Devonshires

Housing Management & Property Litigation Brief - Wales

Issue 3

In this issue...

Welcome

Croeso! A very warm welcome to our newest instalment of the HMPL Brief in Wales.

While there is never a dull moment in the housing world, we have spent much of the last year coming to terms with the fact that the Renting Homes (Wales) Act really is here to stay! As evidenced by the contents of this bumper edition, the breadth of topical issues we – and you – are faced with currently is remarkable and this edition hopefully gives you an insight into at least some of them. From the Leaseholder Support Scheme through to the new succession rules, we hope there is something interesting in here for everyone.

Happy reading…

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Aviva Investors Ground Rent GP Limited and another v Williams and others [2023] UKSC 6

A new key Supreme Court service charge decision clarifies that a service charge clause which requires the tenant to pay a fixed percentage service charge or a proportion to be reasonably determined by a landlord, is valid.

The appeal concerned in particular, how section 27A (6) of the Landlord and Tenant Act 1985 should operate and gave landlords the comfort they were seeking.

This has been a long running dispute which essentially raised the question of how far section 27A of the Landlord and Tenant Act 1985 ('LTA 1985') can be interpreted.

Brief case facts

The leaseholders of long residential leases in a property in Hampshire were required under their leases to pay service charges towards the maintenance of the building and of the estate. The individual leases required that they paid a specific proportion of the overall costs "*or such part as the landlord may reasonably determine*".

The landlords sought to reapportion the service charges by attempting to vary the percentage due from each leaseholder, but a number of the leaseholders then raised an objection to this and issued a claim in the First Tier Tribunal ('FTT') stating that the re-apportionment was not reasonable and was void pursuant to section 27A (6) of the LTA 1985.

This section of the LTA provides that an agreement by a tenant "*is void in so far as it purports to provide for a determination (a) in a particular manner, or (b) on particular evidence, of any question which may be subject of an application (to the First Tier Tribunal under section 27A)*".

Essentially, it was the exact scope of this provision that was in dispute here.

FTT decision

The FTT rejected the contention that the lease provision was void and held that this lease provision giving the landlord the ability to vary the service charge proportion was not void and in addition that the apportionment was in fact reasonable.

Upper Tribunal decision

The leaseholders subsequently appealed and the Upper Tribunal held that the lease provision was void pursuant to section 27A (6) and so the service percentage could not be varied and they only had to pay what was originally set in the lease.

Court of Appeal decision

The landlord then applied to the Court of Appeal where it was held that the re-apportionment was not void but instead the effect was to transfer the discretion to vary the service charge proportions from them to the FTT. The Court of Appeal restored the decision of the FTT. This was later criticised by the Supreme Court for the resulting outcome was not the aim of the legislation.

Supreme Court decision

The leaseholders in turn appealed to the Supreme Court who consequently dismissed the appeal. They ruled that the revised apportionment was valid, restored the FTT's decision but gave different reasons than the lower courts.

The Supreme Court judgment deals with the actual effect of section 27A (6) of the LTA 1985 which provides controls on the ability of a landlord to determine what service charge is payable by a tenant. It was considered that it is an anti-avoidance provision but was not meant to allow the Tribunal extra jurisdiction. The judgment stated that *"it was not the purpose or effect of section 27(A) 6 to deprive that form of managerial decision-making by landlords of its ordinary contractual effect, save only to the extent that the contractual provision seeks to make the decisions of the landlord or other specified persons final and binding, so as to oust the ordinary jurisdiction of the FTT to review its contractual and statutory legitimacy"*.

The Supreme Court disapproved of the Court of Appeal interpretation of section 27A (6) and the previous case law it was based on as it would have the effect that every discretionary management decision affecting service charge (such as what works to carry out) would be transferred to the FTT. This, added to the fact a landlord would never safely be able to incur costs without first seeking a decision of the FTT as to whether those could be charged to its tenants, could lead to a flood of applications that would overwhelm the tribunal. As above, this was not the purpose of the legislation.

The Supreme Court further stated that the FTT was still able to review whether the adjustments were reasonable, as was required by the leases and the Tribunal determined that they were reasonable. Therefore, section 27A (6) of the LTA 1985 was not engaged, and the re-apportionments were valid.

The clarity this decision brings will be welcomed by landlords who may now not be so hesitant to reapportion and will be confident that they can keep control over decisions of this nature. Additionally, the decision itself should result in less disputes concerning apportionments being brought in the first place.

For more information, please contact Neil Lawlor or Mark Foxcroft.

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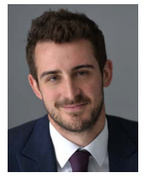

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Guide to Dealing with Litigants in Person

With historic cuts to legal aid and the current cost of living crisis, it is not uncommon for a party to find itself litigating against somebody who has not instructed legal representatives or otherwise known as a Litigant in Person ("LiP"). A LiP is a party to Court proceedings who has no solicitor or other legal representative on the record as acting for them.

LiPs can instruct a barrister on a direct access basis to represent them at Court hearings, seek the ad hoc assistance of legal advisers or "McKenzie Friends" (unregulated individuals who can assist LiPs with Court proceedings), or do everything entirely by themselves. Some LiPs can be very sophisticated and may even be legally trained themselves.

This article sets out some important points to bear in mind if you are litigating against a LiP.

General principles

The starting point is that LiPs receive no special treatment. The Civil Procedure Rules apply just as much to somebody who may be represented. The Supreme Court in Barton v Wright Hassall LLP [2018] UKSC 12 said: *"It is reasonable to expect a litigant in person, who is about to take a significant step in the Court's procedure, to find out what the rules are and to take steps to comply with them."*

However, some allowances are required for unrepresented parties, and the legal representatives of their opponents often find themselves in a delicate position. It is crucial for practitioners to conduct themselves accordingly but also for represented parties to understand their own lawyers' duties.

A solicitor owes duties to their client, and it is not their job to give an opponent legal advice. That being said, a solicitor also has professional duties towards the Court and the administration of justice. It is part of the Solicitors Regulation Authority's Code of Conduct that a solicitor must not take unfair advantage of any party. Of course, it is not taking unfair advantage to apply the law and rules of procedure in your client's interests, but a solicitor facing a LiP will be expected to take care in their dealings with them.

For instance, a solicitor for a represented party may have to explain matters of procedure in simple terms (for example, flagging up that, since a document was served on a particular date, the LiP's response is due on another), avoid jargon or explain any unavoidable legal terms, and point LiPs in the right direction to locate the applicable rules. Unrepresented opponents should be encouraged to seek independent legal advice, or signposted to other assistance forums (for instance the Citizens Advice Bureau). More time likely needs to be allowed for deadlines to be complied with than with represented parties for instance.

Represented parties should accordingly not be surprised to find their own solicitor being more helpful than they would have expected to an opponent. It is of course also in the interests of represented parties for a Court to see them behaving beyond the norms, particularly when there is an unrepresented opponent. Failure to observe proper conduct can have a negative impact on costs.

Points to note with LiPs

It is key to remember that your opponent does not have the benefit of professional assistance to present

their evidence and arguments in support of their case. Dealing with LiPs can be an unpredictable process. Without legal advice, they might not always understand the points you are trying to make. This can lead to potentially vexatious and unmeritorious claims being issued which will have to be dealt with to avoid judgment in default. An application to strike out is often the quickest and cheapest way to dispose of these, albeit inevitably it will take up legal costs and internal resources.

LiPs who may be overconfident in their case can be harder to reach an agreement with as they may not have the benefit of professional advice and guidance to navigate their way to a reasonable outcome.

Costs

Having a LiP as an opponent will often increase a represented opponent's costs. It will bear a higher burden of dealing with issues that would not otherwise fall to it. For example, an unrepresented claimant's duties of producing bundles and case management documents will often fall to a represented defendant.

Generally speaking, LiPs may increase the costs of conducting proceedings because they do not have the benefit of professional guidance. It is not uncommon to receive long letters that are inflammatory but that unfortunately have to be read, advised upon and responded to.

Additionally, LiPs may not know how best to present their case at trial. For example, a cross-examining LiP could spend hours taking witnesses through their statements paragraph by paragraph asking them to confirm what is stated.

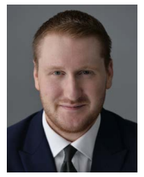
Hearings may also last longer because judges will spend more time explaining things in detail to LiPs. Judges might come across as making special allowances for LiPs but it is important that hearings are conducted fairly, as otherwise judgments can be appealed.

For all of these reasons, it should always be borne in mind that the costs of litigating against a LiP can be even higher and more unpredictable than the costs of legal proceedings generally.

In addition, any party considering proceedings should always make sure that their opponent, represented or not, would be able to satisfy any judgment and costs orders. The fact that a party is not represented may suggest that they are not able to instruct external legal representatives and in turn that could have consequences in terms of seeking to enforce or satisfy any judgment or costs orders. This means that a represented defendant can find itself having been forced to defend frustrating proceedings by a LiP who refused reasonable attempts to settle, only to be unable to enforce a costs order if successful.

On the other hand, an unrepresented party will not themselves be incurring significant legal costs that they can claim if they win. A LiP can recover reasonable disbursements and there are limits to what they can recover on an hourly rate basis.

For more information and advice about Housing Management and Property Litigation, contact Lee Russell. For general Litigation and Dispute Resolution, contact Pauline Lépissier.



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Quantification of a Data Breach

What do courts tend to award claimants who suffer data breaches?

The High Court has handed down judgment in the case of *Driver v Crown Prosecution Service* [2022] EWHC 2500 (KB). In summary, Mr Driver was awarded £250 for his data breach claim. This is a very welcome case for data controllers dealing with low level data breach claims.

By way of background, the CPS disclosed details of an ongoing fraud investigation (named Operation Sheridan) concerning Mr Driver in an email to a member of the public, Paul Graham. Mr Graham was not involved in the investigation but was described in the Judgement to be a political opponent of Mr Driver. Mr Graham made an enquiry with the CPS and was sent the following email;

"A charging file has been referred from the Operation Sheridan investigation team to the CPS for consideration."

Mr Graham communicated the contents of the email with his own comments, which included naming Mr Driver, to several further individuals. There was no evidence, however, that anyone read the email or acted further upon it.

Mr Driver brought a claim against the CPS on the basis that the email had caused him distress, relying on the following causes of action;

- breach of the General Data Protection Regulation (the "GDPR") or in the alternative for breach of the Data Protection Act 2018 (the "DPA 2018");
- misuse of private information ("MPI");
- breach of the Human Rights Act 1998 (the "HRA 1998").

Did the email amount to Mr Driver's personal data?

The CPS argued that no data breach occurred as the email did not contain Mr Driver's personal data. This argument was rejected by the High Court on the basis that the email enabled the recipient to identify Mr Driver as one of the people mentioned in the "charging file".

GDPR or DPA 2018 claim?

The High Court held that Mr Driver's claim was not a GDPR claim, but that it instead fell within the law enforcement provisions of the DPA 2018.

Did a data breach occur?

Yes. The key takeaway was that there was no necessity to update the Mr Graham and therefore there was no lawful processing condition that could be relied on.

Did the CPS violate Driver's human rights or misuse his private information?

In relation to the allegation of misuse of private information, the court found that Mr Driver had no reasonable expectation of privacy concerning the details of Operation Sheridan, as much of the information was in the public domain.

The human rights claim was subject to a 12-month limitation period which had expired but could have been extended at the court's discretion. As it was established that Mr Driver had no reasonable expectation of privacy in the misuse of private information claim, the judge declined to extend this period. Therefore, the human rights claim also failed.

The claim for distress

The DPA 2018 enables data subjects to be compensated if they have "suffered material or non-material damage as a result of an unlawful processing operation".

Section 168(1) of the DPA 2018 specifies that "'non-material damage' includes distress".

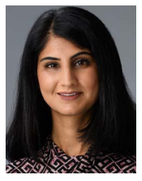
Mr Driver's claim for distress was successful but caveated for the following reasons.

To support his claim for distress, Mr Driver relied on the fact that he visited his doctor in 2020 and was prescribed anti-anxiety medication. The judge saw no evidence that the data breach was the specific cause of Driver's anxiety "rather than… the stress of having been under police investigation, by then, for six years or so."

The judge was also sceptical of Mr Driver's claims about the extent of his distress, denying that the data breach could have reasonably caused the claimant "anything like the level of anguish which he claimed".

Weighing up the above factors, the High Court awarded Mr Driver damages of £250 which is of course minimal. Data controllers should however of course note that the CPS would have been liable to pay Mr Driver's legal costs which are likely to have been substantial. Overall, this is very helpful guidance in that a case involving limited personal data and limited distress being suffered, £250 is an appropriate figure for damages (or at least as a starting point).

For more information, please contact Hetal Ruparelia.



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EPA Procedure

Statutory Nuisances and the Environmental Protection Act 1990

There has been a spike in recent months of statutory nuisance notices being served on landlords pursuant to the Environmental Protection Act 1990 (“the EPA 1990”). There may be a few reasons for this, but a potential cause could be the (now delayed) introduction of fixed recoverable costs which are set to come in in the next couple of years.

Finding yourself in receipt of a statutory nuisance notice or even summons is unfamiliar territory for many within the Housing sector and with their apparent resurgence, we are here to answer a few questions you may have such as:

What is a Statutory Nuisance?

A statutory nuisance will generally fall within two categories: damp and mould or pests (such as mice, rats and bed bugs) (s79(1)(a) EPA). We will refer to mice as an example throughout for ease.

The mere presence of mice would not be enough to satisfy the Court that a statutory nuisance exists, the key here is whether the alleged presence of mice is injurious or likely to cause injury to health.

A statutory nuisance notice can served by a ‘person aggrieved’ (s82 EPA). This means that anyone can bring these cases as an action, whether or not they are the tenant (as in disrepair claims).

The notice should be brought against the personal responsible (s79(7) EPA) such as the landlord or owner of the property for their default and a defect in the structure of the property, such as holes in the wall which allow mice to enter.

Once a statutory notice is served, the personal responsible will have at least twenty-one days to get rid of the alleged nuisance.

If the issue persists, then the person aggrieved can then lay the information with the Magistrates’ Court. Although these cases are criminal matters and they can seem intimidating, there is a higher burden of proof which is ‘beyond all reasonable doubt’ and it’s on the person aggrieved to make their case and prove it. This is a much higher threshold compared to civil cases.

What Happens Next?

If the information is laid and the matter is defended, a first directions hearing will take place. You will agree directions such as disclosure and witness statements all the way up to trial.

At the trial the Court has two issues to consider. The first is whether a statutory nuisance existed on the date the information was laid, and whether it continues to exist on the date of the trial. The second point is whether the Defendant is the person responsible for the statutory nuisance.

There are several defences available to you at each stage of the process, briefly, these are:

1. That you have done all that can be reasonably done upon receipt of the statutory notice. You have inspected the property, ascertained whether there are mice there and brought in pest control to carry out a programme of works.

2. You can potentially argue that the information was laid too early, and the summons is possibly defective.

3. At the stage of giving evidence, any expert report needs to comply with the Criminal Procedure Rules. The expert instructed needs to be qualified to comment on whether the alleged statutory nuisance is prejudicial to health. Note that experts in disrepair cases are not normally qualified to do this.

4. Finally, at the trial, you can argue that the person aggrieved has not been able to prove that a statutory nuisance existed or exists at the property beyond all reasonable doubt or that you are the person responsible. Factors such as failure to provide access to carry out works, and unreasonable refusal of alternative accommodation will be considered.

What Happens if your defence does not work?

If it is found that there was a statutory nuisance at the date that the information was laid, but that it no longer exists at the date of trial, and that you were the person responsible, then the only issue is whether you are liable for costs (s82(12) of the EPA).

If, however, it is found that both a statutory nuisance existed or exists at the date the information was laid and at the date of trial and that you are the person responsible, then the Judge will make an order for abatement, order a fine of up to £5,000 and costs for the person aggrieved. As this is a criminal case you will also have a criminal record.

If the abatement order is breached, then it is at this stage that an offence is committed. The only defence available would be “reasonable excuse”, where you must show that you have done all that is reasonably expected of you to comply with the order.

Top Tips

- As soon as you receive a statutory notice, get into the property, carry out an inspection and undertake the works. If you can’t get access, keep trying.
- Try to abate the nuisance within the twenty-one days.
- Evidence keeping is key – document everything, letters, inspection reports, any communications had and refusal to provide access.
- Make sure you instruct someone qualified to comment on whether the alleged statutory nuisance is prejudicial to health, such as an Environmental Health Officer.

If you have any questions or would like further information, please contact Narin Masera.

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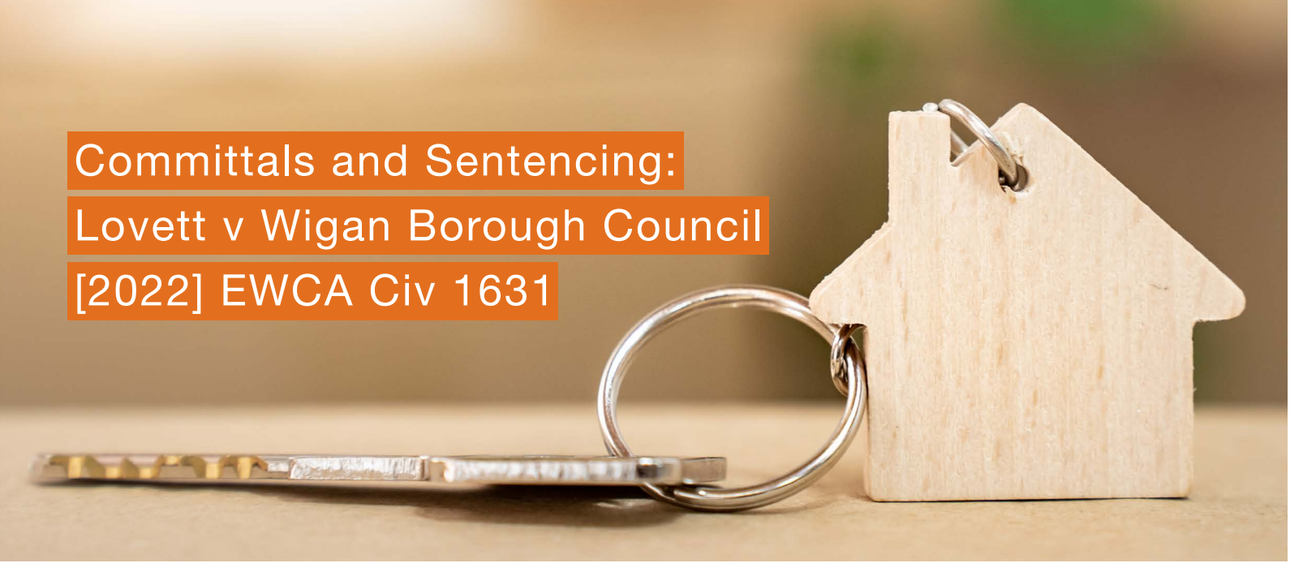


Committals and Sentencing: Lovett v Wigan Borough Council [2022] EWCA Civ 1631

Anna Bennett was recently instructed on the case of *Issac Smith v Network Homes Limited* which was one of the three conjoined appeals heard by the Court of Appeal in November 2022 with judgment being handed down on 16 December 2022. The three cases all concerned appeals against sentences received by residents of social housing who had breached the terms of Injunctions obtained against them further to the Anti-Social Behaviour Crime and Policing Act 2014.

The Court of Appeal took the opportunity to provide guidance to the civil courts when considering committal applications and breach as concerns had been raised by the Civil Justice Council ("CJC") in a Report dated July 2020 entitled July 2020 entitled Antisocial Behaviour in Civil Courts about inconsistencies in the penalties imposed by judges when considering breach or committal applications.

This will prove helpful for the Courts as prior to this there had not been any guidance set down for Judges in civil cases in how to consider contempt applications as opposed to breaches of criminal injunctions for example, which have a much higher sentence.

The three cases were factually different, *Optivo v Hopkins* concerned a case where Miss Hopkins had been sentenced to a 28 day custodial sentence suspended on condition she complied with the injunction until April 2023. Ms Hopkins appealed on the grounds that (1) the sentence was immensely excessive and (2) that in sentencing, the Judge took into account irrelevant information or failed to take into account relevant information.

The case of *Smith -v- Network Homes Limited*, involved an appeal by Mr Smith against a 12 week custodial sentence suspended for 12 months. He had been found to be in breach in respect of 9 of 10 allegations made against him. The grounds in this appeal were (1) that the judgment had not been transcribed and placed on judiciary website at the proper time contrary to CPR rule 81.8 (8); (2) that the Judge had erred in not considering a possession order against the Defendant as an alternative of committal; (3) that the Judge was wrong to determine the committal application without determining whether Mr Smith was eligible for legal aid.

In *Wigan Council-v- Lovett*, Mr Lovett had been found to be in breach on 177 separate occasions and being committed to prison at least four times prior to the most recent finding of breach in July 2022, where he had been sentenced to 30 weeks custody to be served concurrently with a previous custodial sentence. Mr Lovett appealed on whether the judge was correct to fine him in breach and whether he was entitled to challenge the Injunction.

In considering the three appeals, the Court of Appeal highlighted the purposes of sentencing for breach of an Order made under Part I of the Anti-Social Behaviour Crime and Policing Act 2014, being as follows:

1. To ensure future compliance with the order
2. Punishment
3. Rehabilitation

The options that are available to the Court when considering penalties are as follows:

1. An immediate order for committal to prison
2. A suspended order for committal to prison
3. Adjourning the consideration of the penalty
4. A fine
5. No Order

In terms of custodial sentences for breach of a civil injunction the maximum custodial sentence available would be is 2 years imprisonment.

Suspension of sentences and adjournment consideration of sentencing were also raised as useful tools to amend and impose a variety of conditions which may assist the subject of the Injunction to comply. The Court of Appeal referred to and approved the scheme suggested by the CJC in its report as a valuable tool to use when considering breach and bearing in mind each case will be fact sensitive, for ease we have reproduced the table below.

In the table below culpability differentiates between

- A – serious breach or persistent serious breaches
- B – deliberate breach falling between A and C
- C – minor breach or breaches

Harm is categorised as follows:

- Category 1 – breach causes very serious harm or distress
- Category 2 – Cases falling between 1 and 3
- Category 3 – Breaches cause little or no harm

Harm	Culpability		
	A	B	C
Category 1	*Starting point:* 6 months *Category range:* 8 weeks to 18 months	*Starting point:* 3 months *Category range:* Adjourned consideration to 6 months	*Starting point:* 1 month *Category range:* Adjourned consideration to 3 months
Category 2	*Starting point:* 3 months *Category range:* Adjourned consideration to 6 months	*Starting point:* 1 month *Category range:* Adjourned consideration to 3 months	*Starting point:* Adjourned consideration *Category range:* Adjourned consideration to I month
Category 3	*Starting point:* 1 month *Category range:* Adjourned consideration to 3 months	*Starting point:* Adjourned consideration *Category range:* Adjourned consideration to 1 month	*Starting point:* Adjourned consideration *Category range:* No order/fine to two weeks

Essentially, where a breach is extremely harmful or distressing and is also high culpability, a very serious breach or persistent, then it would fall into the top left hand box and the judge should consider immediate imprisonment with a starting point of 6 months but within a range of 8 weeks to 18 months. Note that for the majority other cases, the guidance suggests that sentencing be adjourned for further consideration so that the Court could come back and has a chance to speak to the tenant again.

Applying the sentencing guidance, for the Optivo and

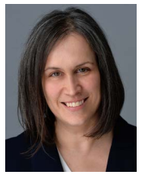
Hopkins case, the Court of Appeal allowed the appeal against the sentence and replaced it with no order. For Smith -v- Network Homes, whilst Mr Smith failed on all his grounds for appeal, the Court of Appeal consider the sentence was a little excessive and the sentence was reduced to 1 month custodial sentence for 12 months. In relation to Lovett v Wigan Borough Council– the appeal was dismissed.

What does this mean for Registered Providers?

For Registered Providers ("RPs") who already have Injunctions in place against tenants under Part I the Anti-Social Behaviour Crime and Policing Act 2014 and where those tenants are continuing to breach those Injunctions, we would advise that applications for committal are brought sooner rather than later. If there is a power of arrest attached then the timing of any committal proceedings may well be taken out of the RPs hands.

For RPs the prime concern will be to encourage those tenants to comply with the terms of the Injunction and if it appears they are not able or willing to do so then to protect other residents, consideration should be given to issuing possession proceedings on the relevant Grounds available to them. If breach is proven then it does allow RPs to pursue proceedings on the mandatory grounds for possession.

For further information, do contact Anna Bennett.



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The Leaseholder Support Scheme – An Update

In November 2022, we wrote an article setting out an overview of the Leaseholder Support Scheme introduced by the Welsh Government on 27 June 2022 (the 'Scheme'). That article is available to read here.

The Scheme was introduced by the Welsh Government to help those facing significant financial hardship as a direct result of fire safety issues affecting their property.

Subject to the satisfaction of the eligibility criteria, the Scheme affords leaseholders with support and financial advice from an Independent Financial Advisor ('IFA') on how best to manage their specific situation.

In certain circumstances, the Scheme may also buy-out the leaseholder from their property at 100% of the property's open market valuation.

Prior to 23 January 2023, to be eligible for the Scheme a leaseholder was required to:

- Be the owner of a property in an eligible building;
- Be an owner-occupier or a displaced resident (this is where there has been a need to move out because the property was unable to meet physical or occupancy needs, and due to an inability to sell due to fire safety concerns the leaseholder is now renting the property out);
- Pass the Financial Eligibility Assessment (where it is checked whether the leaseholder's disposable income means falls into the Social Metrics Commissions' definition of significant financial hardship because of fire safety issues).

Under the Scheme, an 'eligible building' is one that is over 11 metres in height and must have recognised or potential fire safety issues that are rendering the leaseholder unable to obtain an accurate valuation for mortgage purposes. In addition, the fire safety issues will have led to an increased service charge that has been passed onto the leaseholder by the building owner (e.g. for removal of unsafe cladding or for interim mitigation measures such as waking watch costs).

What has Changed?

On 23 January 2023, the Minister for Climate Change gave a statement (available here) in which two fundamental changes were made to the eligibility criteria for the Scheme. It is expected that these changes will open up the Scheme to a considerable number of Leaseholders to whom it was previously unavailable.

Firstly, the assessment and calculation used to establish financial hardship now considers the rapidly rising costs of energy. This change, and the recognition of the greatly increased energy price cap, will cause many more leaseholders to satisfy the financial eligibility assessment and grant them access to the Scheme.

Secondly, and perhaps even more significantly, the requirement for the leaseholder to be the owner-occupier or a displaced resident of the relevant property has now also been removed. The removal of this criteria now also opens up the Scheme to leaseholders who may have purchased properties as an investment, rather as their primary place of residence, including those who may have received the leasehold interest through inheritance.

We will produce further updates as this Scheme continues to evolve, but for more information please contact Lee Russell.

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Unlawful Profit Orders:
A Simple Tool with a Big Impact

The Prevention of Social Housing Fraud Act 2013 ("the Act") introduced an ability to obtain an Unlawful Profit Order ("UPO"), which is an order requiring a tenant to pay their landlord any profit they have made from subletting their home.

Seeking an UPO from the Court can be a very simple task and usually has a big impact, deterring tenants from subletting their homes. Below is a handy how to guide to assist with obtaining an UPO.

When can the Court make an UPO?

An UPO can be requested within civil proceedings and can be made in the case of both secure and assured tenancies.

In order to obtain an UPO in the case of a secure tenancy, all of the following conditions must be met:

a) in breach of an express or implied term of the tenancy, the tenant has sub-let or parted with possession of;
   - the whole of the property, or
   - part of the property without the landlord's written consent

b) the tenant has ceased to occupy the property as their only or principal home, and

c) the tenant has received money as a result of the conduct described in paragraph (a).

In the case of an assured tenancy, in order to obtain an UPO, all of the following conditions must be met:

a) the landlord is a private RP of social housing, a RSL or Community Landlord in Wales

b) the tenancy is not a shared ownership lease

c) in breach of an express or implied term of the tenancy, a tenant under the tenancy has sub-let or parted with possession of the whole or part of the property

d) the tenant has ceased to occupy the property as their only or principal home, and

e) the tenant has received money as a result of the conduct described in paragraph (c).

How to request an UPO

The request for an UPO can be made within civil proceedings either within possession proceedings or as a stand-alone money claim.

Where a landlord is seeking possession of a property, the request can simply be made within the pleadings when issuing the claim.

On some occasions, a landlord may wish to seek an UPO where for example, they have already obtained possession of a property. This can be done by issuing a stand-alone money claim, supported by witness evidence.

How to calculate the unlawful profit

The amount payable under an UPO must be such amount as the court considers appropriate, having regard to any evidence and representations made by or on behalf of the landlord or the tenant.

Th maximum amount payable under an UPO is calculated as follows:

Step 1

Determine the total amount the tenant received as a result of subletting or parting with possession of their home (or the best estimate of that amount).

Step 2

Deduct from the amount determined under step 1 the total amount, if any, paid by the tenant as rent to the landlord (including service charges) over the period during which they sublet or parted with possession of their home.

The calculation can be a best estimate and based on evidence received, for example statements from sub-tenants, other individuals or bank statements where money is received electronically.

How to enforce an UPO

Where you have successfully obtained an UPO, you can seek to recover the monies.

A strongly worded letter before action is advised in first instance, with the possibility of setting up a payment plan.

Where the Defendant does not engage, you could consider seeking to recover the monies via the court. Options available may be an attachment of earnings order where the Defendant is in employment, a third party debt order where monies are known to be in a bank account, or a property charging order where the Defendant owns a property.

Top Tips

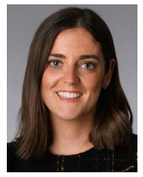
Having successfully assisted numerous landlords with obtaining UPOs, including those for £78,000, £102,000 and £145,000, my handy top tips are as follows:

1. Make use of partnership working-work in partnership with local authorities or fraud investigators to strengthen your evidence of an unlawful profit. Bank statements should be obtained along with other evidence which indicates that the tenant is subletting or has parted with possession of the property. Putting small pieces of evidence together can create a bigger picture to prove your case.

2. Don't sit back once a claim is issued, continue to gather evidence to prove your case. Make a Part 18 Request, requiring the Defendant to answer questions.

3. Publicise your wins! It's important that these results are publicised so that tenants will think twice before unlawfully subletting their homes to make a profit. With a shortage of housing in the UK, homes should be occupied by those in genuine need of housing.

For more information, please contact Victoria Smith.



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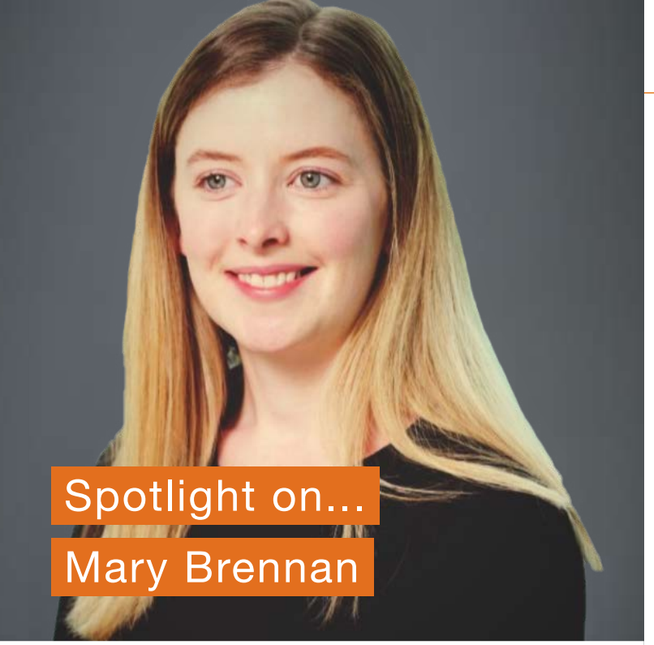

Spotlight on... Mary Brennan

I have recently joined the team at Devonshires, based in our fast-growing Leeds office. Having come from a specialist property litigation team, acting for mostly private landlords, it is an exciting opportunity to have exposure to a wide variety of landlord and tenant matters, acting for registered providers of social housing.

I started my career in London, working with social housing landlords on a wide range of contentious matters including possession claims for breach of tenancy, tenancy fraud, anti-social behaviour, and access injunctions. Since then, my experience has spanned into commercial property matters, acting for one of Britain's major telecommunications operators, representing their interests in various real estate matters relating to the telecommunications Code. I have since broadened my practice into both residential and commercial contentious property matters and I look forward to developing and applying this knowledge in my new role.

Re-locating to my hometown of Leeds has allowed me to enjoy a varied lifestyle, commuting into the busy and thriving city of Leeds to work alongside my colleagues during the week, whilst enjoying the national parks and wide-ranging countryside at the weekends. My role with Devonshires also means that a visit to our London office is never too far away, and it's great to meet and collaborate with the wider team.

Since joining just a couple of weeks ago, I've been working on leasehold advisory work in light of the Building Safety Act 2022, which is a prominent topic affecting some of our major clients. I have received a warm welcome from the team and look forward to getting involved in varied and interesting work over the coming months.

For more information, please contact Mary Brennan.

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0113 733 7051
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Spotlight on... Alex Loxton

My career in law started at the County Court in Birmingham so many years ago that my first day coincided with the Civil Procedure Rules first being implemented – May 1999! I guess that gives away my age a little …

I started off as an Admin Officer issuing new claims by the pile and worked my way around the different teams, spending quite a long time in the enforcements team as the Bailiffs Clerk dealing with all Warrants for Possession, setting of eviction dates, applications to suspend evictions and trying to keep 23 bailiffs under control!

Eventually however I became the personal Clerk to the High Court Judge in charge of the Mercantile Court in Birmingham. This gave me invaluable experience of both Court process and Court hearings as I clerked everything from short applications through to multi-national Trials with witnesses giving evidence from America after the 9/11 terrorist attacks via the first use of video link evidence in the Birmingham High Court. The technology at the time was rocky to say the least but those in attendance were fascinated - how the world has moved on since then when video hearings are now the norm, especially post-Covid. I'd like to think I was somewhat of a pioneer but I think I'm probably highly overinflating my involvement!

One of the highlights of my time at Birmingham Civil Justice Centre was being able to Clerk for Mr Justice Neuberger (as he then was) who later went on to become Master of the Rolls and ultimately President of the Supreme Court.

It was during my time at the County Court that I started my studies to become a Legal Executive and, after just over 4 years at the Court, I moved onto my first private practice role. I started out in the regulatory world but very quickly moved into social housing litigation and have never left!

The world of Social Housing never stands still and you never know what each day will bring – there's never a dull day and this is what keeps me coming back for more. My real passion is helping Social Housing providers find solutions to difficult situations that haven't been solved despite all the hard work that has gone on before the matter even reaches my desk. It is incredibly rewarding to see a community gain some relief from the anti-social behaviour it has suffered for example or to see a vulnerable tenant obtain the much-needed support from other agencies that was not being provided before legal proceedings were proposed or issued. Our work makes a real difference and is something I'm incredibly proud of. I'm really looking forward to continuing to make that difference here at Devonshires and am really excited to have joined such a wonderful team.

For more information, please contact Alex Loxton.

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020 3815 2655
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Ask the Expert - Succession

Kenya Greenidge

Q How has the Renting Homes (Wales) Act 2016 changed succession rules in Wales?

A The Renting Homes (Wales) Act 2016 ('the RHWA') introduced enhanced succession rights. This article focusses on succession rights under secure contracts, which are the occupation contracts primarily granted by community landlords.

Under the RHWA, there are enhanced rights of succession allowing for "priority" and "reserve" successors to succeed to an occupation contract on the death of a contract holder. Accordingly, it is possible for two successions to occur in relation to a contract where the deceased was not a joint contract holder. In addition, carers are now qualified to succeed where certain conditions are satisfied. In order to identify potential successors, landlords must first consider the provisions of the RHWA which set out the definitions of the following categories:

1. Priority Successors
2. Reserve Successors – Family Members
3. Reserve Successors – Carers

Priority Successors

Under section 75 of the RHWA, a person will be a priority successor where the following conditions are satisfied:

- They are a spouse or civil partner of the contract holder or lived as so; and
- They occupied the property at the time of the contract holder's death as their only or principal home.

They will not be a priority successor to a contract where the contract holder themselves was a priority successor to the contract.

Reserve Successors – Family Member

Under section 76 of the RHWA, a person will be a reserve successor where the following conditions are satisfied:

- They are not a priority successor;
- The meet the family member condition (they must be a member of the contract holder's family);
- They occupied the property at the time of contract holder's death as their only or principal home; and
- If they meet the family member condition because of section 250(1)(c) of the RHWA (family member other than spouse or civil partner etc, to include a parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or niece), they also meet the basic residence condition.

The basic residence condition requires that the person must have occupied the property or lived with the contract holder for a period of 12 months ending with the contract holder's death.

Reserve Successors – Carers

Under section 77 of the RHWA, a carer will be a reserve successor where the following conditions are satisfied:

- They are not a priority successor;
- They meet the carer condition. This is met if at any time in the period of 12 months ending with the contract holder's death, they were a carer in relation to the contract holder or a member of the contract holder's family who, at the time the care was provided, lived with the contract holder;
- They occupied the property as their only or principal home at the time of the contract holder's death; and
- They meet the carer residence condition which requires that they meet the basic residence condition (under section 76 above) and at the time of the contract holder's death, there was no other property which they were entitled to occupy as a home.

A person will not be a carer for the purposes of section 77 where they have provided care due to a contract of employment or other contract with any person.

Multiple Qualified Successors

Where there is more than one person qualified to succeed, the successor will be determined in accordance with section 78 of the RHWA.

Where more than one person is qualified to succeed, if one of the persons is a priority successor, they will succeed to the contract. If two or more of the persons are priority successors, the person or persons who succeed to the contract is/are:

1. The priority successor (or successors) selected by agreement between the priority successors, or
2. If they fail to agree (or fail to notify the landlord of any agreement) within a reasonable time, whichever of them the landlord selects.

In the event that all persons are reserve successors, the person or persons who succeed is/are:

1. The person (or persons) selected by agreement between the reserve successors, or
2. If they fail to agree (or fail to notify the landlord of any agreement) within a reasonable time, whichever of them the landlord selects.

Any persons not selected as a successor can appeal to the court against the landlord's decision within four weeks of being notified by the landlord that they have not been selected. The court must determine the appeal on the merits and not by way of review.

For more information, please contact Kenya Greenidge.

Kenya Greenidge
Paralegal
020 7880 4488
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Faces behind the Devonshires Team:

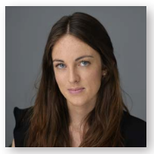
What we've been up to...

Rebecca Brady, Chartered Legal Executive:

"I have been managing a number of large-scale applications for dispensation from consultation requirements in relation to utility contracts, but managed to fit in a recent visit to our Birmingham office to meet our new joiners Emilie, Alex and Hana!"

Kerri Harrison, Solicitor:

"In addition to advising on a number of contested succession matters and Equality Act issues, I have recently enjoyed a recent trip to our new Birmingham offices to help welcome our new team members!"

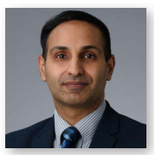


Hannah Keane, Solicitor:

"I have been very busy dealing with a number of group action matters and a mediation."

Duvaraka Balachandran, Paralegal:

"I am working on a number cases including disrepair, succession possessions, ASB possession claims and most recently fire door access injunctions."



Jatinder Bhamber, Chartered Legal Executive:

"I have been advising on a number of shared ownership and service charge disputes, some of which are in the FTT, as well as drafting anti-social behaviour possessions and injunctions. In addition, I have been disputing several disrepair claims."

Mary Brennan, Paralegal:

"I have been here for just over a month now and have been busy advising on complex lease issues relating to fire safety as well as dealing with a recently issued Tribunal claim relating to telecoms apparatus."

Hana Rashid, Paralegal:

"I started my Paralegal role in the team three weeks ago and have settled in with a trip to the London office and lots of disrepair and possession work!"

Alex Loxton, Chartered Legal Executive:

"I'm really excited to have joined Devonshires' Birmingham office with my colleagues Emilie and Hana recently! It's been great getting to know new colleagues and being welcomed so warmly to the team. I've enjoyed getting to know some new client officers and assisting with everything from disrepair through to defended possession proceedings requiring the Official Solicitor to be appointed as a Litigation Friend. So pleased to have joined such an amazing team."

James Hardwick, Paralegal:

"I have been primarily working on disrepair and possession proceedings. More recently I have been working on a breach of lease dispute brought by a freeholder against one of our leaseholder clients, where underletting has led to a delay in them being able to deliver up vacant possession to the freeholder because their tenant has over-stayed."

Lee Russell, Partner:

"I have had a busy few months getting clients prepared for their new fire safety obligations with front entrance fire doors. In-between the usual building safety issues, I managed to settle a tricky estoppel case and helped landlords with the leaseholder support scheme in Wales!"

Zoe McLean-Wells, Solicitor:

"I have given lease extension training, advised on The Building Safety (Leaseholder Protections) (Information etc) (England) Regulations 2022 and made a number of applications to the First Tier Tribunal."

Billy Moxley, Trainee Legal Executive:

"I am working on several access injunction matters where landlords have been unable to gain access to the property to complete/carry out required works. I have also been dealing with disrepair claims and counterclaims."

Lisa Faulkner, Professional Support Lawyer:

"I have been here for just over six months now and am busy organising both internal and external training whilst working on various knowledge projects and keeping the team up to date with the ever evolving legislation!"

Charlotte Knight, Paralegal:

“I have been keeping busy dealing with lots of access injunctions, ASB injunctions and ongoing disrepair matters.”

Narin Masera, Paralegal:

“I am currently working on a number of inquests as well as an Environmental Protection Act trial. I’ve also recently been spending a lot of my time on Equality Act 2010 and disrepair counterclaims to possession proceedings as well as advising on a number of possession cases where defendants lack capacity. ”

Georgia Goddard, Paralegal:

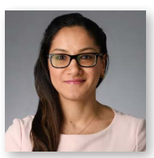
“I have been dealing with various matters including disrepair, rent possession and succession.”

Donna McCarthy, Partner:

“I have been busy working with our Leeds team on new client initiatives, preparing for the arrival of the new Birmingham team and planning the Devonshires conference programme for the coming year – watch this space!”

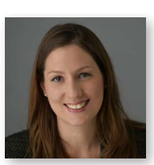
Amirah Adekunle-Fowora, Paralegal:

“I am currently on secondment two days a week and when back at Devonshires, I have been busy working on a number of possession, disrepair and ASB injunction matters.”



Lina Amir, Solicitor:

“I have been busy working on leasehold and general housing management matters, which have included various county court claims and reviewing various policy documents for clients.”



Samantha Grix, Partner:

“I’ve had a been a very busy few months advising clients on the Direction to cap rent increases for social and affordable rent tenants to 7% and voluntary cap for shared owners. ”

Victoria Smith, Solicitor:

“I have been busy providing advice in relation to the Renting Homes (Wales) Act 2016 and tenant complaints. I also recently obtained possession of two properties due to subletting, we were awarded Unlawful Profit Orders of £9,000 and £102,000 plus legal costs.”

Hetal Ruparelia, Partner:

“I have had a busy start to the year advising clients on recovering possession of shared ownership properties due to subletting, managing complicated and time-consuming Subject Access Requests and drafting a new offering for her clients for a health check on their data protection compliance.”

Charlotte Greatorex, Solicitor:

“I am new to the team after completing my training contract with Devonshires in October and have been working on cases including possession applications and disrepair matters. I have also assisted with rent advice and will be assisting with inquest work going forward. I am excited to expand my knowledge further in the housing sector.”

Hafsa Hafiz, Solicitor:

“I have had a busy few months dealing with FTT hearings relating to reasonableness of service charge as well as disrepair and EPA cases.”

Kenya Greenidge, Paralegal:

“I have been busy dealing with a number of disrepair and possession matters, as well as working on two access injunctions which have resulted in orders being granted. I am also an active member of our Wales team and I am enjoying learning about the new legislation.”

Emilie Pownall, Solicitor:

“I am in my fourth week at Devonshires and have taken on a full caseload of disrepair, ASB, accelerated possession and succession matters. I recently attended a whole team social in London where I met most of the team and spent a day working from the London office. I am also busy integrating myself into the Wales team and preparing for a webinar on the Renting Homes Wales Act (2016) in May.

HMPL Building Blocks

Webinar Programme - 2023

Devonshires Housing Management and Property Litigation Building Blocks Webinar programme is back due to popular demand! These webinars are aimed at those at the beginning of their careers in tenancy and leasehold management and are suitable for anyone wanting to learn the basics of housing law and how it relates to their day to day job.

An Introduction to Assignment, Mutual Exchange and Succession

16 May 2023

11:00 - 12:00 with Q&A

How to Book

If you are signed up to our mailing list, invitations outlining the programme and speaker details will be issued for each webinar with a registration link. Once your place has been confirmed, you will receive the link for the webinar which you will use on the day to access it.

If you are not signed up to our mailing list, and you want to hear more about our Building Blocks programme, or any of our other future HMPL webinars, articles and updates, make sure to join! **Click here** to sign up.

HMPL Building Blocks

Webinar Programme - 2023/2024

Issuing Possession Claims Based on Rent Arrears

11 July 2023

14:00 - 15:00

Tackling Non-occupation and Sub-letting

9 August 2023

11:00 - 12:00

Leasehold Management – Dealing with Breach of Lease

12 September 2023

11:00 - 12:00

Dealing with Disrepair Claims – Law and Procedure

4 October 2023

14:00 - 15:00

Service Charges & Ground Rent- Dealing with Arrears for Leasehold and Shared Ownership Properties

24 October 2023

11:00 - 12:00

Section 20 Consultation Requirements for Leaseholders

15 November 2023

11:00 - 12:00

Law and Procedure Following Death of a Tenant

7 December 2023

11:00 - 12:00

Shared ownership – Dealing with Breach and Subletting

31 January 2024

14:00 - 15:00

Legal Tools to Combat Anti-Social Behaviour

29 February 2024

11:00 - 12:00

Tenancy Management – Assignment, Mutual Exchange and Succession

21 March 2024

14:00 - 15:00

A Housing Officer's Guide to Court Proceedings

24 April 2024

11:00 - 12:00

Leasehold Management – Dealing with Managing Agents

21 May 2024

11:00 – 12:00

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