

**OFFER BACK CLAUSE**

**Drafting notes**

1. Introduction
	1. This precedent contains offer back provisions that oblige the tenant to offer to surrender the lease to the landlord before assigning the lease or underletting the whole or, optionally, part of the premises. It should be altered to reflect any requirements that are specific to the property, parties and terms of the transaction.
	2. Offer back provisions are most often used in retail leases, particularly where there is a turnover rent.
	3. Offer-back provisions must be registered by the landlord either as a c(iv) Land Charge against the name of the tenant where the lease is unregistered or by means of an agreed or unilateral notice on the tenant’s title where the title to lease the lease will be registered.
	4. The offer-back provision must be cross-referenced in clause LR9.2.
2. Structure of the offer back provisions
	1. The offer back provisions are structured so that the tenant can be required to offer to surrender the lease before it seeks a proposed assignee or undertenant or, optionally, after it has agreed terms for the proposed assignment or underletting. You will need instructions on the appropriate trigger for the exercise of the offer back provisions.
	2. If the offer to surrender has to be made before the tenant seeks a proposed assignee or undertenant, the price at which the offer is made will be the open market value of the premises or, optionally, £1 in the case of an underletting. The tenant must specify what it believes the open market value of the premises to be in the offer notice and the landlord can accept this price or require the price to be determined by an expert before deciding whether or not to accept the tenant’s offer to surrender. If expert determination of the open market value is required, the period for accepting the tenant’s offer is extended to allow the determination to be made.
	3. If the offer to surrender has to be made after the tenant has agreed terms with a proposed assignee or undertenant, the price at which the offer is made will be the price to be paid by the proposed assignee in the case of an assignment or in the case of an underletting the open market value of the premises or, optionally, £1.
	4. Where the offer back provisions will be triggered on a proposed underletting of the premises, you will need instructions from the landlord on whether:
		1. underlettings of part will trigger the provisions; and
		2. the surrender of the lease should be at £1 or the open market value of the premises.

If the lease will not permit underlettings of whole or part, this will not be relevant.

* 1. This precedent does not include drafting for more complex forms of pre-emption that would require the tenant to offer to surrender the lease before giving consent to an assignment of an underlease by the undertenant.
1. Incorporation into the Lease
	1. In clause 4.15 (Alienation) of the Lease, add a new clause 4.15.2 (and renumber the remaining clauses) in the following form:

4.15.2 The Tenant must not assign the whole [or underlet the whole [or a Permitted Part]][[1]](#footnote-1) of the Premises unless it has complied with its obligations in Schedule [NUMBER] and the Landlord has decided (or the Landlord is treated as having decided) not to accept an offer to surrender the Premises to the Landlord.

* 1. Consider whether the offer back provisions should be disregarded on rent review. If they are include a specific disregard in the definition of the “Hypothetical Lease”.
	2. Include the following provisions of this precedent as a new Schedule to the Lease.
1.

Offer back provisions

* 1. : Terms of the offer back
		1. **Defined terms**
			1. This **Schedule 1** uses the following definitions:

**“Acceptance Period”**

the period of [one month] starting on the date on which the Landlord receives the Tenant’s Notice [subject to extension under **paragraph 2.6**][[2]](#footnote-2);

**“Acceptance Notice”**

any notice served by the Landlord on the Tenant accepting the Tenant’s offer to surrender the Premises to the Landlord;

**“Completion Date”**

the date [20] Business Days after the date of an Acceptance Notice;

**“Disposal”**

1. an assignment of the Premises; or
2. the grant of an underlease of the whole of the Premises [or a Permitted Part][or any part of them];[[3]](#footnote-3)

**“Disposal Period”**

the period of [three] months starting on the last day of the Acceptance Period;

**[“Independent Expert”**

a chartered surveyor having at least 10 years’ experience in valuing premises similar to the Premises, acting as an independent expert;][[4]](#footnote-4)

**[“Open Market Value”**

the price at which the Premises may be assigned at arms length in the open market disregarding the terms of any proposed underletting and assuming:

1. a willing seller and willing buyer;
2. a reasonable period in which to market the Premises;
3. that values remain static throughout this period;
4. that the price does not reflect any value attributable to the Tenant’s business carried on at the Premises;
5. that the price does not reflect any value attributable to tenant’s or trade fixtures at the Premises that the Tenant is entitled to remove on quitting the Premises; and
6. that the Premises are in their actual state of repair and condition at the date of the Tenant’s Notice but subject to the terms of the Lease;][[5]](#footnote-5)

**“Price”**

1. in the case of a proposed assignment of the Premises [the price (excluding VAT) that has been agreed with a proposed assignee for the assignment of this Lease [or if the Tenant’s Notice is served before terms have been agreed with a proposed assignee]] the Open Market Value at the date of the Tenant’s Notice; or
2. in the case of a proposed underletting, [£1][the Open Market Value at the date of the Tenant’s Notice];

**“Rejection Notice”**

any notice served by the Landlord on the Tenant rejecting the Tenant’s offer to surrender the Premises to the Landlord on the terms set out in the Tenant’s Notice;

**“Tenancy Documents”**

any agreement for underlease, underleases, licences and other deeds and documents relating to the Premises;

**“Tenant’s Notice”**

a notice that:

1. contains an unconditional offer to surrender this Lease;
2. shows the Price at which the Tenant is proposing to surrender the Lease and details of how the Price has been calculated;
3. [in the case of a proposed assignment of the Lease provides:
	1. complete and accurate particulars of the proposed assignee and any proposed guarantor;
	2. the main terms of the transaction including any premium or reverse premium to be paid;
	3. the latest published accounts (if any) for the proposed assignee and any proposed guarantor,
	4. but this will not affect the Landlord’s right to call for any further information to which the Landlord may be entitled on any subsequent application to assign the Premises to a proposed assignee;][[6]](#footnote-6)
4. [in the case of the proposed grant of an underlease provides:
	1. full and accurate details of and the latest published accounts (if any) for the undertenant and any proposed guarantor;
	2. the length of the term to be granted;
	3. the proposed rent (and any proposals for or the existence of any ancillary agreements relating to the rent to be reserved under the underlease); and
	4. the provisions for rent review,

but this will not affect the Landlord’s right to call for any further information to which the Landlord may be entitled on any subsequent application to underlet the Premises to a proposed undertenant;][[7]](#footnote-7)

1. specifies the matters (including any underleases) to which the surrender will be subject and the terms of those matters; and
2. is otherwise in the form contained **Part 2** of this Schedule.
	* 1. **Offer to surrender**
			1. Before making any Disposal, the Tenant must serve a Tenant’s Notice on the Landlord.
			2. No Tenant’s Notice may be served unless and until the Tenant has agreed heads of terms for the proposed Disposal with a potential assignee [or undertenant, as the case may be].[[8]](#footnote-8)

**OR**

The Tenant must serve a Tenant’s Notice before marketing Premises or seeking to agree heads of terms for the assignment [or underletting] of the Premises.[[9]](#footnote-9)

* + - 1. The Tenant’s Notice will constitute an irrevocable offer by the Tenant, which is to remain open for acceptance at any time during the Acceptance Period, to surrender the Premises to the Landlord on the terms set out in the Tenant’s Notice [subject to any determination of the Price under **paragraph 2.5**].
			2. Following the service of a Tenant’s Notice, the Tenant must provide the Landlord with any additional information about the Disposal that the Landlord properly and reasonably requires within [five] Business Days of a request by the Landlord for that information.
			3. [If there is any dispute about the Price, the matter must be immediately referred to the decision of an Independent Expert who will determine the Open Market Value. If the Landlord and the Tenant do not agree the identity of the Independent Expert, the Independent Expert will be appointed by the President of the Royal Institution of Chartered Surveyors on the application of either the Landlord or the Tenant. The Independent Expert will:
				1. invite the Landlord and the Tenant to submit to him a proposal for the Price with any relevant supporting documentation;
				2. give the Landlord and the Tenant an opportunity to make counter submissions;
				3. give written reasons for his decisions, which will be binding on the parties; and
				4. be paid by the Landlord and the Tenant in such shares and in such manner as he may decide (or failing such a decision, in equal shares).
			4. If the Landlord notifies the Tenant that there is a dispute about the Price, the Acceptance Period will be extended and will expire 10 Business Days after the Independent Expert gives written notice to the Landlord of his decision under **paragraph 2.5**. The Price will be the Open Market Value determined by the Independent Expert.][[10]](#footnote-10)
		1. **Acceptance Notice**
			1. At any time during the Acceptance Period, the Landlord may serve an Acceptance Notice accepting the Tenant’s offer to surrender the Premises. If the Landlord does so:
				1. the Tenant must surrender and the Landlord must accept the surrender of the Lease on the Completion Date;
				2. the terms set out in **paragraph 6** will apply.
		2. **Failure to accept surrender**
			1. The provisions of **paragraph 4.2** will apply if:
				1. the Landlord does not serve an Acceptance Notice on the Tenant during the Acceptance Period; or
				2. the Landlord serves a Rejection Notice on the Tenant.
			2. Subject to **paragraph 4.1**, during the Disposal Period the Tenant may, subject to obtaining the prior written consent of the Landlord on the terms set out in this Lease, enter into the Disposal on the terms set out in the Tenant’s Notice.
		3. **Time of the essence**
			1. Time is of the essence for the service of any notice under this **Schedule 1**.
		4. **Terms of the surrender**
			1. The surrender will be made subject to and with the benefit of any Tenancy Documents.
			2. The Landlord must not raise any requisition or objection to the title except in respect of [any matters registered against the Tenant’s title to this Lease after the date of this Lease[[11]](#footnote-11)][any Land Charges registered against the name of the Tenant after the date of this Lease[[12]](#footnote-12)].
			3. The Tenant must surrender the Lease with full title guarantee.
			4. The surrender will be in the form required by the Landlord with the Price, any Tenancy Documents and other relevant details inserted where required.
			5. Until the surrender is completed all the terms and conditions of the Lease will remain in full force and effect including the provisions relating to the payment by the Tenant of the rent and all other sums payable under the Lease.
			6. On completion of the surrender **clause [5.4]** will apply.[[13]](#footnote-13)
			7. Completion of the surrender will not prejudice the rights of the Landlord in respect of any arrears of the Rents [or any breach of the tenant’s repairing obligations under the Lease] but will otherwise release the Landlord and the Tenant from all past, present and future obligations under the Lease.
	1. : Form of Tenant’s Notice

|  |  |
| --- | --- |
| To: | [Name of Landlord] (“the Landlord”) of [Address of Landlord] |
| From: | [Name of Tenant] (“the Tenant”) of [Address of Tenant] |
| Lease: | A [lease][underlease] of the Premises dated [date] made between [original parties to the Lease] |
| Premises: | [Address of Premises] |
| Disposal | A disposal the Premises on the terms set out in the Schedule to this Notice |
| Price: | [Amount in figures] |
| Date: | [Date] |

* + 1. This notice is served on you under **Schedule 1** to the Lease.
		2. We [have agreed terms for][intend to agree terms for] the Disposal.
		3. This notice constitutes an irrevocable offer by us to surrender the Lease to for the Price.
		4. The Price is [the price that the proposed assignee referred to in the Schedule to this Notice has agreed to pay for an assignment of the Lease][our estimate of the Open Market Value of the Premises (as defined in the Lease) subject to any determination of that Price pursuant to **paragraph 2.5 of Schedule 1** to the Lease][the agreed sum of £1 to be paid on a surrender of the Lease if we propose to underlet the Premises].
		5. This offer remains open for acceptance by you during the Acceptance Period defined in **Schedule 1** to the Lease.
		6. For the purposes of section 2 Law of Property (Miscellaneous Provisions) Act 1989, this offer incorporates the terms set out in **Schedule 1** to the Lease.
		7. Please sign and return one copy of this notice indicating whether you wish to accept or reject the offer to surrender the Lease on the terms set out in this Notice.

**SCHEDULE**

**The proposed Dealing**

An assignment of the Premises at a premium of [not less than[[14]](#footnote-14)] [amount in figures] to [name of assignee] [with the obligations of the assignee to be guaranteed by [name of guarantor][[15]](#footnote-15)].

An underlease of the [whole][part] of the Premises at an initial rent of [amount in figures] per annum [subject to review] on the following terms:

Undertenant: [Name of proposed undertenant][[16]](#footnote-16)

Undertenant’s Guarantor [Name of proposed guarantor][[17]](#footnote-17)

Contractual Term of the Underlease: [number] years from and including [date]

Rent free period: [number] months

Other terms: [Details]

Any variations to the Lease to be
included in the underlease: [Details]

Signed: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

For and on behalf of the Tenant

We, [accept][reject] the offer to surrender the Lease to us at the Price contained in this Notice [or otherwise determined pursuant to **paragraph 2.5 of Schedule 1** to the Lease].

Signed: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

For and on behalf of the Landlord

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

1. You should take instructions on whether the offer back provisions will be triggered by underlettings of whole or, where underlettings of part are permitted under the lease, on underlettings of part. Requiring the tenant to offer back the Premises on an underletting of a permitted part is less common and would not usually be included unless required by the heads of terms agreed between the landlord and tenant. [↑](#footnote-ref-1)
2. The words in square brackets will be required only where the Tenant has to specify the Open Market Value of the Premises in the Offer Notice and the Landlord will have the right to require an expert to determine the Open Market Value if there is a dispute. [↑](#footnote-ref-2)
3. You will need instructions from the Landlord on whether underlettings of part will trigger the offer back provisions. If the Lease does not permit underlettings of whole or part, you can delete the whole of (b). [↑](#footnote-ref-3)
4. This definition is required only where the Tenant has to offer to surrender the Premises at their Open Market Value and the Landlord has the right to require that value to be determined by an expert if there is a dispute about that value. [↑](#footnote-ref-4)
5. This definition is required only where the Tenant has to offer to surrender the Premises to the Landlord at their Open Market Value. [↑](#footnote-ref-5)
6. Paragraph (c) will not be required if the Tenant must offer to surrender the Premises before agreeing terms with a proposed assignee. [↑](#footnote-ref-6)
7. Paragraph (d) will be required only where the grant of an underlease will trigger the offer to surrender the Premises **and** the Tenant must have agreed heads of terms with a proposed undertenant before making the offer to surrender the Premises to the Landlord. [↑](#footnote-ref-7)
8. These words should be included only where the Tenant must have agreed heads of terms for an assignment or underletting before offering to surrender the Premises to the Landlord. [↑](#footnote-ref-8)
9. These words should be included only where the Tenant must make an offer to surrender the Lease before marketing the Premises in the open market. [↑](#footnote-ref-9)
10. **Paragraphs 2.5 and 2.6** will be required only where the Tenant has to offer to surrender the Premises at their Open Market Value and the Landlord can require that value to be determined by an Independent Expert. [↑](#footnote-ref-10)
11. Use this wording where title to the Premises is registered and insert the date of the office copy entries deduced to the Landlord as part of the Tenant’s title. [↑](#footnote-ref-11)
12. Use this wording where title to the Premises is unregistered. [↑](#footnote-ref-12)
13. **Clause 5.4** is the repayment of rent clause. The cross-reference must be updated to refer to the correct clause in the Lease. [↑](#footnote-ref-13)
14. For use where the offer-back is to be made before terms are agreed for an assignment. [↑](#footnote-ref-14)
15. For use where the offer-back is to be made after terms have been agreed for an assignment. [↑](#footnote-ref-15)
16. For use where the offer-back is to be made after terms have been agreed for an underletting. [↑](#footnote-ref-16)
17. For use where the offer-back is to be made after terms have been agreed for an underletting. [↑](#footnote-ref-17)