The housing advice bulletin from Shelter for the National Homelessness Advice Service

Housing matters

Issue 133 December 2019

NHAS National Homelessness Advice Service

Specialist support on housing advice

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Housing matters
Housing matters is produced by Shelter for the NHAS and aims to provide a source of up-to-date housing and homelessness news, focus on important case law, cover key legal issues, and produce information for public use.

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Housing matters welcomes contributions from NHAS members. If you would like to provide an article or update for *Housing matters* please email Ewa_Brem@shelter.org.uk

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The National Homelessness Advice Service (NHAS) is funded by the Ministry for Housing, Communities and Local Government.

The service aims to prevent homelessness and remedy other housing problems through increasing public access to high-quality housing advice in England, including online information on the NHAS website at www.nhas.org.uk

The NHAS provides the following services to local authorities, public authorities (such as the NHS, DWP and prisons/ probation staff), local citizens advice and other voluntary agencies in England:

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What's new?

PRS Innovation and Enforcement Grant
The Ministry of Housing, Communities & Local Government has published guidance for local authorities on how to access the Private Rented Sector Innovation and Enforcement Grant, aimed at enabling local authorities to support good landlords, tackle criminal landlords and empower tenants.

Tackling rogue landlords
On 2 October 2019, the Ministry of Housing, Communities & Local Government published Private rented sector: learning toolkit for local authorities – a set of interactive resources to help local authorities take enforcement action against rogue landlords and letting agents.

Electrical safety in the PRS
On 25 October 2019, the Housing and Planning Act 2016 (Commencement No. 11) Regulations 2019 SI 2019/1359 brought into force sections 122 and 123 of the Housing and Planning Act 2016, giving the Secretary of State the power to make regulations to impose duties on private landlords in England in respect of electrical safety standards in rented homes and to facilitate enforcement of those duties.

Help for destitute families
The charity Project 17 has launched an Emergency Hotel Fund to assist homeless families challenging local authority's refusal of support under section 17 of the Children Act 1989. Referrals from voluntary organisations and lawyers are accepted.

Vulnerability – medical evidence
In Guiste v Lambeth LBC [2019] EWCA Civ 1758, the Court of Appeal held that where the local authority rejected medical evidence from a distinguished consultant psychiatrist provided in support of a homeless applicant's review of a decision on his vulnerability, choosing instead to rely on the evidence of its own medical advisers, its failure to explain the reasons for its choice constituted an error of law, because it breached the principles of rationality and fair decision-making.

Succession to a secure tenancy
In Simawi v Haringey LBC [2019] EWCA Civ 1770, the Court of Appeal rejected the argument that the succession regime under sections 88(2) and 88(2A) of the Housing Act 1985, differentiating between children of parents who became sole tenants on divorce and children of tenants who succeeded to a joint tenancy by way of survivorship, amounted to unlawful discrimination under Art. 14 of the European Convention on Human Rights.

New Rent Standard
The Regulator of Social Housing has announced that from 1 April 2020 the new Rent Standard will be limited to the Consumer Price Index (CPI) plus 1%.

'Bedroom tax' and survivors of DV
In JD and A v The United Kingdom [2019] ECHR 753, the European Court of Human Rights held that the application of the 'bedroom tax' provisions to survivors of domestic violence housed in 'sanctuary schemes' constituted unlawful discrimination.

HB and pre-1 April 2017 bedroom entitlement
In RR v Secretary of State for Work and Pensions [2019] UKSC 52, the Supreme Court held that public authorities, including local authorities, courts and tribunals, are able to disapply secondary legislation if it is incompatible with the European Convention on Human Rights ('the Convention') and not apply the 'bedroom tax' reduction in relation to periods before 1 April 2017, in cases of an adult couple unable to share a bedroom due to a disability or a child requiring an overnight carer. The 'bedroom tax' regulations were amended on 1 April 2017, following the outcome of R (on the application of MA & others) v Secretary of State for Work and Pensions [2016] UKSC 58 but the amendments were not retrospective.

New grounds on appeal
In Notting Hill Finance Ltd v Sheikh [2019] EWCA Civ 1337, the Court of Appeal held that a case did not have to be exceptional for the appellate court to exercise its general discretion whether to allow new points to be raised, and that the decision would depend on the analysis of relevant factors, such as the nature of the proceedings, the nature of the new point and whether the opposing party would suffer prejudice as a result.

Housing Ombudsman consultation
The Housing Ombudsman has launched consultations on the changes proposed in its business plan for the upcoming financial year and the revised Housing Ombudsman Scheme. The deadlines for responses are 6 December 2019 and 20 December 2019 respectively

Unauthorised encampments
The government has launched a consultation on proposals including criminalising unauthorised encampments, decreasing the number of vehicles necessary for a site to be classed as an encampment, and giving the police powers to arrest those involved and seize property.

Getting triage right

In this article, Nicola McEwen walks us through a triage form for tenants in rent arrears to explain the importance of effectively triaging clients for legal casework by finding out as much as possible about their circumstances as soon as possible.

Nicola McEwen is a Professional Support Lawyer at Shelter.

Effective triage is a key factor in helping clients get the right advice from the right person as quickly as possible. However, it is not uncommon for this task to be delegated to fairly inexperienced advisers, which can result in key legal points being missed. This can lead to, at best, a delay and, at worst, misdiagnosing the client's circumstances. In possession cases, this can mean the difference between keeping and losing one's home.

'Triage forms', or checklists, are a way of helping frontline staff get the basic information from new clients and enabling them and their caseworker colleagues to quickly and accurately assess the merits of each case, in order to ensure that appropriate advice and assistance is given. For inexperienced staff such forms are invaluable, but even for experienced staff they can serve as a useful resource.

This article looks at a triage form for rent arrears used to diagnose possession cases and explains the importance of each question.

Who is your landlord?

When faced with a possession claim based on rent arrears, the client's rights will depend entirely on what type of tenancy they have. This is partly governed by who their landlord is. Most occupiers know whether they rent from the council, a housing association (HA) or in the private rented sector (PRS), even if they cannot say what type of tenure they have.

Knowing who the landlord is can also help experienced caseworkers gauge how they might approach the case – some landlords are known for being more reasonable and flexible than others.

For PRS tenants, it is worth checking whose name is on the tenancy agreement as the landlord – it is not unknown for a managing agent, rather than the landlord, to issue proceedings in their own name, giving a complete defence to the claim.

PRS: Does your landlord live with you?

Many clients are unaware of the fact that having a resident landlord offers limited protection from eviction, so may not volunteer this information. It is always best to check.

What type of tenancy do you have?

Not many clients are able to identify their tenancy type. A few might be able to produce a copy of their agreement, which will usually clarify the matter (although it is worth bearing in mind that some agreements incorrectly say they are a licence when in fact the client is a tenant, with greater protection). Knowing who the landlord is can help establish the type of tenancy and therefore ascertain whether the correct type of notice has been served. A comprehensive guide to different tenancy types can be found on Shelter Legal.

Council tenants

If someone says they are a council tenant, this means they could be:

- a secure tenant
- a flexible tenant
- an introductory tenant, or
- in temporary accommodation following a homeless application.

If the client took the tenancy by assignment or succession, they are likely to be secure. If they were given it when they made a homeless application, it is likely to be temporary accommodation (and their landlord is, in fact, unlikely to actually be the council).

HA tenants

If someone says they are a HA tenant, this could mean they have:

- a fully assured tenancy
- an assured shorthold tenancy (AST) akin to a council introductory tenancy, sometimes called a starter tenancy
- a long fixed-term AST.

PRS tenants

Most PRS tenants who rent from a non-resident landlord and who moved in on or after 28 February 1997 will have ASTs. Those who moved in before this date, who have succeeded to their tenancy, or have had it assigned to them may be assured or regulated tenants and enjoy a greater level of protection.

Even if it is not possible to diagnose the tenancy type, it is worth recording any information obtained from the client, as this will help an adviser narrow down the possibilities.

Correspondence and court papers, as well as asking how long ago the client moved in, should also give some clues. For example, someone who moved into a council property ten years ago is likely to be a secure tenant,

while someone who has been a council tenant for less than a year is likely to have an introductory tenancy. For HA tenants the difference would be between a fully assured tenancy and an AST respectively.

Have you received a notice?

If possible, a copy of the notice of proceedings the client has received should always be obtained. Has the client received one at all?

Checking the notice's validity is important to identify possible defences.

The notice may also offer clues about the client's tenure. If the landlord has not applied to court yet, checking the notice is the best way of getting information about the problem.

For secure and fully assured tenants, the notice should set out grounds for possession based on the relevant statutory provisions.[1] The notice will confirm whether this is a rent arrears case, whether the landlord is relying on any additional grounds (for example, anti-social behaviour), and exactly what the landlord will have to prove.

In order to correctly identify possible defences for HA tenants, it is vital to check the exact grounds listed, because two rent arrears grounds are discretionary, and one is mandatory.[2]

If a client has an AST, the notice may or may not list grounds, depending on what procedure the landlord is relying on.[3]

For ASTs terminated by a section 21 notice, no grounds are needed.

Have proceedings been issued in court?

'I'm being evicted next week!' is a common panicked cry from an anxious client. It is possible that they are about to be evicted, but also that next week is when:

- a notice warning of possible proceedings expires
- there is a court hearing, or deadline for a defence
- a possession order takes effect.

The appropriate level of casework required is obviously very different depending on the exact circumstances. This is why it is absolutely vital to check whether court proceedings have started and if so, what stage they have reached.

Any available documents, letters and court papers should be checked for clues.

It is important to remember that the court processes can vary – while most possession cases include a hearing, the accelerated possession procedure (used to end certain types of ASTs) can proceed without one.

Have you been to court about this matter before?

If there has already been a hearing, it is important to try to understand what happened.

Practical steps include:

- obtaining a copy of the order
- if the client saw a duty adviser at court, obtaining a copy of the advice letter (it should set out what order was made, the reasons, and steps the client should be taking to keep their home, for example, making specific payments, following up benefit issues)
- if the hearing was adjourned, establishing why, how long for, and what payments the client should be making in the meantime.

When is the next hearing?

Caseworkers will need to know how urgent the case is, so that they can assess if it is possible to deal with it effectively in the available time. Even if there is no fixed date, knowing that a case has been adjourned 'to the first open date after 4 weeks' is helpful in estimating when it might be listed for a hearing.

It is worth asking about any other key dates the client may be aware of.

How much are the arrears?

The prospects of successfully defending a claim usually depend significantly on the level of arrears and whether these are being repaid. Some housing association tenants may be able to improve their prospects of successfully defending possession proceedings if rent arrears fall below the eight weeks' threshold before the court hearing.[4]

Obtaining copies of recent rent statements or letters about the arrears is always useful – clients can sometimes be over-optimistic and documents are likely to include more detail and precise figures. Even without a rent statement, if the client can identify their current rent, what they are paying themselves, and what is being covered by welfare benefits, it should be possible to work out whether the arrears are being or could be reduced.

Why are you in arrears?

For the majority of social tenants, the landlord will be relying on a discretionary ground for possession, which means that they will need to persuade the judge not just that the client has fallen behind on their rent, but that it is also

Footnotes

[1] See Sch. 2 Housing Act 1985 and Sch. 2 Housing Act 1988 respectively.

[2] See grounds 8, 10 and 11, Sch. 2 Housing Act 1988.

[3] See ss. 8 and 21 Housing Act 1988.

[4] See ground 8, Schedule 2 Housing Act 1988.

reasonable for a possession order to be made. The reason for the arrears will be key to any potential defence and it is important to find out more about the underlying problem.

Some landlords can be persuaded to be sympathetic and flexible if there is a good reason for the arrears, and it can be shown that there are good prospects for reducing the arrears in the foreseeable future.

The most common reasons for arrears include:

- welfare benefits issues, including universal credit (UC), leading to a low or erratic income
- problems with housing benefit (HB) and housing element of UC that directly impact the client's rent account (for example, delays assessing claims, change of circumstances resulting in the award being stopped, non-dependent deductions, recovery of over-payments)
- loss of employment
- health issues leading to a drop in earnings or difficulty managing the rent account and benefit claims
- relationship breakdown
- debt repayments (particularly if debts are being recovered from UC)
- unforeseen expenses (for example, paying for a funeral).

Benefit issues, especially HB/housing element of UC, are particularly relevant, as judges are usually open to adjourning cases while claims are being assessed and issues addressed. If the benefit problem is resolved successfully, arrears could be significantly reduced.

An adjournment also gives the client an opportunity to start making regular payments themselves.

Health issues can be a key factor in relation to both reasonableness of any possession claim, if they are relevant to either the cause of the arrears or the potential impact of a possession order.

Health issues may also be the basis of a possible disability discrimination defence under the Equality Act 2010.[5] An example of this is a council or HA tenant in rent arrears as a consequence of mental health issues that affect their ability to deal with their benefit claims and manage their rent account. If the health issues amount to a disability and the landlord should know about them, the tenant may have a defence.

Are there any disrepair or safety issues in your home?

If the tenant can bring a counterclaim for disrepair[6] or because the property is unfit for habitation,[7] any compensation awarded can be 'set off' against their rent arrears to reduce or clear them, giving a defence to the claim.

Legal aid is usually only available in cases about the condition of a tenant's home if the problems are very severe, but there is an exception to this rule if the case is brought as a counterclaim in possession proceedings. This means that the possession case can give the client an opportunity they would not otherwise have to not only get compensation but also force the landlord to improve their living conditions.

Necessary information to obtain:

- nature of the problem(s)
- how long ago the problem(s) arose
- if and when the client told the landlord.

Even basic information should help with establishing a potential counterclaim and the approximate level of compensation.

AST: Deposit paid and protected?

This will help work out if a section 21 notice is valid[8] and, especially when the landlord is using grounds for rent arrears, whether there is a counterclaim for the landlord's non-compliance with the tenancy deposit protection (TDP) legislation, which could reduce the amount of rent the client owes.

If a deposit has been paid but has not been protected in accordance with the TDP rules, or the landlord has protected the deposit but not provided the client with prescribed information, the client may be able to claim up to three times the amount of the deposit as compensation[9] and use it to reduce the arrears.

Necessary information to obtain:

- date the deposit was paid (any evidence of payment would be useful, for example a bank statement)
- the amount of the deposit
- any communication with the landlord about the deposit.

What is your monthly income and capital?

While this question may seem irrelevant or even intrusive to some clients, it is essential that an adviser knows whether the client is likely to be financially eligible for public

Footnotes

[5] ss. 13,15,19,20-22,35 Equality Act 2010.

[6] s.11 Landlord and Tenant Act 1985.

[7] s.9A Landlord and Tenant Act 1985, as inserted by s.1(3) Homes (Fitness for Human Habitation) Act 2018.

[8] s.215(1A) and s.215(2) Housing Act 2004. Section 21 notice rules are complicated and it may be necessary to seek further advice. An overview is available at **https://england.shelter.org.uk/legal/security_of_tenure/notices/notices_assured_shorthold_tenancies**.

[9] s.214(4) Housing Act 2004.

funding. The regulations[10] and guidance for both Legal Help and Legal Aid are complex, and beyond the scope of this article. It may not be possible to be certain whether a client is financially eligible at this stage, but it is important to obtain as much information as possible about their income and capital.

Clients would be expected to evidence their income and capital – the Legal Aid Agency will require proof of means for both Legal Help and Legal Aid applications, and caseworkers will not usually be able to start work on a case until this is provided.

Certain welfare benefits are 'passporting benefits', meaning that someone in receipt of one of them (either directly or indirectly through a partner) automatically meets the income eligibility criteria.

Passporting benefits include:

- universal credit
- income support
- income-based job-seeker's allowance
- income-related employment and support allowance
- pension credit (guarantee element).

For those who are working or on other benefits, it will be necessary to obtain information and evidence about all their income for the last month. This will include all sources, including:

- earnings (PAYE and self-employed)
- welfare benefits awards
- any maintenance received
- student loans
- gifts or financial support from friends or family.

For each source, the type of income and the amount should be recorded.

The client's gross income must be below the current financial limit, currently £2,657 per month for most clients. Deductions can be made from this income for allowances for dependants, tax or national insurance, housing costs and employment expenses, some of these being for fixed or capped amounts.[11]

The client's disposable income must be below the current financial limit of £733 per month.

Clients must also be eligible based on their capital (savings and other assets), so it will be necessary to obtain details of all bank or building society balances and any significant financial assets, including vehicles.

The client's capital must be below the current financial limit of £8,000.

The Legal Aid Agency's online eligibility calculator can be used to assess whether the client is financially eligible.

What might triage notes look like?

While the above list of questions can look daunting, and at times it may be difficult to get the information needed, it is usually possible to succinctly summarise the findings.

Below is an example of a recent referral made at Shelter, following triage. While not every single question has been answered, this gives a caseworker enough information to work out that there is a good defence to the case (disrepair counterclaim), that the client is likely to be eligible for legal aid (UC is a passported benefit), and the likely timescale for the necessary work.

Triage notes - an example:

- *Client is an assured tenant of a HA called XYZ Living.*
- *Rent is £125 per week and the arrears are £4000.*
- *The claimant pleads grounds 8, 10, 11.*
- *Disrepair: unusable bedroom and a flat roof leaking for 10 years in heavy rain. The boiler loses pressure regularly and as a result the heating system often fails'.*
- *14 days to file and serve a defence and witness statement, and the case will be relisted to a hearing on first open date after 3 November.*
- *Client has Child Benefit, Child Tax Credit and just claimed Universal Credit.*

Conclusion

Triaging clients well and obtaining the relevant information quickly and concisely is a skill in itself. While a triage form is a useful tool, understanding the reasons why each question is asked can help front line workers focus on the relevant facts and the appropriate level of detail when asking for and recording clients' answers. This has to mean a better service to clients, and better chances of keeping them in their homes.

Footnotes

[10] The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 SI 2013/480.

[11] See Legal Aid Agency Keycard 55 (pdf).

Charging orders and different types of ownership

In this article Alexa Walker considers the effects of charging orders on different kinds of property ownership.

This is the second article in a series on charging orders. The first article, published in Housing matters 132 (October 2019) considered the process a creditor must follow to obtain an order in respect of a judgment debt, along with avoidance tactics available to clients.

Alexa Walker is a Specialist Debt Adviser at the Specialist Debt Advice Service and a Senior Legal Writer in the Central Legal Team at Shelter.

As we have already learnt,[1] charging orders allow creditors to secure debts on the borrower's home and if the debt is not paid off, the creditor can then proceed to apply for an order for sale allowing them to recover the money. It is not uncommon for advisers to encounter situations where a charging order relates to a jointly owned property or to interest other than legal ownership.

The estate in land

All land in England and Wales belongs to the Crown, with private owners holding an estate in it, which can be divided into two broad categories:[2]

- an estate in fee simple (freehold), and
- a term of years absolute (leasehold).

The latter is defined as interest in land for a fixed-term.[3]

These estates in land create a bundle of rights that are recorded and stored by the Land Registry.[4]

The Land Registry shows:

- details of the property, such as postal address and boundaries
- type of ownership (freehold or leasehold over seven years), along with owner's names and addresses, rights and restrictions
- details of mortgages, charges, interests in the land and restrictions that affect what happens when the property is sold, or otherwise transferred to a third party.

A copy of this information can be obtained from the HM Land Registry website for a fee.[5]

The Land Registry must be updated when:[6]

- ownership is transferred,
- a charge, for example a mortgage or a charging order, is registered
- a lease of seven years or more[7] is created (including a residential tenancy for a fixed term of seven years or more).

It is possible for a freeholder to grant a leasehold interest in their property. A leaseholder may also grant a further lease, subject to any contractual or other qualifications about subletting, as long as the term does not exceed their own lease.

A charging order can be granted against a residential freehold or a long leasehold interest, usually defined as a lease for a minimum term of 21 years,[8] but not against a short-term residential tenancy.

Legal and equitable charges

Charges can be divided into two categories:

- legal charges
- equitable charges

Legal charge usually refers to the charge that protects the residential mortgage loan. It takes the form of a notice on the Land Registry and must be paid upon the sale of the property.[9]

A legal charge is an actual interest in land and as such is binding on future owners and allows the holder of this charge (the bank or a building society) to take action to repossess the property if the borrower defaults on the loan.

A charging order granted against a sole legal owner or all joint owners is a legal charge, but a charging order granted against one joint owner is an equitable charge.

Equitable charges can be registered as a restriction on the Land Registry. An equitable charge does not make its holder a legal owner of the property but entitles the holder to recoup their money from any surplus funds or equity which remains when a property is sold and all the legal charges are paid off. Creditors who hold an equitable charge cannot start possession proceedings under Part 55 CPR.

Legal and beneficial interest

Usually, the legal owner of the property is also the beneficial owner, meaning that when the property is sold and the legal charge (the residential mortgage) is paid off, they can keep any money left.

However, it is possible for someone who is not a legal owner of a property to acquire a beneficial interest in it, i.e. a share of the money tied up in the house. This takes the form of a trust, which will normally be in writing, because decisions around selling, gifting, or disposing of a property in any other way must be made in signed writing and executed as a deed.[10]

It is also possible for a person wishing to establish beneficial interest in the property to apply to court for a declaration.[11] For example, if a couple (A and B) agree to purchase a property in A's name for both of them to live there and B contributes towards the mortgage, B could apply to court for a declaration of their beneficial interest, i.e. what share of the money they would be entitled to if the property was sold. The most common scenario when such applications are made is relationship breakdown.

It is possible to hold beneficial interest in up to 100 per cent of the equity[12] and in most circumstances beneficial interest should be registered as a restriction on the Land Registry.

A charging order can be granted over the beneficial interest alone, even if the beneficial owner is not the legal owner of the property.[13] In order to obtain an order for sale, the creditor may start action against the legal owner of the property.

So, in the example above, if a creditor registered a restriction on B's beneficial interest, any subsequent application for an order for sale would have to be made against A. Clients in this position, whether they are legal owners affected by charging order against someone with a beneficial interest in their property, or beneficial owners with a restriction registered against their beneficial interest, should be signposted for specialist debt advice.

Joint ownership

The freehold or leasehold estate in land may be held by up to four legal joint owners, sometimes referred to as (beneficial) 'joint tenants'. No joint owner may restrict access to or divide up the land, meaning that all joint owners control the whole leasehold or freehold. If one joint owner dies, the title passes to the other owner(s) at the point of death without the need for a grant of probate or letters of administration. This is known as the doctrine of survivorship[14] and means that the house and equity in it do not form part of the deceased person's estate as it now belongs only to the surviving joint tenants.

For example, a couple jointly owns their family home. One partner defaults on repayments on a credit card held in their sole name and dies before the creditor obtains a charging order. Here, the creditor will not be able to register a charging order on the house, even if they obtained a CCJ before the debtor's death as the ownership has already passed to the survivor. However, if the creditor obtained a charging order prior to the death, this could have far-reaching consequences.

Granting of a charging order against one joint owner's interest severs a joint tenancy, causing the owners to become what is known as 'tenants in common', with shares in the property.[15] The legal title would pass to the surviving joint owner, but the deceased's share of the equity would form part of the estate, meaning probate or letters of administration would have to be obtained, and the property might need to be sold to satisfy the deceased person's creditors.

The fact that a joint ownership of a property has been severed because of a charging order often goes unnoticed until one of the joint owners dies. Many advisers will have encountered scenarios where a distressed homeowner is seeking advice after having been contacted by creditors following the death.

Specialist advice

Where a creditor has applied for a charging order against a joint owner or against someone with a beneficial interest in a property, it will be necessary to check all records on Land Registry and letters from creditors.

Information to look out for includes:

- type of ownership (sole/joint)
- whether the client is the legal owner
- whether there is a mortgage and/or other debt secured against the property
- whether the creditor is applying to register a charge on the client's beneficial interest in a property that belongs to someone else
- whether a charging order has already been made and if not, what stage the proceedings are at (correspondence from creditors and the court will be helpful to establish this).

Agencies providing free advice to clients on debt matters can use Shelter's Specialist Debt Advice Service (tel.: 03300 580 404) – a second tier service for advisers.

Shelter Legal

Orders for sale and charging orders

Footnotes

[1] See A. Walker, 'Charging orders – an overview', Housing matters 132, October 2019.

[2] s.1(1) Law of Property Act 1925; for an overview of legal interests in land, see D. Astin Housing Law Handbook, 4th ed., LAG 2018, 1.12-1.15, pp.6-7.

[3] D.Astin, Housing Law Handbook, 4th ed., LAG 2018, 5.1, p.227.

[4] s. 9 and 10 Land Registration Act 2002.

[5] Search for property information from HM Land Registry [ONLINE] Available at: www.gov.uk/government/collections/fees-hm-land-registry-guides. The fee is currently £3. [Accessed 1 October 2019].

[6] s.4 Land Registration Act 2002.

[7] This refers to a fixed term only, so a residential tenancy would have to be registered on the Land Registry only if the initial fixed term was for seven years or more.

[8] D. Astin, Housing Law Handbook, 4th ed., LAG 2018, 5.2, p.228.

[9] s.32 Land Registration Act 2002.

[10] s.2(1) Law of Property (Miscellaneous Provisions) Act 1989. Where a trust of land has not been made in writing it can exist only as a constructive trust or a proprietary estoppel. Specialist advice should be sought in these instances, see Spotlight on Beneficial Interest, Specialist Debt Advice Service E-Bulletin August 2018.

[11] Applications are made under section 14 of the Trusts of Land and Appointment of Trustees Act 1996.

[12] Tahir v Faizi [2019] EWHC 1627 (QB).

[13] First National Securities v Hegerty [1985] QB 850 (CA), Walton v Allman [2015] EWHC 3325 (Ch).

[14] Right of Survivorship, Halsbury's Real Property and Registration, Law of Real Property 202 Vol 87 (2017).

[15] Putnam & Sons v Taylor [2009] BPIR 769, para 20.

Breaking starter ASTs

In this case brief, Anna Socci explains the outcome of the Livewest Homes Ltd v Bamber case – a significant Court of Appeal decision on termination of fixed-term assured shorthold tenancies (ASTs) granted by social landlords in England.

Anna Socci is a Senior Legal Writer in the Central Legal Team at Shelter.

Where social landlords[1] in England are able to grant ASTs[2] for two years or more, they are subject to special requirements when it comes to terminating such tenancies – they are required to give a six months' written notice of their intention not to renew the tenancy before a section 21 notice can be served.[3] In **Livewest Homes Ltd v Bamber**,[4] the Court of Appeal considered whether this requirement applies to a social landlord that wishes to operate a break clause in the starter phase of a fixed-term AST.

Background

Livewest Homes Limited (L) granted a fixed-term AST of seven years to Ms Bamber (B). The tenancy agreement provided for a probationary 'starter' period as follows:

'This tenancy is subject to a starter period of 12 months. If you break your side of the agreement during the starter period, we may give you notice requiring you to give us possession of the property. (…) If we decide to end the tenancy, or to extend the starter period, we will give you our reasons and you will have the right to have the decision reviewed in line with our Tenancies Policy. If you successfully complete the starter period, you will gain the additional rights set out in the agreement.'

The agreement also contained a break clause allowing L to evict B in the probationary period:

'2.1.1 During the starter period, or extended starter period, we may give you two months' written notice ending the tenancy. If we do this, we will give you our reasons and you will have the right to have the decision reviewed in line with our published procedure.

2.2 Format of notices: A notice under clause 2.1 may be in any written form. (...)'

Five months into the tenancy, allegations of anti-social behaviour against B prompted L to operate the break clause and serve a two months' notice. The notice was to satisfy both the contractual break clause conditions and the requirements of section 21(1) of the Housing Act 1988 (the 1988 Act). L then commenced possession proceedings.

In the county court

B defended the claim for possession by arguing that L's notice was invalid due to non-compliance with sections 21(1A) and 21(1B) of the 1988 Act, which required a social landlord to serve at least six months' notice of non-renewal. The District Judge agreed with B and dismissed L's claim.

L appealed successfully to the Circuit Judge who held, as a preliminary issue to the possession claim, that the requirement of the non-renewal notice under sections 21(1A) and 21(1B) of the 1988 Act did not apply to a case where the fixed-term was brought to an end by the operation of a break clause. It applied only to cases where the fixed-term was due to expire by effluxion of time. Under the break clause in the tenancy agreement (2.1.1), L was only required to serve two months' written notice under section 21(1) of the 1988 Act. L's notice was therefore valid.

In the High Court

B's appeal to the High Court was dismissed, but for different reasons. The Court held that at the expiry of L's two months' written notice in accordance with the break clause, B no longer held 'a fixed-term tenancy for a term certain of not less than two years', and the requirement to serve a six months' notice of non-renewal did not apply.

In the Court of Appeal

B's appeal was dismissed again, but the Court rejected the High Court's reasoning and restored the reasons given by the Circuit Judge.

The Court of Appeal turned for assistance to ministerial statements made when the Localism Act 2011 inserted sections 21(1A) and 21(1B) into the 1988 Act. These clarified that the main purpose of the requirement for a six months' notice was to warn fixed-term assured shorthold tenants of social landlords in advance that the fixed term would not be renewed. The statements confirmed what was implicit in both section 21(1B) and the provisions governing flexible tenancies,[5] that the six-month notice period related to the expiry of the fixed-term by effluxion of time.

In view of the above, the Court held that in this context the word 'expiry' in section 21(1B) of the Act should be interpreted purposively and restrictively, as meaning expiry by the effluxion of time only. So, the requirement on a social landlord to serve a six months' notice of non-renewal would only apply where the fixed-term

tenancy was brought to an end by the effluxion of time; not as a result of termination by notice during the probationary period under the terms of a valid contractual break clause.

In conclusion, section 21(1B) acted as a bar to the court making a possession order only where the fixed term of the assured shorthold tenancy was brought to an end by the effluxion of time.

Obiter

In cases where section 21(1B) of the Act does apply, a further issue was whether the six months' notice must be served so as to expire before or at the end of the fixed term tenancy in order to have effect, Lord Justice Patten was prepared to offer a provisional 'obiter' view that it was still open to the landlord to serve the notice late, even though it would expire after the end of the fixed term. However, the other judges preferred to leave this issue to be decided in a future case where the point is of direct application.

Comment

In the Livewest case, the tenant (Ms Bamber) had a seven-year assured shorthold tenancy, with a break clause that the landlord (Livewest) could operate within the first twelve or eighteen months. The question for the court was whether the break clause was triggered by a simple two months' notice, or whether Livewest had to give six months' notice of non-renewal under s.21(1B) Housing Act 1988 as well. The answer might seem obvious, that a notice of non-renewal would only be relevant at the end of the seven years, not on the operation of the break clause.

That indeed is the outcome. However, because of the uncertain drafting of section 21(1A) and (1B) (which were inserted in the 1988 Act by the Localism Act 2011), the case has been through four layers of the court system (district judge, circuit judge, High Court and Court of Appeal). All the judges except the district judge came to the conclusion that the six months' notice did not apply where the landlord sought to operate the break clause. However, although the High Court judge reached the same conclusion, he reached it for reasons that were disapproved by the Court of Appeal, who reinstated the reasons given by the circuit judge. It may be of some comfort to housing lawyers and advisers wrestling with the uncertainties of recent housing legislation that the courts have had so much difficulty in resolving the issue in this case.

There is one major uncertainty which remains unresolved, because it did not arise on the facts of the Livewest case. It concerns the question of what happens where one of these tenancies is nearing the end of its fixed term. What would happen if the landlord was late with its six months' notice of non-renewal, and only gave the notice three months before the end of the fixed term? What if the landlord allowed the fixed term to expire without giving a notice and only then decided not to renew the tenancy? Would the tenancy automatically become a fully assured tenancy at the expiry of the fixed term?

At the very end of the judgment, Lord Justice Patten raised this issue on an `obiter' (i.e., provisional, non-binding) basis, and tentatively expressed the view that the landlord could resort to late service of the notice – presumably either before the fixed term has ended, or even after it has ended. The other two judges of the Court of Appeal preferred not to express a view on this point until it arose on the facts of an actual case.

It is suggested that Patten LJ's view is the only interpretation that can be effective. Attractive though the argument for a fully assured tenancy is for tenants, assured shorthold tenancies cannot automatically become fully assured tenancies without a notice or agreement from the landlord that the tenancy is no longer to be a shorthold. So, the likelihood is that the landlord will always be required to give the six months' non-renewal notice, even if it is so late in doing so that the fixed term has already expired.

Shelter Legal

Starter tenancies

Footnotes

[1] In this article the term 'social landlord' refers to a Private Registered Provider of Social Housing (PRPSH).

[2] The Localism Act 2011 made special provisions enabling social landlords to grant ASTs for a term of not less than two years. However, a social landlord should only offer the minimum term of two years in exceptional cases. Para 2.2.2. of the current (April 2012) Tenancy Standard requires fixed-term ASTs granted by social landlords to be normally of 'no less than five years'.

[3] s.21(1A) and 21(1B) of the Housing Act 1988.

[4] [2019] EWCA Civ 1174.

[5] ss.107A to 107E, as inserted by Localism Act 2011 c. 20 Pt 7 c.2 s.154 (January 15, 2012 for the purpose specified in SI 2012/57 art.4(1)(p) subject to transitional and savings provisions specified in SI 2012/57 arts 6, 7, 9, 10 and 11; April 1, 2012 otherwis

subject to SI 2012/628 arts 9, 11, 14, 15 and 17).

Factsheet

Does your landlord need a court order?

This factsheet looks at whether the landlord can evict you without having to ask the court for permission.

Most people who rent their home have a right to a court order before they are evicted. It means that they don't have to move out until the landlord:

- serves a valid notice
- obtains a court order
- obtains a warrant specifying the eviction date and arranges for a court bailiff or a court enforcement officer to enforce it.

Unfortunately, not everyone in rented accommodation has this level of protection.If you are in one of the categories of 'excluded occupiers' listed below, your landlord can ask you to leave without having to go to court. Your landlord should still give you a correct notice as per your agreement. If you and your landlord have never agreed on the notice period, you should get:

- a notice equal to one rental period if you have a tenancy
- a reasonable notice if you have a licence to occupy.

Your landlord must not use violence to evict you.

Even if you think you don't have the right to a court order, always seek advice before you agree to leave.

Sharing living accommodation with a resident landlord and/or a member of their family

If you share living accommodation, for example kitchen, bathroom or a living room, with your landlord or a member of your resident landlord's family, you can be evicted without a court order.

Your landlord and their family member must have lived in the property as their home when you moved in and when you move out. If this is not the case, or if you only share the entrance, hallway or stairway and your landlord wants you to leave, they must ask the court for a possession order.

Asylum seekers in UKVI accommodation

If you are an asylum seeker and live in accommodation arranged by the Home Office/ UK Visas and Immigration (UKVI) while awaiting a decision on your asylum application, you can be evicted without a court order.

Licensees in public sector hostels

If you are staying in a hostel run by the council, a housing association or a charity, you may be evicted without a court order.

Homeless applicants granted licence agreements in emergency accommodation

If you applied as homeless and the council has arranged for somewhere for you to stay until a decision is made on your application, you can usually be evicted without a court order.

Rent-free accommodation

If you don't pay any rent, you have less protection. Contribution towards bills is not classed as rent, however even paying a very low rent would mean the landlord might have to get a court order to evict you. If your home comes with your job, rent might be deducted directly from your wages. Seek advice if you are not sure if you pay rent.

'No right to rent' notice from the Home Office

If the Home Office has served a 'disqualification' notice on the landlord telling that nobody in the property has a right to rent, it reduces your tenancy rights. The landlord can then evict you by giving you a minimum of 28 days' notice in a prescribed form. The landlord has to attach the Home Office's notice which must reference section 33D(2) of the Immigration Act 2014 and list all occupiers. It is not enough for your landlord to simply tell you that you have no right to rent.

Genuine holiday lets

If you are on holiday and staying in a genuine holiday let, you can be evicted without a court order. However, if you live in a B&B as your home, you may have the right to a court order.

Further advice

You can get further advice from england.shelter.org.uk/housing_advice, local Shelter advice service or local Citizens Advice. If you have nowhere to sleep tonight, are at risk of harm or losing your home within the next 2 months, call Shelter Helpline on **0808 800 4444** for advice and information on your options.*

*Calls are free from UK landlines and main mobile networks.

Note
Information contained in this factsheet is correct at the time of publication. Please check details before use.