

A practical guide to leases and licences in Jersey

Leases and licences may seem very similar but there are a couple of marked differences between the two. An agreement may purport to be a licence (and even contain confirmations from the parties that it will be deemed to be a licence). However, if:

- the terms of the agreement are indicative of a lease; or
- in practice, the licensee has enjoyed rights or benefits which are generally only granted under a lease;

then it may well be that the purported licence is deemed to be a lease, after all.

If a court is asked to assess whether a licence has become a lease, they will look at the terms of the document as well as the position "on the ground".

The table below lays out a number of hallmarks or defining features of leases and licences, for ease of comparison.

The provisions of leases and licences are very much driven by the individual circumstances and ambitions of the parties. There is, therefore, no "one size fits all". However, the elements below can be viewed as guiding principles.

Principle features

FEATURE OF LEASE	FEATURE OF LICENCE	FURTHER COMMENT
The grant of "exclusive possession"	No grant of "exclusive possession"	<p>Exclusive possession means that the landlord has granted an exclusive right to occupy, use and "possess" specific premises for a period of time.</p> <p>If a lease is granted, the tenant is entitled to occupy those certain premises by virtue of their right of exclusive possession. Subject to compliance with the terms of the lease, the tenant will tend to be able to exercise rights more akin to an owner of the land for a limited time.</p> <p>A licence does not grant exclusive possession. A licensee does not exercise the same level of rights as a tenant would under a lease.</p> <p>This difference is generally seen to be the defining and most marked difference between leases and licences.</p>

FEATURE OF LEASE

FEATURE OF LICENCE

FURTHER COMMENT

A set term (possibly with break rights)

Rolling licence with termination on notice

In order to avoid granting exclusive possession, licensors will tend to do one or more of the following in the agreement:

- ban the licensee using or occupying the premises for certain days of the year;
- reserve the right to move the licensee to another part of the licensor's property;
- provide for the licensor and any other person authorised by them to be able to use the premises during the licence period (provided it does not interfere with the licensee's rights of occupation); or
- provide for the licence to be terminated on short notice (generally the length of one payment cycle).

A lease is normally granted for a set number of years, although there are exceptions (including periodic tenancies and break rights for either the landlord or the tenant).

Licences are more likely to run indefinitely with either side able to terminate the licence on notice.

It is possible to grant a licence for a set number of years. However, this is not done with regularity to reduce the likelihood that (when combined with exclusive possession) a purported licence instead has become a lease.

Repairing obligations

Obligations to keep the premises clean and tidy

As the tenant of a lease is exclusively possessing certain premises, they are normally obliged to keep those premises in good repair and condition.

A licensee is not generally secure in the knowledge that they will be occupying the premises for a set period because the licensor is likely to be able to:

- terminate the licence; or
- require the licensee to move to a different area.

As such, licensees are not normally subject to substantial (if any) obligations regarding repair.

FEATURE OF LEASE	FEATURE OF LICENCE	FURTHER COMMENT
Comprehensive alterations clause	Bar against any alteration	<p>Generally, a lease will permit the tenant to make alterations to the premises, although such alterations are likely to be subject to conditions or restrictions.</p> <p>As with repairing obligations, in view of the licensee generally not having certainty as to the length of time they will occupy the premises, licences do not generally allow any alterations to be made.</p>
Detailed provisions	Principle restrictions only	<p>Given the likely lengthier period of occupation granted under a lease (and the additional rights afforded to tenants), leases will tend to be more detailed. Leases are designed to moderate a longer, more formal relationship between the landlord and tenant.</p> <p>Licences, which are generally less formal agreements that can normally be terminated on notice if a relationship sours, are more likely to be in shorter form.</p>

Benefits and drawbacks

ASPECT	LEASE	LICENCE
Flexibility and certainty	<p>A lease will generally grant the tenant a right of exclusive occupation for a set term. It is unlikely that the landlord will have a right to terminate the lease other than in circumstances where the tenant is in breach or where the premises have been damaged or destroyed.</p> <p>As such, the tenant is able to operate their business with increased certainty. This certainty can be invaluable when making long term investment decisions.</p> <p>Although a tenant may have rights to break the lease, they are normally subject to lengthy notice periods and occur only on certain dates throughout the term.</p> <p>Just as the landlord is bound to allow the tenant to possess the premises for the term, the tenant is bound to pay rent for the term. This arrangement reduces the amount of flexibility afforded to either party.</p>	<p>Licences generally afford a substantial amount of flexibility to both the licensee and the licensor.</p> <p>Licences are normally terminable on a short amount of notice, which allows licensees to operate their businesses knowing that they have an easy escape route if they want to relocate or wind down their business. Equally, licensees will often benefit from substantially less certainty than tenants of leases. It is common for licensors to reserve the rights to relocate licensees or to terminate on short notice periods. This may present issues when a licensee is planning their business investments.</p> <p>The usual ability to terminate licences easily allows the licensor to obtain a vacant property and remove troublesome occupiers from their property. On the other hand, the licensor is likely to lose some security over their income stream as opposed to letting their premises out under a lease.</p>

ASPECT	LEASE	LICENCE
Exclusive possession	<p>Tenants are granted exclusive possession of the premises, meaning that they will enjoy uninterrupted use. This affords them both certainty and control over their business premises.</p> <p>Landlords, however, are "tying up" the premises for the duration of the lease. They will normally only be entitled to access to inspect the condition of the premises or to carry out necessary works.</p>	<p>Licensees are not entitled to exclusive possession of the premises. Instead, the licensor may grant other rights of occupation to third parties or access the premises themselves.</p> <p>Whilst the licensor cannot impede the licensee's right to occupy, the possible access of other parties may present a disruption to the licensee's business activities.</p> <p>The licensor reserves some flexibility as to their onward use of the premises and the rights they may grant to third parties.</p>
Rights and obligations	<p>Given the nature of leases and the length of the relationship envisaged between the landlord and the tenant, it may be no surprise that a lease generally:</p> <ul style="list-style-type: none"> – creates more onerous obligations on both parties; and – grants substantially more wide-ranging rights to both parties. <p>Leases are prescriptive, by nature. They seek to lay out the rights and obligations of each party in almost all scenarios. A lease sets out the way in which the relationship should operate from start to finish.</p> <p>The detail contained in the lease provisions provides certainty to both parties.</p>	<p>Given the possibility that the licence may be terminated on short notice or that the licensee may be required to move to different premises, licences are in shorter form and contain fewer rights and obligations.</p> <p>For example, it is unlikely that the licensee will be responsible for repairing the premises, which reduces the licensee's potential liability. However, they are also less likely to be able to make alterations to the premises, which may impact their ability to trade in the way they may wish.</p>

This table has been prepared for information purposes only and does not constitute legal advice. Appropriate legal advice on specific matters should be sought by legal advisors qualified in the relevant jurisdictions. The property team at Bedell Cristin are qualified to advise on the laws of the British Virgin Islands, Cayman Islands, Guernsey and Jersey.

Stamp duty

It is usual for occupational leases of offices, retail units or hospitality premises to be granted for a term of nine years or under. Such leases are colloquially known as "paper leases"). There is no stamp duty payable on the grant of a paper lease or on a licence.

Leases which are granted for a term of over nine years need to be passed before the Royal Court and stamp duty is payable by the tenant. Stamp duty is calculated on the rent.

Legal status

In Jersey, the tenant of a lease does not automatically benefit from a right to renew that lease. However, a tenant who stays in the premises after their lease has expired (where the landlord continues to accept rent) may become a tacit tenant. This means that the old lease is deemed to have been renewed on the same terms (other than the length of the lease and any guarantees given under the previous lease). The landlord may serve notice on their tacit tenant to terminate the renewed lease. The length of the notice period required to terminate a tacit tenancy may be lengthy and is calculated according to the size of the premises among other things.

Licencees who stay in premises following the termination of the licence are not entitled to a tacit renewal. Therefore, the licensor can obtain their eviction with relative ease.

Conclusion

Both leases and licences have their benefits and drawbacks. Whether a lease or licence is the best option for the parties will turn very much on the commercial pressures and business plans of the parties.

Where a licence is entered into, it is of crucial importance that:

- the terms of a licence do not carry hallmarks of a lease; and
- the position on the ground is not indicative of a lease having been granted;

otherwise, there is (at very least) an argument that the licence has indeed been converted into a lease. Such circumstances may produce unforeseen implications for both parties.

If you would like any further information, please get in touch with your usual Bedell Cristin contact.