

Licences vs Tenancies – Tenant Decanting for RSLs

Decanting is the procedure when temporarily moving a Tenant for the purposes of undertaking refurbishments or when other “emergency situations” occasionally arise.

When a Tenant is decanted, a Tenancy Agreement or Contractual Licence should be created, for the benefit of both the Association and the Tenant. This would also be in line with the Housing Corporation’s Regulatory Code 3.5.3, which requires Housing Associations to provide Tenants with “Agreements that clearly set out residents’ and landlords’ rights and obligations”. Which type of Agreement is used is dependent upon the circumstances of the occupation.

Where the decant Tenant has exclusive possession of a property for a term certain (a specified period of time, i.e. a fixed term or a week-to-week tenancy) for a payment, case law establishes that this would be a Tenancy. If any of these three elements is not present, then it is arguable the Agreement can be a Licence.

Given the above, it is arguable that a Licence can be used, as the payments (the third element) are being made for the substantive or original property rather than the decant property. The use of a Licence is also supported by the fact that a Licence represents merely a permission to stay at a property rather than the grant of an interest in land, which is the case for a Tenancy.

Regrettably the case law is not entirely conclusive that all three elements are **essential** and does in fact contradict itself, suggesting that the core element for a Tenancy is exclusive possession. Clearly therefore, whilst a Licence certainly does seem appropriate, there is the possibility that its use could be open to challenge.

Another aspect which ought to be considered is the Housing Corporation's Good Practice Note issued in November 2007. The Practice Note makes specific reference to 'decant accommodation' and suggests that a Housing Association should grant a Tenancy if there is exclusive possession, notwithstanding that there is no charge being made for the decant property. In light of this guidance it is more probable that there would be challenges if the Association adopted Licence Agreements for decants.

Whilst this might appear to be bad news at first glance, the recovery of possession should in theory be no more onerous as the type of tenancy would only be a Contractual Tenancy and would not have the protection under the Housing Acts. This is because the occupant will retain the tenancy of the substantive property and because that would be their principal home, it would have the protection under the Housing Acts. Any other tenancy could therefore not be protected and so would only be contractual. In short, the Landlord would not need to plead or make out a 'ground' for possession – possession would be mandatory based upon 'former tenant holding over' proceedings. These proceedings are very similar in their nature to the type of Trespass proceedings which would be pursued against the occupant under a Licence. In addition, the 28 day NTQ notice period is the same.

Accordingly, given the Housing Corporation's guidance and the similar mandatory nature and process for recovering possession, it is recommended that if the Landlord is to utilise Occupancy Agreements for decants, that these are Contractual Tenancies.

As a final consideration, it is questioned what procedure is used when the occupant to be decanted is a Tolerated Trespasser. On the basis that a Tolerated Trespasser would not be occupying the substantive property under a Tenancy Agreement protected by the Housing Act 1988, it would be a concern that the grant of any new tenancy, albeit a Contractual Tenancy, could result in the Tolerated Trespasser remaining in situ upon completion of the works. There is also the risk that they could claim that they are now occupying the decant property as their only or principal home, and that the Contractual

Tenancy is in fact a Statutory Tenancy protected under the Housing Acts. Clearly the Landlord would wish to avoid this situation at all costs. Accordingly, when dealing with a Tolerated Trespasser, it would be recommended to use a Contractual Licence. Justification for suggesting a Licence is again for the reason that the occupant is not making payments and as such, one of the three elements for a Tenancy is not satisfied.

Whilst clearly there is a possible risk that this is open to challenge because the core element of exclusive possession would be satisfied, I do not consider that a further challenge could be successfully brought on the basis of a secondary argument that the type of Occupancy Agreement used did not comply with the guidance provided by the Housing Corporation i.e. the use of Tenancies as opposed to Licences.

This is because the Practice Note on Tenure issued by the Housing Corporation in November 2007 is silent on the issue of Tolerated Trespassers and decants.

Clearly from a management perspective, the operating of two types of Occupation Agreement may cause difficulty and confusion with staff as will the identification of who is a Tolerated Trespasser. It may therefore be necessary to take a considered view on this issue and decide to opt for one type of Occupation Agreement over the other. If this is the case then, given that there are likely to be many more tenants than there are Tolerated Trespassers, Landlords may favour Contractual Tenancies.

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