



Housing Law for
Housing Professionals

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Introduction

Welcome to Issue 11 of Emsleys Housing Law Newsletter. In this Special Edition we focus on the long awaited decision of the Court of Appeal in the case of **White v Knowsley Housing Trust**, which concerned the application of the legal doctrine of tolerated trespass to assured tenancies.

As well as summarising the decision of the Court we also highlight the key principles that every RSL must now be aware of, as a result of the judgment.

John Murray
May 2007

Tolerated Trespass and Assured Tenancies:

Julie White v Knowsley Housing Trust (2007) Court of Appeal

- Ms W had a contractual periodic assured tenancy. In 2004 the Court made a suspended possession order on the grounds of rent arrears in the standard form N28 (-the usual form of order until Postponed Possession Orders were introduced by the Courts in July 2006).
- The order provided for the tenant to give back possession of the property on a date 28 days from the date on which the order was made; this order however was not to be enforced whilst the tenant paid the current rent plus a regular amount off the arrears.

The Court of Appeal held that the tenancy came to an end on the date for possession specified in the order, even if there had been no breach of the conditions and even though Ms W had not given up possession of the premises.

In other words the Court of Appeal decided that the effect of a possession order on a periodic assured tenancy was the same as the effect of an order on a secure tenancy: the tenant became a tolerated trespasser once the date for possession specified in the order for possession had passed.

This was the case even though there were differences between the statutory rules set out in the 1988 Housing Act (-which governs assured tenancies) and the 1985 Housing Act (-which governs secure tenancies and which had formed the basis of the case-law on tolerated trespass so far)

Implications for RSLs

All RSLs must now be aware of the key features of this area of law, because if an occupier has no tenancy, s/he may not have the “normal” rights that otherwise may be expected, in a wide variety of situations. In addition RSLs need to be careful to avoid creating confusion (and possible legal challenges) by correctly referring to tolerated trespassers in letters, rent increase notices, and other documentation.

Who is Affected?

These legal rules apply to all assured and assured shorthold tenants, if the tenancy is contractual or if it is a statutory tenancy arising on the expiry of a fixed term agreement. This area of law is therefore equally relevant to starter tenancies (-ie assured shorthold tenancies) as well as “full” assured tenancies.

When Does the Assured Tenancy Come to an End?

A statutory periodic tenancy that comes into existence when a fixed term tenancy expires, will itself come to an end on the date for possession specified in an order for possession.

A contractual periodic assured tenancy comes to an end on the date for possession specified in an outright order for possession.

A contractual periodic assured tenancy comes to an end on the date for possession specified in a suspended or postponed order for possession, if such a date is specified.

If the Court has made a suspended order for possession that contains no date for possession, the tenancy continues until the terms of the suspension are broken. If the order is in the new form N28A, a postponed order for possession, the tenancy comes to an end on the date for possession fixed by the Court in response to an application by the landlord, which itself is only possible once initial conditions set by the Court have been broken by the tenant.

Effects of Being a Tolerated Trespasser:

If the assured tenancy is brought to an end by the order for possession the tenant loses many rights, including the following:

- The right to buy (if any)
- The right to assign or transfer the tenancy by deed, mutual exchange or property transfer order
- The right to have another person succeed to the tenancy on the tenant’s death or to pass the tenancy on by will or intestacy
- Rights to have repairs done under the express provisions of the tenancy, or under the implied provisions contained in s11 1985 Landlord and Tenant Act/s4 1972 Defective Premises Act. (NB tolerated trespassers can still bring legal proceedings under the statutory nuisance provisions of the Environmental Protection Act 1990)

How Can the Former Tenancy Be Revived?

Once the tenancy has ended because of the possession order, the occupier can get the tenancy back by an application to the Court, as part of the possession claim, to vary the terms of the possession order.

Such an application is only possible legally if the original order for possession was made on discretionary grounds.

So, the tenancy can be revived if the case was brought on Ground 10/11 (rent arrears/persistent delay in paying rent) but not Ground 8 (mandatory rent arrears ground). It can also be revived if possession was awarded under Ground 14 (-anti-social behaviour) or Ground 12 (-breach of the express terms of the agreement, including anti-social behaviour).

No revival will be possible if the tenancy was an assured shorthold tenancy and the Court has made an order for possession under s21 1988 Housing Act.

If the original tenancy was a joint tenancy the court will be reluctant to revive that former tenancy if one of the joint tenants is not involved in the revival application.

What Will Not Revive the Tenancy?

The Court has decided that the following will not revive the tenancy:

- Successfully applying to Court to suspend a warrant for possession
- Paying off the arrears and costs under the possession order

In addition, there is a strong argument that an agreement to revive the tenancy is of no effect if it is not confirmed by a Court order.

What is the Effect of a Successful Revival Application?

The occupier gets the assured tenancy back, not only with effect from the date of the successful application to Court, but also with full retrospective effect- the tenancy is deemed to have never ended, and the occupier to have been in possession of the property as an assured tenant at all times since the making of the original possession order.

This causes particular issues in relation to compensation for past failure to carry out repairs, hence we advise RSLs to do repairs to the property as though the tenancy was still in existence, even if the occupier has become a tolerated trespasser, if there is a possibility of a revival application being successful at some later date.

When Can The Occupier Apply to Court?

The occupier must apply for a revival of the tenancy before s/he is evicted by the bailiffs, and before s/he vacates the premises voluntarily.

In addition, it will be too late to apply for a revival if the parties have signed a new tenancy agreement or if the wording of the possession order means that, if the arrears and costs are cleared, it is effectively discharged (-see below).

What Factors Will the Court Take into Account?

It is up to the Court to decide whether it is reasonable to order a revival of a tenancy, in the light of the facts of each case. There is no duty on the Court to order a revival.

In a typical case involving a possession order made on the grounds of rent arrears, the Court will take into account the degree to which the occupier has complied with any

arrangements made about payment of the rent and arrears, since the making of the order for possession, as well as the future prospects of compliance with any such arrangement.

In addition the Court can also take into account other breaches of tenancy, for example anti-social behaviour, if that new material is introduced into the case in a lawful way.

How Important is the Wording of the Original Possession Order?

Many decisions of the Court of Appeal in this increasingly complex area of law have highlighted the overriding importance of the wording of the original order for possession. Any RSL requiring legal advice on a particular case should provide us with a copy of the possession order.

The Court has decided that there are some situations where clearing the arrears and costs prevents the occupier subsequently applying to Court for a revival- in other words the occupier is stuck as a tolerated trespasser, with no way of reviving the tenancy either retrospectively or with future effect. However this is not always the case – so contact us if you have any queries.

Can RSLs Create New Tenancies for Tolerated Trespassers by Accident?

Once a person has become a tolerated trespasser there are some situations in which the Court will be prepared to infer that a new tenancy has arisen as a result of “landlordly behaviour” by an RSL, without a new tenancy agreement being signed.

If there is a new tenancy, that will not alter previous periods of residence as a tolerated trespasser, and arguably it will be too late for the occupier to make an application to the Court to revive that former tenancy if a new one has since come into being.

Although all RSLs should proceed with caution in terms of how they deal with tolerated trespassers, in terms of for example how correspondence or rent increase notices refer to them and their rights of occupation, the Courts will be reluctant in many cases to decide that apparent “landlordly behaviour” has occurred which would create a new tenancy without a new agreement being signed.

The Court will only infer a new tenancy if the alleged “landlordly behaviour” forces the conclusion that there is indeed a new relationship of landlord and tenant between the parties – in other words there is no other explanation of the situation. A key factor in this evaluation by the Court will be whether it is still legally possible for the occupier to make an application to revive the former tenancy – hence the wording of the original order for possession will be crucial. Because of this it is often difficult to give accurate advice on a case without full documentation.

Even if there is a successful “ new tenancy” argument from the occupier, in most cases the new tenancy will be a periodic assured shorthold tenancy.

Further Action Against Tolerated Trespassers

Commonly, an RSL may have a suspended/postponed order for possession against a weekly assured tenant on the grounds of rent arrears; the tenancy may have come to an end as a result of the order but the occupier is still in the property. There are then allegations of anti-social behaviour; what should the landlord do?

The correct way forward depends on a variety of factors:

If there are still outstanding arrears under the possession order the RSL could make an application to vary the order to an outright order or an order suspended on terms relating to behaviour as well as rent – provided that the new material is introduced into the proceedings correctly, and provided that the original order was made on a discretionary ground.

If the arrears and costs have been cleared, the order may have been discharged. This depends on the precise wording of the order. If the order has been discharged, the RSL will need to bring a second set of proceedings for possession based on anti-social behaviour. These proceedings will be brought on the basis that the occupier is a trespasser however, so possession will be guaranteed – unless the occupier argues that there has been a new tenancy by implication, due to “landlordly behaviour”.

Conclusion

After years of uncertainty, this area of law has been clarified by the decision of the Court; however we understand that there may be an appeal to the House of Lords; you may not have heard the end of this.

In the meantime all RSLs should evaluate the implications of the decision for a wide variety of day to day housing management issues, as a matter of urgency.

For expert advice please contact our specialist Housing Law Team

CONTACTING THE TEAMS

Property Law Team – Rothwell

Viscount Court, Leeds Road, Rothwell Leeds LS26 0JH
Tel: 0113 201 4900
Fax: 0113 201 4901

Alistair McKinlay
Secretary: Alison Martin
alistair.mckinlay@emsleys.co.uk

Steph Leaver
Secretary: Marella Wood
steph.leaver@emsleys.co.uk

Keira Hart
Secretary: Marella Wood
keira.hart@emsleys.co.uk

Matthew Walsh
Secretary: Alison Martin
matthew.walsh@emsleys.co.uk

Housing Litigation Team – Crossgates

35 Austhorpe Road, Crossgates, Leeds LS15 8BA
Tel: 0113 260 3115
Fax: 0113 260 6693

John Murray
Secretary: Maureen Chapman
john.murray@emsleys.co.uk

David Higgins
Secretary: Heather Grange
david.higgins@emsleys.co.uk

Juliana Caines
Secretary: Sue Jones
juliana.caines@emsleys.co.uk

Vicky Keers
Secretary: Maureen Chapman
vicky.keers@emsleys.co.uk

Frequently Asked Questions

Email your questions to us for a response
Questions and Responses will be contained in subsequent issues of the Bulletin