

UNDERSTANDING YOUR COMMERCIAL LEASE OR LICENCE



BRIDGING TO THE FUTURE



In the course of your business, you may have decided to rent a shop, stall or market plot. This may have involved you entering into an agreement with your landlord. The purpose of this factsheet is to provide you with an overview of the rights that you may have against your landlord, as well as the duties you owe them.

Please note that this factsheet should not be used as a substitute for legal advice. It is only intended to provide information and an introduction to commercial landlord and tenant law. If you have any specific queries, you should consult a qualified solicitor. The law stated in this factsheet is correct as at 1st April 2018.

WHAT TYPE OF AGREEMENT DO I HAVE WITH MY LANDLORD?

Commercial property is usually let under a **lease** or a **licence**. You may find your agreement with your landlord states if you have a lease or a licence. However, this classification may not be accurate or reflect your use of your business premises. Therefore, if you have a dispute with your landlord, the courts will look at whether you have **exclusive possession** of the property.¹ Generally, tenants have exclusive possession of a property, but licensees do not.

WHAT DOES IT MEAN TO HAVE EXCLUSIVE POSSESSION OF MY BUSINESS PROPERTY?

You may find that you have exclusive possession of your business property if you can **exclude your landlord** from the premises. Usually, this means that your landlord can only enter your shop or stall to carry out an inspection or repairs by giving you reasonable notice. If you are unable to do this, your agreement with your landlord will be a licence.

Sometimes, it can be difficult to work out if a business owner is a tenant or a licensee. Take the case where one shop is shared by two separate business owners. If these business owners do not have a right to use a particular part of the shop or exclude the other person from the property, they will be licensees. This is because they do not have exclusive possession of the property. Similarly, if you have a market stall and the landlord is able to move your plot, you will have a licence agreement rather than a tenancy.²

WHY DOES IT MATTER IF I HAVE A LEASE OR A LICENCE?

A lease will give you a **property right** in your business premises. This means that if you sell your business, you can transfer that right to the new owner. That may make your business more attractive to a potential buyer and could increase its value. As a tenant, you may also have the right to stay in your business property once your lease comes to an end.³ However, this does depend on the terms of your agreement with your landlord.

On the other hand, a licence gives you a **right to use** your business property for a specified purpose. A common example of a licence is a cinema ticket. This gives you the right to see a film at the cinema at a particular time. It does not mean you own the cinema or even your seat!

If you have a licence, you cannot transfer this agreement to a new owner on the sale of your business. For the new owner to continue to use your business property, she will need to negotiate her own agreement with your landlord.

WHAT SHOULD I THINK ABOUT WHEN I AM NEGOTIATING A LEASE WITH MY LANDLORD?

When you are negotiating a lease, the landlord may ask for a **premium**. This is an upfront payment that is in addition to your rent. You may also find that you are required to contribute to the landlord's costs or legal fees. Do remember that these costs can be negotiated. If you think that the price is too high, you can ask for it to be reduced. It is often helpful to find examples of the rent charged for other business premises that are located close to your shop to use in negotiations.

Aside from that, your landlord may provide you with a **schedule of condition**. This is written or photographic evidence of the state of the property at the start of the tenancy. Before you sign your agreement, think about whether the schedule of condition is accurate. Does it include the fixtures and fittings? Is the gas, electricity and water working? If not, it will need to be amended. Once you have signed your agreement, the schedule of condition is deemed to be accurate. This means that at the end of your tenancy, you will be expected to return the property to your landlord in that condition.

WHAT RIGHTS DO I HAVE UNDER MY AGREEMENT WITH MY LANDLORD?

Usually, the rights that you have against your landlord are set out in your rental agreement. As a result, it is important for you to **read your agreement** carefully to work out what those rights may be. However, your agreement should provide you with a right to use the property for your business. You may also find that your landlord is required to insure the property or carry out certain repairs.

If you are a tenant, there are certain rights that you have against your landlord that are implied by law. These rights will apply to your tenancy, even if they are not set out in writing in your agreement with your landlord. Unfortunately, if you have a licence, this does not apply to you.

Under a lease, a tenant has the **right of quiet enjoyment**. This means that the tenant should not be subject to any unreasonable or undue influence from the landlord. The landlord may breach your right to quiet enjoyment if she carries out work that obstructs the entrance to your shop⁴ or damages the property.⁵ However, if your landlord's conduct simply causes you inconvenience⁶ or a loss of privacy⁷, that may not be sufficient to establish a breach of the covenant of quiet enjoyment.⁸

As a tenant, you also have a **right of non-derogation from grant** against your landlord. In effect, this means that your landlord cannot do anything that would frustrate your proposed use of the property. In the context of a shopping centre, this could involve your landlord closing the area where your shop is located during trading hours.

WHAT RIGHTS DOES MY LANDLORD HAVE AGAINST ME?

Under the terms of your lease or licence, you will have agreed to **pay rent** to your landlord. You may also be responsible for certain taxes, charges or the landlord's legal fees.

Aside from that, you may have agreed to **carry out repairs** to the property or keep it in good condition. Generally, these repairing obligations depend on the duration of your rental agreement. So, for example, if you are renting a property for a short period of time, it is unlikely that you will be required to carry out any substantial work. However, with a long lease, that may not be the case.

Finally, your landlord may require you to **use the property for a particular purpose**. This may restrict the type of business that you can run at the property, but it is often done to comply with planning permission requirements.

WHAT HAPPENS IF I HAVE A DISPUTE WITH MY LANDLORD?

This depends on the nature of your dispute with your landlord. If your landlord is being difficult or acting unreasonably, there may be little that you can do. Nevertheless, if your landlord has breached a term of your rental agreement, you can bring a claim against her in court. It is common to find a tenant bringing a claim against her commercial landlord for failing to carry out any agreed repairs, or unlawfully evicting her from the business premises.

If you are successful, the court may award you damages, or require your landlord to carry out repairs. Do remember that it is expensive and time-consuming to bring a claim in court. The case could take years, and you may find that it has a negative effect on your relationship with your landlord. This may make any future dealings with her difficult, particularly if you have a long lease.

WHAT HAPPENS IF I CANNOT COMPLY WITH THE TERMS OF MY LEASE?

If you cannot comply with the terms of your rental agreement, your landlord may bring a claim against you in court. This could be for unpaid rent, the incorrect use of your business premises or failure to carry out any agreed repairs. If your landlord wins her claim, you may have to pay her damages, costs and legal fees.

If you have a tenancy of a business property, your landlord may be able to **forfeit the lease**. This remedy is available to your landlord if you do not comply with the terms of your rental agreement. The effect of forfeiture is that the lease will come to an end, and you will not be able to use your business property.

Sometimes, a landlord may forfeit a lease by serving notice and commencing court proceedings. However, where there is a serious breach, the landlord may forfeit the lease by **peaceable re-entry**. This means that your landlord will instruct bailiffs to change the locks and exclude you from the property. Forfeiture by peaceable re-entry must be carried out without violence and at a time when the property is empty.⁹ In many modern leases, the landlord has

the right to forfeit the lease by peaceable re-entry if the rent remains unpaid for 14 or 21 days.

If you have a licence, your landlord is not able to forfeit the lease. Nevertheless, she can terminate your rental agreement on reasonable notice.

CAN MY LANDLORD RAISE THE RENT?

In some commercial leases, there may be a **rent review clause**. Usually, this allows a landlord to increase the rent to the current market value every 5 or 7 years.

Rent review clauses may set out a procedure or a timetable for your landlord to increase your rent. In most cases, your landlord will serve a notice, increasing the rent. You will then have an opportunity to object. However, even if your landlord fails to comply with the procedure in the rent review clause, she may still be able to increase your rent.¹⁰

If there is a dispute about the level of rent that the landlord is demanding, you may find that it is helpful to consult a surveyor. Otherwise, you could obtain evidence of the rent paid for similar properties that are located close to your shop or stall.

WHAT HAPPENS WHEN MY AGREEMENT WITH MY LANDLORD COMES TO AN END?

When your lease has come to an end, you may be able to stay in the property or ask your landlord for a new agreement under the Landlord and Tenant Act 1954. This right is called **security of tenure**. To have security of tenure, you must be a tenant and use the property to carry on your business. Unfortunately, this right does not apply to licensees.

It is possible for a landlord to **contract out** of the Landlord and Tenant Act 1954, so that a tenant does not have security of tenure. This is common if the landlord is intending to develop the property and does want the tenant to stay in the premises when the lease ends.

To exclude a tenant's right to security of tenure, a landlord must serve notice on the tenant at least 14 days before the lease is due to start. After that, the tenant must counter-sign the notice before entering into the tenancy. If the

tenant fails to do this, the landlord is still able to contract out of the provisions of the Landlord and Tenant Act 1954. However, in this case, the tenant must sign a statutory declaration.

If you have security of tenure, your lease will not come to an end at the end of the term of your rental agreement. Instead, it will continue on the same terms as the original lease and you will be able to stay in the property. If you have security of tenure and your landlord does not want the tenancy to continue, she must serve a notice under the Landlord and Tenant Act 1954. As a tenant, you can object to the proposed termination of your lease by making an application to court.

¹ *Street v Mountford* [1985] UKHL 4.

² *Dresden Estates Ltd v Collinson* [1987] 1 EGLR 45.

³ *s.23 Landlord and Tenant Act 1954*.

⁴ *Owen v Gadd* [1956] 2 QB 99.

⁵ *Markham v Paget* [1908] 98 LT 605, [1908] 24 LTR 426, [1908] 1 Ch 697, [1908] 77 LJ Ch 451.

⁶ *Kelly v Batershell* [1949] 2 All ER 830.

⁷ *Browne v Flower* [1911] 1 Ch 219.

⁸ *Platt v London Underground Ltd* [2001] All ER 257.

⁹ *s.6(1) Criminal Law Act 1977*.

¹⁰ *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904; *Bello v Ideal View* [2009] EWHC 2808.

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