

LICENCE TO OCCUPY

Guidance Notes



1 Introduction

This licence has been prepared for a short term sharing of occupation (such as seasonal lettings) where the parties want to keep the arrangement flexible with either party being able to terminate the licence on, for example, one month's notice. The licence can be used for retail or office premises and is personal to the licensee.

As there is unresolved debate about whether it is possible to create a licence to occupy under Scots law (see *Bradford Properties Ltd v British Telecommunications plc* 1992 SLT 490), it is for the user to decide whether the final document meets the criteria for a licence, for instance, by ensuring that one of the fundamentals of a lease is absent, namely either:

- (a) there is no fixed term; or
- (b) there is no rent payable; or
- (c) there are no defined premises.

You will also need to consider with your client the impact of the licence being held to be a lease, notwithstanding the parties' intentions to the contrary. This may, for example, include the limited security of tenure provided for retail tenants by the Tenancy of Shops (Scotland) Act 1949, or the provisions for a notice to quit under the Sheriff Courts (Scotland) Act 1907.

Given the current uncertain state of Scots law on the subject, the PSG can give no assurance as to whether or not it is possible to create a licence under Scots law, or whether the document as drafted would be construed as a licence or a lease, even if any of the stated fundamentals are absent.

2 Licence granted by tenant

If the licence is granted by a tenant rather than an owner the licence will need to refer to the lease obligations. Given the short term and temporary nature of the licensee's occupation it would not be appropriate for the licensee to undertake all of the tenant's positive obligations under the lease (such as the full repairing obligation) but the licence would need to be subject to the non-pecuniary restrictions in the lease. For example the licensee would need to comply with the use restrictions, insurance provisions, any title conditions affecting the tenant etc.

3 Definitions and Interpretation

Delete those definitions that do not apply to your transaction.

"Ancillary Rights" -ancillary rights to be granted to the licensee need to be considered for each transaction and may include rights to use kitchen facilities, toilet facilities or meeting rooms.

4 **Clause 2 Licence**

Clauses 2.2 and 2.3 are included to make it difficult for the licensee to argue that the licence is in fact a lease, but the inclusion of these clauses do not guarantee that a court would not hold that the licence is actually a lease.

If the licensor does not want to let defined premises, but wants to be able to move the licensee from space to space, then provision to be able to do this should be made in this clause, and the definition of "Property" in Clause 1 may have to be appropriately adjusted.

5 **Clause 3 Duration**

The licence is designed for short term occupations which can be terminated on a short period of notice by either party. By not giving a fixed term this may strengthen the argument that this is a licence and not a lease.

6 **Clause 4 Payments**

There are alternative provisions in Clause 4.1: either the licensee pays a licence fee weekly/monthly or no licence fee is payable.

Even where there is no licence fee payable under Clause 4.1, it could be argued that the payment provided for in Clause 4.2 is tantamount to rent payable by the licensee, which may have a bearing on whether or not the licence is construed as a lease.

7 **Clause 7 Alienation**

The licensee may not assign the licence or share occupation in any way. The licence is personal to the licensee, as the licence is principally intended to be used for short term occupation.

8 **Clause 8 Condition**

If the parties have agreed a schedule of condition for the Property, this can be referred to in this clause. Otherwise, you should amend the wording to remove reference to a schedule of condition.

9 **Clause 9 Alterations**

Amend as appropriate. It would not be unreasonable for there to be a prohibition on any alterations given the short term nature of the licensee's occupation.

10 **Clause 10 Access**

This clause is drafted on the basis that rights of access do not need to be specifically reserved to the licensor, given the temporary and non-exclusive nature of the licensee's occupation. This clause simply states what will happen if access is taken.

10 **Clause 12 Early Termination**

You may want to consider specifying a minimum period of notice that should be given in the event of the provisions of this clause being triggered. This may be as short as 24 hours, depending on the type of premises.

11 **Clause 15 Formal Documentation**

The purpose of this clause is to ensure that the offer and acceptance constituting the Licence are themselves properly executed, and that the missives constituted by the exchange of letters record the complete agreement between the parties in relation to the licence arrangements for the Property.

12 **Clause 16 Costs**

Amend as appropriate depending on whether each party is bearing its own costs, or the licensee is paying the licensor's costs.

13 **Clause 17 Proper Law and Prorogation**

Reference is made to the Scottish Courts and Scots Law in relation to the Licence.

14 **Clause 19 Time Limit**

It is normal practice to impose a time limit for acceptance of the offer to grant a licence.

15 **SDLT**

No SDLT is payable on a licence to occupy (section 48(2) Finance Act 2003), so no SDLT provisions have been included.