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The Deregulation Act 2015

Planning restrictions on short-term lettings

This briefing is the third in a series looking at the Deregulation Act 2015 (the Act) and its effect on landlords and tenants. Our first briefing, entitled "Some good, some bad and some very ugly" provided an overview of the main changes made by the Act. The second, "Simply making tenancy deposit protection complicated" considered Tenancy Deposit issues arising under the Act. This briefing will consider changes to planning law affecting London and residential lettings.

The simple

Under the Greater London Council (General Powers) Act 1973 (the 1973 Act), residents of London who wish to rent out their homes for short periods of time over the year need to obtain planning permission for change of use.

A failure to do so could lead to enforcement and a large fine. In practice, the restrictions have not been universally enforced throughout London, nor consistently. In some areas, there has been no enforcement at all.

Taking into consideration the importance to London of its tourism industry and the rise of short-letting organisations such as airbnb, the Government considered that the provisions were restrictive so decided to remove them in sections 44 & 45 of the Act. These revisions will come into force on 26 May 2015.

Section 44 of the Act amends the 1973 Act to make it clear that the use of residential property as temporary sleeping accommodation in Greater London does not represent a material change of use requiring planning permission if:

(i) the aggregate number of nights during a calendar year for which the property is used as temporary sleeping accommodation is not greater than 90, and;

(ii) the person who provides the accommodation is liable for council tax as opposed to business rates (to ensure the revision only affects residential property and not commercial).

Section 44 of the Act also allows the Government to re-apply the controls to particular types of property or to particular areas.

So far, so simple.

And now, some complexity

(In the form of notes and questions, not always with answers)

1. As a change to planning law, the Act does not necessarily give landlords carte blanche to use their properties for short-term lets. A landlord who owns the lease of a property may not be able to sub-let it if the lease prohibits sub-letting.

2. While many leases do permit sub-letting (albeit on first having obtained the landlord's written consent on each occasion), they also seek to control the way in which the property and building are occupied and used. So, even if there are no direct restrictions on short-letting, there are often many other restrictions in leases that will, or could, have a similar effect. For example, there might be a lease restriction on the type of occupier permitted (e.g. just one person, or one person and his immediate family) and there will often be extensive provisions against causing a nuisance or annoyance to others (which is often a concern caused by a succession of newcomers).

3. Whether or not the property is subject to a lease, what will the basis of the short term letting be? Landlords might believe that a short-term letting will not confer any statutory protection on the person being let into occupation. Yet that probably won't be the case. Often, the whole of the property will be let, and for a fee. In that case, in all likelihood, a tenancy will be created. But what sort of tenancy would it be?

4. The letting will be within the scope of the Housing Act 1988 (assured/assured shorthold tenancies) unless:

    a. the letting is to a company, because the 1988 Act only applies to lettings to individuals, or

    b. it is at a rent which, when considered on an annual basis, amounts to more £100,000 per year, or

    c. the letting is specifically intended to allow the tenant the right to occupy the property for the purposes of a holiday.

5. If the letting is not within the Housing Act 1988, it does not mean that an occupier can simply be 'turfed out' if they decline to leave at the expiry of the letting agreement. The landlord is likely to need a possession order from court, having given any required notice before starting the court claim.

6. If the letting is not excluded from the ambit of the Housing Act 1988, then it could be an Assured Shorthold Tenancy (AST). There is no minimum period for an AST.

7. If a letting is in fact an AST and the tenant fails to vacate when required, the provisions of the Housing Act 1988 and linked legislation as amended by the Act will apply.

8. This could mean (from the time all provisions of the Act have been brought into force) a landlord who wishes to get his property back from short-term occupiers who have declined to leave at the end of the letting period may experience substantial and unexpected delays and a number of substantial obstacles. These obstacles will be addressed in a future briefing in this series, but in summary:

    a. a two-month notice seeking possession under section 21 of the Housing Act 1988 will need to be given

    b. a section 21 notice cannot be given earlier than the expiry of four months from the beginning of the tenancy

    c. a section 21 notice cannot be given unless all current and new hurdles have first been satisfied or overcome, including the protection of any deposit and that the notice is in the form that is going to be prescribed

d. a court claim for possession will have to be made, and started within 6 months from when the section 21 notice was given (which one imagines would happen in a case where it was originally intended the letting be of short duration), and

e. if a court claim does have to be started and comes to be considered by a judge, the judge cannot make an order for possession that takes effect earlier than the expiry of 6 months from the beginning of the tenancy (although that ought to be rare, given that the 2 month notice will not be able to be given until the expiry of 4 months from the beginning of the tenancy).

9. Landlords should also consider whether they need permission from their lender to enter into a short-let agreement. Some, or many, mortgages ban them.

Comment

As we noted in our first briefing on the Act, while on one level the Act has simplified some of the contentious issues relating to the letting of residential property, it has not solved all of them and in fact has caused a number of different problems. As noted above, for example, if a short-letting is in fact an AST and the tenant fails to leave, it could be some time before a claim for possession might be made. This difficulty cannot be over-stated: a landlord who lets tenants into occupation for, say, one month might not even be able to serve a two-month notice to get them out until three months *after* he expected them to leave. That delay might cause some to conclude it is not worth letting out their residential property on short-lettings. This may have been deliberate on the part of the Government, but we suspect not.

We plan to publish further briefings covering the new Regulations that are being introduced by the Act. We will look at the curbing of retaliatory evictions and some new hurdles for landlords to negotiate before they can serve valid section 21 notices seeking possession, both of which are due to be introduced later this year, by which time landlords might have sorted out their deposit troubles, or identified new ones.

For more information, please contact:

Jason Hunter
Partner
+44 (0)20 7440 4812
Jason.Hunter@russell-cooke.co.uk

Ed Cracknell
Senior associate
+44 (0)20 7440 4818
Ed.Cracknell@russell-cooke.co.uk

Stephen Small
Associate
+44 (0)20 7440 4845
Stephen.Small@russell-cooke.co.uk