

# TAKING POSSESSION - HOW TO MANAGE THE UNCERTAINTY OF UNDOCUMENTED OCCUPATION

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With UK landlords facing the ambiguity of implied tenancies, we explore how to manage the risks

We'll paint a scene for you: a multi-let building is ripe for redevelopment and the developer/landlord is working towards obtaining possession of the various parts and terminating any rights that interfere with the development. It knows one tenant has a lease, contracted out of the Landlord and Tenant Act 1954 (1954 Act) to ensure it would expire on the proposed block date for the building without any statutory renewal rights. But the project experiences delays, and the landlord wants to retain its income stream for as long as possible.

It discusses a short-term tenancy, with flexibility for the landlord to terminate when it is ready. But those negotiations stall. The lease ends, the tenant remains in occupation paying the same rent as per the expired lease and discussions are not resumed with any vigour. Fast forward a year and the landlord is ready to recover possession from said tenant. Are they a tenant at will? Are they a periodic tenant? And what does it matter?

It matters because it makes a huge difference when it comes to terminating the arrangement. A tenancy at will does not attract any protection under the 1954 Act and can be terminated without any notice period, following which the landlord may re-enter the premises and change the locks.

On the other hand, a periodic tenancy is protected under the 1954 Act and can only be terminated by the landlord serving a section 25 notice specifying one of the statutory grounds to oppose a renewal (such as the landlord intending to redevelop the premises) and giving notice to quit. However, there are complex timings to be considered. The notice to quit needs to expire on the last day of the term and the period of notice required is generally equal to the length of the periodic term (except for an annual periodic tenancy, where the requisite notice is six months). The tenant may also be entitled to statutory compensation under the 1954 Act.

If a landlord gets it wrong and tries to take possession when a tenant argues it has a protected periodic tenancy, not only may it be liable for damages for breach of quiet enjoyment, it may also have committed a criminal offence.

## **WHAT DO THE COURTS SAY?**

While the courts have given guidance on the factors pointing to a tenancy at will or periodic tenancy, it is clear each case is fact specific. As a general rule of thumb, if the tenant remains in occupation paying rent regularly without on-going negotiation for a formal arrangement, a periodic tenancy is more likely to be implied.

However, the recent judgment from the High Court, in the case of *Valley View v NHS Property Services Limited*, emphasises it is important to consider all the surrounding circumstances and particularly the parties' intentions (assessed objectively). This judgment concerned five test cases to determine whether GPs are liable to pay full a service charge to their NHS landlord (and the extent of the landlord's liability to provide those services). The GPs had been occupying their surgeries for years with no written agreements or record of the terms of their occupation. The first issue for the court to decide was whether the GPs were tenants at will or periodic tenants.

In one case, the GP had occupied their surgery for over 14 years. They had discussed, but not fully agreed, terms for a sublease before they moved in, but nothing really progressed further for over four years. They later considered taking an assignment of the NHS landlord's lease, but again negotiations were slow and stalled for years at a time. During this period the GP paid a regular rent to the NHS landlord. However, the court determined a tenancy at will was the appropriate implication, stating: "All that is required and, as I have found, existed in the present case, is that both parties should remain of the intention that there should be a new lease on terms to be agreed."

An important factor in the court's reasoning was the proposed sublease was to be contracted-out of the protection of the 1954 Act. If a periodic tenancy was implied, it would attract 1954 Act rights which directly contradicted the objective intentions of the parties. Jonathan Gaunt QC of Falcon Chambers, acting for the NHS landlord, describes the case as a "particularly striking example" of the principle that a pause in the negotiations does not necessarily result in a periodic tenancy, particularly considering the length of the pauses.

## **HOW WE CAN HELP**

Clearly, the grounds are ripe for dispute when there is no written agreement to record the terms and the relationship between the parties. Due to the specific facts in each case, there can be a lot of uncertainty for landlords who want to recover possession, which may lead to lengthy court proceedings. If a tenant is going to remain in occupation while negotiation of the terms for a short-term interest are still proceeding, we can advise on how to protect the status quo and reduce those uncertainties.

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