Devonshires solicitors

Housing Management Brief

Issue 18

In this issue

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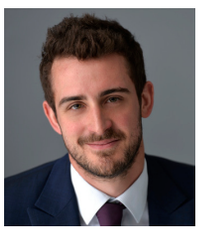

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Welcome

It has been a very busy 9 months since our last edition of the Housing Management Brief. We seem to have faced a new Government policy announcement or some policy "scare" every other week since the May general election and it is clear that housing associations and local authorities in particular face major changes in how they do their business in future and how Government wants them to operate, particularly as deliverers of the Government's homeownership agenda. Some of the changes are discussed in this edition.

However, whilst high policy continues to evolve, there is still an awful lot going on at the "coalface" of operational housing management both for RPs and for private landlords in the PRS and we highlight in this edition some of the topical issues we have come across in the varied caseloads clients send our way.

As always, something of interest for everyone whether you are a landlord of social housing or a private landlord.

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Success at Appeal in the Upper Tribunal

Devonshires recently represented Irwell Valley Housing Association ("Irwell Valley") in an appeal to the Upper Tribunal relating to a proposed rent increase. The rent increase was due to come into place in September 2013 but the tenant, Mr O'Grady, referred the notice to the First Tier Tribunal ("FTT"). Mr O'Grady complained of disrepair at the property and alleged that the rent increase was excessive.

An inspection of the property was followed by a hearing in August 2013 in the FTT. Neither party was represented. No evidence was adduced at the hearing relating to comparable properties and rents but, after the hearing was concluded, the Tribunal obtained their own comparables. Unfortunately, the Tribunal did not advise either party of the comparables meaning neither was able to comment on them.

The Tribunal's decision was sent to the parties in writing after the hearing, at which point Irwell Valley found out that the Tribunal had considered the comparables. The Tribunal made various corrections to the decision after it had been served.

Irwell Valley then instructed Devonshires and an application for permission to appeal was filed and permission was given. The Upper Tribunal gave permission to appeal the use of the unseen comparables and the the various corrections.

At the appeal in the Upper Tribunal, Martin Rodger QC concluded that the matter should be remitted to the FTT for fresh consideration as the FTT had erred in using specific comparables without allowing the parties to make submissions on the evidence.

As ordered, the matter was remitted to the FTT and heard by a different panel. In anticipation of the hearing, evidence was filed and served detailing appropriate comparable properties to Mr O'Grady's property as well as the mechanism for calculating the rent increase in 2013. The evidence proved successful as the FTT decided that the rent increase proposed by Irwell Valley in September 2013 was reasonable and in fact set the rent at a higher level than that proposed.

The key point to take from this case is that it is imperative to provide the tribunal with details of comparable rents to establish that the rent increase you propose is reasonable.

"It is imperative to provide the tribunal with details of comparable rents to establish that the rent increase you propose is reasonable."

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Internet lettings and social housing – The rise of Airbnb

As holiday travellers, we hear a lot about the potential benefits of AirBnB. However, there are increasing reports about the problems caused to communities by these unregulated, short-term lets.

In tourist destinations such as Berlin, New York and Barcelona, concerns have been raised about the transient community of persons coming and going with little or no consideration for permanent residents. It is already an issue for UK residents in blocks in areas such as central London, where there is such a premium on hotel rooms.

Legally speaking, if a secure or assured tenant is "hosting" the whole or part of their property on AirBnb, they are highly likely be in breach of their tenancy agreement, either by subletting on an unauthorised basis or by operating a business from their home. They further risk losing their security of tenure, which, once lost, cannot be regained. Letting properties out as holiday lets has not been unknown in the past, with Gumtree, for example, being used to advertise properties. However, the popularity of Airbnb may lead the tenant to assume that they are doing nothing wrong.

For Leaseholders, subletting may well be permitted under the terms of the Lease. However, even if it is, it is likely that Leaseholders will fall foul of other clauses in their Lease relating to running a business from their properties.

If you consider that the purpose of social housing is to provide affordable accommodation to those in need then, at the very least, tenants advertising and offering that same property out as a holiday let makes a mockery of that tenant's apparent need for that property.

"Legally speaking, if a secure or assured tenant is "hosting" the whole or part of their property on Airbnb, they are highly likely be in breach of their tenancy agreement."

On a day-to-day basis, social landlords may start to receive more complaints from residents regarding unknown persons coming and going, potential nuisance from holiday makers and, indeed, concerns about the safety of residents. At a recent training seminar, a delegate spoke of a leasehold block where a resident had attached a key safe to the exterior of the building without the landlord's knowledge or consent meaning that any person who had been sent that code could access the Block without even the "host" resident having to be there.

Whilst social landlords may view these developments with concerns, this view is not necessarily shared by the Government, with Eric Pickles wanting to announce reforms to scrap rules preventing homeowners from renting properties on sites such as Airbnb.

For now, such subletting is almost certain to be a breach of tenancy. If social landlords are not already regularly checking Airbnb for adverts on estates where you have tenants or leaseholders, it may be worth starting these checks. If social landlords are alerted to an allegation that a tenant is using the property for holiday lets, then it should try to find that advert on Airbnb and take a screengrab or print out a copy of that advert.

Given how difficult subletting is to prove, the landlord shouldn't rely solely on this but should also try to obtain statements from other residents, or even the Airbnb guests themselves. Once this evidence is gathered, the landlord can take a view as to the action it wants to take and, of course, if social landlords require any further advice the merits of any such cases, then do contact us for further advice.

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6 The Smoke and Carbon Monoxide Alarm (England) Regulations (2015)

On 1 October 2015, the Smoke and Carbon Monoxide Alarm (England) Regulations 2015 ("the Regulations") came into force. The Regulations have been introduced in order to clarify the responsibilities of private rented sector ("PRS") landlords in relation to the installation of smoke alarms and carbon monoxide detectors in the properties they let out. Please note the Regulations do not apply to RPs.

The Regulations require PRS landlords in England to:

- Install smoke alarms on each storey of properties where there is a room used wholly or partly as living accommodation; and
- Install carbon monoxide alarms in any room containing a "solid fuel burning combustion appliance" ("high risk rooms") of properties used wholly or partly as living accommodation.

What is particularly significant is that the Regulations also apply to tenancies granted **before 1 October 2015** meaning that any PRS landlords letting properties which fulfil the criteria will have to ensure they install the requisite alarms.

In relation to tenancies granted **on or after 1 October 2015**, there is an additional obligation on PRS landlords to ensure the required smoke and carbon monoxide alarms are in "proper working order on the day the tenancy begins". However, it is significant to note that, once the initial check has been carried out by the PRS landlord, routine maintenance and testing falls to the tenants. Should the alarms develop a fault or expire during a tenancy it remains the responsibility of the PRS landlord to replace them once notified by the tenant of

to £5,000.

There are, however, ambiguities within the Regulations which may cause problems in the future. The Regulations do not make clear what actually constitutes a "smoke or carbon monoxide alarm" as they do not make reference to any typical standards required. Further, "proper working order" is also not defined. Does this mean simply pressing the test button on the day? This does not necessarily confirm the alarm is in proper working order, as it only checks the sounder is working. There is also the fact that these alarms are to be tested on "the day the tenancy begins", meaning not the day before and not the day the tenant signs their tenancy agreement but the exact day the tenancy begins. This will not be easy where there are large numbers to check on the same day.

"The Regulations have been introduced in order to clarify the responsibilities of private rented sector ("PRS") landlords in relation to the installation of smoke alarms and carbon monoxide detectors in the properties they let out."

the issue.

It is imperative that these obligations are complied with as sanctions for non-compliance have also been introduced by the Regulations, responsibility for the enforcement of which lies with the relevant local housing authority ("LA"). Where a LA believes that a PRS landlord has failed to comply with the Regulations, it is obliged to serve a remedial notice on the landlord within 21 days.

If such a notice is served, the PRS landlord has 28 days to make representations to the LA. Irrespective of those representations, the PRS landlord is required to comply with the notice within the same 28-day period. If the landlord does not comply with the notice, the LA is under an obligation to arrange its own sanction against the PRS landlord within 28 days of becoming satisfied that the notice has not been complied. These sanctions can include a civil penalty of up

The introduction of the Regulations clearly provides more clarity in relation to PRS landlords' responsibilities regarding smoke and carbon monoxide alarms with the aim of protecting tenants and reducing the number of injuries or deaths from smoke or carbon monoxide poisoning in the private rented sector. However it remains to be seen whether, in practice, the ambiguities in relation to the enacted regulations will cause any issues in the future and how aggressively LAs pursue PRS landlords for non-compliance.

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The new Pre-action Protocol for Possession Claims by Social Landlords

On 6 April 2015, the Pre-action Protocol for Possession Claims based on Rent Arrears was revised and became the Pre-action Protocol for Possession Claims by Social Landlords ("the Protocol"). Although coming into force on 6 April 2015 the Protocol was, somewhat surprisingly, not published on the Ministry of Justice website until several weeks later. The Protocol replaces and extends the scope of the previous Protocol by including possession claims where the Court's discretion to postpone possession is limited by Section 89 (1) Housing Act 1980. The Protocol expressly states that it applies to residential possession claims by social landlords and private registered providers of social housing but does not apply to claims in respect of long leases or to claims for possession where there is no security of tenure.

The Protocol comprises three parts:-

Part 1 - aims and scope of the protocol;
Part 2 - Possession claims based on rent arrears;
Part 3 - Mandatory grounds for possession.

Aims and scope of the Protocol

As with all Pre-action Protocols, the Protocol aims to encourage more pre-action contact and exchange of information between the parties with the dual intentions of avoiding litigation where possible and enabling effective use of Court time where necessary. The Court should take into account whether the Protocol has been followed when considering what orders to make and expressly states that the landlord should also comply with guidance issued from time to time by the Homes and Community Agency, the Department for Communities and Local Government and the Welsh Ministers.

Part 1 also emphasises that, where the landlord is aware that the tenant has difficulty reading or understanding information given to them, the landlord should be able to demonstrate that reasonable steps have been taken to ensure the information was appropriately communicated. Further, where the landlord is aware the tenant is under 18 or is particularly vulnerable, the landlord should consider issues that may arise in relation to mental capacity, the Equality Act 2010 and, in the case of a Local Authority landlord, whether there is the need for a Community Care assessment.

"The Protocol aims to encourage more pre-action contact and exchange of information between the parties with the dual intentions of avoiding litigation where possible and enabling effective use of Court time where necessary."

Possession claims based on rent arrears

Part 2 of the Protocol concerns possession claims brought solely on the grounds of rent arrears. In most respects it is the same as the previous Pre-action Protocol in this regard but landlords should note that paragraph 2.8 introduces a new requirement to send a copy of the Protocol to the tenant after service of the statutory notice but before issue of proceedings.

Mandatory grounds for possession

Part 3 expressly states that it applies *"in cases where if a social landlord proves*

its case, there is a restriction on the Court's discretion on making an order for possession and/or to which s. 89 Housing Act 1980 applies (e.g. non-secure tenancies, unlawful occupiers, succession claims, and severing of joint tenancies)."

Part 3.2 states that, in cases where the Court must grant possession if the landlord proves it case, then before issuing any possession claims social landlords –

a) Should write to occupants explaining why they currently intend to seek possession and requiring the occupants within a specified time to notify the landlord in writing of any personal circumstances or other matters which they wish to take into account. In many cases such a letter could accompany any Notice to quit and so would not necessarily delay the issue of proceedings; and

b) Should consider any representations received, and if they decide to proceed with a claim for possession give brief written reasons for doing so.

"Whilst this may seem like another unwelcome procedural step, in fact, most landlords would be reviewing the decision to seek possession in all cases."

Finally, part 3 states that, in these cases, the social landlord should include in its Particulars of Claim or any witness statement a schedule giving a summary of the following:

a) Whether it has invited the defendants to make representations of any personal circumstances or other matters they wish to be taken into account before issue of proceedings;

b) If representations were made that they were considered;

c) Brief reasons for bringing proceedings;

d) Copies of any relevant documents which the social landlord wishes the court to consider in relation to the proportionality of the landlord's decision to bring proceedings.

Effectively, now, when contemplating serving a notice on a tenant prior to issuing a possession claim where the Court will not have discretion (i.e. s21 Notice Requiring Possession claims, NTQ claims for no security of tenure, Ground 8 claim), landlords should ensure that they amend their standard covering letter to invite the tenant/occupier to provide written representations of any circumstances which the tenant considers that the social landlord should take into account before the claim

is issued and give them a reasonable period to respond by. Once those written representations are received, the landlord should consider the tenant's submissions, review their decision to take possession action and write to the tenant to confirm the outcome of that decision before the claim is issued.

Whilst this may seem like another unwelcome procedural step, in fact, most landlords would be reviewing the decision to seek possession in all cases. Provided the tenant is invited to provide written representations on the same date that the Notice is served, the additional steps should have no real impact on timelines and, of course, the Court will note if the steps have not been taken. If social landlords require any help or suggested wording for this process, then please contact us.

Although it is easy to understand the aims of the Protocol, its content and implementation have been far from satisfactory. Given the ambiguity in drafting and late publication, it remains to be seen to what extent Court will take into account a landlord's failure to follow the Protocol. However, to avoid sanction, we would strongly recommend that in all cases where the court cannot consider reasonableness, the Protocol is followed.

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Ask the expert: How to deal with squatters of commercial property

Since September 2012, squatting in residential buildings has been a criminal offence and the police have powers to enter, arrest and remove persons found to be trespassing. If prosecuted, trespassers could face a prison sentence of up to 6 months and/or a fine of up to £5,000. Whilst this is positive news for homeowners and those owning residential properties, owners of commercial properties are increasingly at risk.

How can you use the courts if your commercial property is squatted?

There are two ways of using the courts to recover possession;-

1. Interim Possession Order (IPO)

This procedure is usually used when a landowner requires possession of a

property urgently. A claim is issued at Court consisting of an application for an IPO and a supporting witness statement. Once issued, the claim and application must be served at the property within 24 hours. The squatters then must leave the property within 24 hours of being served with the IPO – failing to do so is a criminal offence. There will then be a further hearing at which point the Court will decide whether or not the order should be made final. If it is, the squatters will have already left and therefore getting the final possession order is usually just a formality.

Owners should be warned that when they ask the Court to make an IPO they will generally have to give a number of undertakings to the Court, including to pay damages to the squatters should it be determined that the squatters do have a right to remain in the property. So caution should be exercised when considering this route.

In order to use this procedure, the claim must be issued within 28 days of the owner finding out that the property has been squatted. Therefore, if you do want to go down this route, you need to seek advice as soon as possible.

2. Summary Possession Proceedings

A claim is usually issued against the anonymous person(s) and served at the property. There are specific time limits for service before the hearing – 2 clear days for non-residential property and 5 clear days for residential property. A hearing will then take place when the Court will decide whether to make an Order for possession or not. The squatters will have an opportunity to put in a defence to the possession claim if they want to and to attend the hearing. If a defence with any merit does go in, the first hearing may be adjourned to a later date.

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

Which option is best for you?

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

"If prosecuted, trespassers could face a prison sentence of up to 6 months and/or a fine of up to £5,000."

If the land that has been squatted is not a building, an IPO may not be available as this option only applies to buildings and land adjacent to buildings. So it won't help you if it is open land that has been squatted.

There are pros and cons for both routes and we would advise that you speak to us as quickly as possible if property that you own is squatted.

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Deregulation Act 2015 – A Guide to the Regulations

The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulation 2015 ("the Regulations") provide detail of the much anticipated prescribed requirements, information and form of s.21 Notice following the sparse enactment of the Deregulation Act 2015.

Below is the key information Landlords need to know about the Regulations. Please note that this does not cover the contents of the Deregulation Act itself.

For all tenancies granted on or after 1 October 2015

1. **Prescribed legal requirements** - A s.21 Notice will not be valid in relation to an AST if the landlord does not:

   a. provide an energy performance certificate to a tenant free of charge under Regulation 6(5) of the Energy Performance of Buildings (England and Wales) Regulations 2012

   b. provide tenants with a gas safety certificate under regulation 36 of the Gas Safety (Installation and Use) Regulations 1998

2. **Prescribed s.21 Notice** - The prescribed form of s.21 Notice will be in force for use from 1 October 2015.

   Form 6A has been inserted into the Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 2015 as the new prescribed s.21 Notice. This form can be found at the back of the Regulations of which the link is attached below.

   The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 - http://www.legislation.gov.uk/uksi/2015/1646/pdfs/uksi_20151646_en.pdf

For tenancies granted on or after 1 October 2015 by a landlord that is not a Registered Provider of Social Housing

3. **Prescribed Information** – There is a requirement to provide prescribed information. A s.21 Notice may not be served unless the assured shorthold tenant is given the document entitled "How to rent: the checklist for renting in England", as published by the Department for Communities and Local Government.

   This can be provided:

   a. in hard copy; or

   b. by email if the tenant has notified the landlord they are content to accept service of notices and other documents in connection with the tenancy by email.

In reality the Regulations should not cause too much difficulty for RP's and the main difficulty with these changes remains the challenge of navigating the different regimes over the next three years depending on when the AST in question was granted. Of course you may wish to adopt the new regime for all tenancies from 1 October 2015 to avoid running two different procedures.

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"The Regulations should not cause too much difficulty for RPs and the main challenge with these changes remains that of navigating the different regimes over the next three years depending on when the AST in question was granted."

Practical Case Study: Death of Tenant Pending, Expiry of Notice To Quit

The Issue

RPs commonly find themselves in the situation where a tenant has died and they wish to bring the tenancy to an end as a result. In such circumstances, the RP is required to serve a Notice to Quit ("NTQ") on the Personal Representatives of the Estate of the deceased tenant and on the Public Trustee prior to commencing a Claim for Possession.

However, what is the position where a NTQ is served when the tenant is alive but the tenant then passes away prior to it expiring or, if it has expired, prior to a claim for possession being issued relying on that NTQ? Is the NTQ still valid or does a new one have to be served prior to possession proceedings being issued?

The Facts

Devonshires recently dealt with just such a situation. In the case, the sole tenant of the property was an elderly lady who had spent a large amount of time residing away from the property in a series of residential homes. The tenant's granddaughter was left occupying the property.

Upon it becoming clear to the landlord that the tenant would be residing permanently at a residential home, the landlord wished to recover possession of the property. A NTQ was duly served at the property addressed to the tenant. After its expiry, the landlord intended to commence possession proceedings as the tenant's granddaughter remained in occupation of the property.

"Upon it becoming clear to the landlord that the tenant would be residing permanently at a residential home, the landlord wished to recover possession of the property."

However, in the period after the expiry of the NTQ but before a Claim for Possession could be issued, the tenant passed away. In such a situation, could the landlord proceed and issue a Claim for Possession relying upon the expired NTQ? Or did a fresh NTQ need to be served in order to account for the tenant's death?

The Legal Position

The answer in these circumstances is that the landlord could continue to rely on the expired NTQ and a new NTQ did not be served. However, the overriding and decisive factor in respect of whether a new NTQ was required was very much an issue of timing.

The reason that the landlord could continue to rely upon the expired NTQ was because, at the date of the expiry, the tenant was still alive. Therefore, the tenancy had been validly terminated by the expiry of the NTQ within the tenant's lifetime and the tenancy was no longer in existence on the date that she passed away.

However, imagine a scenario where an NTQ is served (addressed to the tenant) and, a day prior to the date on which the NTQ was due to expire, the tenant passed away. In these circumstances, does a new NTQ need to be served?

In this scenario the answer is yes, you would need to serve a new NTQ. The tenancy would immediately vest in the Estate of the tenant upon their death. Therefore, a day later, when the NTQ was due to expire, it is no longer valid as it is addressed to the tenant themselves and not their Estate. As such, a fresh NTQ addressed to the Personal Representatives of the deceased tenant would need to be served at the Property.

The Practical Advice

When RPs are seeking to claim back possession of a property where the tenant is no longer residing there as their only or principal home due to medical reasons the following points should be noted:

- Keep in contact with the residential home or healthcare providers for updates on the tenant's condition and treatment – Find out if the tenant is to return and, if they are not, serve a NTQ as soon as possible.

"Upon it becoming clear to the landlord that the tenant would be residing permanently at a residential home, the landlord wished to recover possession of the property."

- Monitor the situation at the property regarding whether any occupiers remain at the property in the tenant's absence or any other person takes up occupancy.
- Know when the NTQ expires and issue the Claim for Possession as soon after expiry of the notice to avoid any confusion or changes in circumstance.

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Housing Management Training Programme 2015/16

Devonshires Solicitors' Housing Management Team is pleased to present the 2015/16 Housing Management training programme.

Invitations outlining programme and speaker details will be issued for each event. Places are issued once the flyer for the individual seminar is sent out.

Seminar Programme

Tackling ASB and Nuisance Conduct
21 January 2016
Half day session

Mental Health and Housing
23 February 2016
Half day session

HM Update
10 March 2016
Half day session

Tackling Tenancy Breach
21 April 2016
Half day session

Defending Actions for Disrepair and Claims under Environmental Protection Act 1990
16 June 2016
Half day session

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