



Introduction

Welcome to the latest edition of Emsleys Housing Law newsletter for Registered Social Landlords, in which we highlight developments in several key areas that we have covered in previous issues, including the applicability of tolerated trespass to assured tenancies; disability discrimination in the possession process; and rights of audience for RSL employees in the County Court.

Tolerated Trespass and Assured Tenancies

In issue 11 of our newsletter we highlighted the decision of the Court of Appeal in **White v Knowlsey Housing Trust (2007)**, in which the Court ruled that a periodic assured tenant ceased to be a tenant, and instead became a tolerated trespasser, when the date for possession in a standard N28 order for possession passed.

After an unsuccessful application to the Court of Appeal for permission to appeal, Ms White went to the House of Lords for permission to appeal to that Court, and permission has been granted. As a result this area of law is still not completely settled.

Meanwhile the Ministry of Justice has amended the Practice Direction to Part 55 of the Civil Procedure Rules so that the new N28A Postponed Possession Order procedure, replacing the old N28 order and initially intended for secure tenancy cases, now applies to assured tenancies.

Postponed Possession Orders (PPO's)

The key features of the PPO procedure are:

- It is intended for use in claims for possession brought on discretionary rent arrears grounds (i.e. Grounds 10 & 11);
- If the Court is satisfied that the ground is proven and that it would be reasonable to make an order for possession but that it would also be reasonable to suspend/postpone possession, the Court should make a PPO;
- The PPO requires the tenant to give possession of the premises to the landlord on a date to be fixed in the future;

- The landlord cannot apply for such a date to be inserted into the PPO if and so long as the tenant complies with specified conditions (e.g. payment of the current rent plus an amount off the arrears);
- The tenancy is not ended by the Court making the PPO;
- Even if the tenant breaches the conditions set by the Court, the landlord must write to the tenant asking for an explanation of the alleged default and notifying the tenant that it intends to apply to the court for an order inserting a possession date into the PPO that has already been made;
- The tenant has at least 7 days in which to respond;
- The notification to the tenant must advise the tenant that s/he can still apply to Court for a further postponement of the possession date, or a stay of execution/suspension of eviction;
- The landlord cannot apply for a date to be inserted less than 14 days after sending the notification to the tenant, and not more than 3 months after that notification;
- If the landlord intends to proceed with the application for a date to be inserted into the PPO it must file an application notice with the Court attaching key documents, including a copy of the rent account and a copy of the notification to the tenant and any response;
- The Court will normally consider the landlord's application without a hearing and if it grants it the Court will insert a possession date into the PPO which is the next working day; the Court serves the order on the tenant;
- There will be a hearing though if the tenant makes his/her own application to postpone the possession date further, or to suspend enforcement;
- The tenancy comes to an end on the date for possession inserted into the PPO;
- The Court still retains the power to postpone possession, or suspend or stay eviction, right up to the execution of the order;
- The Court still retains the right to revive the tenancy at any time before eviction, by an application for the date for possession to be varied;
- Once the arrears and costs are fully cleared, it appears to be likely that para 7 of the PPO means that the PPO will discharge itself and it will be too late for the occupier to apply to Court to revive the tenancy.

Disability Discrimination and Housing Possession

In issue 10 of our newsletter we highlighted the developing case-law around the Disability Discrimination Act 1995 (DDA) as a defence to possession proceedings.

In **London Borough of Lewisham v Malcolm and Disability Rights Commission (Intervener) (2007) Court of Appeal** Mr M was a secure tenant of his Council home. He was also schizophrenic; he decided to sublet the whole of the property, which meant that the tenancy irrevocably lost its secure status. Lewisham gave him Notice to Quit as a non-secure tenant and then applied to Court for possession.

The Court of Appeal held that the DDA defence was available to Mr M even though this was not a case where the landlord had to prove grounds for possession. The DDA defence can therefore be raised in any type of landlord and tenant possession claim.

The Court also held that all Mr M had to do was show that the landlord's reason for wanting him out was "related to" (as opposed to "caused by") his disability; and that the correct approach was for the Court to ask whether the impact of the disability on Mr M's ability to carry out normal day to day activities was more than minor.

Comment: the effect of the decision in Malcolm is massive. Not only does it allow the DDA to be raised as a defence in any type of landlord and tenant possession claim, it also interprets other aspects of the defence in a way that makes it much easier for the tenant to succeed. However in nuisance possession claims it is important to remember that if, at the point of issuing proceedings, the landlord has witness evidence from neighbours that sets out the effect of the nuisance on their health, the health and safety justification allowed in the DDA will usually be available to the landlord and the DDA defence will fail.

Anti Social Behaviour Case-law

Brent LBC v Doughtan (2007) Court of Appeal

Between 2002 and 2004 Mr D, a secure tenant of a flat, caused nuisance to neighbours by being noisy whilst drunk. The Council got an anti social behaviour injunction in September 2004 which was breached in 2 minor incidents; committal was suspended by the Court.

Further complaints in 2005 led to the Council issuing a possession claim in October 2005; the Circuit Judge dismissed the claim for possession and made no order for possession, having regard to substantial positive character witness evidence. The Judge found that both D and the principal complainant were acutely sensitive and vulnerable due to mental health issues, that there had been few incidents of a minor nature, and that the noise was not greatly above what might be expected in such blocks of flats. She held that "the difficulties could and should have been foreseen by competent housing management when they place a largish, rather excitable gentleman, with a history of difficulty with neighbours, directly above the residence of a quiet and older lady, herself a person of some vulnerability."

The Court of the Appeal refused the Council's appeal, describing the trial Judge's approach as unappealable.

Comment: the Court of Appeal decision highlights the trial Judge's importance in such cases; the trial Judge has the primary responsibility for determining reasonableness as well as finding as a fact whether there was nuisance, and if so, how serious. Here the Court of Appeal took the view that the "housing management" argument referred to above was only an ingredient in the Judge's reasoning-but the decision means that tenants can and will raise it as part of their defence.

Sandwell MBC v Hensley (2007) Court of Appeal

S had a secure tenancy; he used the premises for the large scale hydroponic cultivation of cannabis and was convicted of this in 2005. He had many previous convictions for similar offences and referred to his dealing drugs as a hobby. He did not give live evidence at trial. The Court made a possession order suspended on good behaviour for 2 years.

The Council appealed to the Court of Appeal and won: the trial Judge had sparse grounds for suspending possession, with there being little evidence to support the view that he had turned over a new leaf. In view of his previous convictions this was particularly significant. Where the tenant had committed a criminal offence such as this at the premises, the Court should make an outright possession order unless there were exceptional circumstances giving a sound basis for an expectation that the tenant's behaviour would change.

Raglan HA v Fairclough (2007) Court of Appeal

F became the assured tenant of 1 Banks Cottages by succession on the death of his mother. He transferred to 5 Banks Cottages in January 2005. No 5 was close to No 1 but separated from it by a narrow alley.

In 2004 he was arrested on suspicion of offences under the 1978 Protection of Children Act, but was not charged until January 2006; in March 2006 he pleaded guilty to 15 counts of downloading indecent pictures of children from the internet whilst he was living at No 1.

The HA then issued possession proceedings once it became aware of the convictions.

The trial Judge found that the statutory ground for possession was not restricted to offences committed during the life of the tenancy of No 5; the ground for possession was therefore made out, it was reasonable to make an order for possession and it was not reasonable to suspend the order-the trial Court made an outright possession order.

On appeal F agreed that the offences had been committed in the locality of No 5-a key element of the ground for possession- but argued that the offences could not be taken into account as they had been committed before the tenancy of No 5 started. The Court of Appeal held that there was no reason to think that Parliament intended to restrict the ground for possession to offences committed during the life of the particular tenancy.

Rent Increase Clauses

Riverside HA v White (2007) House of Lords

A periodic assured tenancy contained a clause stating that "The rent payable will be increased annually with effect from the first Monday of June each year." Riverside did not impose an increase in June 2000, but instead increased the rent from April 2001, regarding this as the increase it could have imposed in June 2000, introduced 10 months later.

The tenant defended rent possession proceedings on the basis that the rent claimed was not due as it had not been increased in accordance with the clause in the agreement.

The House of Lords interpreted the clause as meaning the rent could be lawfully increased as Riverside had done. It took account of the fact that Riverside was an RSL and the fact that the level of increase did not depend on the date of increase; “with effect from” the first Monday in June meant “at any time after...”

The rent had therefore been lawfully increased and the tenant’s defence failed.

Contour Homes v Rowen (2007) Court of Appeal

A periodic assured tenancy contained a clause stating that “The rent will be reviewed by the Association in April of each year. The association shall give to the tenant no less than four weeks notice of the revised amount payable. The revised Net Rent shall be the amount specified in the notice of increase. The Association agrees not to set a rent in excess of the prevailing market rent for the premises.”

The Court of Appeal that even though it did not specify what figure the rent would be increased to, the clause meant that the tenant could not refer the rent increase issue to the Rent Assessment Committee under 1988 Housing Act s13/14. Such clauses took the rent increase issue out of the scope of the Housing Act rent control mechanisms.

Security of Tenure in Temporary/ “Decant” Accommodation

Mansfield DC v Langridge (2007) High Court

There were ongoing possession proceedings regarding L’s secure tenancy, during which L was seriously assaulted. The Council made a flat in a supported housing scheme available to L on a licence basis, for him to live in until the main proceedings were resolved. L tried to argue he had a tenancy of the flat. Held: it had been the mutual intention of the parties that L’s occupation of the flat should be limited in time until the conclusion of the possession proceedings; the purpose for which L had been allowed into the flat was a primary consideration when determining whether there was a tenancy; the Court held that he had a licence of the flat.

Statutory Law: Rights of Audience for RSL/ALMO staff

In issue 10 we reported the case of **Hackney LBC v Spring**, in which the County Court decided that ALMO staff should not be granted rights of audience in rent possession proceedings. This was followed by a memorandum from Lord Justice Neuberger to all District Judges confirming that this was the case. The same principles apply to RSL Housing Officers in Court, and were stated again in **Islington LBC v Rexha (2006)** Islington and Shoreditch County Court.

The **2007 Legal Services Act** received Royal Assent on 30 October 2007.

Section 191 of the Act creates rights of audience for housing management staff (-defined as ALMO staff) in some types of proceedings brought in the name of the Local Authority. These are identified as anti-social behaviour proceedings although the Lord Chancellor has the power to order that other types of proceedings are covered (-this is how rental possession matters could be brought within the scope of the Act).

The proposed changes do not refer to RSL housing officers at all.

The Act goes on to create a statutory framework within which rights of audience are regulated; for example, s192 of the Act creates a specific duty for the Court to give reasons if it refuses to grant rights of audience to someone, and s 188 of the Act confirms that anyone exercising rights of audience has a free-standing duty to the Court, to act with independence in the interests of justice, which overrides any obligation owed to the individual's employer for example.

It is unclear when the 2007 Act will come into force. At present it does not resolve the difficulties raised by case-law in relation to rent arrears cases and is of little help to RSLs.

For expert advice please contact our specialist Housing Law Team

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Frequently Asked Questions

Email your questions to us for a response

Questions and Responses will be contained in subsequent issues of the Bulletin

Suggestion Box Please email suggestions/comments for future editions to john.murray@emsleys.co.uk