



E: Briefing - ASB & Housing Management

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Queries? Contact.....



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In this edition we will look at a number of issues that have come to us as queries through our free advice line.

***Licences v Tenancies** - during a decant, the landlord and the tenant both need some sort of written agreement but which one is best?*

***Granting tenancies to minors** - a complex issue where young tenants cannot hold a tenancy themselves and a 'Trust' has to be set up*

***Housing law update** - what's new in the housing world including the implementation of the Housing & Regeneration Act section on Tolerated Trespassers ?*

Dates for your diary

Don't forget to book your place at our free lunchtime seminars coming up in June.....

ASB

17th June - Brighouse (Pennine Housing 2000)

Housing Management

23rd June - Sheffield (Arches Housing)

NEW: Damp & Condensation Seminar

16th July - Leeds Federated HA

(contact Neil Whitehead for further details)

Licence v Tenancy in a Decant

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.

Licence v Tenancy cont.....

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.

If you have any queries about this issue please contact Jason Hobday on 01257 266008 or e-mail at jason.hobday@whiteheadsols.co.uk.

Other publications....

Don't forget to check our website for further updates on the following:

Disrepair

Property Matters

Housing Law updates

Tenancies for Minors

Elyarna Alexander – David and the Mayor & Burgesses of the London Borough of Hammersmith & Fulham [2009] EWCA

Background

This case raises a number of very important issues for all landlords when they are considering granting a tenancy agreement to persons under the age of 18.

Ms Alexander-David was a homeless, 16 year old girl who was pregnant when she entered into her tenancy agreement.

Shortly after she moved in, there were complaints from other residents about nuisance, rubbish being left in communal areas and that Ms AD kept a dog without her landlord's permission. Her rent account was also in arrears.

Following numerous letters from LBHF and an interview with Ms AD in August 2007, the ongoing problems were not resolved so the landlord decided to terminate the agreement and recover possession.

On the 14th September 2007, an NTQ was served by posting the Notice in her letterbox in accordance with terms of the tenancy agreement. Possession Proceedings were then commenced. The court ordered Ms AD to give possession of the property by 25th February 2008. This decision was appealed but the appeal application dismissed. The matter was then appealed to the Court of Appeal who quashed the original order.

Legal Principles

- Part 7 of the Housing Act 1996 – duty on LAs to provide accommodation if an Applicant is homeless,
- eligible for assistance, has priority need and has not become homeless intentionally.
- Persons aged 16 or 17 have priority need (Homelessness {Priority Need for Accommodation} England Order 2002).

- The Law of Property Act 1925, Section 1(6) – minors cannot hold legal estates

Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) – the purported grant of a legal estate will operate as a declaration that the premises are held in trust for the minor.

Tenancies for Minors

The offer of accommodation was not in dispute in this case. The problem arose because the landlord used a standard Tenancy Agreement which contained no provision for the fact that the interest in the premises would have to be held in Trust for the tenant as she was a minor.

Ms AD's barrister successfully argued in the Court of Appeal that:

- Being a minor, Ms AD's Tenancy Agreement should (as per TOLATA) operate as a declaration that the premises would be held in trust.
- The landlord (as a Trustee) would have to serve the NTQ on itself which would clearly be a breach of the Trust they had entered into with Ms AD

Local authorities still have a duty to provide 16 and 17 year olds with accommodation, but they have to bear in mind the inability of minors to hold a legal estate and the conflict that may arise if they were to act as Trustee.

The Court of Appeal Decision in this case made reference to an article headed "Child Tenants – a Minor Problem, in the New Law Journal, 14th October 2005. This article suggested that to resolve this conflict, a local authority could seek to appoint a third party Trustee by way of an Application to Court. Action can then be taken to terminate the tenancy and obtain possession of the property.

We would therefore encourage all Landlords to ensure they have the following in place:

- Policies and procedures outlining how third parties will be appointed as Trustees on behalf of minors
- Specially-worded tenancy agreements which outline that the property is being held on Trust
- A Trust deed confirming the minor's equitable interest in the property

A Vesting Deed to vest the legal interest to the beneficiary upon them reaching the age of 18.

Housing Law Update

I know we promised not to mention TTs ever again but we thought it important to finally lay to rest this topic so this is the very last we will say about it. In fact we may get an injunction to stop us mentioning it again!

New Statutory Instruments in place:

Housing & Regeneration Act (Commencement Number 5) Order 2009 (SI2009/1261)

Housing (Replacement of Terminated Tenancies) (Success of Landlords) (England) Order 2009 (SI2009/1262)

Housing & Regeneration Act 2008 (Commencement Order Number 5) Order 2009 (SI2009/1261)

This Order has brought into force Schedule 11 of the Housing & Regeneration Act 2008 which contains provisions to abolish the status of Tolerated Trespasser and furthermore to prevent any future tenants becoming Tolerated Trespassers.

Housing (Replacement of Terminated Tenancies) (Success of Landlords) (England) Order 2009 (SI2009/1262)

This Order abolishes the status of a Tolerated Trespasser where a Landlord, possibly a local authority, has obtained a Possession Order but has thereafter transferred its interest in the property to another landlord. This may be for example as a result of a large scale voluntary transfer.

Points to Note

Warrants

Part 1 of Schedule 11 of the Housing & Regeneration Act 2008 has made amendments to the Housing Act 1985, 1988 and 1996 so that a tenancy will continue until a Warrant for Possession of Land has been executed.

Assured tenancies

With regard to assured tenancies governed by the Housing Act 1988 this particular amendment has been made redundant by the decision of the House of Lords in Knowsley Housing Trust v White which decided that an assured tenancy would not come to an end until a Warrant for Possession of Land had been executed.

Tolerated trespassers - HRA in force...

Other Amendments

Further amendments have been made to the Housing Act 1985 Section 85(4) and Section 9(4) of the Housing Act 1988.

This gives the Court power to “discharge” or “rescind” an Order for Possession if it thinks it appropriate to do so having regard to:

- Any condition imposed upon that Order.
- The conduct of the tenant in relation to such conditions.

This will allow the Courts to discharge or rescind an Order even where the terms of the Order have not been adhered to.

This situation has undoubtedly arisen in circumstances where an Order for Possession has been suspended on very specific terms and albeit the tenant may not have made payments on those specific dates times but the global value of repayments might be equal to the sum which would have been due if they had made payments on a specific date and time as referred to in the Order.

Status of Tolerated Trespassers

The Tolerated Trespasser would become a tenant under a “Replacement Tenancy” If:

- They continued to live in the property as their only or principal home – “the home condition” – throughout the time they had been a Tolerated Trespasser &
- The former landlord is still entitled to let the property to them &
- No other tenancy agreements had been entered into during the time the tenant was a Tolerated Trespasser, then;

If the former landlord had transferred its stock for example local authority to a Registered Provider (RSL) the Tolerated Trespasser will not be a secure tenant but an assured tenant under the terms of the replacement tenancy.

The Replacement Tenancy (RT)

Terms and Conditions of the (RT) will be the same as the original tenancy agreement with some exceptions including:

- The level of any payments made during the period when the tenant was a Tolerated Trespasser (e.g. any rent increases during the time the tenant was a TT will apply to the new RT).

Tolerated trespassers - HRA in force....

- Any outstanding monies which were due to the landlord by the Tolerated Trespasser will be arrears and fall due under the RT.
- If the TT was originally an introductory/demoted or demoted assured shorthold tenancy, the new RT will be the same and the one year period will start again from the date upon which the new RT arose.
- Any Court Order for Possession or Suspension of a Warrant which applied whilst the tenant was a TT will now apply to the new RT.

Continuity – From the Date of the Original Tenancy Agreement

There will be continuity,

If a Court orders so for “relative claims” e.g. claims for breach of tenancy agreement e.g. disrepair claim.

For Succession Rights.

For any Right to Buy.

For claims pursuant to Ground 8 of the Housing Act 1985.

Consultation

Any required consultation pursuant to the Housing Act 1985 carried out during the period when the tenant was a Tolerated Trespasser is not invalidated if the landlord failed to consult with the Tolerated Trespasser during that period and will apply to the new RT.

The information above is only a summary of some of the more relevant parts of Schedule 11 of the Housing Regeneration Act 2008. If upon reading this anyone feels the need for clarification they should not hesitate to contact Paul Lloyd at Whiteheads Solicitors on the details below.

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Please remember, if you need detailed advice on any issue included in this E-Briefing, please contact us.

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