Devonshires solicitors

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Welcome

Welcome to the winter edition of the HM Brief. We bring you winter cheer with news of some of our recent successes. Our clients continue to face Article 8 Human Rights Act defences and in this issue Ruth Hills takes this opportunity to report on Westminster v Holmes, one of the first High Court Cases following Pinnock and Powell. We have no doubt this will go a long way to helping our clients resist this type of defence in the future. We also welcome back Alex Wyatt to the expert's chair in this edition of Ask the Expert. Alex considers the impact of bankruptcy and Debt Relief Orders on possession claims.

Nick Billingham, Partner and Head of Housing Management

A summary right to possession: *Holmes v Westminster CC [2011] EWHC 2857*

This case is welcome news for social landlords who are keen to avoid the difficulties of prolonged and expensive litigation presented by Human Rights Act challenges raised when social landlords seek possession. The High Court found that the County Court Judge was fully entitled to rely on written evidence explaining why possession was appropriate and that it was not necessary to go through a lengthy and costly trial process involving cross examination of those witnesses.

Mr Holmes is a man in his early fifties with a history of mental health problems which caused him to have priority need for accommodation. He was housed as a non-secure tenant by Westminster under their homelessness duties. Westminster sought possession after Holmes allegedly assaulted two housing officers as they sought to give him a letter about alternative accommodation. Westminster applied for possession on a summary basis, namely on written evidence so as to avoid delay and expense. A possession order was made on that basis in the County Court but Holmes appealed the possession order to the High Court

This case was one of the first High Court appeals to follow in the wake of the Supreme Court decisions in the cases of Pinnock and Powell and confirms that if tenants do try to defeat a landlord's claim for possession by relying on Article 8 of the Human Rights Act they will find it very difficult. It reinforces that Courts are correct in deciding whether such defences should be allowed without the need for a full trial.

Key points

1. Possession procedure: CPR 55 intends that possession claims will normally be determined without the need for a trial namely on a summary basis where the judge is only expected to read the written evidence submitted. (§9 citing CPR 55.8)
2. Proportionality & exceptionality: The threshold for a tenant raising an arguable case on proportionality (ie an article 8 defence) is a high one which will 'succeed in only a small proportion of cases' (§27, citing Powell §35). The Supreme Court in Powell in a 'statement of law comes close, although it has been disavowed, to espousing a test of exceptionality'. (§28 citing Powell §37)
3. Disputed facts: What mattered in this case was 'whether or not the Council had reasonable grounds to believe that he (Holmes) had behaved in the way described by its officers. In order to base a possession order on a tenant's conduct, it is not necessary to go through a trial process to establish criminal guilt, or even to prove a civil wrong on a balance of probabilities. Conduct may be legitimately regarded as unacceptable, on the part of a tenant, without necessarily passing either of those tests'. (§37)
4. Breach of policy: In Barber v Croydon LBC [2010] HLR 26 Patten LJ observed that 'the Council behaved … as though its policies on vulnerable people had no application and the decision reached had been' perverse on the facts (§15 citing Barber §45). But in the instant case Westminster had had regard to its own Anti-Social Behaviour Policy (§45) and the Recorder was entitled to conclude that he was 'unable to identify any cogent evidence to show that there has been any breach of policies'. (§46)
5. Disability discrimination: The Recorder 'rightly noted that there was a need for cogent evidence of breach of policies or duties under statute before such a defence can carry weight' (§47) and he was entitled to conclude that 'there was no cogent evidence to demonstrate a breach of statutory duty'. (§49)
6. Conclusion: The Recorder was entitled to conclude that he 'could reach a fair outcome without the need for oral evidence' and his approach was 'in accordance with the public

"In order to base a possession order on a tenant's conduct, it is not necessary to go through a trial process to establish criminal guilt."

policy requirements, under CPR Part 55, to the effect that there should be a summary determination wherever possible.' (§34) The Recorder was 'fully entitled to come to the conclusion … that there was no need to reject what has become the standard summary procedure for possession cases and to adopt, contrary to normal practice, a trial process involving a determination of whether or not Mr Holmes had committed either a criminal or civil assault'. (§40, 51)

Jon Holbrook, instructed by Ruth Hill of Devonshires, appeared for Westminster City Council in the County Court and High Court.

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Successful claim for possession after tenant's son is caught out

Devonshires successfully recovered costs of £25,000 for a Housing Association client in relation to a claim for possession. The Association had pursued possession of a four bedroom house following the death of the tenant. The tenant's son claimed that he was entitled to succeed to his mother's tenancy. The Association did not accept the son had been living with his mother before she passed away. Therefore, a claim for possession was brought.

As the case progressed, it became apparent that the tenant's son owned a separate property and that the deceased tenant had also owned a separate property. Devonshires was successful in having the son's legal aid withdrawn because of this. As the case approached trial, evidence was also obtained that the son actually held a tenancy elsewhere which proved he was not living with his mother at the time of her death and, therefore, he could not succeed to the tenancy. Given the overwhelming case against the son, he agreed to accept a possession order and to pay the Association's costs of £25,000.

To ensure that the costs were paid, a charging order was obtained against the mother's property. This was then sold as part of the process of distributing her estate to the beneficiaries under her will - her son being one of the beneficiaries. The property was sold so as to discharge the charging order and £25,000 was paid out to the Association.

The case highlights the importance of identifying any assets a defendant has and making sure that the appropriate method of enforcement is used to make sure costs are recovered where at all possible.

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Can a Landlord limit its ability to serve a Notice to Quit?

The Supreme Court has now considered the case of *Berrisford v Mexfield Housing Co-operative Limited*. In a past edition of HM Brief, we commented on the Court of Appeal decision where Mexfield Housing Co-operative Limited had successfully argued that they were not restricted in their ability to serve a Notice to Quit on Ms Berrisford who was occupying one of its properties.

By way of summary, Mexfield Housing Co-operative Limited is a mutual housing association and Ms Berrisford was one of its members. She signed an occupancy agreement which was expressed to be a monthly tenancy. The agreement provided that Ms Berrisford could determine on one month's written notice but that Mexfield was only entitled to end the agreement in four specific circumstances. Although none of these four circumstances applied, Mexfield served one month's Notice to Quit. It was Mexfield's case that the agreement was a monthly tenancy at common law and that it was not restricted in its ability to give Notice to Quit. This was accepted by the Court of Appeal.

Ms Berrisford appealed this decision and asked the Supreme Court to decide on a number of issues, most importantly, whether it was a tenancy, whether it could be terminated by one month's notice and whether she was entitled to remain in possession.

The Supreme Court decided that in the absence of any indication to the contrary the tenancy that was granted from month to month was a monthly tenancy and might be determined by one month's notice. However, the Court had to consider the circumstances of the agreement and in this case the purpose of the agreement between the parties was to provide Ms Berrisford with a home. It was clear to the Court that the agreement could only be determined by Mexfield in defined circumstances set out in the agreement. It was a long established legal principle that an agreement for an uncertain term could not be a tenancy. Under Section 149(6) of the Law of Property Act 1925 the tenant had a tenancy for a term of 90 years determinable after the tenant's death by one month's notice from the landlord. During the tenant's life the agreement could only be determined relying on the relevant clauses.

This case has implications for Cooperatives and re-establishes the principle that where you have an agreement that restricts your ability to give notice (save for certain circumstances such as tenant nuisance or rent arrears) this will have to be established before a notice can be served. It is important to ensure that your agreements are reviewed and checked carefully to avoid the pitfall of creating a similar lifetime tenancy. For those existing tenants it is important to ensure that the facts of any breach are made out before the notice is served particularly in light of proportionality arguments which could be raised following on from the cases of *Manchester City Council v Pinnock* and *Hounslow v Powell*.

"It was the case of Mexfield that the agreement was a monthly tenancy at common law and that it was not restricted in its ability to give Notice to Quit."

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Donna is currently advising a number of Coops on amendments to their tenancy agreements in the wake of this judgement.

Injunction with a power of arrest and exclusion order against tenant's violent partner

Devonshires obtained an injunction with a power of arrest and exclusion order for a Housing Association client against the partner of one of its tenants. The tenant's partner had targeted three neighbouring tenants and their partners within the same block of flats and subjected them to violent threats and abuse over a period of twelve months. The perpetrator lived elsewhere and visited his partner on regular occasions. Many of the incidents had been witnessed by the victims' children as the incidents occurred while the victims were taking their children to and from school. The situation came to a head when the perpetrator made serious threats of violence that resulted in the police arresting and charging him.

The victims had kept detailed diary sheets over the twelve months and some of the incidents had also been caught on the Association's CCTV in the block. The victims were also all interviewed with a housing officer present. An application to court was then prepared and details of the case were provided in a witness statement prepared on behalf of the housing officer. The statement explained what the victims had experienced and also exhibited the diary sheets they had kept.

"It shows that courts are willing to deal with the applications without the defendants being made aware, if there are threats of violence."

An application for an injunction was then made to court without telling the perpetrator as it was feared if he did become of aware of it before an injunction was in place, he would threaten the victims again. The Judge was happy to make an injunction order restraining the perpetrator's behaviour so that he was not allowed to make threats or cause a nuisance. Crucially, he was also excluded from the local area around the block of flats in which the victims lived.

The case shows that courts are willing to make exclusion orders, especially if the area the person is being excluded from is not their home. It also shows that courts are willing to deal with applications without the defendants being made aware, if there are threats of violence and good reason to fear that giving the perpetrator notice will inflame the situation and put others at risk.

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Possession order against tenant for sons' anti-social behaviour

Possession proceedings were issued against a tenant due to anti-social behaviour caused by her two teenage sons in the local area. This included hanging around in gangs, robbery, shoplifting, joy riding mopeds, shouting abuse, drinking and fighting.

Devonshires also obtained without notice injunctions against the tenant and her eldest son shortly after the claim was issued because her sons were involved in a fight outside the property. The injunctions had powers of arrest attached and the son was arrested for breach within a couple of weeks when he swore and spat at police officers on the Estate where the property was located. The son was found guilty of the breach at the committal hearing which was used as evidence at the trial.

The tenant defended the claim for possession on the basis that she did not know what her sons were doing, couldn't control them and it wasn't her causing the anti-social behaviour. Devonshires worked closely with the local police force and obtained full and detailed police disclosure about the tenant and her sons. This included details of every relevant incident, how many times they had been called to the property over previous 3-5 years and how many times her sons had been arrested. This evidence, which the police provided at trial, proved invaluable as no direct witnesses were prepared to give evidence out of fear of repercussions.

The tenant also tried to challenge the landlord's anti-social behaviour policy which she alleged had not been complied with. In view of this line of defence Devonshires prepared a detailed statement explaining where the policy had been complied with and explaining where and why it had not in other parts.

The trial was part heard after two days with two days remaining when the tenant's youngest son was arrested for criminal activity. The landlord used this as evidence that the tenant was not able to control her household. Although the tenant also had a young son, the Judge made an outright possession order due to the evidence of the tenant's inability to control her household and the fact that she knew what the consequences were but did not take steps to deal with it.

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Criminal v Civil Standard of Proof

Earlier this year, Devonshires acted for a Housing Trust on possession proceedings against a tenant living in a ground floor flat in Tottenham.

There had been some friction between the Defendant and his neighbour, Mrs M, who lived in a flat on the first floor, caused by the Defendant leaving shoes and other items in the communal corridor, playing loud music and being verbally abusive.

There were also historical incidents between the Defendant and members of staff of the Housing Trust where the Defendant had been confrontational and abusive.

Matters came to a head between the Defendant and Mrs M in May 2010. Mrs M returned home with some members of her family for a wake after a family funeral. Mrs M and her family were outside of the flats, having arrived in a number of taxis. They laid out some wreaths from the cemetery in the garden. The Defendant returned to the flats and pushed past Mrs M. Mrs M asked him to "show some respect" and after an exchange of words, the Defendant spat in Mrs M's face and punched her. A scuffle ensued and members of Mrs M's family were also attacked by the Defendant.

The Police arrested and charged the Defendant with assault. The Housing Trust instructed Devonshires and we swiftly obtained an urgent Injunction against the Defendant, excluding him from his home with immediate effect. We then commenced possession proceedings on behalf of the Trust.

The Defendant remained defiant throughout the proceedings, repeatedly denying that he had harmed Mrs M or caused a nuisance.

Meanwhile, the criminal proceedings relating to the assault continued to trial and, to the dismay of

Mrs M and her family, a jury found the Defendant not guilty of assault.

Notwithstanding this, possession proceedings continued and Devonshires assisted the Trust in obtaining detailed witness statements from each witness. At trial at Central London County Court, the witnesses gave compelling evidence and the Defendant was vigorously cross-examined by Counsel instructed by Devonshires.

Whilst giving judgment in the case, the Judge noted that Defendant had not been convicted of the assault in the criminal court but explained that this was "not problematic bearing in mind the different burdens of proof". The criminal court required the assault to be proved 'beyond reasonable doubt', which is a higher burden of proof compared to 'on a balance of probabilities' in civil proceedings. The Judge decided that, on a balance of probabilities, the Defendant had assaulted Mrs M.

the court, the Judge ordered a Possession Order, and finding it reasonable to do so, he made the order on an outright basis. The Judge commented that the Defendant's behaviour was "intolerable and could not be tolerated in our society".

The success of this case shows that even where a perpetrator of anti-social behaviour is not convicted of an offence in the criminal courts, all is not lost. On the contrary, if sufficiently detailed witness statements are prepared and witnesses who have been kept on board throughout proceedings give good, reliable evidence at court, the desired result can be achieved.

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"Even where a perpetrator of anti-social behaviour is not convicted of an offence within the criminal courts, all is not lost."

The Judge was impressed by the witness statements submitted in support of the claim, which were a lot more detailed than the statements taken by the Police. Perhaps suggesting a reason as to why the result was different in the criminal court, the Judge stated that he understood that there is a difference between a police officer taking a statement immediately after an incident and a solicitor taking a witness statement in calmer circumstances.

The Judge was particularly impressed by the evidence given by the housing officers of the Trust and especially the contemporaneous records of the housing officers' encounters with the Defendant, which detailed incidents clearly and in stark contrast to the Defendant's version of events.

In light of the Judge's finding of fact in relation to the assault and the impressive evidence before

Landlord's determination finally secures a quiet life for elderly neighbours

At a hearing at Clerkenwell & Shoreditch County Court on 13 September 2011 a tenant had his second application to suspend a warrant of eviction dismissed. He will be evicted within the next 4 to 6 weeks.

The tenant has terrorised neighbours and other residents of the landlord for over six years with drunken behaviour, parties, verbal abuse and harassment, to name just some of his offences. He is also well known to police for general drunk and disorderly behaviour, verbal abuse, indecent exposure and threatening and violent behaviour.

He became a tenant in November 2005 and first complaints were received in December 2005. The landlord attempted everything including an anti-social behaviour contract, injunction, undertaking and applying to commit the tenant to prison for contempt of court for breaching the injunction but to no avail. A Notice of Seeking Possession was served in September 2009 and instigated legal proceedings for possession in February 2010.

Two years later the landlord has finally been given the go ahead to evict him.

This tenant was given numerous last chances by the court. Whilst there is a need to protect defendants' rights, in this case the court tipped the balance too far in favour of the tenant, thereby perpetuating the suffering of his neighbours.

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Ask the expert: Insolvency and rent arrears

Alex Wyatt, Senior Solicitor in the Housing Management Team, takes the chair in this edition's Ask the Expert slot in which readers raise typical (and topical) day to day housing management "posers".

In recent years we have seen an increase in the number of queries we receive about insolvency, and how it impacts on rent arrears. This has historically related to bankruptcy and more recently Debt Relief Orders (DRO). However, the position is no way near as bad as many landlords fear.

The idea of insolvency is to allow the debtor a fresh start, free from their debts. Those debts left unpaid at the end of the insolvency are written off and are unenforceable by the creditor. How does this relate to a landlord wanting to seek a money judgement for the arrears and / or possession of the property?

Can rent arrears be included in bankruptcy and DRO?

The answer to this is yes. The rent arrears themselves are a type of debt which can be included in personal insolvency. However, only arrears owed at the date the insolvency/DRO was made are included; arrears after then are not.

How do bankruptcy and DROs impact on money judgements and money claims for rent arrears?

As rent arrears can be included within the insolvency/DRO it does mean that a landlord's ability to recover rent arrears through a money judgement is prevented. Any rent arrears owed at the time of the bankruptcy or DRO are caught and cannot be recovered through the courts. It does not matter if the landlord has already obtained a money judgement prior to the insolvency/DRO.

How do bankruptcy and DROs impact on possession proceedings for rent arrears?

The fact that rent arrears can be included in personal insolvency/DRO does not mean that all is lost for a landlord. Through a series of cases the courts have confirmed that bankruptcy and DROs do not prevent a landlord from seeking possession for rent arrears, even where the arrears are included in the insolvency.

The first of these cases was that of *Harlow District Council v Hall*. This case related to a tenant with rent arrears who applied for bankruptcy after a possession order had been made, on rent arrears grounds. The Court found that the bankruptcy did not defeat the possession order.

The key point is that the Insolvency Act prevents "remedies against a debt. A money judgment is a "remedy against a debt". However, according to *Harlow v Hall*, the possession proceedings are not a remedy against a debt. They are a remedy against land. The landlord is seeking possession of land (albeit for non-payment of rent), not seeking to recover the arrears.

> *"A landlord can still seek possession for rent arrears, even if a tenant includes those arrears within the bankruptcy or DRO."*

In July of this year, two cases have given landlord's further guidance on whether the timing of insolvency matters and what the position is regarding DROs. Those cases were *Sharples v Places for People* and *Godfrey v A2 Dominion Homes [2011] EWCA Civ 813*, which were heard together.

The Court of Appeal confirmed that the timing of the insolvency was not relevant. It did not matter whether the insolvency pre-dated the issue of the possession claim; post dated the claim but was before a possession order being made; or came after the possession order was made. The court also found that there was no difference between bankruptcy and DROs. Both prevented "remedies against a debt" and possession proceedings were possession of land, not a remedy against a debt.

Therefore, a landlord can still seek possession for rent arrears, even if a tenant includes those arrears within the bankruptcy or DRO. However, the landlord cannot ask for or get a money judgment for the arrears.

Practical points

Since insolvency/DROs do not prevent possession proceedings for rent arrears, landlords should write off those arrears from the rent account and should proceed into possession action as they would against any other tenant.

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Claimant in disrepair claim agrees to withdraw claim in the middle of a trial

The tenant, represent by solicitors, issued a claim for damages and specific performance arising out of disrepair against a Local Authority. The claim was valued by the tenant as being worth up to £15,000 plus their costs. However, the particulars of the claim included allegations which were not capable of amounting to disrepair - or very minor issues of disrepair - and were vague. By comparison, Devonshires valued the tenant's potential damages in the low hundreds

The tenant made an initial offer of settlement of £6,000 and then a second offer of £5,000. Both offers were refused. Devonshires argued that if the tenant was prepared to reduce her claim by two thirds then it was clear that the claim had been inflated to obtain allocation to the fast track so that the tenant's solicitors could recover their costs. But in any event the offer of £5,000 was still inflated and far in excess of the actual value of the claim which was in the low hundreds.

second day. Devonshires withdrew all offers of settlement and invited the claimant to withdraw the claim with no order as to costs. The tenant finally consented to this offer.

It is unusual for a disrepair claim to go to trial but in this case the Local Authority felt that they had to take a stand and refuse to settle on the terms proposed by the tenant. There was clear evidence that the claim was of minimal value and the tenant had unreasonable expectations. Further, it became evident that the tenant's solicitors were running the claim solely in an effort to obtain their costs.

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"The tenant continued to seek an excessive sum, even though they risked being dismissed at trial."

Protracted correspondence took place between the parties, the point of which was to force the tenant's solicitor to revalue their client's claim on a more realistic basis. Despite these negotiations, the tenant continued to seek an excessive sum, even though they risked being dismissed at trial.

In an effort to save costs, Devonshires made a without prejudice offer of settlement of £1,500 in view of the fact that trial was imminent. The tenant refused this offer and the claim went to a fast track trial.

At trial it became clear to the court that there was no merit in the claim due to the Local Authority being able to give evidence of the work done at the property and efforts taken to address the disrepair raised by the tenant. Additionally, it became apparent that the tenant was an unreliable witness and was exaggerating the claim. The trial did not conclude after the first day and was listed for a

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19 January 2012
Successfully Tackling Anti-Social Behaviour: All You Need to Know

8 February 2012
Dealing with Capacity in Housing Management

14 March 2012
Housing Law Update

19 April 2012 (am)
A Practical Guide to Rent Possession Claims for Housing Officers

19 April 2012 (pm)
Practical Advocacy: A Step by Step Guide on How to Present Cases in the County Court

28 June 2012
Dealing with Disrepair: A Practical Guide for Social Landlords

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