenant has the benefit of such insurances which, in some circumstances need to run for the duration of the term. However, in the case of the development phase, the period of insurance is from the date of the LPA to the Actual Completion Date. To the extent the Tenant has no liability for the structure and design of the premises, this is no doubt adequate with regard to the construction aspects. However, such insurance would not cover the Tenants against any losses it may incur as a result of the delay in delivery of the premises (or possibly contamination issues) and the Tenant would have to rely upon its entitlement to liquidated damages in this respect which, in practice, might be difficult to recover (though this is no different to a traditional lease).

It would be crucial for the Tenant to consider the level and type of insurance cover offered in the circumstances of its own individual case and to ensure these will be adequate for the purposes.

It will also be essential for the Tenant to ensure that the cost of the insurance following the Actual Completion Date (which will be borne by the Tenant) will be reimbursed by the PCT.

Finally, the Tenant should be aware that the existence of the insurance does not necessarily prevent it from incurring any liability (apart from the general liability referred to above) and Clause 37.5 enables the Landlord to pursue a claim against the Tenant for loss or damage caused by the Tenant which is not covered by the insurance. The Tenants should bear in mind in this respect that this loss may arise because the Landlord has accepted a high excess and the Tenant should ensure that this point is checked at the time of each renewal.

Having identified the extent of the insurance cover required at the commencement of the term, there may be occasions in the future when the risks specified in the LPA can no longer be covered. In such circumstances, the Landlord is obliged to serve notice to this effect upon the Tenant pursuant to Clause 37.17.1. If this is not resolvable, the Landlord can then serve not less than twelve months notice on the Tenant to determine the Lease and if the Facilities are subsequently damaged or destroyed so as to prevent the premises from being fit for occupation and use, either the Landlord or the Tenant may serve notice to determine the Lease forthwith.

The Landlord is obliged to supply the Tenant with copies of every insurance policy as soon as it is available (Clause 37.9) and the Tenant should ensure that they utilise this disclosure to good effect by ensuring the insurance is adequate.

The Tenant should be aware that in the event of a claim being made the insurance proceeds are shared if the Tenant decides it wants the premises to be rebuilt and the Landlord fails to comply with its obligations to use all reasonable endeavours to reinstate, in other circumstances all proceeds belong to the Landlord and even if the premises are totally destroyed and not reinstated, the Landlord has the sole claim against the proceeds. The Tenant should ensure, therefore, they carry their own insurance with regard to their own assets within the premises and for loss of business etc. This will be at the Tenant's own expense. It is essential that the Tenant should

clearly identify the extent of their assets etc particularly those which may be affixed to the structure of the premises.

In the event of the premises being destroyed (in whole or part) and not having been reinstated within thirty-six months from the date upon which they were originally destroyed or damaged, either the Landlord or the Tenant may determine the Lease by notice in writing. The effect of this is that even if the Landlord were to do nothing for thirty-six months following destruction, the Tenant would have to wait for this period to expire (though of course the Tenant would be paying no rent for this period) before being able to extricate itself from the LPA and commit itself to alternative premises. This should be seen against the fact that the local public sector authorities will be shareholders in LiftCo (the Landlord). It is also better than under many traditional leases where there is sometimes no right to terminate.

If, in the meantime, the Landlord offers the Tenant alternative temporary accommodation, which the Tenant accepts, the Tenant will continue to be liable to pay the full Lease Payment to the Landlord for the premises that are being repaired. Accordingly, the Tenant should be very careful to check the financial implications before automatically agreeing to an invitation to the Landlord to occupy other premises nominated by the Landlord and in particular to check that there is no shortfall in rent reimbursement arrangements.

10 THE TENANT'S OBLIGATIONS

The Tenant's obligations amount to the following:-

10.1 Permitted Use

Only to use the premises for the Permitted Use which is defined in Schedule 1 of the LPA. Clearly it is essential to ensure that the definition is sufficiently extensive to cover the specific projects and to allow a degree of flexibility in the future if appropriate. It may not be easy to extend the definition of Permitted Use at a later date. There is an absolute obligation and liability on the part of the Tenant not to use the premises for any other use which means that there could be a claim brought against the Tenant for any loss suffered by the Landlord as a result of the Tenant so doing (in addition to the Landlord's usual right to forfeit the Lease for a breach of covenant).

It should be noted that Clause 22.3 states that nothing shall be deemed to constitute any warranty or representation by the Landlord that the premises are authorised for any specific purpose. It is essential it is recognised that the premises do have a specific purpose as a doctor's surgery as agreed in the planning consent for the building.

The Tenant is permitted (without consent) to use the Premises for non-NHS purposes provided full reimbursement of the rent is not affected. This would currently allow 10% private use. More than this is possible with the Landlord's consent which is not to be unreasonably withheld or delayed.

10.2 Alienation

This is a generic expression which covers various ways in which the Tenant may move away from or share occupation of the premises. By way of:-

- Assignment
- Underletting of the whole or part of the premises
- Sharing possession of the premises.

10.2.1 Assignment

Unusually, compared with conventional 3PD Leases, the LPA stipulates that the Landlord should be approached for consent to assign the Lease even in circumstances where the proposed Assignment is to another practitioner in the same practice. This consent clause gives the Landlord the following options:

Clause 23.2.5 enables the Landlord to determine whether the intended Assignee is, in the Landlord's opinion, "of sufficient financial standing to enable it to be able to comply with the covenants on the part of the Tenant contained within this Lease and is likely to continue to do so following the proposed Assignment". Naturally, the key consideration in determining this should be the fact that the new tenant will continue to be in receipt of reimbursement of the Lease Payment from the PCT. However, this wording would not preclude the Landlord from being entitled to seek information about the personal financial standing of the proposed Assignee.

This might be of concern to GP Tenants who may select their Partners on the basis of their clinical ability and personality and not on their financial standing.

The process of application for consent could also lead to some delay and cost both of which may be considered unnecessary, particularly in circumstances where a new Partner is being introduced to replace an existing partner (who is thus keen to be released from his liability under the Lease as soon as possible).

The Incoming Tenant can be required to enter into a direct Deed of Covenant with the Landlord confirming he will abide by the terms of the Lease. This, in itself, is not unreasonable although there are costs implications associated with it.

In the case of an Assignment to anyone other than a public sector body or GP, the requirements are more rigid and the former Tenant may be required to enter into what is known as an Authorised Guarantee Agreement (AGA). The effect of this is that notwithstanding the fact the Tenant has retired from practice and ceased to be a Tenant under the Lease, he/she may still have some ongoing liability to the Landlord in the event of his/her successor failing to comply with the terms of the Lease. Depending upon the nature of the successor, this may cause the GP some concern. It is however a provision which it is usual to find in a commercial lease.

10.2.2 Underletting

If a GP Tenant takes the headlease from LIFTco and wishes to underlet either the whole or part of the premises, it should be understood that in doing so, the Tenant retains full liability for the actions (or inactions) of the Sub-tenant. Accordingly, this may not be the preferred option if GPs are trying to limit the extent of their liability. On the other hand, it may be considered that it provides the means of retaining an interest in a part of the premises for which a GP Tenant may have no use immediately, with a view to recovering it in the future, and whilst securing an income stream from it in the meantime.

In such circumstances the GP should not expect to receive rent reimbursement of the whole of the Lease Payment payable under the headlease from the PCT as it would be

reduced pro rata, and the GP should therefore consider carefully whether it can rely on its undertenant to make up the payment of the shortfall (which would remain payable under the headlease) before embarking on this route.

Where the PCT has entered into the Headlease, and granted an Underlease to a GP, there is a provision that the rent payable under the Underlease may be limited to the amount the GPs are entitled to recover by way of reimbursement, notwithstanding the fact, this may be (pro-rata) less than the Lease Payment reserved under the Headlease.

Whilst it may be considered to be the more favourable option for GPs to take an underlease from the PCT, depending upon their particular circumstances, the following downsides should also be considered:

- any future assignment of that Underlease will require not only the consent of the Tenant (usually the PCT) but also the Landlord LIFTco in addition
- the GPs would be prohibited from being able to underlet further and would therefore have to accept that they would be taking on responsibility for the whole of those premises for the duration of the term unless they were able to assign with consent.

10.2.3 Sharing

In addition to the right to assign and underlet as discussed above, the Tenant will have the right to share occupation of the premises with a person, body or organisation “providing ancillary or complementary services to those provided by the Tenant”. It is essential in these circumstances, however, that no relationship of Landlord and Tenant is created which means that the Tenant would not be in a position to charge the occupier rent and ideally it should not be offered exclusive occupation of a specific area.

In addition to the stipulations above, the Tenant is not permitted to enter into a mortgage of the Lease or Underlease – although this is somewhat academic in the circumstances as it would not be considered to have any residual value and thus provide adequate security, in any event.

Once any of the above has been entered into, there is a requirement for the Tenant to serve notice on the Landlord within one month of the same producing copies of all relevant documents and bearing the Landlord’s reasonable fees.

10.2.4 Nuisance/Obstruction/Prescriptive Rights

Clause 25 deals with various requirements imposed upon the Tenant either not to do something (negative) or do something (positive). It is significant to note that this imposes an absolute obligation on the Tenant, which means that it is no defence to not know that something has or has not been done which may be in breach of the terms of the Lease. In such circumstances, the Tenant would be absolutely liable.

10.2.5 Yielding Up

Clause 26 deals with what happens at the end of the term of the Lease. However, the fact that the Tenant has very few obligations imposed upon it means that the liabilities upon the Tenant at the end of the term are considerably curtailed and there should be no question of significant dilapidations liability. This is a positive benefit compared with a traditional lease. That said, the Tenant would remain liable to make good any damage (Clause 27) arising out of “any deliberate or negligent act or omission” arising not only throughout the operational phase but also arising out of the carrying out of the Tenant’s Commissioning.

10.2.6 Signs

Clause 28 imposes restrictions upon the Tenant being able to erect any signs although clearly it would be necessary for the Tenant to be able to erect all such signs which are necessary in order to comply with the terms of service

10.2.7 Planning

Clause 29 imposes various restrictions on the Tenant in their ability to apply for or undertake any works pursuant to the Planning Acts (although it is doubtful that the Tenants would wish to spend money on the premises in any event as they have no capital interest in them). Furthermore, the Tenant could be required to join with the Landlord in making an objection against any proposal from a third party, notwithstanding the fact the Tenant may otherwise wish to support such proposal, or even that the rejection of such a proposal may be positively detrimental to the Tenant’s business. In practice this set of circumstances is not expected to occur.

10.2.8 Costs

Clause 30 provides that the Tenant shall pay to the Landlord on demand all “costs charges expenses damages and losses” incurred by the Landlord in connection with the preparation of any notice under Section 146 and 147 of the Law of Property Act 1925 in connection with the enforcement of any of the Tenant’s covenants under the Lease or after the termination of the Lease.

However, provided the Tenant generally complies with the covenants of the Lease and does not cause damage to the property (and then fail to rectify it) it seems unlikely this penalty could arise.

11 PROFESSIONAL ADVICE

As will be apparent, it is crucial the Tenant does not simply sit back and allow the scheme to develop without contributing its own input – and in order to be able to make informed decisions in this respect the Tenant will require expert professional advice in a number of areas to include the following:

- Design and Specification
- Legal
- Accountancy
- Valuation (re the disposal of existing premises).

Furthermore, it may be considered prudent for the GP to take preliminary advice on whether there are alternatives open to the practice which would provide a means of providing new premises which fall outside LIFT.

No two cases are identical and notwithstanding the production by PfH of standardised documentation, it is inevitable that any given case will require minor variations to reflect the circumstances of the case e.g. with regard to the title to the site and the range of occupiers.

The standard LPA is a complex document as is evidenced by the fact it is some three times the length of an average 3PD lease (i.e. 150+ pages rather than the average 50 pages), although this is not an exact comparison because the LPA includes the provisions that would be found in an Agreement for Lease.

Whoever the GP appoints to give such advice it is strongly recommended that they should deal with someone who is already experienced in this field and with the LPA and aspects of LIFT in particular. It should be appreciated in this respect that the requirements of GP

surgery premises, both in terms of design and the legal and accountancy implications involved, are very different to any other type of development. On this basis, it may be appropriate for the GP to seek advice from a professional team other than their usual advisers for the specific purposes of this project. Failing this, opportunities are likely to be lost, delays may be caused and costs may be greater as a result if the opportunity to seek an appropriate expert opinion is not pursued.

SCHEDULE 1

GLOSSARY

| | |
|-----------------|---|
| “GMS” | General Medical Services |
| “PMS” | Personal Medical Services |
| “PfH” | Partnership for Health – a joint venture between the Department for Health and Partnerships UK. Responsible for implementation of LIFT as well as being an equity investor in each LIFTco |
| “LIFTco” | The joint venture company limited by shares, whose shareholders are a PSP, local health and social care stakeholders and PfH established to develop fund and manage LIFT projects and to act as landlords to each LPA |
| “LPA” | Lease Plus Agreement |
| “PSP” | Private Sector Partner |
| “SPB” | Strategic Partnering Board – a steering board of the local health and social care stakeholders in a LIFT area |
| “SPA” | Strategic Partnering Agreement between LIFTco and the members of the SPB |
| “SSDP” | the Strategic Service Delivery Plan amended annually which identifies and prioritises primary care developments within the LIFT area. |
| “PFU” | Private Finance Unit of DoH |
| “VFM” | Value for money |

“Partnerships UK”

A joint venture between H M Treasury and private sector companies.

SCHEDULE 2

OVERALL SUMMARY OF LPA

Produced by Bevan Ashford retained Solicitors for PflH

1. This is the Agreement to be entered into by the Liftco and each tenant. It is therefore the main document detailing obligations in respect of specific developments and the primary care estate for an area. It contains development obligations covering the period during which the premises are to be constructed or refurbished. It also contains the obligations on both parties throughout the period of occupation of the premises by the tenants.
2. The term "Lease Plus" is used because it offers more than a traditional lease, drawing on some of the benefits of a maturing PFI market. Lease Plus offers flexible serviced accommodation, with the benefit of whole life cost, for an inclusive rent. A simple payment mechanism is designed to incentivise Liftco to perform to the agreed standards set out in the Output Specifications based primarily upon the concept of availability. It respects the principle of no service, no payment.
3. The lease term will be negotiated on a case by case basis but 25-30 years is likely to be the norm for new build premises. However, Liftco may be able to offer shorter leases to some individual tenants, for example where the majority of a development is let under a long lease, or where property is being refurbished rather than new built.
4. The LPA assumes that most developments will be occupied by several tenants on individual leases, but on a project by project basis the PCT may be willing to take responsibility for NHS funded tenants. This includes GPs, and a PCT headlease may, for example, enable GPs to take shorter sub-leases where this is appropriate to their circumstances.
5. The LPA assumes the acquisition of the site by Liftco and the grant of detailed planning permission have been already achieved. Obligations in respect of these matters are contained in the Strategic Partnering Agreement. The LPA is signed before the premises are prepared by Liftco for occupation and it grants Liftco the right to carry out such works. Liftco is responsible for all costs in relation to the site from the date of the LPA.

6. The tenants are granted the right to occupy their premises, as well as to use shared areas, such as reception, kitchen, car parking etc. They also have the right to use the premises utilities. Liftco has the right of access for repair etc.
7. The tenants jointly appoint a Tenants' Representative to act on their behalf in overseeing the works.
8. The design and construction of the development, which will be sub-contracted by Liftco, are in accordance with:
 - the tenants specified requirements
 - Liftco's responding proposals
 - all relevant legislation
 - thermal and energy efficiency requirements
 - the project quality plan
 - the project cost plan
 - the project programme
 - the principle of flexible accommodation to enable alternative uses of the premises.
9. Where the premises include specialist areas where the tenant alone possesses knowledge regarding the operation of such elements, the tenant is to confirm that the design meets the clinical requirements.
10. Liftco liaises closely with the Tenants' Representative to finalise the design and specification. Liftco provides design information relating to appearance and/or functionality to the Tenants' Representative. During construction the Tenants' Representative can object to, but not vary, the design proposals, unless such variation would incur no additional cost and not delay the works. On completion, Liftco provides as built information to the tenants.
11. For simple premises, Liftco undertakes the commissioning and allows the tenants access to carry out their own commissioning. For premises requiring specialist equipment, Liftco and the tenants assist each other to ensure that commissioning does

not delay completion, including providing access to tenants to undertake their own commissioning.

12. Liftco and the tenants appoint an independent certifier (at Liftco's cost) to certify conclusively the completion of the works and the snags to be rectified by Liftco.
13. Liftco completes the works by the agreed programme completion date. The Tenants' Representative awards an extension of time for the works if delayed by a breach by the tenants or by the opening up of non-defective works. The tenants also pay Liftco compensation for such events. The Tenants' Representative also awards an extension of time as appropriate for relief events (events outside the control of the parties). Relief events attract no payment and no extension of the lease plus term. Where tenants' specific circumstances require certainty of the completion date, Liftco may be liable for liquidated damages for failure to achieve the completion date.
14. The tenants make the monthly lease payments to Liftco from the date of completion of the works. Payments include:
 - lease costs (i.e. rental plus service costs)
 - pass through costs (rates and property insurance)
 - utilities costs (Liftco procures utilities and charges tenants based on usage at an agreed unit price)
 - VAT (as appropriate)

less:

- deductions calculated for failures of functional areas (unless replaced by acceptable temporary accommodation or caused by tenants). For larger premises with more than one functional area, these may be calculated proportionately.
 - costs of tenant self-help (where tenants rectify failures themselves in an emergency or where Liftco fails to rectify in accordance with its obligations)
15. The rental and services element of the lease payments are adjusted annually for inflation in accordance with RPI.

16. Liftco monitors the standard of services provided to tenants, including details of failures, using a combination of:
 - service desk/helpdesk
 - self-monitoring
 - performance review (including user satisfaction surveys).
17. Tenants use their premises for permitted uses and may sub-let (for permitted uses) with the consent of Liftco. Sub-letting terms are generally as the Lease Plus. Tenants may share with organisations providing ancillary or complementary services. Liftco uses/lets other parts of the premises for permitted uses.
18. Liftco provides the maintenance services (programmed and unprogrammed) to tenants throughout the operational phase without disruption to tenants. Programmed maintenance is in accordance with an annually updated 5 year plan. Services may be varied by Liftco with tenants' agreement. Tenants may request an acceleration of programmed maintenance at their additional cost (if appropriate). Levels of performance of individual services are specified in the Output Specifications, with periods for rectification allowed to address underperformance. Tenants may also require Liftco to provide FM services.
19. Liftco insures. Insurance proceeds are held in trust for use at the premises. If the premises are destroyed or materially damaged tenants may opt to discontinue the lease, subject to confirmation of the SPB. Otherwise Liftco reinstates/rebuilds. If Liftco is unable to obtain appropriate consents and to rebuild within 3 years either party may terminate the lease.
20. Liftco notifies tenants should property risk become uninsurable and shall liaise with the SPB to agree a response. If no agreement is reached, Liftco may terminate the lease not less than 12 months after the notification or immediately if the risk materialises during that time. This is subject to the tenant's right to elect to bear the uninsurable risk themselves.
21. The agreement allows for transfer of equipment and consumables to Liftco, and for the provision of IT services and medical equipment, if appropriate.
22. Should Liftco fail to complete the works within 12 months of the completion date, or abandon the works, the main tenant may terminate the lease or purchase the site for

the original Liftco purchase price (adjusted up or down in respect of the works already undertaken).

23. Liftco has the right of termination should the tenant:
- fail to make the lease payments
 - fail to perform/observe the covenants
 - enter into administration/liquidation/receivership/bankruptcy.

This is subject to the tenant's statutory rights of relief from forfeiture.

24. In accordance with the flexibility principle, tenants may terminate the lease where Liftco and the SPB are working on proposals for alternative accommodation for the tenants in accordance with an updated SSDP and another tenant or buyer can be found for the premises.
25. Rights under the Landlord and Tenant Act 1954 are not excluded, so there is an opportunity for tenants to renew if they wish to remain in occupation at the end of the lease term. Additionally, at the end of the lease term, the main public sector tenant may buy the freehold at a modified OMV. This right may be foregone when negotiating the agreement if the PSP can show associated value to the public sector.
26. Should relevant changes of law (discriminatory, specific or qualifying) cause Liftco's costs to vary beyond an agreed threshold, the parties shall agree compensatory increases or decreases to the lease payment.
27. Tenants may make minor alterations to the premises at their own cost (including any additional operational cost) and with the consent of Liftco (or may agree that Liftco makes the alterations). Liftco undertakes practicable minor structural alterations and service variations on behalf of tenants at tenants capital and operational cost (in accordance with the VFM provisions of the SPA). Major structural alterations are not allowed by the LPA (but would be subject to consideration and approval by the SPB under the SPA as a 'new project').
28. The parties are relieved from liability to the extent affected by events of force majeure, subject to taking reasonable steps to mitigate such effects. The payment mechanism continues to apply so that payments are not due if premises are Unavailable. The parties shall try to agree appropriate modifications to the

agreement. If the parties cannot agree such modifications within 6 months, the main tenant may purchase the site at open market value if LiftCo decides to terminate the lease.

29. The parties attempt to reconcile disputes by direct negotiation between senior representatives or by mediation. Disputes may be referred to adjudication in accordance with the Scheme for Construction Contracts in which case the decision of the adjudicator is binding pending determination by the Court. Where required by the agreement disputes are resolved by binding expert determination (with each party bearing its own costs).