

REIQ Contracts- The Implications of Allowing Early Possession in a sale of Residential Property

Focus: Residential Tenancies and Rooming Accommodation Act 2008

The REIQ Contract

Most contracts for the sale of residential property regulate arrangements between a Seller and Buyer if a Buyer is granted possession to a property before Settlement of the Contract. For example, the Standard REIQ Contract (Second Edition) for the sale of House and Land states that if early possession is granted, such possession is on terms that:

- the Buyer must maintain the property in the same condition as at the date of possession, fair wear and tear excepted;
- entry is under licence, personal to the Buyer only, and no relationship of lessor and tenant is created, nor are the Buyer's rights under the Contract waived;
- the Buyer must insure the property to the Buyer's satisfaction;
- the Buyer indemnifies the Seller against any expense or damages incurred by the Seller as a result of the Buyer's possession of the property.

However, a Seller of residential property should consider seeking legal or other professional advice before granting early possession. This is particularly the case given the implications under the Residential Tenancies and Rooming Accommodation Act 2008 ("the Act") for allowing such possession. This article considers the circumstances in which the Act will apply to a Seller granting early possession.

The Act

The Act commenced in 2008. One of the main objects of the Act is to set out the rights and obligations of tenants and landlords for residential tenancies. As explained below, the Act will apply to certain early possession arrangements (creating a residential tenancy), and can cause a Seller headache if the correct steps are not followed in entering into, running and ending the possession arrangement.

What is a Residential Tenancy?

Even though the parties may expressly contract to avoid a tenant and landlord relationship when early possession is granted, the Act states that in certain circumstances a Residential Tenancy is created when the right to occupy premises under a Residential Tenancy Agreement is granted.

A Residential Tenancy Agreement is an agreement pursuant to which someone gives someone else the right to occupy premises as a residence, whether or not the right is of exclusive occupation.

The Act then applies to the Residential Tenancy ("tenancy"), to regulate the relationship and obligations of the parties.

Are Tenancies or Licences created under a Contract for Purchase excluded?

Exclusions do apply. For example, the Act does not apply to a tenancy if the tenancy is created or arises between the parties to a Contract of Sale of residential premises under a term of the Contract, and the tenancy is for a period of 28 days or less. However, if the tenancy is for a period of 29 days or more, the Act will apply, meaning that the parties will have entered into a tenancy, and must comply with the provisions of the Act. The parties will need to realise that if possession is granted for, say, 25 days, and the possession continues with the consent of the parties beyond 28 days, a tenancy will be created.

What are the implications?

If a duty or obligation is implied or imposed under the Act, then those duties will apply to the tenancy. There is an obligation on the Seller to ensure that the tenancy agreement is in writing, and that the

standard terms of agreement (set under the regulations) apply to the tenancy. Although the parties may wish to adopt special terms (or conditions) to the tenancy, the standard conditions will prevail to the extent of inconsistency. This may hinder any special arrangements that are to be put in place between the parties as to conducting repairs, maintaining the premises, lodgement of bond, the payment of rental...etc.

The Act is also specific about how a tenancy is ended. Whilst Sellers often require the ability to end the tenancy should the Contract not proceed, if a tenancy agreement is entered into the Seller will need to be mindful of the minimum notice requirements for ending the tenancy, which again cannot be varied if such variation is inconsistent with the terms of the Act.

The parties to the tenancy will also need to follow the procedures set by the Act in starting, running and ending the tenancy.

Is contracting out permitted?

Often early possession is granted on the express condition that there is no landlord/tenant relationship formed by such possession, and in some cases the parties Contract to exclude the provisions of the Act. However, an agreement attempting to exclude, change or restrict the terms of a residential tenancy agreement is void to the extent of any inconsistency. Furthermore, the parties are excluded by the Act, from entering into any agreement with the intention of defeating, evading or preventing the operation of the Act.

Conclusion:

Sellers or Buyers entering into a Contract of Sale where occupancy of the premises may be given as a result of the Contract, for a period of 28 days or more should be aware of the implications of the Act, and their automatic applicability to residential tenancies. It certainly appears that the Parliament did not intend for any flexibility in the Act to allow for parties to make their own commercial decisions about early residency arrangements which differ from the standard provisions set by the Act.

Should you have any queries regarding the contents of this article, please do not hesitate to contact Short Punch and Greatorix Lawyers.