Devonshires

Housing Management Brief

Issue 20

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Welcome

Welcome to our new-look HM Brief. We hope you like the new format which gives you the usual updates on typical Housing Management Issues, but also gives you more of an idea of who's behind the Devonshires Housing Management Team. 'Breadth and depth' is a rather hackneyed phrase, but I think you'll agree that this new-look newsletter demonstrates that the team has got just that.

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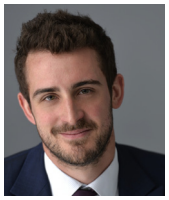
The Homelessness Reduction Act 2017: What do RPs need to know?



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The Homelessness Reduction Act 2017 ("the Act") received Royal Assent in April this year. Although it is not currently in force, the latest indication from the Government is that there will be consultation on a draft Homelessness Code of Guidance shortly before the Act comes into force in April 2018.

The Act represents the biggest shake-up of the law relating to homelessness for almost 20 years with significant amendments to the Housing Act 1996 being introduced in relation to how local authorities (LAs) assist people who are homeless or threatened with homelessness. The overarching aim of the legislation is to help all such applicants find accommodation at an earlier stage than under the current statutory framework.

The focus of the Act is aimed at the duties of LAs but some of the changes being introduced are likely to have a knock-on effect on RPs meaning they should be aware of the same.

'Threatened with homelessness'

Under the changes introduced by the Act, where a LA is satisfied that an eligible applicant is threatened with homelessness, the 'prevention duty' arises under amended s.195 HA 1996. This duty requires the LA to take reasonable steps to help secure that accommodation for the applicant does not cease to be available in that period.

Under the Act (amended s.175(4) HA 1996), a person will now be considered to be threatened with homelessness if it is likely that they will become homeless within 56 days, doubling the current 28 days. During that period, the prevention duty requires the LA and applicant to work together so that alternative accommodation can be found or so the applicant can remain in the existing accommodation.

Further, the Act makes it clear that being served with a valid section 21 notice that expires within 56 days constitutes being threatened with homelessness. The likely effect of this is that LAs will be scrutinising s.21 notices served on applicants for homelessness in much greater detail because, if such a notice is invalid, the applicant will not be considered threatened with homelessness meaning the prevention duty will not arise.

RPs will be aware that the law relating to s.21 notices is complex and littered with potential pitfalls, so care should be taken to ensure that s.21 notices being served fulfil all the statutory requirements to avoid these being challenged.

It is also worth RPs bearing in mind that the changes introduced by the Act do not go so far as to make the date of expiry of a s.21 notice the date an applicant actually becomes homeless thus engaging the new 'relief' duty introduced by the Act (new s.189B HA 1996) which requires the LA to take reasonable steps to help the applicant find suitable accommodation.

Although there was some discussion regarding the possibility of the expiry of a s.21 notice triggering 'actual' homelessness during the passage of the Bill, this did not make it into the Act. As such, it remains the case that LAs will likely continue to insist that an applicant for homelessness await the issue of possession proceedings, the making of a possession order or even a date for a bailiff's appointment before considering that applicant homeless.

This means that RPs will continue to have to issue and pursue possession proceedings on expiry of s.21 notices even where the tenant has made an application for homelessness to the relevant LA.

For further information on the introduction of the Act or the requirements for service of a valid s.21 notice, please contact Mark Foxcroft on 0207 065 1861 or mark.foxcroft@devonshires.co.uk .

Unlawful Profit Orders – Housing benefit to be taken into account when calculating profit

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A recent case, Poplar Harca -v- (1) Begum (2) Rohim [2017]UKHC 2040 (QB) has provided some useful guidance for social landlords in respect of subletting cases and in the calculation of Unlawful Profit Orders.

Poplar Harca had obtained a Suspended Possession Order against its tenants at first instance for breach of tenancy by subletting part of the property. The Court found that whilst it was clear the property had been sublet, it could not find that the Defendants had made a profit because they had collected £400 per month but were being charged over £600 per month. For this reason, the Recorder was persuaded by the Defendants' claim that they had moved out of the flat so that they could look after an ill relative. He considered that the Defendants had altruistic reasons for moving out of the flat which "takes this case right out of the ordinary run of [subletting] cases." On that basis he did not grant an outright order and made no order on the claim for an Unlawful Profit Order.

The landlord appealed to the High Court on the basis that the judgment was demonstrably flawed. The High Court agreed and found that the Recorder had not taken into account that the Defendants were in receipt of housing benefit for the property, and that there was no evidence to support the decision that the tenants had moved out for altruistic reasons.

Commenting that '...it is not compassionate to allow profiteering fraudsters indefinitely to continue to occupy premises and thereby exclude from such accommodation more needy and deserving families", Mr Justice Turner duly exercised his discretion and ordered an outright order for possession in place of the SPO previously ordered.

The High Court then turned its attention to the calculation of the Unlawful Profit Order under Section 5 of the Prevention of Social Housing Fraud Act 2013. Finding that the rent for the flat was covered entirely by housing benefit and as such the monies received by the tenants was pure profit, the Court found that housing benefit should be included within the calculation of the funds received as a result of their subletting. He considered that to disregard housing benefit when assessing the monies received by the tenants but to include it to the advantage of the tenant when calculating rent paid would be to thwart the obvious intention of Parliament to provide a mechanism by which to strip a fraudulent tenant of his spoils.

For future cases, when calculating the profit a tenant has made by subletting under Section 5 of the Prevention of Social Housing Fraud Act 2013, landlords should take into account the housing benefit received by the tenant as well as the rent that tenant received from their subtenant when calculating the overall gain by the tenant and before deducting the rent paid over the same period.

For further guidance or advice on particular subletting cases, do contact Anna Bennett on 020 7880 4348 or anna.bennett@devonshires.co.uk.

Squatting in commercial properties: Options for landlords

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Squatting in residential buildings has been a criminal offence since 2012 but the number of people squatting is still rising with owners of commercial properties now at most risk.

According to a survey last year carried out by the BIFM and Orbis, 16 per cent of respondents reported an increase in commercial squatting with London property managers seeing the highest squatting rates.

If you're one of the growing number of commercial property owners affected by squatters, or if the police are not using their powers to remove squatters from residential property, you have two options to recover possession:

1. Interim Possession Order (IPO)

This is usually used when a landowner requires urgent possession of a property. A claim is issued at Court which consists of an application for an IPO and a supporting witness statement. This must be issued within 28 days of the owner finding out that the property has been squatted.

Once issued, the court will list the application for a hearing. The hearing will be as soon as practicable, but not less than 3 days from issue. The claim and application must then be served at the property within 24 hours of issue. If the court is satisfied and makes an IPO at the first hearing, this must be served within 48 hours. The squatters then must leave the property within 24 hours of being served with the IPO – failing to do so is a criminal offence.

There will then be a further hearing at which point the Court will decide whether the order should be made final. If it is, the squatters will have already left and therefore getting the final possession order is usually just a formality.

This option should however, be approached with caution as owners will generally have to give a number of promises (undertakings) to the Court at the first hearing. These include paying damages to the squatters if it is later determined they have a right to remain in the property.

2. Summary Possession Proceedings

A claim is usually issued against the anonymous person(s) and served at the property. There are specific time limits for service before the hearing – two clear days for non-residential property and five clear days for residential property.

A hearing will then take place at which the Court will decide whether to make an Order for possession or not. The squatters will have an opportunity to put in a defence to the possession claim. If a defence with any merit does go in, the first hearing may be adjourned to a later date.

Once a possession order has been obtained, enforcement can be carried out by the Court bailiffs following issue of a Warrant of Possession, or an application can be made to transfer to the High Court so that enforcement officers can carry out the eviction. This is generally fairly costly but is a lot quicker than waiting for the County Court bailiffs to list the eviction.

Which option is best for you?

If urgency is key then an IPO is likely to be faster. It does, however, mean that there will be two hearings to attend which will increase costs. There is also the risk of giving undertakings for damages.

If the land that has been squatted is not a building, an IPO may not be available as this option only applies to buildings and land adjacent to buildings.

There are pros and cons to both routes, so take legal advice as quickly as possible if a property you own has been squatted.

For further information, please contact Rebecca Brady on 0207 065 1838 or rebecca.brady@devonshires.co.uk.

Meet Our Team

Solicitor Spotlight - Mark Foxcroft

How did I get into housing law?

I studied Law at University and originally trained as a barrister at Law School. After qualifying after 4 years of hard work, I went travelling for a few months. Upon my return, I was unsurprisingly short of money whilst applying for pupillage so was in need of a job. I came across an advert for an ASB Officer at Southern Housing Group and thought it sounded really interesting - which it definitely turned out to be.

I spent 18 months at SHG and had a steep learning curve in the world of housing management and, in particular, ASB. I loved every second of it as I got to make a real positive impact on residents who had been suffering at the hands of nuisance tenants, sometimes for years, and that provided real satisfaction. When a job came up at Devonshires in 2011, it was the perfect match for my legal background and housing experience and I have never looked back, cross-qualifying as a Solicitor in 2013.

What interested me about housing management and leasehold?

Housing is a topic that constantly seems to be in the news, especially at the moment, as it is so clearly an issue that is at the forefront of the public agenda. Where and how we live and interact, particularly in big cities, is such a fundamental aspect of all of our lives and I have always found it interesting for that reason. Housing law is constantly adapting and developing to meet the changing demands of society and, as such, I have always found it an exciting area of law to work in as it feels very current and relevant.

What skills did I pick up in my time at SHG that have helped me in my career at Devonshires?

Working at the coal face of housing management with tenants gave me a genuine insight into the realities of what front-line housing staff deal with on a day-to-day basis. As lawyers, we can sometimes forget what it is like on the ground and my time working for an RP has helped me to provide practical advice to my clients and also to lend a sympathetic ear when necessary. I've been in their shoes and know that situations are sometimes not as cut and dry as we would like them to be which means I can usually assist in providing realistic and pragmatic solutions to even the most obscure housing management issues that arise.

Working as an ASB officer also helped give me a thick skin as some residents can be…challenging…and that tough exterior has served me well as a litigator.

…and finally tell us something interesting

With Autumn fast approaching, have you ever wondered why October is the 10th month of the year but an octopus has 8 legs and an octagon has 8 sides? I'm sure you have (!) but on the off chance it has never crossed your mind, the answer lies with those pesky Romans. Octo is Latin for 8 and, sensibly, October was originally the 8th month of the year under the Roman lunar calendar.

That calendar only had 10 months and started in March as the Romans considered Winter to be a fallow time of year in which very little should be done (entirely reasonable in my opinion) so didn't bother giving it any months. The calendar year would end in December and start again in March. However, this (perhaps unsurprisingly) led to confusion and January and February were duly added later bumping poor old October out of sync.

Bonus interesting fact: July and August used to be called Quintilis and Sextilis but were renamed by Emperor Augustus to honour his and Julius Caesar's conquests. How's that for self-promotion?

Home Loss Payment Increases: What you need to know

The Home Loss Payments (Prescribed Amounts) (England) Regulations 2017 (SI 2017/769) come into force on 1 October 2017 ("the Regulations"). The Regulations increase the amount of compensation payable under the Land Compensation Act 1973 ("LCA 1973") to a person who is permanently displaced from their home where possession of the property is required for the purposes of re-development or improvement by a local authority or RP.

When is Home Loss Payment payable?

Home Loss payments are limited to those with a legal interest in the property, including tenants. The payments will apply to occupiers who have to move permanently as a result of their property being demolished or re-developed. Home Loss payments are paid by the local authority or RPs if they are intending to re-develop/improve the property and have obtained possession on this basis.

How is Home Loss Payment calculated?

The amount payable depends on the extent of the occupier's interest in the property. If the occupier has an 'owner's interest' in the property (freehold or leasehold with more than 3 years to run), the amount will be 10% of the property's market value but will be subject to the new minimum and maximum amounts introduced by the Regulations, which have been raised both for owner-occupiers and for tenants:

- The maximum amount for owner-occupiers has increased from £58,000 to £61,000;
- The minimum amount for tenants has increased from £5,800 to £6,100.

Where the occupier is a statutory tenant, the prescribed amount of compensation payable has been increased by the Regulations from £5,800 to £6,100.

For further information or advice on home loss payments, please contact Kerri Harrison on 020 7880 4267 or kerri.harrison@devonshires.co.uk.

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Environmental Protection Act claims: How to avoid prosecution

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In recent years, there has been a significant increase in tenants claiming that the condition of their home constitutes a statutory nuisance as defined by the Environmental Protection Act 1990 (EPA).

Landlords who are used to managing disrepair claims commonly fall into the trap of treating EPA claims in the same way. This can often prove fatal and result in a landlord walking straight into a prosecution and associated liability for costs.

To help avoid this situation arising, follow this advice:

Check the contents of the EPA pre-action notice, its purpose and timescales

The most common and fundamental error landlords make is to assume an EPA pre-action notice should be treated in the same way as a letter of claim served under the Pre Action Protocol for Housing Disrepair Cases (the Protocol).

When a tenant sends such a letter of claim, the landlord has 20 working days to carry out an inspection, provide a response to the allegations, disclose documents and, if necessary, make proposals for settlement and/or to agree a single joint expert.

In contrast, an EPA notice must specify the nuisance complained of and give the landlord 21 days' notice to abate it before the start of any proceedings for prosecution. Note this is calendar not working days.

Carry out the necessary works within 21 days

There is no provision within the EPA to seek to resolve issues to avoid proceedings and, if the tenant's objectives in serving the EPA notice are to be compensated for the nuisance and/or to recoup legal costs, it would not be in their interest to delay. It you receive an EPA notice, it is therefore imperative to carry out the necessary works to abate the statutory nuisance within the 21 day period.

If prompt action is taken and the nuisance is abated within 21 days, the tenant would have no remedy in the Magistrates Court as a statutory nuisance must exist at the date the complaint is made to the Court. This means that the resident couldn't claim for compensation or payment of legal costs if the nuisance is abated within the 21 day period of the notice, although it is important to note that, in many cases, the defects/conditions that give rise to a nuisance claim could also form the basis of a separate disrepair claim.

Consider the 'person responsible'

The tenant must prove beyond reasonable doubt that the landlord is the 'person responsible' for the statutory nuisance. As a result, a tenant can't engineer non-compliance by obstructing access as failure to do so is likely to give the landlord a complete defence.

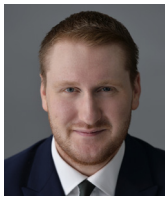
If the nuisance continues to exist because of the tenant's actions, the landlord's defence would be that the tenant is the "person responsible" for the nuisance.

Do whatever is necessary before proceedings are issued

In EPA claims it is always in the landlord's best interest to abate the statutory nuisance before proceedings are issued, not only to avoid potential costs and compensation, but also a possible fine, order for works and the potential reputational damage these cases can attract.

To find out more or for assistance managing EPA claims, please contact Donna McCarthy, Partner in the Housing Management Team on 0207 880 4349 or donna.mccarthy@devonshires.co.uk

Dismissing False Discrimination Claims: How an assessor can help



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Social landlords are frequently faced with discrimination allegations in response to possession claims but rarely appoint an assessor who could help deal with potentially complex court proceedings.

So, what is an assessor and how can landlords benefit?

The Equality Act 2010 provides legal protection for individuals from discrimination in the workplace, at home and in wider society. Since 1 October 2010, there has been a presumption that any Equality Act claim relating to possession proceedings should have the benefit of a specialist assessor to sit with the judge unless 'there are good reasons for not doing do'.

According to the 2010 Code of Practice on Services, Public Functions and Associations, assessors are "persons of skills and experience in discrimination issues who help to evaluate the evidence."

The reason for their introduction is twofold. Firstly, it furthers the Equality Act's purpose of making the law easier to understand – in this case for judges who can draw on specialists trained to deal with discrimination complaints. Secondly, it strengthens protection in some situations by recognising that the sensitive nature of discrimination and vulnerability requires an added layer of safeguarding.

If a breach of the Equality Act has been pleaded, the judge must find good reasons not to appoint an assessor. The Code of Practice points out that a good reason is not because the court believes it can hear the issues without an assessor or that they would lengthen proceedings.

An assessor will assist the court in dealing with a matter in which they have the appropriate experience and skills. The matter is identified before the assessor is appointed on the basis that different forms of discrimination can't be all treated the same. An assessor will not make judicial decisions but advise and educate the judge to ensure he or she reaches a suitably informed decision.

A key advantage of an assessor is the ability to discern whether people are deceiving the court. They can understand the sort of masks, pretences and protests which are often put forward by those who discriminate as well as how unconscious bias or stereotyping can operate.

It's this knowledge and experience that can be vital for social landlords. It can result in greater scrutiny of dealings with tenants which could prove key in helping to dismiss false discrimination claims.

The statutory provisions in the law clearly see assessors as the norm, but surprisingly, legal teams rarely apply for them to be appointed and in my experience, they have been the exception rather than the rule. However, parties and their representatives involved in claims relating to the Equality Act could be missing a useful opportunity to assist the court in what are often complex cases.

For further information on assessors or advice on managing discrimination claims, please contact Lee Russell on 020 7880 4424 or lee.russell@devonshires.co.uk.

What we've been up to

Lee Russell has been getting to grips with the intricacies of data protection in order to advise a newly established RP.

Hannah Keane has recently joined the HM team and has been assisting Lee Russell and Kerri Harrison on a number of disrepair cases and anti-social behaviour without notice injunctions.

Amongst her usual tenancy management caseload, **Anna Bennett** has recently been advising clients on issues around fixed term tenancies and presenting training to housing officers where new fixed term tenancy regimes are now being implemented.

Tazim Ladha has been filling her summer dealing with several disrepair cases, and worked hard in negotiating agreement on a complex antisocial behaviour matter where the tenants lacked capacity in order to reach resolution for all parties. She is now looking forward to a weekend away in Copenhagen!

Hetal Ruparelia has been busy settling a significant professional negligence claim and her client is overjoyed with the result. She is also preparing for a two day trial at the Valuation Tribunal next week which is coming to a head after three years of perseverance. She needs to save some energy however for climbing the Great Wall of China in 7 weeks and 4 days (not that anyone is counting!).

Maninder Bassan climbed Monte Bre in Switzerland in summer and is looking forward to Christmas shopping in New York. She is currently working on anti-social behaviour cases both possession claims and injunction cases.

Besides trying to pass her LPC exams and sadly missing out on the sunshine, **Portia Guidotti** has been filling her time with without notice injunctions and disrepair claims, and has also dealt with a number of appeals on final possession orders.

As well as planning events for Women in Housing, the InLaws and the CSR group **Donna McCarthy** has been kept busy advising on a number of matters involving vexatious complainants and litigants.

Housing Management Training Programme 2017/18

Devonshires Solicitors offers a comprehensive training programme on all aspects of housing management to their clients. Topics covered include:

Seminar Programme

Tackling ASB and Nuisance Conduct

26 September 2017

Half day session

HM Update

12 October 2017

Half day session

Tips and Tricks: Dealing with the Courts and the effective instruction of Lawyers

23 November 2017

Half day session

Tackling Non Occupation, Subletting and Disputed Succession Claims

24 January 2018

Half day session

Mental Health and Housing

28 February 2018

Half day session

HM Update

28 March 2018

Half day session

Tackling Tenancy Breach

25 April 2018

Half day session

Local Authority Enforcement and the HHSRS: A practical guide for Landlords

10 May 2018

Half day session

Defending Actions for Disrepair and Claims under Environmental Protection Act 1990

14 June 2018

Half day session

How to Book

Invitations outlining programme and speaker details will be issued for each event with a registration link. Places are issued once the flyer for the individual seminar is sent out.
All sessions are free to attend.

Look out for our responsive Webinars and Breakfast Briefings announced throughout the year

To sign up to our mailing list please email seminars@devonshires.co.uk

Help is at hand

Housing Management Helpline

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Leasehold Management Helpline

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Legal updates and seminars

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If you would like to receive legal updates and seminar invitations please visit our website on the link below.

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