

CAMELOT PROPERTY MANAGEMENT LIMITED

ANTI SQUATTING AGREEMENTS

ADVICE

CONCLUSIONS

1. For the reasons given below, my conclusions in brief are as follows:
 - (a) The Authorisation Agreement confers a right to possession on Camelot sufficient to enable Camelot to bring possession proceedings against any occupier wrongfully remaining in occupation.
 - (b) Camelot would not be entitled to remain in possession of the Property on the termination of the Authorisation Agreement.
 - (c) The Licence will create a licence and not a tenancy, provided that the arrangements described in it are genuinely intended.
 - (d) If a Guardian wrongly held over after termination of his licence, Camelot could claim possession and, in exceptional circumstances, might be able to obtain an urgent injunction excluding the licensee from the premises.
 - (e) Even if the Licence did create a tenancy, it would not be a tenancy binding on the Owner on the expiry of the Authorisation Agreement, unless the Owner was aware of and made no objection to the particular circumstances leading to the creation of the tenancy. Subject to that, the Owner would be entitled to possession from any Guardian who wrongfully held over after the termination of his agreement.

THE FACTS

2. Camelot Property Management Limited (“Camelot”) provides a service of protecting temporarily vacant property in return for a fee paid by the property's owner. Camelot enters into an Authorisation Agreement with the owner. Camelot then allows persons, called “guardians”, to live in the property in return for payment of a fee paid by the guardians to Camelot. The guardians each enter into a Licence agreement with Camelot.

The Authorisation Agreement

3. The Authorisation Agreement is made between the owner (“the Owner”) of the relevant property (“the Property”) for a period starting on a specified date (“the Start Date”). The agreement continues until either the Owner or Camelot gives the other 5 weeks written notice. In the case of the Owner this must expire on a Monday. In the case of Camelot it can expire at any time: see clause 10.1 and the definition of “Notice” in clause 1. There is also provision for the determination of the agreement immediately by the Owner if Camelot breaches any term of the agreement or is subject to certain specified insolvency procedures: see clause 10.2.
4. Clause 4 of the Authorisation Agreement sets out what Camelot is entitled to do during the term of the agreement. By clause 4.1, the Owner grants possession of the Property to Camelot for the duration of, and on the terms of the agreement, for the purposes of securing it against trespassers and protecting it from damage. By clause 4.2, the Owner authorises Camelot to grant temporary, non-exclusive licences to share occupation of the Property which do not confer any right to the exclusive possession of the Property or any part of it (“Licences”).
5. By clause 4.3, Camelot agrees that at no time will Camelot occupy the Property by itself or by its servants or agents, grant possession of the Property or any part of it to any other person, allow any person to have exclusive occupation of the Property or any part of it, or carry on a business in all or any part of the Property, and that it will only use the Property for the residential occupation of persons sharing the occupation of the Property under Licences (“Guardians”).

6. By clause 4.4, the Owner authorises Camelot to install “Temporary Facilities”. These are defined as the temporary facilities specified in the schedule to the agreement or, if no facilities are so specified, such temporary facilities as Camelot shall consider necessary to enable the Property to be occupied by Guardians. Clause 4.4. also authorises Camelot to remove the Temporary Facilities when the agreement terminates.
7. Clause 5 provides for the payment of a defined monthly fee by the Owner to Camelot.
8. Clause 6 sets out the Owner’s obligations to Camelot. These can be summarised as follows:
 - (a) Clause 6.1: give Camelot vacant possession
 - (b) Clause 6.2: maintain the Property in a wind and watertight condition, keep any heating system fully functioning, and keep all communal areas such as hallways, parking areas, and toilets in a useable condition.
 - (c) Clause 6.3: maintain and pay for the supply of heating, gas, oil, electricity, water sewerage and telephones (if connected).
 - (d) Clause 6.4: maintain insurance.
 - (e) Clause 6.5: pay all rates and other outgoings.
 - (f) Clause 6.6: if the Owner inspects, not to unduly disturb the Guardians or damage property.
 - (g) Clause 6.7: do everything necessary to comply with the requirements of any authority.
9. Clause 7 sets out Camelot’s obligations to the Owner. These can be summarised as follows:
 - (a) Clause 7.1: install the Temporary Facilities.

- (b) Clause 7.2: recruit suitable Guardians to occupy the Property under Licences.
- (c) Clause 7.3: cause regular inspections of the Property to be carried out by experienced property managers.
- (d) Clause 7.4: report to the Owner any damage and/or trespass to or at the Property as soon as reasonably possible.
- (e) Clause 7.5: organise the repair of any damage at the request and cost of the Owner.
- (f) Clause 7.6: use reasonable care to ensure that no damage is caused.
- (g) Clause 7.7: enforce the Guardians' obligations under the Licences.
- (h) Clauses 7.8: take and pursue possession proceedings against any Guardian who fails to vacate the Property when lawfully required to do so.
- (i) Clause 7.9: maintain insurance against its own risk of injury or loss to third parties.
- (j) Clause 7.10: not to carry out alterations or additions other than the Temporary Facilities.
- (k) Clauses 7.11, 7.12 and 7.13: on termination of the agreement to yield up possession and remove its goods. However, provided Camelot complies with clause 7.8 and takes possession proceedings against Guardians who unlawfully remain in occupation, Camelot will not be in breach of its obligation to yield up possession at the end of the agreement. Clause 7.13 provides that, in that case, the Owner can either continue the agreement until the last Guardian has vacated, or require Camelot to co-operate in securing the removal of any remaining Guardians. Camelot is not obliged to remove the Temporary Facilities unless they constitute goods. If they are fixtures, Camelot is entitled but not obliged to remove them.

- (l) Clause 7.14: permit the Owner to inspect on 24 hours notice.
- 10. Clause 8 contains various declarations, including an exclusion of liability in certain circumstances.
- 11. Clause 9 contains an agreement by the Owner that Camelot may possess the Property on the terms of the agreement without interruption by the Owner or any person lawfully claiming through, under or in trust for the Owner.

The Licence

- 12. The draft Licence agreement between Camelot and the occupier, called a “Guardian” provides by clause 4 that the Guardian is given personal, non-assignable non-exclusive permission to share occupation of the Property during the “Licence Period”. That is defined as the period commencing on the date of the Licence and expiring on the expiry of a written notice of not less than four weeks served at any time and expiring at any time.
- 13. By clause 5, the Guardian is to pay a monthly Licence Fee in advance on each 25th of the end of the month of the following month and to pay a deposit and interest on late payments.
- 14. Clauses 6, 8, 9, 11 and 12 provide regulations for the use of the Property. These include:
 - (a) Clause 6.1: the Guardian is only to use the Property to live in and not for any trade or business.
 - (b) Clause 6.4: the Guardian will comply with all directions given by Camelot from time to time as to the use of the Property.
 - (c) Clause 8: the Guardian shall use his best endeavours to share the Property amicably and peaceably with such other licensees as Camelot shall from time to time permit to make use of the Property and shall not interfere with or otherwise obstruct such shared occupation in any way whatsoever.

- (d) Clause 9.5: in co-operation with all other licensees sharing occupation of the Property and under the direction of Camelot will ensure that at no times is the Property left vacant.
15. Clause 7 provides for determination of the Licence by notice and clause 10 for determination immediately in the case of gross misconduct (as defined), or more than two instances of misconduct (as defined).

ADVICE REQUIRED

16. I am asked to advise on whether the Authorisation Agreement or the Licence will confer any security of tenure on Camelot or a Guardian in occupation under a Licence, and on the law governing the recovery of possession from a Guardian following termination of a Licence.

THE LEGAL FRAMEWORK

Licence or tenancy

17. Under English law, various codes of statutory protection provide protection to residential occupiers. Those codes all distinguish between residential occupiers who have exclusive possession of the premises they occupy, and those who do not. An occupier with exclusive possession for a set period, or on a periodic basis, who pays for his occupation, is a tenant. An occupier without exclusive possession is a licensee: see *Street v Mountford* [1985] AC 809.
18. If a person (the owner) grants a licence to another person (the licensee), and the licensee then grants to an occupier a right of exclusive possession, the occupier will acquire a tenancy as against the licensee, even though the licensee, had no power to grant a tenancy binding the owner: *Bruton v Quadrant Housing Trust* [2000] 1 AC 46. The tenancy acquired is, however, not an estate in land: *Kay v London Borough of Lambeth* [2004] EWCA Civ 926 at para 84.
19. In deciding if an occupier has exclusive possession, the courts look at the reality of the arrangement, and are astute to detect shams, or pretences: *A G Securities Ltd v Vaughan, Antoniadis v Villiers* [1990] 1 AC 417. Those were two appeals heard by the

House of Lord together, which illustrate neatly the circumstances in which a residential occupier will be treated as a licensee, and those in which he will be treated as a tenant. In *AG Securities v Vaughan* four separate bedrooms in a house were occupied by four separate individuals under four separate and independent agreements, all four occupiers being entitled to share the house in common. But they did not enjoy exclusive possession of the house jointly. Each had exclusive possession of one bedroom but shared possession of the other parts of the house. The bedroom was not a dwelling house and the house was shared. In these circumstances each occupier was a licensee. In *Antoniades v Villiers*, a one-bedroomed flat was occupied by a couple on the terms of licences which expressly reserved to the owner the right to share and permit other persons to share the flat. The reservation, which was not and could not reasonably be acted upon, was a pretence designed to disguise the fact that the couple were granted exclusive possession at a rent and were therefore tenants.

20. If the owner genuinely retains control of the premises then the occupiers will not have exclusive possession. Examples are a hotel, lodging house or shared flat where the owner's staff have access to the occupier's room to clean it, change linen, replace light bulbs etc: *Huwlyer v Ruddy* (1996) 28 HLR 550, an old people's home: *Abbeyfield (Harpندن) Society Ltd v Woods* [1968] 1 WLR 374, as interpreted in *Street v Mountford* at p.824B, and a hostel used for the temporary accommodation of homeless people: *Westminster CC v Clarke* [1992] 2 AC 288.
21. The same is true if the occupier is given a right to share premises with other persons, not connected with him, so that each occupier has a non-exclusive right to share the premises as a whole with such other occupiers as the owner nominates from time to time. That was the position in *AG Securities v Vaughan*. There, the owner entered into separate agreements with four different occupiers. Each agreement was in the same form, and was expressed to be made between the "Owner" and the "Licensee". The agreement contained the following relevant clauses:

"1. THE Owner grants to the Licensee the right to use in common with others who have or may from time to time be granted the like right the flat known as 25 Linden Mansions Hornsey Lane N.6 but without the right to exclusive possession of any part of the said flat TOGETHER with the fixtures furniture furnishings and effects now in the said Flat for six months from the day of 19 and thereafter until

determined by either party giving to the other one month's notice in writing to take effect at any time.

2. THE LICENSEE agrees with the Owner as follows:

(1) To pay the sum of , per month for the right to share in the use of the said Flat such sum to be payable by equal monthly instalments on the first day of each month

(2) Not to damage or cause any damage to the walls or floors of the said Flat or to the fixtures furniture furnishings and effects therein.

(3) To share the use of the said Flat peaceably with and not to impede the use of the said Flat by such other persons not exceeding 3 in number at any one time to whom the Owner has granted or shall from time to time grant Licence to use the said Flat in common with the Licensee and not to impede the use by such other persons of the gas electricity and telephone services supplied to the Flat PROVIDED that each shares the cost of such services.

(4) If at any time there shall be less than 3 persons authorised by the Owner to use the said Flat in common with the Licensee upon reasonable notice given by the Owner to meet with any prospective licensee nominated by the Owner at the Flat to provide an opportunity to such prospective licensee to agree terms for sharing the costs of services in accordance with Clause 2(3).

(5) Not to assign this Agreement nor permit any other person except as licensed by the Owner to sleep or reside in or share occupation of the said Flat or any part of it at any time.”

22. The flat was kept fully occupied; whenever one agreement was terminated the company invited applications to fill the vacancy. The company's agent produced a draft of the agreement to an applicant. The monthly sum payable by the applicant was not necessarily the same as the monthly sum payable by any of the continuing occupiers of the flat because inflation and other factors caused the value of an agreement to fluctuate. The owner and its agent gave no directions or explanations about the manner in which the applicant and other persons not exceeding three in number would use the flat in common. The applicant was sent off to the flat to agree terms with the three continuing occupiers. There he would be offered a vacant bedroom and the use of the lounge, sitting room, kitchen and bathroom with the other occupiers, each of whom had his own bedroom. It was the practice that, whenever a bedroom fell vacant on termination of an agreement, each of the three continuing occupiers, in order of seniority, decided whether to change his bedroom. The applicant for the vacancy was then offered the bedroom which the other three least coveted. The applicant, if content, signed his agreement and moved into his bedroom. If he were unable to share the use of the common parts of the flat peaceably he could terminate his agreement, or the other three occupiers could terminate their agreements or prevail on the company to terminate the agreement of the unpopular occupier.

23. The House of Lords held that the occupiers did not have exclusive possession, and so had licences and not tenancies. The four agreements were independent of one another. The agreements reflected the true bargain between the parties. It was the purpose and intention of both parties to each agreement that it should confer an individual right on the licensee named that he should be liable only for the payment which he had undertaken and that his agreement should be capable of termination without reference to the agreements with other persons occupying the flat. The agreements were not shams and each of the four occupants had arrived independently of one another and not as a group.
24. There are, then, two quite different ways in which an owner of residential property can ensure that an occupier who pays for his occupation only has a licence, and not a tenancy:
- (a) He can retain control of the premises himself, by running them as a hostel, lodging house, or similar, with a housekeeper, warden or similar person employed by the owner controlling the use and occupation of the premises.
 - (b) He can grant licences to share the use of the premises as a whole to different, unconnected persons.

Recovering possession

25. A tenancy of residential accommodation normally creates an assured shorthold tenancy under the Housing Act 1988, with limited security of tenure which lasts, effectively, for the first 6 months of the tenancy. There are exceptions - for example if the tenant is a company, if the rent is very low or very high, or if the tenant does not occupy the accommodation as his only or principal home.
26. If a licence of residential accommodation is granted, the licensee enjoys no security of tenure. However, under the Protection from Eviction Act 1977:
- (a) A notice to terminate a periodic licence must be in writing, must give certain prescribed information, and must be given not less than 4 weeks before the date on which it is to take effect: s.5.

- (b) At the termination of the licence, the owner may only recover possession by proceedings in the County Court: s.3.
27. Those provisions do not apply to certain types of licences, called “excluded licences”: see s.3A - for example licences where the owner shares accommodation with the licensee, or the licence was granted for holiday purposes. However, the licences which Camelot proposes to grant to Guardians would not be excluded licences.
28. If a licensee remained in occupation wrongfully after the termination of his licence in circumstances where there was real urgency in recovering possession, it might be possible to obtain an injunction restraining him from entering or remaining on the premises, without having to wait for the hearing of the possession claim. An interim injunction requiring a defendant to vacate premises can be granted: *Manchester Corporation v Connolly* [1970] 1 Ch 420. However, that would be an exceptional remedy for the court to grant, and there would have to be special circumstances justifying it.
29. Normally, a claimant claiming an order for possession has to wait for the first hearing date of the possession claim, which will normally be between 4 and 8 weeks from the issue of the claim: see CPR pt 55.5(3). A possession order is then obtained. There is then a further delay before the order for possession takes effect. In the case of a licensee, the court cannot defer a possession order for more than 14 days unless there are exceptional circumstances, in which case a deferral of up to 6 weeks is permitted: s.89 of the Housing Act 1980. Once the possession order takes effect, if the licensee still does not vacate, there is a yet further delay while the possession order is enforced by the court bailiffs.
30. The Authorisation Agreement deals in clause 7.13 with any delays which may occur in securing the removal of a Guardian by giving the Owner a choice. It may happen that, at the date when the agreement would otherwise expire, a Guardian is still in occupation, despite Camelot having commenced and diligently pursued all proceedings necessary to secure an order that such Guardian does vacate the Property under clause 7.8. If that did happen, then, under clause 7.13, the Owner may at its election either:

- (a) require the agreement to continue to have effect until such time as the last Guardian has vacated the Property. In that case, Camelot will continue to be responsible for securing the eviction of the Guardian under clause 7.8; or
 - (b) require Camelot to co-operate with the Owner in securing the removal of any remaining Guardians from the Property (including applying for the Owner to be substituted as Claimant in any proceedings for the eviction of any Guardian which Camelot has commenced). In that case, the Owner will take over responsibility for securing the eviction of the Guardian.
31. If an owner of property grants a licence to another to use the property, and squatters then take possession, the licensee can sue for possession in his own name if, but only if, the licence gives him a right to occupation and control of the property: *Countryside Residential (North Thames) Ltd v Tugwell* [2000] 2 EGLR 59. Effectively, this means that the licence must confer on the licensee the right to possession at least as against persons other than the licensor, even if not as against the licensor himself. The Authorisation Agreement confers possession on Camelot so that Camelot will be entitled to take proceedings for possession in its own name.

THE POSITION HERE

Camelot's position

32. Camelot is given possession of the Property under the Authorisation Agreement. On the face of it, this means that the agreement creates a tenancy. However, there are two reasons why it may create only a contractual licence conferring possession on Camelot.
33. First, it is arguable that the duration of the agreement is uncertain. It continues until notice is given. The law does not recognise a tenancy for an uncertain duration: see *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386. However, the fact that the Owner pays a monthly fee to Camelot probably means that the duration of the agreement is to be characterised as being periodical, continuing from month to month until determined by notice to quit in accordance with the terms of the agreement, and therefore a monthly tenancy.

34. Second, it is arguable that the agreement cannot create a tenancy, because the payments are made to Camelot by the Owner, rather than the other way around, and because the purpose of the agreement, as recited in clause 3.3, is to enable Camelot to provide to the Owner the service of protecting the Property from trespassers and damage. However, there is no rule of law that a tenancy cannot exist where payments are made from the landlord to the tenant rather than the normal position, where the tenant pays rent to the landlord. The payment of rent by the tenant to the landlord is not an essential characteristic of a tenancy: see Woodfall para. 1.030. Nor does the fact that the grant of a right to exclusive possession is motivated by a desire to protect the property from squatters or vandals prevent it from creating a tenancy.
35. Accordingly, I consider that the Authorisation Agreement does confer a monthly tenancy, terminable by notice to quit in accordance with the terms of the agreement.
36. The tenancy created by the Authorisation Agreement, it not, however, one which confers any security of tenure on Camelot. Camelot is a company, so that the tenancy cannot be an assured tenancy. Under s.1(1) of the Housing Act 1988, a tenancy can only be assured if the tenant is an individual.
37. Nor will the tenancy be protected by part II of the Landlord and Tenant Act 1954. Under the Authorisation Agreement, Camelot agrees not to occupy the Property itself and not to carry on any business at the Property (see clause 4.3). Under s.23 of the 1954 Act, a tenancy is only protected by part II of the Act if the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes. I do not think that Camelot could be said to be occupying the Property through the medium of the Guardians, as they are not employees or agents of Camelot, but third parties making payments to Camelot in return for the right to share occupation of the Property.
38. As no form of security of tenure applies to the tenancy created by the Authorisation Agreement, on the termination of the Authorisation Agreement, Camelot will have to give up possession of the Property to the Owner.

39. Whether the Authorisation Agreement creates a licence or a tenancy, so long as the agreement remains in effect, Camelot is entitled to possession and could bring proceedings in its own name to recover possession from any unlawful occupier, including a Guardian wrongfully remaining in occupation after the termination of his Licence.

The position of the Guardians

40. Whether the Licence creates a licence or a tenancy depends on whether the rights described in it are a genuine reflection of the terms agreed. If it was to be used to grant rights to share the occupation of the Property to unconnected persons it would be a genuine reflection of what was agreed and would create a licence. The occupiers would genuinely be sharing the available space, and none of them would be intended to have exclusive possession of any part of the property, as in *A G Securities Ltd v Vaughan*.
41. The position might be different if the terms of the Licence constituted a sham or pretence, as in *Antoniades v Villiers*. That could be the case if:
- (a) Camelot allocated particular identified parts of the Property for the accommodation of a Guardian. In that case, the Guardian might be treated as having possession, and so a tenancy, of that part.
 - (b) Licences were simultaneously granted to a connected group of occupiers. In that case, it might be that the true arrangement would be for the grant of exclusive possession to the occupiers.
42. Even then, it might well be that Camelot would be treated as retaining possession, given the terms of the Authorisation Agreement and the Licence and the genuine requirement on the part of Camelot to retain control of the Property in order to provide the services under the Authorisation Agreement: see *Camden LB v Shortlife Community Housing* (1992) 25 HLR 330.
43. However, even if the Licence did create an assured tenancy as between Camelot and the Guardian, that tenancy would not bind the Owner on the termination of the

Authorisation Agreement. S.18 of the Housing Act 1988 protects an assured tenant on the termination of a superior tenancy, but only if the property is “lawfully let on an assured tenancy”. This is similar to the provision in s.137 of the Rent Act 1977 and its statutory predecessors that applied to “any sub-tenant to whom the dwelling-house or any part of it has been lawfully sublet”. The Courts held that a subtenant holding under a subtenancy granted in breach of a covenant or agreement not to grant subtenancies was not one to whom the property had been “lawfully sublet”, unless the head landlord waived the breach: see *Megarry: The Rent Acts* (11th edition) p.333 and *Woodfall* para 23.141 and the cases cited there.

44. In my view, s.18 of the Housing Act would be interpreted in the same way. That is also the view of Timothy Fancourt QC, the editor of *Megarry’s Assured Tenancies* (2nd edition): see paragraph 11-11, which states:

“The words “lawfully let” exclude any letting in breach of any term of the superior tenancy, but if the breach is subsequently waived, the letting thereupon becomes lawful, a result emphasized by the words “for the time being”.

45. Because the Authorisation Agreement expressly forbids the granting of exclusive possession of the Property or any part of it by Camelot, any tenancy that Camelot did inadvertently create would be an unlawful tenancy, and section 18 would not apply. The only danger would be if:

- (a) The particular circumstances under which Guardians were allowed into occupation were such that the terms of the Licence were held to be a sham, and the true arrangement was held to be one under which the Guardians held a tenancy.
- (b) The Owner knew of the particular circumstances under which particular Guardians were let into the Property and took no objection to them, so that the Owner could be said to have waived the breach of the Authorisation Agreement.

That would not be a danger if the Owner left the selection of the Guardians entirely to Camelot as the Authorisation Agreement contemplates.

46. Thus, provided the Owner acts in accordance with the Authorisation Agreement, on the termination of Camelot's right to possession under the Authorisation Agreement, any tenancy granted to a Guardian would also terminate, and the Owner would be entitled to possession.

DISCLOSURE OF THIS OPINION TO POTENTIAL CLIENTS

47. I am asked if Camelot may disclose this Advice to potential clients of its business. As to that, I have no right to prevent Camelot from disclosing my Advice in that way, but I do not think it is reasonable for me to assume responsibility for this Advice to such potential clients. There will, or may, be many different such clients, and I know nothing of the particular circumstances in which any given client may propose to rely upon this Advice. As I understand it, such clients will be businesses or property investors rather than individuals dealing with non-commercial matters, and I do not think that it is unreasonable to expect such clients to obtain their own legal advice if they wish to be able to rely on it. Accordingly, although Camelot may disclose this Advice to potential clients, no potential client should rely on this Advice and I assume no responsibility to such potential clients.
48. If I can be of any further assistance, my Instructing Solicitors should not hesitate to contact me in Chambers.

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Stephen Jourdan

14 October 2004

CAMELOT PROPERTY MANAGEMENT
LIMITED

ANTI SQUATTING AGREEMENTS

ADVICE

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