

PRACTICAL GUIDE

Leases, Licences and Hiring Agreements for Churches

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CONTACT DETAILS

Church Growth Trust

1 Manor Farm Barns, Baines Lane, Seaton, Oakham, Rutland, LE15 9HP

01536 201339

enquiries@churchgrowth.org.uk

www.churchgrowth.org.uk

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1.0 Introduction

This practical guide aims to help churches understand the difference between leases and licences/hiring agreements, the legal implications for each type of letting and some practical considerations. It is not a legal textbook on landlord and tenant law. Legal advice should be sought, particularly where leases are being drawn up.

The first part of the paper deals with churches that are allowing others to use their building. The second half of the paper helps churches where they are hiring or leasing a premises for their use.

2.0 Lease or licence?

2.1 Lease

There is a difference between a lease and a licence and each will be appropriate at different times. A lease is a legal arrangement where a tenant occupies a property or part of a property exclusively, for a fixed period of time and for a certain fee usually called a rent. A licence, on the other hand is where a landlord retains control of the property but grants permission, which is personal (i.e. not assignable) to an occupier to use the property for a specific purpose. The essential difference is one of control, in that with a lease the landlord grants control of the leased premises to the tenant, whereas a licence grants only a permission to occupy the premises—it does not give a right to exclude the landlord from the premises and, if it does do that, it may be construed by the court as creating a lease, not a licence. So a lease will almost certainly exist where an occupier (usually referred to as a tenant or lessee) has exclusive occupation¹ of the whole or part of a property. This could be the whole of a church building or a church hall, or as little as one storeroom. Exclusive occupation means that the landlord or lessor does not normally have a right of access at any time to the premises (e.g. a model railway club might store their equipment in a cupboard and have the only key to that cupboard), but a lease may still allow the landlord to have access for limited purposes (e.g. to inspect the property's state of repair). The other condition normally required for this to be a lease is that a rent is paid. This does not necessarily need to be called a rent, but would be a regular payment (i.e. monthly, quarterly or annually). The rent does not have to be of significant value and is often expressed as “one peppercorn” that in reality is never actually paid. (Although a rent is normally required for a lease to exist, simply omitting any reference to a rent will not necessarily prevent an arrangement from being regarded as a lease.)

Generally leases should be granted by deed (i.e. signed and witnessed by the parties); although leases or tenancies for a term of three years or less, at the best rent which can reasonably be obtained without taking a premium, can be granted by signed written agreements without being witnessed as deeds.

If the occupation is for more than six months the lease is subject to Part 2 of the Landlord and Tenant Act 1954² and the tenant would normally have a right to renew their lease. There are only certain grounds under which the landlord can object to a renewal (see section 4 below).

¹ Case law refers to “exclusive possession” rather than “exclusive occupation”, because it is possible to be the tenant of a lease without occupying the premises.

² This makes the assumption that a church or other charitable use is considered to be a “business use”, as defined by the Landlord and Tenant Act 1954. There is some doubt as to whether charity use is business use and whether your use and occupation as a church are protected by the 1954 Act.

2.2 Licence and hiring agreement

A licence is legally similar to a hiring agreement, and would give someone the right to use all or part of the premises, but would not give exclusive occupation. It would normally specify the use and activities, as well as the times that access is available and the areas that are to be used. Hiring agreements tend to be used for one-off bookings or for regular but short bookings (e.g. a two-hour slot each week). Church Growth Trust's Hiring Agreement Pack is available for £25 plus VAT. A licence tends to be used for a more permanent or substantial use of the property, such as the use by a pre-school every morning of the week. It sets out the liabilities and responsibilities of each party in more detail than the hiring agreement. It would normally include the following:

- Use of the building - Which rooms and facilities are to be used by the licensee (person or party sharing the building) and which rooms should be cleared and when? This will ensure the Licensee does not take over the whole building (unless that is your intention) and that the other work of the church can continue unhindered.
- Alterations - What alterations are required to the building to make it suitable and who will be responsible for carrying out these works and at whose cost? For instance it may be a requirement to have office partitions, new lighting, additional (children's) toilets and the kitchen may need to be altered. However, if the alterations are substantial, that may point to the 'licence' being construed by the court as intended to create a lease, because it would have a more permanent context.
- Business rates - Who will pay business rates if they are payable? (If a building is registered as a place of worship a full exemption from business rates will normally apply. In other cases, a discount of 80% is usually applicable to properties occupied by charities, but sometimes local authorities will offer a complete exemption for charities).
- Storage - Where will the licensee be storing their equipment (as this can take up a considerable amount of space)?
- Security - Are there any issues that need to be noted?
- Times - What are the hours and days that they require use? Include set up and break-down time.
- Term - What will be the length of the licence (start and finish dates) and do you want there to be a break (i.e. either party can end the licence early by giving the other say three or six months' notice)? A key feature of a licence is that permission to occupy can be withdrawn at any time and the occupier must leave immediately, even if the terms of licence require a period of notice to be given. However, in those cases, the occupier may be entitled to financial compensation for being required to leave on short notice.
- Licence fee – How much is the licensee expected to pay and how often? This can be structured in different ways; either a set fee payable (e.g. monthly or possibly by Standing Order) or a fee that is based on other factors such as the number of children or turnover (income).

- Deposit – Do you want to charge a deposit to cover the cost of any damage caused? If so, how much?
- Repairs - What will the licensee be responsible for? If there are breakages who will pay (will you want to pay & recharge)? Do you want to charge a service charge (to include an element for the cost of general repairs to the property)? Again, the heavier the responsibility imposed on the 'licensee' for repairs, the more likely it becomes that a court could construe the licence as a lease or tenancy.
- Services - How are you charging (if at all) for gas, electric, water etc and for the heating?
- Cleaning - What is the licensee responsible for?
- Signs – Are you happy for the licensee to have a sign to promote their activities and, if so, where and what size?
- Statement of belief – If you want to ensure the licensee is not going to do anything or teach anything that would be contrary to your core beliefs you could include a statement of beliefs or refer to the Evangelical Alliance Mission Statement.
- Details - What are the names & addresses of the church and the licensee (full names of charity and company as well as full names & addresses of the signatories to the licence, plus charity and company registration numbers)?
- Legal fees - Who is paying for drawing up the licence agreement? Do you want to charge the licensee for half or all the cost?
- Plans – Do you have a layout plan of the building to show the various areas/uses?

Merely calling a letting arrangement a licence will not necessarily mean that it is in law a licence. If the criteria set out above for a lease are met, the letting arrangement will be a lease in practice, rather than a licence. There are some practical ways that can help you avoid a licence becoming a lease³, including:

- Not giving exclusive occupation, by keeping a key to gain access to each part of the premises and making it clear that you do have a right of access at all times. However, if you retain a key but never actually access the premises in practice, the arrangement may still be regarded as a lease.
- Not giving exclusive occupation by storing your own items in the areas that will be used by the hirer.
- Writing into the licence that the licensee would need to move to alternative rooms if required and that the use may not be possible on certain occasions (usually with reasonable notice) (but such provisions may be ineffective if, in practice, you never do require the hirer to move to alternative rooms).

³ These suggestions will help in any argument, but each case needs to be considered on its own merits and there is no guarantee that these will be enough to prove your case is a licence.

- Reserving the right to require use for church purposes, subject to say a month's notice, so that the licensee's permission can be suspended temporarily.

It is also important to use the correct terminology by not referring to the licence or hiring agreement as a lease and it is helpful not to refer to the licence fee or hiring fee as a rent.

2.3 When to use a lease or licence

If you are happy to give up part of your premises because you do not have a use for it and are unlikely to need it in the near future, it may be appropriate to grant a lease of this part of the premises. If you are not wanting to give up exclusive use of the premises and only wish to allow a certain use for specific times in the week, a licence or hiring agreement would be more appropriate. A regular and substantial use of the premises such as a pre-school using the premises every morning or every morning and afternoon of each weekday or the Foodbank using the premises (including storage) would be more suited to a licence (unless they need exclusive use of storage areas or need to insist for child-protection purposes that representatives of the church cannot enter the premises during their use). Other one-off bookings for meetings, celebrations or activities and where these are regular but only for say a couple of hours on one day a week, a hiring agreement would be more appropriate. Always bear in mind the essential difference between a lease or tenancy and a licence which is that under a licence the landlord retains a high degree of control over the premises, but under a lease or tenancy the landlord hands over control to the tenant, and the document must reflect that difference

3.0 Factors to take into account when letting your premises

There are a number of factors that need to be taken into account when allowing others to use your premises and particularly where the use is regular or permanent. These include the following:

3.1 Your charitable objects and powers

You will need to consider whether the proposed use is within your objects or contrary to these. You will also need to ensure that you have powers within your constitution to allow you to permit the proposed use and, where a lease is involved, the power to grant a lease. It would also be important to consider the reputational aspects for your church if the activities of the proposed tenant or licensee may damage the church's reputation even where those activities are lawful.

3.2 Restrictions on the property

Some properties have restrictive covenants written into the title which restrict the use of the property. These could require the property to be used only for religious purposes and you would need to weigh up whether the activity that you want to allow your tenant or licensee to carry out is allowed within this. There may be other restrictions that stop specific uses, such as retail use, that may stop you using the premises as a café or granting a licence to someone else to do so.

If you are holding a lease of the property the lease may restrict your use, in the same way as a restrictive covenant mentioned above. There may also be a prohibition against you sub-letting or sharing use of the premises.

3.3 Planning use and business rates

It is likely that your church premises will have a specific D1 Use Class planning consent for your church use. There is normally a flexibility with "church use" to allow for various activities, such as hiring the premises for other non-church uses, providing the primary use

still remains as church use. As church use falls within the D1 Use Class, this normally would include medical use (e.g. doctors, medical centre or dentist) and non-residential educational use (e.g. pre-school). Also if you grant a lease of part of the premises for a non-D1 Use (e.g. offices) then this would require planning consent for a change of use. It may be possible to obtain the change of use, often as a temporary consent, so that the part of the premises reverts to church use if it is no longer required for its proposed use. If your property is a registered place of worship there is a risk that you could lose the registration if the primary activities are no longer worship or if parts of the premises are exclusively used for non-church use. Registered places of worship are exempt from business rates. Losing that registration could mean that the local authority start to charge business rates for your non-church activities.

3.4 The Equality Act 2010

The implications of the Equality Act 2010 in relation to leasing and hiring your church premises are complex and not dealt with in detail by this paper. Church Growth Trust's paper on "Hiring Church Premises and the Equality Act" goes into more detail.

3.5 Hindrance to church use

If granting one or more leases, licences and hiring agreements, often with the benefit of raising income for the church, prevents you from using the building for your main activities, including worship and outreach, these should be reviewed and, if necessary, cut back.

4.0 Gaining possession

When granting a licence for use that is continuous, rather than a one-off event, it is important for the terms of the licence to set out how each party can terminate the arrangement. If the terms of the licence do not explicitly cover this and do not refer to a fixed term, either party will be able to terminate the arrangement at any time. This may not be desirable for either party. For example, in the case of a licence to a mothers' and toddlers' group, the church may have set its budget on the assumption that it will have income from that use for the whole year and may face a deficit if the group simply decides to leave; from the other side, the mothers' and toddlers' group may have to disband if the church requires it to stop using the building without a notice period, because it does not have any time to find alternative accommodation. Therefore, the licence agreement should set out how long the arrangement will last for and what notice either side must give to bring the arrangement to an end. If the licence requires the church to give, for example, two months' notice, the church can still require the occupier to leave on shorter notice, but the church would then have to pay financial compensation to the occupier for losses suffered as a result of having to leave early.

Leases should also be in writing, for a fixed length of time and, if appropriate, contain break clauses to allow for the landlord and/or the tenant to terminate the lease early by serving a specific length of notice. Unlike, the position with a licence, a landlord cannot require a tenant to leave the property by giving less notice than the notice period required by the lease (unless the tenant is in breach of important terms in the lease). If a lease is for six months or longer the lease will come under Part 2 of the Landlord and Tenant Act 1954 and the notice (which must be in a statutory form) by the landlord terminating the lease will have to be at least six months prior to the end of the fixed term. The tenant will have a right to apply to the court for a new tenancy at the end of the existing one on substantially the same terms; although there can be a review of the rent. The tenant would have to serve an appropriate notice on the landlord to this effect and the landlord would only be able to object to the new lease on certain grounds. These include the following:

- Where the landlord wishes to use the premises for its own use (but not merely to let it to someone else);

- Where the landlord wishes to redevelop the property (e.g. a new housing scheme is to replace the church premises) proof that this is to take place will be required, usually in the form of a planning consent for the redevelopment;
- Where the tenant has persistently failed to meet his obligations (e.g. by not paying rent or carrying out repairs).

The main way for a landlord to remove the risk of not being able to get the premises back at the end of a lease, is for the landlord to exclude the lease from Part 2 of the Landlord and Tenant Act 1954. In order to do this a notice would need to be served on the tenant prior to the lease being completed and the tenant will need to sign a declaration (or if there is less than 14 days between the notice and the commitment to starting the lease, the tenant will need to swear a statutory declaration) to confirm that he has received the notice. The notice and the declarations need to be in specific forms set out by legislation and it is advisable for these to be served by solicitors. By excluding the lease from the 1954 Act, you not only have absolute discretion about whether you grant a new lease at the end of the existing one, but you will also not be required to pay compensation to the tenant for not granting a new lease.

5.0 Telecommunication equipment

Sometimes churches are approached by telecommunication companies to ask for permission to attach telecommunication equipment (e.g. aerials) to the church premises. They will often refer to these as licences or easements, but in practice these tend to be leases. As they come under the Telecommunications Act, they are also difficult to end, as they are protected by the legislation. Legal advice should be sought before agreeing to any arrangement with telecommunications companies.

6.0 Use of other people's property

Where you, as a church, are wanting to use a premises (e.g. your local school) for a few hours on a Sunday morning or for specific activities during the week (e.g. using the village hall for a coffee morning), it would normally be appropriate to have a hiring agreement. This limits your cost and liability.

If you are looking for more permanent use of a building, for Sundays and a range of activities during the week, it would be better to lease a building or part of a building on a more permanent basis. There are a number of matters that need to be considered when doing so, including the following:

6.1 Landlord

Who is your landlord? Are there any superior landlords and is their consent required?

6.2 Premises

What is included in the lease? If it is only part of a building, are there communal areas (e.g. lobbies, WCs, kitchens, lifts and car parks)? What rights are there over these communal areas and who is responsible for them? Are there car parking spaces allocated specifically to the premises? If the premises relate to only part of the building, who is occupying the remainder of the building and how will this affect the lease/use?

6.3 Term

When will the lease start? How long will it be – what does the landlord want and what do you want? Is there a compromise position?

6.4 Break

Depending on the length of the lease, is it appropriate to have a break clause to allow you to terminate the lease early? Are you happy to have this at a specific point during the term or a rolling basis (e.g. after two years you will be able to give three/six months' notice at any time)?

6.5 Security of tenure

Will the lease be within the Landlord and Tenant Act 1954 or will it exclude Part 2 of the Act (which would effectively mean you would have no rights to apply for a new lease at the end of the term)?

6.6 Rent

What is the rent proposed and what rent do you wish to pay? How often is the rent payable (i.e. monthly or quarterly) and is this in advance or in arrears?

6.7 VAT on the rent

VAT will only be payable on the rent if the Landlord exercises an option to charge the premises to VAT by giving notice to HMRC. A landlord may want to do this so that the landlord can recover VAT spent on the premises. However, in many cases, even where a landlord exercises an option to tax, a tenant that is a charity can seek to disapply the option if the premises will be used for "relevant charitable purposes". The VAT position of the landlord should be checked at an early stage so that you can consider if you need to disapply the option to tax and discuss this with the landlord. If you do want to disapply the option to tax, you will need to give notice of this before the lease is entered into.

6.8 Rent Review

Is there to be a rent review? Normally this is on a third or fifth anniversary. Should it be a market rent or perhaps tied to the Retail Price Index (RPI)? If RPI and you want to give some certainty to both you and the landlord, you could agree an upper and lower limit on this (e.g. 1% and 4% rise per year). It may be possible to agree future rents now. If the review is to be on an open market basis and not restricted to a D1 Use Class basis what effect might that have upon the rental level? Also, is the review upwards only or could it go down if market rents fall?

6.9 Use

What is the present use of the premises? If it is not D1 Use Class (i.e. place of worship, community use or non-residential education/training centre), then planning consent will be required for change of use. Who will be obtaining the consent and what will happen in the meantime (i.e. will there be an agreement to lease, which would trigger the lease once the planning consent has been obtained)? Is the landlord aware of the proposed use and happy with this?

6.10 Alienation

Normally the landlord tries to limit your ability to assign (transfer) the lease to someone else or to sub-let either the whole premises or part of it. What do you require? If it is only to be able to hire out rooms to others, then this can be allowed within the lease, but specific wording should be included in the lease at the outset. If you are a Trust you need the right to assign the lease to new trustees as they are appointed.

6.11 Insurance

Does the landlord wish to insure the building or will he require you to do so? If the landlord is paying for the insurance and you are only occupying part of the building, how is the insurance re-charged to you (i.e. is it based on floor area)?

6.12 Repairs

What repairs are the landlord and tenant responsible for? If you are only occupying part of the building, is the landlord responsible for repairs to the outside of the building (i.e. roof, rainwater goods, walls and possibly windows/doors) and if so, how will he recharge this to you? Is the building in good condition and are there likely to be major works during the lease? What state are the premises in? If the premises are in poor condition, will you require the landlord to put them in good condition at the beginning of the lease or will the landlord expect you to do so (for which perhaps a rent rebate will be granted). Alternatively, will you accept the premises in their current condition, but not be required to return them in any better condition at the end of the lease? If so, you will need a schedule of condition to record the current condition. This can be a simple schedule of photographs or a more detailed written record. This would have to be agreed with the landlord at the outset. Normally there will be a requirement for the tenant to put the premises into a good state of repair at the end of the term, unless there is some alternative lesser responsibility upon the tenant agreed at the outset

6.13 Service Charge

Is the landlord responsible for the repairs to communal areas, for items such as fire alarm systems, lift maintenance, electricity, gas, water/sewerage etc and how is this to be recharged to you? Normally this is by a service charge. How is this charged; as and when the landlord incurs the cost or on a quarterly/annual basis or on a fixed figure? If there is to be a service charge, there will probably be a regular payment required and you should make enquiries about this and ask about any planned major expenditure before taking the lease. Ideally, you should try to agree a cap on the annual charges.

6.14 Improvements

Is the landlord expecting to carry out any improvements to the premises and, if so, what? Do you wish to carry out any improvements and, if so, on what basis will these be treated (i.e. will the landlord give a rent rebate to purchase them or will he compensate you at the end of the lease)? You may need a licence to alter at the start of the lease.

6.15 Equality Act

Is the building accessible for disabled people and, if not, what will be required to make it so? Who will be dealing with these works?

6.16 Asbestos

The 2012 Asbestos Regulations require a survey and management plan for asbestos in all non-residential buildings. Has the landlord carried out this survey? You should ask for a copy of the survey/plan.

6.17 Energy Performance Certificate

These are not normally required for church buildings.

6.18 Plans

Does the landlord have detailed floor and site plans. If the lease is for seven years or longer Land Registry compliant plans will be required, as you will be required to register the lease with the Land Registry.

6.19 Costs

Does the landlord expect the tenant to pay his letting and legal costs or will each party bear their own costs? The latter is always preferable.

6.20 Personal liability of trustees

If individual trustees are to take the lease for the church, they will be personally liable to the landlord for all the obligations of the tenant including payment of the rent. Ideally, your church should, if it is not already a charitable company limited by guarantee or a charitable incorporated organisation, form and register one of these structures to take the lease or alternatively negotiate with the landlord to limit the personal liability of the trustees to the church's assets, or the provision of a rent deposit instead. The limited company or charitable incorporated organisation structure will mean that the individual trustees will not have personal liability. If the landlord still requires individual sureties or guarantors for the company or charitable incorporated organisation then a rent deposit should be offered instead of sureties or guarantees.

6.21 Stamp duty

As a church the tenant will almost certainly be able to claim the exemption from stamp duty land tax for charities and so if anyone asks you for stamp duty make sure that the exemption is claimed.

6.22 Subject to contract

Any correspondence should be marked "subject to contract" to avoid commitment to specific terms.

7.0 Disposal of the lease

Should you wish to dispose of your lease, by virtue of the Landlord and Tenant (Covenants) Act 1995 the landlord may require the church to guarantee on behalf of the assignee (the party to whom the lease is to be transferred) the obligations of the lease. It is unlikely that the church would have legal power to give such a guarantee, so you should negotiate in the lease at the outset that you should not be required to give such a guarantee. The lease could provide that the incoming tenant should provide a rent deposit instead.

8.0 Legal advice

Where granting a lease or taking a lease yourself, legal advice should be sought. Church Growth Trust are able to help with negotiations and agreeing heads of terms. Church Growth Trust can also help with reviewing lease documents when you are leasing a property for your use. Where a lease is for three years or longer this is a deed and will need to be drawn up by a solicitor. The same applies to notices served where you are wanting to exclude the lease from the Landlord and Tenant Act 1954. See section 9 below for recommended solicitors. Care should also be taken when serving notice to terminate a letting arrangement. If in doubt about anything, advice should be taken.

9.0 Additional Information

Church Growth Trust's hiring agreement pack can be obtained by contacting the office and on payment of £25 plus VAT (£30).

Church Growth Trust's practical guide on "Hiring Church Premises and the Equality Act 2010" is available from the website <https://churchgrowth.org.uk/area/general-papers/>. This can be downloaded free of charge.

Solicitors that may be able to advise on leases are as follows:

Ellis-Fermor & Negus

Attn: Kevin Allard

2 Devonshire Avenue, Beeston, Nottingham, NG9 1BS

Telephone: 0115 922 1591

Email: kevin.allard@ellis-fermor.co.uk

Website: www.ellis-fermor.co.uk

Edward Connor Solicitors

Attn: Paul Tollerton

10 The Point, Market Harborough, LE16 7QU

Telephone: 01858 411568

Email: paul.tollerton@edwardconnor.com

Website: www.edwardconnor.com