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Publications —— Winter 2017

Housing Litigation Update

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Foreword

Welcome to the winter 2016/2017 edition of Housing Litigation update.

2016 ended in a flurry of judicial activity and there seems to be no reason to believe 2017 will be any different.

In this edition, we start by considering what may be considered to amount to oppression in rent possession proceedings. Our guest contributor, Michael Morgan, from the Tenancy Deposit Scheme then considers the role tenancy deposit schemes have when a letting agent becomes insolvent.

This article is followed by a look at the initiatives proposed to reduce homelessness and is followed by an interesting article regarding unlawful discrimination and the bedroom tax. Civil injunctions continue to be a popular remedy to address anti-social behaviour and in our next article we consider whether evidence which pre-dates 23 September 2014 can be relied upon when seeking a civil injunction order.

To assist in keeping you up to date we then consider some issues which you may have missed, or with the passage of time may have forgotten. In particular, note the reference to very recent changes to two court forms following the decision in *Cardiff County Council v Lee* [2016].

The area of succession is one where we receive lots of queries and the case of *Holley v London Borough of Hillingdon* [2016] provides some very useful guidance.

With the demands on the finances of tenants increasing, there is an interesting article regarding deductions from Universal Credit towards rent arrears.

We finish with an article which considers Equality Act defences in mandatory possession claims.

We hope that you find this edition of interest and value. We always welcome any feedback and suggestions for future articles so please feel free to email us at hlu@trowers.com with any comments.

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Oppression and the Pre-Action Protocol for Possession Claims by Social Landlords

The issue of whether a possession order can be set aside on the basis of 'oppression' after an eviction has taken place where each of two joint defendants were not written to individually by the Claimant landlord, was considered in the County Court case of *Home Group Limited v Jacqueline Emery and another* [2016].

Mrs Emery and her husband (Defendants) were joint assured tenants of the Claimant, Home Group Limited (Home Group).

Home Group commenced possession proceedings under Grounds 11 and 12 of Schedule 2 of the Housing Act 1988 for rent arrears. Mrs Emery's husband had attended the hearings and in May 2016, a possession Order was made.

On 2 August 2016, bailiffs attended the Defendants' property and Mrs Emery immediately made an application to the County Court to set aside the possession order.

Mrs Emery argued she had no knowledge of the possession proceedings and the first she knew about this was when the bailiffs attended her property. Mrs Emery claimed that at no point had Home Group contacted her individually.

Home Group argued that the Defendants were joint tenants and the necessary court papers were sent to the property, in the name of the parties, and the current eviction should stand.

The Court's power to stay, suspend and set aside possession orders is extinguished when a warrant has been executed, unless there has been:

1. oppression;
2. fraud; or
3. the possession order itself is set aside.

Mrs Emery argued that oppression arose as Home Group had failed to comply with the Pre-action Protocol for Possession Claims by Social Landlords, where paragraph 2.1 states:

"The landlord should contact the tenant as soon as reasonably possible if the tenant falls into arrears… Where contact is by letter, the landlord should write separately to each named tenant."

CPR 39.3 further states that a party who fails to attend a hearing may apply to set aside an order if they acted promptly. Mrs Emery argued that she acted promptly as she made an application to set aside the possession order as soon as she was made aware of it, which in this case, was at the time of the eviction.

The Judge accepted that Mrs Emery was not aware of the proceedings until the eviction, and she had acted promptly. The Judge also held that Home Group failed to write to each tenant separately, as required by the pre-action protocol.

Consequently, the warrant and possession order were set aside, and a suspended possession order was made on terms.

This is a County Court decision, and therefore not binding. However, the case dealt with an important example of what amounted to oppression, and highlighted the importance of writing to each joint tenant separately before issuing proceedings. In addition when issuing proceedings enough copies should be sent to the court so that each defendant can be served.

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What role do tenancy deposit schemes have when a letting agent becomes insolvent?

The Tenancy Deposit Scheme (TDS) is run by The Dispute Service Ltd. It is an insurance backed tenancy deposit protection scheme authorised by the Government. TDS has two main roles:

- **to protect deposits:** tenancy deposit protection applies to all deposits for assured shorthold tenancies that started in England or Wales on or after 6th April 2007. By law, a landlord or agent who receives a deposit for such a tenancy must protect the deposit. To protect a deposit with TDS, the landlord or agent needs to be a member of TDS, register the deposit on the TDS tenancy database, and pay a membership subscription or deposit protection charge.
- **to help resolve disputes about deposits:** where the parties are unable to reach agreement about the return of the deposit after the tenancy ends, they can refer the dispute to TDS as an alternative to taking the dispute to court. TDS will ask the parties to submit evidence supporting their respective claims, and makes an impartial adjudication decision about how much of the disputed deposit amount should be repaid to the agent/landlord and tenant(s).

In the insurance backed scheme, the landlord or agent holds the deposit during the tenancy. When TDS is told about a deposit dispute after the tenancy ends, the landlord or agent must send TDS the amount in dispute. When TDS makes its adjudication decision, the deposit will be paid out accordingly.

Not all landlords and agents send the disputed deposit to TDS when asked to do so. If the deposit holder does not send the disputed deposit, TDS will take legal action to recover it. This will not delay TDS in resolving the dispute. The insurance guarantees that, ultimately, tenants will always get back the money to which they are entitled.

If the deposit holder cannot pay the disputed amount e.g. because it was held by an agent who is insolvent, TDS will arrange the adjudication and pay the tenant(s) the amount awarded to them. TDS will, if necessary, make a claim to its insurers. Many landlords are unaware of this and can help their tenants make a claim from TDS if the agent they have been using is insolvent and the deposit is gone.

It is important to note that the law requires TDS to guarantee only that the tenant receives the amount they are entitled to. There is no legal requirement to guarantee the landlord's interest in the deposit. A landlord who is faced with an insolvent agent will themselves need to check whether their agent had client money protection in place.

For further information, please visit www.tenancydepositscheme.com or call 0300 037 1000.

About the author

Michael is the Tenancy Deposit Scheme's Director of Dispute Resolution. Mike joined TDS in 2006 as a Deputy Independent Case Examiner. He is now responsible for the overall management of its dispute resolution services and the quality of its adjudication functions. Mike has also led a number of key 'behind the scenes' innovations at TDS.

Michael Morgan

The Homelessness Reduction Bill

Tabled by Conservative backbencher Bob Blackman in June 2016 and based on a report commissioned by the charity Crisis, this private members' Bill is intended to amend Part 7 of the Housing Act 1996 to place additional duties on councils to prevent homelessness by further assisting those at risk of becoming homeless.

There were two fundamental proposals. Firstly, to extend the definition of 'threatened with homelessness' from 28 to 56 days. The intention is that local councils will intervene earlier. And secondly, local councils will have to accept a valid Notice to Quit, or equivalent, as evidence that a tenant is threatened with homelessness. This is a hugely significant change from the current position as set out in the case of *Sacupima v Newham LBC [2001] 1 W.L.R. 563* whereby a council does not have to accept a person as homeless until they are physically evicted, which has led to tenants being advised to remain in their property until the bailiffs arrive.

In addition to these two major developments, the Bill also proposes amendments to the Housing Act 1996 to create stronger duties in the following areas: advice and information, prevention, relief for those with a local connection and emergency accommodation for those with nowhere safe to stay.

On 28 October 2016 the Bill passed its second reading in the House of Commons meaning it has now progressed to Committee stage to be scrutinised. While it has quite some way to go, it is notable that the Bill has, to date, received quite significant cross-party support from MPs and backing from the Government.

Shadow Housing Minister John Healey, while backing the Bill, raised the issue of how local councils are going to be able to fund the additional duties proposed. The Minister for Local Government, Marcus Jones, responded by saying that additional funding would be made available by the Government although no details have been provided as to how much and where the money would come from.

Despite being labelled 'gesture politics' by Labour's Mike Gapes for its failure to provide extra homes, the focus on earlier intervention by councils is to be welcomed and could potentially prove to be of huge benefit assuming funds are forthcoming.

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Unlawful Discrimination and the bedroom tax

The Supreme Court has handed down judgment on the issue of whether the removal of the spare room subsidy (the bedroom tax) was discriminatory in *MA & Ors, R (on the application of) v The Secretary of State for Work and Pensions [2016] UKSC 58*. The judgment comes after a ruling on seven individual cases, each of which challenged the housing benefit regulations underpinning the bedroom tax. The decision comes after years of cases on the topic and upholds that bedroom tax regulations, in certain circumstances, unlawfully and unjustifiably discriminate against those households with disabled members.

By way of background, the bedroom tax was introduced in April 2013 and is essentially a cap on the amount of housing benefit payable to tenants in social housing deemed to be under-occupying their home. Those affected lose between 14% and 25% of their housing benefit, depending upon how many spare bedrooms they have in their property.

In the lead judgment in the case by Lord Toulson it is made clear that the correct test is whether regulation B13 was 'manifestly without reasonable foundation'. Notably, Lord Toulson rejected the appellant's submission that 'weighty reasons' were required in disability discrimination cases.

In two of the other appeals forming part of the judgment, namely *Rutherford* (1) and *Carmichael* (2) it was held that in cases where there is a clear need for an extra bedroom on medical grounds, it is not enough that discretionary housing payments (DHP) may be awarded. This, it was held, is the type of case that the regulations should make exemption for.

By way of factual summary to these other appeals, in *Rutherford*, their child required a carer overnight and in *Carmichael*, the couple were unable to share a bedroom due to a disability. In these circumstances, the Court noted that there was currently an 'ironic and inexplicable inconsistency in the Secretary of State's approach' to the justification of the difference in treatment between disabled adults and disabled children.

However, other appeal cases raising disability discrimination were not successful on the basis that there was no direct medical need for an extra room. In other words, there was no direct connection between their or their family member's disability and the need for an extra bedroom. In these appeals, the Court held there was a 'social need' for the extra bedroom.

The distinction, it seems, is a matter for consideration on the facts of each case and the merits of the social need. The DHP system of addressing the wider range of reasons for needing or wanting the extra room was a justifiable means of assessment in disability cases.

In light of this judgment, it seems certain that the current regulations will be amended by the Secretary of State to provide exemptions for households with the disabled individuals demonstrating a clear medical need for the extra room. For those not currently exempted, the DHP system will continue to apply.

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Can you rely on evidence older than six months when applying for a Civil Injunction Order?

In the recent case of *Birmingham City Council v Pardoe* [2016] the High Court specified the circumstances in which conduct occurring before 23 September 2014 was admissible as evidence in a Civil Injunction application.

Birmingham City Council (BCC) applied for a Civil Injunction against various defendants, one of whom was Glenn Pardoe (GP). It was alleged GP, had engaged in anti-social behaviour over many years by targeting elderly and vulnerable people and charging them excessive sums of money for unnecessary building works which were of poor quality. At trial, BCC was successful in obtaining interim Civil Injunction order, The Court then considered an application by the Defendants to exclude the first 27 of 49 allegations put forward by BCC on the basis that they had taken place prior to 23 September 2014. This meant that the Court was prevented from considering them by virtue of section 21(7) of the Anti-social Behaviour, Crime and Policing Act 2014 (the Act) which states that the Court may only take account of conduct occurring up to six months before the commencement date, this being 23 March 2015.

Section 1 of the Act states that the Court may grant a Civil Injunction if two conditions are met:

1. the Court is satisfied on the balance of probabilities that the Respondent has engaged or threatened to engage in anti-social behaviour; and
2. the Court considers it just and convenient to grant an Injunction for the purposes of preventing the Respondent from engaging in anti-social behaviour.

The District Judge dismissed the Defendants' application stating that the sub-section should not be construed to mean that the Court could not consider any alleged incident which took place before 23 September 2014 as that would lead to "absurd and unworkable results".

The District Judge concluded that whilst the Court could not consider the period before 23 September 2014 in relation to the first condition under Section 1 of the Act, it could, and should, consider the period before 23 September 2014 in relation to the second condition (whether it was just and convenient to grant an Injunction).

GP appealed arguing that the limitation period set out in Section 21(7) was clear and unambiguous and applied to both conditions of Section 1 of the Act. The High Court dismissed this argument and held that: (1) Anti-social behaviour involved a course of conduct. There would usually be an interval of some time between the earliest incident complained of and an application for a Civil Injunction. Section 21(7) served as an "obvious and a sensible" purpose because it allowed BCC to rely on conduct that had occurred during the six months prior to the commencement of the Act as qualifying behaviour when it would otherwise have been limited to acts occurring after the commencement date.

It was also held that the effect of section 21(7) would reduce the longer the Act was in force making it less likely for a social landlord to need to rely on conduct which occured before the Act commenced.

It was therefore determined that when applying for a Civil Injunction under the Act a Claimant landlord has to satisfy the Court of the first condition in section 1 by proving that a defendant has engaged in anti-social

behaviour after 23 September 2014 and if such behaviour was not proved the Court had no jurisdiction to grant an Injunction.

Whilst the 23 September 2014 date will become less troublesome for (social) landlords the longer the Act is in force, this case provides useful clarification on the ability to rely on evidence that pre-dates this date.

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Housing Management issues you may have missed or forgotten!

With a New Year upon us and the area of residential landlord and tenant developing at such a pace, detailed below are some developments which you may not be aware of or you may have forgotten.

1. The Court of Appeal decision in the case of *Cardiff County Council v Lee (Flowers)* in October 2016 made it abundantly clear that where a landlord wishes to apply for a Warrant of Possession due to a tenant's failure to comply with a Suspended Possession Order (SPO), the permission of the Court must be obtained first.

   On 21 December 2016 the Ministry of Justice (MOJ) published Court form N325A - Request for Warrant for Possession of land following a suspended order for possession. This form is to be used where a landlord is seeking to enforce a SPO based on rent arrears. The MOJ also issued a fresh version of form N445 – re-issue of a warrant.

   Forms N325A and N445, both state "(3) a statement of the payments due and made under the judgment or order is attached to this request". This means that all a landlord has to do is attach a rent statement evidencing the alleged breach(es) of the SPO and pay a Court fee, currently £121. N325A negates the need for a separate N244 application for permission and payment of a further Court fee to be paid. When reissuing a warrant no fee is payable if the request is being made within 12 months of a warrant being suspended.

   The positon regarding SPOs made in anti-social behaviour cases is less clear. Hence, landlords should continue to make a N244 application and once permission has been granted, then should apply for a warrant. This process will attract the payment of two Court fees. However, it is hoped the Civil Procedure Rules Committee will imminently review this situation with a view to providing clarity.

2. New section 8 NSP introduced with effect from 1 December 2016 which incorporates mandatory Ground 7B enabling landlords to recover possession where a tenant does not have the Right to Rent. These changes apply in England only.

3. Since 1 September 2012 squatting in residential accommodation has been a criminal offence under Section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. If you believe someone is squatting in residential accommodation contact the police as there is no need for possession proceedings to be issued. Note squatting in commercial property is not a criminal offence.

4. Serious offences for the purposes of relying upon mandatory Ground 7A for assured tenants (or under section 84A of the Housing Act 1985 for secure tenants) are detailed in Schedule 2A of the Housing Act 1985.

5. In his Autumn Statement, Philip Hammond, made a surprise announcement that letting agent fees to tenants in England are going to be banned. It is expected consultation regarding the ban, which is expected to come into force in 12 – 18 months' time, will be announced soon. He also announced the introduction of the Voluntary Right to Buy is to be delayed until April 2018 and the existing pilot is to be extended.

6. When drafting witness statements consideration should be given to CPR 32 and its practice direction. Remember to include a Statement of Truth at the end, see CPR 22.

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Court of Appeal upholds Council's refusal to allow a second succession in *Holley v London Borough of Hillingdon [2016]*

This case challenged Hillingdon London Borough Council's (the LA) refusal to allow a second succession to a property by Mr Holley (H) pursuant to section 87 of the Housing Act 1985.

H had lived in the three bedroomed property in question for nearly all of his life. The property could sleep six people but the only people occupying it were H and his brother. H also suffered from a range of mental health problems.

A first succession had taken place when H's grandmother died and his grandfather had succeeded to the tenancy of the property. The LA's policy allowed for one succession although there was an exception for potential successors who were vulnerable. However, H did not satisfy the criteria under the policy as he was too young.

At the possession hearing, the Court, having determined as a preliminary issue that H had no arguable defence under Article 8 of the European Convention of Human Rights, made a possession order. Although H had lived in the property nearly all of his life and had mental health difficulties, the Judge concluded he was constrained by the decision of *Thurrock Borough Council v West [2012] ECWA Civ1435* which had held that the length of a person's residence in their home was irrelevant.

H appealed arguing that:

1. the Judge had wrongly concluded that in considering a second succession, the length of occupation could never be a relevant factor;
2. the LA's second succession policy was unlawful because it did not permit the exercise of any residual discretion and even if it did, the LA had failed to give proper consideration to such discretion.

The Court of Appeal upheld the decision to make the possession order and held that the period of residence, however long, would not on its own be sufficient to found an Article 8 proportionality defence in a second succession context. However, the length of residence may form part of an overall proportionality assessment but this was not likely to be a weighty factor given that Parliament had specifically excluded second successions to family members.

In considering the lawfulness of the LA's allocation policy, the Court of Appeal held that there was a form of residual discretion which addressed exceptional circumstances of applicants for housing. However, given the evidence that the LA produced of an acute shortage of housing within its borough, H's own position came nowhere near qualifying for the exceptional allocation of a three bedroom house.

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Rent arrears deductions from Universal Credit

Universal Credit (UC) was introduced as a new benefit for people of working age when they are out of work or on a low income. It will eventually replace Housing Benefit, Income Support, Income Based Jobseekers Allowance, Income Related Employment and Support Allowance, Child Tax Credit and Working Tax Credit. It was originally planned to be rolled out to all parts of the country by 2017 however, this is now unlikely to happen until March 2022.

Section 11 of the Welfare Reform Act 2012 states that the calculation of an award of Universal Credit is to include an amount in respect of any liability on the part of the claimant to make payments in respect of the accommodation they occupy as their home.

Regulation 111 of the UC Regulations 2013, which came into force on 29 April 2013, allows for deductions of up to 40% from the basic standard allowance (the part of the benefit that covers living allowance) in respect of housing costs.

This means that a single person under the age of 25 can be left with as little as £151.06 per month for them to buy food, clothing and to live on. If the full 40% is deducted from their UC by the Department for Work and Pensions ("DWP") It would appear there is an unbalanced approach as a result of the DWP deducting the full 40% in some areas of the country, and in others 20%, which is causing undue hardship to those unfortunate enough to be subjected to a deduction.

This therefore raises the question as to whether a common approach should be adopted or whether the 40% should in fact be reduced so that it falls into line with the current rates which are set by the Court. The rate for 2016/2017 is £3.70 per week and is the maximum the Court can order a tenant to pay towards their arrears in rent possession proceedings where they are unemployed and in receipt of welfare benefits; the amount generally increases by £0.05 every financial year.

The current rate of deductions is based on 5% of the personal allowance for Income Support, Income Based Jobseekers Allowance and Income Related Employment and Support Allowance. The question is: should the DWP reduce the maximum amount which can be deducted from a claimant's UC from 40% to 5%?

As stated there is an inconsistency in the amount DWP is deducting ranging between 20-40%. Social landlords obviously want the amount reduced to be affordable to tenants, the idea being that a tenant will be more likely to be able to sustain their tenancy thus reducing the risk of possession proceedings being issued against them. DWP has stated that they do not have the power to deduct any sums from a person's UC entitlement unless the amount which can be deducted has been set by the Secretary of State. Tenants have a right to appeal to a tribunal against any deduction in any event.

Some social landlords are requesting Suspended Possession Orders knowing that the DWP is already deducting 40% towards a tenants' arrears. This could be seen as a social landlord having "two bites of the cherry" to the financial detriment of tenants. Surprisingly, some District Judges appear to be willing to do this which goes against the rent arrears Pre-action Protocol for Possession Claims by Social Landlords which is aimed at the parties taking all possible steps to avoid Court action. In light of this, it is questionable whether the Court should be granting a Suspended Possession Order in cases where the DWP is already making deductions from a tenant's UC.

The Pre-action Protocol also states that a landlord should try and agree affordable repayment sums with a tenant. It could therefore be argued that a 40%, or even 20%, reduction of a tenant's UC is far from affordable and this amount should fall to 5% in line with the level currently set by the Court.

Therefore, when UC is eventually completely rolled out, consideration will need to be given to what amount the DWP can deduct at source to pay towards a tenant's rent arrears and if such a deduction is made, social landlords should consider adjourning possession cases generally rather than also seeking the payment of additional sums via the making of a Suspended Possession Order which is contrary to the Pre-action Protocol for Posession claims by Social Landlords and may cause tenants undue hardship.

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Dealing with Equality Act defences in mandatory possession claims: more than just lining up your ducks

In the case of *Birmingham City Council vs Stephenson* [2016], the Court of Appeal looked at disability discrimination type defences under the Equality Act 2010 (the Act) in the context of a mandatory possession claim. The case acts as a helpful reminder that the Court must apply the guidance set down by the Supreme Court in *Akerman-Livingston v Aster Communities* [2016] when such defences are raised.

In September 2015, Birmingham (B) had commenced a possession claim against Stephenson (S) an introductory tenant, on the basis of complaints of significant noise nuisance that were having an adverse effect on the wellbeing of a neighbour.

At the first hearing in November 2015, B accepted S suffered from mental health problems (schizophrenia), and that he had a disability within the definition of disability in the Act. B, however, alleged that S had failed to keep appointments to receive his anti-psychotic medication. As S was representing himself, the Deputy District Judge (DDJ) adjourned the hearing to enable him to seek legal representation. In adjourning S was also invited to use his best endeavours to file a defence prior to the next hearing.

S managed to obtain legal representation, however he only did this a couple of days prior to the adjourned hearing.

Accordingly at the hearing in January 2016, S's solicitor asked for a short adjournment so that he could file and serve a defence setting out, amongst other things, Equality Act and Article 8 defences. Notwithstanding the guidance set down in *Akerman-Livingstone* on dealing with disability discrimination defences on a summary basis, the DDJ declined to grant the further adjournment and instead made a possession order. The DDJ made a finding that S had been given enough time to file and serve a defence, and even more surprisingly, discarding the fact that there was much possibility of S having a substantial defence to the claim.

The Court of Appeal did not agree with the DDJ. It concluded that the DDJ had not given enough regard to S's mental health problems, and that an adjournment should have been given because there was a prospective *Akerman-Livingston* defence. Further, the DDJ had erred in looking at proportionality as a binary choice between eviction on the one hand, and doing nothing on the other hand. As an alternative there were other intermediate steps that might resolve the problems (thereby avoiding an eviction), and so these should not be ruled out on a summary basis. It was also reiterated that B had the burden of convincing the Court that the alternative remedies were not feasible and that the only real option was an eviction.

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Front cover image: Fotolia