



Top of the pop-ups

Alexandra Townsend-Wheeler advises on the legal issues around granting rights to pop-ups and warns both landlords and tenants not to simply choose the quickest and cheapest way forward because the arrangement is short term



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While the 'pop-up' might seem a relatively new phenomenon, it is a concept that has been in use for some time. Traditionally, temporary shops and businesses were launched to coincide with seasonal events, to take advantage of periods of increased footfall and demand for specialist goods, for example in the pre-Christmas trading period. However, the pop-up approach really took hold of the property market following the 2008 recession when, as tenants frequently collapsed into insolvency, landlords were left with high numbers of retail vacancies.

The increasing subsequent success of pop-ups

has contributed to a partial revival of the UK's high streets. The report 'Britain's Pop-Up Retail Economy', issued by the Centre for Economics and Business Research in August 2015, estimates that there are almost 10,500 pop-up shops and businesses across the UK, which employ close to 26,000 people. At the time the report was prepared, the industry was valued at approximately £2.3bn.

Granting rights to pop-ups, even at a low rent, is an attractive prospect for landlords – it can assist with cash flow and safeguard vacant premises against squatters, and will often cover the basic costs for that property until a permanent tenant

can be secured. Further, the publicity surrounding marketing-savvy pop-ups can raise the profile of a landlord's estate, which may assist in attracting longer-term tenants on a more lucrative basis.

In particular, a genuine short-term letting of vacant property presents landlords with the opportunity to reduce business rates liability. Vacant non-domestic properties have the benefit of a relief period of three months (six months for industrial properties) after which full rates are payable by the property owner until re-letting. However, if the property is re-occupied for a minimum of six weeks, when it then becomes vacant again, the owner may claim a further period of exemption.

For new businesses, pop-ups provide an opportunity to test the market in a relatively low-risk, low-cost way. Businesses can determine if there is sufficient footfall in an area to justify longer-term occupation, and can potentially act as a 'shop window' to attract investors before pursuing a more permanent venture. For existing businesses, a temporary outfit can reinvigorate brands and enable engagement with customers in new ways.

The nature of the pop-up industry means that opportunities for a particular business or brand will often be time limited, so occupiers will want to complete the legal process quickly. The longer and more complex the process is, the more expensive it is likely to be. Both parties will be reluctant to incur significant legal fees for short-term arrangements.

Planning permission

First, the parties should consider whether the proposed use will be covered by an existing planning permission. The time and cost involved in obtaining planning permission for a material change of use could make the pop-up unviable. Following receipt of a valid planning application, the local planning authority usually has eight weeks to make a decision. If the parties consider that there is a risk of challenge, they may wait for a further six weeks after a planning decision before proceeding.

In May 2013, the government relaxed planning regulations to encourage businesses to take advantage of empty high-street properties. This allows pop-up retailers to use a property for up to two years for financial services, offices, restaurants, cafes, or retail in buildings designated as retail, financial services, offices, restaurants, pubs, takeaways, non-residential institutions, leisure, or assembly.

Additionally, planning permission is not required for any use of land that does not continue for more than 28 days in a 12-month period. This is one reason pop-ups often only stay open for four weeks or less, although clearly this benefit needs to be

balanced against set-up costs for such a short trading period.

If the pop-up will occupy less than 150 square metres in an existing commercial space, the local planning authority may accept this as a temporary flexible change of use. The business will need to notify the local planning authority and comply with any express requirements that it makes. The temporary use must be a single use, rather than for mixed uses, and further restrictions and notification procedures apply if it is a use class A4 drinking establishment.

Licensing arrangements

Occupiers also need to consider whether any further licences or permissions are required. For example, is a street-trading or sitting-out licence needed?

If regulated entertainment, such as the performance of a play, live or recorded music, an exhibition or indoor sporting event, or hot food and alcohol, is offered and the pop-up will last for more than one week, it will need to apply to the local licensing authority for a premises licence. For any venture lasting less than one week, only a licence to sell alcohol is required.

Due diligence

Due diligence on the property is likely to be limited, but in any event the following should be considered:

- Is the property registered at the Land Registry? Check the title for any matters which may prohibit or otherwise hinder the proposed use;
- Is the property charged? Does the landlord have the right under its facility documentation to permit the occupation and, if so, is the mortgagee's consent required? and
- Is the landlord's interest leasehold? If so, does it have rights under its own lease to permit a temporary occupation and use? Is the superior landlord's consent required? If the property is part of a larger estate, will the pop-up result in the breach of any non-competition clauses benefiting other occupiers?

Agreement type

It is key to ensure that a proper written agreement is put in place which, while proportionate to the length of the occupation, also safeguards the landlord's future plans for the space.

- **Licence to occupy:** The parties may favour a licence to occupy as they tend to be shorter documents and can be put in place quickly and cheaply. This option should be used cautiously – one of the key features of a licence is that it is a personal right to non-exclusive occupation. If it is not correctly drafted, the owner may inadvertently grant a lease instead, which can >>



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>> lead to occupiers obtaining exclusive possession and potentially security of tenure, when this was not the intention;

- **Tenancy at will:** With a very short-term pop-up arrangement (e.g. a two-week period), some might consider a tenancy at will appropriate, on the basis that it will be quick and inexpensive to put in place. However, a tenancy at will must, by its nature, not be given for any term and must be terminable at any time. If occupation for a given period is intended, there is a considerable risk that a periodic tenancy will be created, so a tenancy at will is probably best avoided; and
- **Short-term lease:** Although a more expensive option, the safest course for a landlord is a short-term lease. This will give exclusive possession to the occupier, but the tenancy can be granted outside the security of tenure provisions of the Landlord and Tenant Act 1954. With a fresh letting for a fixed term of less than six months, security of tenure does not arise, or otherwise it can be overcome by following the necessary contracting-out procedure. The landlord may want to ensure it benefits from a rolling break option, in case it secures a long-term tenant for the space or wishes to redevelop. An occupier might want to impose restrictions on when such a break is operable, so that key trading periods are not disrupted, but the landlord will need to consider the impact this might have on retaining the interest of a potential new permanent tenant. Regardless of term length, occupiers will want to ensure they benefit from a break option themselves in the event that the pop-up is not attracting trade or becomes financially unviable.

Financial commitments

An occupier will want an all-inclusive rent so it is aware of the total financial commitment at the outset and that it will not be liable for additional service charges, insurance costs, business rates, and utilities costs. Occupiers should also check whether they are required to pay VAT on the rent and any other sums due.

Landlords understandably will not necessarily be keen to agree to this, given the variable nature of these costs, and may insist that an occupier is at least responsible for rates and utilities in addition to the rent. If the service charge will be charged separately, the occupier should negotiate a cap on what it is required to pay. Occupiers will not want to contribute for repair and maintenance to the property for any period after they have vacated as such financial obligations could have an impact on the success of their venture.

Landlords may require a rent deposit as

additional security, particularly from start-ups with little or no trading history. The pop-up business may not have the cash flow for this in addition to the monies it has budgeted for rent and set-up. In this case, the landlord may want to consider obtaining a third-party guarantee or taking full payment of the rent up front instead.

Alterations and repair

If an occupier needs to carry out fit-out works to make the pop-up viable, it will want to minimise the requirement for approval of those works from the landlord (and any superior landlord) because of the limited time of occupation.

Landlords will require that the space is kept in good condition by the occupier, and that it is returned in the same state at the end of the term. An occupier will not want to redecorate or return the property in any better condition than it took it in, and may require an agreed photographic schedule of condition for evidential purposes.

Utilities and services

Utilities need to be connected from the date the occupiers take occupation so they are not in possession of an unusable property. As utility companies can take weeks to reconnect supplies, either the owner or occupier will need to make the necessary arrangements in a timely fashion. An approach will also need to be agreed between the parties as to what, if any, other services are needed for the use and occupation of the property.

Insurance policy

The landlord will need to ensure that its existing buildings insurance policy will cover the pop-up use.

Occupiers should also effect their own insurance for contents and against unexpected liability costs (i.e. public liability and employer's liability). This is often only available on an annual basis, meaning that they may have to overpay or suffer cancellation penalties, although some insurers have recently begun to offer specific 'pop-up insurance' to provide comprehensive cover on a short-term basis.

With landlords usually keen to permit short-term occupation of empty spaces, occupiers are likely to be able to negotiate favourable terms, which will provide a business opportunity with low overheads and no long-term financial commitment to specific premises. However, the risks with pop-ups are essentially the same as those for longer-term lease arrangements, so it is important for all concerned not to simply choose the quickest and cheapest way forward, merely because the arrangement is intended to be short term. As is always the case, it is a matter of balancing the interests of the parties in a cost and time-effective manner. **SJ**