Devonshires

# Housing Management Brief

Issue 24

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## Welcome

Another edition of the HMPL Update hot off the presses…More on the PSED in the light of Devonshires' two appeal cases, Forward and Patrick, which are now the leading cases on the PSED. Also, some helpful guidance on High Court possession claims and fixed term tenancies and break clauses. Lots to interest you as well as our usual features 'Ask the Expert' and 'Solicitor Spotlight'.

And if you see references to "HMPL" in the text that follows, do not be alarmed, we are now officially the 'Housing Management & Property Litigation' Team in recognition of the breadth of our practice, covering housing management, leasehold management and property disputes more generally. Test us out on one of our two free helplines – details on the back page.

Enjoy…

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# Ensuring compliance with the Public Sector Equality Duty - 10 top tips for Social Landlords

**How a social landlord can comply with the public sector equality duty ("PSED") has been the subject of a number of challenges in court in recent years.**

This year alone has seen three key cases decided in the High Court and Court of Appeal. Rebecca Brady's article in the previous Housing Management Brief ("*Recent cases provide guidance on the application of the public sector equality duty*") set out the background to two of the most recent claims, *Powell v Dacorum Borough Council* [2019] EWCA CIV 23 and *Forward v Aldwyck Housing Group* [2019] EWHC 24 (QB).

Since those judgements, there have been two further key decisions, L*ondon & Quadrant Housing Trust v Patrick* [2019] EWHC 1263 (QB) and F*orward v Aldwyck Housing Group* [2019] EWCA Civ 1334. Both cases were dealt with by Devonshires and the decisions have provided comfort to social landlords who face vigorous challenges in relation to the application of the PSED.

In the case of *Forward,* the Court of Appeal decided that there is no rigid rule that non-compliance with the PSED should always mean the decision to claim possession should be set aside or quashed.

It concluded that the court needed to look closely at the facts of each case and decide whether, in the event of non-compliance with the PSED, "*it is highly likely that the decision would not have been substantially different if the breach of duty had not occurred*".

While it is of comfort to have these judgments to fall back on in the event that there has been some form of non-compliance, this should not change a social landlord's approach to its decision making processes when considering taking action against an occupier who is disabled.

With that in mind, I set out below my top ten tips for compliance:

1. Know your tenant. Make sure that your sign up information is retained so that you can access it when you are looking to make decisions later in the tenancy – this could draw your attention to a disability that may otherwise have not been considered by the decision maker.
2. Keep your enquiries open. It is good practice to make enquiries as to the occupiers' health and/or give the occupier the opportunity to provide information that may affect your decision making.

3. Keep good records. This covers all records of interactions between the landlord and the occupier which could demonstrate with clarity what information the landlord had in respect of the occupier's circumstances/disability and any steps taken to explore alternative options before the decision to take possession was reached. Further, make sure that all interactions with third party agencies such as social services are documented and retained as these will be vital for any decision makers to take into account when having due regard.
4. Be guided by expert opinion. If in doubt as to whether or not the occupier's condition constitutes a disability, seek further information. If you are still unsure, conduct an assessment on the basis of available information, clearly stating that you are unable to satisfy yourself that the condition meets the definition of disability (Section 6 Equality Act 2010) but that you have conducted an assessment on the basis that it does. This will preserve your position in any future claim.
5. Ensure that decision makers have a good precedent framework to work from to give certainty that all relevant issues are considered when assessment is made. Avoid rigid templates as this should not be a tick box exercise.
6. Record the decision. The Equality Act does not provide that a written record must be kept but it is vital to keep a written record to demonstrate due regard and the factors taken into account at the time the decision was made.
7. Carry out an assessment at the earliest possible opportunity. It is good practice so ensure that an assessment is carried out before any notice is served. Otherwise at the first possible time thereafter.
8. Make sure that the PSED is kept under review during the whole process. It is an ongoing obligation to have due regard, not a stand-alone decision.
9. A clear policy is a must have. Make sure that officers know it and follow it.
10. Training is key. Ensure that your decision makers and officers are trained in the requirements of PSED and also have a broader understanding of the provisions of the Equality Act.

For more information in relation to the PSED, or how we can assist you with your policy or training requirements, please contact Donna McCarthy:

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# Issuing and enforcing possession claims in the High Court

**Most claims for possession of land are issued in the County Court. Whilst it is possible to issue a possession claim in the High Court, the Civil Procedure Rules (CPR) make clear that this is only appropriate in exceptional circumstances.**

Indeed, the rules go on to warn that, if the High Court considers a claim has been wrongly issued, it may be struck out or transferred to the County Court with the claimant unable to recover their costs incurred in issuing and transferring. This article considers what is likely to qualify as exceptional circumstances, and also the possibility of transferring a case issued in the County Court to the High Court for the purposes of enforcement only.

## Issuing claims for possession in the High Court

Practice Direction 55A to the CPR states that possession claims should only be started in the High Court in exceptional circumstances, and that this may include where:

1. there are complicated disputes of fact;
2. there are points of law of general importance; or
3. the claim is against trespassers and there is a substantial risk of public disturbance or of serious harm to persons or property which properly require immediate determination.

It is generally accepted that, whilst in many possession claims there is likely to be a serious risk to property, only a limited number of cases will be considered sufficiently urgent to require immediate attention.

The damage to property doesn't have to be permanent or enduring. One example given by the High Court in a 2016 Practice Note is cases involving tipping of significant amounts of waste material on commercial land. The waste material may contain dangerous substances which could pose a risk to persons gaining access to the site or those in the locality of the property.

Where this concern exists, or it is likely that further tipping will occur, this may well justify urgent steps being taken to prevent further harm being caused to the property.

If the High Court does consider that there is sufficient urgency to justify issuing a claim, then it is possible for the land to be recovered very quickly. We recently acted for a housing association who owned a piece of open non-residential land that trespassers had gained access to.

There was clear evidence of fly tipping with concerns over the material that was being tipped, and due to this, the claim was successfully issued in the High Court. The proceedings were issued, the hearing listed, and the order obtained, served and executed all in the same day.

This was an extremely important outcome for the land owner as any delay in recovering possession would have led to significantly more damage to the land and an increased cost to the organisation in clearing up.

## Transferring up to the High Court for the purposes of enforcement only

Under Section 42 of the County Courts Act 1984, it is possible to seek the lower court's permission to transfer the case to the High Court for the purposes of enforcement only. This is not appropriate in all cases and citing delays in obtaining bailiff warrants in the County Court will not be reason enough alone. However, there may be circumstances which will justify a transfer. Examples of successful applications we have made include a claim based on the mandatory anti-social behaviour ground following the making of a closure order, and a case in which a tenant was soon to be released from prison and their conduct in the property posed a serious health and safety risk to other residents and the landlord's employees.

Issuing and enforcement of possession claims in the High Court is not going to be appropriate in the majority of cases, but if the circumstances do justify it, this can be a vital tool in protecting property and limiting financial or other risk to the land owner.

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## In our spotlight piece, Paralegal Billy Moxley answers some important questions...

### How did you get into law?

After attending College and University where I studied Sports Science, I planned on taking a gap year. However, I decided that I would like to gain some work experience in London and away from the area of sport.

I had not previously considered a career in law but I applied for the role of General Office clerk at Devonshires. I was in this role for approximately one year when I was given the opportunity to become the firm's Outdoor Clerk.

This role was based within the Housing Management and Property Litigation Department but I also worked with our Litigation & Dispute Resolution and the Clinical Negligence Departments. During my time as the Outdoor Clerk, my interest in law grew and I really enjoyed the role as I was the firm's main point of contact for any court matters, especially given the variety of work that I was exposed to by assisting multiple departments.

The role meant that I was in court on a daily basis issuing proceedings or filing urgent documents which gave me a real insight into the fast paced nature of the legal environment.

Alongside my role as the Outdoor Clerk, I assisted on Gas Access Injunctions which allowed me to run my own caseload and deal with clients directly. I have developed my knowledge in relation to the Gas Access Injunctions and I am now HMPL's point of contact in respect these matters.

I then moved into my current role as a Paralegal just over two years ago. Alongside my work, I am also studying the CILEX (the Chartered Institute of Legal Executives) course to become a Chartered Legal Executive.

### What interests you about housing management and property?

My interest in HMPL stems from the variety of work and skills that it involves - we are constantly problem solving and no two days are ever the same. It is an area of practice where the law is constantly evolving which requires us to stay up-to-date on numerous issues.

### What skills did you pick up during your time Clerking that has helped in your career as a Paralegal?

I learnt that you need to be very organised given the number of deadlines that you are required to meet (with the Court, clients and supervisors). Ensuring that you are organised is key in helping you to meet all deadlines and ensures that no deadlines are missed. Communication is another key skill that I have picked up from my time clerking, in my role as a Paralegal it is essential that I communicate with other members of the department and also with clients directly which is vital when taking instructions and this assists me to progress matters as efficiently.

### ..... and finally tell us something interesting

I currently play football at a semi-professional level and am a big West Ham United fan. I also used to play cricket for Essex in my younger years.

For any further information please contact Billy Moxley:

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# Ask the Expert: Beatrice Gallivan

**Q** We have a tenant who fell through a manhole cover in her back garden while mowing the lawn and broke her ankle. The garden is demised to her as part of her assured tenancy. The Law Centre is acting for her and claiming damages for the injury. Can she claim? What should we do?

**A** The tenant may be able to make a claim under Section 4 of the Defective Premises Act 1972. Section 4(1) of the DPA 1972 provides that, where premises are let under a tenancy which places on the landlord an obligation for maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to be affected by defects in the state of the premises a duty to take such care as is reasonable in the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect.

This scenario was considered in the case of *Elizabeth Rogerson v Bolsover District Council* (2019) EWCA Civ 226. In this case, the tenant produced expert evidence to show that the cover to the manhole in her garden that she had fallen through was a clear and obvious risk in light of its age (being 40 to 60 years old) and condition. The landlord did not provide any evidence to the contrary.

The County Court held in the first instance that it was for the landlord to show that it had complied with the duty of care under Section 4 of the DPA 1972. Although the landlord had not known of the defect, it had carried out both an inspection and a survey during the year before the accident and failed to notice the defect. The Judge accepted that the defect was a "*clear and obvious safety risk*" that would have been revealed by a simple pressure test during the landlord's inspections. However, the landlord did not have any evidence to show that this pressure test had been done.

The tenant was awarded £15,082.88 by way of damages in the County Court. The Court of Appeal upheld this decision.

In order to comply with its duty under Section 4 of the DPA 1972, a landlord does not necessarily need to implement a system of regular inspections to determine whether any relevant defects exist which may cause personal injury or damage to property. However, there will be occasions when it is reasonable to do so. Whether a landlord is required to implement inspections depends on the facts of each case, one factor being whether a landlord had any knowledge of likely or known risks at the property.

You will need to review your records to determine whether any inspections have been carried out at the property since the start of the tenancy and, if so, what the results of those inspections were. If you have not inspected, you will need consider whether you had any knowledge of likely or known risks at the property, for example whether a potential defect has ever been reported to you.

If not, there may not have been a duty on you to carry out inspections and as a result notice this defect. If the tenant does make a claim and relies on expert evidence in support of this, the case of *Elizabeth Rogerson v Bolsover District Council* highlights the importance of a landlord calling its own evidence if it disagrees with the tenant's evidence.

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# Fixed Term Tenancies, Break Clauses and Section 21 Notices

## *Livewest Homes Limited (Formerly Liverty Limited) v Sarah Bamber* [2019] EWCA Civ 1974

Registered Providers will welcome the decision of the Court of Appeal in this case, which examined the effect of a break clause in a 7 year fixed term tenancy which had incorporated a starter period of one year.

### Background

A fixed term tenancy in this context is an assured shorthold tenancy for a fixed period. Fixed Term Tenancies ("FTTs") were introduced and encouraged by the Government following the introduction of the Localism Act 2011 with the intention of replacing lifetime assured tenancies. In order to comply with the Tenancy Standard, social landlords should only offer FTTs for periods of at least 5 years to general needs tenants.

During the fixed term, the usual "no fault" section 21 Notice will not be effective and, as such, some FTTs are drafted to incorporate probationary periods of 1 or 2 years, whereby the FTT can be brought to an end prematurely by a break clause and service of a s21 Notice.

There was potentially difficulty with the above approach as FTTs of over 2 years let out by Registered Providers are also subject to section 21(1B) of the Housing Act 1988 which states that a Court may not make an order for possession unless the landlord has given the tenant not less than 6 months' notice in writing confirmation that the landlord does not propose to grant another tenancy on expiry of the FTT and giving them information of how to obtain help or advice (in particular from the landlord). This is popularly known as the "Minded to" notice.

### The facts in this case

Ms Bamber benefited from a 7 year FTT which included a probationary period of 2 years. Livewest served a s21 Notice in compliance with the break clause and during the probationary period to terminate the tenancy due to anti-social behaviour.

It did not serve a "minded to" notice.

Ms Bamber argued that the s.21 notice could not be effective due to s21(B) Housing Act 1988 which stipulates that a "minded to" notice is to be served at least 6 months before a FTT ends.

## Decision

The Court or Appeal found that service of a s21 Notice during any probationary period of a FTT in compliance with the terms of the tenancy will act as service of a break notice; the tenancy would thereafter be treated as a periodic assured shorthold tenancy following expiry of the s.21 notice. The Court found that the 6 month "minded to" notices as set out in s21(B) were only relevant where a FTT was due to expire at the end of the fixed period (i.e. after 7 years in the Bamber case) and accordingly s21(B) will not apply in any case where RPs look to end a FTT during its probationary period using the s.21 notice.

## Lessons for RPs

Many RPs have started to switch back to lifetime assured tenancies due to the difficulties and the extra resources needed to operate FTTs, however for those RPs that are still using FTTs and in particular those RPs that are using FTTs which incorporate a probationary period, the clarity that this case brings is welcome news.

## For more information, please contact Anna Bennett:

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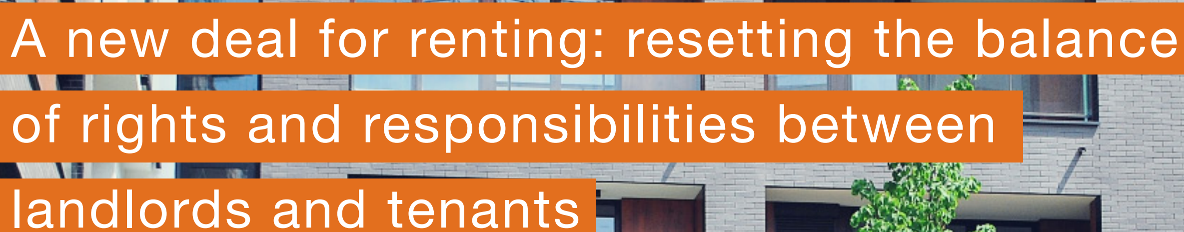

# A new deal for renting: resetting the balance of rights and responsibilities between landlords and tenants

**The Government should exempt social housing from its plans to abolish Section 21 and the rest of the assured shorthold tenancy regime along with it writes Lee Russell.**

The proposals in the MHCLG's consultation: *A new deal for renting: resetting the balance of rights and responsibilities between landlords and tenants*, mean that landlords will be unable to evict tenants without giving a reason. Instead, they will use one of the grounds for possession currently available or one of the new or amended grounds proposed in the consultation paper.

There are several reasons the social housing sector should be exempt from the proposed changes, not least because private registered providers ('PRPs') are already subject to significant regulation by the Regulator of Social Housing under the Regulatory Framework. Social landlords are already well used to ensuring that their decision-making processes are reasonable, proportionate and ultimately subject to judicial challenge if not. Take for example the requirements of Part 3 of the Pre-Action Protocol for Possession Claims by Social Landlords not to mention the obligations under Article 8 of the ECHR and the Equality Act.

It is also worth looking at what others have done.

Scotland was the first to replace their equivalent of the assured shorthold tenancy ('AST') with the private residential tenancy in 2017. In recognising the special requirements of social landlords, they are exempt from using the new tenancy. Why should PRPs in England be treated any differently?

The proposals would also give rise to some odd outcomes. For example, they would result in the incongruous position of a Local Authority tenant, who should arguably have the highest degree of tenure security, actually having the lowest as a result of a Local Authority's ability to offer an introductory tenancy (which would not be affected by the abolition of Section 21).

The importance of the AST regime is paramount in the sector, particularly so in relation to supported housing and homelessness arrangements with partner Local Authorities. Private sector leasing schemes provide much-needed housing options for the homelessness sector and rely on the use of ASTs and the Section 21 process to ensure possession can be obtained before leases with private owners expire. Intermediate market rent products which help keyworkers and other lower paid professionals to rent in otherwise expensive areas or offer them the opportunity to buy (Rent to Buy, Rent to Save etc.) would become problematic.

Landlords are likely to be far more cautious about these sort of schemes should the proposals be implemented.

In respect of anti-social behaviour, starter tenancies (which also rely on the provisions of Section 21) remain an important tool in the social landlord's armoury to tackle ASB. They allow tenants an opportunity to demonstrate their ability to manage and comply with the terms of a tenancy and ensure that the landlord can recover possession relatively quickly if not.

The proposals at present fail to adequately guarantee that social landlords would be able to regain possession efficiently in situations they currently employ ASTs. The proposed additional grounds for possession would not be available in many situations where social landlords currently use ASTs to good effect.

By way of quid pro quo the Government has promised to speed up the court process in possession claims. However, the Government failed to pledge any further investment in the Courts in last month's Spending Round and the HM Courts and Tribunals Service's modernisation project for possession proceedings has not yet even begun. The proposal to establish a specialist Housing Court to reduce delays to possession claims is also awaiting a decision by the Government.

The courts are full of complex and lengthy proceedings involving housing issues and possession claims in particular. These proposals would only serve to exacerbate that situation. Most people working in the social housing sector know that it already takes an inordinate period of time to conclude possession proceedings and it is difficult to see how these proposals will not just mean longer delays and more pressure on an already over-worked court system. No specific proposals have, as yet, been made to deal with that.

The consultation's suggestions will undoubtedly make it more costly for landlords to recover possession as well. This means an increase in legal budgets for social landlords which, in turn, results in less money to spend on other projects including building new affordable housing. More generally, the proposals threaten to reduce the supply of rented homes in both sectors.

The reality is that the Government needs to sort out the court system before it contemplates reform to the law - all the rights in the world are of no use, for landlord and tenant alike, if they cannot be enforced in an effective, timely and cost-efficient way through the justice system.

For more information, please contact Lee Russell:

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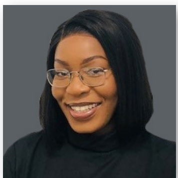
# Faces behind the Devonshires Team: What we've been up to...

Nick Billingham, Head of Department:

"I have been advising a lot of our clients on implementing the forthcoming 2020 Rent Standard which will come into effect from April 2020. The new Rent Standard is good news as it marks the end of 4 years of rent reduction. However, it brings with it some technical issues which RPs must get right first time. I suspect between now and April, a lot of my time will be spent on training and advice on this subject."



Amirah Adekunle-Fowora, Paralegal:

"I have recently joined the HMPL Team and I am assisting Anna Bennett on various cases, ranging from access injunctions to disrepair. I'm currently studying for my LPC. I'm also preparing for my first trial surrounding Succession."

Donna McCarthy, Partner:

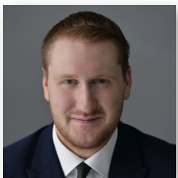
"I have been dealing with a marked increase in issues related to adult safeguarding and advising a number of landlords in respect of vulnerable residents in both supported and general needs accommodation."

Thomas Malony, Paralegal:

"I have been working on a number of disrepair matters as well as anti-social behaviour injunctions. I have also been honing my baking skills and recently took 2nd prize in the firm's annual Bake Off."

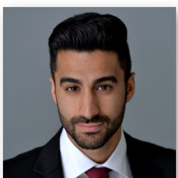
Abbie Grimwood, Trainee Solicitor:

"I have just joined the HMPL team as a Trainee Solicitor and have been assisting Donna with her case load including working on an injunction case, a judicial review case and some possession cases."



Lee Russell, Solicitor:

"I have spent the last few months dealing with prosecutions from all angles, some tricky contractual disputes on fire safety works alongside training clients on the new Liberty Protection Safeguards."



Arjen Xani, Paralegal:

"I have been dealing with a number of succession matters and have joined the advice line helping Housing Associations and RPs with any housing related queries."

Anna Bennett, Solicitor:

"I have welcomed new paralegals Emily Cross and Amirah Adekunle-Fowora onto the team, both Emily and Amirah have hit the ground running and are already working on the full gambit of possession claims, injunctions and disrepair disputes and will no doubt prove an asset to the HMPL team for the long term."

Tackling ASB and Nuisance Conduct
18 September 2019
Half day session

HMPL Update
8 October 2019
Half day session

Tackling Tenancy Fraud
27 November 2019
Half day session

Tenants' Rights: A Guide for Social Landlords
15 January 2020
Half day session

Tackling Non Occupation, Subletting and Disputed Succession Claims
23 January 2020
Half day session

Mental Health and Housing
27 February 2020
Half day session

HMPL Update
26 March 2020
Half day session

Tackling Tenancy Breach
2 April 2020
Half day session

Dealing with Trespassers, Squatters and Adverse Possession Claims
7 May 2020
Half day session

A Landlord's Guide to Dealing with Claims for Disrepair, Fitness for Human Habitation and Statutory Nuisance
11 June 2020
Half day session

## Legal Updates and Seminars

Devonshires produce a wide range of briefings and legal updates for clients as well as running comprehensive seminar programmes.

If you would like to receive legal updates and seminar invitations please join our mailing list:

**www.devonshires.com/join-mailing-list**

# Helplines:

*Why not give us a call?*

Housing Management Helpline

**0800 0854 529**

Monday - Friday, 9am - 5pm

Leasehold Management Helpline

**0845 994 0091**

Monday - Friday, 9am - 5pm

Devonshires