

# Housing Management Brief

## Autumn 2010



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## Welcome

This really is a bumper edition of our quarterly HM Brief. As always, the Courts have been busy making decisions across a range of housing management issues and we have been equally busy dealing with the usual chaotic mix of crack dealers, alcoholic and abusive tenants and families from hell. Judicial review remains very much to the fore and we have a brief summary of the sort of practical steps RPs should be taking to minimise the risk of challenge. This quarter we also welcome Neil Brand to our Ask the Expert slot.

Enjoy!

Nick Billingham  
Partner and Head of Housing Management

# Partnership: The Key to Successfully Tackling Anti-Social Behaviour

London and Quadrant Housing Trust, represented by Amy Gibbs of the Devonshires Housing Management Team, was recently successful in evicting a drug dealer, who also allowed his spare room at his property to be used for prostitution.

The Defendant, who was a long standing tenant of the Trust, had been the subject of possession proceedings previously in 1998 but the proceedings had been effectively settled and the problems at the property seemed to stop.

A decade or so later, the Defendant's prolific drug dealing resumed and he even allowed his spare room to be used by his 'friend' to offer sexual services. Neighbours were frequently disturbed by people coming and going from the property and were horrified to find dirty needles in the street and in their gardens.

The Police, believing the property to be an established crack house, executed a drugs warrant at the property and discovered a variety of drug paraphernalia.

The Judge questioned why the Defendant had not learned his lesson in previous years. The Judge stated that he must consider the effect of the Defendant's behaviour on others and he found that the effect on neighbours had been 'appalling'.

The Judge was of the view that whilst the Defendant was a vulnerable person, the Defendant's conduct would continue and that it would be a 'waste of time' to suspend any Possession Order. The Judge therefore made an outright Possession Order.

The case demonstrates that even if the Defendant alleges that they are vulnerable, the Judge will balance this against the impact of the anti-social behaviour on the neighbours.

The case also demonstrates that success in any possession case on the back of a Closure Order will depend on working effectively in partnership with the Police.

*“The Judge questioned why the Defendant had not learned his lesson in previous years.”*

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Shortly after the drugs raid, and relying on anonymous statements provided by neighbours as well as the results of the raid, the Police successfully applied to the Magistrates' Court for a Closure Order. The property was therefore boarded up and the Defendant sought accommodation elsewhere.

Working in partnership with the Police, the Trust applied for possession of the property soon after the Closure Order was made. The Trust produced as evidence the anonymous witness statements provided by neighbours to the Police, as well as a copy of the Closure Order itself. A housing officer appeared on behalf of the Trust.

The Defendant did not deny the allegations against him. Rather, the Defendant defended the claim on the basis that he believed it was not reasonable to make the Order because he had 'learned his lesson' and that he was a vulnerable person as he had mental health issues.

For more information, please contact Amy Gibbs in our Housing Management Team.

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# Fully Mutual Housing Associations - Tenancies in Doubt

The case of Mexfield Housing Cooperative Limited v Berrisford [2010] EWCA CIV 811 was decided by the Court of Appeal on 15 July 2010.

This case will be of particular interest to fully mutual housing associations who currently enter into contractual tenancies with their members. A fully mutual housing Association tenancy cannot be a secure or assured tenancy in accordance with the Housing Act 1985 and the Housing Act 1988.

This means that the Association's members/tenants have no statutory protection against eviction apart from Section 3 of the Protection from Eviction Act 1977 which requires that they are not evicted without Court Order. Further the Court's power to postpone execution of the possession order is limited to a maximum period of only 6 weeks.

As is often the case with lettings of this type the tenancy agreement provided that the Association

on appeal and thereafter Ms Berrisford was given permission to appeal to the Court of Appeal.

The Court of Appeal concluded that the clause purporting to limit the circumstances in which the agreement can be determined would render the term of the tenancy uncertain and would therefore mean that the tenancy itself was void. As the object of the agreement was to create an interest in land it had failed to do so. In its place there was, implied by reference to the periodic payment of rent and the tenant's exclusive occupation of the property, a monthly periodic tenancy which could be determined by either party giving one month's notice to quit.

The Court clearly had reservations in reaching this conclusion as the result is that the decision means that it is not what the parties had intended when they entered into the tenancy agreement. There was one dissenting Judge who concurred that the tenancy itself was void but that the tenant

*“The Court of Appeal concluded that....the tenancy itself was void.”*

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could only determine the agreement in certain circumstances: if the tenant owed the Association arrears of rent; if the tenant had breached any other condition of the agreement; if the tenant ceased to be a member of the Association; or if the Association was dissolved. The tenant entered into the tenancy agreement on 13 December 1993.

The Association served a Notice to Quit on Ms Berrisford 11 February 2008 and possession proceedings were issued thereafter. It was the Association's case that this Notice to Quit determined the contractual tenancy and that there was no defence to the claim for possession. In effect, the case was that it did not matter if there was a reason to determine the agreement or not. The Association sought summary judgment based upon the Notice to Quit. In the first instance Ms Berrisford was successful which was reversed

would have a right to specific performance of the agreement in equity. This would mean that the Association would still need to show a reason to determine the agreement.

The effect of this decision is that clauses that purport to restrict the circumstances in which a fully mutual Association can seek possession are, for the moment at least, likely to be disregarded in any possession claim. However it should be noted that there may well be a further appeal to the Supreme Court and given the finely balanced judgment in this case it is not inconceivable that the tenant may succeed.

If you have any queries or require further information please contact Donna McCarthy in the Housing Management Team.

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# More Success in Tackling Anti-Social Behaviour

A Housing Association instructing Sam Darlington of the Devonshires Housing Management Team recently obtained an injunction and subsequently an outright possession order against an alcoholic tenant who was harassing, threatening and intimidating his elderly neighbours in sheltered accommodation.

The tenant lived in a housing development for elderly people. The tenant was an alcoholic but in good health and at the younger end of the scale.

The tenant preyed on the more elderly and frail residents of the development and regularly shouted abuse at them and staff of the association. Due to the erratic and threatening nature of the tenant's behaviour, he confined numerous residents to their flats when he was in the public areas.

During one incident, the tenant chased two female residents into the communal laundry room and screamed abuse at them whilst banging on the door and threatening to harm them.

Although the tenant had an alcohol addiction and was an ex-serviceman, the housing association had been in contact with addiction support services to try and help him but the tenant refused to engage.

The tenant had been given an opportunity to change his behaviour in 2008 when the housing association issued possession proceedings for similar behaviour to that exhibited in 2009-2010.

On that occasion the tenant undertook to refrain from harassing and threatening other residents and staff of the housing association but was only able to comply with this for a year.

Ultimately, it was necessary and appropriate that a possession order be granted.

For further information contact Sam Darlington in our Housing Management Team.

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*“Nine witnesses, including five residents of the sheltered scheme, gave evidence at the trial.”*

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He was subsequently arrested and found guilty of numerous criminal offences. On another occasion the tenant forced his way into another resident's property and tried to strangle him.

An injunction was obtained against the tenant to restrain his behaviour.

However, this failed to substantially change the tenant's behaviour and he breached two conditions of the injunction within eight weeks of it being granted.

Following this an outright possession order was obtained. Nine witnesses, including five residents of the sheltered scheme, gave evidence at the trial. The Judge found their evidence to be persuasive and made a possession order on the basis that the tenant's behaviour had had such a severe negative impact on the other residents' enjoyment of their properties that the only reasonable remedy was to remove the tenant from the property.



# Succession - Where You Stand on Questionable Claims

The Devonshires Housing Management Team has recently acted for its local authority clients in various contested succession cases where occupants have claimed questionable rights to succeed to the tenancy of their deceased spouse or family member under the Housing Act 1985.

When determining the merits of an application for a statutory right of succession, the legislation provides for a spouse to automatically succeed to the tenancy on the death of the tenant, providing they were residing at the property with the tenant at the time of death, and that a qualifying family member (which can include sons, daughters or partners) can succeed to the tenancy on having lived at the property as their only or principal home for a minimum of 12 months.

Whilst you may appear to have a strong case for refusing an application for succession it is important to be aware of the factors the Court may take into account if the occupant decides

However, the question the Court will consider at a possession hearing will be whether as a question of fact the occupant actually resided in the property as her only or principal home for the 12 months prior to the death of the tenant.

Whilst demonstrating the existence of a tenancy elsewhere would assist your case, the occupant may still be able to defend the claim, and rely on witness evidence attesting to their use of the property in question as their only and principal home.

Consider another situation where there is a son or daughter of the deceased tenant, claiming a right to succeed on the basis of their occupancy of the property for the requisite 12 month period. You have serious doubts about their claim but they produce a number of witnesses to support their case.

Whilst you may question whether the witnesses are trustworthy, where the Court is judging

*“A Court may dismiss any claim for possession if there is the possibility that their claim may be true.”*

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to defend a claim for possession and assert their right to succeed under the statutory rules.

The following set of examples will assist in determining success in obtaining a possession order in the County Court:

Consider a situation where it is an elderly person in occupation of the property, who was the tenant's live-in carer and partner for over 12 months prior to the tenant's death, but who you have subsequently discovered has a tenancy with another social landlord and has claimed and continues to claim Housing Benefit for that property.

On such facts, you might draw the conclusion that there is a strong claim for possession on the basis of the occupant not having occupied the property as her only or principal home during the 12 months prior to the tenant's death.

between one individual's evidence against another, the benefit of the doubt, once again, may well be afforded to the occupant, if the witnesses perform well and come across as credible.

These examples serve to highlight the importance of having robust evidence to rebut an alleged successor's claim to have been in occupation of the property and ensuring that the "successor" is given every opportunity to produce their own evidence, including witnesses, before you take the step of issuing proceedings.

Please contact Sam Swann or Jonathan Hulley for further information.

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# Tenant Pays the Price for Rent Arrears

In 2001, a tenant was granted a secure tenancy of the premises by a Local Authority client.

Shortly after the tenancy commenced the tenant fell into rent arrears and in 2002 the Local Authority commenced possession proceedings and obtained a suspended possession order.

The tenant breached the terms of the suspended order and at this point the tenant became a tolerated trespasser at the property. The Local Authority applied for a bailiffs warrant and the tenant made an application to suspend the warrant which the Court duly granted.

Upon the tenant breaching the terms of the suspension order, the Local Authority made two further attempts to enforce the warrant and the tenant made two further applications to suspend enforcement, the last of which was unsuccessful and the Authority applied for an eviction date to be set.

On the day prior to the eviction the tenant cleared the rent arrears and the eviction did not go ahead.

applied to the Court for a warrant of restitution but following a request by the tenant's solicitor, the application was adjourned pending the outcome of the tenant's application.

Soon after this hearing, the property was transferred by way of stock transfer from the Local Authority Landlord to a Housing Association and the Devonshires Housing Management Team was instructed to act for the new Landlord.

At the return hearing of the tenant's application the Court considered the Housing & Regeneration Act 2008 and that the tenant as a tolerated trespasser during the period of the alleged disrepair was required to make an application under this Act in order to be able to bring a counterclaim for disrepair.

Whilst making submissions to the Judge, Counsel for the tenant stated that the tenant had been saving money to pay to the Association and could clear the arrears if their application was successful and the possession order set aside.

*“This case highlights the strong line a Judge will take in circumstances where a tenant has deliberately failed to adhere to the Court Process.”*

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On 20 May 2009 the Housing & Regeneration Act came into force and the tenant was deemed no longer to be a tolerated trespasser but to hold a replacement tenancy in accordance with the Act.

Following a further period of non payment of rent by the tenant, the Authority served a Notice of Seeking Possession and initiated further possession proceedings.

The tenant did not submit a defence or attend the possession hearing and the Court made an outright possession order which was later executed by the Authority and the tenant was evicted. When attending the premises days after the eviction the Authority became aware that the tenant had illegally re-entered the premises and changed the locks.

The tenant then made an application to set aside the possession order made some three months before, on the grounds that there was a valid defence in the form of a disrepair counterclaim. The Authority

The Association were successful in defeating the tenant's claim and the Judge dismissed the tenant's application to set aside the order and ordered that the tenant pay the money she had saved into Court to be held for the Association. A penal notice was attached and the tenant was warned that an arrest would follow if any of the terms of the order were breached.

This case highlights the strong line a Judge will take in circumstances where a tenant has deliberately failed to adhere to the Court Process.

The Court took such a dim view of the tenant's behaviour that the Judge took the unusual steps of ordering that the tenant pay the sum of money into Court and that the tenant be prohibited from accessing her bank account before this sum was paid.

For further information please contact:

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# How to Avoid a Judicial Review Challenge

Judicial Review is the process by which the High Court reviews the legality of acts or decisions taken by public bodies.

The Court of Appeal decision in *London & Quadrant and Weaver* confirmed that functions of management and allocation of housing stock (including decisions concerning the termination of tenancies) are functions of a public nature.

This decision affects most Housing Associations and means that decisions to terminate tenancies and the allocation of accommodation to tenants can be challenged in the High Court in Judicial Review proceedings.

In order to avoid a Judicial Review Challenge, Housing Associations should carefully consider the following:-

- Proper consideration of and responses to representations made by tenants e.g. a request made to transfer away from current accommodation or an application for a mutual exchange;
- Ensure compliance with internal policies and

procedures at all times (and ensure these policies and procedures are fair and reasonable);

- If you decide to terminate a tenancy, it is important to record all decisions made including the decision to serve Notice and the decision to issue possession proceedings. There should also be monitoring and upwards review of decisions taken;
- Keep clear and accurate records of decisions taken at all times;
- Ensure proper access to tenants to appeal decisions made;
- Consider making a new decision if the original decision made was unreasonable or inappropriate;
- Involve key colleagues and get good legal advice at an early stage.

For further information on how to avoid or handle a Judicial Review Challenge contact:

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## Ask the Expert

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This edition's expert is Neil Brand, a senior solicitor in the Housing Management Team. The question posed to him is set out below:

**"We have a number of tenants in a block which is heated by a communal boiler in a boiler house owned by us but which is on the other side of the Estate. Can we charge the tenants a service charge for servicing the boiler or does the cost have to come out of the rent? Does it make any difference if the tenants are assured or secure?"**

Neil Brand says, "An interesting question, and one which arises more often than people might imagine. The starting point is that assured and secure tenants cannot be charged service charges for costs associated with the landlord's statutory repairing obligations under section 11 Landlord & Tenant Act 1985. These include the costs of maintaining installations for the provision of heat (ie central heating) and hot water in the tenant's home. These costs must be borne by the landlord as part of the rent – not service charge.

The situation is slightly different where you are dealing with communal boilers outside the tenant's home. Before the Housing Act 1988 (which commenced on

15 January 1989) section 11 did not cover installations outside the tenant's home so the costs of repairing and maintaining communal boilers either in the common parts of a block of flats or in a separate building on an estate, could be recovered as service charges. And this remains the case for tenancies granted before 15 January 1989 i.e secure tenancies granted before that date.

However, section 116 of the Housing Act 1988 extended section 11 to cover heating installations in the common parts or in separate buildings owned by or under the control of the landlord. This means that tenants with tenancies granted after 15 January 1989 (generally assured tenants but you could have new secure tenants following internal transfers) cannot be charged a service charge for the costs of maintaining communal boilers in their blocks or in buildings elsewhere on the estate (provided they are owned or controlled by their landlord) and those costs must come out of the rent. And to be consistent (and for simplicity's sake) most RPs do not seek to recover service charges for these costs from pre-1989 secure tenants even though, strictly speaking, they could."

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# Another Family From Hell....

The Devonshires Housing Management Team was recently instructed to represent a Housing Association in a serious and long running anti-social behaviour matter.

Since the very start of the Defendant's tenancy she, her husband and their two sons had been the cause of numerous complaints from local residents, leading them to be described as "the family from hell".

The family had been given numerous chances to address their behaviour, including service of five NOSP's and previous possession proceedings that were adjourned on terms and later subject to a suspended possession order (SPO) to enable the family to remain in their home.

For the duration of each set of proceedings, the family did modify their behaviour to such an extent as to comply with the terms of any order.

On expiry of the SPO the Defendant and her family started to cause further fear and intimidation in the neighbourhood to such an extent that the premises

In addition, at the first hearing, the Defendant produced letters of support from approximately 30 neighbours stating she was a good neighbour.

The extent of the earlier anti-social behaviour was such that the witnesses in the Closure Order proceedings were either forced to move out of their homes or refused to give evidence at trial because they were so frightened for their safety.

In progressing the possession proceedings a number of anonymous statements were submitted, but without any witnesses giving evidence at court. The Judge had little regard to the contents of their witness statements.

The Judge further decided he was not bound by the findings in the Closure Order proceedings. Despite this, the Judge found that the Defendant was still in breach of her tenancy agreement and it was reasonable to make a possession order on grounds 12 and/or 14 of Schedule 2 to the Housing Act 1988.

The Housing Association was successful in

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became subject to a three month Closure Order obtained by the Police. Possession proceedings were then issued in the local county court by the Association.

At the time of the issuing of the proceedings, the tenant and her two sons were both subject to Anti-Social Behaviour Orders, as well as the tenant being subject to a Parenting Order.

The Closure Order was subsequently extended for a further three months, to the maximum limit of six months, in order to allow the possession proceedings to conclude before its expiry.

Following the Closure Order, the tenant and her family moved in with her parents, who lived a few houses down the same road. Despite the long running anti-social behaviour of the family, the anti-social behaviour stopped completely once proceedings had been issued.

obtaining a Suspended Possession Order against the Defendant, which contained strict undertakings given by both the Defendant and her husband, in relation to their future conduct. This case highlights the importance of witnesses in anti-social behaviour cases attending Court to give evidence

In this case, the Judge emphasised the fact that the Court can offer protection to such witnesses (e.g. giving evidence behind a screen) and that had any of the Claimant's witnesses attended Court, particularly given so many of the Defendant's witnesses attended, he may have concluded that an Outright Order would have been appropriate.

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