

RICS GUIDANCE NOTE



# Commercial property management in England and Wales

England and Wales

2nd edition, October 2011

Effective from October 2011

# COMMERCIAL PROPERTY MANAGEMENT IN ENGLAND AND WALES

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# RICS professional standards and guidance

## RICS guidance notes

### Definition and scope

RICS guidance notes set out good practice for RICS members and for firms that are regulated by RICS. An RICS guidance note is a professional or personal standard for the purposes of *RICS Rules of Conduct*.

Guidance notes constitute areas of professional, behavioural competence and/or good practice. RICS recognises that there may be exceptional circumstances in which it is appropriate for a member to depart from these provisions – in such situations RICS may require the member to justify their decisions and actions.

### Application of these provisions in legal or disciplinary proceedings

In regulatory or disciplinary proceedings, RICS will take account of relevant guidance notes in deciding whether a member acted professionally, appropriately and with reasonable competence. It is also likely that during any legal proceedings a judge, adjudicator or equivalent will take RICS guidance notes into account.

RICS recognises that there may be legislative requirements or regional, national or international standards that take precedence over an RICS guidance note.

## Document status defined

The following table shows the categories of RICS professional content and their definitions.

### Publications status

Type of document	Definition
<i>RICS Rules of Conduct</i>	These Rules set out the standards of professional conduct and practice expected of members and firms registered for regulation by RICS.
International standard	High-level standard developed in collaboration with other relevant bodies.
RICS professional statement (PS)	Mandatory requirements for RICS members and RICS regulated firms.
RICS guidance note (GN)	A document that provides users with recommendations or an approach for accepted good practice as followed by competent and conscientious practitioners.
RICS code of practice (CoP)	A document developed in collaboration with other professional bodies and stakeholders that will have the status of a professional statement or guidance note.
RICS jurisdiction guide (JG)	This provides relevant local market information associated with an RICS international standard or RICS professional statement. This will include local legislation, associations and professional bodies as well as any other useful information that will help a user understand the local requirements connected with the standard or statement. This is not guidance or best practice material, but rather information to support adoption and implementation of the standard or statement locally.

# 1 Introduction

- 1.1** Management is about achieving defined objectives that should be agreed with the client at the outset of each instruction, particularly the provision of quality services which are value for money.
- 1.2** This guidance note is principally concerned about how the person(s) in control of a building should act and in particular how they manage, communicate and control income and expenditure and minimise various associated risks. Managers should at all times seek to comply with the principles set out in this guidance note. While this guidance note refers principally to the management of multi-let properties the principles can be applied to the management of all types of commercial property. The property manager is commonly appointed on behalf of the landlord to assist them with services that may include:
- meeting their investment objectives, e.g. to preserve and enhance value or to facilitate a future redevelopment
  - maintaining comprehensive tenancy records
  - discharging their obligations under leases and ensuring tenant compliance with lease covenants
  - day-to-day tenant liaison and service satisfaction
  - ensuring that they meet their statutory obligations
  - operating the property day to day on a sustainable basis including procurement of cost effective facilities management services
  - undertaking the financial administration of the property, including rent collection and service charge administration
  - ensuring that adequate insurance is in place to satisfy lease covenant and any lending institutions and administering any claims.
- 1.3** It should be appreciated, that subject to the occupiers' rights under the lease and the law, the landlord has to decide what actions to take or not to take in respect of a property. Equally, the property manager must manage. Nevertheless, effective management needs to take into account what occupiers think. Occupiers are landlords' customers and business is generated from satisfied customers. Whilst the objectives of landlord and occupier may differ, mutual benefits will be derived through an understanding of each party's requirements and by co-operation, resulting in fewer unforeseen disputes for the manager. Effective communication is critical if success is to be achieved.
- 1.4** A successful property manager must be efficient, effective and accountable. They should be open about their methods of management. Consultation and communication will invite challenge, but they are essential if standards are to be improved.



## 2 Purpose and scope

- 2.1** This guidance note applies to all members who undertake property management, for the landlord as managing agent. However, the general principles would apply to any property manager.
- 2.2** The purpose of this guidance note is to summarise best practice in property management of commercial properties and highlight key aspects that property managers should bear in mind in successfully managing a property
- 2.3** It is focused on the management of commercial properties in England and Wales (and refers to English law throughout).
- 2.4** Although commercial property (i.e. office, retail, industrial) is the focus, special mention is made of mixed use development where commercial property is typically mixed with residential property.
- 2.5** This guidance note deals with property management, not asset management or facilities management.
- 2.6** Appendix 1 provides a summary of the main areas of English statute law that are relevant to the management of a commercial property. These are accurate at the time of going to press. Please visit [www.legislation.gov.uk](http://www.legislation.gov.uk) to check current information on English law. Appendix 1 should be a useful resource to property managers for checking they have the procedures in place to manage these legal responsibilities, and understanding the context in which they provide their services. Please note this information is not exhaustive and is not intended to be legal advice – in specific cases it is recommended that specific legal advice is sought.
- 2.7** This guidance note only provides an overview. Other useful RICS documents that go into more detail on property management include:
- RICS code of practice, Service charges in commercial property, 2nd edition (2011)
  - RICS information paper: Managing mixed use developments (2009)
  - RICS information paper: Commercial property handover procedures (2011)
  - RICS guidance note: Insurance for commercial property managers (2010)

These can all be found at [www.rics.org/standards](http://www.rics.org/standards)

## 3 Overview – key principles

The overall objective for a property manager is to act as an agent for the landlord to manage:

- a** some or all of the responsibilities the landlord has:
  - i** under the property's lease, if any, from a superior landlord and
  - ii** under the property's occupational leases to occupiers and other occupiers
- b** some or all of the landlord's responsibilities regarding laws in owning or operating a property;
  - and support in:
    - i** making a financial/economic success of the property; and
    - ii** the successful use and operation of the property.

### 3.1 Acting as agent of the landlord

**3.1.1** It is an important principle that the property manager manages the property on behalf of a landlord. Although the landlord is delegating the management of the property to the property manager, the landlord still retains the primary responsibility for the property. The landlord would have made the necessary capital investment and will therefore take the capital risk or reward arising from that. This does not mean that the property manager has no responsibility at all (see 3.3 on duty of care), but it is important to bear in mind this agency relationship.

### 3.2 Managing third party suppliers

**3.2.1** The property manager will carry out some significant tasks, but many substantial aspects of the operation of a building will be fulfilled by other suppliers such as various providers of facilities management services (e.g. security, cleaning, plant maintenance). Therefore, the property manager ensures the property is successfully operated, not necessarily by doing everything but by managing others to do so.

### 3.3 Duty of care

**3.3.1** The primary duty of care that a property manager has is to his/her client, the landlord. This is usually set out in the contract with the landlord (see Appendix 2 on property management contracts). Even in the absence of a written contract the English courts are likely to find that a property manager has a 'duty of care' to the landlord, which means that the property manager will have legal liability if he/she is negligent – i.e. fails to manage the property with reasonable skill and care.

**3.3.2** A property manager will not just have responsibilities to the landlord; they will also have significant day-to-day contact with the occupiers, among others. At the very least this creates commercial and reputational duties to those occupiers, and could have the potential

to create a legal duty of care to those occupiers. Therefore a good property manager will need to ensure they take good care of the occupiers and other relevant stakeholders.

**3.3.3** A property manager may also be asked to agree to have a duty of care to parties providing finance in connection with the properties being managed (see section 8.4 on duty of care agreements).

# 4 The property manager's core duties

The property manager has two core duties, and the application of the following points differs between multi-let and single-let properties:

- a** the collection of rent, service charge and other sums, owing by the occupiers to the landlord, from the occupiers and
- b** the management of the property.

## 4.1 Liaising and reporting with the landlord

**4.1.1** It is critical that the property manager seeks to develop a positive relationship with the landlord, understands the landlord's objectives and approach, and establishes a format and frequency for reporting.

## 4.2 Collection of monies

**4.2.1** A key role is the collection and management of sums owing by occupiers relating to rent, service charge, insurance, and any other sums due under the lease. It is important that a property manager has an established process in place to arrange for the efficient collection of these monies. This means that a property manager will:

- a** have a thorough understanding of the relationship between landlord, occupier and other occupiers in the building;
- b** obtain, wherever possible, from the landlord, copies of all relevant documents, leases, licences and so on;
- c** understand from those documents the payment obligations;
- d** maintain a database of the occupiers and other occupiers to record the financial position with each of them;
- e** put payment processes in place so that the occupiers are clear exactly how much, when and to whom rent, service charges, insurance, rents and other amounts are due;
- f** make sure the payment process is clear so that no occupier or occupier can argue that the amount due or the time of payment is not known;
- g** have a mechanism in place to notify of any default in payment or a dispute over any payment and promptly report this to the landlord in the manner agreed about such default;
- h** have a process in place to pursue occupiers for defaults in payments;

- i have arrangements in place to forward sums collected, less deductions, e.g. service charge, on to the landlord. The landlord will want these sums to be forwarded as quickly as possible; and
- j report to the landlord on the reconciliation of the amount actually paid to the landlord and the amount collected.

## 4.3 Client accounts

**4.3.1** A key advantage of a property manager who is professionally qualified is the ability to use client account arrangements, which the landlord can have confidence in as being subject to regulatory review. Where the property manager is a member of RICS they will be required to comply with the RICS Rules of Conduct. RICS Regulation has also issued a help sheet, *Clients' money: general advice for firms*, that sets out guidance in its requirements for the handling of client money.

## 4.4 Defaulting occupiers

**4.4.1** It is recommended that the property manager agrees with the landlord how defaulting occupiers should be dealt with; in particular, when the landlord wants to be alerted to a default. As a recommended minimum, property managers should inform the landlord as soon as the property manager feels it is sensible to instruct debt collection agencies, to take legal proceedings to recover monies owed or take steps to repossess the property under the lease terms.

**4.4.2** It is important for the property managers, if they do instruct a solicitor and/or a debt collection agency on behalf of the landlord, to ensure it is made clear to the debt collection agency/solicitor that the property manager is acting on behalf of the landlord and that all liabilities and costs arising from the instruction will be for the landlord's account.

## 4.5 Service charge

**4.5.1** Calculating the service charge apportionment and corresponding budget is a key duty of the property manager and needs to be handled with care. Occupiers will be anxious to ensure that the service charge budget is appropriate in its amount and allocation. Landlords will want to ensure their obligations under the occupational leases are fulfilled and the property is properly maintained. Service charges can be the cause of significant friction between occupiers and landlords, which mean the property manager will need to take particular care to communicate and be clear and transparent.

**4.5.2** The property manager should keep monies collected as part of the service charge in a separate service charge account with transparent records for all income and expenditure. The 2nd edition of RICS code of practice, *Service charges in commercial property* (2011) goes into more detail on this.

## 4.6 Deposits

**4.6.1** The property manager will need to review the occupational leases and associated rent deposit deeds to understand what deposits are held and on what terms. It is recommended that the property manager establishes a separate, interest-bearing account to hold occupiers' deposits and manages the funds and any accrued interest in accordance with the relevant legal documentation.

## 4.7 Managing the building

**4.7.1** The landlord will have responsibilities to ensure that the building is managed to its superior landlord (if any), to its occupiers, licencees and occupiers under the relevant lease or similar document, and responsibilities in law. It is the property manager's responsibility to ensure that the landlord understands their responsibilities, and that these are appropriately delegated to the property manager.

**4.7.2** The property manager should ensure the effective operation of the property. This means ensuring the property is efficiently managed; anticipating and monitoring potential problems; maintaining regular contact with occupiers; and seeking to comply with the service charge budget.

**4.7.3** In addition, it is essential that the property manager has copies of all of the leases and related documents relating to the relationship of the superior landlord (if any), and with each and every occupier, licencee and other occupier. It is essential that the property manager reviews and understands these documents and identifies any missing documents. If the property manager identifies any gaps or missing documents these should be promptly notified to the landlord. Please note the landlords obligations under 6.1.

**4.7.4** The property manager should consider maintaining an electronic database of all the key documents, dates, etc.

**4.7.5** Handover from the previous property manager (and handing over to the next property manager) is an important process. The RICS information paper, *Commercial property service charge handover procedure* (2011) provides useful information.

**4.7.6** It is important that the property manager has a good understanding of the landlord's legal responsibilities. Appendix 1 lists the key statutory responsibilities in England at the time of publication. It is the property manager's responsibility to keep abreast of developments and advise the landlord of significant changes.

**4.7.7** It is important that property managers not only ensure that they assist their landlord to fulfil all of their legal obligations, but also maintains records to demonstrate that the property manager has done so.

**4.7.8** It is recommended that property managers have clear policies setting out how they are dealing with the review of documents related to the building, compliance with all laws and so on.

## 4.8 Management policies

**4.8.1** It is recommended that policy documents are kept by the property manager detailing the following:

- a** calculation and management of the service charge account;
- b** collection of rent, service charge and other monies;
- c** repair and maintenance of the building;
- d** operation of the building;
- e** appointing and managing contractors;
- f** health and safety compliance;
- g** insurance;
- h** liaising with occupiers – generally, and also specifically in relation to consents such as consent to assign, consent to alter and so on; and
- i** management of procurement.

## 4.9 Insurance relating to the property

**4.9.1** The landlord is normally required under its occupational leases to obtain insurance against damage to the property, including loss of rent, and public liability insurance, and the lease will usually allow the landlord to charge the occupiers for the insurance premium.

**4.9.2** The advising on, brokering or arranging of insurance policies is subject to various financial services regulatory requirements. This is a complex area. For example, introducing the landlord to an insurer or handling claims may or may not be subject to regulation, depending on the circumstances. If a property manager has agreed to do more than simply collect insurance premiums for occupiers in relation to an existing policy then the property manager should check whether he/she is therefore subject to financial services regulations and if so, what level of compliance is required and how this will be achieved. Please refer to RICS guidance note, *Insurance for commercial property managers*, 1st edition (2011).

**4.9.3** It is important for the property manager to understand the insurance arrangements and the property manager's role in these insurance arrangements as:

- a failure to have appropriate insurance in place could create a huge potential claim if there was a catastrophic loss. Making sure insurance is in place is a simple step to manage a huge risk
- the property manager needs to understand what is to be charged to and collected from occupiers to pay for the insurance
- the property manager needs to be able to identify when it may be appropriate to make an insurance claim.

**4.9.4** It is sensible for the property manager to hold appropriate public liability insurance. If a person is injured whilst in the managed property then they will consider making a claim against all of the people involved – the landlord, the relevant occupier, the relevant service

provider (e.g. cleaning contractor or security contractor) and the property manager. This risk is especially high for buildings open to the public with high footfalls such as shopping centres. Traditionally the landlord and property manager hold separate public liability insurance, recognising that their interests are different. It is recommended that property managers ensure that they factor in to their charges the costs of securing public liability insurance (especially where a high footfall public building is being managed). If a property manager wishes to hold no/minimal public liability insurance and rely on the landlord's insurance, then it is important that this is expressly agreed in detail with the landlord to ensure the property manager is not exposed. This is a complex area but it is covered in the guidance note referred to in 4.9.6.

**4.9.5** The property manager will also need to consider which insurances they are required to hold by law such as employers' liability insurance and motor insurance (if relevant), and those that are sensible to hold

**4.9.6** The RICS guidance note, *Insurance for commercial property managers*, 1st edition, (2010) explains in detail the insurance covers required by commercial property owners.

## 4.10 Occupier liaison

**4.10.1** Seeking to create a good relationship with occupiers is essential to good property management. Therefore the property manager should:

- ensure the occupiers know who the property manager is and how to contact them
- seek regular contact with each occupiers
- establish a regular occupiers forum
- provide emergency contact details for out of hours incidents, e.g. a helpdesk facility operated by a specialist third party or in house operation
- properly respond to occupier queries and
- comply with the communication and consultation provisions set out in RICS code of practice, *Service charges in commercial property* (2011).

**4.10.2** Part of the property manager's role is to manage applications by occupiers under the occupational leases, such as licences to assign, alter and underlet. The property manager should have a system in place to ensure these are dealt with properly and efficiently, reviewing them and making recommendations to the landlord. The property manager should bear in mind that although these applications may seem routine, to the occupiers they are often important and therefore need to be managed accordingly. The property manager needs also to ensure that it acts in accordance with statutory requirements under the *Landlord & Tenants Acts* (please refer to Appendix 1).

A particular consideration is the issue of time limits when responding to a tenant's application. In circumstances where a landlord is under an obligation (direct or implied) to act reasonably, the courts have determined that decisions must be made within strict timeframes. Failure to issue a decision within a reasonable timeframe could expose the property manager (as agent for the landlord) to a potential claim for damages should the tenant subsequently lose an opportunity to assign or sub let.



Therefore tenant applications must be reviewed and handled expeditiously if there are direct or implied obligations to act reasonably, and clients will need to be advised of the time constraints when matters are referred to them for decision by the property manager.

The property manager may recommend to their client that legal advice should be taken if the tenant is not supplying sufficient information required to make a decision or the landlord wishes to refuse consent.

## 4.11 Energy management

**4.11.1** Energy management is increasingly important with rising energy costs and growing responsibilities around CO<sub>2</sub> omissions and energy conservation. The property manager should be aware of any new regulations relating to environmental performance of buildings. The property manager also needs to ensure that energy procurement, energy conservation and regulatory competence is given a high profile.

At the outset of an instruction the property manager should determine whether or not their client is obliged to provide annual Carbon Reduction Commitment (CRC) returns and, if so, ensure there are clear responsibilities for the information required by the client, the timing of the information and the format of the information, e.g. electricity supply meter readings.

It should be noted that where a landlord is responsible for the electricity supply for a multi-let property, and there are sub meters recording consumption by the occupiers, the sub metered supplies will still be recorded against the owner's consumption profile.

In this event the property manager will also need to consider the need to implement a recharging of electricity consumption to the occupiers. The 2nd edition of RICS code of practice, *Service charges in commercial property* (2011) indicates that 'reasonable administrative charges' are appropriate for a property manager operating a mechanism of recharging utility costs.

## 4.12 Building management systems

**4.12.1** Many buildings now have a building management system – in effect, an IT system to operate the building. It is the property manager's responsibility to ensure the system is operating properly and is maintained regularly, not least because the system will be a key part of ensuring compliance with the regulatory obligations applying to the building.

## 4.13 Health & safety and fire safety

**4.13.1** A key role for the property manager is overseeing health & safety and fire safety in the property, ensuring it is managed to comply with all legal obligations. Keeping the building safe and ensuring compliance with relevant legislation will require the establishment of systems and procedures to ensure statutory inspections are in place and systems monitored. Appendix 1 sets out the key legal rights which property managers need to be mindful of.

## 4.14 Procurement of third party suppliers

**4.14.1** Many of the services required for the good operation of a building e.g. security, cleaning and plant maintenance will be provided by third parties. To source these services the property manager will normally enter into arrangements with third party suppliers as agent for the landlord. This means that the contracts (if properly created) are actually between the landlord and supplier. This has the effect that:

- the supplier is liable to the landlord for the performance of the services, which is important as the landlord is, in turn, responsible to its occupiers
- if the property manager changes, the third party contracts will not be affected
- ultimately the landlord is responsible for paying the suppliers so if, for example, the landlord becomes insolvent owing money to the suppliers, the property manager is not liable to the supplier.

**4.14.2** It is recommended that the property manager has an appropriate procedure for selecting third party supplies to ensure that they are capable, reputable and good value for money. That procedure should identify when (e.g. annual contract value trigger) a more formal competitive tender should be used. Where the services procured are substantial, consideration should be given to using a procurement specialist.

**4.14.3** The property manager should:

- ensure they have a comprehensive, signed contract in place with all third party service providers
- ensure the contracts clearly state that the property manager is entering the contract as agent for the landlord
- ensure the contracted scope of services is clear
- ensure that the contracts with the service provider comply with any requirements the landlords has included in its property management contract (e.g. length of contract)
- ideally, ensure that all contracts with service providers can be terminated on one months notice on sale of the property (see RICS information paper *Commercial property service charge handover procedures* (2011))
- consider including in the services contract a performance management regime or service levels
- consider maintaining an electronic database of suppliers and contracts.

## 4.15 Management fees

**4.15.1** It is important that details of the property manager's fee, such as the amount, when and how it is payable and the invoicing and reporting processes are made clear to the landlord. RICS guidance in relation to management fees is set out in the RICS code of practice, *Service charges in commercial property* (2011) which requires that:

'...fees are set on a fixed price basis rather than being calculated as a percentage of expenditure. Percentage is no longer appropriate and is considered to be a disincentive to the delivery of value for money. The management fee should be a fixed fee subject to annual review or indexation.

It is recognised that many leases refer to the management fee as a percentage of the total service charge or contain a percentage cap. This guide cannot override the terms agreed between the parties and recorded in the lease.'

**4.15.2** For the complete text of this clause please refer to section 1.3 of the RICS code of practice: *service charges in commercial property* (2011). It is worth noting here that the Code expressly states that the cost of collecting rent should be excluded from the service charge management fee.

**4.15.3** It is also worth considering the following when setting and administering the fee:

- Whichever means of fee calculation is applied it is essential that how it is calculated is clear.
- Consideration may be given to the impact of voids in a property upon any formula for calculating the fee.
- Where the term of the property management is a significant period, usually more than a year, then consideration needs to be given to how the fee will be adjusted or reviewed.
- It should be made clear whether the fee is payable in advance or in arrears, monthly or quarterly.
- Consideration should be given to the reporting a landlord requires and invoicing processes.
- The mechanics for payment will need to be established. The property manager will want to have express authority to deduct (to the extent appropriate) payment from the service charge account, and require the landlord to fund the account if the service charge is not adequate (e.g. vacant building, high level of voids).

**4.15.4** The property manager will not be able to manage a property if the service charge account is insufficiently funded. If the building is fully occupied and occupiers are paying their service charges then the service charge account should normally be sufficiently funded. However, property managers should ensure a landlord continues to fund the service charge account for any shortfall – such as in relation to voids.

# 5 Additional responsibilities of the property manager

**5.1** As well as the core duties, property managers often become involved in other property issues. For example:

- Acquisition and sale support and advice
- Rent reviews
- Rating reviews
- Letting agency
- Dilapidations advice.

**5.2** Property managers should ensure that any additional services (and their related fees) are properly documented. Property managers should be aware of the industry code for leasing business premises – available from [www.leasingbusinesspremises.co.uk](http://www.leasingbusinesspremises.co.uk).

## 6 Landlords' responsibilities to the property manager

**6.1** A key responsibility of the landlord to the property manager is to provide information regarding the property and the relationships with occupiers. A property manager cannot effectively, efficiently and successfully manage a property without that information. The property manager should make the landlord aware that if the landlord cannot provide all necessary information then the property manager's service will be impaired and that additional costs may be incurred. Where there is a change in property manager the outgoing property manager will provide the information to the incoming property manager. The incoming property manager needs to check the information received. RICS' information paper, *Commercial property service charge handover procedures* (2011) goes into more detail on handover from one managing agent to another.

# 7 Employees and employment law

- 7.1** The property manager will usually employ one or more people whose duties will include managing certain aspects of the property. If a property is large or especially complex (e.g. a shopping centre or multi-let office) then it is likely there will be a number of employees who will focus on the management of the property or, where applicable, a particular landlord's portfolio of properties. In addition, the various suppliers of services to the property (e.g. security, cleaning and so on) will also employ individuals who will spend a significant amount of their time working in or in relation to that property.
- 7.2** This means that the employees of the property manager and the service suppliers to the property are likely to have the benefit of the *Transfer of Undertakings (Protection of Employment) Regulations 2006* (TUPE). TUPE has the effect, in certain situations, of moving employees automatically from old supplier to new supplier. Mishandled it can present a significant liability to property managers. It is often not properly understood by landlords. Therefore it is essential for property managers to understand TUPE to ensure they understand and avoid the risks and are able to explain them to landlords. Appendix 2 includes the RICS information paper *TUPE – Information for Property Managers* (2009) setting out the issues in more detail.

## 8 Specialist Issues

### 8.1 Managing a portfolio

Where a landlord has a portfolio of properties and a property manager is appointed to manage all, or part, of them, it is possible to do that with a single contract. When drawing up this contract it is worth considering the following:

- how properties are added and removed (and consequential impact on fees)
- TUPE – it is more likely the property manager will have dedicated staff (not just on site but also back office) and therefore TUPE is an increased risk
- whether or not the types of service are the same across all properties.

### 8.2 Mixed use developments

**8.2.1** Mixed use developments are those with a mix of commercial and residential occupiers. There are considerable differences between the nature of managing a commercial occupier and a residential occupier. The nature of managing residential occupiers will vary further depending on whether occupiers' leases are assured shorthold tenancies or long leases.

**8.2.2** There is, in addition, significant legal protection for residential occupiers (see for example the Landlord and Tenant Acts 1985 and 1987, the Commonhold and Leasehold Reform Act 2002 and the Leasehold Reform, Housing and Urban Development Act 1993). This means, for example,

- residential leaseholders who pay service charge can challenge any item of the service charge before the Leasehold Valuation Tribunal and
- long-term contracts (i.e. more than 12 months) with service providers must be the subject of consultation with residential leaseholders.

**8.2.3** The property manager must be clear on the statutory requirements for administering service charges in residential properties (or where residential use forms part of a larger mixed use property and contributes to a building or estate service charge). The requirements must be adhered to completely unless qualifying exceptions apply. See the RICS information paper, *Managing mixed use developments* (2009) for more information.

### 8.3 Offshore ownership

**8.3.1** It is not unusual for properties to be owned offshore, e.g. by a Jersey registered company, to mitigate tax exposure. This raises three potential issues, which the property manager needs to be aware of and give due consideration to:

- Due diligence/Client ID. The property manager will need to identify the client and the beneficial owners of the properties being managed and fulfil money laundering requirements. This will be more difficult with an offshore company, but equally that is why

this cannot be ignored. For further guidance, please see the Money laundering guidance, November 2010, co-authored by the National Federation of Property Professionals, Royal Institution of Chartered Surveyors, Association of Relocation Professionals, and the Association of Residential Managing Agents.

- Non-resident landlord scheme. This is a tax scheme operated by HMRC requiring UK 'letting agents' to deduct tax from rent they collect for non-resident landlords, unless the agent receives notification from HMRC that it can transfer rents to the non-resident landlord without deduction of tax. The agent will need to register with HMRC and account to HMRC quarterly in respect of any tax due to HMRC. The agent is also required to complete annual returns to HMRC in respect of income received for all non-resident landlords.
- It is often a requirement that the property manager pays over VAT to HMRC as advised by the client's adviser. In these situations the property manager will need a standing approval from their client to take instructions from their client's adviser in respect of amounts to be remitted to HMRC.

## 8.4 Duty of care deeds

**8.4.1** A duty of care deed is a document between a property manager and the landlord's funder. The purpose is to create a direct legal relationship between property manager and funder, particularly as to payment of rent, but also more generally. They create additional risk for the property manager. RICS' information paper, *Duty of care deeds and commercial property* (2009), explains duty of care deeds in more detail and how property managers should deal with them.

## 8.5 Insolvent landlords and LPA receivers

**8.5.1** If a landlord becomes insolvent then an administrator, liquidator or Law of Property Act receiver is likely to be appointed. Each of these have different powers and approaches:

- An administrator will be looking to operate the landlord's business as a going concern with a view to selling the business and maximising the return to creditors. Therefore to an administrator the property manager is important to collect rent and manage the building pending the sale of the business.
- A liquidator will be looking to liquidate the landlord's business – i.e. break up and sell the individual assets. Usually an administrator is appointed first and the administrator often concludes the best approach for the creditors is to liquidate and then the administrator will become a liquidator. Again to a liquidator the property manager is useful to continue to manage a building pending its disposal.
- A *Law of Property Act* receiver (LPA receiver) is appointed by someone who has a fixed charge or mortgage over the property where the owner has failed to make payments. The LPA receiver is appointed as an agent to the borrower, but the courts recognise that the LPA receiver will take heed of the lender's interests. The exact scope of the LPA receiver's powers will depend on the detail of the mortgage/charge agreement. An LPA receiver is likely to wish to sell the property if that is the best approach for the lender, but where the better approach is to delay selling then the LPA receiver may be prepared to operate the building. The property manager will therefore be useful to the LPA receiver in these circumstances.



### 8.5.2 The property manager should:

- monitor the financial health of the client so that he/she can be aware of a potential insolvency
- ensure the contract with the landlord allows the property manager to terminate on the landlord's insolvency, which means that if the landlord becomes insolvent the property manager at least has a choice and
- contact the administrator/liquidator/LPA receiver immediately if a landlord becomes insolvent to request a copy of their appointment; identify if the property manager's services are required; and obtain confirmation that the property manager will be paid, preferably in advance rather than in arrears. Given the onerous legal duties that arise from owning a property then the property manager's services are likely to be needed at least in the short term, but the property manager will require commitment on fees before proceeding.

# Appendix 1 Main English legislation relevant to the management of a commercial property

This schedule sets out the principle relevant English legislation that applies to the operation of commercial property.

The information is not exhaustive. In particular, it focuses on legislation specific to property management or arising from a property. It does not include the variety of laws that any company will need to comply with.

A short summary is included for each item. This is only intended to be a very brief summary for reference and is not legal advice. Specific legal advice should be sought to understand the impact of legislation.

This is only a list of English legislation. Outside of England other legislation may apply.

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
HEALTH AND SAFETY			
	Corporate Manslaughter and Corporate Homicide Act 2007	This act creates a new offence in England & Wales or Northern Ireland, which enables a corporation to be guilty of manslaughter and homicide.	<p>An organisation is guilty of this offence if it causes a person's death due to a gross breach of the organisation's relevant duty of care to the deceased.</p> <p>An organisation is only guilty of an offence if the death was caused by the way in which its activities are managed or organised by senior management.</p>
	Occupiers Liability Act 1957	This act imposes a duty of care on persons occupying or <u>in control of any premises</u> in relation to visitors.	<p>The occupier has a duty to ensure that any visitor is reasonably safe whilst on the property.</p> <p>The occupier's duty of care is relative to the visitor (e.g. the occupier must be prepared for children to be less careful than adults).</p> <p>The occupier will not be released from liability by merely putting up a warning sign, unless the warning sign was sufficiently clear to enable the visitor to be reasonably safe.</p> <p>If injury has been caused to a visitor due to faulty work carried out by a third party (e.g. subcontractor), the occupier will only be released from any liability if he/she has taken reasonable steps to satisfy him/herself that the contractor was competent and that the work had been done properly.</p>

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	Occupiers Liability Act 1984	This act confers a duty on the occupier of a premises to any persons other than visitors.	<p>The occupier owes a duty to any person who is not his visitor in the same way as he owes a duty to his visitor if:</p> <ul style="list-style-type: none"> <li><b>a</b> he is aware of any danger or hazard on the premises or has reasonable grounds to believe that one exists;</li> <li><b>b</b> he is aware or has reasonable grounds to believe that any person is or may be at risk from any danger (this applies whether or not the person is lawfully or unlawfully on the premises); and</li> <li><b>c</b> the occupier should be expected to offer reasonable protection against that danger (i.e. fencing off a dangerous area or putting up warning signs).</li> </ul> <p>Placing a sign that simply says 'Danger' will not be sufficient. The sign should state the nature of the danger and some sort of preventative measure should be put in place deterring the visitor from entering the premises or preventing the visitor from being harmed.</p>

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	Health & Safety at Work etc. Act 1974	This act confers a duty on employers to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees.	<p>The employer must provide information, instruction, training and supervision to all employees to ensure their safety at work.</p> <p>He/she must also ensure that the premises are maintained in a condition that is safe and without risks to any health of his employees.</p> <p>The employer must provide and maintain adequate facilities for the needs of his/her employees.</p> <p>This information must be recorded, and all health and safety measures (i.e. fire alarms) must be tested.</p> <p>The same duties apply to people not directly employed by the employer, but doing work on his/her behalf.</p>

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	Management of Health and Safety at Work Regulations 1999 (SI 1999/3242)	These regulations confer further obligations on the employer to provide for employees' adequate health and safety. This includes making assessment checks on risks to employees' health. This duty extends, for example, to carry out portable appliance testing (PAT testing).	<p>The employer must make a suitable and sufficient assessment of all the risks to the health and safety of his/her employees (and non-employees carrying out work on the employer's instruction).</p> <p>If the employer employs more than five employees, the findings of any risk assessment (and how the findings might affect any groups of his/her employees identified as being especially at risk (i.e. any disabled employees)) must be recorded.</p> <p>The employer must appoint one or more competent person to assist with complying with statutory provisions for health and safety (i.e. a health and safety officer).</p> <p>The employer will provide all employees with comprehensible and relevant information on risks to their health and any preventative measures (i.e. the health and safety risk assessment/policy).</p>
	The Provision and Use of Work Equipment Regulations 1998 (PUWER)	These regulations apply to work equipment used by employees at work, and ensure that employers are responsible for the equipment used by employees at work.	<p>Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair. (Regulation 5 (1) Maintenance (PUWER, 1998))</p> <p>The regulations only apply to work equipment used by workers at work. This includes all work equipment (fixed, transportable or portable) connected to a source of electrical energy. PUWER does not apply to fixed installations in a building. The electrical safety of these installations is dealt with by the Electricity at Work Regulations.</p>

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	Control of Substances Hazardous to Health Regulations 2002 (as amended)	These regulations place a general duty on an employer, prohibiting the use of certain substances and to carry out risk assessments or preventative measures to ensure that employees are not exposed to hazardous substances.	<p>Employers must not carry out work that may expose employees to hazardous substances unless a suitable and sufficient risk assessment has been made. Employers must also take steps to minimise the exposure of its employees to such risk.</p> <p>Risk assessments must be reviewed regularly. If any risk assessment shows that employees are at risk, the employer must prevent the risk of exposure or, if not possible, control the risk to the fullest extent possible.</p> <p>Every employer must also ensure that personal protective equipment, including protective clothing, is properly stored, checked at suitable intervals, and if discovered to be defective, repaired or replaced before further use. It is the employer's responsibility to check that this equipment is either made safe or correctly destroyed.</p> <p>Where the risk assessment indicates that employees are at risk, the employer has a duty to adequately monitor its employees through a suitable monitoring procedure. Records must be kept of the monitoring procedure.</p>

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	Water Supply (Water Fittings) Regulations 1999	<p>These regulations seek to regulate anyone who installs, alters, connects or disconnects etc. water fittings.</p> <p>The purpose of these regulations is to prevent waste, misuse or contamination of water, for example, to prevent legionella (Legionnaire's disease).</p>	<p>Water fittings must not be installed, connected, arranged or used in such a manner that they cause waste, misuse, undue consumption or contamination of water.</p> <p>Every water fitting must be of an appropriate quality and standard. (The specific requirements are set out in Schedule 2 of these regulations).</p> <p>Where a water fitting is installed, altered, connected or disconnected by an approved contractor, the contractor must provide a signed certificate stating that the water fitting complies with the requirements of these Regulations to the person who commissioned the work.</p>
	Electricity at Work Regulations 1989 (EAWR) (SI 1989/635)	<p>These regulations impose a duty on every employer and employee, and self-employed person to ensure safety in the workplace in relation to electricity.</p> <p>These regulations also impose a duty on employers to carry out PAT testing on all electrical systems and equipment.</p>	<p>The employer must ensure that all systems are maintained so as to prevent danger, and that any equipment provided to protect persons working on or near electrical equipment shall be suitable and properly maintained.</p>



Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	The Defective Premises Act 1972	This act imposes a duty on the landlord to prevent injury to persons on the premises by ensuring the premises are properly maintained.	<p>If the tenancy places an obligation on the landlord to maintain and repair the premises the landlord owes a general duty of care to anybody who might be at risk from personal injury or damage to their property caused by any defect in the general state or repair of the premises.</p> <p>The landlord owes this duty if he/she knows of any defect that needs to be repaired/remedied, or if he/she ought to have known of such defect.</p>
	Control of Asbestos Regulations 2006 (SI 2006/2739)	These regulations place an obligation on the dutyholder to assess whether or not any asbestos is present on the premises.	<p>These regulations will generally not apply where exposure of employees to asbestos is generally low.</p> <p>The dutyholder (every person who has, by virtue of a contract or tenancy, an obligation to maintain or repair a premises) must carry out a suitable and sufficient assessment to ascertain whether or not asbestos is on the premises.</p> <p>The assessment must be recorded and reviewed if the dutyholder has any reason to suspect that the assessment is no longer valid.</p> <p>If the dutyholder is employing persons to carry out work at the premises, a suitable and sufficient assessment of the risk to the health of any employee must be made. This assessment should also be recorded and reviewed as above.</p>

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	Regulatory Reform (Fire Safety) Order 2005 (SI 2005/1549)	These regulations impose a responsibility on employers to create a safe working environment to its employees in relation to fire safety.	<p>The responsible person (employer or person in control of a premises) must take such general fire precautions to ensure the safety of his/her employees and other occupants of the premises.</p> <p>The responsible person must make a suitable and sufficient assessment of any risks to his/her employees/occupants who might be exposed to any potential fire risks.</p> <p>The responsible person must record the risk assessment if he/she employs five or more people, there is a licence in force in relation to the premises, or there is an alteration notice requiring the assessment to be carried out.</p> <p>The relevant person must ensure that the premises are equipped with fire fighting equipment and fire detectors and alarms, that there are adequate fire escapes and he/she must nominate a competent person to implement safety measures.</p>
	Pressure Systems and Safety Regulations 2000 (PSSR) (SI 2000/128)	These regulations impose a duty of care on any person who designs, manufactures, imports or supplies any pressure system or any article which is intended to be a component part of any pressure system.	<p>The user shall not operate the pressure system or allow it to be operated unless he/she has established the safe operating limits of that system.</p> <p>The user is also responsible for ensuring that the pressure system is properly examined and maintained. All maintenance checks should be recorded, and the user must keep a record of the last report made, or any other report still relevant to the condition of the pressure system.</p>

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	Gas Safety (Installation and Use) Regulations 1998 (SI 1998/2451)	These regulations impose a duty on an employer or self-employed person to take reasonable steps to ensure that the person undertaking work relevant to gas safety is approved under the Health and Safety Executive (HSE).	<p>The responsible person for any premises must not use a gas appliance, or permit a gas appliance to be used, if at any time he/she knows or has reason to suspect that it might be dangerous.</p> <p>If an employer requires any work in relation to a gas fitting to be carried out, he/she must ensure that the person undertaking that work is, or is employed by, a member of a class of persons approved by the HSE.</p> <p>The employer must ensure that any gas appliance, installation pipe work or flue installed at the premises is maintained in a safe condition.</p> <p>A landlord must -</p> <ul style="list-style-type: none"> <li>a. ensure that each appliance and flue is checked for safety within 12 months of installation, and then regularly checked at 12 month intervals;</li> <li>b. ensure that a record in respect of any appliance or flue so checked is made and retained for a period of two years from the date of that check.</li> </ul>

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	Construction (Design and Management) Regulations 2007 (CDM)	These regulations impose a duty on construction managers to manage and coordinate projects in a competent manner.	<p>The client must not -</p> <ul style="list-style-type: none"> <li>a. appoint or engage a CDM co-ordinator, designer, principal contractor or contractor unless he/she has taken reasonable steps to ensure that the person to be appointed or engaged is competent;</li> <li>b. accept such an appointment or engagement unless he/she is competent;</li> <li>c. arrange for or instruct a worker to carry out or manage design or construction work unless the worker is competent, under the supervision of a competent person.</li> </ul> <p>Every client shall ensure that the arrangements made for by persons managing the project (including him/herself) are suitable to ensure that the construction work can be carried out without risk to the health and safety of any person.</p> <p>Every place of work shall be made and kept safe for any person at work there.</p> <p>NB. 'client' means a person who in the course or furtherance of a business—</p> <ul style="list-style-type: none"> <li>a. seeks or accepts the services of another which may be used in the carrying out of a project for him/her; or</li> <li>b. carries out a project him/herself;</li> </ul>

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	The Lifting Operations and Lifting Equipment Regulations 1998	These regulations ensure that all lifting equipment and activities are operated and carried out safely within the workplace.	<p>Every employer must ensure that lifting equipment is of adequate strength. Every employer must also ensure that lifting equipment must be designed to prevent a person using it being crushed, trapped or struck, or generally exposed to danger.</p> <p>Machinery and accessories for lifting loads should be clearly marked to indicate their safe working loads.</p> <p>All lifting operations involving lifting equipment must be properly planned, appropriately supervised and carried out in a safe manner.</p>
<b>LANDLORD AND TENANT</b>			
	The Landlord and Tenant Act 1988	This act imposes statutory duties on landlords in connection with covenants to assign, underlet, charge or part with the possession of the premises without consent.	<p>This act applies where a tenancy includes a covenant that a occupier cannot assign, underlet etc. the premises without the consent of the landlord (such consent not to be unreasonably withheld).</p> <p>If a occupier serves a written application on the landlord to assign, underlet etc. the landlord must within a reasonable time either:</p> <ul style="list-style-type: none"> <li>- give consent; or</li> <li>- if it is reasonable not to give consent, serve on the occupier written notice of his decision either completely withholding his consent, or giving his consent subject to certain conditions.</li> </ul>

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	The Landlord and Tenant Act 1954	This act provides security of tenure for occupying occupiers under certain leases, including leases for occupying property for business, professional or certain other purposes.	<p><b>Termination of tenancy by the landlord</b></p> <p>The landlord may terminate a tenancy if he/she gives notice to the occupier, providing the notice is given not more than 12 months and not less than 6 months before the date of termination of the tenancy.</p> <p>The Landlord must state one or more of the statutory grounds for opposing the tenancy in the notice.</p> <p><b>Occupier's request for a new tenancy</b></p> <p>A occupier can request a new tenancy where the current tenancy is for a term greater than one year. (This includes a rolling contract tenancy that has lasted for over a year).</p> <p>A occupier is not able to make this request if the landlord has already given notice to terminate the current tenancy.</p> <p>If the landlord has failed to give notice, then he may oppose the application for a new tenancy within two months of the occupier making the request, stating his grounds for opposition.</p>

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	Landlord and Tenant (Covenants) Act 1995	This act imposes new rules on tenancies dated on or after 1 January 1996, concerning the relationship between landlords and occupiers.	<p>When any occupier assigns a tenancy, the 'new' occupier becomes bound by any occupier covenants (subject to exceptions), and becomes entitled to the benefit of the landlord covenants (subject to exceptions).</p> <p>Where the landlord assigns a tenancy, the 'new' landlord becomes bound by the landlord covenants (subject to exceptions), and becomes entitled to the benefit of the occupier covenants (subject to exceptions).</p> <p>The 'original' landlord and/or occupier will then be released from their obligations under the tenancy.</p> <p>If any covenant of the tenancy confers any rights in favour or against a management company, then it shall be treated as if it was a occupier covenant exercisable by the landlord; and/or a landlord covenant exercisable by the occupier.</p>
	The Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (SI 2003/3096)	These regulations reform legislation in relation to business tenancies, such as the Landlord and Tenant's Act 1954.	<p>The landlord is entitled to request the following information from the occupier:</p> <ul style="list-style-type: none"> <li>a. whether the occupier occupies the premises for business; and</li> <li>b. whether there are any sub-tenancies affecting the tenancy.</li> </ul>

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544)  and (amended by)  Financial Services and Markets Act 2000 (Regulated Activities) Order (No 2) 2003 (SI 2003/1476)	These regulations aim to protect the general public when purchasing insurance by ensuring that all persons who undertake insurance mediation are registered and meet strict professional requirements.	If any person is involved in advising, arranging, administering or performing insurance contracts on behalf of the landlord (or any other third party), they are conducting insurance mediation activities, which are regulated activities under these regulations.  No one can carry out a regulated activity unless authorised by the Financial Services Authority.



Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	The CRC Energy Efficiency Scheme - (CRC Energy Efficiency Order 2010 – SI 2010/768)	The CRC Energy Efficiency Scheme is a UK mandatory cap and trade scheme designed to cut CO <sub>2</sub> emissions and increase energy efficiency. It affects large commercial and public sector organisations including local authorities, central government departments, hotel chains, owners of large office and industrial premises, shopping centres etc.	<p>Any organisation that meets the qualification criteria must participate in this scheme. Participants must report emissions and purchase ‘allowances’ to cover those emissions. One ‘allowance’ must be paid per tonne of CO<sub>2</sub> emissions emitted.</p> <p>Both property managers and landlords should be aware that the scheme is aimed at emissions of <u>organisations</u>, and not individual properties. An organisation is viewed widely – a group of companies is considered to be one organisation.</p> <p>The person responsible for paying the ‘allowances’ will vary depending on the circumstances. Generally speaking, the person responsible will be the person who has a direct agreement with the energy supplier and who receives the benefit of the energy supplied. The bill payer will normally either be the landlord or occupier depending on notice of contract.</p> <p>It may be the case that a occupier only occupies part of a premises and that the landlord (supported by the property manager) is responsible for paying the bills for the common parts of any building. Careful consideration should be given to who is responsible for paying the ‘allowances’ and how these payments should be managed.</p>

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007	These regulations impose a duty on the landlord to present a prospective occupier (or prospective buyer) with an Energy Performance Certificate when renting (or selling) a property.	<p><b>Energy Performance Certificates</b></p> <p>The relevant person must make available free of charge a valid energy performance certificate to any prospective buyer or occupier at the earliest opportunity.</p> <p>The energy performance certificate must be accompanied by a recommendation report.</p> <p>A recommendation report is a report containing recommendations for the improvement of the energy performance of the building, and is issued by the energy assessor who issued the energy performance certificate.</p> <p><b>Inspections of air-conditioning systems</b></p> <p>It is the relevant person's duty to ensure that the air-conditioning system is inspected by an energy assessor at regular intervals at least every five years.</p> <p>The relevant person must keep the most recent inspection report made by an energy assessor.</p> <p>The 'relevant person' is either the seller, landlord or (for the purposes of air conditioning systems) person in control of the relevant part of the premises.</p>

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	Private Security Industry Act 2001	This act established the Security Industry Authority, which regulates, reviews and monitors the private security industry. Participants of this industry must have a licence to carry out certain specified security activities.	<p>The current designated sectors or activities that must be covered by a licence are as follows:</p> <ul style="list-style-type: none"> <li>• security guarding - under contract</li> <li>• door supervisors - under contract and in-house</li> <li>• vehicle immobilising - under contract and in-house</li> <li>• private investigation - under contract</li> <li>• security consultants - under contract</li> <li>• keyholders - under contract.</li> </ul> <p>The following categories of people will need licences:</p> <ul style="list-style-type: none"> <li>• security contractors, directors of security companies and partners in security firms</li> <li>• employees of security contractors, security companies and security firms</li> <li>• agency workers performing the designated duties</li> <li>• persons who manage or supervise security operatives supplied under contract by a security contractor (but not in-house supervisors of contractors)</li> <li>• agency-supplied managers or supervisors of security operatives supplied under contract</li> <li>• directors of security companies and partners in security firms who do not themselves carry out the designated activities</li> <li>• in-house door supervisors and vehicle immobilisers and their employers, managers and supervisors</li> <li>• others who immobilise vehicles on private land against a release fee.</li> </ul>

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (TUPE)	These regulations were put in place to protect employees during the transfer of any business, <u>including a service provision change</u> .	<p>These regulations apply to a service provision change. This includes a property manager providing services on behalf of the landlord.</p> <p>In summary these regulations might potentially apply on appointment of the property manager or termination of an appointment if there are any employees spending a significant amount of time dedicated to the account or property. If there is such a person then they might be transferred to or from the property manager.</p> <p>Unless an employee objects to being employed by the new employer, the contract of employment of that person will not be terminated.</p> <p>Any employment contract would transfer to the new employer, as though it was originally made between the employee and the new employer. Upon the transfer, all the rights of the old employer in relation to the employment contract will transfer to the new employer.</p> <p>The new employer will also be responsible for any act or omission that the old employer committed <u>before the transfer</u> (but it is common to reallocate liability in contract).</p> <p>Any contract of employment that is transferred cannot be varied unless the sole reason for the variation is:</p> <ul style="list-style-type: none"> <li>i. the transfer itself, or</li> <li>ii. a reason connected with the transfer that is not economic, technical or an organisational reason entailing changes in the workforce.</li> </ul>

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	Data Protection Act 1998	This act regulates the processing of information relating to individuals, including the obtaining, holding, use or disclosure of such information (data controllers).	<p>Personal data must not be processed by a data controller unless an entry is made on the register, which is maintained by the information commissioner.</p> <p>The commissioner is appointed to ensure that data controllers comply with the provisions of this act.</p> <p>Any data controller who wishes to be added to the register shall give a notification to the information commissioner. A notification must specify a general description of measures he/she will take to ensure compliance with data protection principles. The notification must be accompanied by a fee.</p> <p>Subject to certain exceptions, the data controller must, within 21 days of receiving a written request from any data subject, make the relevant particulars available to that person in writing free of charge.</p>

Number	Name of legislation	Brief summary of legislation	Key points/key sections/schedules
	Disability Discrimination Act 1995 and Disability Discrimination Act 2005	These acts impose a duty on persons occupying a premises not to discriminate against disabled persons.	It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises: <ul style="list-style-type: none"> <li>a. in the way he/she permits the disabled person to make use of any benefits or facilities;</li> <li>b. by refusing or deliberately omitting to permit the disabled person to make use of any benefits or facilities; or</li> <li>c. by evicting the disabled person, or subjecting him/her to any other detriment.</li> </ul> It is also unlawful for a person with power to dispose of any premises to discriminate against a disabled person:— <ul style="list-style-type: none"> <li>a. in the terms on which he/she offers to dispose of those premises to the disabled person;</li> <li>b. by refusing to dispose of those premises to the disabled person; or</li> <li>c. in his/her treatment of the disabled person in relation to any list of persons in need of premises of that description.</li> </ul>
	The Equality Act 2010	This Act requires employers (and others) to have regard generally to reducing socio-economic inequalities, discrimination and victimisation and to increase equality of opportunity.  The Act itself contains very detailed information and specific advice should be sought to ensure compliance with it.	The Act covers equality issues over many areas – not just the employment of workers, it covers the supply of services.

# Appendix 2 Property management contract

Property managers should ensure that they have a comprehensive written contract with their landlords. The written contract should set out clearly the scope of services of the property manager and the amount that the property manager gets paid.

All too often, property management arrangements are too informal, either with no written contract at all or a very brief written arrangement. Entering into an informal property management contract of this nature can present significant risks to both the client and the property manager:

- a** It will not be clear what the scope of the property manager's responsibilities are. Given that the property manager has a duty of care to the landlord, if a contract is unclear a court may find that a property manager did have responsibility for an aspect of managing the property the property manager had not contemplated. This could pose considerable risk and cost to the property manager.
- b** The property manager will often be handling significant sums of money and therefore it is important that there is a clear understanding between landlord and property manager how those payments are calculated and sums managed.
- c** In an informal contract it may not be clear how much a property manager will be paid. This means that a property manager risks being paid less than expected.
- d** The length of the contract will be unclear, which could mean the landlord, or the property manager, could terminate on short notice.

This means that simply referring to managing a property 'in accordance with the principles of good estate management' with no further detail is no longer an adequate approach.

A well drafted property management contract will usually include the following:

- a** the identity of the property or properties – this may seem like an obvious point but all too often the property is identified loosely, which will only lead to confusion and risk.
- b** commencement and duration – the contract should clearly set out when it starts its duration, whether the contract is fixed term or rolling, whether either party can terminate on notice at any time, and procedures in the event that the landlord sells his/her interest in the property.
- c** scope of services – the contract would typically include general obligations on the property manager to provide the services. There should be a detailed services schedule setting out exactly the scope of the property manager's responsibilities. In particular handover transition at the beginning and end of the property manager's appointment should be identified.

- d** obligations of the landlord – it is important that the property manager is provided with all information that the landlord has available relating to the property; therefore the contract will need to make this responsibility of the landlord clear.
- e** payment – the contract should make it clear how much the property manager will be paid and when and how this will be reconciled against the service charge; for example, what is the position if the building is empty or there are voids and what impact does that have on the property manager’s fee? If the contract is for a significant duration what are the mechanics to alter the fee? To what extent can the property manager deduct his/her fee from the service charge account?
- f** liability – there should be basic clauses protecting the property manager, limiting and controlling his/her liability. Ideally there should be a ‘force majeure’ clause, which makes it clear that the property manager has no liability if he/she is unable to supply the services due an event outside his/her reasonable control. See 8.4 for more detail on contract liability.
- g** TUPE – given the significant likelihood that an employee of the property manager spends a significant amount of their time on a particular account or a particular property, it is important to consciously consider the risk of TUPE. If there is any risk of TUPE applying, whether at the time of the contract or in the future, then TUPE clauses should be included. For more information see at Appendix 2 the RICS Information Paper TUPE: Information for property managers (2009).
- h** termination – the contract needs to make it clear that the contract can be terminable by either party if that party is in material breach and to also allow the party to terminate if the other party becomes insolvent. Detailed insolvency clauses are often required to ensure that the property manager is not in a position of managing a property on behalf of the landlord who has no money but who is not yet formally insolvent.
- i** other parties - to what extent:
  - i** can either party assign the contract?  
 Assignment means transferring the benefit of the contract to another person (it is not possible to transfer the ‘burden’ without the agreement of all three parties). If the contract is silent then usually the benefit will be freely assignable. The ideal position is that the landlord cannot assign but the property manager can assign. Usually a landlord will object to that and so it is normally agreed neither party can assign without the other party’s consent (possibly allowing the parties to freely assign within the group).
  - ii** can the property manager subcontract its responsibilities?  
 If the contract is silent on subcontracting then normally the property manager can freely subcontract. If the property manager does subcontract, the property manager remains responsible to the landlord for the performance of the subcontractor.
  - iii** should any third parties (for example members of the property manager’s group or the landlord’s group) benefit from the contract?  
 It is normal to expressly state no third parties have the benefit of the contract.



- j general clauses, for example:
  - i confidentiality; and
  - ii law and jurisdiction (usually English law and English courts).

It is an important part of a property manager's risk management to ensure that the property management contract addresses and manages their level of liability. This is important as normally the property manager's fee (and margin) is disproportionate to the value of the building being managed. In other words the potential risk is very different to the reward. The RICS information paper, Limiting liability in property management contracts (2009) goes into this in more detail but in summary:

- Make sure the contract is in writing and the scope of the services is clear.
- Include a 'force majeure' clause – the property manager will be liable for events outside of his control (e.g. a flood) unless a force majeure clause is included.
- Cap liability - it is normal for a property management contract to include a cap on liability. The amount will depend on the building, the fee and key risks.
- Exclude indirect losses. These are losses that are not, in broad terms, reasonably foreseeable and are unlikely to be insured.
- Avoid giving indemnities – they extend liabilities.

It is important that a property manager holds appropriate professional indemnity insurance. However, do not confuse holding insurance with capping liability – for example, a property manager agreeing with a landlord to hold £2 million of professional indemnity insurance does not cap the property manager's liability to £2 million, it merely means that the manager has agreed to have insurance covering the first £2 million of any losses.

## Delivering confidence

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