

CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE FORM OF RENT DEPOSIT DEED

The rent deposit deed is a ubiquitous document in the landlord and tenant arena. Its usage may well be increased by difficult economic conditions.

There are a number of different approaches to the form of rent deposit deed, whether it be tenant's money charged in landlord's favour, or landlord holding deposit on trust for tenant, or the deposit being held in a stakeholder account, run, for example, by the landlord's solicitors.

With a multiplicity of possible arrangements, the Land Law Committee considered that it would be helpful to produce a form of rent deposit deed that will hopefully assist practitioners. The Committee decided to adopt the charging arrangement as this is probably the most frequently encountered.

The Committee has drafted the deed to cater for the majority of issues arising in a rent deposit situation, but without it becoming a complex banking document.

The deed provides for the landlord to set up and be able to withdraw sums from the deposit account (having given a short period of notice to the tenant), so that the landlord controls what happens to the deposit. The deposit remains the tenant's property, subject to the terms of the deed.

The deed allows for an increase in the level of the rent deposit following rent increases on review or otherwise under the lease.

The deed can be used for both "new" and "old" tenancies for the purposes of the Landlord and Tenant (Covenants) Act 1995. The deed includes a release of an outgoing landlord, provided various conditions are satisfied (see clause 6). One or two Committee members expressed a concern that the House of Lords' decision in *Avonridge v London Diocesan Fund* [December 2005] may only be authority for the efficacy of a contractual release of an original landlord, but not successor landlords. On the other hand, a number of Committee members could see nothing in *Avonridge* to suggest such a limitation.

The deed provides for repayment of the then deposit balance to the tenant if it assigns (along with certain other repayment points). The landlord will presumably, as a separate matter, seek deposit, guarantees or other security for the assignee, where required. The deed also includes optional repayment provisions in the event of the tenant satisfying a profits test (see clause 7.1.3).

Any guarantor for the tenant should be a party to the deed to acknowledge that its obligations (under the lease) are unaffected by the deed (see clause 11). This clause also provides that the guarantor's obligations will also apply to the tenant's obligations under the deed.

Clause 12 of the deed seeks to take advantage, where possible, of the Financial Collateral Arrangements (number 2) Regulations 2003. If the deed does benefit from those Regulations, then the charge in the deed will not need to be registered at Companies

House (assuming the tenant to be a company). However, most firms are cautious and continue to register the charge at Companies House (using form 395), within 21 days after the date of the charge's creation. Do not forget the Slavenburg procedure for foreign tenant companies with a principal place of business in England or Wales, and the different form 395 for limited liability partnerships. The Companies Act 2006 will be making some minor changes to the registration procedures in 2009. There will also be changes to the Slavenburg procedure.

There are governing law and agent for service provisions in case of foreign parties to the deed. Where the tenant or guarantor is foreign, the landlord should consider obtaining a legal opinion (covering, among other matters, the enforceability of the tenant/guarantor's obligations in the deed) from counsel qualified in the law of the jurisdiction in which the tenant/guarantor are incorporated. The CLLS has produced a form of foreign legal opinion, which can be found on the Land Law committee page of the CLLS website, a link to which follows-

<http://www.citysolicitors.org.uk/Default.aspx?SID=923&IID=0>

The notice provision (clause 10) refers to the notice provisions in the lease.

As a matter of good practice, the landlord should liaise with the tenant prior to completion of the deed to ensure the landlord has all it needs to set up and operate the account, including satisfying any requirements of the bank.

Please do let the CLLS know if you have any comments on this deed, or have any other suggestions for future CLLS projects.

THIS DEED is made on (date)

BETWEEN:

- (1) • [(Company No. •)] [a Company incorporated under the laws of •] whose [registered office][principal office in the United Kingdom] is at • (“the Landlord”).
- (2) • (Company No. •) whose registered office is at • (“the Tenant”).
- (3) • (Company No. •) whose registered office is at • (“the Guarantor”).

IT IS AGREED as follows:

1. INTERPRETATION

1.1 In this Deed unless the context otherwise requires:

1.1.1 Words importing the singular include the plural and vice versa and words importing any gender include every gender;

1.1.2 Words importing natural persons include an individual, company, corporation, firm, partnership, unincorporated association or body of persons, and any state, or governmental or local division or agency of a state, or any local governmental authority;

1.1.3 References to clauses are references to the relevant clause in this Deed;

1.1.4 References in this Deed to any legislation include references to that legislation as amended, consolidated or re-enacted or as other legislation modifies its application from time to time and any subordinate legislation made or to be made under that legislation;

1.1.5 An obligation on the Landlord or the Tenant not to do or omit to do anything, includes an obligation not to allow it to be done or omitted to be done by any person under its control;

1.1.6 Where the Landlord or the Tenant covenant to do something, they are to be deemed to fulfil that obligation if they procure that it is done;

1.1.7 Any sum payable by one party to the other is to be exclusive of VAT which, if chargeable, is to be payable in addition;

1.1.8 The words "including" and "in particular" shall be construed as being by way of illustration or emphasis only and shall not limit the generality of the preceding words;

1.1.9 The headings in this Deed are for ease of reference only and are not to be taken into account in the construction or interpretation of any provision of this Deed to which they refer.

1.2 In this Deed, unless the context otherwise requires, the following expressions have the following meanings:

["Accepted Accounting Principles" accounting principles, concepts, bases and policies generally adopted and accepted in the United Kingdom for the preparation and presentation of audited financial statements and accounts;]

"Account" an interest bearing account (to which the Deposit is credited) designated "[SPECIFY TENANT'S NAME]- RENT DEPOSIT ACCOUNT FOR [SPECIFY ADDRESS]" (and includes any new account opened under clause 9 and any renewal, redesignation or renumbering of any relevant account from time to time) with a Clearing bank of the Landlord's choosing from time to time held subject to the respective rights in this Deed of the Landlord and the Tenant;

"Bank" the Clearing bank at which the Account is held at any relevant time;

"Clearing bank" a bank incorporated under the law of and with its principal place of business in the United Kingdom and which is a "sterling member" of CHAPS Clearing Company Limited;

"Deposit" the initial sum of • POUNDS (£ •) and any further sums deposited pursuant to clause 5;

"Deposit Balance" the sum, from time to time, standing to the credit of the Account including any accrued interest;

"Disposal" a disposal by the Landlord of the immediate reversion to the Lease;

"Landlord" includes all parties from time to time entitled to the immediate reversion to the Lease;

"Lease" the lease of the Premises dated [•] [today] and made between the Landlord (1) [the Tenant] [•] (2) and includes any agreement collateral to the Lease;

"Liabilities" has the meaning in clause 2.8 and **"Liability"** includes any sum forming part of the Liabilities;

"Premises" the premises let by the Lease being [•];

"Required Credit Level" [£ •] [an amount equal to [] months' principal rent from time to time reserved under the Lease] [together with a sum representing VAT at the highest rate expected to be payable during the term of the Lease on that [amount/principal rent]] (subject to increase under clause 5.2);

"Tenant" the party named as the Tenant in this Deed;

"VAT" value added tax and any other tax of a similar nature;

"Working Day" any day from Monday to Friday (inclusive), which is not Christmas Day, Good Friday or a statutory Bank Holiday.

1.3 This Deed is collateral to the Lease.

2. **DEPOSIT**

2.1 The [Tenant's solicitors have] [the Tenant has] paid the Deposit to the Landlord of which the Landlord acknowledges receipt.

2.2 The Landlord shall credit the Deposit to the Account [to be] opened by the Landlord and to be operated by the Landlord in accordance with this Deed.

2.3 The Deposit Balance is the property of the Tenant subject to the terms of this Deed.

2.4 The Tenant irrevocably authorises the Landlord to:

2.4.1 sign such instruments, execute such documents and do such things as the Landlord may require:

2.4.1.1 to open, maintain, perfect, operate, transfer or close the Account;
and

2.4.1.2 to perfect the security constituted by this Deed; and

2.4.2 make appropriate withdrawals from the Account to meet Liabilities, from time to time, up to the extent of the Deposit Balance;

in accordance with the terms of this Deed.

2.5 The Tenant shall (upon request in writing by the Landlord) sign or execute such documents and provide all assistance necessary to enable any Account to be set up and operated by the Landlord and to perfect the security constituted by this Deed.

2.6 To secure performance of the obligations of the Tenant under this Deed and to supplement the powers conferred on the Landlord by this Deed, the Tenant irrevocably appoints the Landlord to be the attorney of the Tenant in the name of the Tenant, to do anything in relation to the Account or the money from time to time standing to its credit or the security constituted by this Deed, which the Tenant is or may be required to do under the terms of this Deed.

2.7 The Landlord shall at intervals of not less than six months following the date of this Deed account to the Tenant for an amount equal to the interest (less tax where requisite) then accrued to the Account, save and to the extent:

2.7.1 there are at the time of account outstanding Liabilities, whether or not quantified; or

2.7.2 that would cause the Deposit Balance to fall short of the Required Credit Level;
or

2.7.3 such interest is set off against any deficit in the Required Credit Level under clause 5.2.

- 2.8 Liabilities are all sums required to discharge all obligations and liabilities from time to time due to the Landlord under the Lease or this Deed, and to compensate for all losses from time to time of the Landlord arising in consequence of the forfeiture or disclaimer of the Lease, and include:
- 2.8.1 rent, service charges, insurance premiums or other contribution to the cost of insurance of the Premises, outgoings, interest, and other payments payable to or recoverable by the Landlord under the Lease, whether or not reserved by way of rent, and whether or not formally demanded;
 - 2.8.2 claims, demands, damages, losses, costs and expenses arising out of or incidental to:
 - 2.8.2.1 a breach by the Tenant of the covenants and conditions in the Lease, or of obligations in this Deed; or
 - 2.8.2.2 enforcement of the obligations of the Tenant under the Lease or this Deed;
 - 2.8.3 loss of rent or mesne profits arising in consequence of the forfeiture or disclaimer of the Lease; and
 - 2.8.4 VAT, if chargeable, in respect of Liabilities.

3. **CHARGE**

- 3.1 The Tenant, with full title guarantee, charges its interest in the Account and in the Deposit Balance (and the Tenant's right to the return of monies representing the Deposit Balance in accordance with this Deed) in favour of the Landlord as security for the payment to the Landlord of the Liabilities.
- 3.2 The Tenant warrants that the Deposit is free from any charge, encumbrance or other security interest in favour of any third party and the Tenant shall not assign or otherwise dispose to any person whatsoever the benefit of any of the Tenant's rights under this Deed or the Tenant's interest in, nor create any further charge, encumbrance or other security interest over, the whole or any part of the Deposit Balance or the Account.
- 3.3 This Deed operates as a continuing security even if an intermediate payment of Liabilities is made.
- 3.4 The rights of the Landlord under this Deed:
 - 3.4.1 are in addition to, and do not prejudice, any contractual or other right whether under the Lease or otherwise or any other security which is available to the Landlord now or in the future; and
 - 3.4.2 are to remain in effect even in case of invalidity of any other right, remedy or security, or the Landlord releasing, varying or abstaining from perfecting or enforcing any of them.

4. **WITHDRAWALS**

The Landlord may at any time make withdrawals from the Account of sums sufficient to discharge any Liability if:

- 4.1 the Landlord has previously given to the Tenant not less than five Working Days' notice in writing of its intention to make a withdrawal from the Account and the notice has specified the amount to be withdrawn and the relevant Liability; and
- 4.2 the Tenant has not discharged the relevant Liability to the Landlord's satisfaction before the expiration of the notice.

5. **REPLENISHMENT OF THE ACCOUNT**

- 5.1 The Tenant must maintain the Deposit Balance at the Required Credit Level.
- 5.2 The Tenant must replenish or supplement the Account by paying to the Landlord the amount of any deficit in maintaining the Deposit Balance at the Required Credit Level within ten Working Days of a written demand made to the Tenant by the Landlord in any of the following events:

5.2.1 withdrawals made in accordance with this Deed to meet Liabilities; [and]

5.2.2 [an increase in the Required Credit Level consequential on the review or other adjustment of the principal rent reserved under the Lease;]
[and]

5.2.3 [an increase in the Required Credit Level consequential on any increase in the rate of VAT;] [and]

5.2.4 [an increase in the Required Credit Level consequential on the Landlord exercising the option to tax for VAT purposes after the date of this Deed in respect of the Premises or the property of which the Premises form part;]

but the deficit may be reduced (or eliminated) by setting off such interest as may at the time have accrued to the Account.

- 5.3 If the Landlord has received from the Tenant a payment under clause 5.2, the Landlord shall credit to the Account an amount equivalent to such payment.

6. **TRANSFER OF REVERSION**

Following a Disposal, the Tenant agrees with the transferring Landlord that if the transferring Landlord shall:

- 6.1 assign the benefit of this Deed to its successor in title to the immediate reversion to the Lease; and
- 6.2 obtain from its successor a covenant with the Tenant to observe and perform all the obligations of the Landlord under this Deed;

then from the later of the date of the assignment and the date of such covenant:

- (i) the transferring Landlord is released from future liability to the Tenant for the observance and performance of such obligations;
- (ii) the transferring Landlord shall account to the Tenant for interest (less tax where requisite) standing to the credit of the Account at the time of the Disposal, unless and to the extent that there is a deficit in maintaining the Deposit Balance at the Required Credit Level at that time;
- (iii) if there is no deficit, or the deficit is made good by the time of the Disposal, the Tenant shall cease to be liable to the transferring Landlord under this Deed; and
- (iv) the Tenant shall be liable to the transferring Landlord's successor to observe and perform all the Tenant's obligations under this Deed and shall enter into any covenant to that effect and any replacement rent deposit deed in the same terms as this Deed if and when required by the successor.

7. REPAYMENT OF DEPOSIT BALANCE

- 7.1 Subject to clauses 7.2- 7.4 (inclusive), the Landlord shall repay the Deposit Balance (except such part or the whole as is required to meet Liabilities) to the Tenant within ten Working Days after the first to occur of the following:

- 7.1.1 the date of expiration or sooner termination of the term granted by the Lease [as continued by statute]; [and]
- 7.1.2 the date of registration with the Landlord of the assignment by the Tenant of the Lease which assignment is authorised by the Lease (but excluding an assignment by operation of law) and where applicable such later date of registration of the assignment at Land Registry; [and]
- 7.1.3 the date on which there is produced to the Landlord final audited unqualified accounts (or if qualified, qualified in accordance with Accepted Accounting Principles) for the Tenant for [three] consecutive accounting years (the last ending on a date not more than [12] months before the date on which such accounts are produced) showing for each such year annual pre-tax net profits (calculated in accordance with Accepted Accounting Principles) exceeding [£[.....]/three times the principal rent [plus VAT] from time to time reserved under the Lease]].

- 7.2 If there is an unascertained or unquantified claim for Liabilities at the relevant date specified in clause 7.1, the Landlord shall not be obliged to repay the Deposit Balance

under clause 7.1 until the date [nine] months after that date, or, if earlier, when the claim is ascertained or quantified.

7.3 If the Lease is forfeited or disclaimed, the Landlord shall not be obliged to repay the Deposit Balance under clause 7.1 until the date the principal rent under a new lease of the Premises becomes fully payable.

7.4 If clauses 7.2 and 7.3 both apply, the Landlord shall not be obliged to repay the Deposit Balance under clause 7.1 until the later of the dates under those clauses.

8. **RELATIONSHIP TO LIABILITY UNDER THE LEASE**

8.1 A breach of obligation in this Deed is to be treated as a breach of obligation under the Lease, and, in the case of a breach by the Tenant, entitles the Landlord to exercise its rights of re-entry under the Lease.

8.2 A sum not paid by the Tenant when it is due under this Deed may be treated by the Landlord as if it were rent in arrear under the Lease and be recoverable accordingly.

8.3 The rights of the Landlord under this Deed are additional to those in the Lease, and the liability of the Tenant under the Lease is not limited to the amount of the Deposit.

9. **CHANGES OF THE BANK**

The Landlord may transfer the Deposit Balance into another Account at the same or another Bank for retention on the terms of this Deed and the Landlord agrees to notify the Tenant within fifteen Working Days after doing so with details of the new Account, and, if applicable, of the new Bank.

10. **NOTICES**

The provisions as to notices contained in the Lease shall apply to any notice or notification given or made under this Deed.

11. **GUARANTOR**

The Guarantor acknowledges to the Landlord that the Guarantor's obligations contained in the Lease and any rights the Landlord may have in that regard are unaffected by this Deed and shall continue in full force and effect and shall also apply to the Tenant's obligations in this Deed.

12. **SECURITY FINANCIAL COLLATERAL ARRANGEMENT**

To the extent that any part of the Deposit constitutes "financial collateral" and that this Deed (including the obligations of the Tenant) constitutes a "security financial collateral arrangement" in each case as defined in and for the purposes of the Financial Collateral Arrangements (number 2) Regulations 2003 (the "Regulations"), the Landlord shall have the right to appropriate all or any part of such financial collateral in or towards discharge of the Liabilities. For this purpose, the value of such financial collateral so appropriated shall be the amount of the Deposit Balance, together with any accrued but unposted

interest, at the time the right of appropriation is exercised and the method of valuation provided for in this Deed shall constitute a commercially reasonable method of valuation for the purposes of the Regulations.

13. **CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

A person who is not a party to this Deed has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Deed, but this does not affect any right or remedy of any person which exists or is available apart from that Act.

14. **SET-OFF**

All sums payable by the Tenant under this Deed are payable without deduction, set-off or counterclaim.

15. **INVALIDITY OF CERTAIN PROVISIONS**

If any term of this Deed or the application of such term to any person or circumstance shall be to any extent invalid or unenforceable, the same shall be severable and the remainder of this Deed or the application of such term to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected by such invalidity or unenforceability and each term and provision of this Deed shall be valid and be enforced to the fullest extent permitted by law.

16. **GOVERNING LAW**

16.1 The validity, construction and performance of this Deed (and any claim, dispute or matter arising under or in connection with it or its enforceability) shall be governed by and construed in accordance with the law of England and Wales.

16.2 Each party to this Deed irrevocably agrees to submit to the exclusive jurisdiction of the courts of England and Wales over any claim, dispute or matter arising under or in connection with this Deed or its enforceability or the legal relationships established by this Deed.

16.3 Each such party irrevocably waives any objection which it may have now or hereafter to proceedings being brought in the courts of England and Wales and any claim that proceedings have been brought in an inconvenient forum. Each such party further irrevocably agrees that a judgment in any proceedings brought in the courts of England and Wales will be conclusive and binding upon each such party and may be enforced in the courts of any other jurisdiction.

16.4 **[[Party 2]** irrevocably appoints *[name]* of *[address]* *[fax number]* as its agent to receive on its behalf in England and Wales service of any proceedings or notices arising out of or in connection with this Deed or its enforceability or the legal relationships established by this Deed. Such service shall be deemed completed on delivery to such agent (whether or not it is forwarded to and received by **[Party 2]**). If for any reason such agent ceases to be able to act as agent or no longer has an address in England and Wales, **[Party 2]** shall

immediately appoint a substitute acceptable to the Landlord and deliver to the Landlord the new agent's name, address [and fax number]].

DELIVERED as a deed on the date of this Deed.

SIGNED as a **DEED** by)
[])
acting by [a director and its secretary]
[two directors]

Director

Director/Secretary

SIGNED as a **DEED** by)
[])
acting by [a director and its secretary]
[two directors]

Director

Director/Secretary

SIGNED as a **DEED** by)
[])
acting by [a director and its secretary]
[two directors]

Director

Director/Secretary