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Resolving housing issues
the latest news and advice on social housing

Tolerated Tresspassers

The latest **The issue of tolerated trespassers has repeatedly featured in the courts and in these newsletters. Following the House of Lords' decision in *Knowsley Housing Trust-v-White* in December 2008, and with section 299 and schedule 11 of the Housing and Regeneration Act 2008 having come into force on 20th May 2009, it seems sensible to provide a summary of the current position. This is as follows:**

Assured tenants

The Lords' decision in the *White* case means that assured tenants who had possession orders made against them but remained in occupation of the property have not, at any stage, become tolerated trespassers.

The Housing and Regeneration Act confirms that assured tenancies cannot generally be brought to an end by the landlord except by the landlord obtaining a possession order and execution of that order – the tenancy will continue until a warrant is executed.

Secure tenants

Old possession orders

Following the House of Lords' earlier decision in *Burrows-v-Brent London Borough Council* in 1996, secure tenants who had possession orders made against them became tolerated trespassers when those possession orders "took effect", whether by virtue of the stated date for possession being reached and/or due to the terms of the order being breached.

On 20th May 2009, when the relevant provisions of the Housing and Regeneration Act came into force, provided the owner of the property was in a position to let it, those tolerated trespassers who had continued to live in the property as their only or principal home automatically acquired new tenancies, known as "replacement tenancies".

Replacement tenancies have the same terms and conditions as the original tenancy but subject to any rent increases that have taken effect.

Replacement tenancies are subject to the terms of the existing possession orders and stay orders "as far as practicable".

Replacement tenancies are subject to any arrears of former rent/use and occupation charges – these will be payable as rent arrears under the replacement tenancies.

The period between the original tenancy ending and the replacement tenancy commencing i.e. the period of the tolerated trespass, will count for right-to-buy purposes and may also count for the purposes of a disrepair claim, if the tenant makes a successful application.

New possession orders

Under the Housing and Regeneration Act, where possession orders are made after the provisions are in force, the position will be the same as with assured tenants – the possession order itself will not bring a secure tenancy to an end, the tenancy will only end once the order is executed.

Change of Landlord

Special provisions apply where, after the occupier became a tolerated trespasser and before 20th May 2009, there was a change in the identity of the landlord.

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New Pre-action Protocol

All social landlords should now be used to complying with court protocols when dealing with disrepair and rent arrears. As from 6th April 2009, we now have a general protocol for all pre-action conduct. It covers cases where specific protocols apply (they still have to be followed as well) and many types of other potential litigation. It should be noted that it does not, however, apply to possession claims.

Where officers receive and respond to letters of claim, particularly from solicitors, they will need to be aware of the protocol and ensure that it is followed. The chief elements are that, before starting court proceedings:

- The would-be claimant should send a detailed letter of claim to the proposed defendant setting out why the claim is being made, the alleged facts and the documents relied upon to support the claim.
- The proposed defendant should provide a full written response within 14 days or, if that is not possible, provide an acknowledgement within 14 days.
- The acknowledgement should state the position regarding advice being sought, insurance and when a full response will be provided.
- The full response should, if not accepting the claim, explain why, identifying facts and documents relied on and giving details of any counterclaim.
- Each party should provide the other with copies of the documents they intend to rely on and should also provide copies of any documents requested by the other party.
- Both parties should give serious consideration to alternative dispute resolution (ADR), for instance, by way of discussion and negotiation; mediation; mutual evaluation; or arbitration. The would-be claimant should propose a form of ADR in the claim letter and the proposed defendant should deal with the issue in its response and the parties should continue to consider the possibility of reaching settlement at all times.
- If, after completing the protocol procedure, the matter has not been resolved, the parties should each review and take stock of their positions to see if proceedings can still be avoided - proceedings should only be issued as a last resort.

Note that special additional provisions within annex B of the protocol apply where a business wishes to bring a debt claim against an individual.

The full text of the protocol is available at **www.justice.gov.uk/civil/procrules**

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These are contained in the Housing (Replacement of Terminated Tenancies) (Successor Landlords) (England) Order 2009. The nature of the replacement tenancy will depend on the identity of the new landlord. For instance, if there has been a stock transfer from a local authority to a housing association, the former secure tenant who had become a tolerated trespasser will now have an assured tenancy.

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- Postponed possession orders were introduced to prevent the situation where the suspended possession orders that had been made by the courts automatically brought tenancies to an end, taking away tenants' rights and creating tolerated trespassers. The new statutory changes mean that possession orders can no longer have that effect. The tenancy will only end once the tenant is actually evicted. Arguably, therefore, there is now no need for postponed possession orders and we should revert to a simpler, less expensive, system. Social landlords may be minded to instruct officers attending court hearings to seek suspended possession orders, especially where tenants have failed to respond to correspondence or to attend the court hearing.
- The new provisions may require landlords to exercise additional caution when considering whether to take back properties without a warrant being formally executed. For instance, where an outright possession order has been made and the tenant appears to have vacated the property but has not returned the keys, it seems that execution of a warrant is still required to bring the tenancy to an end. Otherwise, if the tenant subsequently sought to return or learned that a warrant had not been executed, a claim for unlawful eviction could be brought.
- The provisions as to any existing possession order or subsequent order being "treated, so far as practicable" as if it applies to the replacement tenancy are likely to be the subject of debate and litigation. Marsons' interpretation is that the replacement tenancy will effectively be subject to a possession order suspended on terms, so that if the tenant breaches the order and further agreement cannot be reached, the landlord will be entitled to apply for a warrant, and the tenant will be entitled to apply for a stay, in the usual way.
- The provisions as to the terms and conditions that will apply to the replacement tenancies are also likely to become the source of litigation

Public law defences gather pace

Increasingly, social landlords, including housing associations, face public law defences in ordinary possession proceedings. Officers, particularly managers, need to be acutely aware that, in cases where there would usually be an automatic entitlement to an outright possession order, the occupier may now seek to establish a public law defence – usually on the basis that the decision to serve the notice/issue proceedings was one which no reasonable public authority would have made, given the particular circumstances.

Potentially, the service of a notice to quit; the issue of section 21 proceedings against assured shorthold tenants; reliance on the mandatory ground 8, can all now be countered by a public law/human rights defence to the possession proceedings.

How come?

Three strands have combined to bring this about:-

- In *Lambeth London Borough Council-v-Kay and Leeds City Council-v-Price* in 2006, the House of Lords held that points which could be taken by an applicant in a judicial review in the High Court, can also be pursued in a defence in the County Court.
- In *McCann-v-United Kingdom* in May 2008, the European Court of Human Rights held that, for our housing law to observe human rights, an outright possession order cannot be the automatic outcome in every case where a tenancy has been brought to an end by notice to quit – the court must have some discretion to consider the occupier's human rights and balance those against the property rights of the public authority.
- In *Weaver-v-London Quadrant Housing Trust* in June 2008, the High Court decided that, when exercising its housing management functions, London and Quadrant Housing Trust (and so we must presume any registered social landlord) must be regarded as a public authority, so its decisions can be subject to judicial review and human rights challenges.

Subsequent cases

These three strands of case law have since been developed by the House of Lords in *Birmingham City Council-v-Doherty* in July 2008. This was acknowledged by the Court of Appeal in *Liverpool City Council -v-Doran* in March 2009 where the court stated that "a new battle ground area" had been created which enables a licensee whose licence has been terminated to rely on a wide range of factors to argue that a decision to seek possession would not have been arrived at by a reasonable public landlord. Both of those cases involved travellers.

Most recently, on 1st April 2009 in *Welling Hatfield BC -v- McGlynn*, the Court of Appeal set aside a possession order that had been made against a non-secure tenant, accepting his public law defence. The Court of Appeal found that it was seriously arguable that a reasonable public authority would not have issued the possession proceedings unless it was satisfied as to certain matters and that there was a lack of information about the landlord's decision-making process.

Currently, Marsons is acting for a housing association in a case where the occupier is raising a public law defence, challenging the reasonableness of the association's decision to terminate a temporary licence and seek possession of the property.

What's Next?

The decision of the High Court in *Weaver* which resulted in registered social landlords being treated as public authorities is being appealed. If that decision is reversed, housing associations should no longer be subject to public law challenges, at least pending any further appeal. Of course, if the High Court decision is confirmed, public law defences may become "par for the course". The outcome will be reported in Marsons' next bulletin or newsletter.

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Decisions, decisions, decisions. To put the organisation in the best position to answer a public law defence, decision makers should:

- be sure to gather all of the relevant information that is held within the organisation;
- ensure that sufficient enquiries have been made, including with the occupier;
- consider all relevant matters in the light of the organisation's policy;
- consider whether there are any exceptional circumstances that would warrant more favourable treatment than generally provided for under that policy;
- make a decision that appears reasonable, fair and appropriate in the light of the above; and
- document the decision, including the matters considered and the reasons for arriving at the given conclusion.

Find us under 'Social Housing' in the **Chambers Guide 2009**

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Granting 'Tenancies' to Minors

Tenancies granted to minors are known as equitable tenancies, as under-18 year olds cannot hold a 'legal estate' in land. The minor is entitled to the benefit of the tenancy but someone else must hold the legal title 'on trust' for the young person.

Q **What if there is no adult family member available to act as trustee?**

A See whether another organisation e.g. the referring agency, is willing to hold the tenancy on trust. If no one else is available the usual practice has been for the landlord to act as trustee but this can pose problems later on - see below.

Q **What if we simply grant an ordinary tenancy?**

A It will take effect in law as an equitable tenancy and the landlord will be the trustee by default.

Q **Are there any other options?**

A Granting a licence instead of a tenancy may be an option, but only if the landlord provides such services, or has access to such an extent, that the minor does not have exclusive possesion of the property. Entering into an agreement to grant a lease when the minor turns 18, and allowing the minor into possesion in the meantime, may be a less problematic way of giving the minor an equitable interest.

Q **What if we have to take action to recover possession from a minor who is an equitable tenant?**

A This can prove complex. It may be necessary for the landlord to serve additional notices, including upon itself, before commencing proceedings. The court may insist upon a Litigation Friend being appointed to assist the minor. If the landlord is also the trustee, seeking to end the tenancy may be regarded as a breach of trust. There may be a dispute as to whether the terms of the tenancy agreement are enforceable against a minor. Much will depend upon whether the Judge takes a legalistic approach or a practical approach.

If you have any questions, send them by email to mary.martil@marsons.co.uk

frequently asked questions

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