

Welcome.....

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to the latest edition of Emsleys Housing Law Newsletter for Registered Social Landlords, in which we update RSLs on several key themes in housing law, and take a detailed look at the recent Good Practice Note from the Housing Corporation on Tenure

John Murray
Summer 2008

Tolerated Trespass-the Saga Continues

In issue 12 we looked at the impact of tolerated trespass on assured tenancies; this highly problematic area of law has changed again in recent weeks as the DCLG has itself put amendments into the Housing and Regeneration Bill which will automatically restore the tenancies of those tolerated trespassers who are still in occupation of their homes.

The date on which these changes in the law will come into effect is unclear, and the amendments as drafted do not appear to resolve the position of occupiers who became tolerated trespassers at a time when a Local Authority was the owner of the property, where there was then a subsequent stock transfer to an RSL.

We will of course return to this area in a future issue of this newsletter once these issues become clearer.

Disability Discrimination and Housing Possession - Another Continuing Saga

In issue 12 we reported on the Court of Appeal decision in **London Borough of Lewisham v Malcolm and Disability Rights Commission (Intervener) (2007) Court of Appeal**

Given the massive impact of the case it is unsurprising that it is now to be considered by the House of Lords later in the year. At present this area of law is not finally settled, and RSLs should contact us for advice or training on this area in the meantime.

Security of Tenure in Temporary/ “Decant” Accommodation Mansfield DC v Langridge (2008) Court of Appeal

In issue 12 we reported on the High Court decision in this case; it has been appealed to the Court of Appeal which has ruled that even if Mr Langridge had a licence to occupy his decant accommodation, the licence was a secure licence with the same rights as those arising under a secure tenancy as it was let as a separate dwelling.

Comment: the outcome would not be the same where the landlord was an RSL and the decant accommodation made available after 15 January 1989-see below, under Housing Corporation Good Practice Note 14.

Housing Corporation Good Practice Note (GPN) 14: "Tenure" November 2007

This wide-ranging document is essential reading for all RSLs and replaces the Code of Practice on Tenure for Supported Housing but has relevance to other types of social housing as well. It sets out the Housing Corporation's expectations about a wide variety of tenure issues; the principal provisions are highlighted below.

Tenure in General

- RSLs must use periodic assured tenancies unless the specific circumstances of the case justify a less secure form of tenure such as a licence or assured shorthold tenancy.
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When is an Occupier a Licensee?

- The Corporation clearly advises that whether an agreement is a tenancy or a licence is nothing to do with the way the agreement is labelled. Instead the key factor is whether the occupier has exclusive possession of at least some accommodation. The GPN explores this issue in detail.
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 - If the occupier shares a bedroom with another individual who is not in their household, that will create a licence; however this is probably quite rare.
 - If there is a clause in the agreement that gives the RSL the power to move occupiers round within a particular scheme to avoid lifestyle clashes between residents, and if that clause is actually used in practice, that will create a licence.
 - However the fact that the agreement gives the landlord the right of access to the accommodation for cleaning, health and safety checks or repairs does not create a licence. Instead the occupier will have a tenancy.
 - Similarly the fact that the landlord has a specific right of access to the accommodation in order to provide support or care services at specific times does not create a licence. Instead the occupier will have a tenancy.
 - If an RSL's own interest in the property is time limited-for example it is leased from a private owner-the Corporation's advice is that agreements granted to individual residents by that RSL will be assured shorthold tenancies and not licences.
 - Finally, if the accommodation in question is "decant" accommodation, the Corporation would see that as being let on a tenancy if the occupier had exclusive possession. The tenancy would not be assured or an AST as it wasn't the tenant's only or principal home however, so the occupier must be served Notice to Quit and then possession proceedings must be issued, to which there would be no defence.
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What Notice Should RSLs Give a Licensee?

- The GPN recommends that RSLs give a minimum 28 days notice to occupiers who are licensees, except in specified circumstances which are spelt out in advance in the licence agreement.
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Licensees in Hostels

- Under the 1977 Protection From Eviction Act, an occupier who is a licensee in a hostel provided by an RSL or Council can be evicted lawfully after reasonable notice has been given and has expired, without the need for a Court order for possession.
 - A building is not a hostel if the resident has self contained accommodation. However where the occupier has a true licence (see above) and where that resident has to share some accommodation with other people, basic landlord and tenant law says that no Court order is necessary.
 - **Crucially however, the Corporation expects RSLs “not to evict (such) residents without a Court order if the resident does not voluntarily leave even though this is not a legal requirement.”**
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Occupiers Under 18

- The Corporation does not expect RSLs to grant lesser security of tenure to minors just because of their age. The GPN repeats previous guidance from the NHF about the legal enforceability of contracts for necessities entered into by a person under 18.
 - The Housing Corporation’s view is that if an RSL gives an under-18 year old an agreement that calls itself a licence, that agreement will in fact be a tenancy if s/he has exclusive possession of at least one room. The GPN also tells RSLs to grant a new agreement once the occupier turns 18, and to recover any outstanding arrears which have accrued under the initial agreement by inserting a special tenancy condition into the new agreement.
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Assured Shorthold/Starter Tenancies (ASTs)

- The Corporation accepts that RSLs will use such tenancies but only allows them to be used in clearly defined circumstances:
 1. To tackle anti-social behaviour as part of a wider strategy; use of ASTs in this context must be reviewed within 3 years of their introduction in the light of evidence-based monitoring which is reported to the governing board; or
 2. Where accommodation is made available on a time-limited basis eg private sector leased accommodation (see above) or time limited supported housing
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ASTs Coming to an End

- The Corporation does not expect RSLs to allow fixed term ASTs to drift into statutory periodic status-tenants should be signed up to a new fixed term, or RSLs should operate contractual periodic ASTs from the start. At several points in the GPN the Corporation tells RSLs that when an AST is coming to an end it expects the RSL to take all reasonable steps to ensure the tenant does not become homeless

Use of s21

- The Corporation only expects RSLs to use the mandatory s21 possession procedure where the RSL's interest in the property is coming to an end or where the resident is in supported accommodation and s/he no longer requires that support. This would include situations where the resident has not engaged with support services, where the resident has been offered suitable move on accommodation but has refused it, or where the resident's stay is "incompatible with the aims and objectives of the scheme"
- In such cases "the association must use its best endeavours to find alternative accommodation **before** possession is sought through the Courts" (emphasis added)
- If the tenant has an AST but there are rent arrears, nuisance or other breach of contract the Corporation expects RSLs to pursue possession under the relevant Housing Act grounds, not s21
- However, where the breach of the agreement is an alleged failure to engage with support, RSLs must use s21.
- Finally, "the Corporation does not expect a s21 notice requiring possession to remain active on a tenant's file 12 months after serving unless the association intended to take possession action"-even though such notices have no legal maximum "shelf life".

Conclusion

Many of these requirements reflect the current state of landlord and tenant law but many go beyond the "legal minimum" and require RSLs to reconsider a variety of day to day housing management practices. Housing advice services and tenant's solicitors are becoming increasingly familiar with the GPN and RSLs should be prepared for it to be used against them. For advice on specific situations please contact a member of our Housing Law team.

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**For advice on individual cases or to discuss recovery procedures and practices in general terms,
please contact our specialist Housing Law Team.**

Frequently Asked Questions

Email your questions to us for a response

Questions and Responses will be contained in subsequent issues of the Bulletin

Suggestion Box Please email suggestions/comments for future editions to john.murray@emsleys.co.uk