

## From AST to a sorry tale

What seemed like a straightforward residential letting recently turned into a complicated affair for one unlucky landlord. Eloise Illingworth and Rupert Cohen recount the facts and reflect on lessons learnt

Imagine this: you let your flat through an agency regulated by the Property Ombudsman to a professional couple for a year while you work abroad. Your flat has two bedrooms and was recently refurbished. After a month or so, you are contacted by the concierge of the building, who reports that your flat has been advertised on Airbnb. With your agent bizarrely uncommunicative, you are driven to inspect the flat yourself, whereupon you see that it is occupied by four strangers and that partitioning has been erected, carving up the living room to create two further bedrooms. Those strangers then all produce copies of their occupation agencies granted to them by a different agency (agency B).

### What next?

That was the scene which greeted a client for whom we acted recently.

As you would expect, our task was to obtain a possession order, which sounds simple enough. However, this possession matter involved some unusually thorny legal analysis.

While there are certain exceptions, most short-term tenancies granted to an individual (or individuals) who occupy the relevant dwelling as their only or principal home will be assured shorthold tenancies (ASTs).

Of course, in this case, the original couple to whom the tenancy was granted were no longer occupying the flat as their "only or principal home". The effect of this was that their tenancy converted from being an AST to an ordinary common law tenancy.

After some digging, it transpired that the couple (whose passports turned out not to be genuine, and arguably never existed) had granted a two-year tenancy to agency B. Agency B had never carried out checks to see if the couple actually owned the flat



– and astonishingly, were not required by any regulations to do so. The "two-year tenancy" allowed agency B to sublet and erect non-structural partitioning, in contrast to the terms of the original AST.

### Legal effect

The legal effect of a tenant granting another entity a tenancy which is longer than the initial tenancy is that the grant operates as an "assignment" of the initial tenancy to the new tenant. In other words, agency B became our client's tenant under the terms of the AST. The legal effect of the second, two-year tenancy (if any) was unclear, but the court was prepared to effectively ignore it at trial. It did not seem fair or reasonable that its terms could bind our client.

As for the four individuals occupying the flats – all young international students studying in London – their occupation agreements had been granted in breach of the terms of the original AST, which in law had been assigned to agency B.

In order to obtain possession, three possession notices were served:

1. A notice under section 8 of the Housing Act 1988 (which is applicable to tenants under ASTs) on the original

couple, requiring possession for breach of the prohibition against subletting and making alterations, and, without prejudice to the validity of that notice;

2. A forfeiture notice under section 146 of the Law of Property Act 1925 on the original couple, giving them notice that if they failed to remedy the breaches of their newly converted common law tenancy within a reasonable period, their landlord would seek possession; and finally
3. A forfeiture notice under section 146 of the Law of Property Act 1925 on agency B giving them notice in the same terms as above.

The third notice was the critical notice, as the couple had dropped out of the picture by effectively assigning their tenancy to agency B. However, we served the first two notices on the original couple to cover all bases at the hearing.

### View from the bench

The court agreed with our analysis at trial.

A possession order was obtained forthwith (rather than following the usual 14 days) against the original couple, agency B and the students; damages for the costs of removing the partitioning and putting the flat back

into its original position after our client's builder gave evidence as to the costs of reinstatement; and an order for arrears of rent and mesne profits, which equated to the larger sums paid by the four students under the terms of their occupation agreements to agency B. The money elements of the claim, which included a very substantial order for our client's costs, were all directed towards agency B rather than the students.

### Top tips for practitioners

- More is more when serving notices seeking possession of residential tenancies. There is often value in serving several notices without prejudice to one another to cover the range of possible tenures and potential defendants.

- Remember to include prescribed wording in accordance with section 5 of the Protection from Eviction Act 1977 if you are serving a notice to quit on a tenant or periodic licensee.

- Possession claims can be made against persons unknown, which may be sensible when dealing with unlawful subletting cases. Don't forget that possession orders take effect against the land (*R v Wandsworth County Court ex parte London Borough of Wandsworth* [1975] 1 WLR 1314). All occupiers – whether or not named as defendants in the proceedings – will be subject to the order.

- When applying to the court for a possession order, ask for a longer hearing (at least 15 minutes) if your claim is complicated.

- It is always worth considering whether to settle with tenants and unlawful occupiers rather than commencing proceedings to avoid incurring additional legal costs of possession proceedings and loss of rent.

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