Leases and Licences

1. Introduction

This article is an introduction to the two principal legal agreements that a property owner can use to grant another individual or organisation the right to use and/or occupy property for non-residential (i.e. business) purposes. It focuses on the implications of these agreements as they apply to artists' studios and their individual artist studio holders.

The information in this article is most appropriate to studios in England and Wales. The law is different in Scotland and Northern Ireland, and studios based there should contact NFASP for further guidance. A key difference in Scotland is the absence of the Landlord and Tenant Act 1954, or anything equivalent. Whilst in Northern Ireland the Act does apply, unlike in England and Wales it is not possible for landlords and tenants to agree to 'contract out' of specific parts of the Act that relate to security of tenure.

The two key types of commercial (or business) property agreement are 'leases' and 'licences'. A lease is a substantial legal entity, granting the leaseholder a 'tenancy' along with significant legal rights, including the right to exclusive use and occupation of the premises and the right to a new lease when the original one expires. A licence, by contrast, simply grants an individual or organisation the right to do something on a landlord's property. It does not create a tenancy or grant exclusive use, and it gives no longer-term legal entitlement to the property.

It is important to be aware that it is the rights of use set out in the contract that determine whether a document is a lease or a licence, *not what the document itself is called.* Simply labelling a lease a licence does not make it one.

Property law is a complex subject and it is essential to seek professional advice from a qualified solicitor before entering into legally binding contracts. Routinely, commercial landlords will usually include terms that principally benefit their own interests, and—provided these are within the law—it is the prospective tenant's responsibility to investigate whether the terms are acceptable and to negotiate more favourable ones if they are not.

When thinking about property and other legal matters it is important to remember that, practically speaking, 'commercial' or 'business' in this context means everything other than private residential use. Any activity carried out by a 'body of persons' is considered a business, and there are no special rules for unincorporated associations (such as clubs), non-profit organisations or even charities.

2. A legal overview

2.1 Leases

A person holding the lease of a property is known as the ‘tenant’. A lease creates ‘an interest in land’, which means that the tenant has the legal right to the exclusive use of the property and to the advantages conferred through this use. In theory this gives tenants very similar rights to those of an owner: including the right to sublet, and to restrict access to the property by third parties and even its actual owner. In practice however, a lease will usually contain clauses that ‘reserve’ certain rights to the landlord: such as allowing entry for specific purposes, or restricting the tenant’s right to sublet the property.

The following characteristics are likely to indicate that a contract is a lease:

- It gives sole occupation of a specifically-defined premises and the right to exclude the owner and third parties from the property (this is a clear indication of a lease).

- It contains clauses reserving rights of entry, inspection, or rights of way to the owner (reserving such rights implies that the owner would not otherwise have them, which, in turn, suggests a lease).

- It contains clauses prohibiting or restricting assignment (i.e. transferring the lease to another party) or subletting (again, prohibiting these rights implies that otherwise they would exist, and therefore that the contract is a lease).

- It grants a tenant a fixed or periodic term (period of permitted occupation) for a defined rent (the use of the words ‘tenant’ and ‘rent’ in themselves point towards the contract being a lease, as a licence would usually specify a ‘licence holder’ or ‘licencee’ and specify a ‘fee’).

2.2 The Landlord and Tenant Act 1954

The Landlord and Tenant Act 1954 protects tenants who enter into business tenancies by giving them ‘security of tenure’ (i.e. the right to have their lease renewed when it expires). The landlord has the right to charge a market rent on the new lease, but otherwise the terms should generally remain the same as in the original lease. Under the Act there are only limited sets of circumstances (such as demolition or major renovation of the building, or where the landlord intends to take it for their personal use) that permit a landlord to end a secure tenancy.

The Landlord and Tenant Act 1954 applies only to commercial *leases*. It does not apply to licences, and trying to avoid granting security of tenure is one of the reasons that landlords may sometimes attempt to disguise a lease as a licence. Trying to do this is a mistake however, because—as has already been mentioned—it is the *overall effect* of the rights given by the contract that the courts use to determine its nature, and courts are specifically charged with looking out for situations where a lease is being concealed.

If the rights conferred by the Act are not appropriate for the circumstances, then it is possible for the landlord and tenant to agree to 'contract out' of the Act. Increasingly landlords do not want to grant security of tenure and 'contracting out' is now a standard procedure. In order to do so, the prospective tenant must sign a declaration to this effect *before the lease itself it signed*. In addition, the lease itself must *also* make specific reference to the fact that both parties have agreed to contract out. This is an area where a solicitor should be involved, as failing to follow the correct legal procedure can result in the agreement being void and a tenancy protected under the Act being created.

2.3 Licences

Although it involves the use of property, a licence can be thought to be more akin to a contract for a service. It gives the right to use a property *for a specific purpose*, as opposed to the right *to the property in itself*. Legally speaking, a licence grants only the right to carry out an activity on a landlord's property; it does not create 'an interest in land', but it stops the activity being an encroachment or trespass.

Licences allow the property owner the right to enter the premises at any time and often involve the licencee sharing the space with the owner. Managed workspaces—where workspace holders can be moved around the property at the management's discretion—are usually let via a licence, as is spare desk space in a company's office.

The following are indicative of a licence:

- There is no exclusive right to any part of the licensed space (i.e. the licencee does not exercise a final say over any part of the space).

- The landlord can move the licencee to a similar space in the property (or even to a different property).

- The licencee shares the space with the landlord.

The following may imply that a licence is in reality a lease:

- The contract has the effect of giving exclusive access to the property, or a significant part of the property.

- The contract is for a specific, definable or self-contained property or part of a property.

- The contract refers to ‘rent’ rather than ‘licence fee’.

- The contract refers to itself as a ‘lease’ or refers to a ‘tenancy’.

3. How leases and licences may apply to artists’ studios

The legal implications of leases and licences will impact on artists’ studio group and organisations in their negotiations with landlords for space, and also in the types of contracts that they issue to their artist studio holders.

3.1 Artists’ studio providers entering into agreements with landlords

When renting a studio building from a landlord for any significant length of time (six months or more), it would generally be rare for a landlord to offer a licence agreement as opposed to a lease. In circumstances where this does happen, there is a strong possibility that it is an attempt to circumvent the Landlord and Tenant Act 1954. As described above, this is neither a wise nor a necessary thing for a landlord to do.

It is more likely a lease will be offered for the premises. In ideal circumstances the studio group or organisation would not be required to contract out of the Act. However, in many situations, studio providers will find themselves required to contract out of the Act, which means that they will only be guaranteed a tenancy for the duration specified in the lease.

As discussed in the introduction, it is important that any lease offered is scrutinised by a solicitor before it is signed. Following convention, commercial leases are generally written to maximise the advantage to the landlord. It is up to the prospective tenant to ask for terms to be adjusted as part of the negotiations, before the lease is signed.

3.2 Artists' studio providers granting leases or licences to studio holders

Whether studio providers offer spaces to artists on leases or licences, will depend on the organisational structure of the studio provider, the nature of the spaces being offered and what the agreement with the property owner may require.

In an open plan studio, it is likely to be most appropriate for individual artists to hold a licence, as the open plan nature of the space is unlikely to indicate exclusive possession of any particular area (however, it is worth specifying in the licence that studio members can be moved around the studios as deemed necessary by the studio management). Where an organisation is a collective, it is also highly likely that studio holders will hold licences, or that their membership of the collective effectively forms a licence to make use of a portion of the whole space.

Where studio members have individual enclosed spaces, the situation starts to move in the direction of a lease. However, it is still possible for such spaces to be let on a licence basis, provided special care is taken to make sure their terms are kept more appropriate to a licence than to a lease. Key to this is that the agreement should be for a *particular a type of space* (i.e. one that makes available certain physical features), rather than being for *any one particular space of that type.* It should make it clear that a studio member can be moved to another similar space if this is deemed necessary by the studio management. It is also very important to avoid the use of terms such as 'rent', 'tenancy' or 'lease' in the agreement.

If granting a licence it is important that this reflects the actual arrangement and is not an attempt to avoid using a lease. So long as they are well thought out and prepared, with the appropriate legal advice taken and procedures followed, there is no reason for a studio organisation to shy away from implementing lease agreements for studio spaces. A well-drafted fixed-term lease agreement is more appropriate, and offers better security to all, than an attempt to write a licence where a lease is in reality in effect. A lease is also more detailed and provides a more comprehensive 'description' of the relationship between landlord and tenant and the rights and responsibilities of each. Unless a studio organisation is relatively well resourced, with a secure long-term future, it is probably unlikely that it will want to create a protected tenancy (security of tenure), so requiring studio holders to contract out of the Landlord and Tenant Act 1954 will be essential.

It is very important to remember that a studio organisation should be careful not to grant security of tenure to its artist tenants if it does not have security of tenure itself (i.e. because it has contracted out of the Act), as it may find itself unable to hand the building back at the end of the term with 'vacant possession' (i.e. with no sub-tenants in occupation) and could be liable for taking legal action to remove sub-tenants and/or paying compensation to the property owner. Often the lease that the studio

organisation enters into will permit subletting but require that sub-tenants ‘contract out’, sometimes requiring that a copy of the lease or licence granted to studio holders is supplied.

4. Links to further reading

Landlord Zone, on various aspects of commercial tenancies:
http://www.landlordzone.co.uk/legal/tenancies-commercial/

inbrief.co.uk, on understanding the contents of a commercial lease:
http://www.inbrief.co.uk/regulations/contents-of-a-commercial-lease.htm

dfw.co.uk, on the differences in property law between Scotland and England:
http://www.dwf.co.uk/news/xprNewsDetail.aspx?xpST=NewsDetail&news=1181