



Housing Management & Property Litigation Brief - Wales Issue 2







Welcome

Welcome to the second edition of our Housing Management Brief- Wales. With the Renting Homes (Wales) Act 2016 due to be implemented next month, we are highlighting some important changes being introduced by the Act. We are also considering the Leaseholder Support Scheme and concentrating on some important updates in Data Protection and Public Sector Equality Duty (PSED) arenas. We bring you a case update on Eastlight Housing (disrepair). The spotlight in this edition is on Sara Mondon who has recently joined us as a solicitor in our thriving Leeds office and, lastly, do enjoy reading about what some of the members of our ever growing team have been busy doing!

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Faces behind the Devonshires Team: What have we been up to?

2022/2023 Training Programme



Since the Grenfell Tower tragedy, landlords and building owners across the UK have been assessing the construction of their building stock and particularly the external wall systems and fire safety of the same. As part of those assessments, it is unfortunately not uncommon for landlords and building owners to find defects with the construction and design of their buildings in the context of fire safety. As such, remedial works are often needed and given the nature and context of the same, it can often be a complex and lengthy process not least because of the potential for legal claims against third parties that have to be considered. These issues have resulted in some leaseholders who occupy buildings being 'trapped' in them as they are unable to re-mortgage or sell them due to the concerns of lenders and/or prospective purchasers over these properties pending remedial works being carried out and completed.

The Welsh Government announced a 'Leaseholder Support Scheme' ('the Scheme') on 27 June 2022 to help those facing significant financial hardship because of fire safety issues affecting their properties.

The Scheme offers leaseholders advice and in some cases a solution to the financial concerns of such leaseholders, including in some circumstances the purchase of the relevant leasehold property. The Scheme will run for a two-year period, initially, starting from June 2022.

Leaseholders need to complete the 'eligibility checker' which provides an initial indication as to whether or not they may be eligible to apply to the Scheme. To be eligible, a leaseholder must;

• 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).

The building must be 11 metres or higher and have recognised or potential fire safety issues which make the property unable to receive an accurate valuation for mortgage purposes. These fire safety issues will have led to increased service charges which have been passed on to the leaseholder.

Eligible leaseholders will receive advice from an Independent Financial Adviser ('IFA'), with the costs covered by the Welsh Government and then be able to sell their property at a 'fair market value'. If the IFA advises a buy-out is the best option, there is also an option to rent it back.

For more information, please contact Lee Russell.



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The Renting Homes (Wales) Act 2016 ('the Act') is due to be implemented next month. It is set to shake up housing law in Wales as we know it, introducing some key changes. We set out below 10 important changes being introduced by the Act to help landlords prepare for implementation.

- Most tenancy agreements and licences will be replaced with Occupation Contracts. There will be two new types of occupation contract, a standard contract which will mainly be used by private landlords and a secure contract, which will mainly be used by community landlords such as a local authority or registered social landlord.
- 2. Written statements of contract will need to be issued to contract holders. For a new contract granted from 1 December 2022, a written statement must be issued within 14 days of occupation.
- Existing tenancies and licences will convert to an occupation contract on the date of implementation.
 Landlords will have 6 months to issue a written statement of contract.
- 4. Written statements will have four key sections; key terms, fundamental terms, supplementary terms and additional terms.
- The Welsh Government has published model written statements for some occupation contracts. Where used, these must be reviewed carefully and additional terms inserted.
- 6. The Act introduces enhanced succession rights and a requirement for properties to be fit for human habitation.

- 7. There will be greater flexibility for contract holders; a contract holder can be added or removed without the need to end the contract.
- 8. Landlords will be able to repossess abandoned properties without a court order, though a procedure must be followed.
- 9. Ahead of implementation, policies and procedures will need to be reviewed and amended. Community landlords will also be under an obligation to make and maintain arrangements for consulting with and informing contract holders of relevant housing management matters. This may include a new programme of maintenance or a change in practice or policy in relation to management or maintenance of a property.
- 10. Where a secure funding arrangement is in place, lenders consent to the new form of occupation contract may be required.

For more information, please contact Victoria Smith.



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Re-cap:

What is the Public Sector Equality Duty ('PSED')?



It is the duty under section 149 of the Equality Act 2010 ('EA 2010') and it applies to public authorities, or bodies who are not public authorities but who exercise a public function.

Section 149(1) states:

- (1) A public authority must, in the exercise of its functions, have due regard to the need to:
- a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act:
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

Notable Cases

- Powell v Dacorum Borough Council [2019] EWCA Civ
- 2. Forward v Aldwyck Housing Group [2019] EWCA Civ 1334
- 3. London and Quadrant HT v Patrick [2019] EWHC 1263 (QB)
- 4. Luton Community Housing v Durdana [2020] EWCA Civ 445 (2)

- 5. Taylor v Slough Borough Council (2020) EWHC 3520 (Ch)
- Rosebury Housing Association Ltd. V Williams & Anor (2021) EW Misc 22 (CC)

Updates:

Taylor v Slough Borough Council (2020) EWHC 3520 (Ch)

Background

Taylor ('T') was a tenant of the Council from 2010. In 2011 she was diagnosed with bi-polar disorder and the Council was aware of this from 2012.

A closure order was made at the property in January 2018. As a result, the Council served T with a NOSP. In March 2018 an officer of the Council carried out an Equality Act assessment in respect of T and assessed her on the basis that she had no disability.

Possession proceedings were commenced and a subsequent set of proceedings, on the basis of rent arrears, were commenced. Both sets of proceedings were heard together and in June 2018, T was diagnosed with Emotionally Unstable Personality Disorder.

The Council admitted that their officer had not addressed T's disability in her Equality Act assessment and/or the decision to issue proceedings. The Council argued that due regard was subsequently given to the PSED. Once aware of the diagnosis, the Council did the following:

 made enquiries with agencies providing mental health support relating to questions that would be asked if carrying out an Equality Act assessment;

- worked closely with Police;
- took steps to investigate what could be done to facilitate the recommendations in the expert report;
- visited T to discuss her housing needs.

The Decision

The Court concluded that the Council had taken T's vulnerabilities seriously and exercised with rigour in substance and with an open mind the PSED. The Council had complied with the PSED and the Defence failed.

The Appeal

T appealed arguing a breach of the PSED could not be 'cured' by subsequent compliance.

The Court reminded itself of L&Q v Patrick. There was a breach of the PSED but the question was whether the Council's subsequent conduct could cure the breach and whether it was sufficient to do so.

The Court found that the lack of a record by the Council was not in itself a further breach and the findings of fact by the Trial Judge as to the Council's actions were sufficient for her to have reached the conclusion as to subsequent compliance with the PSED. T's appeal was dismissed.

Rosebury Housing Association Ltd. v Williams & Anor (2021) EW Misc 22 (CC)

Background

The Defendant was a shared ownership leaseholder. The Defendant suffered from Obsessive Compulsive Disorder. One manifestation of her disability was to film her surroundings on an almost constant basis. As a result of the Defendant filming her surroundings, allegations of anti-social behaviour had been made against the Defendant and her mother over a number of years which escalated from 2017.

The Claimant made an application under Part 1 of the Anti-social Behaviour Crime and Policing Act 2014 for an injunction order. The terms of which sought to restrain the Defendant from causing nuisance or harassment to her neighbours. The allegations included verbal abuse, filming/video recording her neighbours with the intention of distressing them and playing music at an anti-social volume.

The Defendant brought a disability discrimination counterclaim under the EA 2010 including breach of the PSFD.

The only allegation the court accepted was the issue of noise nuisance owing to the Defendant's loud music. In respect of the Counterclaim, the Defendant's OCD was accepted as a disability pursuant to section 6 of the EA 2010

The Defendant provided expert evidence showing that her OCD manifested itself in her compulsive need to film her surroundings and that she was neither in control of those behaviours, nor able to stop them.

The Decision

The Court found that under section 15 of the EA 2010 an injunction would be a detriment to the Defendant and the argument that the injunction was not sought mainly or exclusively as a result of her OCD related behaviours, was rejected.

The principal grievance with the Defendant's behaviour appeared to be her video recording, and therefore the court decided that the injunction claim arose as a consequence of her disability.

The Court did not find that the Claimant's application for an injunction was proportionate. The Court relied upon a failure to follow ASB policy, the delay in citing the allegations, encouraging action which would trigger the Defendant's condition, failing to investigate cross allegations, failing to consider lesser measures and failure to comply with the PSED.

The Defendant's counterclaim for discrimination was successful and the Court awarded £27,400 in damages. Some key paragraphs of HHJ Luba's judgment are set out below:

"If ever there was a case in which the social housing provider needed to acknowledge, become familiar with and then discharge the public sector equality duty with vigour it was this one. From a very early stage it should have been obvious to Rosebery that Cara's condition, particularly if untreated and worsening, would need to be accommodated with reason and understanding by

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her neighbours and that it would itself need specialist expertise to address a situation with which its own staff had little or no experience. It seems that there was the convening of a residents' meeting to try and get a suitable 'message' across. But that should have been only the start of the provision of information, support and the encouragement of neighbour tolerance and restraint. Much more could and should have been done. To an extent, it was a question of getting neighbours to accept the inevitability of this disability-related intrusion into their lives and their privacy. It was a delicate and difficult task for which Rosebery was not equipped and for which it failed to equip itself..."

"What has been even more extraordinary is the pursuit by Rosebery of the claim right down to trial. That is in the face of compelling medical advice (...) that an injunction was more likely to give rise to further anxiety, and inflame the situation on the ground, rather than to bring any relief. Instead of diverting attention to the real, effective, remedy of ensuring that Cara received the help, support and treatment she needed, it pressed on with the claim in a manner consistent with its solicitors' early indication that it did not want to engage in the resolution of the dispute 'by correspondence' but rather by litigation."

Lessons to learn

- 1. Inform residents of allegations of anti-social behaviour in a timely manner and allow them an opportunity to provide their version of events.
- 2. Investigate counter allegations with the same rigour.
- 3. It is good practice to have a PSED policy.
- 4. Ensure that employees are trained on the EA 2010 and their PSED obligations.
- 5. In complex cases, consider seeking expert or specialist advice.
- 6. Consider if there are alternative options to manage a tenant's behaviour before pursuing legal action.

For more information, please contact Hannah Keane.



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Devonshires acted for Eastlight Community Homes in successfully defending a disrepair case in which the judge was highly critical of the actions of the tenant's 'No Win No Fee' solicitors.

The case concerned three separate incidents of cracks appearing in the walls at the tenant's home in Essex over a number of years and how Eastlight had responded to the complaints. At the time Eastlight received the letter of claim, they had already made a subsidence claim to their insurers who had appointed experts to complete investigations and monitoring. Lawyers representing the tenant pushed ahead with the claim and argued that despite works having been undertaken by the landlord on each occasion that cracks were reported, the works were not sufficient to remedy the issue and the disrepair had lasted for seven years.

The claim was defended on the basis that whenever Eastlight had been put on notice of an issue, their repairs teams had responded in a timely manner, had sought expert advice and had remedied the cracks on each occasion. It was submitted that the claim had been unreasonably and prematurely brought in circumstances where Eastlight's insurers were already instructed to deal with the cracks and the underlying cause.

After a two-day hearing in Chelmsford, the judge not only ruled in Eastlight's favour dismissing the claim, but also awarded the landlord their legal costs on an indemnity basis.

In dismissing the claim in its entirety, the judge justified the decision to impose indemnity costs on the basis that the claim should never have been brought when it was given that insurers were instructed and investigations underway, the results of which should have been awaited before determining whether or not there was a claim.

The judge also criticised the conduct of the tenant's solicitors holding that they had not complied with the Pre-Action Protocol for Housing Conditions Claims (England) and that the claim brought was unnecessarily and disproportionately lengthy and over-complicated. The judge also recognised the unprecedented and significant impact of the Coronavirus pandemic on housing associations like Eastlight carrying out repairs during this timeand was very clear that he would not attribute any blame on the landlord where non-urgent works had been delayed as a result of this.

Rulings like this are of course very rare as the majority of disrepair cases are settled at an early stage on a commercial basis either because there may be some element of liability, or where financially it is more cost effective to settle the claim than take the case to a final hearing. This case was one where Eastlight had clearly acted reasonably and promptly when complaints had been made about cracking and it was made clear to the tenant's solicitors from the outset that investigations and monitoring were underway, with works to be completed as soon as was reasonably practicable.

Disrepair claims are a huge issue for the social housing sector currently with vast numbers of claims being brought, predominantly by solicitors acting on 'No win, no fee' agreements, many of which are spurious and lacking in any merit. What this case illustrates is that where there is a credible defence, cases can and should be defended, with a message sent to solicitors firms that social landlords should not be seen as an easy target and a lucrative source of funds.

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Subject access requests (SARs) can often be a costly, complex and burdensome process for data controllers. In particular, there is an increasing pattern of SARs being used as an improper alternative to pre-action disclosure.

A consultation was launched by the Government as part of its drive to take advantage of the UK leaving the EU and being able to set its own legislative framework. This consultation considered whether the current threshold for refusing a SAR (namely whether it is manifestly unfounded) should be changed.

The Government published its response on 23 June 2022 and this confirmed that the Government does plan to amend the threshold for refusing to respond to or charge a reasonable fee for a SAR from "manifestly unfounded or excessive" to vexatious or excessive".

This amendment is to be made by passing the Data Reform Bill. The Bill was published on 18 July 2022 and was expected to make its way through parliament in September but has been delayed. Paragraph 7 of the Bill adds a new Article 12A to the UK GDPR which permits data controllers to charge a fee or refuse to respond to SAR if it is vexatious or excessive.

Whether a request is vexatious or excessive must be determined by having regard to the circumstances of the request, including (so far as relevant);

- (a) the nature of the request;
- (b) the relationship between the data subject and the

controller;

- (c) the resources available to the controller;
- (d) the extent to which the request repeats a previous request made by the data subject to the controller;
- (e) how long ago any previous request was made; and
- (f) whether the request overlaps with other requests made by the data subject to the controller.

Helpfully, the Bill also provides tangible examples of "vexatious" requests. This includes those intended to cause distress, which are not made in good faith, or which constitute an "abuse of process".

This has the potential of providing much awaited relief to data controllers. Case law to date has confirmed that the intention of a SAR cannot be taken into account.

In particular, the Court of Appeal in *Dawson-Damer v. Taylor Wessing LLP, [2017] EWCA Civ 74* considered whether a court can use its discretion under section 7(9) of the Data Protection Act 1998 ("DPA") not to compel compliance with a SAR where the data subject's real motive is to use the personal data to assist in litigation. This case confirmed that as the DPA does not limit the purposes for which a SAR may be made, it would be "odd" to conclude that the sole purpose of a SAR must be to verify the accuracy of the data subject's personal data. Such a "no other purpose" rule would have undesirable consequences, such as non-compliance by data controllers on the basis that the data subject had an ulterior motive for making the SAR.

In contrast, the examples set out in the Bill suggest the

wider context in which the SAR is made, such as ongoing litigation proceedings, could potentially be taken into account. We will await further guidance which we suspect will be issued by the ICO.

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Well, the three months since joining Devonshires have certainly flown by! It's been an incredibly exciting and challenging time for me. I have been a Local Authority Solicitor for many years with a number of different authorities and certainly didn't expect that I will be moving into private practice at this stage in my career, but I am certainly very pleased that I made the move.

I have really enjoyed the challenge of increasing my knowledge of the many different types of tenancies and appreciating the private practice nuances of client relationships.

It's also been an adjustment having so many different clients and not having a good working relationship with one local court. At the time, I certainly didn't appreciate the benefits of knowing the voices and names of most of the staff at the local court. I thought West Yorkshire courts were hard to get through to but that is nothing in comparison to the London courts!

I started my career as a Legal Executive and then decided to cross-qualify as a Solicitor. However, starting the LPC when my son was eight months old was not part of my original plan. That year was a bit of a blur but despite everything I enjoyed my time back being a student again. I do enjoy learning and 10 years later I decided to do a Masters at Leeds University, thankfully by this time both my children were at school so there was slightly less juggling required.

I relocated from Dorset to Yorkshire in 2006 due to my

husband working for Jet2 who moved their head office to Leeds and I love life here. I do still miss the beach, not so much in the summer when it's very busy but I love a winter beach walk. I'm a campervan fan so our weekend trips often involve a journey to the coast, although I don't think I could have found anywhere so far from the coast when moving!

I had been largely home-based since Covid and whilst I appreciated not having a two-hour daily commute, I didn't miss the M62 and its inevitable traffic jams. However, I did miss my colleagues and interaction with them. Long-term working from home was just too sedentary and I'm really enjoying being in the office two days a week and have been cycling in over the lovely summer. I'm not so sure how much I will enjoy cycling through a Yorkshire winter though, but time will tell!

It has been so much better seeing and getting to know colleagues in person and especially as a new starter, I really appreciated having someone on hand to answer my inevitable IT questions. A big thank you to both the London and Leeds teams for all their help so far and for making me so welcome.

For more information, please contact Sara Mondon.



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Rebecca Brady, Chartered Legal Executive:

"I have been working on a large application to the Tribunal for dispensation from consultation requirements in relation to utility contracts. I have also been preparing for a number of trials coming up in the Autumn."



Ikram El-Ahmadi, Paralegal:

"I have been working on several new areas including advising on sprinkler systems in line with the new Building Safety Act 2022 and consideration of how this will affect our clients."



Hetal Ruparelia, Partner:

"I have recently returned from my holiday in Malta and am now knee deep in utility bill disputes, delivering data protection training and recovering possession of properties which have been obtained fraudulently."



Billy Moxley, Trainee Legal Executive:

"I have been advising on a number of electrical safety matters and seeking to resolve several disrepair matters."



Samantha Grix, Partner:

"I have had a busy few weeks dealing with rent regulation queries from clients in light of the consultation on rent increases next year."



Donna McCarthy, Partner:

"Over the summer I have been advising several housing providers in respect of housing benefit appeals, particularly in respect of whether the accommodation arrangements meet the definition of exempt accommodation."



Lee Russell, Partner:

"I have had a busy few months advising on a few developments gone wrong and also advising on service charges and landlord's certificates in light of the new Building Safety Act. I have also been busy training clients on the new Renting Homes (Wales) provisions and helping with some last-minute preparations before implementation in December!"



Courtney William-Jones, Solicitor:

"I am new to the team after completing my training contract with Devonshires in April and have been busy working on a number of cases including anti-social behaviour injunctions, access injunctions and disrepair matters. I am ecstatic about the opportunity to gain more knowledge in the housing sector and to broaden my practice."



Zoe McLean-Wells, Solicitor:

"I have been busy assisting with the Trainee recruitment process."



Arika Rai, Paralegal:

"Having been with Devonshire's for nearly six months, my caseload has varied from disrepair, ASB injunctions, possession claims and leasehold matters."



Duvaraka Balachandran, Paralegal:

"Having now been with Devonshires for a year now, my caseload has varied significantly from disrepair, succession possessions, ex-parte and on notice injunctions to rent and ASB possession claims."



Charlotte Knight, Paralegal:

"I have been keeping busy dealing with multiple ASB injunctions, as well as drafting possession claims and dealing with ongoing disrepair matters."



Victoria Smith, Solicitor:

"I have been busy drafting written statements of contract ahead of implementation of the Renting Homes (Wales) Act 2016 on 1 December 2022. I have also been assisting clients with complaints involving the Housing Ombudsman."

Housing Management Brief

Housing Management Brief



Anna Bennett, Partner:

"I am now back doing a five-day week after a few years of part time working. I have also welcomed a new kitten into the family and consequently have had to invest in some new slippers to guard my toes from kitten bites whenever I am trying to relax."



Amirah Adekunle-Fowora, Paralegal:

"I have had a busy few weeks preparing for upcoming hearings for service charge disputes, possession and contempt proceedings."



Narin Masera, Paralegal:

"I am currently working on a number of possession claims with counterclaims and Equality Act defences and I have recently advised a client on Home Rights."



Lisa Faulkner, Professional Support Lawyer:

"I am busy getting my feet under the table having started in August as the teams' Professional Support Lawyer, responsible for looking after our training and knowledge needs."



Georgia Goddard, Paralegal:

"I have recently been dealing with many rent possession cases and have managed to obtain both suspended and outright possession orders at various courts."



Diana Migo, Paralegal:

"I am working on a number files involving noise nuisance and managed to obtain a committal order in respect of one of the files. No audio evidence was provided or required, just thorough logs of each incident from the witnesses giving evidence."



Neil Lawlor, Partner:

"I have been acting for a landlord in a leasehold enfranchisement claim and have been preparing for a two-day hearing in the First Tier Tribunal while continuing to engage in negotiations which resulted in settlement of the terms of acquisition shortly before the hearing."



Hafsa Hafiz, Solicitor:

"I am a new addition to the team and have been dealing with FTT matters in relation to service charge disputes as well as general leasehold matters. I also deal with general housing litigation including disrepair and possession matters."



Jatinder Bhamber, Chartered Legal Executive:

"I have been busy working on a number of leasehold disputes in the First Tier Tribunal as well as delivering training sessions to clients on various topics including anti-social behaviour, possessions, disrepair and recovery of arrears for shared owners and leaseholders."



Lina Amir, Solicitor:

"I have been busy delivering training on anti-social behaviour and possession proceedings and working on various injunction applications and disrepair claims."

HMPL Building Blocks Webinar Programme - 2022/2023

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.

Leasehold

Webinar Programme - 2022/2023

Devonshires Leasehold & Property Litigation Team are pleased to present the new Leasehold & Property Litigation Webinar Programme for 2022/2023.

An Introduction to Service Charges and s20 Consultation

6 December 2022

14:00 - 15:00 with Q&A

An Introduction to Procedure Following Death of Tenant

17 January 2023

11:00 - 12:00 with Q&A

An Introduction to Court Proceedings

9 February 2023

14:00 - 15:00 with Q&A

An Introduction to Tackling Anti-Social Behaviour

21 March 2023

11:00 - 12:00 with Q&A

An Introduction to Shared Ownership

18 April 2023

11:00 - 12:00 with Q&A

An Introduction to Assignment, Mutual Exchange and Succession

16 May 2023

11:00 - 12:00 with Q&A

Focus on: Ground Rent following Stampfer v Avon Ground Rents [2022] UKUT 68 (LC) and enactment of Leasehold Reform (Ground Rent) Act 2022

1 December 2022

14:00 - 15:00 with Q&A

Extending contracts for services and s.20 Consultation

11 January 2023

11:00 - 12:00 with Q&A

Managing the Managing Agents

1 February 2023

11:00 - 12:00 with Q&A

Service Charges and s.20 who should be consulted

22 February 2023

11:00 - 12:00 with Q&A

Service charges when should demands be made?

15 March 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.

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Housing Management Helpline:

Why not give us a call?







