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All Clear at Last?

Assured tenancies and the tolerated trespasser debate

At long last the question of whether the law relating to tolerated trespassers applies in relation to the assured tenancy regime has been answered by the Court of Appeal.

The problem

The problem was that all of the tolerated trespasser cases that have been to the Court of Appeal in the past, had involved former secure tenants. So, there was no direct court authority for dealing with assured tenancy cases. Moreover, the precise wording of the relevant statutory provisions in the Housing Act 1985 (for secure tenancies) and in the Housing Act 1988 (for assured tenancies) is not identical. The 1985 Act specifies that a secure tenancy comes to an end on the date stated in a possession order. The 1988 Act, although providing that a landlord must obtain a court order to bring an assured tenancy to an end, does not contain an explicit provision about the date on which the tenancy will end.

The arguments

The argument put forward on behalf of tenants was that, in the absence of such an explicit statutory provision, an assured tenancy could only end upon the tenant actually giving up possession or upon the Bailiff executing a warrant. That would mean that the tolerated trespasser status would have no place in the assured tenancy regime – if the tenancy continues until eviction, there is no stage at which the occupier can become a mere tolerated trespasser.

For social landlords, it was argued that the position is effectively the same as under the secure tenancy regime – that the court can choose to specify a date in a possession order and that the tenancy will terminate on that date.

The decision

The case of *Julie White –v- Knowsley Housing Trust [2007] EWCA Civ 404* was heard by the Court of Appeal on 14th March and judgment was handed down on 2nd May. The Court of Appeal found that, as in the case of a secure tenancy, an assured tenancy will terminate on any day a court chooses to specify in an order for possession. As a result, it is now clear that:

i) A former assured tenant who remains in occupation beyond the date specified in an outright order for possession or in a suspended possession order, will be a tolerated trespasser.

ii) A court which is considering making a possession order against an assured tenant has the option of making a postponed possession order (which, by postponing the insertion of a date for possession, preserves the tenancy for the time being) just as it does in secure tenancy cases.

iii) The court rules need to be amended urgently to provide that the standard form of postponed possession order, and the procedure for subsequently obtaining a date for possession where the terms of the order are breached, apply under the assured tenancy regime.

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- Always seek a date for possession where a postponed possession order has been made and there is any significant breach of its terms – to make sure that your postponed order is worth more than the paper it is written on!
- To obtain a date, follow the current secure tenancy procedure laid down in the court rules for fixing a date for possession – Section IV of the Practice Direction to Part 55 of the Civil Procedure Rules can be obtained at **www.justice.gov.uk** or ask us for a copy.
- Watch out for an amendment to the court rules.

Notices of Increase of Rent

Common sense prevails

It is not often that housing law cases go as high as the House of Lords. Riverside Housing Association was left with little option but to appeal to the highest Court in the Land, however, after the Court of Appeal had found that annual Notices of Increase of Rent, which it had served on its assured tenants from 2001 onwards, were invalid.

Although the Court of Appeal decision was in respect of a single assured tenancy, the implications were that all of the Notices which had been served on Riverside's other assured tenants in the same circumstances, were invalid. Other social landlords were also being affected, with tenants increasingly raising the defence of "unlawful" or "invalid" rent increases in rent arrears proceedings. The financial implications – income being limited, arrears being irrecoverable, repayments falling due – were huge.

In the Judgment in *Riverside Housing Association Limited -v- White [2007] UKHL 20*, which was handed down on 25th April 2007, the House of Lords has ensured that common sense will prevail. It was a question of interpretation of the terms of the tenancy agreement, especially the terms relating to rent and rent variation. The House of Lords found that the kind of strict interpretation that would be applied to a rent review clause in a commercial lease, is not appropriate to a tenancy agreement between a social landlord and a tenant who is unlikely to have any experience of interpreting legal documents.

The agreement in this case provided that :

"Riverside may increase the rent by giving the tenant four weeks' notice in writing as set out in accordance with the provisions of this agreement".

And

"The rent payable will be increased annually with effect from the first Monday of June each year".

The House of Lords held that, on a correct interpretation, those clauses did not mean that the only date on which rent could be increased each year was the first Monday in June. The Lords found that, rather, the provisions left it open to Riverside, subject to giving four weeks' notice, to increase the rent once in any year to the amount which would be applicable as at the first Monday in June. – The actual increase could take place on that first Monday in June, or on any day thereafter, as the words *"with effect from"* should be interpreted as meaning *"on or at any time after"*.

In reaching this decision, the Lords laid stress on the fact that the tenancy agreement had to be interpreted "in context". The context referred to was Riverside's status as a Registered Social Landlord and a Charity; its receipt of public funding; the fact that it has tenants on its Board; and the fact that tenants would be inexperienced in dealing with legal documents.

The Lords also emphasised the importance of reaching a finding that is "sensible" and "fair". – A tenant loses nothing by a rent review taking place after a given date, but a social landlord would suffer substantial losses if missing that date resulted in it being kept out of a cost-of-living increase for a whole year.

While this case concerned the interpretation of a specific rent variation clause in a specific agreement, the fact that the Lords largely based their decision on context and fairness can be expected to help many RSLs faced with challenges to their Notices of Increase of Rent.

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Where a tenant's solicitor claims that a Notice of Increase of Rent is "invalid" -

- Look carefully at the rent increase clauses in your tenancy agreement and at the Notices served to see whether or not the rent increase provisions seem to have been followed precisely.
- Look at the finances and, if the tenant has not been disadvantaged, point that out to the judge.
- Refer the judge to the case of *Riverside v White* and ask for a similar method of interpreting the rent increase clauses in your tenancy agreement to be applied.

More Tolerated Trespassers

When to issue fresh proceedings

On 19th April 2007, the Court of Appeal handed down another Judgment which helps to provide more clarity in this troubled area. The case was *London & Quadrant Housing Trust -v- Ansell [2007] EWCA Civ 326.* It dealt with a question which has often proved troublesome.

The Scenario

- The occupier is a tolerated trespasser
- But she has paid off all of her arrears
- Do you apply for a warrant and risk the court finding that the order is unenforceable and that your application is an abuse of the court's processes?
- Or do you issue fresh proceedings and risk those proceedings being found to be an abuse of the court's processes because a possession order already exists?

Apply for a Warrant

The first port of call is to look at the precise terms of the existing possession order. Is it stated anywhere on the face of that document that, "When you have paid the total amount mentioned, the Claimant will not be able to take any steps to evict you as a result of this order". If that or similar wording does not appear, then the order, in theory, remains enforceable regardless of payment. In those circumstances, a bailiff's warrant can always be applied for, subject to the court's permission being obtained when the order is more than six years old.

If that wording does appear, the next stage is to check whether the tenant has paid the "total sum" ordered i.e. arrears plus costs. Has the tenant brought the rent account back to nil balance and paid the costs separately, or has the account gone into credit by at least an amount equal to the costs? If the answer to those questions is 'No', a Warrant can be issued.

Issue fresh proceedings

The flip side applies – if the order does say that it will not be enforceable once the total sum has been paid **and** an amount equivalent to the arrears plus costs has been paid at some stage, fresh proceedings can be issued. The Judgment in *Ansell* makes it clear that those proceedings will not be an abuse of process. The proceedings would simply be on the basis that the occupier is a trespasser and the owner of the property is no longer prepared to tolerate that trespass.

Observations

In *Ansell*, London & Quadrant had decided that it was no longer prepared to tolerate Ms Ansell as a trespasser, as it had received various complaints of anti-social behaviour against her and her family. Ms Ansell accepted that she was a tolerated trespasser. She argued that London & Quadrant were not entitled to issue fresh proceedings against her – that, as there was already an Order in existence, London & Quadrant would have to rely on that Order. She argued, moreover, that as the existing Order was no longer enforceable, it was no longer possible for London & Quadrant to remove her from the property.

It was an all or nothing approach by the tenant. As the Court of Appeal pointed out, she had chosen not to appeal against the County Court Judge's finding that a credit made to the rent account was sufficient to clear the costs under the order. (As a result, the Court of Appeal may well be asked to consider that question in some future case.) It is hardly surprising that the Court of Appeal refused to accept what was effectively an argument that an occupier can become "a perpetual tolerated trespasser".

The Appeal Judges, however, expressed concern that, as the law stands, some tolerated trespassers who have paid the amount due under a possession order are at a relative disadvantage.

Tolerated trespassers who have not paid an order in full can always, if faced with a bailiff's appointment, apply for a stay of execution and ask the court to use its extended discretion under the Housing Acts to suspend the warrant on terms. On the other hand, tolerated trespassers who have paid the arrears and costs due under an order can thereby lose the protection of the Housing Acts. – Faced with fresh proceedings based on their status as trespasser, the protection of the Housing Acts will not be available to them, either to defend the proceedings or to hold off the execution of a Warrant. ■■■■

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When dealing with tolerated trespassers

- Always let them know where they stand.
- Always set up a sundry account for court costs and inform the Defendant that payments received will be applied to the costs – there is no reason why these should not be paid ahead of the arrears.
- Consider developing and operating a written tolerated trespasser policy, to ensure consistency of treatment.
- Consider whether, as part of your policy, occupiers who clear their arrears and costs should be offered a fresh tenancy.
- Be careful and reasonable in your decision-making – if no defence to fresh proceedings is available, solicitors acting for tolerated trespassers may want to try for Judicial Review. ■

A step too far...

Blaming someone else for our misfortunes is always tempting. Too often it seems that tenants are allowed to get away with blaming landlords for their lifestyle choices. A recent attempt by one Ms Siddorn, however, was found by the High Court to be a step too far.

Windows in Ms Siddorn's rented first-floor flat looked out over the flat roof of a garage that was attached to the building. During a party, Ms Siddorn and some friends, climbed on to the roof and began dancing around. The flat roof had two skylights through one of which Ms Siddorn promptly fell.

According to Ms Siddorn, the accident and her injuries were all her landlord's fault – the skylights should have had a stronger cover, she ought to have been warned of the danger of climbing on the roof, there should have been regular inspection and maintenance.

Landlords will be relieved to hear that the High Court found that Section 1 of the Occupier's Liability Act 1984 does not stretch that far. If a tenant chooses to dance around a skylight on a roof that she has no permission to use, when the inevitable happens, there really is no-one else to blame – not even the landlord.

Siddorn-v-Patel and another, Queens Bench Division, March 28, 2007.

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