

Housing Management Brief

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Welcome

It is looking like a very busy year ahead for housing managers and for us housing lawyers. We have the prospect of the Localism Bill coming into force in April; new ASB measures later in the year; and every week seems to see a new announcement from Government about social housing policy. Inevitably this edition of HM Brief focuses on key aspects of the government's housing agenda as they affect housing management. But we also have our usual reports on recent cases we have been involved in, some of which grapple with our old friends Pinnock and Article 8, and we welcome back Neil Brand as our expert in this edition's Ask the Expert slot. Happy reading!

Nick Billingham, Partner and Head of Housing Management

Localism and the Housing Agenda: All Change Please

The Localism Bill was published just before Christmas and provided some of us with stimulating festive reading.

Set to become law in April, the Bill covers a huge area of social housing and local authority law and practice. From a shake-up of local authority accountability, local referenda, community asset lists, planning law changes, and extensive new powers for London's Mayor to new affordable rent tenancies, revisions to the homelessness laws and a new tenancy mobility scheme - there is an awful lot to take in.

And Grant Shapps and Eric Pickles (or their civil servants at least) have got their work cut out getting the detail behind the new provisions drawn up in advance of the Act coming into force. Hence the series of weekly announcements and open letters emanating from CLG.

cases where the landlord has an unqualified right to possession. So, it will be by no means a foregone conclusion that tenants will have to move up or out at the end of their fixed term affordable rent tenancy.

Some good news for social landlords lies in the proposed changes to prevent tenant complaints going to the ombudsman unless they are supported by a local councillor, MP or tenant panels. This will cut down on the number of unmeritorious appeals which currently end up with the ombudsman.

And amendments to homelessness legislation will mean that local authorities will be able to discharge duty by arranging accommodation on assured shorthold tenancies in the private sector; at the moment such an offer does not have to be accepted by the homeless person.

“Grant Shapps must be cursing the UK Supreme Court for bowing to the European Court in Pinnock.”

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By the time you read this, the new affordable rent framework will have been published in draft. This will herald the new dawn of fixed term tenancies and 80% rents. We know the amount of grant available will be pretty minimal and it remains to be seen how many associations will be able to make the combination of higher rents and grant allocation stack up for funding new development. We already know that in some regions 80% of market rent will be nowhere near high enough to provide a viable funding stream.

And what of fixed term tenancies? Grant Shapps must be cursing the UK Supreme Court for bowing to the European Court in Pinnock. Subject to further clarification in the judgments awaited (as we go to print) in *Salford -v- Mullen* and its associated appeals, it is already established law that defendants are entitled to ask for a proportionality hearing in possession

It will be some time before we can assess whether these changes (and we have highlighted just a few here) will have the desired effect of supporting new development whilst making sure that existing social housing goes to those most in need. What is fairly certain is that the passing of power to local authorities and local people means that if it all goes wrong, central government will not accept the blame.

For further information on the Localism Bill and the forthcoming changes to housing law please contact:

Nick Billingham on 020 7880 4272 or nick.billingham@devonshires.co.uk

Pinnock in Action: Landlord Fights Back

Devonshires were recently successful in obtaining an order in the Wandsworth County Court dismissing an application to set aside a possession order, where human rights and proportionality arguments had been raised.

The application, which had been listed for a one day hearing, had been made by the occupant of the property, who had refused to leave after the tenant, his wife, had served notice to quit to end her tenancy as a result of domestic violence and had subsequently agreed to an outright possession order at the original court hearing on 18 August 2010. The occupant instructed a local law centre to act on his behalf on receiving the notice of the eviction date.

Whilst the landmark Supreme Court Judgement of *Manchester City Council v Pinnock* had not been handed down at the time the application was made, the outcome of the case had clearly been anticipated by the occupant's solicitors

of its actions in its decision to seek possession.

At the hearing, the Circuit Judge heard strong counter-submissions from the landlord's Counsel, Mr Byron Britton, that its decision to seek possession was the result of the balancing act which naturally ensued from having a limited supply of housing stock available to it, the highly serious allegations of domestic violence that had been made against the occupant, and the legitimate rights of ongoing lawful occupiers that it had a duty to consider. In addition, the landlord had a "victim centred approach" to managing domestic violence cases which would be substantially undermined in the event the occupant's application was to succeed, and it would be highly inequitable if the occupant was able, by virtue of his own acts of domestic violence, to derive a benefit from his actions by the tenancy being transferred into his name.

"This case serves to illustrate that the judgment in Pinnock is now starting to feature in defences to possession claims..."

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who submitted that the landlord had not considered the occupant's Article 8 rights under the European Convention of Human Rights in seeking possession and that the decision to do so was disproportionate. Given that possession was obtained on the basis of the tenant's notice to quit, and the landlord's right to possession was therefore unfettered, there was little choice for the applicant but to seek to base the application to set aside on Pinnock.

In support of the argument that the decision to evict was disproportionate, it was submitted that the occupant had occupied the property as his home for many years and was vulnerable as a result of multiple medical ailments.

The landlord's response on the issue of proportionality was that, contrary to what had been alleged, the landlord had considered the occupant's Article 8 rights and the proportionality

On considering both parties' pleadings and submissions, the Circuit Judge found that it had been entirely proportionate and reasonable for the order for possession to have been granted to the landlord on 18 August 2010 and that in the circumstances the occupant's application to set aside the possession order should be dismissed. The Judge also deemed it appropriate to grant an order for costs against the occupant, also on the basis of the landlord's entirely proportionate and reasonable conduct in the course of the proceedings.

This case serves to illustrate that the judgment in Pinnock is now starting to feature in defences to possession claims where the landlord has an unfettered right to possession and gives an indication as to how judges are likely to interpret Pinnock in the County Courts.

It suggests that where landlords have fully considered their reasons for seeking possession, and have shown that the personal circumstances of defendants have been considered, courts will be willing to grant or uphold orders for possession. A landlord who has conducted an assessment of proportionality on similar lines to an assessment of reasonableness where possession is sought on discretionary grounds, and has justified to itself on this basis its decision to seek to evict in advance of the issue of proceedings, should therefore have little to fear from Pinnock.

Neil Brand and Sam Swann in the Housing Management Team acted for the Landlord in this case and can be contacted for more information on:

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Possession at a First Hearing Following a Proportionality Defence and a s.21 Notice

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Devonshires were recently instructed to represent a housing association in a possession claim against joint assured shorthold starter tenants using the accelerated procedure. The housing association brought possession proceedings after discovering that one of the joint tenants had been accused of a sexual assault on a neighbour's brother in the premises. Devonshires were instructed as the defence alleged the possession action was a breach of the tenants' human rights.

They stated that losing their home for a single breach of their tenancy, for which they had already been convicted and punished through the criminal courts, was unreasonable and disproportionate. The tenants also defended on the basis that their landlord had failed to give them two warnings, thereby failing to follow its policies and procedures.

The tenants originally appealed the decision to serve a s.21 Notice, which was heard by the housing association's appeals panel. The panel decided that even though only one incident had occurred and the tenants had not been given two warnings, in light of the serious nature of the incident and the fact that a recent incident of anti-social behaviour had occurred, it was appropriate to seek possession.

The hearing was just two days before the judgment in *Manchester City Council -v- Pinnock* was due to be given. It was considered that issues arising out of the judgment in Pinnock could be applicable to this case so the court was asked to adjourn the proceedings to allow the parties to consider the judgment and to ensure the court dealt with the case effectively. The court granted our request and adjourned the matter for a month.

The extra time allowed us to consider Pinnock's impact and to file and serve a lengthy witness statement ensuring that we produced evidence to show that the aim of the eviction was legitimate and that an eviction would be a proportionate means of achieving that aim.

During the adjournment we were able to significantly improve the quality of the association's evidence. In obtaining certificates of convictions from the Magistrates' Court we were able to prove that the tenant also had a previous sexual conviction in relation to a minor. We also obtained evidence from a neighbour, who informed us of other and severe incidents of anti-social behaviour, harassment, threats to kill and even a conviction against one of the tenants for using threatening, abusive or insulting words.

At the return hearing, the association was able to prove to the court that the aim of the eviction was legitimate, in order to protect the other residents

of the block from the anti-social behaviour of the tenants and possession of the premises was granted at the first hearing.

This case highlights the importance of effective case management and preparation for hearings. In this instance, we worked with the association to improve their quality of evidence so as to effectively deal with, and knock out, any defence summarily.

For further information please contact:

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Dishonesty That Didn't Pay Off

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London and Quadrant Housing Trust, represented by Devonshires, successfully obtained a possession order against two tenants who had lied about their circumstances in order to get a larger home.

The two defendants in the proceedings, who were married, had a secure tenancy of a local authority property. They agreed to exchange homes with an assured tenant of London and Quadrant Housing Trust who lived in a large four bedroom house. In the mutual exchange application form, the defendants stated that their four children and the husband's elderly mother were living with them and would continue to do so. London and Quadrant Housing Trust approved the application and allowed the defendants to exchange to the four bedroom family home.

However, soon after, the trust discovered that for almost a year before the exchange, the defendants' four children had been in the care of the local authority and living elsewhere. A final care order had been made in child care proceedings in which it was concluded that the husband was deemed to be a serious risk to the children. It also became clear that the grandmother had in fact never lived with the defendants and had not joined them in the new property. The fact that the children and the grandmother were not living with the defendants should have been flagged up by the local authority prior to the exchange.

It also came to light that the defendants, despite their children not living with them for the best part of a year, had continued to claim benefits in respect of them, including housing benefit and child benefit. Essentially, the defendants had continued to use their children to cash in all

round whilst significantly under-occupying a four bedroom home.

London and Quadrant Housing Trust claimed possession of the property using discretionary ground 17 of Schedule 2 to the Housing Act 1988. This ground can be used where the landlord has been induced to grant a tenancy by a false statement made knowingly or recklessly by a tenant. The trust served a notice of seeking possession and then instructed Devonshires to commence a claim in the County Court.

A District Judge made a possession order; he agreed that a valid notice of seeking possession had been served, that ground 17 was proved and that it was reasonable that a possession order should be granted. He also considered that it was reasonable that such an order should not be suspended or postponed. The defendants later applied to stay the warrant of possession. However, counsel instructed by Devonshires,

requested that the matter be brought before the same Judge and then successfully persuaded the Judge to dismiss the defendants' application. The eviction went ahead the next day.

Whilst fraud and dishonest breaches of tenancy like sub-letting are commonplace in today's social housing sector, reliance on ground 17 is fairly uncommon. However, this ground is not to be overlooked; it neatly covers the situation where prospective tenants are dishonest about their household make-up, usually in order to gain a larger property. Happily, London and Quadrant Housing Trust can now re-let the four bedroom property to a family in genuine need of a family home.

To discuss this and any other ASB queries you have contact:

[Amy Gibbs on 020 7880 4238](tel:02078804238) or
amy.gibbs@devonshires.co.uk

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Neil Brand, senior solicitor in the Housing Management Team, continues his regular Ask the Expert slot in which readers raise typical (and topical) day to day housing management "posers":

Question 1: We went to court on a normal Ground 10 rent possession case last week. We had the tenant's agreement to an SPO beforehand but District Judge Temper refused to give us our order. She was very angry and said we had not shown that an SPO was proportionate and that because of Pinnock she now had to decide on the proportionality of making any possession order. She has adjourned the case for an hour's hearing on a date to be notified by the court. The tenant is now paying nothing because he's got the idea from the judge that he doesn't have to. Can you advise please?

Neil writes:

This seems to be a clear misapplication by the judge of the principles set out in the case of *Manchester City Council –v- Pinnock [2010]*. The Pinnock case is only relevant where a landlord has an unqualified right to possession and is seeking possession on that basis.

Your claim is based on Ground 10, a discretionary ground which requires you to prove, in addition to the fact that there were arrears at the date of service of the NOSP and on issue of the proceedings, that it is reasonable in all the circumstances for a possession order to be made. As such, you do not have an unqualified right to possession and Pinnock does not apply. A further error on DJ Temper's part is to raise proportionality herself. The judgement in Pinnock expressly provides that it is for a defendant to raise questions of proportionality, failing which

proportionality does not fall for consideration by the court.

Given DJ Temper's error, coupled with the fact that the tenant is no longer making any payments and will not on that basis realistically now agree to the SPO previously agreed, I would suggest that you look to appeal her order so that the court can then order the agreed SPO upon upholding the appeal.

Question 2: We obtained a possession order against an assured tenant of ours last week on the grounds of subletting. He did not turn up at the hearing. He has now instructed solicitors who say they are going to apply to set aside the order. The tenant says he knew about the hearing but did not attend because he was "out shopping" at the time of the hearing. He denies the subletting but we have a statement from the subtenant and the estate agent who advertised the property for the tenant. The solicitors are talking about a case

Following on from Forcelux, however, the court of Appeal in *Hackney LBC –v- Findlay [2011]*, has recently held that the court should usually apply the requirements of CPR 39.3 and not use its general case management powers in considering whether to set aside a possession order (even if made at a hearing other than a trial).

Applying CPR 39.3 to the present case, in order for your tenant to successfully apply to set aside the possession order, he would need to show that (a) he acted promptly when he found out that the court entered judgment order against him; (b) he had a good reason for not attending the trial; and (c) he has a reasonable prospect of success at the trial.

Given the fact that the order was made last week, an application made now (or soon) would no doubt satisfy the requirement to make the application promptly.

"I would suggest that you look to appeal her Order so that the Court can then order the agreed SPO upon upholding the appeal."

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called Forcelux and saying that they are bound to get the order set aside and we must agree; if we don't they say they will get costs against us of at least £5000. Can you help?

Neil writes:

The Forcelux case referred to by the tenant's solicitors is a rather unhelpful case. It decided that where someone does not turn up for a hearing and subsequently applies to set aside the order, the court can decide under its general case management powers in Part 3 CPR whether to set aside the order – instead of under the old rule, CPR 39.3. The Forcelux case has given judges much more discretion in deciding whether to set aside and in a lot of possession cases – inevitably perhaps – they have exercised that discretion in favour of the tenant to set aside the possession order obtained in their absence and allowed the tenant to defend.

I suspect that the tenant may find it more of a struggle to prove that he has a good reason for not attending the hearing and that he has a reasonable prospect of success at trial, particularly given the evidence of sub-letting. In the absence of being able to prove these requirements, and with the threat of an adverse costs order clearly an attempt by the tenant's solicitors to scare you into agreeing to an application, my advice would be to oppose any application to set aside the possession order on the grounds that the tenant does not appear, on the facts, to have either a good reason for not attending the hearing nor a reasonable prospect of successfully defending the possession claim at trial.

For further information please contact:

Neil Brand on 020 7880 4342 or
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ASBO Overhaul

The government has put forward new proposals to deal with anti-social behaviour. Anti-social behaviour orders will be replaced by criminal behaviour orders and crime prevention orders later this year.

The new order will provide local authorities and the Police with a more efficient, effective and flexible way of tackling anti-social behaviour. The order will provide those tackling anti-social behaviour with more helpful tools to deal with the problems in communities.

For example, Police "direction" powers will allow Police to direct any individual causing or likely to cause crime or disorder away from a particular place and to confiscate related items.

James Brokenshire the Crime Prevention Minister has stated that "For too long anti-social behaviour has wreaked havoc in our communities and ruined decent people's lives."

The new measure will allow authorities to take a more pro-active approach in dealing with the problems in local communities.

You can read and respond to the Home Office Consultation Paper "More Effective Responses to Anti-Social Behaviour" at:

<http://www.homeoffice.gov.uk/publications/consultations/cons-2010-antisocial-behaviour/>

and you can discuss what this will mean to you with Amy Gibbs or Shinal Patel in our Housing Management Team.

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Upcoming Seminars

22 March - Housing Law Update - MWB
Liverpool Street, 55 Old Broad Street, London, EC2M 1RX.

30 March - Successfully Tackling Anti-Social Behaviour: All You Need to Know - Devonshires Solicitors, 30 Finsbury Circus, London EC2M 7DT.

17 May - A Practical Guide to Rent Possession Claims for Housing Officers Seminar - Devonshires Solicitors, 30 Finsbury Circus, London EC2M 7DT.

12 July - Dealing with Disrepair: A Practical Guide for Social Landlords Seminar - Devonshires Solicitors, 30 Finsbury Circus, London EC2M 7DT.

Further information can be obtained from our Business Development Department on 020 7628 7576 or by emailing seminars@devonshires.co.uk