NALC

Legal Topic Note

LTN 48

October 2010

THE DIFFERENCE BETWEEN LEASES AND LICENCES

Why is the difference important?

1. Leases and Licences can be quite similar in many respects. Both are types of contract which can be used to grant someone rights in or over land but there are important differences between them. All types of contract contain provisions which confer benefits on one or both parties and the benefits conferred by a given contract on the parties to it is dependant on two things:

   a) the terms of the contract; and
   b) the type of contract entered into.

2. The importance of [a] speaks for itself but the relevance of [b] is often disregarded. A licence is often considered to be quite precarious because it can be ended quite easily by either party at short notice but a lease is much more secure because the notice required to end it may need to be given as much as 12 months in advance. The added security of leases means that they are considered to be more valuable than a licence.

3. More importantly, however, some types of leases are protected by legislation (e.g. some business leases are protected by the provisions of the Landlord and Tenant Act 1954) but licenses are not.

4. An important consequence of this distinction is that some landowners prefer to grant their occupiers licenses rather than tenancies so that they can avoid the consequences of 1954 Act protection. Owners have, in the past, sought to devise many schemes to avoid agreements they make falling within the provisions of the 1954 Act but the courts have been quick to identify “sham” agreements and to ensure that they are properly labelled as protected leases.

5. Local councils should take care over documents purporting to be licenses and should consider whether the arrangements, properly construed, give rise, in fact to a lease. Similarly, councils should not purport to grant licenses where, in fact, the necessary constituents of a lease are made out. A description of leases and licences is set out below. It is important to note that an agreement may be a lease even though it may be disguised as a licence. In the words of one Lawlord:

   "The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

   A court would determine if an agreement was a lease or a licence by looking at the true nature of the agreement rather than the name given by the parties to the agreement.

(i) Leases

6. Leases are interests in land and must be evidenced in writing. In Street v Mountford (1985), the court held that there are 3 main indicators of a lease. These are (i) exclusive possession of the land is given to the occupier such that the lessee may exclude anyone else from his land (including the landlord) because, during the term of the lease, he "owns" the land. To determine whether or not a given agreement confers exclusive possession a good rule of thumb is to consider whether the agreement confers a large degree of maintenance and control of the premises. An occupier who has a large degree of control over land is more likely to be a lessee than a licensee (ii) the lease is for a fixed or periodic term (e.g. from month to month or year to year) (iii) there is payment of a premium or a periodical payment by the occupier.

(ii) Licences

7. The main difference between a lease and a licence is that a licensee does not enjoy exclusive possession of the land and has no rights in the land itself. The ownership of the land remains with the owner who by a written or oral licence confers rights of occupation or use on a person which can be fairly easily withdrawn. It has been said that a licence simply makes lawful would otherwise be unlawful without it. A classic example is a ticket for a football match. The ticket is viewed, in law, as a licence which permits the purchaser to enter a football stadium. Without a ticket a person would not have permission to be on the premises and would probably be a trespasser. What the tickets

have in common with a licensee is that they entitle the purchaser to enter land for a specified purpose but do not grant any further rights – such as the right to exclude or evict others from the land. Unlike a lease, no formalities are required for the creation of a licence; they may arise from a written or an oral agreement.

8. Where councils are offered exclusive possession of land it is likely that they will be entering into a lease with the owner and should be slow to sign any documents which purport to grant a licence.

The Landlord and Tenant Act 1954

9. As stated above, the Landlord and Tenant Act 1954 provides a number of measures designed to protect business tenants. In this context the word "tenant" applies to lessees. If a council is asked to sign a "licence", but considers that the "licence" is actually a lease, it should obtain legal advice and seek to enter into a proper lease with the owner. In these circumstances, owners will be aware that the grant of a lease is likely to engage the protection afforded by the 1954 Act and ask the council to give up their rights to such protection by signing various forms. Councils should be slow to do so and should give serious consideration to obtaining independent legal advice. LTN 49 ("Business Tenancies") deals with the provisions in further detail.

LTN	Title	Relevance
49	Business Tenancies	Sets out the provisions of the Landlord and Tenant Act 1954.
50	The Agricultural Tenancies Act 1995	Explains farm business tenancies.
75	Lease Negotiations	Describes how to negotiate leases. Also defines and gives guidance on important lease terms.