



Housing Law for
Housing Professionals

Newsletter Spring 2007 Issue No. 10

Introduction

Welcome to the Spring 2007 issue of Emsleys' Housing Law Newsletter. Whilst the Law Commission continues to recommend a simplification of landlord and tenant law in the future, the current legal framework grows ever more complex.

The latest area for change is the overlap between housing law and disability discrimination. Important new provisions came into force on 4 December 2006, and we feature an overview of those changes along with a case-law update that focuses on possession proceedings.

To discuss any of the issues raised below, or indeed any other aspect of housing law, please contact our specialist housing team

John Murray
March 2007

Landlord and Tenant Possession Proceedings

Tolerated trespass: Application to assured tenancies

- Secure tenants lose their tenancies and become tolerated trespassers if they have a possession order against them and the date for possession specified in that order passes; in some cases breach of a suspended possession order has the same effect.
- The Court of Appeal is due to hear a test case in the near future which will decide whether the effects on an assured tenancy are the same.

Setting Aside Eviction Warrants

It is established law that the Court has the power to set aside an eviction warrant after the bailiffs have repossessed the property in limited circumstances, which include "oppression" in the eviction process.

Mersa v Waltham Forest LBC (2006) Bow County Court

- The Court held that a warrant could be set aside on the grounds of oppression before the eviction date as well as after – even in a case where under the Housing Act the Court had no power to suspend the warrant (eg ground 8 or s21 cases).
- Here, the tenant proved to the Court that she had made an agreement under which the landlord agreed not to enforce the possession order if she paid current rent plus

an amount off the arrears each week, which she had kept to. The Court ruled that eviction in such circumstances would be oppressive and set the warrant aside.

Southwark LBC v Augustus (2006) Lambeth County Court

- A was a secure tenant. The Council obtained a suspended possession order. This was breached by the defendant, but she was in work and making some payments. The Council applied for a warrant of possession. The arrears at that time stood at £274. A failed to open the letter notifying her of the eviction date. The warrant was executed while she was out at work.
- The Judge set aside execution of the warrant on the grounds of oppression. Where the claimant was a public authority, the court was able to consider public law issues. The Council had failed to have regard to its own rent arrears policy requiring it to use eviction only as a last resort. In particular, it had failed to consider applying for an attachment of earnings order.

Comment: Although it is strongly arguable that an RSL is not a public authority, many tenant's solicitors would argue that there is an express or implied term in an RSL assured tenancy to the effect that the landlord will comply with Housing Corporation regulatory Guidance (eg Circular 07/04) and its own recovery policies, which in most cases will be similar to the Local Authority's in this case. In other words, the same issues and principles will be raised in Court, in the context of the contractual relationship between an RSL and its tenants. Our advice is therefore to ensure that all relevant procedures and guidance are followed.

Housing Officer Rights of Audience in Court

Hackney LBC v Spring (2006) Shoreditch County Court

- Under the Courts and Legal Services Act lawyers have automatic rights of audience in Court, as do Local Authority rent arrears officers. Anyone else can only address the Court if s/he has been granted an individual right of audience by the Court, at the discretion of the Court.
- The Judge ruled that ALMO housing officers do not have automatic rights of audience in Court, as they are not employed by the Council; and that such rights of audience should only be allowed on a case by case basis in exceptional circumstances, which did not exist on the facts.
- As a result of the Spring case, all Judges and District Judges have been sent a memorandum confirming that ALMO officers should not be granted rights of audience other than in exceptional situations. Many ALMOs are therefore having to use solicitors or other legal professionals to represent them at routine possession hearings.

Comment: the relevance to RSLs is clear. RSL housing officers are legally in the same position as ALMO officers – they have no automatic rights of audience, and following the recent memorandum to the Judiciary, there is a risk that some Courts at least will refuse to hear cases presented by housing officers.

Possession Claims Online: new rules on rent account evidence

RSLs using Possession Claims Online (PCOL) should be aware that from 1 January 2007, it is no longer necessary to provide full rent account details at the point of issuing claims. Instead the claimant must state

- (1) The amount of arrears as stated in the notice of seeking possession served under either section 83 of the Housing Act 1985 or section 8 of the Housing Act 1988, or at the date of the claimant's letter before action, as appropriate;
- (2) the dates and amounts of the last three payments in cleared funds made by the defendant or, if less than three payments have been made, the dates and amounts of all payments made;
- (3) the arrears at the date of issue, assuming that no further payments are made by the defendant.

Provided that the full rent schedule is served on the defendant within 7 days of the issue of the claim.

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Provided that the full rent schedule is served on the defendant within 7 days of the issue of the claim.

Anti Social Behaviour: Amended ground for possession

- The wording of the Housing Act ground for possession relating to anti social behaviour has been changed, albeit only slightly.
- Rather than the ground being made out when an arrestable offence has been committed in or in the locality of the premises, the ground now refers to an "indictable offence"
- The change applies to both assured and secure tenancy cases
- RSLs are urged to amend their notices and accompanying documents so that the correct statutory wording is used, and to prevent defendants arguing that the notice is invalid and that cases should be struck out
- However, many more offences fall within the new definition ("indictable") than the old one, so overall the change benefits landlords

Reasonableness in anti social behaviour cases

Even if the ground for possession is made out on the evidence, the Court will make an order for possession against an assured tenant only if it is reasonable to do so. This is by no means guaranteed.

Lambeth LBC v Assing (2006) Lambeth County Court

- The tenant assaulted the concierge in his tower block, and was convicted of the assault. He was given a community sentence. The Council claimed possession or demotion of the tenancy.

- The Court held that it would not be reasonable to make a possession or demotion order; the offence was a “one off”; there was no effect on the neighbours; the concierge did not feel there was any ongoing risk; and then tenant had since been of good behaviour.

Comment: in such a case, the Court had taken account of all relevant factors and had applied the correct law; there was therefore no prospect of the landlord being able to appeal

Disability Discrimination and Rented Premises

From 4 December 2006, there are wider duties owed by landlords to tenants and other lawful residents in relation to disability, under changes to the 1995 Disability Discrimination Act as amended by the 2005 Disability Discrimination Act

Under the new legislation it is unlawful for a “controller of let premises” to discriminate against a disabled personⁱ who is a person to whom the premises are let; or who is not the tenant but is lawfully in the premises eg as the lodger, family member or partner of the tenant.

The duty applies to landlords and also managing agents, and to licences as well as tenancies.

A new duty arises where a controller of let premises has a practice, policy or procedure which has the effect of making it impossible, or unreasonably difficult, for a relevant disabled person to enjoy the premises, to make use of any benefit, or facility, which by reason of the letting is one of which he is entitled to make use, or a term of the letting has that effect.

The controller must take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to change the practice, policy, procedure or term so as to stop it having that effect.

This duty to make such reasonable adjustments only arises where the disabled person has requested such a change, and where the practice would not have the effect that is being complained of if the disabled person did not have the disability.

These new provisions create 2 new potential defences to claims for possession:

- The landlord has interpreted a term of the tenancy which the tenant is alleged to have breached in a discriminatory way; had it been interpreted in a manner which amounted to a reasonable adjustment, there would be no breach and so no entitlement to possession; and
- The tenancy enforcement and arrears recovery policies, practices and procedures of the landlord are discriminatory, and the landlord has not made reasonable adjustments; had these adjustments been made, proceedings would not have been issued.

However for either defence to be arguable, the tenant must have asked the landlord to make adjustments to the relevant policy, practice, procedure or tenancy term.

Example: Tenancy Term

A disabled tenant cannot access the drying area in her block of flats because of her disability. The landlord agrees not to enforce the term of the tenancy that prohibits her from hanging out clothes on the balcony, so that she can use the balcony to dry clothes. This is likely to be a reasonable step for the landlord to take.

Example: Housing Management Procedure

A Housing Association tenant with a learning disability is accused of anti social behaviour by a neighbour. The landlord's usual procedure is to send a warning letter to the tenant, but as it already knows this tenant is unable to read letters, it alters its policy by visiting the disabled tenant personally to discuss the complaint. This is likely to be a reasonable step to take.

No discrimination if justification for treatment

A failure to make these changes will not be unlawful however if the justification defence in the Act is made out: this has 2 alternative elements:

- that it is, in the controller's opinion, necessary to refrain from complying with the duty in order not to endanger the health or safety of any person (which may include that of the disabled person concerned); or
- that, in the controller's opinion, the disabled person concerned is incapable of entering into an enforceable agreement, or of giving informed consent, and for that reason the failure is reasonable

And, in either case, it was reasonable for the controller to hold that opinion.

RSLs, Public Authorities and the General Equality Duty

With effect from 4 December 2006, it is unlawful for a public authority to discriminate against a disabled person in carrying out its functions. This is sometimes described as the general equality duty and represents a further extension of disability law into housing law.

Public Authority

The definition of "public authority" resembles that set out in the 1988 Human Rights Act, and includes, in the housing context, Councils and Arms Length Management Organisations. The definition also includes a body that has functions of a public nature.

The view of the Disability Rights Commission (DRC) and the Housing Corporation is that "It is likely that housing associations will be public authorities for the purposes of the disability equality duty...in this respect, the disability equality duty has a potentially broader reach than the Human Rights Act" All public authorities are under the general duty, including those Housing Associations who are public authorities.

Under the general equality duty, every public authority shall in carrying out its functions have due regard to-

- a. the need to eliminate discrimination that is unlawful under this Act;
- b. the need to eliminate harassment of disabled persons that is related to their disabilities;
- c. the need to promote equality of opportunity between disabled persons and other persons;
- d. the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons;
- e. the need to promote positive attitudes towards disabled persons; and
- f. the need to encourage participation by disabled persons in public life.

In addition, some public authorities are subject to specific equality duties, and in the context of housing, Local Authorities are the prime example; Housing Associations are not subject to specific equality duties although their governing body, the Housing Corporation, is. The main specific equality duty is to produce a Disability Equality Scheme by 4 December 2006.

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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