**FAQ 2**

**Fixed term tenancies: can landlord require notice from tenant if he intends to leave on last day of fixed term?**

**Example of problem**

A tenant is coming to the end of a 12-month fixed term assured shorthold tenancy. He has notified the landlord about two weeks from the expiry date that he intends to leave on that date. The landlord is insisting on a full month’s notice and states that rent will be due until the expiry of such a notice.

The tenancy agreement contains the following provision:

“Required notice period: Two months’ notice by the landlord, or one month’s notice by the tenant, ending on the last day of any rent period on or after expiry of the fixed term.”

The landlord holds the client’s deposit (which was paid before 6 April 2007, and is not therefore subject to the rules regarding tenancy deposit schemes), and is intending to retain it in lieu of rent for the additional month’s notice period.

**Advice**

The basic position at common law is that a tenant does not need to give any notice if he or she simply intends to leave at the end of a fixed term tenancy. This is not something that is derived from statute, but from case law. The case law authorities are: Flower v Darby (1786) 1 T.R. 159 and Cobb v Stokes (1807) 8 East 358. Woodfall on Landlord and Tenant, states at para 17.215:

“At common law, no notice to quit is necessary where the contract of tenancy specifies the term or event upon which the tenancy is to determine. This applies where the demise is for one year, or for any certain number of years, or until a particular day.”

***Express term of the contract***

This being a common law rule, however, it can in principle be displaced by an express term of the contract. The situation here is whether the clause in the tenancy agreement is sufficient to do that. The wording of the clause is not absolutely clear, but the crucial words are that the notice can only end “on or after expiry of the fixed term”. This indicates that the clause is not intended to operate as a break clause which would bring the fixed term to an end before it has run its course. Nor can it relate only to the statutory periodic tenancy which would follow on if the tenants stayed beyond the end of the fixed term: if it did, it would not state that a notice could be served so as to end “on” expiry of the term. So the clause purports to impose on the tenants an obligation to give one month’s notice even if they intend to leave on the expiry date.

The landlords may genuinely not be aware of the common law rule, and it may be worth quoting it to them. The argument would need to be that the clause is not clear enough to displace the normal rule. A clause which seeks to alter the common law position needs to be certain and explicit.

***The Unfair Terms argument***

There is also an argument that the clause is in any event unenforceable under the Unfair Terms in Consumer Contracts Regulations 1999. Under the Regulations, a term is unfair if “contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer” (reg 5(1)). The Office of Fair Trading (OFT) has issued Guidance on Unfair Terms in Tenancy Agreements (OFT 356, September 2005, obtainable at [www.oft.gov.uk](http://www.oft.gov.uk) ). The Guidance states as follows:

“3.78 A tenant is not required to give notice to bring the tenancy to an end at the end of the fixed term. That is because a fixed term agreement comes to an end at the end of the fixed term, and no periodic tenancy will arise if the tenant then leaves. We appreciate that landlords will want to ensure that their properties are not left empty between tenancies, but object to terms that impose a contractual obligation on the tenant to give notice in order for the tenancy to be terminated at the end of the fixed term…”

The Guidance is an expression of how the OFT believes the law is likely to be interpreted, and not a binding statement of the law, but it should weigh persuasively with the courts.

The tenant should therefore argue that the clause is (a) invalid, because it is inadequate to displace the common law rule; and (b) unenforceable in any case, because of the Unfair Contract Terms Regulations.

There is one further tactic which the tenants could adopt as a matter of negotiation, again based on the Unfair Terms argument. They could suggest to the landlord that, if he continues to maintain that the clause is valid, they will refer the tenancy agreement to the Office of Fair Trading for its consideration. If the OFT believes that a landlord is routinely using agreements which flout the regulations, it can apply to the court itself for an order declaring the offending part to be unlawful. The landlord may well come to terms rather than submit his standard tenancy agreement to the scrutiny of the OFT.

Shelter

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