

The Cancellation of a Lease, Sublease or Licence

Strictly follow the provisions of the Property Law Act 2007 (“PLA”)

This is of critical importance. The ramifications for a tenant in terms of losing their business/livelihood can be significant as a result of a cancellation. As a result, should your notice of cancellation be defective in any way then you run the risk that a tenant could challenge it and apply for relief against forfeiture (see below).

Cancellation Notices in relation to rental arrears need to be accurate

In order to prevent the tenant applying to the High Court for injunctive relief your notice must specify the following:

- the nature and extent of the breach complained about i.e. the fact that the tenant is obliged to pay rental on a due date and has not;
- the amount that must be paid to remedy the breach;
- the period within which the breach must be remedied;
- the consequence that, if the breach is not remedied at the expiry of the specified period, the landlord may seek to cancel the lease;
- the right of the tenant to apply to the Court for relief against cancellation of the lease, and that it is advisable for the tenant to seek legal advice on the exercise of that right.

Serve your Notices correctly

We suggest that you use a process server for this purpose.

Where the tenant is a company you need to ensure that notices are served at the current address for service recorded with the Companies Office, or on a person who is named as a director of the company (pursuant to the current ADLS lease).

Where the tenant is a company the notice should also be served on the guarantors under the lease, which can be done by way of registered post.

Ten day arrears period can run concurrently with ten day remedy period

Section 245 of the Property Law Act provides that the landlord may exercise a right to cancel a lease only if the rent has been in arrears not less than ten working days.

Section 245 also provides that the landlord must serve on the tenant a notice of intention to cancel and at the expiry of the period specified in that notice, if the breach has not been remedied, the landlord may re-enter and cancel the lease.

Many people assume that rental must be in arrears for ten working days before the notice of intention to cancel can be served, and then a further ten working days must elapse before a right of re-entry arises. This is incorrect.

A closer look at Section 245 of the PLA reveals that these two timeframes can actually run concurrently. In order to preserve your position we suggest serving a notice of intention to cancel within the first few days of the rental being in arrears, to enable the right of cancellation and re-entry to arise as soon as practically possible.

Section 246 Notices

Section 246 of the Act can be used for cancellation of a lease for breaches of covenants other than the covenant to pay rental.

Breaches that are covered by Section 246 may include tenants not keeping the premises open for business during usual trading hours, a liquidation of the tenant company, not complying with the permitted business use, breach of a franchise agreement (where this is expressed to be a breach of the lease) or anything of a nature that does not relate directly to the payment of rental or operating expenses.

Section 246 provides that at the expiry of a period that is "reasonable in the circumstances" if the breach has not been remedied then the landlord may cancel the lease.

Care needs to be taken when exercising the landlord's rights pursuant to Section 246. What will be deemed a reasonable period of time within which to remedy the breach will depend on the nature of the breach i.e. the tenant company going into liquidation may justify a relatively short notice period.

A landlord who re-enters without giving proper notice may be deemed in breach of the covenant to provide quiet use and enjoyment, and may potentially be deemed a trespasser.

Re-entry of the Premises

Any re-entry of the premises must be a peaceable re-entry and must occur without the use of force.

If a breach of the peace occurs this could in fact be deemed a breach of Section 91 of the Crimes Act 1961.

Re-entry must occur during the day, and within daylight hours, however outside business hours would be preferable to minimise conflict.

You should then arrange a suitable time with the tenant for them to remove their chattels from the premises.

Right to Distrain

Section 265 of the Property Law Act 2007 abolished the landlord's previous ability to distrain goods or chattels for unpaid rental. This applies to every lease or sublease of land.

Whilst the right to distrain has been abolished with respect to leases and subleases it is important to note that there is a distinction between a lease and a licence to occupy. A licence may still provide that the licensor may seize chattels for non-payment of a licence fee. You do however still then potentially encounter further issues if another party has already registered a GSA (a charge) over those goods or chattels.

What to do if tenant won't leave

If the tenant does not facilitate a peaceable re-entry then your only option at that point is to apply to the Court for an order for possession pursuant to Section 244 of the PLA.

If this process is pursued then the landlord should claim rent up to the date on which the cancellation takes effect, and should ask the Court, when making the order for possession and cancelling the lease, to order the tenant to pay the rent up to the actual date of cancellation or any later date on which the tenant yields up possession.

The most critical items to take from the advice above are that your Property Law Act notice needs to be correctly drafted, the notice needs to be correctly served, and it is prudent for the notice to be prepared and served promptly, given that the timeframes prescribed within the PLA can run concurrently.

We can help!



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Important: This information is provided as a guide only and is not intended to be legal advice. You are strongly recommended to consult the services of an experienced property lawyer if you are considering purchasing an apartment.

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