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Publications —— Winter 2018/19

Housing Litigation Update

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Foreword

Welcome to the Winter 2018/19 edition of Housing Litigation Update.

We start by looking at the impact the Equality Act 2010 has on the suspension of warrant for eviction, before considering a High Court decision in a case involving anti-social behaviour and the mental health issues of the tenants.

We then move on to look at the wide scope a trial judge has when trying a case on discretionary grounds.

We then look at an interesting decision involving a licensee and the use of McKenzie friends before considering a case involving the termination of fixed term tenancies within the starter tenancy period.

Clear drafting in tenancy agreements, especially when it comes to access clauses, is our next focus of attention before ending with a round-up of a few issues which are worthy of note.

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

Yetunde Dania
Partner —— Property Litigation

t +44 (0)121 214 8822
e ydania@trowers.com

Equality Act 2010 and suspension of warrants

The case of *Paragon Asra Housing Limited v James Neville* [2018] EWCA Civ 1712 involved an appeal on the issue of whether disability discrimination should be considered afresh on an application for the stay of a warrant following a breach of a suspended possession order.

Paragon Asra Housing Limited (Paragon) brought a possession claim against Mr Neville on the basis of his anti-social behaviour. Mr Neville admitted the breaches, but argued that his behaviour was as a result of personality and behavioural disorders from which he suffered which amounted to a disability under the Equality Act 2010. Therefore, the possession proceedings were discriminatory.

In the County Court a suspended possession order (SPO) was made without a trial. Mr Neville's admissions were recorded in the order together with Paragon's acceptance that Mr Neville's disability amounted to a protected characteristic under the Equality Act 2010, but that the court was satisfied that it was reasonable to make an order for possession suspended on terms that Mr Neville did not commit any further material breaches of his tenancy agreement.

Mr Neville subsequently breached the SPO. Paragon applied for a warrant and Mr Neville sought to stay the warrant on the basis of his earlier arguments of disability and proportionality. At the stay hearing, the District Judge accepted that there was no issue for the court to re-consider under the Equality Act 2010, unless there had been a material change of circumstances since the SPO was made. Mr Neville's application was dismissed. However, upon appeal by Mr Neville, the Recorder agreed with Mr Neville and stated that the Equality Act 2010 considerations should have been reconsidered at the enforcement stage.

Paragon appealed to the Court of Appeal on the basis that the District Judge who granted the SPO had already determined that the order did not discriminate against Mr Neville, and therefore the enforcement of that order did not discriminate against him.

The Court of Appeal agreed with Paragon: the relevant inquiry into the proportionality of the SPO had been undertaken when the SPO was made. As the court had been satisfied at that stage that the terms of the SPO were proportionate, the order could be enforced in the event of a breach. There were no relevant changes to Mr Neville's circumstances, so he could not request that the court reconsider the same issue of proportionality at the warrant stage.

The case has highlighted that a tenant cannot have "two bites of the cherry" and resurrect the same arguments of proportionality that have already been ruled upon at trial at the eviction stage.

Dorota Pawlowski
Senior Associate —— Property Litigation

t +44 (0)121 214 8826
e dpawlowski@trowers.com

Mental health and anti-social behaviour

The High Court decision of *Eales v Havering London Borough Council* is worth noting for those dealing with anti-social behaviour caused by tenants with mental health issues. This was an extempore judgement of the High Court meaning that there is no written record of it.

Miss Eales had been convicted of a racially-aggravated public order offence in relation to a neighbour and had a history of acting in an anti-social manner. Havering London Borough Council (the Council) applied for an injunction to exclude her from her property together with a claim for possession based on a notice to quit. A public law defense, namely an allegation that the Council had failed to follow its own policy and procedure by failing to refer Miss Eales to its Vulnerable Persons' Panel, and disability discrimination, was raised. The Council maintained that any disability she had was exacerbated by her drug and alcohol misuse and a psychologist's report was produced confirming that she had to address her addictions before her personality disorder could be managed.

A possession order was made at first instance based on the view that her behavior was caused by her drinking and drug use rather than her disability. Miss Eales appealed.

The High Court dismissed the appeal, finding that the possession order was a proportionate means of achieving a legitimate aim, namely of protecting other tenants, and it was an effective management of its housing stock. The reasoning in the case of *Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15 was followed.

Miss Eales argued that an injunction alone would have been sufficient, but this argument was rejected as was the argument that the Council's failure to refer Miss Eales to the vulnerable persons panel was a material breach. The High Court held that the Council had been entitled to take a “broad brush” approach.

The High Court went on to rule that the making of a possession order was a proportionate means of achieving the legitimate aim of protecting the rights of other tenants and allowing the Council to manage its housing stock.

This case is a useful reminder that there must be a clear causal link between the disability of a tenant and their behavior to make out a defence based on disability discrimination. If an expert’s report does not adequately deal with this point, questions should be put to the expert, which can legitimately be done pursuant to Civil Procedure Rule 35. Ultimately, Miss Eales' behavior was primarily linked to her drinking and drug misuse.

Jeni Hancock
Solicitor —— Property Litigation

t +44 (0)1392 612211
e jhancock@trowers.com

Beware of the judge's discretion

The case of *Curo Places v Walker* [2018] EWHC 2462 serves as a reminder of the wide scope which a trial judge has when trying a case on a discretionary ground.

On 7 July 2015, Curo Places Limited (Curo) granted a six-year fixed term assured tenancy to Ms Walker. Problems of noise nuisance soon began. Curo therefore served a notice seeking possession (NSP). The possession claim was issued on 7 July 2016, the first anniversary of the tenancy being granted.

At trial, Ms Walker admitted to being responsible for some noise but denied other noise nuisance. She argued that much of the noise arose due to poor insulation in the building and her having two young children who woke early in the morning. She argued that she had several mental health conditions which made her impatient and gave her low tolerance levels.

Curo placed reliance on a conviction which Ms Walker had received in a Magistrates' Court for harassment.

The judge heard sound recordings in evidence. Those recordings (described by the High Court as "underwhelming) gave the impression that Ms Walker was not directing racially abusive terms towards her neighbour but rather was simply repeating back to herself such terms which another person had used towards her. Moreover, the judge found that much of the noise nuisance was simply everyday sounds which her neighbour wrongly believed was directed towards him but which was audible because of poor insulation in the building.

The judge found that if a possession order was not made, the noise disturbances would be likely to continue but at a reduced rate. He dismissed the possession claim, holding that it was not reasonable to make a possession order because much of the disturbance was the result of poor insulation in the building and because of Ms Walker's mental health problems.

Curo appealed on the basis that the judge:

- had erred in stating that he was not bound by the criminal conviction of Ms Walker in the Magistrates' Court;
- had failed to give adequate consideration to section 9A of the Housing Act 1988 (i.e. the extended discretion ground – which required him to consider the effect of the nuisance/annoyance on other persons if it were to continue);
- should not have found that the nuisance/annoyance could have been dealt with by way of Curo improving the sound insulation (since Ms Walker had not raised an Equality Act reasonable adjustments duty defence, nor could any reasonable adjustment require Curo to alter a physical feature of the building);
- decided not to make a possession order which was perverse in light of his finding that the noise disturbances would continue; and
- had erred in considering an Equality Act defence when none had been pleaded.

The High Court dismissed the appeal for the following reasons:

- whilst the trial judge was required by section 11(2) of the Civil Evidence Act 1968 to take Ms Walker to have committed a criminal offence for which she had been convicted unless she proved the contrary, this did not compel him to make a possession order notwithstanding his own view of her overall conduct;
- section 9A of the Housing Act 1988 required the trial judge to take into account the effect that the nuisance or annoyance, if repeated, would be likely to have on persons affected. In doing so, the judge had found that most of the disturbances were caused by the reasonable activities of daily life exacerbated by poor sound insulation hence did not amount to nuisance/annoyance;
- the trial judge had not held that Curo should have altered the structure of the building in order to improve the sound insulation in the building but had simply taken into account, as he had been entitled to do, that the disturbance caused to the neighbours had been exacerbated by the poor sound insulation in the building;
- the trial judge had therefore not acted perversely in dismissing the possession claim; and
- Curo had not been taken by surprise by the Equality Argument raised by Ms Walker and it had been fully argued before the trial judge, this having never been pleaded by Ms Walker.

The appeal was therefore dismissed.

This case serves as a reminder to social landlords not to lose sight of the fact that depending on the view a trial judge takes of the evidence, they could end up without an order at all.

It is also worth noting that sound recording evidence should be approached with caution. At trial, Curo had warned the judge to expect a "rather shocking" sound recording. However, the recording was described by the appeal judge as "underwhelming" and it in fact assisted Ms Walker's case by demonstrating the poor sound insulation in the building, and how the insulting words were spaced out in time and did not sound as if they were being directed at the aggrieved neighbour.

The judgment is a reminder of the fact that whilst a neighbour may be annoyed by certain conduct of the tenant, it does not mean that it necessarily amounts to nuisance/annoyance.

The judgment also demonstrates that whilst it is always in a tenant's interest to plead an Equality Act defence so that there is no scope for a technical point to be taken at trial about the fact that it was not pleaded, the courts will allow such arguments even when this has not been done.

Dorota Pawlowski
Senior Associate —— Property Litigation

t +44 (0)121 214 8826
e dpawlowski@trowers.com

You can't get rid of me that easily

In *Kirby v Salvation Army Hostel Association* (2018), the Queen's Bench Division considered whether a resident who failed to pay licence fees was entitled to an injunction preventing his eviction.

Mr Kirby occupied a room in a hostel run by the Salvation Army. He failed to make payments and accumulated £13,000 of arrears. Consequently, the Salvation Army served a notice to quit.

Mr Kirby made a successful application to the High Court, with the assistance of a McKenzie friend and without notice being given to the Salvation Army, preventing his eviction until the return date or further order. However, the Salvation Army still evicted him so Mr Kirby obtained an order for re-entry into the hostel, and the Salvation Army allowed him back in.

At the final hearing, Mr Kirby was not present, however his McKenzie friend made representations on his behalf. He accepted that the accommodation was occupied under a licence which was excluded from the Protection from Eviction Act 1977 but argued that the injunction should continue as the threat of eviction amounted to harassment. The Salvation Army argued that the injunction should never have been granted.

The Court held that there had been no proper basis for granting the injunction and it was set aside. The Court found that the judge who granted the injunction may have been misled in respect of his powers. The Court also recognised that the only option in light of the non-payment of licence fees was to terminate the licence. In addition, it was not the Salvation Army's responsibility to complete a housing benefit application for Mr Kirby which had been his argument.

Importantly, it was held that the application for an injunction should not have been issued in the High Court as the value threshold for issuing there was not met. The Court pointed out that had the matter been before the County Court, then the limits of the Court's power in a case of threatened eviction would have been recognised.

Finally, the Court pointed out that a McKenzie friend was considered as an assistant and could not assist an absent litigant as a court could not be satisfied that what a McKenzie friend did on the party's behalf was authorised by the litigant. Although the Court was satisfied that Mr Kirby's interest would otherwise have been seriously prejudiced if the McKenzie friend had not made representations on his behalf, it was held that at future hearings a court could not hear submissions from a McKenzie friend in the absence of the party.

Thankfully, this case was most probably an anomaly that is not likely to be repeated. However, it is helpful to have a judgement in relation to the use of McKenzie friends as these can often prove problematic.

Subhana Anhu
Paralegal —— Property Litigation

t +44 (0)121 214 8858
e sanhu@trowers.com

Terminating fixed-term tenancies within the starter tenancy period

In the case of *Livewest Homes Limited v Sarah Bamber* [2018] EWHC 2454 (QB), the High Court held that social landlords can use two month break clauses in long fixed-term assured shorthold tenancies within the starter tenancy period.

Ms Bamber was the tenant of Livewest Homes Limited (Livewest). Livewest had previously tried to evict Ms Bamber in proceedings that were pending before the Court of Appeal but these were determined by consent on the basis that Ms Bamber was granted a further seven year fixed term tenancy. Livewest sought to combine a starter tenancy with a two-year plus fixed-term assured shorthold tenancy by providing in the tenancy agreement (as an express written clause) that within the first 12 months (extendable to 18 months in certain circumstances) it could exercise a break clause to end the fixed term by giving two months' written notice.

Following allegations of anti-social behaviour in the starter tenancy period, Livewest served a notice upon Ms Bamber purporting to both exercise the two month break clause and be a Section 21 Notice. The decision to serve the notice was upheld on review by Livewest and three months later, possession proceedings were issued.

It should be noted that by virtue of s21(1B) of the Housing Act 1988 (HA 1988), where an assured shorthold tenancy is granted by a social landlord for a fixed term of at least two years, the landlord must first serve six months' written notice if the landlord does not intend to grant another tenancy at the end of the fixed term.

Ms Bamber's defence therefore was based on the fact that she had not been served with six months' notice under s21(1B) of the HA 1988. She maintained that this was required because the tenancy's fixed term was for more than two years.

Livewest agreed that the tenancy's original fixed term exceeded two years, but argued that the operation of the break clause had ended this fixed-term tenancy, which removed the obligation to serve a notice pursuant to s21(1B) of the HA 1988. The first instance judge agreed with Livewest's argument.

Ms Bamber appealed to the High Court against that decision, but the appeal was dismissed by Dingemans J.

The High Court held that Livewest were not required to serve the six months' notice because the service of the two months' notice in the starter tenancy period left Ms Bamber with a statutory periodic tenancy pursuant to s5(2) of the HA 1988. Therefore, Livewest had evaded the requirements of s21(1B) of the HA 1988, namely to give Ms Bamber six months' notice.

The decision, if not appealed, means that a social landlord can trigger a contractual break clause within the starter tenancy period in a two-year plus fixed-term assured shorthold tenancy in order to end a fixed term early.

Thomas Norris
Trainee Solicitor —— Property Litigation

t +44 (0)121 203 5641
e tnorris@trowers.com

Say what you mean and mean what you say – access for improvement works

Network Homes Ltd v Harlow [2018] EWHC 3120 (Ch) demonstrates the importance of good, clear drafting in tenancy agreements especially in relation to access clauses. Landlords frequently encounter issues gaining access to their properties to carry out repairs, periodic inspections, or to carry out improvements to the property. Enforcing that right may result in an application to court being made.

Mr Harlow was the tenant of a flat in a sheltered housing scheme. Network Homes Limited (Network) wished to gain access to replace his front door due to fire safety concerns. Mr Harlow, who had a number of complex medical needs, refused access unless certain conditions were met. He had impaired vision and was concerned that the door may be difficult to operate and prove a safety risk. The parties could not agree on what the conditions should be. Therefore Network made an injunction application requiring Mr Harlow to grant access.

The County Court found in favour of Mr Harlow, concluding that the tenancy agreement did not provide a right of access for carrying out improvement works in the relevant access clause, namely clause 3.19. Whilst this clause stated "you must give all authorised employees of Network reasonable access to the property to inspect or carry out essential maintenance, inspection and repair to the property…", improvement works were not included in this clause. Whilst clause 2.2 stated "we retain the right to carry out any repair, maintenance or improvement works …" it did not contain a right of access provision.

Network appealed the decision and the High Court allowed the appeal. It was held that as the wording of the tenancy agreement was poorly drafted it should be borne in mind that the choice of language was unfortunate so the Court should be more willing to depart from the natural meaning of words chosen than when considering a more carefully drafted document. Hence it was held that clause 3.19 did include a right of access for improvement works. On a final note, the Court commented that that this case was an object lesson in the need for clarity in drafting agreements.

Social landlords should ensure that tenancy agreements are clear when they are drafted in order to avoid costly disputes. Tenancy agreements should be reviewed regularly to ensure they remain fit for purpose and access clauses should not be overlooked in this respect.

Charlotte Brasher
Paralegal —— Property Litigation

t +44 (0)1392 612432
e cbrasher@trowers.com

A round-up of things worthy to note

- The report stage of The Tenant Fees Bill took place in the House of Lords on 11 December 2018 when a line by line examination of the Bill took place. A third reading took place on 15 January 2019 which was the final chance for the Bill to be amended. It was also announced on this date that the Bill will receive Royal Assent imminently and will come into force with effect from 1 June 2019.

- The Homes (Fitness for Human Habitation) Bill received its third reading in the House of Lords on 19 December 2018 and received Royal Assent on 20 December 2018. This new piece of legislation will come into force on 20 March 2019.

- The Sub-Let Property (Offences) Bill had its second reading on 23 November 2018 and is now being prepared for publication.

- Section 21 of the Housing Act 1988, the use of the Form 6A Notice Seeking Possession in relation to assured shorthold tenancies (ASTs) came into effect on 1 October 2018 in respect of all ASTs regardless of the start date. Possession proceedings have to be issued within six months of the date of service of a section 21 notice (assuming a weekly or monthly rental period), after which the notice will become invalid and would need to be reserved. Furthermore, it is imperative that court form N5B(E) is used where a property is located in England and court form N5B(W) is used where a property is located wholly in Wales.

- On 29 January 2019 the Government announced its plans to impose a legal requirement on private landlords to undertake electrical testing in their properties every five years and to ensure the persons they hire to carry out mandatory electrical safety inspections in their properties are competent to do so. Legislation to bring this requirement into force will be passed as soon as parliamentary time permits. It is already known that letting agents and landlords will be given at least six months notice before the new legislation comes into force so they may familiarise themselves with their new obligations. There will be a two year transitional period with the effect that in year one all new private tenancies will be affected and in year two the new legal requirements will apply to all existing tenancies. It should be noted that properties that already have a valid electrical installation condition report (EICR) will not need to replace it until five years have elapsed since it was issued.

- On 1 October 2018, The Civil Procedure (Amendment No. 3) Rules 2018 came into effect. Part 83 of the Civil Procedure Rules 1998 were changed. Since this date there has been no need to make a separate Part 83(2) application for permission for a warrant for breach of a rent arrears based suspended possession order. However, such an application is still required through Part 83.2(3)(e) for all non-money payment breaches of suspended possession orders. It should be noted that such applications may not just be rubber stamped and may be listed for a hearing which clearly will delay the obtaining of an eviction date.

Yetunde Dania
Partner —— Property Litigation

t +44 (0)121 214 8822
e ydania@trowers.com

trowers & hamlins

For further information please contact our offices
or visit our website at **www.trowers.com**

Contact

London

3 Bunhill Row
London
EC1Y 8YZ

t +44 (0)20 7423 8000
f +44 (0)20 7423 8001

Birmingham

10 Colmore Row
Birmingham
B3 2QD

t +44 (0)121 214 8800
f +44 (0)121 214 8801

Exeter

The Senate
Southernhay Gardens
Exeter
EX1 1UG

t +44 (0)1392 612600
f +44 (0)1392 612601

Manchester

55 Princess Street
Manchester
M2 4EW

t +44 (0)161 838 2000
f +44 (0)161 838 2001

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