

# **Lease vs. License – What is the difference?**

**Or**

## **If it looks like a lease and reads like a lease...**

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### **1. Introduction**

Commercial property occupancy agreements can take various forms. The term "lease" is commonly used to describe the agreement that governs the relationship between parties whereby one party is entitled to occupy the property of another party for a fee. Similar to leases, license agreements can also govern the contractual relationship between an occupant and a property owner. However, each type of agreement provides for different sets of property rights for both occupants and owners and understanding the distinguishing factors between the two is critical in the commercial leasing context.

This paper will highlight the similarities and differences between leases and licenses by: (i) providing an overview of the elements that make up each agreement, and (ii) through a case law lens, illustrate the main differences in the rights that each agreement allocates to parties and provide recommendations on which type of agreement is suitable for a particular client's needs.

### **2. The Main Elements of a Lease Agreement**

At its core, a lease is both a conveyance of an estate in property and a contractual document.<sup>1</sup> Commercial leases can be used to provide occupation rights to a tenant that is carrying on business activities on a piece of land, or all or part of a building.<sup>2</sup> There are various categories of commercial leases, such as ground leases, industrial or warehouse leases, office leases, retail leases and renewable energy leases. The *Commercial Tenancies Act* (the "CTA") governs the landlord-tenant relationship in the commercial context and generally sets out rights and obligations of the parties in terms of the payment and collection of rent, arrears recovery mechanisms, and other important issues.<sup>3</sup> It also provides the Ontario Superior Court of Justice with jurisdiction to hear and determine disputes pursuant to the CTA.

Lease agreements may confer various rights to the tenant, including the right of exclusive possession of the property, the right to assign its interest in the lease, and the right to sublet its interest to a subtenant. When a landlord sells a property that is subject to a valid lease, the tenant's interest in the property generally runs with the property, unless otherwise indicated in the

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<sup>1</sup> LexisNexis, *Commercial Tenancies in Ontario*, (LexisNexis:2020) at 1 [*LexisNexis*].

<sup>2</sup> *Ibid* at 2.

<sup>3</sup> R.S.O. 1990, c. L.7.

agreement.<sup>4</sup> While landlords do not have actual possession of their property during the term of a lease, the leasehold estate allows the landlord to retain reversionary interest in the property.<sup>5</sup>

### ***Type of Leases***

There are generally five types of leases that may form a landlord-tenant relationship: fixed term lease, lease for life, periodic tenancy, tenancy at will, tenancy at sufferance, and perpetual lease. A common difference between all of the above is the term of each lease. Each type of lease is briefly described below.

#### **i) Fixed term lease**

A fixed term lease is for a specified term. To constitute a valid lease, the commencement date of the term must be certain, or at least ascertainable based on a triggering event, and the termination date must also be certain. These leases may have an extension or renewal provision, which may extend or renew the term, however, in order to be enforceable, the maximum length of the lease should be clearly specified.<sup>6</sup>

#### **ii) Lease for life**

A lease for life does not require the length of the agreement to be certain, as such leasehold interest is treated like a life estate, with the difference being that a lease for life requires rent to be payable, whereas a life estate does not.<sup>7</sup>

#### **iii) Periodic tenancy**

Periodic tenancies are effective during a recurring period of time, such as a monthly or weekly tenancy. Typically, when a fixed term lease comes to an end and the tenant remains in possession of the leased premises and continues to pay rent that is accepted by the landlord, the fixed term lease automatically turns into a monthly tenancy. Periodic tenancies are lease agreements that continue until they are terminated by notice, which is usually equivalent to the length of the recurring tenancy period. They can also be terminated by an agreement between the parties or pursuant to statute.<sup>8</sup> For example, Section 28 of the CTA states that at least one week's notice and one month's notice is sufficient to terminate a weekly or monthly tenancy, respectively.<sup>9</sup>

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<sup>4</sup> Distinction Between a Lease, Licence and Similar Arrangement, Canada Revenue Agency: <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/p-062/distinction-between-lease-license-similar-arrangements.html>.

<sup>5</sup> Bruce Ziff, *Principles of Property Law*, (Thomson Reuters:2018) at 324 [Ziff].

<sup>6</sup> *Ibid* at 325.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ibid* at 326.

<sup>9</sup> *Supra* note 3 at s. 28.

#### iv) Tenancy at will

A tenancy at will has no set term. By providing notice, either a landlord or a tenant can bring the tenancy to an end, even if the right is stated to be at the sole prerogative of the landlord.<sup>10</sup> The creation of this type of tenancy can be implied after a previous tenancy expires and the tenant remains on the leased premises with the landlord's consent. Similar to periodic tenancies, the terms of the original lease would apply in so far as they are applicable with the new arrangement.<sup>11</sup>

#### v) Tenancy at sufferance

This type of tenancy arises when, at the expiry of the lease, a tenant remains on the premises without the consent of the landlord. Once a tenant refuses to vacate the leased premises in response to the landlord's demands, the tenant then becomes a trespasser on the property. Since this tenancy is not consensual, it does not actually produce a tenurial relationship between the parties.<sup>12</sup>

### *Essential Terms of the Lease*

The formal requirements for an unimpeachable lease were introduced through the *Statute of Frauds 1677*.<sup>13</sup> Ontario's *Statute of Frauds* (the "**Statute**") provides that leases with a term of three years or more must be in writing and signed by the landlord or its agent.<sup>14</sup> Generally, where there is no written agreement, the Statute provides that a tenancy at will is created if the tenant takes possession of the property with the landlord's consent.<sup>15</sup>

For a lease to be valid and enforceable, it should (i) identify the parties; (ii) provide a description of the leased premises to be demised; (iii) state the commencement date of the term; (iv) state the duration of the term; (v) state the rent payable; and (vi) list all of the material terms of the contract, including any covenants, conditions, exceptions or reservations.<sup>16</sup>

When one or more of the essential elements are not present or are ambiguous in a lease, the parties can apply to the court to determine the validity of the agreement and for interpretation of the lease. The court can consider evidence that demonstrates the parties' intentions at the time they entered into the lease and whether the parties intended to create a binding contract. In *Canada Square Corp. Ltd. Et. Al. v. Services Ltd. Et. Al.*,<sup>17</sup> the Court held that in the presence of unclear language, if the evidence provides that there is a degree of certainty as to the essential terms, it can be determined that the parties intended to create a binding lease agreement.<sup>18</sup>

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<sup>10</sup> *Winslow v. Nugent* (1903) 36 N.B.R. 356, 1903 Carswell 53 (S.C. *en banc*) at 358 N.B.R.

<sup>11</sup> *Ziff*, *supra* note 5 at 326.

<sup>12</sup> *Ibid.*

<sup>13</sup> *LexisNexis*, *supra* note 1 at 17.

<sup>14</sup> R.S.O. 1990, c. S.19, s. 3.

<sup>15</sup> *Ziff*, *supra* note 5 at 327.

<sup>16</sup> E.K. Williams, *Canadian Law of Landlord and Tenant*, 3<sup>rd</sup> ed. at 68 in *Pattenick and Adams Furniture Co. (Re)* [1970] 2 O.R. 529 11 D.L.R. (3D) 416 (Ont. H.C.J.).

<sup>17</sup> *Canada Square Corp. Ltd. Et. Al. v. VS Services Ltd. Et. Al.*, [1981] O.J. No. 3125, 34 O.R. (2d) 250 at 16.

<sup>18</sup> *Ibid.*

### ***Parties***

The main parties to a lease are generally the landlord and tenant. On occasion, landlords may require the tenant to provide a guarantor or indemnifier to guarantee the tenant's obligations under the lease or indemnify the landlord from defaults of the tenant and when one is provided, the guarantor or indemnifier also becomes party to the lease.<sup>19</sup>

### ***Description of the Premises***

The courts have generally held that in the absence of a descriptive identification of the leased premises, the agreement is void.<sup>20</sup> While some partial or ambiguous property descriptions have been determined to be complete by the admission of extrinsic evidence,<sup>21</sup> it is preferable to provide a clear description of the leased premises so that the lease will not be held to unenforceable if challenged. Description of properties may include any restrictions on the use of common areas of office buildings or shopping centers and may also allow the landlord to retain control over such non-leasable common areas.

### ***Term***

Generally, leases in perpetuity are invalid at common law. As such, a requirement of an enforceable lease is that it must provide for a definite length of term. In *Lace v. Chandler [1994]*,<sup>22</sup> the Court held that if parties fail to specify the duration of the lease, a tenancy agreement will be void. Where a fixed term lease contains a right of termination at an earlier date or in case of an event of default, the lease will still be interpreted as valid and enforceable.<sup>23</sup>

### ***Rent***

"Rent" is the payment due to the landlord by the tenant in consideration for the use of the landlord's property. The tenant is bound by contract to make this payment at a specified time interval, for a specified amount. Depending on the nature of the commercial lease, Rent may include base rent, percentage rent, and additional rent, which may include operating costs, utilities, and taxes.<sup>24</sup> Provided that the lease states a fixed amount of rent to be paid by the tenant or provides a means of how to ascertain the fixed rent amount, the provision can meet the requirement for certainty as an essential term of the lease.

### ***Covenants, Conditions, and other terms***

Covenants impose obligations on a party. They may be positive, negative or restrictive covenants, which set out an action to be taken, or prohibit or restrict an act, respectively. While there are no specific requirements for any specific type of covenant to be present in a valid lease, where a lease is silent as to the covenants to be inserted, or it states that the "usual covenants" are applicable, the

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<sup>19</sup> *LexisNexis, supra* note 1 at 3.

<sup>20</sup> *Ibid* at 29.

<sup>21</sup> *Ibid*.

<sup>22</sup> *Ibid* at 71.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid* at 95.

lease will be found to be enforceable.<sup>25</sup> Conditions are stipulations that go to the root of the agreement and a breach of a condition gives rise to treat the agreement as repudiated or terminated.<sup>26</sup> Other terms such as reservations or exceptions can be negotiated and inserted into the lease document as parties see fit.

### 3. What is the Nature of a License Agreement?

Unlike lease agreements, license agreements do not grant an interest in land to the licensee nor create any estate or interest in the property.<sup>27</sup> Licenses may also be referred to as "concession agreements",<sup>28</sup> and merely provide a right to enter upon and use the grantor's land in a specified manner or for a specified purpose at the grantor's discretion. The nature of licenses is to provide licensees with permission to use premises or do that which would otherwise constitute as trespass on the premises.<sup>29</sup> Licensee rights do not continue upon the sale of the property by the grantor and the purchaser would not be bound to take on a license that was subject to the land at the time of the sale.<sup>30</sup> Where a prospective sale or lease negotiation fails, but a party has entered into possession of the premises, the relationship between the parties can be said to be that of a licensor and licensee.<sup>31</sup>

Since licenses do not create an estate or interest in land, they are subject to less formal requirements than leases.<sup>32</sup> Although there are no formal requirements, licenses can be created through an agreement in writing between the parties and generally set out similar information that is provided for in a lease. Such information may include the parties, the licensed premises, and the fee for the use of the licensed premises.

License agreements may be used to facilitate the occupancy of a variety of commercial spaces such as, but not limited to retail kiosks in shopping centers, pop-up store designated retail space, cosmetic counters at department stores,<sup>33</sup> seats at sporting or performance venues,<sup>34</sup> and camping grounds.<sup>35</sup>

Several forms of licenses exist, including bare licenses, contractual licenses, and license coupled with interest. A brief explanation of each follows.

A bare license is a license that is unsupported by a contract and is fully revocable.<sup>36</sup> This type of license is created without consideration, can be revoked at any time by the licensor, and is automatically revoked by the death of the licensor or the disposition of the land.<sup>37</sup> In contrast, other

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<sup>25</sup> *Ibid* at 126.

<sup>26</sup> *LexisNexis, supra* note 1.

<sup>27</sup> Williams and Rhodes' Canadian Law of Landlord and Tenant, 6th Edition, Chapter 1, 1;9.

<sup>28</sup> *LexisNexis, supra* note 1 at 6.

<sup>29</sup> *Ziff, supra* note 5 at 354.

<sup>30</sup> *Supra* note 8.

<sup>31</sup> *Downsworth Investments Inc. v. Anthony* [1990] O.J. No. 261 at para 29.

<sup>32</sup> *Somogyi v. Kapasky*, 2003 CanLII 26266 (ONSC) at para 16.

<sup>33</sup> *LexisNexis, supra* note 1 at 6.

<sup>34</sup> *Ziff, supra* note 5 at 355.

<sup>35</sup> *Harvey v. Bingemans and Waterloo Region Police*, 2022 ONSC 3905 (CanLII) at para 49.

<sup>36</sup> *Ibid* at paras 26-28, 49.

<sup>37</sup> *Supra* note 32.

contractual licenses may be irrevocable and while they may confirm a measure of permanence over possession, they do not elevate a license into conferring an actual interest in land.<sup>38</sup> An example of an irrevocable license is an admission ticket for a sporting or performance event. When a ticket is purchased, there is a creation of a contractual license for use of a specific seat in a venue for the duration of the sporting event or performance. Admission tickets often contain terms that outline the ticketholder's rights, and the fine print may state that the license is fully revocable for any reason or due to a breach of any expressed or implied terms by the ticketholder.<sup>39</sup> Essentially, a license to attend the sporting event and use of an assigned seat remains in place so long as the ticketholder adheres to the governing rules of conduct.<sup>40</sup> If the ticket is silent on revocability, it is likely that the license cannot be revoked for the duration of the event if the ticketholder behaves generally well.<sup>41</sup>

A license coupled with a leasehold interest can potentially bind third parties. For example, a license to use a parking lot may run with the assignment of a lease. Though on its own the license would not run with the land, because the interest it is coupled with is assignable, the interest and the license will have the ability to bind a third party.<sup>42</sup>

The revocability of a license is a key distinguishing factor between a license and a lease agreement. Unlike leases, which require the term of the lease to be set out in the agreement, license agreements do not require the same formal element. In a lease, unless a termination right is specifically granted to a party by the terms of the lease, the lease cannot be terminated by the landlord or tenant prior to the natural expiry of the term. Further, in order to be valid, any notice provided by a party under the lease, including a notice of termination, must be made in accordance with the provisions of the lease. Finally, there are additional mechanisms in place under the CTA that limit each party's ability to unilaterally terminate the relationship. In contrast, licenses often do not contain similar provisions.

Bare licenses are known to be fully revocable, and in most instances, so are contractual licenses. *Winter Garden Theatre (London) Ltd. V. Millennium Productions Ltd.*,<sup>43</sup> dealt with the revocability of a contractual license. The owners of the Winter Garden Theatre had given Millennium Productions Ltd. a license to occupy the theatre for an initial period of six months. The licensee had an option to extend the term for an additional period of six months at increased rent. Following the expiration of the extended term, the license allowed for ongoing occupation by the licensee at a weekly rental rate and required one month's notice for the termination of the license by the licensee. The license did not contain any provisions requiring the licensor to provide a notice to terminate the agreement. On September 11, 1945, the licensor provided the licensee with a notice of termination and required the licensee to vacate by October 13, 1945. The licensee asserted that the license only provided the licensee with the right to terminate the license and as such, the licensor was in breach of its terms, or in the alternative, the license was valid for a

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<sup>38</sup> *Ziff*, *supra* note 5 at 354.

<sup>39</sup> *Ibid* at 355.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*.

<sup>42</sup> *Ibid* at 358.

<sup>43</sup> [1948] AC 173.

reasonable period of time after the notice of its termination had been given and that such period had not yet expired.

The issue before the Court was whether a contractual license could be revoked when the licensee was not in breach of any of its terms. The Court discussed the scenario of when a person purchases a ticket to attend a performance or sporting event. If a ticketholder is not in breach of the terms of that license, they are entitled to remain on the property until such time as the performance or event has ended. However, the license at issue was made under different circumstances and it was not perpetual. The Court held that the license could be terminated by the licensor upon providing reasonable notice and that the one-month notice provided by the licensor was sufficient notice to terminate the license agreement.

Ontario courts have followed the decision in *Winter Garden Theatre* as it relates to the rights that ticketholders/licensees have at sporting events. In *Davidson v. Toronto Blue Jays Baseball Ltd.*,<sup>44</sup> the Superior Court held that a ticket to a Blue Jays game was a personal revocable license that provides the ticketholder with a right to be present in the stadium during a game. The Court also stipulated that a well-behaved licensee should not be treated as a trespasser until the event which the ticketholder has paid to see is over, and until the ticketholder has a reasonable time thereafter to depart.<sup>45</sup> The license, however, may be revoked by the management in accordance with the terms or conditions that are stipulated on the reverse side of each ticket,<sup>46</sup> and if there are any breaches of municipal, provincial, or federal by-laws or regulations by the licensee, the license does not shield them from being removed without compensation from the event by the relevant authorities.<sup>47</sup>

#### **4. Lease vs. License: What Criteria Do Ontario Courts Consider?**

Depending on the terms of the agreement and the relationship between the parties, there may be disagreements regarding which type of agreement was entered into and what rights were conveyed to each party through the agreement in respect of the property.

When interpreting which kind of agreement exists, Ontario courts apply a test that considers whether the agreement, on a construction based on the intention of the parties, grants exclusive possession to the occupants, or merely grants permission to occupy subject to the rights of the owner.<sup>48</sup> Courts have also stated that the use of descriptive language to identify the parties as either a "landlord" or "tenant" or simply titling the document a "lease" is not enough to conclude that the agreement is a lease.<sup>49</sup> Similarly, describing the relationship as a "license" is not enough to conclude that the agreement is a license, especially when the occupant has exclusive possession of the premises.<sup>50</sup>

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<sup>44</sup> 1998 CanLII 14938.

<sup>45</sup> *Ibid* at paras 15, 41, 43.

<sup>46</sup> *Ibid* at para 39.

<sup>47</sup> *Ibid*.

<sup>48</sup> *LexisNexis*, *supra* note 5 at 6.

<sup>49</sup> *Metro-Matic Services Ltd. v. Hulman*, [1973] O.J. No. 2309, 4 O.R. (2D) 462 (ONCA).

<sup>50</sup> *Keith Whitney Homes Society v. Payne*, [1992] O.J. No. 849 at para 33-34.

**i. Lease, not license**

The two criteria that courts consider when determining which type of agreement was entered into are: (1) the intentions of the parties; and (2) whether exclusive possession was conferred to the party occupying the premises for a fee. In *Re B.A. Oil Co. & Halpert*,<sup>51</sup> B.A. Oil filed two applications, as landlord, requesting an order for a writ of possession for two gas stations that were occupied by the respective defendants under a monthly lease. The parties had executed a document described as a "service station lease" in a standard form of lease and provided for a monthly tenancy, renewable every month until written notice of termination was provided thirty days prior to the expiration date. On the same date that the document was executed, an exclusive sales agreement was also signed which restricted Halpert to only sell gas that was supplied by the landlord.

The landlord's applications were dismissed by a County Court judge and the relationship between the parties was deemed to be that of licensor and licensee. On appeal, the landlord argued that the agreement was a lease as it was seeking a declaration that section 75 of the Landlord and Tenant Act, R.S.O. 1950, c.199 would enable the landlord to obtain a writ of possession of the premises.

The Court of Appeal held that "an agreement which confers exclusive possession of the premises as against all the world, including the owner, is a lease, while if it merely confers a privilege to occupy under the owner, it is a license".<sup>52</sup> The Court stated that to determine whether an agreement creates the relationship of landlord and tenant or merely that of licensor and licensee, "the intention of the parties must be ascertained."<sup>53</sup> Looking at both documents, it was evident to the Court that there was nothing to suggest that the landlord intended to retain possession of and control of the service station premises in a manner which would be inconsistent with the grant of a right of exclusive possession. The Court held that the agreements "in clear and unmistakable terms gave exclusive possession to Halpert and the very nature of the business to be carried out on the premises required that they have exclusive possession."<sup>54</sup> As a result, we conclude that when a document confers exclusive possession and exclusive control over the premises, the Court has found the agreement to be a lease agreement due to the creation of interest in the property.

In *Metro-Matic Services Ltd. v. Hulman*,<sup>55</sup> the tenant plaintiff had installed coin-operated washing and drying machines in apartment premises pursuant to a written agreement made between the plaintiff and the owner of the property. The agreement was titled "Lease Agreement" and in it, the owners were called "the Landlord" and the plaintiff was called "the Tenant." The agreement provided that the Landlord "does demise and lease unto the Tenant the laundry room or rooms located on the ground floor(s) of the Landlord's premises", and it contained a habendum clause providing that the plaintiff was "To have and to hold the demised premises for and during the term of five (5) years", and provided for payment by the plaintiff of \$1.25 per suite per month.<sup>56</sup> The agreement also contained a covenant by the plaintiff that the "demised premises shall be used only

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<sup>51</sup> 1959 CanLII 125 (ONCA).

<sup>52</sup> *Ibid* at 9.

<sup>53</sup> *Ibid* at 13.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Supra* note 49.

<sup>56</sup> *Ibid* at 1.



for the purpose of carrying on the business of an automatic laundry" a covenant by "the Landlord" for quiet enjoyment as well as further covenants. Essentially, the agreement contained the necessary elements required of a lease.

The plaintiff brought an action for loss of profit and damages against the defendant as after purchasing the building, the defendant had requested the plaintiff to remove its equipment from the premises. The Court held that the plaintiff did not have a valid lease and dismissed the action. The plaintiff appealed, and the Court held that it was clear from the wording of the document that the parties intended to create a lease. The words "lease" and "demise" were words traditionally used to create an estate or interest in land. The covenant for quiet enjoyment and the habendum clause, in the absence of a clear statement to the contrary, were conclusive of the intention of the parties to grant a lease with exclusive possession and control over the leased premises by the plaintiff.<sup>57</sup>

Where the parties called the agreement a "license agreement", but the intention of the parties was to create a landlord-tenant relationship, the Court has held that the agreement constituted a lease. In *Keith Whitney Homes Society v. Payne*,<sup>58</sup> the applicant, a registered charitable organization operated non-profit housing at 147 Queen Street East in Toronto. All residents of the home were required to enter into a license agreement which set out the rights and responsibilities of the residents and of the applicant organization. The agreement also provided that each resident pay a monthly rent which was set according to their financial circumstances and when rent was not paid on time, the resident was deemed to have indicated their intention to vacate the premises. On the issue of whether the agreement created a tenancy for Payne, the Court considered whether Payne had exclusive possession of the premises based on the intentions of the parties as expressed in the agreement. The agreement set out building rules and other regulations, including an extensive section on conflict and dispute resolution. The Court concluded that the parties intended for the agreement to be an agreement for more than just the use of a designated room on the property.<sup>59</sup> The agreement was personal in nature as Payne was expected to participate in the decisions of the community and to be governed by its rules. The Court also noted that the parties cannot turn a tenancy into a license by merely calling it a license. Though the parties had called the agreement a license and it contained provisions not typically found in a lease, the agreement gave the respondent exclusive possession of the premises for a term in return for rent. As such, the relationship between the parties was one of landlord and tenant.

## ii. License, not lease

In the absence of words that confer a demise or grant of an interest an estate in land or the right of exclusive possession, the court has held that the agreement that the parties entered into is a license agreement. In *Town of Brockville v. Dobbie and Ritche*,<sup>60</sup> the parties had entered into an agreement to operate the local theater. The agreement allowed for assignment of the agreement with the consent of the landlord. When the Town's consent was not sought for an assignment, it filed an

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<sup>57</sup> *Ibid* at 5-7.

<sup>58</sup> *Supra* note 50.

<sup>59</sup> *Ibid* at para 34.

<sup>60</sup> [1929] O.J. No. 21, 64 O.L.R 75 (Ont. C.A.).

application to restrain the defendants from continuing to operate the theater and for damages resulting from a breach of covenant. The Court held that notwithstanding the use of the word "rent" in the agreement, and that the agreement provided for exclusive management by the theater company, the agreement was not to be regarded as a lease. The agreement was merely a license as it did not contain any words of demise or grant, or any provision regarding exclusive occupation and it did not purport to confer upon the theater company any estate or interest in the property. As a result, the Court found that there was no breach of the covenant and no forfeiture.<sup>61</sup>

The issue of whether an agreement was a license or lease was also raised in the context of premises in a shopping centre. In *Cadillac Fairview Corporation v. Great Pretenders Sparkle Tree*,<sup>62</sup> the landlord and the tenant agreed to relocate the tenant to a temporary location in the shopping centre, as its previous premises were going to be destroyed for renovations. Both parties were hopeful that a permanent location in the shopping centre would become available. During the time the tenant occupied the temporary premises, the tenant did not pay any rent and the landlord did not request rent for the first four months of occupancy.

Despite the efforts of the parties, they were not able to agree on alternate premises and new a lease agreement. The landlord brought an application for an order for possession and for compensation for the use and occupation of the commercial premises. The landlord provided the tenant with three days' advanced notice to vacate the premises. The tenant vacated the premises one month after the date set out in the notice, arguing that it was entitled to thirty days' notice due to its rights as a tenant. While the issue was moot by the time it was heard, the Court held that the relationship of the parties during the time the tenant occupied the temporary premises was not one of landlord and tenant, but rather one of licensor and a licensee without an interest in the premises. The licence, being for an indefinite term, was revocable at the will of the licensor. The licensee was entitled to a reasonable time to vacate the premises. The three days' notice provided by the licensor was found to be reasonable. The failure of the licensee to vacate within that time gave rise to a liability to pay rent after the eviction date set out in the notice. As the licensor had failed to lead evidence substantiating its claim that the rent for the temporary space should be \$2,000 per month, the licensee was ordered to pay one month's rent at the rental rate of its former, short-term lease, which was \$1,500 per month.

Most recently, the Superior Court of Justice held that mere permission to occupy land does not meet the requirements of a lease if exclusive possession of the land is still absent. In *Harvey v. Bingemans and Waterloo Region Police 2022*,<sup>63</sup> the applicant had purchased a license to occupy a seasonal camping site for a trailer within the Bingemans Camping Resort grounds. The applicant signed a 184-day "License of Occupation" and upon occupying the premises, the applicant built a fence around his trailer without the consent of the Bingemans, which initiated a dispute between the parties. After receiving several warnings about the fences, the applicant also built a wooden deck on the site, contrary to the Bingemans' grounds rules and regulations. The applicant initially claimed that Bingemans was his commercial landlord, that their relationship was governed by the CTA, and that the fence was a "human rights accommodation". On another occasion, he claimed

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<sup>61</sup> *Ibid* at paras 46, 49, 51-52.

<sup>62</sup> [1988] A.J. No. 1011, 92 A.R. 365 (Alta. Q.B.).

<sup>63</sup> *Supra* note 35.

that the relationship may be subject to the *Residential Tenancies Act*. Bingemans served a Notice of Termination of the License of Occupation on the applicant. The applicant did not vacate the premises and Bingemans subsequently issued a Trespass Notice onto the applicant. The applicant attended the site again and was met by two officers of the Waterloo Region police who arrested him after a brief exchange and refusal to leave when directed pursuant to the *Trespass to Property Act*.<sup>64</sup> After providing him with an Offence Notice, the applicant was asked to leave, and he did.

The issues before the Court included deciding whether the applicant was a licensee or a tenant, and if a tenant, whether the *Residential Tenancies Act* or the CTA would apply. The Court made the following distinctions between a lease and a license:

*There is a difference between a license and a lease. A license is a permission to use a property. It does not convey a leasehold interest in the land. With a license, one becomes a licensee; with a lease, one becomes a tenant. There are similarities between the rights of tenants and licensees, but they are not the same. The concepts cannot be used interchangeably. A licensee is permitted to enter onto lands, with the permission or consent of the owner. A license gives the licensee right to do something on the owner's property, which the owner could otherwise prevent. Generally, a lease exists where the owner agrees to turn over exclusive possession of the property for another for a period of time. The conveyance of exclusive possession is an essential characteristic of a lease. A license, on the other hand, is an agreement that gives the licensee permission to use the land only at the owner's discretion. A license is a revocable privilege.*<sup>65</sup>

The Court moved on to interpret the contract between the parties and found that although the applicant was arguing that he was a tenant because he had permission to occupy the land, more is required to meet the attributes of a lease. The agreement specified that the campground site was to be used for "seasonal recreation and vacation purposes only" and the applicant was required to maintain a permanent residential premises at another location, which he did. The Court found that the essential elements of a lease were not present, and a conveyance of exclusive possession was not granted. As a result, the agreement was found to be a license and as such, Bingemans could revoke the license in response to the applicant's refusal to comply with the rules and regulations of the site.

As mentioned previously, where lease or purchase negotiations fail, but the potential purchaser or tenant enters into possession of premises, the courts have held that a license governs the relationship between the parties. In *Downsworth Investments Inc. and Anthony (Re)*,<sup>66</sup> the parties entered into an agreement of purchase and sale for the whole of the land. They had also agreed that the purchaser would lease back half of the land for 20 years at a set rental fee. The purchaser drafted a lease, but the parties never executed it as there was disagreement about the rent. The seller took possession of the land and took the position that they were a tenant at will and brought an application for a writ of possession of the land. The Court determined that it was not the intention of the parties to create a proprietary right. Any proprietary interest had to be in the form

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<sup>64</sup> *Trespass to Property Act*, R.S.O. 1990, C. T.21.

<sup>65</sup> *Supra* note 35 at paras 26-28.

<sup>66</sup> *Supra* note 31.

of a tenancy and the requirements of a tenancy had to be satisfied. No tenancy for a specified term had been created since the term of the agreement could not be ascertained with certainty. There was also no tenancy at will because at common law, a tenancy at will only arises when either party can terminate the relationship at will. In this case, the respondent was in the position to terminate as it took possession of the land, but not the applicant. As a result, the Court held that the seller had not acquired any proprietary interest in the part of the land occupied by him and accordingly, that Part III of the Landlord and Tenant Act did not apply, and the Court was without jurisdiction to grant any relief in this proceeding.<sup>67</sup>

## **5. Conclusion - What Works Best for Clients?**

This paper has discussed the main elements that make up a lease and a license respectively. The main difference between the two agreements is that while leases convey an interest in the property to a lessee, licenses are purely contractual, do not convey an interest in the property, and do not provide exclusive possession of the property to the licensee.

License agreements simply allow for the occupant to use the property for a fee and licensees are subject to the agreement being revocable with little to no notice. In contrast, lease agreements are subject to the CTA and more established common law principles that govern the landlord-tenant relationship which provide each party with a more comprehensive set of rights and obligations. To determine the true nature of an agreement, the courts look at the intention of the parties and whether the agreement provides for exclusive possession of the property or an interest in the property to the occupant.

While both agreements can serve the interest of parties in a commercial context, when advising a client on which agreement would serve them best, it is important to consider the duration of the term of the agreement, the rights that they are interested in retaining or conveying, and the ability to terminate the agreement.

Generally, for property owner clients, a license may be optimal in many scenarios. As a license does not provide exclusive possession to the licensee, the licensor is afforded the ability to revoke the license with little to no notice and the license is not subject to the CTA. That being said, opting for a lease agreement may be beneficial to a property owner for longer term tenancies where more comprehensive rights are set out and tenure and financial certainty are more guaranteed.

For occupant clients, a lease may be most beneficial in providing certainty that they will be able to remain on the premises for a specified period of time or be entitled to receive reasonable notice from the landlord if they require the premises to be vacated. Further, a lease agreement provides dispute resolution mechanisms through the CTA and through established common law principles. As such, this type of agreement provides a broader set of rights regarding the occupancy and possession of the property. For occupant clients that are looking for temporary space, want to avoid the greater costs of negotiating a lease, and are accepting of the risk that they may be asked to vacate the premises on short notice, a license agreement may be suitable.

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<sup>67</sup> *Ibid* at para 18.

Each potential landlord-tenant or licensor-licensee relationship is unique and will be guided by the needs and intentions of each party. While both a lease and a license can serve to meet the specific needs of a client, what is most important is to ensure that the form of the executed agreement makes it clear as to what type of relationship is being formed. If deciding to enter into a lease, it is important to include the essential elements to ensure enforceability of its terms. In contrast, if entering into a license, it is important that the agreement makes it clear that no exclusive possession or interest in land is being conveyed to the licensee, and for clarity, any termination rights along with relevant notice requirements are set out.