



Professional Series

Agency Agreement

Guidance & Drafting Notes

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1. Introduction

Background

The Letting Centre Agency Agreement Pack will assist you in preparing a comprehensive agency or management agreement. The pack has been compiled by the Letting Centre with the assistance of our in-house lawyers, and Linda Blair, a barrister specialising in housing law. The example agreement included has been extensively used over several years and revised to incorporate recent changes in law such as the provisions for tenancy deposit protection (TDP).

We are also grateful to the various letting firms, both large national chains and independent practitioners, who have contributed various ideas and improvements along the way.

Scope

This Agency Agreement Pack and the enclosed example agreement are primarily aimed at agents involved in property management.

A 'let-only' service can be handled using the enclosed example agreement (with suitable amendments). However, where this is a frequent occurrence, you should consider drafting a separate individual agreement for this purpose.

This pack is not intended as a comprehensive guide to contract or agency law and there are serious risks to relying on this pack unless you have detailed legal knowledge. This pack should be seen as an aid to this process and not as a replacement for professional advice. An agency agreement creates a legally binding contract and errors can be expensive - it is recommended that you have any legal agreement professionally checked before use, and then regularly reviewed and revised annually to keep it up-to-date with legislation or fee changes.

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The Agency Agreement is probably the most critical legal agreement in any professional letting agency business. The agreement should define the duties of the agent very precisely, and the level of fees and charges that the firm may make to its client in return for these services. It should also provide the agent with the formal authority to carry out the various additional tasks (e.g. maintenance).

A well-drafted agency agreement assists both parties; the scope of the service will be clear from the outset, and disputes relating to charges or respective responsibilities can be resolved in many cases by reference to the original agreement. Furthermore, the value of the firm's portfolio of properties can be significant and the agent must take measures not to carry liability for any mishap outside his or her normal control (e.g. damage by burst pipes).

The requirement for a formal and well-written agreement is recognised by authorities in the property management sector. Indeed, the key professional associations for property management (i.e. ARMA, ARLA, NAEA, UKALA) now make it compulsory for their members to have signed such an agreement with all clients.

The Letting Centre Agency Agreement Pack

The Letting Centre Agency Agreement Pack assists firms in preparing and updating a suitable written agreement to be supplied to clients or landlords. The agency agreement is also referred to as the 'Terms and Conditions' or 'Terms of Business' by some firms.

We recommend that you read the contents in the following order:

- 1. LAW OF AGENCY.** The law of agency is complex and these guidance notes include a chapter reprinted from the Letting Centre's Letting Handbook which gives a useful background to contract and agency law. The chapter also includes information on drafting an agency agreement, guidelines for drafting legal agreements and some useful case law examples.
- 2. EXAMPLE AGREEMENT.** Unlike most of the standard forms and agreements that we publish, this pack does not contain a ready-to-use legal agreement. **PLEASE DO NOT USE THIS AGREEMENT WITHOUT MODIFICATION OR FULLY READING THE SUPPLIED GUIDANCE.** You may wish to use the example agreement as the basis for your own agreement, making any suitable changes to suit your own fee structure or methods of business, having carefully read all the guidance contained in these notes. This document is copyright of The Letting Centre so we ask that you acknowledge this by retaining our copyright notice in any final version that closely or substantially resembles our example agreement.
- 3. DRAFTING AND GUIDANCE NOTES - CHECK LIST.** Go through the check list items and jot down any points that are relevant to your business before setting out your draft agreement. The checklist will invariably raise issues of pricing or general business policy that you may want to resolve at this stage.
- 4. UNFAIR CONTRACT TERMS REGULATIONS.** Agreements containing unfair terms are unenforceable on individual consumers (these regulations do not apply to company landlords). A summary of these regulations given overleaf and is also available on our Letting Factsheets (LFACTS10 & 10a). You should check that your agreement contains no terms that may be excluded by the tests of 'fairness and good faith' or 'transparency'.
- 5. FINAL CHECK.** Finally check that the agreement is clear and unambiguous. This is something that it is often best given to a third party reading the document afresh. Getting your agreement professionally checked is important and generally more economical than asking for the document to be drafted from scratch.

Unfair Terms Regulations

A new set of challenges descended upon consumer contracts or agreements with the introduction of the Unfair Terms in Consumer Contracts Regulations. These Regulations applied a test of fairness to most standard terms in a contract or agreement made between a business and a consumer (including the tenancy agreement provided by the landlord to his tenant) and requires agreements to be written in plain and intelligible language. The Consumer Rights Act 2015 (the Act) replaced these regulations on 1st October 2015.

CONSUMER AGREEMENTS: It should be noted that not all agreements or contracts made between letting agents and their client landlords are consumer agreements and therefore subject to the unfair terms regulations. Under the Consumer Rights Act 2015, a consumer is an individual not acting for the purposes of his or her business or profession. The Office of Fair Trading (OFT) now the Competition and Markets Authority (CMA) acknowledges that, although many small landlords may not be regarded as acting in the course of a business (e.g. the short-term letting of the landlord's own residence whilst he/she is working abroad), it is likely that most landlords who have purchased property for investment and letting purposes will be considered to be acting in the course of business.

The effect of this distinction is that, where a letting agent wishes to conclude an agreement with a client landlord with regard to the management of his property (i.e. the agency agreement) with this latter category of landlord (acting in the course of business), the unfair terms regulations will not apply and a more widely-drafted standard agreement may be used.

FAIRNESS AND GOOD FAITH: With the exception of the provisions of the contract which relate to the basic service provided and the price charged for it, which must be in plain English, all terms in a contract or notice should be 'fair'. A consumer notice or a term in a consumer contract is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer under the contract or notice. An unfair term in a contract concluded with a consumer by a trader shall be unenforceable although the contract as a whole shall continue to bind the parties if it is capable of continuing in existence without the term.

TRANSPARENT: A trader shall ensure that any written term of a contract is expressed in plain and intelligible language and is legible. If there is doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail.

PROMINENT: A term is prominent if it is brought to the consumer's attention in such a way that an average consumer would be aware of the notice or term

CARE AND SKILL: Every contract to supply a service is to be treated as including a term that the trader must perform the service with reasonable care and skill and within a reasonable time.

SMALL PRINT: There are limits as to how much information the average consumer (tenant) can take in at one time. It is therefore important to ensure that any additional clauses or key points are brought to their attention prior to signing the agreement.

The Letting Centre has reviewed its series of tenancy agreements with assistance from the Office of Fair Trading (OFT), now the Competition and Markets Authority (CMA). The agreements were further revised following consideration of guidance published by the OFT in Nov 2001 and September 2005 (which has not yet been replaced by the CMA), dealing specifically with how the Regulations apply to unfair terms in tenancy agreements.

ENFORCEMENT: Where an enforcement body (CMA, a local trading standards officer, or the Consumers' Association) considers that an agreement is unfair and in breach of the Regulations, they may apply to the court for a temporary injunction preventing that seller or supplier from using the standard agreement further.

For further information see Letting Factsheets Nos. 10 and 10a (published by the Letting Centre) and the guidance published by the CMA at: www.gov.uk

The Office of Fair Trading vs Foxtons case

In one of the most important cases of its type in relation to unfair contract terms, Estate Agency Foxtons has been banned from using certain terms in its agency agreement after the Office of Fair Trading (OFT) secured a high court order against the firm. The order follows a landmark judgment in Summer 2009, which found that clauses in the Foxtons agreement allowing the agency to charge commission, even if it did not have to find them a new tenant, were not transparent and breached the Unfair Terms in Consumer Contracts Regulations 1999.

The terms, which were not flagged up in sales literature, said Foxtons could ask landlords to pay substantial commission after the initial fixed period of tenancy had expired, even if it had no part in persuading the tenant to stay and no longer maintained the property. The contracts also stated that, even after a landlord had sold a property, they could still be liable to pay Foxtons – if the sale was to the tenant, the estate agent could demand commission even if it had not negotiated the deal. The agency, which chose not to appeal the decision, has already made significant changes to its standard contract. However, the order allows Foxtons to continue charging renewal commissions when it is providing an ongoing management service.

The OFT took in legal proceedings against the estate agents Foxtons Ltd in relation to three elements of their agency agreement which the OFT believed breached the requirements.

1. The charging of commission on renewal or extension of a tenancy even if the agents have no involvement in negotiating or dealing with the renewal;
2. The charging of commission where the landlord has sold the property with the tenant in occupation and the tenant renews or extends the tenancy with the new landlord;
3. The charging of a commission where the landlord sells the property to the tenant.

The OFT has contended that the clauses giving effect to these charges are unfair and are also not written in 'plain and intelligible language' contrary to the provisions of the Unfair Terms in Consumer Contract Regulations which have been replaced by the Consumer Rights Act.

Impact of the case

The Judge in this case made a declaration of unfairness in relation to some aspects of Foxtons' terms postponing making an order until a later date to allow Foxtons time to appeal his decision. They did not do so and he subsequently made an order to the effect that the following terms are unfair and may not be used or relied on in contracts with consumer landlords:-

Terms which require landlords to pay renewal commission to the agent after the sale of their property to a third party because the original tenant remained in occupation;

Terms which require landlords to pay a sales commission to the agents in the event that the agents sell the property to the tenant.

Agents should examine their agreements after this decision. Whilst the Foxtons case was decided on its individual facts, a term is likely to be considered unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of consumers. The regulations say that a consumer is not bound by a standard term in a contract with a trader if that term is unfair. Ultimately, however, only a court can decide whether a term is unfair. But it is important that an agent is aware of the contents of their agency agreements. Any term that gives rise to a charge, cost or other liability to the landlord should be clear and unambiguous and not hidden.

New Action

At the time of writing, (June 2016) there is a further action being brought against Foxtons on account of their agency agreement and claimed hidden commissions. It is claimed that many of Foxton's client landlords do not have knowledge or fully informed consent to the substantial profit commissions that Foxtons earn on maintenance works and tenant fees. And that Foxtons have been charging landlords hidden commission of as much as 33% of a contractor's fee for work carried out to their properties.

Data Protection

Agents and landlords should ensure that the tenant is clear at the start of the tenancy as to how and when their personal details may be passed on. The Information Commissioner's Office (ICO) oversees the implementation of the Data Protection Act 1998 (DPA 1998), and helps to police the various data protection regulations. New regulations are now in force under the Data Protection Act 2018. The new legislation will affect the way letting agents and landlords collect and use individuals' personal data. The ICO have provided a 'Guide to the General Data Protection Regulations' on their website www.ico.org.uk. A key change to data protection is explicit consent requiring a very clear and specific statement of consent from the individual and a positive opt-in, meaning a ban of using pre-ticked opt-in boxes. Consent will be harder to obtain and can be withdrawn at any time and more information must be included on a privacy notice.

Processing Data

The regulations apply to data controllers and data processors. A data controller is a person who decides how, why and when personal data will be processed such as a landlord or an agent dealing with contractors and referencing agencies. A data processor is a third party who is responsible for processing personal data for the data controller for example referencing agencies. An agent may be a data processor where they are acting on behalf of the landlord. The use of any personal data under the regulations must be justified using a lawful basis for processing data which are; that the person gave explicit consent, to fulfil or prepare a contract, that there is a legal obligation, to save someone's life or in a medical situation, to carry out a public function or there is some other legitimate interest. Any lawful basis for processing data which agents and landlords wish to rely on will need to be documented in a privacy notice.

It is important that contracts are in place between the data controller and processor setting out details of data processing. For example, clauses should be included in agency agreements/terms, contractor terms and conditions and referencing agents' terms ensuring that the parties agree to comply with their obligations under the data protection act. Letting agents who rely on explicit consent will need to ensure that the individual has agreed to the sharing of their data and an automatic opt-in tick box or consent has not been used. For example, agents may need to obtain consent in order to share tenants' details with third parties such as utility companies, maintenance contractors and debt collection companies etc.

Letting agents and landlords may be able to rely on the 'legitimate interest' or 'contract' lawful basis with regard to using personal data. In order to fulfil the 'legitimate interest' basis a legitimate interest must be identified, you must be able to show that the processing of data is necessary to achieve it and it must be balanced against the individual's interests and rights e.g. sharing data for referencing purposes. To fulfil the 'contract' basis you must have a contract with the individual and you need to process personal data in order to comply with your obligation under the contract or, if there is no contract yet, you have been asked to do something and you need to process their personal data to do what they have asked e.g. tenancy application form or preparing a tenancy agreement.

Companies must document all processing activity but those with less than 250 employees only need to document processing activities which are not occasional or could result in a risk to the rights and freedoms of individuals or involve processing of special categories of data. Information to be documented must include the company details, the purposes of processing, a description of categories of individuals, their data and recipients, details of transfers to third countries, retention schedules and a description of the company technical and security measures. The ICO provide an example documentation template that can be used on their website.

Information must be retained appropriately, kept secure and protected by using appropriate technical or organisational measures such as restricting access and encrypting data.

Privacy Notice

A proper privacy notice must be displayed on a company website and given to the individual at the time data is collected. Privacy notices are not new under the regulations; these have previously been required under the Data Protection Act 1998. However, more detailed information will now need to be provided. A privacy notice informs people who will be collecting their personal data, how their personal data will be used and who it will be shared with. The following information must be included:

- The name and contact details of the organisation and any representative or data protection officer, who is collecting the data and what data is being collected;
- whether it will be shared with any other organisation and their details including any third countries or international organisations;
- the purpose for processing the data, the lawful basis for processing the data, the legitimate interests for the processing and how it will be used;
- the recipients of personal data and the retention period of the data;
- the right to withdraw consent and the right to lodge a complaint; and
- details of whether individuals are under a statutory or contractual obligation to provide the personal data.

Where data has not been obtained directly from the individual they must also be informed of the source of where it was obtained from and whether it came from a public source. Further information is available from the ICO website www.ico.org.uk.

The Letting Centre tenancy agreements, example agency agreement and contractor agreement include a data protection clause and we also include data protection tick boxes on the following forms in our professional series management forms:

- Example Tenancy Application Form;
- TINFO – Tenant's Information;
- REQUIREDDOC – Required Document Checklist.

2. Drafting Notes and Checklist

These notes accompany the example agency agreement supplied in the pack and should be referred to when drafting the agency agreement.

General Principles

It is important that the agent and landlord enter into a formal contract before the agent undertakes the management work in order to define the authority of the agent, the scope of the responsibilities and the limitation to any liability carried. Although many firms set out such information in a brochure or similar document, these terms may not be held to represent a binding contract.

Under contract law, the agreement will set out the main terms and conditions. By signing the agreement, the client is accepting these terms thereby creating the contract between the parties. The contract also establishes an agency relationship giving the agent appropriate authority to act on behalf of the landlord (the principal) to manage the property and take various actions which bind the principal. Accordingly, it is important that the agent's authority is accurately defined in order that the agent can perform his/her duties without becoming personally liable. Conversely, agents (and their staff) need to clearly understand the limits of each part of the agreement in order that they do not act in excess of their authority (and again become personally liable).

Clearly, great care must be exercised in the drafting process so that nothing of consequence is left out - errors and omissions can be expensive. All parts of the agreement should be clear and unambiguous. In law, ambiguity is generally resolved against the party preparing the agreement and such parts of an agreement might be declared void. Equally, where the agreement is to be used with landlords who might be classified as 'consumers' (see section relating to 'Unfair Terms Regulations' on the previous page), the agreement (or any material changes made to the example agreement supplied) needs to be carefully checked that it conforms to these regulations.

The agreement should also be subject to regular review; firms will wish to examine and improve their fee structure and systems from time to time. Also the legislative framework is constantly changing and new regulations may need to be comprehended by both parties.

Those familiar with the law of estate agency will know that the Estate Agents Act 1979 defines many statutory obligations for estate agents. Certain information (details of remuneration, disclosure of personal interests etc.) must be given to the client by all firms and individuals carrying out estate agency work. In current law, an agent involved in letting and management of residential property is outside the main scope of the Estate Agents Act (and the corresponding criminal penalties) although all of the obligations of agency in common law (e.g. duty to disclose personal interests) will still apply.

Style

- His / her. In these notes, references to a specific gender are avoided wherever possible. The masculine gender is deemed to include the feminine as an established usage and is not intended to imply any preference or to cause offence. The same rules may be applied in the drafting of your agreement.
- Plurals. References to the singular are deemed to include the plural. There is therefore no need to make separate provision for this in your agreement.
- See other style comments in Handbook chapter: The Law of Agency
- Consistency. In drafting your agreement, it is important to be consistent in the use of names. Do not refer to the 'Owner' in one section and the 'Landlord' in another. It is good practice to use capitals for each reference to the main parties or concepts in the agreement (e.g. Landlord, Property etc.). Finally, remember to write all agreements in plain language and check that no ambiguity exists that could be misinterpreted by either party.

Codes of Practice

Agents are increasingly bound by industry codes of practice in their everyday business dealings. Agents who are members of any such association (e.g. ARLA, NAEA, NALS, RICS, UKALA etc.) should ensure that they are aware of any stipulations specified by such codes, and that the agency agreement is compliant with the respective requirements.

A similar principle applies to tenancy deposit protection (TDP). Agents should check with their scheme providers regarding any special requirements with respect to the agency agreement. These are discussed in more detail on pages 20-22 (TDP schemes).

Document Title

The title of your agreement document should reflect its function. The following are commonly used: Management Agreement or Terms of Business

Initial Clause

The initial section of the enclosed example agreement establishes the parties to the agreement, and the nature of the relationship between the parties. The date of the agreement and identity of the landlord is defined on the final page of the agreement.

Cancellation of Contracts

Consumer law implies further statutory rules into the agency agreement where the landlord is deemed to be a consumer (i.e. - an individual acting for purposes which are wholly or mainly outside that of the individual's main trade, business, craft or profession). So a landlord with only a single rental property is likely to be classed as a consumer and protected by such regulations.

Where the Landlord is a consumer and the Landlord cannot be present in person upon signing, the agreement will need to be drafted well in advance and sent by post. In such cases, the practitioner should be aware of the effect of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. These regulations replace the Distance Selling Regulations 2000 and the Cancellation of Contracts Made in a Consumer's Home or Place of Work Etc Regulations 2008 and are effective from 13th June 2014.

From a practical point of view, the Regulations require that, where agreements are concluded 'at a distance' or away from the agent's usual trading premises, the consumer is provided with a cooling-off period of fourteen working days (previously seven days) during which s/he can withdraw from the contract. However, many agents will be keen to proceed with advertising and letting a particular property, so best advice in such situations is to ask the client landlord to sign the agency agreement at the agency's office premises to avoid this possibility. If this is not possible, then the agent takes the risk that the landlord may opt to cancel during the 14 day cancellation period with the subsequent loss of any costs that may have been incurred.

The most recent rules are contained in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. The consumer may cancel the contract within a period of fourteen days starting with the day of receipt of the contract. A copy of the required notice

is now attached to the end of the example agency agreement. This can be removed where not relevant.

✓ ***Check List: Is the Agency Agreement being concluded 'at a distance' or at the consumer's home or workplace?***

If the agency agreement is concluded 'at a distance' or in the consumer's home/workplace, you should ensure that the 'Notice of Right to Cancel' is supplied with the agreement.

Note: It is only possible for consumers to agree to 'opt out' of these regulations if that right has been specifically excluded by agreement between the parties. The Letting Centre has drafted an example waiver clause (see clause 15.6) which explains the consumer's rights and gives the consumer the option to ask an agent to start work immediately thus partially waiving his rights under the legislation. He may still opt to cancel within the 14 day period, but where the consumer requests a service to be supplied during the cancellation period the consumer must pay for the supply of that service already carried out.

Summary of Service Provided

This section is used to define the main duties that the agent will offer as part of the management service. Traditionally the management fee is levied as a percentage of the rents and this system is adopted in the example agreement. This is an important section to include in order to limit the scope of the management work that the agent agrees to undertake. Used without qualification, the description of 'property management' could oblige the agent to perform all manner of duties within the agreed fee. Conversely, by limiting the scope of the duties along the lines of the summary, the agent is entitled to extra remuneration for time and costs expended outside the general scope of the standard service, provided the agent has acted within actual or implied authority.

✓ ***Check List: Are management fees to be charged on rent COLLECTED or rent DUE?***

Note: There is a good case for insisting that your fees are earned on rents 'due' rather than 'collected'. Where the tenant does default, agents will expend considerable extra management time and so there is little justification for performing this work free of charge.

✓ ***Check List: When are the management fees payable?***

Agents typically collect management fees monthly out of rents received and this system is followed in the example agreement (see item 7 on the first page). Where firms wish to collect the fees at the beginning of the tenancy, this will need to be clearly stated in the agreement.

Standard Management Service Clause

This example agreement defines a 'Standard Management Service' (and a corresponding fee for providing this service). This clause in the example agreement lists each item that is to be provided within the standard management service. Any significant items of additional or optional expenditure can be specified separately (e.g. overseas calls) in a schedule entitled 'Scale of Fees'.

It is important to check each item in the summary in order to check that it matches the service provided by your firm.

1. Advising on Rental Income. This is commonly provided by most agents.

2. Advertising and Marketing. Some agents may wish to make an extra charge to cover advertising costs. This might be particularly suitable for large or unusual properties where for example national advertising is appropriate. In this case, delete this clause from the standard service or expressly agree any additional advertising costs with the client prior to taking on the property.

3. Interviewing and References. Firms have different procedures for credit checking and you should amend this clause to suit. Where a third party referencing company is used you should declare any commission fees to the landlord. Agents should also check the terms and conditions of any third party referencing company contract to ensure that the referencing supplier will provide compensation in situations where reference checks have not been completed to a reasonable standard, or insufficient checks have been made on information supplied by the prospective tenants. In *Hale v Blue Sky Property Group* 2016, a letting Agent was found liable for failing to check the references provided by a third party provider and failing to provide any analysis to the landlord, even though the third party provider passed the tenant. The report showed that one of the applicants had a County Court Judgment (CCJ) but the applicant had lied on the application form stating that he had not had a CCJ. This should have rung alarm bells for the agent and the agent should have also obtained further documentation such as bank statements which would have revealed that the tenants had other debts. Agents have a duty of care to the landlord to review any report received and report any findings to the landlord. It would be a good idea to ask the landlord to sign to say that they are happy with the report.

4. Providing a suitable Tenancy Agreement. If it is your policy to make a separate charge to the landlord for drafting the tenancy agreement, then this sub-clause shall be deleted, and the individual drafting fee listed within the Scale of Fees.

5. Liaison with Mortgagees. Agreements frequently need to be checked by the client's mortgagees before permission is granted to let the property.

6. Carrying out Initial Right to Rent Checks. Landlords who rent property in England must carry out checks on adult occupiers to ensure the occupier has a right to rent in the UK even if they are not named on the tenancy agreement. Landlords must establish the occupiers who will be living at the property; whether the property is their only or main home and conduct right to rent document checks. Occupiers should provide original documents and landlords will need to check the documents are genuine with the tenant present and keep copies on file.

If the occupier is only allowed to stay in the UK for a limited time, landlords will need to do the check in the 28 days before the start of the tenancy and must diarise a follow up check one year after the initial check or upon expiry of the time limit whichever is later. Where an occupier does not have a right to rent in the UK landlords will need to make a report to the Home Office.

The checks do not apply to existing occupiers or under 18s but, according to government guidance, when an occupier turns 18 during the course of a tenancy agreement '*landlords do not need to conduct additional follow up checks but, where other adult occupiers require follow up checks, the now adult should be checked at the point these further checks fall due.*'

Responsibility for completing the checking process will primarily lie with the landlord unless this responsibility has been transferred to a superior landlord or a letting agent, which must be agreed in writing. The Example Agency Agreement includes a clause for the agent to carry out the checks and any follow up checks required. You will need to amend this if your working practices are different.

7. Dilapidations Deposit. The agent should have explicit authority to receive and hold the dilapidations deposit. The collection and protection of rental deposits is now subject to statutory protection under the Housing Act 2004 (see notes on Deposits clause below for more detail).

8. Collecting Rents. Under the law of agency, the agent is accountable to the principal for any monies received on his or her behalf. These need to be passed on with minimal delay unless the agreement states otherwise. Your agreement should state the timing of payment of the rents received. An agent should allow a reasonable gap between receipt and payment to

the client in order to account for transfer delays between bank accounts, and administration time to chase up late rents. It is also important that the agreement defines the authority for the agent to collect any fees and expenses from the rental income.

✓ ***Check List: Do you collect all rents on the same day every month?***

There are benefits to collecting all rents together (e.g. 1st day of every month) in a batch for economy of administration. In this case, you may alternatively define in this clause a date by which a landlord can expect to be paid any monies due.

✓ ***Check List: How do you pay rents to clients (Cheque, Bank Giro or Direct Credit etc.)?***

If your payment system is streamlined, and all payments are normally made by direct bank transfer (e.g. Giro credit), then this should be defined in the rent payment sub clause here. You will then be entitled to make an additional charge for landlords who request special payment arrangements.

9. Arranging for Services. Most clients will expect the agent to check that the utility services (e.g. electricity, water etc.) have been transferred into the name of the tenants. Your tenancy agreement should also specify the responsibility of the tenants to pay all such charges (if applicable).

10. Inspections. Where the firm undertakes to carry out regular inspections of the managed property, the frequency of such inspections should be defined.

✓ ***Check List: Will the agent undertake inspections of the property? How frequently?***

The purpose of the second sentence (empty property) is to reduce the liability of the agent to only those situations where the property is tenanted. Risks involved with unoccupied property are significantly higher and statistics held by insurance companies reflect this. Empty property will normally need to be checked more frequently than the standard regular inspections and it is not advised that an agent formally undertakes this responsibility as part of the standard service. Furthermore, no fees are being earned from received rents during that vacant period and it is appropriate that a separate charge is made if the landlord requires a property to be actively managed whilst empty.

11. Maintenance. This clause defines the duties of the agent with respect to the co-ordination of the various maintenance tasks as required on the property and provides the authority that the agent may deduct such expenses from the rents received. Agents are well-advised to be wary of major items of outstanding maintenance or disrepair prior to undertaking the management. Such issues can be protracted and time-consuming and the agent may insist on work being completed before undertaking management or otherwise quoting an extra charge to supervise completion of the works.

Also, agents might wish to give serious consideration to setting a 'retained maximum expenditure limit'. This means that the agreement provides the agent with authority to spend up to the stated amount (or any other amount as individually agreed) on reasonable improvements or repairs in a specified accounting period. In the example agreement supplied, a mechanism is proposed whereby the landlord authorises one of two agreed expenditure limits depending on whether the landlord is UK-based or resident overseas.

12. Disbursements. This clause provides that the agent shall and may (if applicable) make payments on behalf of the landlord for expenses connected with the property.

13. Check-out. This clause defines the agent's duty to carry out an inspection of the property on departure of the tenants and handle any resulting issues. Where agents have opted to make a separate charge for checking-in or checking-out the tenant, then transfer this item into your scale of fees.

Scale of Fees Section

The scale of fees section deals with a particularly vital part of the agreement - the agent's right to be remunerated for the services provided. Having decided what services are to be included under the standard management charge, it is important to consider all other circumstances where extra charges might arise. Generally, the agent should seek to be adequately reimbursed for all management time and expenses spent on behalf of a particular client and all fees whether optional or non-optional should be clearly set out. Where the fee cannot be calculated, for example where it is a percentage fee, the method for calculating the fee should be clearly stated. Extra costs may include:

- Preparation of an inventory
- Preparation of the tenancy agreement where this is not included in the standard management service
- Carrying out immigration checks where this is not included in the standard management service
- Cost of mail redirection overseas
- Cost of faxes and overseas calls to clients
- Duplication of keys
- Checking-in and checking-out of tenants
- Advertising (especially in multi-agency situations)
- Administration of tax returns for overseas clients
- Additional inspections/ visits to property
- Drawing up and serving notices of possession and/or summons for possession

By clearly listing each possible additional charge, the potential for dispute or misunderstanding with the Landlord is considerably reduced. Furthermore, it is possible that extra charges may not be enforceable if they are not clearly defined in the agreement, either within this section, or elsewhere in the agreement and landlords should be aware of what they are expected to pay before signing.

Consumer Rights Act 2015

Section 83 of the Consumer Rights Act 2015 (CRA) requires letting agents to display a list of 'relevant fees' (or a link to the fees) payable by landlords and tenants where it is likely to be seen at each office and on their website (if they have one). The Tenant Fees Act 2019 amends section 83 to also require agent fees to be listed on any third party website where the letting agent advertises but at the time of writing this requirement is awaiting a commencement order. The list of fees must include a description of each fee providing an understanding of the service or cost that is covered by the fee. Where the amount of fee cannot be reasonably determined in advance a description of how that fee is calculated must be published. The amount of the fee must be displayed as inclusive of VAT.

Fees to be listed are those payable by landlords and tenants in respect of letting agency or property management work carried out by the agent or otherwise in connection with an assured tenancy or a dwelling house let under an assured tenancy. Section 85(2) of the CRA excludes certain payments from 'relevant fees' including the rent payable to the landlord, a tenancy deposit, any fees, charges or penalties which the agent receives from a landlord on behalf of another person e.g. paying a gardener and reclaiming the money from the landlord.

Agents are also required to publish with the list of fees a statement of which client money protection scheme and which redress scheme the agent belongs to.

Landlord Fees

One of the agent's most important legal duties is his fiduciary duty to the landlord (including the duty to account). Because this duty runs to the heart of the agency relationship, a breach of this fiduciary duty allows the principal to dismiss the agent and claim damages.

Under this duty, the agent is required to disclose all relevant facts in financial transactions so as not to make secret profits, take bribes, not to put himself in a position where his interest and duty conflict unless there is full disclosure to the principal. Under this duty, it is only acceptable to take commissions or secret profits from a third party if there is full and informed disclosure.

As competitive pressures grow, industry practice regarding fees has changed in recent years. Agents are now under increasing pressure to keep management fees to a low and competitive level. By way of compensation, agents have now inflated many of the fees that are chargeable to tenants to a level that is causing some disquiet amongst consumer groups and the Tenant Fees Act 2019 has been introduced as a result of inflated fees charged to tenants. Equally, many of the more ‘commercial’ agents have started to introduce a multitude of additional fees that are chargeable to landlords such as tenancy agreement drafting fees, inventory preparation, renewal fees, notice service fees, cleaning charges and termination costs – fees that would often have been included in the standard management service in previous years.

Of even greater concern is the practice of receiving significant commissions from external contractors’ invoices and engaging in cosy relationships with local contractors who charge as much as 2 to 3 times the market rate in breach of their fiduciary duty to get a good deal for their landlord client. The practice of receiving undisclosed commissions from maintenance contractors goes against the essence of the agent’s fiduciary duty to protect the interests of the landlord, and has drastic effects. The agent can be summarily dismissed without compensation and any fees or commissions earned without full disclosure can be reclaimed by the landlord. The landlord is also entitled to reclaim such undisclosed fees and profits from the outset of the agency relationship so a backdated claim could become substantial.

In the recent Foxtons case cited earlier, Foxtons are accused of making substantial hidden profits and commissions, and not getting fully informed consent for these types of fees. Foxtons have denied any wrongdoing and rely on a clause in their agency contract that says they may retain commissions taken from third parties. Until this case reaches the higher courts, we do not have a legal ruling as to whether this is sufficient to bind the landlord but many lawyers believe that such general clauses hidden deep in the fine print of the agreement will not be acceptable to constitute ‘full and informed disclosure’ and leave Foxtons open to a substantial damages claim.

Tenant Fees

The agent now has a duty to inform prospective tenants of all additional agency charges prominently in any advertisement, as required by the Advertising Standards Authority, and at each office, on their website and on any third party website where they advertise under the CRA statutory duty above. The fee should indicate whether it relates to each property or each tenant.

It would be good practice to inform the landlord of any fees the agent proposes to charge the tenant, by alerting the landlord to such fees within the agency agreement, as this may have an impact on the Landlord’s decision to enter into the agreement. This could, for example, be provided by insertion of the web address or link to a page on the agent’s website where tenant fees are listed. Such fees should be proportionate and the agent should avoid making a charge to the tenant for activities that are already covered under the landlord’s general management fee, or an additional optional fee.

Tenant fees have now been restricted under the Tenant Fees Act 2019 (TFA 2019) which came into force on 1st June 2019. The Act initially applied to new and renewal tenancies granted from 1st June 2019 but not periodic tenancies that arise after this date from a fixed term tenancy granted before 1st June 2019. Pre-existing tenancies are subject to the requirements of the TFA 2019 from 1st June 2020 and prohibited fee clauses contained in existing tenancy agreements become ineffective from that date.

The TFA 2019 provides that a relevant person (defined as ‘a tenant or a person acting on behalf of, or who has guaranteed the payment of rent by a tenant’) cannot be required to make a payment, enter into a contract, or make a loan in consideration of the grant, continuance, assignment, termination or renewal of an assured shorthold tenancy or licence agreement except for:

- Tenancy deposits which will be limited to five weeks' rent for tenancies where the annual rent is below £50,000 and limited to six weeks' rent for tenancies where the annual rent is equivalent to or more than £50,000.
- Holding deposits will be capped at one week's rent. The holding deposit does not need to be repaid to the tenant in full where:
 - the tenant backs out of the agreement;
 - the tenant fails the right to rent checks;
 - the tenant has provided false or misleading information; or
 - where the landlord or his agent makes every effort to obtain the information needed but the tenant does not provide it by the deadline for agreement (this is 15 days from receipt of the holding deposit or a different day that the landlord or agent agree with the tenant in writing).
- The holding deposit must be repaid to the tenant where the landlord backs out of the agreement or where the tenancy goes ahead. Where the tenancy goes ahead the holding deposit can be used towards the initial rent payment or the tenancy deposit where the tenant agrees to this.
- A rent payment which is a permitted payment. Where a rent payment is more than 14 days overdue interest can be charged at 3% per annum above the Bank of England Base Rate from the 15th day after the rent due date.
- A payment of damages for breach of the tenancy agreement or for breach of an agreement between a letting agent and a relevant person.
- A charge for loss of keys. A reasonable cost can be claimed but this must be evidenced in writing.
- Reasonable costs incurred where the tenant requests early termination, and the landlord accepts the request, or where the tenant fails to give the legally required notice to end a periodic tenancy.
- A payment where the Tenant requests a variation or assignment of the tenancy capped at £50 or the reasonable costs incurred.
- A payment to a billing authority for council tax or for a television licence if the tenancy agreement requires the payment to be made.
- A payment for or in connection with utilities (such as water, gas, electric etc) or communication services (e.g. telephone or internet) or a payment towards energy efficiency improvements under a green deal plan where the tenancy agreement requires these payments to be made. The amount of payment should not exceed the reasonable costs incurred by the landlord.

More detail on the Tenant Fees Act 2019 is available in [Letting Factsheet 51](#).

Standard Management Fee

✓ *Check List:* *What is the standard Management fee?*

Existing firms will already have established a level of fees but may wish to revise their charges or re-examine the fee structure generally. New firms should take account of competitive levels but should be wary not to set fees too low. Research has shown that a significant percentage of landlords do not simply choose the agent with the lowest fees; they are prepared to pay extra for a professional service.

✓ *Check List:* *Does the firm set different rates for different areas?*

Some firms define different rate bands depending on location (often defined as a radius from a central point). E.g. Rate 1 - central area, Rate 2 - outlying area. Rural properties can be more expensive to manage (with increased travelling distances) and often take longer to let.

Letting Only Fees

✓ ***Check List: What type of Letting Only service will you provide?***

It is important to list what will be included in the letting only service, for example, will you include deposit protection and rent collection? Where the agent receives the deposit from the tenant the agent will be responsible for ensuring the tenancy deposit legislation requirements are met. Where the deposit is paid directly to the landlord from the tenant the agent has a duty of care to ensure that the landlord has been informed of his responsibilities and the tenancy deposit legislation requirements have been complied with. Agents should obtain evidence of proof that the deposit has been registered/protected with a scheme and prescribed information has been provided to the tenant.

Where the property is an HMO or in a selective licensing area we advise against offering a letting only and rent collection service. The agent will become a ‘person having control’ under s263 Housing Act 2004 and criminally liable for failure to licence and for any breaches of the Management of Houses in Multiple Occupation (England) Regulations 2006.

Other additional fees

✓ ***Check List: Does the firm charge additional fees to set up the tenancy and draft the letting agreement?***

N.B. The Cost of Leases Act 1958 states that a landlord may not pass on solicitors' costs to tenants for the cost of preparing the tenancy agreement. It does not, however, prevent the agent passing such costs on to the landlord.

✓ ***Check List: Do you wish to charge for abortive instructions?***

The use of a ‘Minimum Fee’ within the fee structure is a safety net to protect the agent against abortive instructions. Additional protection is also given against the unscrupulous landlord wishing to wriggle out of the agreement once the agent has found and installed suitable tenants.

✓ ***Check List: Sole Letting Rights - do you wish to retain sole letting rights under your terms of instruction?***

The example agreement supplied in this pack is drafted on the basis that the letting agent will wish to retain sole letting rights. Firms that decide to accept properties that are listed with several agents could take a comparable approach to estate agency agreements where a minimum fee or higher fee scale is payable where the landlord wishes to have multi-agency letting rights.

✓ ***Check List: Do you wish to provide short lets and, if so, what is the fee structure?***

Short lets may be applicable in areas with a seasonal tourist or holiday trade. Where a firm wishes to offer short term lettings, a higher fee structure should be considered to justify the higher relative management costs and activity involved. The fee should be included in the scale of fees section.

✓ ***Check List: Inventory Preparation - will your firm prepare inventories? (and at what price)?***

Your charges for preparation of the inventory should be stated in the scale of fees. Charges are commonly quoted according to the size of the property or per page. The agent may wish to define other extensions to the inventory work, including producing a more detailed schedule of condition - for example by recording the initial condition of the property with digital photography.

✓ ***Check List: Will you charge for the administration of tax returns for overseas landlords?***

The administration work imposed on letting and managing agents of overseas landlords can be considerable. Under the Income and Corporation Taxes Act 1988, tax assessments can be made on the agent in respect of the rental income and the agent has a statutory duty to complete and return these tax assessments and tax returns and manage all related monies.

✓ ***Check List: Will you charge for the issue of various statutory notices?***

From time to time, the agent may be expected to issue various statutory notices (notice of seeking possession, notice of rent increase etc.). Any additional charges for such notices should be clearly outlined in the Scale of Fees section.

✓ ***Check List: Will you charge for duplication of keys?***

Agents are commonly expected to provide copies of keys and this seemingly simple task can involve complications. Unusual keys may involve visits to alternative suppliers and keys cannot be relied upon until they have been tested in the original lock. An agent may want to include a cost element for time in the quoted cost of providing extra keys in order to cover the administration involved.

✓ ***Check List: Will you charge for the administration of maintenance work?***

In law, an agent owes a fiduciary duty or duty of loyalty to the principal and should not attempt to profit from transactions conducted on the principal's behalf unless such remuneration has the prior agreement of both parties. Commonly, administration of maintenance and repairs is seen as part of the general management duties.

It can be argued that significant items of repair and maintenance (e.g. replacing a roof) are exceptional and outside the scope of regular running repairs. They are also time-consuming and for this reason, many agents make provision for an administration surcharge on major repair works and larger projects.

✓ ***Check List: Will you charge for overseas telephone and postage costs?***

Communication costs (faxes, telephone calls and mail redirection) with overseas landlords can add significant cost and many agents make provision for such costs in their fee structure.

✓ ***Check List: Will you charge extra fees for conducting the checking in and out of the tenant?***

You should list any additional fees that you wish to charge for checking tenants in and out.

✓ ***Check List: Will you charge fees for carrying out the pre-tenancy regulatory checks?***

With the advent of increased regulation and restrictions introduced by the Tenant Fees Act, it has become more common for agents to pass on some of the costs of ensuring that any property being rented complies with all relevant legislation. Although outside the scope of these notes to provide a full list of the regulatory requirements, important checks will need to be carried out under the newly introduced Homes (Fitness for Human Habitation) Act 2018 as well as requirements such as EPC certificates and ratings, electrical and gas checks and houses in multiple occupation licensing etc.

✓ ***Check List: Are there other services/charges that you wish to include?***

Also check any fees for reduced levels of management such as letting-only and rent collection. You may decide to charge a Tenancy Deposit Service Fee plus any scheme costs for protecting the tenancy deposit and providing prescribed information to the tenant when providing the Letting Only Service plus Deposit Protection service.

Terms of Business section

General Authority and Management Services

This is an important clause that establishes the various authorities of the parties. It is important to establish that the client signing the agreement in the capacity of landlord has the right to do so, either as owner or leaseholder (in the case of a flat). The agent is also provided with the authority to carry out the duties as listed in the agreement and receive the commissions specified.

Where a property is mortgaged, the bank or mortgagee may rapidly gain possession if it is clear that the terms of the mortgage have been breached. Such a situation could cause severe distress to a tenant. Most mortgage agreements include a clause requiring that the mortgagee gives permission for a property to be let and therefore it is important for an agent to bring this issue to the landlord's attention. Without this step, the agent could potentially be held liable under the implied duty of care.

Where the property is leasehold the agent should check that the Landlord has permission from the freeholder or head leaseholder to let the property. The agent should also check the terms of any head lease to ensure there will not be a breach of the terms and also provide the tenant with a copy before signing the tenancy agreement.

Agents should check whether the property requires a licence and if so that a suitable licence is in place when arranging the tenancy even if the agent is not collecting the rent or managing the property. The agent may still be liable even if the terms of business state that the landlord is responsible for licensing the property as the agent will have a duty where they meet the statutory definition of 'person having control' or 'person managing' the property under the Housing Act 2004 which includes receiving the rent on behalf of the landlord. In a Magistrates court case London Borough of Camden prosecuted an agent for not having a licence for the property where they had only received the initial month's rent prior to the start of the tenancy (but were not collecting the rents during the tenancy). Camden argued that the receipt of the first month's rent made the agent a 'person managing' the property for the whole of the term of the tenancy. The agent argued that one receipt of rent before the start of the tenancy (October 2016) did not make the agent a 'person managing' the property later on (August 2017) and was not responsible for the breach. The District Judge, however, ruled in favour of Camden. The definition given to 'person managing' by the courts is very broad and it is not clear how long after a receipt of a single payment of rent an agent could continue to be 'a person managing.' The safest option would be for agents, including let only agents, to ensure a property that requires a licence has a licence before it is let to a tenant.

The agent also has no right in law to receive or retain commissions or profits on transactions without the prior agreement of the principal - this is known as the 'agent's duty to account'. Many insurance products offered by firms to landlords provide the agent with a commission and it is important to declare such commissions in the agreement. Agents may also earn and retain commissions from other contractors or services provided to the landlord as a result of referrals to other organisations providing property related services such as finance, repairs, utilities etc. This commission or fee is levied against the contractor/service provider and not the landlord but this would usually result in the contractor/service provider increasing their fee for carrying out the works to cover the commission cost paid to the Agent. Our view is that agents should 'shop around' for quotes to ensure they are acting in the best interests of the landlord to obtain a competitive price for their client landlord. If agents wish to charge commissions and fees or other services these should be included in the agency agreement and brought to the landlord's attention. However, such payments may come under challenge from consumer protection regulations.

'Letting-Only' service, Letting and Rent Collection Etc.

These clauses provide for the situation where the firm also wishes to offer a letting-only service and other variations or subsets of a full management service. Where applicable, you should use this section to define precisely what services are provided, any conditions attached and the scale of fees that apply. If the provision of a Let-Only Service constitutes a significant proportion of the firm's business, then it is common practice for the agent to draft a new

version of the agency agreement dealing solely with this situation. The Let-only terms can then exclude any clauses such as those relating to property inspections, maintenance issues, deposit disputes etc. which do not apply.

Renewals

This clause provides for the landlord to pay a tenancy renewal fee where the tenancy is renewed or extended to the same tenant or a person associated with the tenant originally introduced by the agent. This renewal fee should be reasonable, made clear to the landlord at the start of the tenancy and brought to the landlord's attention prior to renewing the tenancy, for example, by sending a reminder letter to the landlord prior to renewal. The Letting Centre example agency agreement provides for a renewal fee to be charged under a full management service. Where an agent does not provide any ongoing property management or other services after the introduction of a tenant, the Competition and Markets Authority consider that 'it would be a surprising contractual term to require the landlord to pay commission for any events that take place after a tenant has been introduced.' Where agents choose to charge a renewal fee for let only services any fee should be reasonable in proportion to the work carried out (Office of Fair Trading v Foxtons [2009]). A renewal commission term may be more likely to be fair if the agent's entitlement to commission decreases over time and ceases within a reasonable period of time (unless it is demonstrably linked to the amount of work undertaken by the agent and that work does not diminish).

Referencing

This clause provides for the agent to carry out referencing checks either themselves or using a third party referencing company. Where the agent has acted within his authority and duty of care to the landlord (e.g. by carrying out appropriate checks, reviewing any documentation and reports received and reporting findings to the landlord) and has no reason to believe that any information provided is incorrect or fraudulent this clause aims to protect the agent against liability.

Liability for Tenant Default

A disclaimer clause is useful in order to clarify to the landlord the limits of the agent's liability. An agent cannot legally include a disclaimer in order to avoid liability incurred as a result of the agent's negligence, but the agreement should make it clear that the agent is not responsible for the tenant's default or any other event outside the agent's control.

Agent Remuneration

This indemnity clause is vital in order to further contain the liability of the agent and allow the agent to reclaim any reasonable costs and expenses incurred in managing the property. There are many unforeseeable circumstances and the management agreement needs to contain a measure of protection for the agent. In safeguarding the landlord's interests, the agent may in turn suffer loss or claims from third parties and it is important that such losses do not rebound on the agent personally.

Maintenance

This clause defines the agent's requirement that the property should be free from any serious maintenance or disrepair and that the property and its contents conform to current letting standards. With the continuing introduction of new regulatory requirements such as those under the newly introduced Homes (Fitness for Human Habitation) Act 2018 as well as requirements for EPC certificates and ratings, electrical and gas checks and houses in multiple occupation licensing etc agents may need to charge a pre-letting regulation check fee to the landlord for appropriate checks to be carried out to ensure the property meets the current letting standards.

The clause also furnishes the agent with appropriate authority to instruct subcontractors, making provision for such disbursements to be made (up to the specified limits and including the possibility in exceptional circumstances to exceed such limits). In law, an agent is not generally responsible for substandard workmanship of contractors unless it can be shown that such problems arose through the involvement or negligence of the agent. The section relating to subcontractors underlines this fact for the benefit of the client.

The maintenance clause also informs the landlord of the legal requirement to inspect and service all gas appliances on an annual basis and record appropriate details of such checks. Guidance notes and a Code of Practice have been published by HSE in relation to these regulations, and they recommend that: '*landlords who use agents to manage their properties should ensure that the management contract specifies who is responsible for the maintenance of gas appliances and for keeping records to indicate when such maintenance has been carried out.*'

A managing agent would normally take on responsibility for such regular servicing and checks for gas appliances within the general authority (defined above) to carry out any necessary maintenance. The example agreement therefore authorises the agent to carry out these duties.

NB. It is vitally important that the agent fully understands the obligations of the Gas Safety Regulations in this respect. By agreeing to take over the landlord's obligations either formally (by using such an agreement) or even by any implied actions, an agent takes on the full responsibility for compliance (and any criminal penalties that might result from non-compliance).

Overseas Residents

This clause is included for information, explaining the obligations imposed by the Income and Corporation Taxes Act 1988 (as amended by the Finance Act 1995) and the Inland Revenue's Non-Resident Landlord (NRL) scheme rules.

- ✓ **Check List:** *Have you made it clear to overseas landlords what your and their liabilities and responsibilities are, whilst they are letting their property and are resident outside the UK?*

Council Tax

This clause summarises the landlord's statutory duties in respect of council tax payments.

Services

The agent will often administer details relating to utilities and other services supplied to the property.

- ✓ **Check List:** *Is the firm responsible for arranging transfer of services (Electric, Gas etc.) from the landlord?*
- ✓ **Check List:** *Is the firm responsible for taking meter readings?*

It is becoming common practice for the cost of all services (including water rates) to be payable by the tenants of a property (except for short term lettings or holiday accommodation). Yet to protect the landlord from inadvertent or fraudulent charges relating to services consumed by tenants, the prudent agent is advised to take (and communicate to the respective parties) meter readings at the beginning and end of every tenancy rather than rely on the utility companies alone.

Landlords returning from abroad are often disappointed to find disconnected services on arrival. This clause seeks to advise them to make prior arrangements in such circumstances. Similarly, because of the possible problems with mislaying important mail, it is advisable to request that the landlord makes the necessary arrangements to inform all parties of any new address.

Inventory

The preparation of a comprehensive and accurate inventory is a time-consuming process and opens up a large area for ambiguity and potential dispute. An agent failing to note the presence of a particular stain or other damage to the property invites potential dispute with the landlord. The law of agency defines a duty of care to carry out such checks accurately and a potential action for negligence hangs over all agents if mistakes are made or items missed.

There are several methods that firms may adopt to reduce the liability in this area. Some firms employ or contract such work to an independent inventory clerk or simply ask landlords to prepare the inventory. Further levels of detail such as the preparation of a pre-tenancy photographic record of condition can be offered as an additional service. This has the advantage of putting the onus with the landlord for deciding the level of detail that is required by the inventory and declaring any items of exceptional value.

Tenancy Agreement

This clause allows for the provision of a tenancy agreement within the management service and authority enabling the agent to sign the agreement on behalf of the landlord. With such authority, an agent may prepare and sign a tenancy agreement on behalf of the landlord for a term up to three years.

Where an additional charge is made for preparation of the tenancy agreement, then this clause should be amended accordingly. The clause also seeks to limit the extent of such drafting work to an agreement in the firm's standard form. Where substantial alterations are required (e.g.. by the landlord's mortgagee), the agreement will allow the agent to make an appropriate extra charge.

Although the agent holds authority to sign a tenancy agreement on behalf of the principal, the following points should be considered:

- (i) Because of the binding nature of any tenancy agreement signed, an agent is advised (although not obliged) to give the landlord due notice before renewing any existing agreement or signing new agreement(s).
- (ii) Tenancies of three years or less do not have to be created by deed. Any tenancy that is required to be created by deed will in turn require that the agent and landlord must have entered into a deed (a more formal legal agreement) setting out the relevant authority (Power of Attorney Act 1971.)

Notices

This clause gives the agent appropriate authority to issue notices to the tenant(s) on behalf of the landlord. There are, for example, statutory notices for ending a tenancy, increasing the rent, and dealing with disputes under the tenancy deposit protection schemes.

Holding Deposit

This clause gives the agent appropriate authority to take a holding deposit. The initial clause highlights the general risks, potential loss of rents and associated reasonable expenses where a tenant withdraws from a property prior to signing a tenancy agreement. It should also define the terms on which the fee is taken, and explain the limitations of taking such fees. N.B. The Tenant Fees Act 2019 sets out provisions for taking and retaining a holding deposit. See page 14 for more detail.

Tenancy Deposits - Assured Shorthold Tenancies

Since April 6 2007, tenancy deposits taken in connection with the granting of an assured shorthold tenancy will be subject to statutory protection. It is the Government's intention that the majority of residential tenancies will be subject to statutory Tenancy Deposit Protection (TDP). It will be important for the agent to explain this process, and the corresponding responsibilities to the landlord.

- ✓ ***Check List: Which scheme(s) is the agent using for the protection the tenancy deposits?***

The agent should explain to the landlord which tenancy deposit scheme has been adopted.

- ✓ ***Check List: Is the dilapidations deposit to be held by the agent?***

A clause should be included to outline the agent's procedures for taking holding deposits and to advise the landlord of the requirements under tenancy deposit protection legislation.

TENANCY DEPOSIT PROTECTION SCHEMES

The law requires that, where tenancy deposit protection is applicable, tenancy deposits must be protected under one of three approved schemes:

- The Deposit Protection Service (The DPS)
- My Deposits (TDSL)
- The Dispute Service (TDS)

All three schemes have scheme rules and terms that need to be carefully understood before deposits are accepted. The first two schemes are reasonably straightforward and make no special requirements with regard to an agent's terms of business. TDS provide suggested clauses for inclusion within the agency agreement/terms of business. Those using TDS deposit protection and who wish to use the suggested clauses will find them set out in TDS document "Prescribed information and suggested clauses for tenancy agreements and terms of business."

✓ ***Check List: Is the dilapidations deposit to be held by the landlord?***

Where the agent is providing a let only service the deposit may be held by the landlord. A clause should be included within the agreement setting out the landlord's responsibilities.

✓ ***Check List: What happens to the Deposit at the end of the tenancy?***

Where the agent has protected the deposit a clause should be included to explain what happens with the deposit at the end of the tenancy.

Inspections

✓ ***Check List: Are inspections to be included in the management service?***

This clause sets out the extent of the regular inspections (if any) undertaken as part of the management service. It is important to clarify the nature and frequency of these inspections in the agreement. The agent treads a difficult path between checking carefully for any damage or missing items during such inspections and respecting the tenant's rights to privacy and peaceful enjoyment. The second paragraph of the clause relating to inspections highlights the difficulty of testing the operation of all appliances fully after the departure of the tenant and seeks to contain the agent's liability in this respect.

Tenancy Deposit Disputes

At the end of the tenancy, any repair, dilapidations or cleaning costs will need to be assessed by the agent, and communicated to the landlord and tenant. If the tenant does not agree to these charges, and negotiation is unsuccessful, then the dispute may need to be referred to the tenancy deposit scheme, or other outside party, for adjudication.

This adjudication process will normally be conducted as an ex-parte service (i.e. the parties do not attend the hearing) on the basis of paper-based evidence submitted by each party.

Typically, the agent will be required to provide to the adjudicator:

- Copy of the tenancy agreement
- Copy of the inventory and schedule of condition
- Copy of the move-in and move-out procedures
- Copy of any relevant correspondence and other paperwork
- Copies of any inspections, or mid-term visit reports
- Estimates & invoices for remedial work
- Photographs (or report) as evidence of any damage or breakage

This process of preparing the deposit adjudication file will be an additional administrative burden on the agent, which the agent may wish to pass on as a separate additional charge. The agent should inform the landlord of the likely costs of preparing this file either in the agency agreement, or before the dispute proceeds to adjudication.

Because the resolution of any tenancy deposit dispute is likely to take at least three months under the Government TDP schemes, it will also be important that the agent holds sufficient funds to pay for the repairs and cleaning to the Property. An additional clause is included in the agency agreement in order to give the agent explicit authority to hold this fund prior to the termination of the tenancy.

Tenancy Deposits - Non Protected Tenancies

- ✓ *Check List: Is the dilapidations deposit held as 'stakeholder' or as 'agent for the landlord'?*

Outside the statutory tenancy deposit protection rules, an agent has the choice, when holding a tenancy deposit, to hold 'as stakeholder' or 'as agent for the landlord'. The distinction is explained below. If the agent is likely to be handling non-protected deposits, then it will be important to specify in what manner these deposits are to be held. The Letting Centre example agreement provides for the deposit to be held as 'stakeholder.'

As 'stakeholder' the agent acts as a totally independent third party having the obligation to act fairly and correctly to both parties. An agent may only deduct from the deposit money that which is payable in respect of dilapidations or breaches of the tenancy agreement. In this capacity, the agent is open to being sued by either party if the agent does not act fairly and properly. Therefore to avoid liability in this respect, it is generally recommended that agents gain agreement from both the landlord and tenant before making any significant deductions from the dilapidations deposit. Most professional associations prefer the agent to be acting as 'stakeholder'.

As 'agent for the landlord' the agent ultimately has a duty to the landlord as principal and no duty to the tenant. Where there is disagreement over the assessment of dilapidations, the agent may be forced into the position of handing over all sums demanded to the landlord which equally may bring problems and its own set of risks.

Termination

- ✓ *Check List: How may the management/agency agreement be terminated?*

In law, the agreement may be terminated with the agreement of both parties. Equally, the landlord as principal is entitled to terminate, yet in the absence of any express provision the law is unclear as to the agent's entitlement to notice.

This is therefore an important clause as it defines a reasonable notice period by which either party may give notice to terminate. If insufficient notice was given, then the agent would be entitled to claim for damages as compensation.

Where the agreement has been signed away from the office the landlord has a right to cancel the agreement within 14 days of the date of the agreement. The landlord may agree to the agent carrying out works immediately following the date of the agreement and waive his right to cancellation and in this situation the landlord will be responsible for any reasonable costs incurred where the landlord cancels the agreement.

Sole Letting Rights

The example agreement supplied in this pack is drafted on the basis that the letting agent will wish to retain sole letting rights. In the example clause contained in the agreement, the landlord will become liable to pay remuneration to the agent, and any other costs agreed, if he accepts any tenant introduced by another agent, or sells or exchanges the property with a purchaser introduced by your firm, or with whom your firm had negotiations about the property, during the time of your agreement.

Another alternative is for the agent to specify sole agency rights. This is slightly simpler, and restricts the landlord to using only one agent. It does not however prevent the landlord from letting the property himself to someone NOT introduced, directly or indirectly, by the letting agent.

Many letting agents choose not to work on a multi-agency basis due to the potential for wasted time and effort. In this case, you should consider including this stipulation in your agreement. Some landlords may refuse to sign a sole letting rights agreement (normally because they want to list the property with several agents) and will request the clause removed.

Firms that decide to accept properties that are listed with several agents could take a comparable approach to estate agency agreements where a minimum fee or higher fee scale is payable. Alternatively, some agents reserve the right to charge the client for advertising costs where instructions are withdrawn. In either of these two latter cases, it will be necessary to amend the agency agreement in the appropriate manner.

Safety and Energy Performance Regulations

The agent has a duty of care to inform the landlord of any regulations that affect the letting of the property. This clause serves to draw the landlord's attention to these regulations and underline their importance. Landlords should be supplied with appropriate compliance information regarding these regulations prior to signing the agency agreement.

- ✓ ***Check List: Have all landlords been provided with information relating to consumer safety regulations and other statutory requirements?***

For all rented property, there is a statutory right that the landlord maintains the structure and main services serving the property in good repair and that it shall be fit for human habitation. There are also general product safety regulations that require the property and items in the property to be safe, plus specific provisions relating to any gas appliances or furniture supplied. The general product safety regulations state that any item supplied to a consumer in the course of a commercial activity must be safe and this is deemed to include the supply of rented property.

Rented properties are required to meet requirements under the Smoke and Carbon Monoxide Alarm (England) Regulations 2015. A smoke alarm must be installed on each storey of a property on which there is a room used wholly or partly as living accommodation; and a carbon monoxide alarm must be installed in any room of the property which is used wholly or partly as living accommodation and contains a solid fuel burning combustion appliance. Checks must be carried out to ensure the alarms are in proper working order at the start of the tenancy.

The electrical safety regulations require that any electrical appliances supplied must be safe. In order to meet the current requirements, it is important that appropriate checks and safeguards are carried out. At the time of writing, there is no statutory requirement for appliance testing. However, electrical appliances should be tested prior to letting the property, and at periodic intervals thereafter. Appliances used more regularly or in a harsh environment (e.g. wet conditions) may require more frequent testing. Any appliances supplied should contain the approved 'CE' mark.

It is important that the fixed electrical installation (i.e. the mains wiring) and any supplied appliances and equipment are safe. Both are easily tested by a qualified engineer. The Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020 come into force on 1st June 2020 and apply to new tenancies from 1st July 2020 and existing tenancies from 1st April 2021. These regulations require landlords to ensure that electrical safety standards are met and electrical installations are inspected and tested before the tenancy commences and at intervals of no more than five years (or the period recommended in the most recent report if less than five years). 'Tenancy' includes a licence to occupy but excludes a tenancy where the occupier shares accommodation with the landlord or a member of the landlord's family.

Landlords should be provided with relevant information regarding compliance with safety regulations. See Letting Centre Letting Factsheets for more detailed information on the safety regulations.

✓ ***Check List: Has the firm established a strict procedure for the inspection of gas appliances and maintaining suitable records?***

N.B. HSE Guidance - Gas Safety (Installation and Use) Regulations. These regulations impose an obligation on the agent to ensure that all gas appliances in rented property are inspected on an annual basis and to maintain records of such checks, any faults found and what action was taken.

Guidance from the Health and Safety Executive (the enforcement body) recommends that the management agreement includes the following information (Guidance notes - Reg. 35):

- Who is responsible for maintenance of gas appliances;
- Who is responsible for keeping records to indicate when such maintenance has been carried out.

Guidance from the HSE suggests that landlords who are in control of premises will have a duty to manage legionella in residential properties. Our view is that this will include Houses in Multiple Occupation where the landlord retains control of the common areas and blocks of flats. The HSE also advise that the management agreement should make it clear who is responsible for maintenance and safety checks, including managing the risk from legionella.

Landlords must ensure that a valid Energy Performance Certificate (EPC), where required, is made available free of charge to any prospective tenant at the earliest opportunity and in any event no later than which ever is the earlier of:

- (i) the first time the landlord makes available to the prospective tenant any written information about the building; or
- (ii) at the time which the prospective tenant views the building.

The agent should ensure that an Energy Performance Certificate is available for the property.

Instructions

This is an important safety clause for the agent; it provides a safeguard against potential dispute. By demanding that the landlord confirms all significant instructions and other details to the agent in writing, the agent protects against a situation where a landlord claims to have issued verbal instructions and where no record of such instructions exists. Verbal instructions are easily lost or misinterpreted.

Fees and Value Added Tax

✓ ***Check List: Are you registered for VAT?***

Where the agent is registered for VAT any fixed fees should be quoted as inclusive of VAT. If the fee cannot be reasonably calculated in advance, such as a percentage fee, it should be clearly stated how the fee will be calculated and that VAT will be added to the fee. Where the agent is not registered for VAT, it may still be appropriate to inform the client that VAT may apply in the future if it is possible that the firm will exceed the annual turnover threshold for registration for VAT. Where management fees are based on a percentage of the rental income it should be made clear as to how the fee will be calculated.

Insurance

Although agents should take care that all managed properties have adequate insurance, the agreement should establish which party is responsible for this. This clause also underlines the importance of checking that the insurance policy is suitable for rented property and contains no exclusions relating to these circumstances.

Only companies that are authorised by the Financial Services Authority (FSA) are legally permitted to sell general insurance products or offer advice or information regarding insurance. This means that letting agents must be FSA authorised either as an agent, appointed representative or principal to provide insurance or offer advice or administer insurance claims.

Housing Benefit

Increasing problems and regulations relating to the recovery of housing benefit from agents and landlords by local authorities make it important that an agent can in turn recover such payments where appropriate from the landlord. Such clauses should be included even in the situation where a firm or agent does normally accept housing benefit claimants since a tenant can lose his or her employment and need to rely on housing benefit in order to meet their rental obligations.

The clause allows an agent to require a landlord to meet a repayment liability imposed in the first instance on the agent by a local authority, whether or not the agent is still engaged to manage the property under the management agreement.

Legal Proceedings

Rent arrears and breaches of the tenancy agreement are not uncommon situations faced by the letting agent. It is important that the agent has the authority to take expedient action, yet is indemnified against any costs or other actions that may result. Where the owner is abroad or not contactable, it will be important for the agent to be able to start legal proceedings on behalf of the landlord.

Immigration checks

The Immigration Act 2014 requires landlords renting property in England to carry out immigration checks. Responsibility for completing the checking process will primarily lie with the landlord unless this responsibility has been transferred to the agent, which must be agreed in writing. This clause provides authority for the agent to carry out the initial checks and any follow up checks on the landlord's behalf. You will need to amend this clause if your working practices are different.

Complaints

Agents are required to register with one of the property redress schemes and provide landlords and tenants with details of their complaint handling policy and how to refer a complaint to the redress scheme where they are unsatisfied with the way the complaint has been handled.

Keeping records and Data protection

It is good practice for agents to keep paperwork in relation to a tenancy for a reasonable period of time after the tenancy has ended in case there are any queries raised by the landlord or the tenant. The Limitation Act 1980 allows a claim under a contract to be brought within six years so although it might not be convenient to keep paperwork for six years it would be advisable to do so in case of a claim being brought by a landlord or tenant. It might be an option for the agent to store paperwork electronically or send any documents to the landlord and retain a signed receipt. Financial information should be kept for a period of seven years.

Landlords and agents are required to comply with the Data Protection Act and a suitable clause should be included in the Agency Agreement that both parties will comply with these requirements.

About the Agreement

An agreement is generally fixed and binding until the contract is terminated. Yet, at some future date the agent may have good cause to improve the firm's procedures, revise the scale of fees or be required to respond to new legislation. For this reason, it is good practice to make provision for variation in the agreement - and any such variation recorded in writing.

Under the variation clause in the example agreement, the agent has a mechanism to make minor changes to the agreement without requiring that all clients sign new agreements. The

agent would need to give all clients adequate advance notice of such changes in writing and it would be fair and reasonable that such notice was of equal length to the terms given in the termination clause. Equally, the clause should not be considered as a freedom to impose substantial fee increases on the landlord at some future date.

The Provision of Service Regulations

These Regulations (2009 SI 2999) bring in the relevant European Directive which requires that specific information is made available in certain contracts and provision for such information has now been included in the agency agreement. For more information see: www.legislation.gov.uk/ukdsi/2009/9780111486276/contents

Acceptance

The risks of acting without authority and indemnity have been well highlighted. Clients should be issued a copy of your agreement or terms of business at the time of the initial instruction. It is important that the agreement is signed before instructions are accepted from the client.

It should be possible to collect fees if the landlord has not returned the signed agreement although it is clearly preferable to gain formal acceptance from the outset. Acceptance is indicated by the signature of the client. Where the property is jointly owned, all joint owners should sign the agreement.

Evidence of ownership

The acceptance clause requires that the person signing the agreement is the full or joint owner of the property. If jointly owned, both joint owners should be asked to sign. Agents are advised to make appropriate checks to ensure that the ownership is bona fide. In the past, agents have been prosecuted under the Accommodation Agencies Act 1953 for renting out council-owned residential property and failing to take out reasonable checks that their so-called 'landlords' were the true owners and had the appropriate permission to rent out the property. It would be appropriate for agents to ask to see details of mortgage documents or the title deeds to verify evidence of ownership.

Companies signing contracts

A contract can be signed 'by' or 'on behalf of' a company. There are different formalities for execution which are set out under the Companies Act 2006. In most cases simple contracts are made 'on behalf of' a company due to the simple formalities involved. It is good practice to check that the signatories are duly authorised to sign the agreement (the company's articles of association will normally contain a clause which allows the directors and company secretary to contract and sign on behalf of the company). Identity checks should also be made to ensure that the signatories are who they claim they are.

Contracts made on behalf of a company

Contracts can be signed on behalf of a company by a person acting under the company's express or implied authority (s43(1)(b) Companies Act 2006). This may be a director or can also be an employee of the company who has authority to contract on the company's behalf. The person authorised should sign the document and state that they are signing on behalf of the company.

Contracts made by a company under its common seal

Where a contract is made by a company under its common seal it will be correctly executed either by affixing the company's common seal or where it is signed by two authorised signatories (e.g. a director and a company secretary) or one director in the presence of a witness (s44 Companies Act 2006).

3. Extra Clauses - Special Cases

Below are some extra example clauses which can be used in special cases.

Extra Clauses

Flag Boards

✓ ***Check List: Does the firm wish to erect flag boards outside properties?***

Many firms use flag boards which help advertise a property which is to let, and also act as free advertising for the letting firm, helping to promote the firm's presence in the local area.

In order to counter potential future objections from client landlords, it is sensible to obtain prior permission to erect such signs. This can be done with a suitably worded clause in the agency agreement, or by specific prior discussion.

NB. There are special rules that apply to the erection of such flag boards outside properties, both as to their maximum dimensions and that only a single board should be fixed outside the property at any one time (notwithstanding the fact that the landlord may have instructed multiple agents). Agents should check with the landlords of leasehold property whether the lease prohibits advertising boards.

Example Clause:

The Agent may be permitted, within the last two months of the tenancy, to erect appropriate letting signage outside of the Property.

Holiday Lettings

✓ ***Check List: Does the firm wish to operate short lets (i.e. less than six months) or holiday lettings?***

A firm's procedures in this case (procedures for references, deposits etc.) are generally very different from longer lets. It is important to define any departures from the standard procedures. In a holiday let for example, it would not be normal to take up full references and the agreement should make this clear. Otherwise, it could be argued that an agent was in breach of contract for not following the defined standard procedure.

Similarly, in any situation where the agent finds it impractical or impossible to perform the service contract as specified in the agreement, the landlord should be duly informed before the event.

Example Clause for occasional holiday lettings (to include within main terms):***Holiday Lettings:***

For holiday lettings, the administration overhead (and thus the management charge) is proportionally higher. There are also some aspects of the management service that are different or cannot be provided with holiday lettings:

- (a) the Agent will not always be able to interview tenants and take up references for holiday lettings, especially for visitors arriving from abroad.*
- (b) Dilapidation deposits will not be held for holiday lettings.*
- (c) It is generally not appropriate for tenants to make regular monthly rental payments. The Agent shall aim to pass on any rents within 30 days of receipt.*
- (d) Services (electricity, gas etc.) will often be left connected during a holiday let and included in the quoted rent. Council tax may also be payable by the Landlord for holiday lettings and, in case of doubt, the Landlord is advised to contact the local council tax collection office for further information.*

Sale of Property

✓ ***Check List: Do you wish to charge commission on introduction of a purchaser?***

Many agents wish to include a provision which allows the agent to claim a fee or commission from the client landlord for carrying out negotiations should the tenant be interested in purchasing the freehold from the landlord and the parties come to an agreement.

By inserting this clause, the agent would be entitled to claim a reasonable fee in the situation where, for example, the agent arranges a successful sale of the property between the landlord and the tenant.

Some care needs to be taken with regard to such clauses. In the past, the Office of Fair Trading (OFT) now the CMA have complained of such clauses in the standard terms of business of letting agents. In order for such commission to be claimable, it is necessary that the agent's terms of business comply with the Estate Agents Act 1979 since such a clause is considered to operate as an instruction to the agent for the purposes of the above Act. The Act has specific and detailed requirements as to the wording of such instructions (in particular, section 18 of the Act) and what information needs to be provided to a client. A term which is void for the purposes of the Act is regarded by the CMA as an unfair clause and therefore unenforceable in law.

For the above reasons, a clause relating to entitlement to commission upon sale of the property has not been included in the example agreement. An example simple form of wording is given below, but without more comprehensive and detailed wording which complies with the requirements of the above Act, it is open to challenge and potentially unenforceable.

Example Clause:

In the event of a party introduced by the Agent (or any person or body corporate associated with that party) subsequently purchasing the Property, whether before or after entering into a Tenancy Agreement, commission shall be payable to the Agent on completion of the sale at the rate of 1% of the sale price, plus VAT.

Should you wish to include a term relating to the sale of the Property, which is more comprehensive and legally enforceable, then you are advised to instruct your solicitor to draft an appropriate set of clauses.

4. Law of Agency

This chapter is an extract from The Letting Centre's Letting Handbook (Chapter 17) and looks at the legal rules governing the relationship between landlords and agents, and sets out the rights and duties of the respective parties.

The law relating to agency is a mixture of common law rules developed through case law, with statute intervening in particular areas. For example, the Housing Act 1988 (or Housing (Scotland) Act 1988) amended section 1 of the Protection from Eviction Act 1977 so that section 1 of the PEA now applies to agents as well as landlords.

Establishing an Agency Relationship

A genuine relationship of agency requires a **principal**, which in the context of property management will usually be the landlord or owner of the premises, to authorise an **agent** to act on the principal's or landlord's behalf. Authority to negotiate the terms of the tenancy, prepare the paperwork, sign a contract and agree a lease all fall within the relationship of agency.

The general principle of agency is that, where an agent is authorised by a principal to enter into a contract on the principal's behalf with a third party, and does so, then a contract is established between the principal and the third party, the agent becoming transparent to the contract. Thus where a letting agent has been authorised to let a property, find tenants and enter into a tenancy on behalf of the principal (i.e. the landlord), the landlord will be contractually bound by the new tenancy that his agent has created between the landlord and his tenants. However, there are many facets to the agency relationship, some of which are explored within this chapter. Agents can act negligently, or act beyond their legitimate authority and leave themselves open to claims for damages.

The agent's authority should always be set out in a written agreement. This agreement will define the scope of the agent's duties in accordance with standard terms of management, and provide for the agent to be remunerated according to an agreed scale. Agents should always be clear as to the limits of their authority when acting, and be ready to report back and take new instructions from the principal if a new situation emerges which is outside the normal scope of their everyday duties.

Central to the concept of agency is the notion of 'authority'. In the normal case, agency arises by agreement; that is the principal actually authorises the agent to act on his behalf and the agent agrees to do so. An agent's authority may be express or implied. An agent's authority is express to the extent to which it is conferred in so many words - which could be written or verbal.

Express Authority

Express authority is normally given in writing and signed by both parties before the agency relationship commences. A well-drafted agency or management agreement is essential, and should specify all the duties or actions that the agent is authorised to carry out - this will be discussed later in this chapter.

As with any general legally binding contract, formality is not always required. Express authority can be given or amended by verbal instructions but such conversations are best evidenced in writing to ensure clarity and avoid dispute. Equally, in some situations, additional formalities are required. Under the Powers of Attorney Act 1971 if the landlord wants the agent to grant a lease for a term of more than three years (which have to be executed by deed), the agent and the landlord must have entered into a deed themselves setting out that the agent has this authority.

Implied Authority

Authority may also be implied - even where there is no express authority - by the conduct of the parties. Equally, authority may also be implied where the express instructions are not clear, and the acts are reasonably incidental to the execution of the express authority.

For example, it would normally be considered that a landlord who hands the keys of his property to a letting agent gives the agent an implied authority to carry out viewings - even if this authority is not stated explicitly in the agency agreement. The letting agent does not automatically have an implied authority to sign a tenancy agreement on behalf of the landlord. Although there is no recent case law, older cases suggest that there is no implied authority for the letting agent to create and sign leases on behalf of the landlord. This important power, if required, should be explicitly stated in the agency agreement.

Best agency practice requires that all actions are expressly authorised either under a comprehensive written agreement, or for extraordinary items, with the written sanction of the principal.

Lack of Authority

If a tenancy is granted without authority the landlord will not be bound by the tenancy agreement. If the agent has only been instructed to identify a suitable prospective tenant the landlord will not be bound by the contract entered into by the agent. The tenant will in fact be a trespasser. If the agent has maintained to the tenant that s/he does have the authority to grant the tenancy where s/he does not, s/he will be deemed to have impliedly warranted that authority exists and so the tenant can hold the agent liable for breach of warranty. The tenant could seek damages for the value of the tenancy lost.

The law recognises that the landlord can decide to ratify the agent's actions and if s/he does so the agent's actions are deemed to be authorised. Ratification is not necessarily straightforward, but the law will recognise it where it takes place expressly or impliedly. Express ratification could happen where the landlord has communicated to the agent that the tenancy can go ahead. Implied authority will arise if the landlord knowingly allows the tenancy to continue and accepts rent or takes no steps to evict the tenant.

However, an agent may hold apparent authority in certain situations - that is 'the authority of the agent as it appears to others'. For example if the tenant contacts the landlord about a burst pipe and is told to contact the agent, the landlord will be bound by the acts of the agent and be liable for any expense incurred if the agent subsequently calls out the plumber. The landlord cannot claim and is estopped from claiming that s/he is not bound by what the agent has done. It does not matter in these circumstances whether the agent had actual authority to hire the plumber. The landlord cannot lawfully refuse to pay the bill.

Duty of Care

Under the law of agency, the agent is under a duty to his client to exercise reasonable care and skill both in carrying out their duties and in advising the landlord. Although not intended to be a complete list, the examples below demonstrate the type of care and precautions that a competent managing agent should take:

- Correctly advising a client on rental value.
- Declaring any self-interest (e.g. renting to a friend or relation)
- Taking up appropriate references and credit checks on a tenant.
- Setting up the correct type of tenancy with the correct forms.
- Acting with expedience if serious maintenance issues arise.
- Taking appropriate precautions with regard to the security of any keys held.
- Informing the landlord of their various legal obligations (e.g. Gas Safety Regulations).
- Checking for damage or dilapidations to a property either during or on termination of a tenancy.

A considerable number of landlords rely heavily on the skill and expertise of the agents who they appoint to act for them. Where agents undertake repair works themselves but act negligently, e.g. repairing a leak but making the leak worse so the tenant's home is flooded, then the agent will be liable for the negligent acts and the loss which results from them. The tenant could also sue the agent for damages.

The agent's duty of care and skill is discussed later in these notes with supporting case law under the heading 'The Legal Rights and Duties of an Agent.'

Tenancies created by an Agent

When a tenancy is agreed directly between the landlord and the tenant, the legal relationship between landlord and tenant will be straightforward. An agent, holding the appropriate authority, may create a tenancy and sign the tenancy agreement on behalf of the landlord. For example, if the landlord resides overseas, it would not be practical for the landlord to sign personally; it would be normal for the landlord in such cases to grant his agent the authority to sign the tenancy agreement on his behalf.

However where the agent has signed and either has not informed the tenant that s/he is the agent or where the tenant believes in good faith that the agent is the landlord and the actual landlord, the principal, is undisclosed, the tenant can sue the agent. This might happen in a situation where the agent has made various promises to the tenant but is unable to fulfil them because the agent does not hold the relevant authority to carry them out. The agent in such cases can be sued as if he was the landlord. The real landlord, the undisclosed principal may identify her/himself at a later stage but this does not absolve the agent who remains personally liable under the tenancy agreement.

There are two commonly used solutions to the above problem:

1. Where the tenancy agreement and related documentation refers to the 'landlord', then the actual landlord's name can be used at this point. It does not matter that the landlord's address is given as a 'care of' address. E.g..

Landlord: Mr & Mrs Brown

Address: c/o ABC Lettings
194 High Street, Anytown, Wessex, WE0 7AA

2. Where the agent signs on the landlord's behalf, then the agent can make it clear that he is signing 'as agent'. E.g.

Signature: *A N Agent* as agent for Mr & Mrs Brown

Disclosure of Landlord's Identity

Do not forget that if the tenant or their advisor requests the identity of the landlord and their address under sections 1 and 2 of the Landlord and Tenant Act 1985 of any person demanding or collecting rent, that this request has to be complied with. They can further request that the identity of all of the directors and company secretary of a company under section 3 of the same act. Local authorities have the power to prosecute under the Act for failure to supply this information.

Deposit Money

Except for tenancies not covered by the statutory TDP deposit requirements of the Housing Act 2004, agents are bound by law to protect any money accepted as a tenancy deposit from a tenant - these provisions are set out in more detail in Chapter 10. The agency agreement should give the agent actual authority to take a deposit from a tenant at the beginning of the tenancy and hold it under a relevant deposit protection scheme as applicable. Deposits need not be protected where a tenancy is excluded from the TDP provisions - e.g. common law tenancies. If the agent goes bankrupt or into liquidation, the landlord remains liable to return the deposit to the tenant.

The Agency Agreement

This section looks at the main issues in establishing a formal contract between the agent and his principal (i.e. the landlord of a property) in the management of property. This agreement is known as the agency agreement (although it may also be referred to as 'terms of business' or 'management agreement')

Where an agent does not undertake management (e.g. let-only situations), the responsibility undertaken by an agent will be significantly lower. Similar principles will apply to the drafting of a 'let-only' agreement but the scope will be more limited.

Purpose

The agency agreement is one of the most critical legal documents in any letting business. The agreement should define the duties of the agent very precisely, and the level of fees and charges that the firm may make to its client in return for these services. A well-drafted agreement assists both parties; the scope of the service will be clear from the outset, and disputes relating to charges or respective responsibilities can be resolved in many cases by reference to the original agreement. Furthermore, the value of the firm's portfolio of properties can be very significant and the agent must take measures not to carry liability for any mishap which is outside his control (e.g. damage to the property by tenants).

The requirement for a formal and carefully written agreement is well understood by authorities in the property management sector. Indeed, most of the professional associations for property management (e.g. NAEA, ARMA, ARLA) now make it compulsory for their members to have signed such an agreement with all clients.

The agency agreement also provides the agent with the formal authority to carry out the various tasks of property management. It also includes various indemnity clauses so that the agent is not held responsible for events outside his/her normal control.

Legal Context

The law of agency has developed over several centuries; with many of the common law rules being derived from the volumes of case law on the subject. Clearly, the reason that many of these cases came to court was that no formal agreement existed between the parties, or any agreement that did exist was not sufficiently watertight to avoid the conflict in the first place. It is therefore very important that the agreement between the agent and the principal has been carefully drafted so that issues can be resolved without recourse to expensive litigation through the courts.

An agent acting without a written agreement or beyond the scope of his authority risks entering the so-called 'inability minefield'. Where the agent carries no written or express authority, then the doctrine of usual or customary authority will generally apply to agency relationship; i.e. what is usual or customary in the type of business involved. Some essential principles of the law of agency were covered in the earlier section in this chapter and will help us in understanding the operation of agency in relation to the management agreement.

When express instructions or written agreement exist, then the principles of usual authority may, as between principal and agent, be restricted or completely excluded. Where the written agreement or authority conflict with what is usual in the business in question, then under the law of agency, it is the express orders which prevail.

Statute may also determine or even override aspects of the relationship between agent and principal. As we shall see, the new European Directive on Unfair contracts allows, where there is doubt about the fairness or meaning of a written term in a contract, that the interpretation be resolved or even changed in favour of the consumer.

Drafting the Agreement

Some agents starting in business will procure a similar agreement from another agent and use this as the basis for their own agreement. Whilst this may suffice, such an agreement may easily contain errors or omissions, or simply not suit the method in which the new firm conducts its business. Once entered into, the agreement will create a legally binding contract between both parties and any mistakes could be very expensive. It is therefore recommended that you take professional advice from a legal specialist with experience in this field throughout the drafting process.

The notes within this section will assist agents in the drafting of a typical management agreement and provide advice on some important points of law that should be included as improvements to an existing agreement. The actual process of drafting this type of agreement will greatly assist the firm in clearly understanding its contractual responsibilities and often entails a thorough examination of the way the firm should conduct its business and set its fee structure. The agreement should aim to be fair to both parties yet ensure that the firm is adequately compensated for ALL the activities that are necessary in providing the service. Furthermore, the agreement should act to limit the liabilities carried by the firm (or individuals) in pursuance of its duties to what is reasonable.

It should also be mentioned that the drafting process is ongoing; the firm should be regularly reviewing its systems and looking for improvements. Invariably, a firm will identify refinements in its procedures or review fee levels from time to time.

Offer and Acceptance

The law of contract defines a relationship between the agent and principal such that the management agreement and any other information that the agent provides to his client constitutes an *offer*. Some form of acceptance should also occur for the contract to be binding between the parties; a written *acceptance* of the agreement by way of the client's signature is the preferred method. It is quite valid to establish a contract between two parties *verbally* in the same way but the dangers of doing this have already been highlighted. It is therefore of paramount importance that the management agreement has been signed by both parties at the earliest opportunity before accepting instructions to let or manage a property.

Structure and Style

There are several fundamental rules:

1. Be consistent in the use of names; do not refer to the 'owner' in one section and 'Landlord' in another if it is intended that they are the same person. It is a good idea to use capitals for each reference to the main parties or concepts in the agreement (e.g. Landlord, Property etc.)
2. The agreement should be written in plain and simple English that can be understood by the layperson. Check for ambiguity; you should reread each paragraph carefully to ensure that a different meaning could not be implied by the wording.

Distance Contracts/Cancellation of Contracts

Where the agent cannot be present in person upon signing and the Landlord is a consumer the agreement will need to be drafted well in advance and sent by post. In such cases, the practitioner should be aware of the effect of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (and previous consumer contract legislation). From a practical point of view, the Regulations require that, where agreements are concluded 'at a distance' or away from the agent's usual trading premises, the consumer is provided with a cooling-off period of fourteen working days during which s/he can withdraw from the contract. One precaution, therefore, is to ask the 'distance' consumer landlord to sign the agency agreement at least fourteen days in advance of the start of the agency. A copy of the required notice is now attached to the end of the example agency agreement. *This can be removed where not relevant.*

Summary of Service

It is good practice in the agreement to provide a comprehensive summary or list of the duties or services that are to be provided under the standard management service. In this way, should a dispute occur, it will be possible to look to this summary to decide whether a particular action (e.g. checking-out the property at the end of a tenancy) is included as standard or subject to an extra charge.

Scale of Fees

The letting agent's remuneration is generally based on a percentage of the rents received (or even on rents due), plus various additional costs for setting up a tenancy, drafting inventories etc. In setting out your scale of fees, it is important to try and consider all common costs that may be charged to the landlord. It is good practice to give a client notice of any such costs that can be fixed in advance and if a particular item is not listed and costed, the client may be led into the mistaken assumption that such costs are included within the standard service.

There is an important distinction to be made at this point between the 'rents received' and 'rent due' method of calculating management fees. Many agents charge management fees as a percentage of rent collected or received (e.g. '15% of the rent collected'). The drawback of this method is that the agent doesn't get paid if the tenant defaults on the rent payment. Yet it is in just this situation that the landlord relies most on the agent's expertise to carry out all the extra work involved with chasing up defaulters and issuing warning letters. Unless the agent feels obliged to carry the risk and costs on behalf of the landlord, it seems more sensible to specify that fees should be calculated on rent due.

Many agents also ignore minor costs which can be expensive in the long run. For example, an agent may from time to time be asked to arrange for the duplication of keys and he should include a reasonable allowance when doing so for his administration time. Although the actual duplication cost may be minimal, the agent spends time and travel expense in visiting his nearest locksmith. That locksmith may be unable to copy one of the keys in question thus entailing further lost time in finding an alternative supplier. A visit to the property may also be necessary to check the new keys. On a bad day, an hour or two could easily be expended.

The agent should therefore give thought to a fee structure for many common items:

- Drafting of the inventory
- Providing copies of agreements and other documents
- Tenancy renewals
- Redirection of mail (especially overseas)
- Faxes and overseas telephone calls
- Duplication and testing of keys
- Issuing statutory notices
- Administration of Overseas Tax
- Administration of major works

Minimum Charge

Clients are often puzzled by the inclusion of a minimum fee specified within the scale of charges yet this provides an important protection for the firm against premature termination. The landlord will have certain rights to termination (see section below) but the agent will wish to protect against any sharp practice; e.g. where a landlord terminates the management agreement directly the tenant has been found and installed into the property. This minimum fee or penalty fee then acts to re-imburse the agent for the costs of advertising the property and the administration in setting up the tenancy.

If agents wish to guard against the risk of multi-agency (and the subsequent withdrawal of an instruction prior to letting a property) then this type of fee might sensibly be demanded in advance of accepting instructions.

Authority

The level of authority assigned by the principal to the agent should be clear within the agreement. The authority may, for example, include:

- authority to collect rent on behalf of the landlord
- authority to sign the tenancy agreement on the landlord's behalf (especially if landlord is overseas)

In the same vein, you should also seek confirmation within the agreement that the landlord in turn has authority to rent the property, is the true owner of the property, and has received permission from any mortgagee or head landlord to rent the property.

As a further safeguard for the agent, it is good practice to request within the management agreement that any instructions to the agent be made in writing. In this way, it will be difficult for a dispute to arise as to whether instructions had been received on a specific matter, and the exact nature of these instructions.

Indemnity

As a general rule, an agent is entitled to be indemnified by his principal against any losses and liabilities incurred in carrying out his authority subject to any agreement made between the parties to the contrary. However, this is not an area to be left to chance and it is prudent to reiterate the message by including an indemnity clause in the agreement. The Letting Centre example clause provides a general indemnity clause for agents. As the clause is general to ensure it covers liabilities incurred as a result of the Agent providing services to the landlord some landlords may require a more specific indemnity clause such as the example set out below:

3.4. The Landlord agrees to indemnify the Agent against penalties and associated costs levied on the Agent in respect of non compliance of the Landlord with his legal duties in connection with the Property. The Landlord also agrees to indemnify the Agent for any tax liability levied on the Agent in connection with the let Property including any tax payment, related interest, penalty or fine (whether civil or criminal).

An agent is not entitled to be indemnified against any losses incurred in carrying out an unlawful act but this rule will not operate against him if his part in the transaction is innocent.

In *Adamson v Jarvis* for example, an auctioneer sold goods on behalf of a person who in fact had no right to authorise the sale. The auctioneer, who was successfully sued by the owner of the goods, was entitled to recover the damages and his costs from the principal.

An agent will not be able to hide behind an indemnity clause in order to avoid responsibility for ensuring furniture and appliances in a property are safe (See Safety Regulations). The agent is required to brief his client fully as to any risks or regulations in relation to a particular business. Regarding the letting of property, it remains to be tested in the courts whether, by doing this, the agent would be indemnified of liability from prosecution.

Deposits and Payments

It is important to state in the agreement that the agent has authority to accept rent and deposit money on behalf of the landlord, and in what capacity any such deposits are to be held. Deposit money accepted by an agent is commonly held in one of two main ways:

*as 'agent for the landlord'

*as 'stakeholder'

It is important that an agent clearly understands the difference between these two methods (see section on 'Deposits' in chapter 10).

As 'agent for the landlord' the agent is obliged to take the landlord's side in any dispute (even if the landlord is behaving totally unreasonably) whereas as 'stakeholder' the agent may act as a neutral intermediary in deciding between any conflicting claims. As an intermediary, the agent may be liable for his decision to either party and may therefore be advised to define an arbitration procedure to be followed if a dispute cannot be resolved (e.g. 'a dispute may be referred for final arbitration to the RICS'). If no agreement has been made with regard to the acceptance and holding of deposit money, then it will be assumed that any such deposits are held by the agent as 'agent for the landlord'.

Regarding the agent's remuneration, an agent may in law deduct whatever is due to him in respect of money by way of a commission and expenses. Many agents add this authority in their terms and conditions but it is strictly unnecessary.

Regarding the payment of rents onto a landlord, the agreement should seek to define the process for this. E.g. 'we aim to forward any rent payments to our client within 15 working days of receipt'. Still on the subject of rent payments, this may be a good place in the agreement to make reference to the Taxes Management Act 1970 (TMA), Inland Revenue NRL scheme and the agent's requirement to deduct tax at source for cases where the landlord resides overseas. Again, this precaution serves merely to inform the landlord - TMA already provides the legal basis for agents to do this.

Maintenance

As a general rule, an agent must perform personally what he has undertaken to do, in accordance with the maxim '*delegatus non potest delegare*' (meaning simply that agent should not delegate those tasks that he has agreed to undertake). If the agent will need to co-ordinate maintenance and other works with third parties, the management agreement should contain the authority for the agent to instruct such contractors on behalf of the landlord, and in accordance with any pre-set limits or other criteria set by the landlord.

It is good practice to agree an authority to spend up to a pre-set figure (e.g. £100) on any single item of repair or maintenance. This is useful if you do not wish to seek authorisation from the landlord on all minor issues (especially if the landlord is overseas and difficult to contact).

There is a debate as to whether an agent should charge a premium on all maintenance invoices. If such work is handled 'without liability' and costs passed onto the landlord without profit, then it is arguable that the agent escapes liability if a contractor carries out substandard work. Where the agent profits from the transaction, however, the agent may accept at least a degree of responsibility; a landlord could easily argue that the profit element is accepted in return for the proper supervision of the work. For small repairs, the taking of commissions is often uneconomic; but for larger projects the agent may wish to declare a supervision charge to cover his administration time in overseeing the project, arranging access etc.

Inspections

Should the firm undertake to provide inspections throughout the tenancy, then this may be cited in the agreement. A firm providing such a service might be advised to state in the agreement that such inspections are of a limited nature (if this is the case) in order to verify the general good order of the tenancy and do not constitute a complete check of every item in the property.

Emergency Powers

In certain situations, where the property or interests of the principal are threatened by some sort of emergency, or the principal cannot be contacted by the agent on some important issue, the agent may in law act beyond what appears to be the limits of his authority. The powers of a shipmaster to act on behalf of the shipowners represents a wide application of this type of

authority. Yet it cannot be assumed that every emergency can be used to justify this so-called *agency of necessity*. In documented legal case (*Hawtayne v Bourne*), miners who had not been paid obtained warrants of distress enabling them to seize the mining company's machinery. The manager of the mine on his own initiative borrowed money from a local bank to pay the arrears of wages and thus avert the distress. The court held that he could not justify this action on the ground of necessity.

From a managing agent's point of view, this is more likely to happen for overseas landlords, and the standard authority for repairs expenses should be agreed in advance at an appropriate level that agency of necessity is only a rare resort.

Safety Regulations

The letting of property is now closely regulated with respect to consumer safety, and there are important provisions relating to the safety of gas and electrical safety. It is the agent's duty, as a professional in the business, to make the landlord aware of any such regulations and risks. The various safety regulations should be brought to the landlord's attention and it is advisable for the agreement to include some sort of warranty by the landlord and that he or she is aware of the relevant regulations and that the property complies with them.

Unfair Contract Terms Regulations

Care must be taken not to include onerous terms in the agreement which tie the principal beyond what would be reasonable. A common example of this situation is where a letting agent charges a landlord a 'Let-Only' fee for finding a tenant (e.g. 10% of rent due over the term) and demands that the same fee becomes payable on the renewal.

The Consumer Rights Act 2015

The Consumer Rights Act (CRA) came into force on 1st October 2015 and revokes the Unfair Terms in Consumer Contracts Regulations 1999 and parts of the Unfair Contract Terms Act 1977 which relate to contracts between a business and a consumer. The CRA applies to all notices or terms in consumer contracts (with the exception of what might be termed 'core provisions' or provisions which refer to the adequacy of price or remuneration).

The CRA stipulates that all terms in consumer contracts must be expressed in "plain and intelligible language", the test of unfairness will be limited to those terms, apart from core provisions, such as price, where these are prominent and transparent. It is worth remembering that any term which has been drafted in advance, so that the consumer has not been able to influence its substance, (i.e. a standard terms and conditions document) will be subject to the test of unfairness. If a term in a consumer contract is held to be unfair, then it is not binding on the consumer, although this does not mean that the contract will automatically be terminated. If it is capable of continuing without the unfair term, it will still bind the parties. For more information, see Factsheet No. 10.

Variation

Make provision in the agreement for terms to be varied by way of written notice to the client. In this way, you can then make any changes in future and be entitled to vary the agreement.

Termination

The principal is, as a general rule, entitled to revoke the agent's authority at will in the absence of any specific provisions in the agency agreement. Revocation may take any form; verbally or by letter. Many property agents make it very difficult for a principal to terminate the management agreement prior to the end of the tenancy and it is open for discussion whether such an agreement would be enforceable under the unfair terms regulations. If a client can prove that the service provided by the agent is unsatisfactory, then it possible that a court would disregard any obligation to continue. Again, if the agreement is made purely for the period of the tenancy, then thought needs to be given to the issue of renewals and how they will be carried out.

If the management agreement is intended to be ongoing rather than for the defined period of a tenancy, then the agent is advised to specify a (reasonable) notice period for termination within the agency agreement. Similarly, the inclusion of a 'minimum fee' or similar charge as noted previously prevents abuse by early termination.

Finally, on the subject of termination, any such agreement is automatically brought to an end by the death, bankruptcy or even insanity of either party. Where the principal is a limited company, its bankruptcy and subsequent winding up acts in the same way as the death of an individual (see below).

Death of Principal

On the death of the principal, the agency agreement will automatically terminate. This in turn terminates the agent's authority, so that the principal's estate is not bound by any subsequent acts of the agent, even if the principal's death is not known. If the agent continues to act, he becomes liable to the estate for any loss which results.

With respect to property, an agent acting for a deceased landlord is advised to contact the executor of the estate for further instructions before taking any further action on behalf of the landlord. Occasionally, the executor of the estate will need to issue (or authorise the agent to issue) notices terminating the tenancy so that vacant possession can be recovered. In time, the executor will normally sell the property or transfer the title to any beneficiary of the estate. At this stage, an agent will need to establish an agency agreement with the new owner if the property is to remain under the agent's management.

N.B. Where there is a change of landlord either by the landlord selling the property (conveyance) or by the landlord passing on the property through his estate (as above) during the currency of a tenancy, it is important to notify the tenant(s) of the new landlord's name and address details. This is an important legal requirement under section 3 Landlord and Tenant Act 1985. There is an example statutory notice in the Letting Centre's document pack.

Summary

In this section, we have tried to stress the importance to the agent of having a good management agreement and the key issues and situations that the agreement should address. So much for the theory. In practice, as we all know, parties are often eager to go ahead and such things get forgotten.

If you haven't been successful in getting the agreement signed at the initial instruction, then address the issue in a positive way. When you have found a suitable tenant, then confirm the fact in writing to the landlord and ask him to return the signed management agreement to you in order that you may proceed.

The Legal Rights and Duties of an Agent

Agents have certain legal rights that they are entitled to, such as remuneration, and are also required to comply with duties in their capacity as agent acting for the landlord. Although not a definitive guide, we shall consider the most important of the duties imposed upon agents together with the rights available to them.

Duty of Care and Skill

An agent is under a duty to exercise reasonable care and skill which will be examined in the light of all the particular circumstances of the case. From a professional liability point of view, this duty is one of the most important to consider. It holds the highest penalty since professional negligence claims can be costly in time and any awards for damages made if a matter was to go to court.

An agent or any firm involved in the management of property should not lose sight of the extent of the risks and the value of capital at stake.

Repairs to a property damaged by water escape following frozen or burst pipes can total several tens of thousands of pounds. A faulty gas installation could result in a fatality.

The duty of care and skill applies to a firm's obligations to both the landlord (when managing the property as agent) and tenants.

The Supply of Goods and Services Act 1982 section 13 implies this duty into all contracts as a term rather than a condition. N.B. This may override exclusion clause in a firm's standard terms and conditions.

This means it renders the agent liable to pay for loss suffered by the principal - it does not inevitably disentitle the agent to payment. This will depend on the seriousness of the agent's breach. This duty is subordinate to the duty of obedience so the agent cannot disobey an instruction by claiming to have acted in the principal's best interests. This of course can work in the agent's favour. If the agent carries out the principal's imprudent instructions to the detriment of the principal the agent will not normally be liable in negligence.

It has long been settled that, where an estate agent or letting agent is instructed to find a prospective tenant for property owned by his client, he must use reasonable diligence to ascertain that the person whom he introduces is a 'proper' tenant. If the agent fails in this duty, he may well be liable to his client, not only for loss of rent, but also for any damage which the tenant does to the premises.

In *Brutton v Alfred Savill, Curtis & Henson, (1971 218 E.G. 1417)*, for example, an office junior employed by the agents allowed a prospective tenant to take possession of premises without payment of a deposit or any rent in advance because he said that he had forgotten his cheque book. The tenant subsequently defaulted on rent payments and legal proceedings were required to regain possession. The landlady lost some £770 in unpaid rent and the cost of legal proceedings. It was held that, since the normal worldly estate agent would not have been taken in by this simple confidence trick, the young employee's gullibility amounted to negligence, and the defendants were therefore liable to their client for this loss.

In *Hellings v Parker Breslin Estates 1994*, the landlords wished to let a flat until such time as it could be resold. They were concerned that possession could be obtained at the end of the granted term. The landlords then proceeded to let the flat through the agents having explained the situation in full. In 1982, the agent granted a tenancy to a Miss B but later became dissatisfied with the tenant who had fallen in arrears with the rent. When possession proceedings were brought, it became clear to the owners that it was not going to be possible to recover the flat with vacant possession; Case 11 of the Rent Act did not apply unless the dwelling-house was originally occupied by the landlord as his residence and "is required as a residence for the owner-occupier ... ". The judge in this case held that failure by the agent to

explain the circumstances under which possession could have been obtained under Case 11 amounted to a failure of skill in their duty of care to their clients.

With the majority of landlords and firms now using the assured shorthold tenancy, there are fewer pitfalls. Yet agents should still take care, especially when dealing with non-AST tenancies where the protection afforded to the landlord can be substantially reduced.

Repair and Disrepair

Where an agent is employed to manage the property, the agent will normally be responsible for instructing tradesmen to carry out necessary repairs. Although, in law, the agent is not generally responsible for substandard work of contractors, an agent could be liable if the workmen were employed directly (i.e. as the agent's employees), or incorrect instructions were given to the subcontractor. Equally, there are potential liabilities to a landlord for disrepair and an absentee landlord relies on his agent to be diligent in performing these duties. If a tenant brought an action against a landlord in this context, the landlord might well sue the agent in turn for negligence.

Clearly then, the agent also needs to be aware of the duty of care owed by the landlord to the tenant when managing such issues. Failure to take expedient action may cause problems for landlord and agent as a result.

Landlords have a general duty of care when carrying out work to a property so as to avoid defects or damage to the property and danger of injury to the occupier. The landlord should use reasonable materials to ensure that any work done is effective. When a property is built or altered or its use changed there is usually an obligation to comply with building regulations. A person who is harmed by a failure to comply with the regulations may have an action in negligence unless the regulations state otherwise.

It would be impossible to cover all eventualities within a few pages and in many situations, the extent of the agent's duty of care will be far from clear. According to Murdoch, "Where an agent is engaged in a particular profession, it is by the standards of that profession that he will be judged". There is more in this generality than meets the eye; it means that a voluntary code of practice (although not legally binding directly) could easily be produced in court to evidence what is to be considered to be the 'standards of the profession'. The RICS Code of Practice for property management, is an example of this.

One topical example of this nature of this duty of care and skill is where the agent had employed a gas engineer to service and inspect a boiler, the agent should take care that a skilled engineer is appointed. If the repaired or serviced appliance subsequently became unsafe and it transpired that the tradesman was not professionally competent, then the agent could be held liable in part for not taking reasonable care when hiring him. (The fitter would also be criminally liable for working on a gas appliance without appropriate qualifications). In this situation, the measure of competence is fairly straightforward; the gas fitter must by law be Gas Safe registered. It is a simple and recommended procedure for an agent to verify this.

A landlord (or agent) can be in breach of the duty of care if he fails to act or respond promptly to a reported disrepair as we can see in case of *McCauley v Bristol City Council (1991)*. In this case the tenants reported a defective garden step. The Council as landlord failed to carry out repairs. The tenant fell and broke her ankle. The council were held to be in breach of duty of care. Tenant was awarded £4,500 damages.

Employed for Professional Expertise

It should be noted however that where an agent is employed for her or his particular professional expertise there may well be an implied obligation to warn the principal that certain instructions are clearly unwise. For example where a letting agent is instructed to disregard the provisions of the Furniture and Furnishing Regulations 1988 and to buy furniture which does not comply with the regulations. The agent in such a case should refuse to carry out this instruction in any event as it would be unlawful.

Fiduciary Duty

A fiduciary duty is a relationship of confidence or trust between two or more parties where one person acts on behalf of the other to manage assets such as a letting agent managing a property for the landlord. The two key fiduciary duties an agent owes to its principal is to not place themselves in a position where their own interests conflict with those of the principal and the agent must not profit from its position at the expense of the principal. To avoid a breach of these duties an agent can disclose any conflict or profit to the principal and obtain informed consent from the principal.

Fiduciary duties can be contractual or implied. Contractual duties may be expressly incorporated into a contract or expressly excluded from a contract but where these duties are not mentioned the agent will have implied fiduciary duties. The fiduciary duties are discussed in more detail below.

Duty of Obedience

Express instructions are paramount and any agent disobeying these will be automatically liable for any loss which is caused to the principal. This duty takes precedence over the duty to exercise all reasonable care and skill.

Two important issues stem from this point of law. Firstly, it is wise to ask for all significant instructions to be given in writing, both at the initial undertaking and throughout the management of a property. Verbal instructions are more prone to ambiguity and can be forgotten. Secondly, the firm's management agreement should define the professional services provided and what actions will be taken in certain situations. In this way, the definition of 'reasonable care and skill' will be less open to interpretation by any aggrieved client.

The only valid excuse for disobeying such express instructions are that they are unlawful, for example where your principal instructed you to deal with a firm in a country the UK was at war with.

This duty assumes that the instructions are capable of only one interpretation. If they are ambiguous and the agent acts upon a reasonable interpretation she is not liable merely if it happens to be the incorrect one.

Agent's Discretion

The instructions may be actually intended to allow the agent a degree of discretion. If so the agent will not be liable provided the discretion is exercised in a fair and reasonable manner. Clearly as Murdoch points out in his recent book on the subject of agency, "*At this point the agent's duty of obedience effectively merges with the duty to exercise reasonable care and skill*" (Law of Estate Agencies 3rd ed. 1994). It is difficult to give an example here because what is fair and reasonable will depend on the facts of the particular case. In such a case where it is adjudged that the discretion was exercised in the wrong way the agent will be liable for the losses to the principal, but it will not necessarily be a breach of contract or a reason for repudiation of the contract.

Duty of Loyalty

This arises automatically out of the fiduciary nature of the relationship between agent and principal. The underlying principle is that the agent must not allow personal interest or the interest of a third party to come into conflict with the interests of the principal unless the principal has full knowledge of the fact and gives consent.

This might apply, for example, where an agent was letting a property to a friend or relation. The agent has a conflict of interest and it is sensible for the agent to advise his client of the circumstances and obtain permission to proceed.

Where an agent has failed to disclose his personal interest, the principal may choose to set aside the transaction or to affirm it and claim the profit made by the agent.

Furthermore, the agent should not take secret profits (which are deemed to include bribes and commissions) without the prior knowledge and authorisation of the principal. The implication of this duty is that agents should declare any commissions that may be earned within their agency agreement or terms and conditions.

Duty of Personal Performance

As a general rule an agent may not entrust performance of the agency to any other person. In *Allam v Europa Poster Services 1968* the judge said that,

...where the principal does place confidence in the agent... (acts).. must be done by the agent personally unless either expressly or inferentially he is authorised to employ a subagent or to delegate the function to another.

Whether or not an agent is entitled to delegate depends on the scope of the agent's authority. For example a principal who appoints an agent to carry out certain tasks knowing that the agent does not intend to act personally will be taken to have authorised the appointment of a subagent. Authority may also be implied on the basis of what is usual in a particular trade or profession.

Duty to Account

An agent is obliged to pay over or otherwise account for all money in his possession where such money has been received from the principal; that which he receives from a third party to hand over to the principal, and that which he is deemed to receive on behalf of the principal (e.g. a secret profit). In connection with the agent's duty to account, it has been held that it is his duty to keep accurate accounts of all his dealings on behalf of the principal. If he does not, everything which is consistent with the proved facts is presumed against him. In accounting for such money received, the agent may deduct whatever is due to him by way of commission and expenses.

Where the agent has received six months' rent in advance the agent is required to pay the full amount less any agreed fees to the landlord. The agent cannot pay the rent to the landlord as it falls due each month unless the landlord and the agent have specifically agreed that the agent will hold the monies in a client account and pay the rent to the landlord monthly less any agreed fees.

Rights of the Agent

Remuneration

Remuneration may include either salary or wages of a person who is employed full time in the principal's business or the fees or commission charged by an independent professional. The entitlement will depend on the terms of the agency agreement.

If there is no express term, a right will be implied that a professional will be paid a reasonable sum for services rendered. No-one in business should rely on an implied term as to payment as the proving of what is a 'reasonable' sum can be fraught with difficulties.

If however you have been acting for a principal for a considerable number of years and you are asked to take on a transaction which is the same as previous transactions, and those transactions were paid in a way common to all of them, it will not be fatal to such a claim that the present transaction should be paid at the same rate, particularly where there has been no time for the formalities to be observed. This is a good example of the use of the custom and practice argument.

An agent will not be able to claim remuneration in respect of any unauthorised transaction unless the principal ratifies it at a later stage. Neither will remuneration be payable where the agent has been guilty of a breach of duty.

Reimbursement and Indemnity

The general rule is that the agent is entitled to be indemnified by the principal against any losses and liabilities, and to be reimbursed for any expenses which are incurred in acting on the principal's behalf. An agent who incurs losses or liabilities in performing an unauthorised act cannot claim reimbursement or indemnity in respect of these. Nor is an agent entitled to an indemnity for any losses which result from the agent's own failure to obey the principal's instructions, negligence, or other default.

Also, such indemnity does not override statutory obligations. For example an agent would not be indemnified where the agent was prosecuted under the Furniture and Furnishings Regulations.

Lien

The agent may be legally entitled to exercise a lien i.e. retain possession of the principal's goods until debts to the agent are paid. An agent is not in possession of goods if the goods are furniture in a flat or house. The valid exercise of a lien by an agent is only possible where certain conditions are met and although it is unlikely that a letting agent would have possession of goods they are detailed below for the sake of completeness.

1. The agent must be in actual or constructive possession of the goods in question. Constructive possession can be for example, where the agent has stored the goods elsewhere than on her premises.
2. The agent's possession of the goods must be both lawful and authorised. Anything obtained by misrepresentation is not lawful and authorised.
3. The agent must have obtained possession of the goods in the same capacity as that in which the lien is claimed. i.e. cannot be used to claim debts incurred before the commencement of the agency.
4. The circumstances in which the agent obtained the goods must not be inconsistent with a lien. This will be the case, for example, where the agent is only given possession of the goods for a specific or limited purpose such as where the agent is arranging carriage of the goods rather than being the carrier.

Powers of Attorney

A power of attorney is a deed, or legal agreement, by which a person confers power of another to act on behalf of the person granting the power. The person receiving the power is called the **donee** or **agent** and the person granting the power is referred to as the **donor** or **principal**.

A power of attorney operates under the law of agency, creating an agency relationship between the donor and the donee of the power (but according to more formal rules - largely governed by the Powers of Attorney Act 1971). The power authorises the agent to carry out acts on behalf of the donor and these acts or powers are often (but not always) specified. There is no statutory definition of the term which derives from attorneys at law, who acted for an absent creditor in court, producing a 'power of attorney' in order to receive payment from the debtor. Attorneys flourished until 1873 when they became solicitors.

Typical Uses

A power of attorney is often granted when a person is abroad or difficult to contact - for example a landlord living overseas for an extended period - but they can also be granted during short absences such as, for example, where a person is away on holiday and it is likely that action will need to be taken in the person's absence.

Powers of attorney are also commonly used to look after the affairs of elderly people who are, or may become, incapable of handling their own affairs.

Partnership agreements may contain a power of attorney; the partners appoint each other as their attorney to enable them to deal with partnership matters on behalf of each other.

Residential Agents

Residential agents must perform their mandate or duties in person. The instructed agent cannot delegate his duties or employ a sub-agent, except with the consent of his principal (*McCann & Co. v. Pow*, 1974) or where such employment is necessary for the carrying out of the agency (e.g. where an agent is a company which employs staff to handle the various administrative tasks of letting and management), or is customary in the course of business (e.g. instructing tradesmen to attend to the maintenance of the landlord's property).

While residential agents need authority of the principal to sub-instruct, preferably expressly granted in writing, it is useful for letting agents to obtain a power of attorney if they wish to act for their landlord in court - for example in a possession case.

Some courts are prepared to allow an agent to represent their client in court (the so-called 'right of audience') without a power of attorney, but many are not. In *Chesters Accommodation Agency v. Abebrese* (1997), the agent commenced possession proceedings in his name (rather than in the name of his landlord) and no power of attorney has been granted. In this case, it was held that the court is not obliged to grant a managing agent the right of audience in an action for possession and application was refused. The proper plaintiff is the person in whom the immediate reversion is vested, viz, the landlord.

N.B. Following a recent clarification of the court rules, it is clear that a power of attorney does not guarantee that a representative or agent will have a right to audience in court. However, many judges still seem willing to give an agent rights of audience - especially if a power of attorney can be produced in court. In many cases, however, a landlord may be obliged to employ a solicitor to present a case on his behalf in court.

Limited Powers

The power can be general or limited. If it is a general power of attorney, the donee will be empowered to do anything which the donor could have lawfully done. A limited power of attorney, on the other hand, might be more common with regard to the letting of a house, where the agent will have authority only to deal with this type of transaction, or for conveyancing transactions where a house may be purchased by a relocation company.

Granting a Power of Attorney

Anyone who is a solvent adult, of sound mind, can be granted a power of attorney. There is no statutory format for a specific power of attorney, although there is for a general power under Schedule 1 of the Powers of Attorney Act 1971 and for an enduring power under section 2(2) of the 1985 Act.

For letting and managing agents a specific power would be of most value where the client is overseas or for some reason is unable, or does not wish, to attend to his affairs.

All powers of attorney must be executed by deed and witnessed by two persons who are not donees of the power (a deed is simply a formal legal document, clearly identified on the face of it that it is intended to be a deed, signed by the donor and witnessed by two persons).

Stamp duty is also payable on the deed. There is no requirement that the power be lodged with anyone and there is a presumption, provided it appears genuine, that it was rightly granted; the onus of proof being upon the party who alleges that it was not. Section 3 of the 1971 Act provided for copies of the power to be certified by a solicitor or stockbroker.

A specific power should be wide enough to encompass all that may be required to look after the landlord's interests where he is overseas, or does not wish to attend his affairs. Specifically, authority should be granted to the letting or managing agent for expenditure on out-goings, repairs (perhaps not to exceed a stated sum), advertising and other disbursements in the event of a void, and for any legal or other expenses incurred in maintaining or defending the landlord's interests in the property, including insurance and other claims, all reasonable expenses being deductible from rent received. In addition, the agent should be specifically authorised to appear and prosecute or defend any matter concerning or touching the property, either in person, or by employing a solicitor.

Execution of Documents

Once granted, the agent may sign and execute documents (such as tenancy agreements) with his own signature, and, if desired, in his own name. Any document executed or action taken in this manner is as effective as if executed or done in the name of the donor of the power.

Revocation and Expiry

Apart from certain irrevocable powers of attorney (which do not normally affect letting and managing agents), all powers whether special or general, may be revoked by the donor at any time. Revocation may be express, or occur by implication where the donor grants a new power to a different, or even the same person. Obviously, the power of attorney will cease when the occurrence of the event which has been specified has been fulfilled. Death or bankruptcy of the donor, or donee, also revokes the power.

Many powers of attorney are granted without any time limitation. However, the power may be granted for a specified period, either specified as a period of time, or on the happening of a specified event.

In the case of *Danby v. Coutts*, 1885, the donor went abroad and granted a power of attorney to take effect whilst he was abroad. Although the duration was not specified, the power was only exercisable whilst the donor was abroad.

Mental Incapacity

As mental incapacity revokes the power of attorney at common law, the Enduring Powers of Attorney Act 1985 was enacted to bridge the gap between the donor granting the authority when of sound mind, but subsequently suffering mental illness. There would clearly be a delay between suspicion and finding of mental incapacity and the appointment of a curator, or receiver, by the Court of Protection, to take charge of the donor's affairs. So, section 1 provides that an enduring power will not be revoked by 'any subsequent mental capacity of his.' Although great tact and care must be taken, such a safeguard would be valuable in the case of an elderly client or one of presently sound mind, but victim of a mentally debilitating disease.

Illegality

If the performance of a power of attorney involves the commission of an illegal act, then the power of attorney will terminate.

For example, if the agent is asked to let out a property which is not safe, and the landlord is not agreeable to have the appropriate remedial works done to render the property safe, then the agent may consider that the power is terminated and, with it, the agent's duty to act.

Is a Power of Attorney necessary?

In many situations, an agent can do all that is required under the general law of agency, authority being granted either orally, or in preference, using a written management or agency agreement. There are, however, specific situations where a power of attorney is necessary or preferable:

*where the agent wishes to grant a lease for more than three years (or carry out other property transactions where a deed is required (e.g. conveyance of property)

*where an agent is required to represent a landlord in court

*where the landlord is intending to go abroad

*where there is a possibility of the donor becoming mentally incapable

Where there is a possibility of the donor becoming mentally incapable, an enduring power of attorney should be granted - otherwise, under common law, the power would be revoked upon the supervening mental incapacity of the donor. If it is intended that the power should be enduring, the donor needs to grant the power of attorney to the donee using a prescribed form.

Example power of attorney authorising a letting agent to let and manage property

This limited power of attorney is made this day of 20...

by

of

I appoint

of

to do all or any of the following acts:

1. To grant a tenancy or tenancies of [insert address of property] for a term not exceeding years on such terms as my attorney thinks fit.
2. To receive the rent and to apply the rent in discharge of the obligations of the landlord.
3. To take such proceedings as may be necessary to recover any rent or to enforce any of the obligations imposed on the tenant or to recover possession of the property.
4. To arrange for the property to be inspected on a regular basis and to carry out any maintenance as my attorney thinks fit [up to a limit of £ per item of repair]

Signed as a deed and delivered:

Witness:

Witness Address:

Witness Occupation:

Third Parties

In contract law the general rule is that where an agent enters into a contract on behalf of a principal and there is a dispute on that contract the agent 'drops out' of the contract and the third party can sue the principal directly or vice versa. Problems arise where the contract is not clear as to the status of all the parties and some words have been found to be more effective than others at describing the capacity of the person signing the contract.

Where the agent enters into a contract without revealing the existence of a principal the agent is regarded in law as contracting personally. To avoid any doubt the words "for and on behalf of" should be used where the agent enters into a contract on the principal's behalf. Other words of explanation such as "on account of" have been held by the courts to be insufficient. However, the courts will take into account the context of the whole of the contract to determine whether the words used are sufficient to show that the person was acting as agent.

Where it is made clear that the agent is acting as agent even where the principal is not named and the agent signed in her own name this is sufficient to show that she intended to act as agent.

Good Practice Guide - The best way to ensure that there is no doubt is to describe the nature of the parties in the contract and to sign as above. *"If in both places the agent is referred to as agent it will be almost impossible to regard her as the contracting party but if there is no mention in either place it will be almost impossible to deny that she is the contracting party".*

Where the tenant has signed a tenancy agreement in good faith believing the agent to be the landlord, the tenant can sue as if the agent were the landlord. The real landlord in such a case is called the undisclosed principal and even if the undisclosed principal appears at a later stage and identifies herself as the landlord the agent is still liable.

Evidence of Intention

When disputes bring the matter to court the terms and conditions of the agency is determined by the court deciding what the intention of all the parties was at the time the contract was entered into. As always in court the best evidence of this is the written document(s) signed by the parties. Usual custom and practice of the trade or profession, or of the particular parties will also be considered if necessary as already mentioned above.

Misrepresentation

Great care must be taken when making representations to tenants - especially during the pre-contract negotiations in relation to a new tenancy. A significant misrepresentation by the agent will be considered in the same light as if the landlord had made the misrepresentation directly. If the tenant has relied on such representations, and they are material to the tenancy (e.g. the promised availability of a parking space which is subsequently withdrawn) then the tenant may be granted remedies in law. For example, he may be permitted to withdraw from the tenancy or claim damages from the landlord.

In addition, the agent is also bound by additional duties with respect to representations made in his business capacity. Under regulations introduced in 2008 (Consumer Protection from Unfair Trading Regulations) a trader is under a duty to act fairly to consumers. The trader's behaviour should not cause an average consumer to take a transactional decision he would not have taken otherwise. This duty includes both explicit statements and also material omissions. For example, an agent could be guilty of an offence if he knew that a property had an ongoing history of pest infestation that could materially affect the tenant's enjoyment of the property, and failed to disclose the fact before the tenant took occupation. Agents and commercial landlords can no longer hide behind the principle of caveat emptor - let the buyer beware - and penalties can now be applied to any business or individual found committing an offence under these regulations.

Accommodation Agencies Act 1953

The Accommodation Agencies Act 1953 penalises agents if they charge a fee to take details from a prospective tenant and register that person on their books as seeking a tenancy, or take money in return for providing a prospective tenant with addresses of places to let. In 1974 the House of Lords decided that this part of the Act did not create an offence if accommodation is actually taken. If the introduction arranged by the letting agency is successful so that the tenancy is entered into, payment by the tenant to the agency is not unlawful. No offence is committed where the agent demands or accepts payment from the owner of the premises where the agent is genuinely acting for that owner. The Act also creates an offence where 'an agent issues any advertisement, list or other document describing any house or dwelling as being let without the authority of the owner of the house or his agent'.

This puts the obligation on the agent to check the title of any property being offered to let. Thus, if a landlord approaches an agent, asking the agent to let his property, it is prudent for the agent to make sufficient checks to be assured that the landlord is in fact the true owner of the property or if not landlord, a person who has the appropriate authority to let. Such checks might take the form of asking to see the deeds to the property, relevant correspondence with a building society or other lender, or conducting a search at the land registry. An agent was prosecuted in 1996 for offering a house for let where the purported owner was in fact merely a local authority tenant, and the dwelling was a council house.

For more information on the agent's duties and obligations under this Act, see Chapter 7 (The Accommodation Agencies Act 1953) and Factsheet No. 16 (in Appendix).

Summary

Agents should be unequivocal in their dealings both with the client or principal, and also in dealings with third parties. Many agents have faced problems in the past because of the lack of a written agreement, or as a result of sloppy and ambiguous wording in contracts. If in any doubt, it is better to clear the matter up before the act is done, using plain language and putting everything in writing where at all possible. Without this, the agent runs the risk of a dispute ending up in court with a judge deciding the intention of the agreement and what was signed or not signed, said or not said.

The Housing and Planning Act 2016

Banning Orders

The Housing and Planning Act 2016 (Banning Order Offences) Regulations 2017 introduce banning orders for landlords and letting agents in England who commit a serious offence from 6th April 2018. Under the regulations landlords and letting agents can be banned from engaging in letting agency or property management work if they are convicted of a banning order offence. The regulations set out a list of offences which could result in a banning order being issued which include:

- Unlawful eviction and harassment of occupiers;
- Violence for securing entry;
- Failing to comply with an improvement notice or prohibition order;
- Offences relating to Houses in Multiple Occupation and licensing offences;
- Providing false or misleading information;
- Fire safety and gas safety offences;
- Offences under the Immigration Act 2014.

The local authority can apply for a banning order to be imposed for at least 12 months. Breaching a banning order will be an offence and could be subject on summary conviction to imprisonment not exceeding 51 weeks and/or a fine. The local authority can also impose a civil penalty as an alternative to prosecution up to an amount of £30,000. The Housing and Planning Act 2016 also introduces a database for criminal landlords and letting agents who will automatically be added to the database if they receive banning orders. The database will be held centrally by the Department of Communities and Local Government.

Client Money Protection Schemes

The Housing and Planning Act 2016 made provision for regulations to be introduced in relation to client money protection schemes. From 1st April 2019 letting agents in England who hold money on behalf of a client in the course of letting agency work or property management work must belong to an approved or designated client money protection scheme in order to afford protection to that client against loss, theft, misappropriation etc. of their funds (Regulation 3(1) of [The Client Money Protection Schemes for Property Agents \(Requirement to Belong to a Scheme etc.\) Regulations 2018](#)). Regulation 3 also requires that the level of membership obtained must provide compensation to an amount not less than the maximum amount of client money that the agent may from time to time hold (Reg 3(2)).

Letting agency work is defined in [section 54 of the Housing and Planning Act 2016](#) and property management work is defined in [section 55 of the Housing and Planning Act 2016](#).

In accordance with Regulation 4(1) a letting agent must obtain a certificate confirming the membership and display the certificate:

- at each of their premises in England at which the agent deals face-to-face with persons using or proposing to use the agent's services as a property agent; and
- at a place in each of those premises where it is likely to be seen by such persons.

Letting agents must also publish a copy of the certificate on their website (if any) and produce a copy of the certificate to any person who may reasonably require it, free of charge.

If the agent's membership is revoked or the agent ceases to be a member of an approved scheme and becomes a member of a different approved scheme each client must be notified, in writing, within 14 days of the event (Reg 4(2)).

A local authority in England may impose a financial penalty where they are satisfied beyond reasonable doubt that the agent has breached the regulations (Reg 9). Before imposing a financial penalty on an agent the local authority must serve a notice on the agent of its intention to do so within six months of the local authority having sufficient evidence of the breach (Reg 10). Where the breach is continuing the notice can be served at any time when the breach is continuing or within six months from the last day on which the breach occurs. The agent may make written representations to the local authority within 28 days from the date the notice was served.

A fine of up to £30,000 can be imposed for a breach of Regulation 3 (Reg 6) and up to £5,000 (Reg 7) for a breach of Regulation 4. The agent will not be in breach of regulation 4 where they have taken all reasonable steps to obtain a copy of the membership certificate but the scheme administrator has not provided it.

The Homes (Fitness for Human Habitation) Act 2018

[The Homes \(Fitness for Human Habitation\) Act 2018](#) amends the Landlord and Tenant Act 1985 and since the 20th March 2019 it is an implied term in a tenancy agreement that a landlord (or an agent acting on their behalf) in England provides the property as fit for human habitation at the beginning of the tenancy and that it will remain fit for human habitation during the tenancy. The implied term does not require the landlord to:

- carry out works or repairs for which the tenant is responsible e.g. the tenant's duty to use the property in a tenant like manner;
- rebuild or reinstate the property in the case of destruction or damage by fire, storm, flood or other inevitable accident;
- keep in repair or maintain anything which the tenant is entitled to remove from the property;
- carry out works or repairs which would put the landlord in breach of any obligation imposed by legislation;
- carry out works or repairs requiring the consent of a superior landlord or other third party in circumstances where consent has not been obtained following reasonable endeavours to obtain it;
- carry out works or repairs where the property is deemed unfit for human habitation as a result of the tenant's own breach of covenant.

The provisions applied to new tenancies (including renewals) granted on or after 20th March 2019 and a tenancy which was a fixed term tenancy and became periodic after 20th March 2019. The provisions now also apply to existing periodic tenancies (which began prior to 20th March 2019) from 20th March 2020. The Government have provided a guidance document for landlords: [Guide for landlords: Homes \(Fitness for Human Habitation\) Act 2018](#).

As the legislation implies the covenant into a tenancy agreement it is not necessary to insert a clause within the tenancy agreement as without the clause the landlord would still be responsible under the implied term.

Money Laundering

Previously, letting agents have not been required by legislation to register with HMRC for anti-money laundering purposes unless the company is an estate agency who also arranges lettings or the landlord or letting agent is selling a property to an existing tenant. The Money Laundering and Terrorist Financing (Amendment) Regulations 2019, which came into force on 10th January 2020, now require letting agents who rent out property for a term of one month or more, at a rent which during at least part of the term, is, or is equivalent to, a monthly rent of £10,000 euros or more to register with HMRC for money laundering supervision. Letting agents that fall into this category will also be required to carry out a risk assessment and conduct training. Letting agents will also need to carry out client due diligence checks on landlords and tenants for money laundering purposes and put policies/procedures in place to satisfy the HMRC approval checks. The online system for letting agencies to register is due to open in May 2020 and [the Government have advised that businesses must register by 10th January 2021](#). Government have also confirmed that they will be providing updated guidance to assist with compliance but the guidance is not available at the time of writing.

For those few agents that fall within the regulations you may need to include a clause within the agency agreement requiring the landlord to comply with due diligence checks. See below for example wording:

The Agent is required to verify the identity of the Landlord and the Landlord agrees to provide proof of identification to assist the Agent with due diligence checks. Where there is suspicion or evidence of money laundering the Agent is required by law to report the Landlord to the National Crime Agency.

5. Further Information

The following products are also available from the Letting Centre at www.letlink.co.uk

Letting Centre Packs

The following packs are also available from the Letting Centre:

- Possession and Rent Arrears Pack
- Statutory Forms Pack
- Management Forms Pack

Information Leaflets for Landlords

The following information leaflets are available from the Letting Centre:

- L02 - A Brief Guide to Lettings and Tax
- L03 - A Brief Guide to Tax for Overseas Landlords
- L04 - A Brief Guide to Lettings and the Furniture and Furnishings Regulations
- L05 - A Brief Guide to Lettings and the Gas Safety Regulations 1994
- L07 - A Brief Guide to Lettings and Electrical Safety Requirements
- L08 – A Brief Guide to Condensation and Damp
- L09 – A Brief Guide to Landlord Repairing Obligations

Letting Handbook and Factsheets

The Letting Centre's Handbook is packed with useful information collated from our extensive library of statutes, regulations and other technical information. The Handbook guides practitioners through the various practical aspects of setting up tenancies, day-to-day management issues and the requirements for termination and gaining possession at the end of the tenancy.

