

Q&A - What type of tenancy have I granted?

Dispute Resolution

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Q. Why is it important to work out what type of tenancy (if any) has been created?

A. There are many types of tenancy or right to be in occupation – each has a different effect on what rights and obligations are imposed on you and your “tenant”, and how you can serve valid notice on each other.

Disputes and confusion often arise where the occupier doesn't have a valid written agreement or where the agreement is unclear. It should be noted that legal leases can even be created verbally.

The courts have also identified that where a document is clearly entitled “Lease” or “Licence”, it does not necessarily mean just that. The characteristics of each must be present, and the courts have the power to look behind the title to infer the intentions of the parties.

Q. There can't be that many types?

A. You would be surprised, and the courts continue to create new and interesting ways of adding to the list. The House of Lords created a new tenancy called a “non-proprietary lease” to protect an occupier in temporary housing for the homeless.

Licences offer little protection to occupiers, so owners try to argue that the occupier is only there under a licence. There are four main types of licence: bare licence; licence coupled with a grant; licence by estoppel; and contractual licence.

Leases which can be created at common law include: periodic; fixed-term; estoppel; perpetually renewable leases; tenancies at will; tenancies at sufferance; non-proprietary leases; reversionary leases; leases for life; and leases determinable on death or marriage.

The court has discretion to determine what type of agreement is in place, whether it be express; implied; at common law; or in equity.

Q. So what's the difference between a lease and a licence?

A. A lease is a proprietary right which offers exclusive possession for the tenant to the exclusion of all others – including the landlord. An occupier by permission, but without exclusive possession has a licence, and not a lease. Where the landlord provides board and lodgings the occupier will be considered as a lodger, and not a tenant.

There are exceptions to the rule of exclusive possession which include situations where: there is no intention to create legal relations; the relationship is other than landlord and tenant; the grantor has no power to grant a tenancy; or exclusive possession can be changed by the owner.

Q. There must be a more simple way?

A. The Law Commission published a report which criticised the need to distinguish between licences and leases. The recommended reform of simplifying the structure by introducing standard form “occupational contracts” governing almost all agreements was adopted in Wales. The recommendations would abolish a whole range of tenancies, including Assured Shorthold Tenancies and Secure Tenancies. England however, has not shown any sign of adopting the standard form practice.

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