

**TURNOVER RENT PROVISIONS**

**Drafting Notes**

1. Introduction
   1. This precedent is prepared on the basis that the turnover clause is personal and will cease to apply on an assignment of the lease or on an underletting. On assignment and underletting the lease reverts to an underlying open market value. The intention is that this underlying open market rent is initially stated in the Lease as the “Main Rent” with the “Base Rent” being a lesser proportion of this. This precedent should be altered to reflect any requirements that are specific to the property, parties and terms of the transaction.
   2. On assignment or underletting the rent payable reverts to this underlying rent. If this underlying “Main Rent” does in fact equate to the open market rent, then the standard rent review mechanism in the lease operates to review this underlying rent in the usual fashion following an assignment or underletting.
   3. The view has been taken that the alternative mechanism of agreeing an alternative turnover percentage and then the new tenant benefiting from the turnover rent was rarely operated in practice, it being more common that any replacement turnover figure would be reached by negotiation in any event.
   4. The approach can benefit a tenant, in that it allows some certainty on assignment of the lease, or on an underletting, as the rent post-assignment will be known in advance, allowing the property to be properly marketed.
2. Offer-back clause
   1. Landlords may wish to consider including an offer-back clause on assignment and underletting so that they have flexibility in the event of assignment as to whether to allow the lease to revert to the underlying open market rent, or stated “Main Rent”, or alternatively take the premises back and re-let on a new turnover deal. The MCL offer-back clause (MCL-LEASECLAUSE-02) can be used if offer-back provisions are required.
   2. Of course it is always available to the landlord to permit the turnover arrangements to continue by negotiation with the tenant and proposed assignee.
3. Basis of the calculation
   1. In terms of payment mechanics, this clause assumes that ultimately the calculation of the turnover rent payable will be an annual calculation to achieve a fair result in the likely event of seasonal turnover variation. However, the drafting allows for periodic on-account payments, which may be monthly or quarterly.
   2. The periodic on-account payments can be a fixed amount (an initial estimated amount in the first turnover year and then a proportion of the actual turnover rent for the previous year) or can be based on the tenant’s actual turnover for the on-account period. Fixed amounts provide a more certain cashflow for the landlord and require significantly less administration for both parties.
4. Incorporation into the lease
   1. References in this precedent to **Schedule 10** should be replaced with the relevant schedule number in the lease where the schedule is this precedent is included.
   2. Automatic cross-referencing will need to be added where a reference is made to a clause in the lease (for example, clause 3.2). In this precedent, the clause numbers referred to are those in the shopping centre lease.

**Suggested method of incorporation into the lease**

1. Additional defined terms

Add the following defined terms in clause 1.1 of the Lease.

**“Base Rent”**

the amount that is payable under **Schedule 10**.

**“Turnover Rent”**

the amount that is calculated in accordance with and payable under **Schedule 10**.

1. Additional drafting for clause 3 (Demise, term and rent) of the Lease
   1. Add the words “Except when **clause 3.7** applies” to the front of **clause 3.2**.
   2. Add new **clause 3.7** as follows:

3.7 Until the arrangements in **Schedule 10** come to an end in accordance with **paragraph 12 of Schedule 10**, instead of paying the Main Rent under **clause 3.2** the Tenant must pay the Base Rent and the Turnover Rent under **Schedule 10**. This will not affect the operation of the rent review mechanism in **Schedule 2**.

1. Amendments to clause 4 (Tenant’s obligations) of the Lease

Amend **clause 4.1** (Main rent) to state:

4.1 The Tenant must pay the Main Rent or, where **Schedule 10** applies, the Base Rent and the Turnover Rent, when it is due.

1. Amendments to Schedule 2 (Rent review)

Amend the definition of “Hypothetical Lease” in paragraph 1 of Schedule 2 to add the following specific exclusion in paragraph (b) of the definition:

(v) the definitions of “Base Rent” and “Turnover Rent”, the reference to those terms in **clause 4.1**, the entirety of **clause 3.7** and **Schedule 10**, the words “Except when **clause 3.7** applies” in **clause 3.2** and the entirety of **paragraph 5 of Schedule 4**.

1. Amendments to Schedule 4 (Insurance)

Add an additional clause at the end of the insurance schedule in the following form:

“5. **Turnover rent**

Until the arrangements in **Schedule 10** come to an end in accordance with **paragraph 12 of Schedule 10**, references in this Schedule to the Main Rent will be read as references to the Base Rent and the Turnover Rent.”



Base Rent and Turnover Rent

* + 1. **Defined terms**
       1. This Schedule uses the following definitions:

**“Annual Turnover Certificate”**

the certificate to be provided by the Tenant in accordance with **paragraph 4.1**;

**“Authorised Group Company”**

a Group Company of the Tenant who is carrying on materially the same trade or business as [NAME OF INITIAL TENANT];[[1]](#footnote-1)

**“Base Rent”**

[80%] of the Main Rent reserved under this Lease;[[2]](#footnote-2)

**[“Default On-Account Payment”**

[AMOUNT IN FIGURES];[[3]](#footnote-3)][[4]](#footnote-4)

**“Normal Shopping Day”**

any day on which [the majority of the shops within the [Centre][Estate] are open for business[[5]](#footnote-5)][the Tenant should be open for business in accordance with its obligations in **paragraph 8.1**[[6]](#footnote-6)] and **“Normal Shopping Days”** has a corresponding meaning;

**“On-Account Payment”**

1. in respect of the first Turnover Year £[AMOUNT] per annum; and
2. in respect of each succeeding Turnover Year:
   1. up to the date of service of a demand in accordance with **paragraph 4.3** for the preceding Turnover Year, the On-Account Payment for the preceding Turnover Year; and
   2. from and including the date of service of a demand in accordance with **paragraph 4.3** for the preceding Turnover Year, [one-quarter][one-twelfth] of the Turnover Rent payable in respect of the preceding Turnover Year;[[7]](#footnote-7)

**OR**

the amount by which the Specified Percentage of the Turnover in each On-Account Period exceeds the Base Rent payable in respect of that On-Account Period;[[8]](#footnote-8)

**“On-Account Period”**

each period starting on a Rent Day and ending on the day before the following Rent Day but:

1. the first On-Account Period will be the period starting on the [Rent Commencement Date] and ending on the day before the following Rent Day; and
2. the last On-Account Period will be the period starting on the last Rent Day before the Turnover End Date and ending on the Turnover End Date;

**[“On-Account Turnover Certificate”**

the certificate to be provided by the Tenant in accordance with **paragraph 3.2**;][[9]](#footnote-9)

**“Records”**

all books and other documents, records or information (including computer tapes, discs and other storage systems, cash register tapes, bank statements, Till Rolls and any tax returns that relate to VAT or any similar or substituted tax) that are or ought in the reasonable opinion of the Landlord to be kept by the Tenant for the purpose of ascertaining and verifying the Turnover;

**“Specified Percentage”**

[10]%;

**“Till Rolls”**

the printed rolls produced by the tills installed at the Premises and all computerised records (both hard copies and on CD ROM or an equivalent recording medium) recording all sales and entries to the tills and, in the case of EPOS tills, all polling reports and transactions and turnover reports produced on a daily and weekly basis;

**“Turnover”**

Turnover as defined in **paragraph 7**;

**“Turnover End Date”**

the final day that the arrangements in this Schedule apply;

**“Turnover Rent”**

the amount by which the Specified Percentage of the Turnover in each Turnover Year exceeds the Base Rent payable in respect of that Turnover Year; and[[10]](#footnote-10)

**“Turnover Year”**

a period of one year falling within the Term and ending on and including a Year End but:

1. the first Turnover Year will be the period starting on [the Rent Commencement Date] and ending on the Year End that follows or if that Year End is less than [3] months after the commencement of the first Turnover Year, ending on the second following Year End; and
2. the last Turnover Year will be the period starting on the day after the last Year End before the Turnover End Date and ending on the Turnover End Date;

**“Year End”**

[DATE] in each year.[[11]](#footnote-11)

* + 1. **Payment of Base Rent and Turnover Rent**
       1. Starting on the Rent Commencement Date,[[12]](#footnote-12) instead of the Main Rent the Tenant must pay as a rent an annual sum equivalent to:
          1. the Base Rent, payable at the same time as the Main Rent would otherwise have been payable under **clause 3.2** if the provisions of this Schedule did not apply; and
          2. the Turnover Rent, payable as set out in this Schedule.
       2. The remedies for late payment or non-payment of Main Rent will apply equally to late payment or non-payment of the sums payable under this Schedule.
    2. **On-Account Payments of Turnover Rent**
       1. The Tenant must pay an On-Account Payment for each On-Account Period on account of the Turnover Rent. [The On-Account Payment must be paid in advance at the same time as the Base Rent.][[13]](#footnote-13)
       2. [Within [10 Business Days] after the end of each On-Account Period, the Tenant must deliver to the Landlord a certificate signed by [a senior manager of the Tenant] certifying:
          1. the amount of the Turnover during that On-Account Period with the Turnover broken down on a daily basis; and
          2. the number of Normal Shopping Days during that On-Account Period and the hours on those days when the Tenant was not open for trade during the whole of the [Centre][Estate] Opening Hours.
       3. The On-Account Turnover Certificate must contain such details as to the method of calculation as the Landlord reasonably requires. The Tenant must ensure that the On-Account Turnover Certificate states as accurately as the Tenant is reasonably able to do so the amount of the Turnover during the relevant On-Account Period.
       4. Upon receipt of an On-Account Turnover Certificate, the Landlord must calculate the On-Account Payment due for that On-Account Period and issue a demand to the Tenant for the On-Account Payment.
       5. The Tenant must pay the On-Account Payment within 10 Business Days after receiving the demand referred to in **paragraph 3.4**.
       6. If the Tenant does not deliver an On-Account Turnover Certificate in accordance with **paragraph 3.2**, the Tenant must, within [10 Business Days] after the end of the relevant On-Account Period, pay to the Landlord on account of the Turnover Rent an amount equal to the higher of:
          1. the Default On-Account Payment; and
          2. the On-Account Payment made in respect of the most recent On-Account Period in respect of which an On-Account Turnover Certificate has been provided.
       7. If, having made a payment under **paragraph 3.6**, the Tenant subsequently submits an On-Account Turnover Certificate:
          1. if it appears that the amount paid is more than the On-Account Payment that would have been due had the certificate been submitted on time under **paragraph 3.2**, then the Landlord will [repay the excess to the Tenant within 10 Business Days] [credit such excess to the next On-Account Payment due]; and
          2. if it appears that the amount paid is less than the On-Account Payment that would have been due had the certificate been submitted on time under **paragraph 3.2**, then the Tenant must pay the balance immediately with interest at the Interest Rate calculated from the date on which the relevant On-Account Payment should have been made pursuant to **paragraph 3.5**.][[14]](#footnote-14)
    3. **Annual Reconciliation**
       1. Within [20 Business Days] after the end of each Turnover Year, the Tenant must deliver to the Landlord:
          1. a certificate signed by [an independent and professionally qualified auditor] certifying the amount of the Turnover during that Turnover Year with the Turnover broken down on a daily basis; and
          2. a certificate signed by a senior manager of the Tenant certifying the number of Normal Shopping Days during that Turnover Year and the hours on those days when the Tenant was not open for trade during whole of the [Centre][Estate] Opening Hours.
       2. The Annual Turnover Certificate must contain such details as to the method of calculation as the Landlord may reasonably require. The Tenant must ensure that the Annual Turnover Certificate states as accurately as the Tenant is reasonably able to do so the amount of the Turnover during the relevant Turnover Year.
       3. Upon receipt of an Annual Turnover Certificate, the Landlord must calculate the Turnover Rent for the Turnover Year and serve on the Tenant a demand for any balance due taking into account all On-Account Payments made in respect of the relevant Turnover Year.
       4. The Tenant must pay any balance of Turnover Rent within [10 Business Days] of receiving the written demand referred to in **paragraph 4.3**.
       5. If the On-Account Payments exceed the Turnover Rent due in respect of the relevant Turnover Year then the balance will be credited to the next On-Account Payment due for the following Turnover Year (or refunded to the Tenant in respect of the last Turnover Year before the Turnover End Date).
       6. If the Tenant does not deliver the Annual Turnover Certificate in accordance with **paragraph 4.1** the Tenant must, within [20 Business Days] after the end of the relevant Turnover Year, pay to the Landlord on account of the Turnover Rent an amount equal to:
          1. [PERCENTAGE][[15]](#footnote-15) of the Main Rent; less
          2. the total On-Account Payments made in respect of the Turnover Year in respect of which the Annual Turnover Certificate should have been provided.
       7. If the calculation in **paragraph 4.6** produces a negative figure, the Landlord will not be under any obligation to make a payment to the Tenant.
       8. If, having made a payment under **paragraph 4.6**, the Tenant subsequently submits an Annual Turnover Certificate:
          1. if it appears that the amount paid is more than the balance of the Turnover Rent that would have been due had the certificate been submitted on time under **paragraph 4.1**, then the Landlord will [repay the excess to the Tenant within 10 Business Days] [credit such excess to the next On-Account Payment due or repay it to the Tenant if the payment was made in respect of the last Turnover Year before the Turnover End Date]; and
          2. if it appears that the amount paid is less than the balance of the Turnover Rent that would have been due had the certificate been submitted on time under **paragraph 4.1**, then the Tenant must pay the balance immediately with interest at the Interest Rate calculated from the date on which the relevant balancing payment should have been made pursuant to **paragraph 4.4**.
    4. **Maintenance of Records**
       1. The Tenant must maintain the Records fully and accurately whilst the arrangements in this Schedule apply and for a period of 12 months beyond the Turnover End Date.
       2. The Tenant must keep the Records relating to the then current and two immediately preceding Turnover Years safely on the Premises or in such other place reasonably accessible for inspection as the Landlord approves. The Tenant must make the Records relating to these Turnover Years available for inspection at all reasonable times by a representative of the Landlord.
       3. To preserve the operation of this Schedule and to enable the Turnover Rent to be accurately assessed, the Tenant must ensure that:
          1. any person other than the Tenant who contributes to Turnover is subject to the same obligations with respect to Records as are imposed on the Tenant in this Schedule;
          2. the Landlord has the same rights in respect of any such person(s) as it does in this Schedule in respect of the Tenant.
    5. **Main Rent reviewed late**[[16]](#footnote-16)
       1. If, by any Rent Review Date, the reviewed Main Rent (and therefore the Base Rent) has not been ascertained (so that the on account payment mechanism in **paragraph 4 of Schedule 2** applies):
          1. until the new Main Rent has been ascertained, the Base Rent and Turnover Rent will be calculated and paid by reference to the Main Rent reserved immediately before the Rent Review Date;
          2. following the ascertainment of the Main Rent, the Landlord will demand the difference (if any) between the amount the Tenant has actually paid and the amount of Base Rent and Turnover Rent that would have been payable had the Main Rent been ascertained before the Rent Review Date; and
          3. the Tenant must pay that difference to the Landlord within 10 Business Days after that demand and interest at three per cent below the Interest Rate calculated on a daily basis on each instalment of that difference from the date on which such instalment would have become payable to the date of payment. If not paid those sums will be treated as rent in arrear.
    6. **Turnover**
       1. Subject to this **paragraph 7 and paragraph 8.1**, “**Turnover**” means the aggregate of all sums of money or other consideration received or receivable for all [food and drink sold and all other][[17]](#footnote-17) goods sold, leased, hired or otherwise disposed of and for all services sold or performed and from all business of any nature whatever conducted at, in front of or upon the Premises by the Tenant. It includes:
          1. [service charges included in the price of sales of food, drink and other goods or services sold at or from the Premises;
          2. tips and gratuities given by customers that are not paid directly or via a tronc to the Tenant’s employees or contractors;
          3. restaurant and evening entertainment cover charges [to the extent that they exceed a level consistent with the level of such cover charges in the United Kingdom normally charged by restaurants similar to the [restaurant] operated at the Premises];
          4. advance deposits, booking fees or other payments received in advance from customers unless they are repaid to the customer or deducted from the cost of food, drink and other goods or services purchased by the customer where the full cost of the food, drink or other goods or service has been included in the Turnover;][[18]](#footnote-18)
          5. all amounts received or receivable from the sale of gift cards or vouchers;
          6. all amounts received or receivable from orders that originate or are received or accepted or solicited at or from the Premises even if delivery or performance is made at or from any place other than the Premises and even if payment is made to a person other than the Tenant;
          7. all amounts received or receivable from mail, telephone, facsimile, internet or similar medium orders received at or lodged at or from the Premises[ or collected by the customer from the Premises];
          8. all amounts received or receivable from mail, telephone, facsimile, internet or similar medium orders where the relevant goods or services are satisfied from stock at the Premises or by those at the Premises;
          9. all amounts received or receivable from sales made or services provided by means of electronic, mechanical or vending devices at the Premises;
          10. all amounts received or receivable from sales and services that the Tenant in the normal and customary course of the Tenant’s operations would or should credit or attribute to the Tenant’s business on the Premises;
          11. all bonuses, commissions, payments or discounts received or receivable from third parties relating to any transactions or services conducted at or from the Premises including those relating to insurance, warranties and the delivery or installation of goods;
          12. [all commissions, rents or licence fees received or receivable from concessionaires, undertenants or licensees who trade at or from the Premises;][[19]](#footnote-19)
          13. all amounts received or receivable in respect of delivery, postage or insurance charges in excess of the actual costs of delivery, postage or insurance;
          14. all amounts received or receivable from orders solicited off the Premises by persons operating from or reporting to the Premises;
          15. all grants, subsidies and fees of a revenue nature paid to the Tenant by national or local government or any public authority in consideration of or to defray in whole or part the cost of the supply of goods or services at or from the Premises; and
          16. all other consideration received or receivable by the Tenant in respect of the Premises that, in accordance with standard accounting practices, is credited or attributed to the trade or business of the Tenant carried out at the Premises as income or revenue of the Tenant.
       2. In calculating the amount of the Turnover:
          1. every sale on credit terms or on an instalment basis will be treated as a sale for the full cash price at the date when it is made irrespective of the time or times at which the Tenant receives payment;
          2. every hiring of goods to a customer with an option to purchase will be treated as a sale of goods for the normal full cash price at the date when the hiring is made (irrespective of the time or times at which the Tenant receives payment) and there will be excluded from the Turnover any hiring charges in respect of that hiring; and
          3. every deposit by a customer will be included in the Turnover at the time of receipt and will only be deducted from the Turnover if and when repaid.
       3. In calculating the amount of the Turnover, no deduction will be made for:
          1. bad or doubtful debts;
          2. discounts allowed to employees of the Tenant in respect of goods or services supplied to them by the Tenant; or
          3. in the case of transactions paid by credit card, discounts or commissions payable by the Tenant to the provider of the credit.
       4. The following amounts will not be included in the Turnover or if included will be deducted:
          1. VAT, purchase tax and similar sales or excise tax imposed directly on the Tenant in respect of the supply of goods or services but only to the extent that such tax is actually paid or accounted for by the Tenant to the taxing authority;
          2. [tips and gratuities paid by customers that are passed on directly or via a tronc to the Tenant’s employees or contractors;
          3. restaurant and evening entertainment cover charges to the extent they are at or below a level consistent with the level of such cover charges in the United Kingdom normally charged by restaurants similar to the restaurant operated at the Premises;
          4. allowances given in respect of lost, unsatisfactory or damaged orders of food and drink so long as such allowances do not exceed the sale price of the food and drink included in Turnover;][[20]](#footnote-20)
          5. the amount of any cash refund or credit given to a customer when goods are returned so long as the cash refund or credit does not exceed the sale price of the goods included in the Turnover;
          6. the sale price of goods returned by customers for exchange so long as the sale price has been included in the Turnover and the sale price of the goods given in exchange is included in the Turnover;
          7. allowances made in respect of defective or unsatisfactory goods or services so long as those allowances do not exceed the sale price of the goods or the charge for the services included in the Turnover;
          8. the value of the goods transferred whether by way of exchange or otherwise from the Premises to other premises of the Tenant so long as that transfer:

is not made for the purpose of consummating a sale that has been made at in or from the Premises; and

does not deprive the Landlord of the benefit of a sale that would otherwise have been made at in or from the Premises;

* + - * 1. the value of goods returned to shippers, wholesalers or manufacturers; and
        2. interest charges and credit account service charges.
      1. [For the purposes of this **paragraph 7**, “the Tenant” means the Tenant and any sub-tenant, licensee or concessionaire of the Tenant and any other person in occupation of the Premises.][[21]](#footnote-21)
    1. **Substituted Turnover**
       1. [The Tenant must keep the Premises open for business and take reasonable steps to maintain active trade during the [Centre][Estate] Opening Hours unless:
          1. the Tenant is prevented from so doing by reason of the destruction of or damage to the Premises or the [Centre][Estate] by an Insured Risk, Uninsured Risk or some other cause wholly beyond the Tenant’s control so that the Premises are unfit for occupation and use [or inaccessible];
          2. it is necessary to keep the Premises closed for business for any period not exceeding ten Business Days for carrying out with all due speed any repairs or Permitted Works;
          3. it is necessary to keep the Premises closed for business for any period up to five Business Days for the removal with all due speed of any contents and tenant’s and trade fixtures before a permitted assignment [or underletting] under this Lease;
          4. the Tenant is carrying out genuine staff training for any period not exceeding [four] hours on not more than [three] occasions during any Turnover Year or
          5. to do so would be contrary to any regulation or requirement of any competent statutory or local authority.][[22]](#footnote-22)
       2. Subject to **paragraph 8.3**, if the Premises are not open for business on a Normal Shopping Day during the whole of the [Centre][Estate] Opening Hours, then the Turnover for that Normal Shopping Day will be treated as an amount calculated as follows:



Where:

T is the Turnover for that Normal Shopping Day;

AT is the actual Turnover generated during the relevant Turnover Year; and

NS is the number of Normal Shopping Days that the Premises were open for business during the relevant Turnover Year.

* + - 1. The provisions in **paragraph 8.2** will not apply to any Normal Shopping Day where any of the circumstances in paragraphs **8.1.2 to 8.1.4**, inclusive, apply.
    1. **Partial periods**
       1. An On-Account Period and a Turnover Year each means a part of them where the context so requires and the provisions of this Schedule 10 will apply to any such part, with any necessary changes being made.
       2. If any other sum is required to be apportioned by reason of paragraph 9.1 or otherwise, it will be treated as if it had accrued from day to day throughout the period to which it relates and will be apportioned in respect of time accordingly.
    2. **Resolution of disputes**
       1. If the Landlord and the Tenant have any dispute as to the amount of the Turnover or the Turnover Rent payable then either the Landlord or the Tenant can require the dispute to be decided by an independent [expert/arbitrator].
       2. If the Landlord and the Tenant do not agree on who should decide the relevant dispute, if either party requests it, the Landlord and Tenant must make a joint application to the President of the Institute of Chartered Accountants in England and Wales to appoint an [expert/arbitrator] to do so. The parties must accept the identity of the nominated [expert/arbitrator] and jointly appoint them to decide the relevant dispute.
       3. The decision of the [expert/arbitrator will be binding on the parties]. [The arbitration will be conducted in accordance with the Arbitration Act 1996.][The expert:
          1. will invite the Landlord and the Tenant to make submissions to them with any relevant supporting documentation;
          2. will give the Landlord and the Tenant an opportunity to make counter submissions;
          3. will give written reasons for their decisions, which will be binding on the parties; and
          4. will be paid by the Landlord and the Tenant in such shares and in such manner as they may decide (or failing such a decision, in equal shares).]
    3. **Inspection of records**
       1. The Landlord may require that an audit of the Records relating to the current Turnover Year or any of the two preceding Turnover Years is carried out by a professionally qualified accountant appointed by the Landlord.
       2. If, as a result of an audit under **paragraph 11.1**, it is established that the Turnover for any Turnover Year has been understated by more than 2% then the cost of the audit will be borne by the Tenant.
       3. If any Turnover has been understated, the Landlord will be entitled to issue a further demand for any additional Turnover Rent following the audit and the Tenant must pay the additional Turnover Rent to the Landlord within [10 Business Days] plus interest at the Interest Rate calculated from the date that the Turnover Rent would have been paid had the Turnover Rent not been understated.
    4. **End of Arrangement**
       1. Where:
          1. the Lease is assigned, save for an assignment to an Authorised Group Company;
          2. the Tenant grants an underlease of the Premises; or
          3. the Tenant fails to start trading or ceases to trade from the Premises and, in the reasonable opinion of the Landlord, that event is not a temporary cessation of trade arising from a genuine operational requirement of the Tenant,

then the arrangements set out in this Schedule relating to payment of the Base Rent and the Turnover Rent will come to an end and the Main Rent will be payable with effect from the date the relevant event occurs instead of the Base Rent and the Turnover Rent. The obligation on the Tenant to pay sums due under this Schedule for the period up to the date of the relevant event will be unaffected.

* + - 1. Where the total number of days that the Premises are not open for business (or are open for business for less than four hours) on a Normal Shopping Day in any Turnover Year exceeds [NUMBER], the Landlord may serve notice on the Tenant specifying that arrangements set out in this Schedule relating to payment of the Base Rent and the Turnover Rent will be treated as having come to an end at the start of the Turnover Year in question and that the Main Rent will be payable with effect from that date instead of the Base Rent and the Turnover Rent. If the Landlord serves notice under this **paragraph 12.2**, the Tenant will pay to the Landlord on demand the amount specified in the notice as representing the difference between the Main Rent that would have been payable up to the date of that notice and the rents actually paid by the Tenant under this Schedule.
      2. On an assignment of the Lease[, save for an assignment to an Authorised Group Company]:
         1. the Tenant must pay to the Landlord on or before the date of the licence to assign such amount as the Landlord properly and reasonably estimates to be the maximum amount of Turnover Rent due from the Tenant up to the anticipated date of the assignment of the Lease taking into account any sums already paid in advance by the Tenant towards the Tenant’s liability for Turnover Rent under this Schedule; and[[23]](#footnote-23)
         2. in the licence to assign:

the Landlord must covenant with the Tenant to repay to the Tenant any overpayment of Turnover Rent made by the Tenant within [10] Business Days of having received the final Annual Turnover Certificate from the Tenant;

the Tenant must covenant with the Landlord to produce the final Annual Turnover Certificate to the Landlord as soon as reasonably practicable after the date of the deed of assignment and, if any additional Turnover Rent is payable, to pay any excess to the Landlord on demand.

1. This definition allows the turnover provisions to endure on assignments to group companies where the incoming tenant is carrying out the same trade or business as the original tenant. How appropriate this is will depend on the identity of the original tenant. [↑](#footnote-ref-1)
2. This tracks the Base Rent to a percentage of the Main Rent. This is why the wording in **clause 3** of the Lease preserving the review mechanism is important, and also why **paragraph 6** is needed in this Schedule to preserve a fair result. Turnover only leases would define Base Rent as a peppercorn. [↑](#footnote-ref-2)
3. This should be a figure to give the Tenant an incentive to deliver a certificate on time, but it is important to avoid a penalty.

   This payment can be expressed as a percentage of the Main Rent or Base Rent ie if 80% OMV Base Rent, then an appropriate default payment might be 25/30% of the Base Rent payable in respect of the relevant period. The figure should reflect a genuine assessment of the anticipated payment had the turnover information been provided plus any costs that the Landlord might reasonably incur in enforcing the obligation to deliver the turnover information. [↑](#footnote-ref-3)
4. This definition should be used only where the on-account turnover rent payments will be based on the Tenant’s actual turnover for the on-account period. [↑](#footnote-ref-4)
5. Use this wording where the Tenant will not be subject to the terms of a keep open covenant. [↑](#footnote-ref-5)
6. Use this wording where the Tenant will be subject to a keep open covenant. [↑](#footnote-ref-6)
7. Use this wording where the on-account turnover rent payment will be a fixed estimate for the first Turnover Year and a proportion of the previous year’s Turnover Rent in the second and subsequent Turnover Years. [↑](#footnote-ref-7)
8. Use this wording where the on-account turnover rent payments will be based on the Tenant’s actual turnover for the on-account period [↑](#footnote-ref-8)
9. This definition should be used only where the on-account turnover rent payments will be based on the Tenant’s actual turnover for the on-account period. [↑](#footnote-ref-9)
10. This is the usual method for calculating the Turnover Rent. However, other formulae can be used if the Landlord wants the Turnover Rent to be calculated on a different basis. [↑](#footnote-ref-10)
11. It will be a matter of negotiation to decide an appropriate year end, but one must take into account the preference of the Landlord to carry out turnover reconciliations at consistent times, but also the practicalities of the Tenant providing the more formal annual (possibly audited) turnover certificates, which may mean that the Tenant’s financial year end is an appropriate date.

    To avoid complex apportionments at the end of each turnover year where the Tenant pays turnover on account by reference to its actual turnover during each on-account period, the year end should correspond with the final day of an on-account payment period. [↑](#footnote-ref-11)
12. This clause assumes that Turnover Rent will start to be paid on the same date as the Base Rent. If the Landlord has given the Tenant a rent free period, the Turnover Rent should not be payable during that period. Additional drafting may be required if, following the expiry of the rent free period (or instead of a rent free period), the Tenant pays a concessionary rent (for example 50% of the Base Rent for the next six months). In these circumstances, you need to discuss with the client whether a corresponding reduction in the amount of Turnover Rent should be made during that period. [↑](#footnote-ref-12)
13. The words in square brackets should be used only where the on-account turnover rent payment will be a fixed estimate for the first Turnover Year and a proportion of the previous year’s Turnover Rent in the second and subsequent Turnover Years. [↑](#footnote-ref-13)
14. **Paragraphs 3.2 to 3.7** should be used only where the on-account turnover rent payments will be based on the Tenant’s actual turnover for the on-account period. [↑](#footnote-ref-14)
15. This payment should be expressed as a percentage of the Main Rent. If the Base Rent is 80% of the Main Rent, then an appropriate default payment might be 20-25% of the Main Rent. The figure should reflect a genuine assessment of the anticipated payment had the turnover information been provided plus any costs that the Landlord might reasonably incur in enforcing the obligation to deliver the turnover information. [↑](#footnote-ref-15)
16. This clause is needed where Base Rent is linked to the underlying Main Rent. It implements a similar regime to the usual uplift of Main Rent on review. It will also have application where a turnover cap is linked to an underlying Main Rent i.e. may see turnover caps as a percentage of Main Rent. This allows a reconciliation following an uplift in the Main Rent (and hence the cap). [↑](#footnote-ref-16)
17. Only include these words where there is a letting of a restaurant or bar with a turnover rent. [↑](#footnote-ref-17)
18. Only include **paragraphs 7.1.1 to 7.1.4** where there is a letting of a restaurant or bar with a turnover rent. [↑](#footnote-ref-18)
19. Include this wording where the licence fee or rent paid by any concessionaire, undertenant or licensee will be taken into account when calculating the Tenant’s turnover. The alternative approach (see **paragraph 7.5**) is to require the concessionaire’s, undertenant’s or licensee’s turnover to be taken into account when calculating the Tenant’s turnover. [↑](#footnote-ref-19)
20. Only include **paragraphs 7.4.2 to 7.4.4** where there is a letting of a restaurant or bar with a turnover rent. [↑](#footnote-ref-20)
21. See footnote 19. [↑](#footnote-ref-21)
22. Consider whether the Tenant should under an obligation to trade. Note that under **paragraph 12**, if the Tenant does not trade from the Premises, the Landlord has the option of ending the turnover rent provisions and requiring the Tenant to pay the full Main Rent. [↑](#footnote-ref-22)
23. Because of the way in which the Landlord and Tenant (Covenants) Act 1995 operates, the Landlord may have difficulty in recovering the final payment of Turnover Rent following an assignment of the Lease, as the final amount due will not be calculated until after the assignment has taken place. By this time, the Tenant will not be bound by the Tenant’s covenants and this will make pursuing the Tenant for the payment difficult. The solution is to include a condition of assignment that the Tenant pays to the Landlord a proper and reasonable sum on account of the Tenant’s final turnover rent liability before the assignment is completed. [↑](#footnote-ref-23)