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Housing Litigation Update

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Foreword

Welcome to the autumn 2017 edition of Housing Litigation Update.

Subletting continues to be a hot topic and so we begin this edition by looking at a recent case on this issue which was appealed to the High Court.

We move on to look at the Protection from Eviction Act 1977 and the circumstances in which temporary accommodation is occupied as a dwelling for the purposes of this piece of legislation.

As autumn and winter is generally the time that landlords see an increase in complaints about disrepair we have an informative question and answer piece on the Environmental Protection Act 1990.

We then move on to revisit the enforcement of possession orders via the High Court. This is followed by consideration of some helpful guidance handed down by the Court of Appeal about which address for a tenant should be quoted on a notice to quit.

So often there are difficulties personally serving injunction orders so we then look at the service of such orders by alternative methods. We end this edition with a look at the review process where possession is fought on the mandatory anti-social behaviour ground.

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 at hlu@trowers.com with any comments.

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Subletting and unlawful profit orders

In the recent case of Poplar Housing and Regeneration Community Association v (1) Begum (2) Rohim [2017] the High Court overturned a Suspended Possession Order and gave guidance on the making of unlawful profit orders.

Ms Begum and Mr Rohim were the assured tenants of a two-bed flat which they occupied with their children. Having received a tip off that they were sub-letting, Poplar Housing and Regeneration Community Association Limited ("the Landlord") decided to visit the flat. They found that the Defendants were living at Ms Begum's mother's house with their children, which they admitted but later denied. They also admitted they had allowed a couple to occupy the flat who informed investigating officers that they paid the Defendants £400 rent per month. They had access to the entire flat apart from one bedroom which contained the Defendants' belongings. These items were kept there in order to give the impression that the Defendants were living at the flat.

Shortly after this, the Second Defendant went to his flat, unlawfully evicted his sub-tenants, threatened to burn their clothes and demanded his keys back.

Upon being arrested, the First Defendant stated that she had only stayed with her mother the night before in order to look after her ill brother. The Second Defendant gave a "no comment" interview but said to officers afterwards "we'll see who laughs last when the case goes to court".

The Defendants moved back to the flat and the Landlord commenced possession proceedings upon Grounds 10, 12 and 14, as well as having served a notice to quit. Before the matter came to trial, the police raided the flat and found the Second Defendant in possession of cannabis and drug dealing paraphernalia.

At the trial, the Recorder found that the Defendants had not parted with possession of the whole flat as they had retained one bedroom. However, he found that they had sublet part of the flat and made a suspended possession order but he refused to make an unlawful profit order. The reasoning was that the Defendants had moved in with the First Defendant's mother to care for her brother and as the Defendants were paying more for the flat than they were receiving from their sub-tenants, they had not made a profit.

The Landlord appealed and argued that the Recorder's discretion had been seriously flawed. His decision to suspend the possession order was contrary to the public interest and was wrong. His decision not to make an unlawful profit order was flawed because the Defendants had in fact made a profit.

On appeal, the High Court Judge was satisfied that the Recorder's decision had been fatally flawed and held that it was not acceptable to allow "profiteering fraudsters" to occupy premises thus excluding "deserving families". He therefore substituted an outright possession order for the suspended one and made an unlawful profit order, finding that as the Defendants were in receipt of housing benefit they were not paying anything for their property.

This is a rare case where an Appeal Judge has interfered with the discretion of a Trial Judge but in circumstances where the Recorder had, in the Appeal Judge's findings, fallen for the lies of the Defendants.

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When is temporary accommodation occupied as a dwelling?

Bucknall v Dacorum Borough Council [2017] EWHC 2094 (QB):

Mrs B applied to Dacorum Borough Council (DBC) under part 7 of the Housing Act 1996 and was placed in temporary accommodation on a non-secure licence under section 188 pending the outcome of the application.

R(N) v Lewisham London Borough Council [2015] AC 1259 is clear that temporary accommodation provided under section 188 (prior to the section 184 decision) is not occupied as a dwelling.

DBC subsequently determined that the full housing duty was owed under section 193(2). No new licence agreement was issued, but DBC wrote to Mrs B stating that she would be offered suitable private sector accommodation but, in the meantime, she should continue to pay the charges and abide by the conditions of her agreement to occupy the "temporary accommodation you will be provided with". About six weeks later Mrs B was offered permanent accommodation but she refused as it was unsuitable. On review DBC upheld the accommodation as suitable and discharged its duty.

DBC served a notice to quit which did not comply with the requirements of section 5 of the Protection from Eviction Act 1977 (PEA77) and the Notices to Quit etc. (Prescribed Information) Regulations 1988 (SI 1988/2201). DBC then issued possession proceedings in respect of the temporary accommodation. At first instance the Judge referred to R(N) v Lewisham LBC and stated that the accommodation remained interim accommodation provided under section 188 and was not provided as a dwelling. As such the notice to quit did not need to comply with the PEA77 and the above Regulations and a possession order was made. Mrs B appealed.

On appeal to the High Court, it was held that the accommodation was being provided under section 193(2). The section 188 duty ended when the section 184 decision was notified. Following notification that the full housing duty was owed, the accommodation is provided pursuant to that duty even if it was not secure or permanent.

Further, it was held that the property was occupied as a dwelling because of the terms of the section 184 letter and also because of the appellant's continued occupation of it.

It is not the change in duty which necessarily changes the dwelling, or non-dwelling, status of occupation, this depends on the purpose of the occupation. If a person is permitted to stay in accommodation for an indefinite period, it is likely to lead to the conclusion that the continued occupation is as a dwelling. So the question is not simply whether occupation is under section 193(2), but rather whether the occupation is merely transient, and indefinite occupation goes beyond this.

As a result, section 5 of the PEA77 applied to Mrs B's licence and so, in omitting the prescribed information, the notice to quit was ineffective to terminate it and the appeal was allowed.

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Q & A: Environmental Protection Act 1990

Q: I am familiar with claims for compensation in the County Court under section 11 Landlord and Tenant Act 1985 but can landlords really be prosecuted in the Magistrates' Court for disrepair?

A: Yes, they can. The relevant legislation is the Environmental Protection Act 1990 (the Act) and in particular section 82 of the Act. A tenant would pursue the private prosecution of their landlord if the condition of their premises constituted a "statutory nuisance".

Prosecution pursuant to section 82(2) of the Act will only be successful if the Magistrates' Court is satisfied that:

- the alleged statutory nuisance exists; or
- that although abated, the nuisance is likely to recur on the same premises.

For the purposes of residential premises a statutory nuisance will exist if the conditions at the premises are either prejudicial to the health of the occupants or are a nuisance, section 79(1)(a) of the Act.

Q: Is it only a tenant who can prosecute their landlord under this legislation?

A: No, such proceedings may be initiated by any person who is "aggrieved" by the statutory nuisance. Whilst ordinarily this will be a tenant or licensee, the ability to bring such a private prosecution applies to anyone else who occupies the premises in question, such as family members or lodgers.

It should also be noted that under the Act the prosecution is of the person responsible for the nuisance or, where such person cannot be found, against the owner of the premises which will often be the landlord.

Q: What type of proceedings are they?

A: Proceedings instigated under section 82 of the Act are criminal in their nature from the outset and they carry the criminal standard of proof (i.e. the prosecution will have to prove their case beyond reasonable doubt).

Q: What is the procedure for bringing a private prosecution under the Act?

A: Where an aggrieved person believes their premises constitute a statutory nuisance, they must first send a letter to their landlord/ the person responsible for the statutory nuisance, giving notice of the alleged statutory nuisance which exists by providing reasonable details of the issues and giving their landlord/the person responsible for the statutory nuisance 21 days to carry out works to abate the nuisance.

On the expiry of 21 days, if the aggrieved person still considers that a statutory nuisance exists, they can ask the Magistrates' Court to issue a summons by serving an "information" at the Magistrates' Court together with supporting documents on the court officer.

The information will contain a statement of the alleged offence etc., the capacity in which the defendant is being served and detail the relevant section(s) of the Act under which the defendant is being prosecuted.

The court will allocate a hearing date which both parties must attend and it will be necessary for the landlord to be served with the summons and supporting documentation.

At the first hearing, if the landlord pleads guilty, a nuisance order will be made. A nuisance order details the works which need to be carried out to abate a statutory nuisance and gives the timescale in which these works are to be carried out. Furthermore, an order may be made requiring the landlord to pay the prosecution's costs, known as a costs order.

If the landlord pleads not guilty, the court will adjourn the case to a day when there is sufficient time for the case to be tried. However, it is quite possible that there may be a couple of hearings before that time especially if the landlord has commenced work and merely needs more time to complete them. In such circumstances, at the final hearing when it is confirmed the statutory nuisance has been abated, a costs order may be made.

Alternatively, if the matter proceeds to trial, and a nuisance order is made, it is imperative the landlord complies with the nuisance order as breach of the same constitutes a further criminal offence which can be penalised by way of a daily fine in certain circumstances.

Q: What evidence does the prosecution have to produce?

A: Usually there will be a statement by the aggrieved person detailing how they have been affected by the conditions in the premises and a report from a suitably qualified expert, such as an environmental health officer, or a surveyor.

It should be noted that in order to give evidence on issues which are considered to amount to being prejudicial to health, the expert must have some expertise in public health issues.

Q: What steps should a landlord take to minimise the risk of being prosecuted?

A: If a landlord receives a 21 day letter before action, it is imperative they take immediate action so the property is inspected by a suitably qualified person and, they arrange for any necessary works to be carried out as soon as possible to abate the statutory nuisance.

Whilst the timescale is 21 days, an aggrieved person may decide to delay issuing proceedings if they can see that the landlord is committed to carrying out the necessary repairs. Hence, the landlord may be able to negotiate additional time for the works to be completed.

However, if the condition of the premises is in dispute, ultimately the issue will be determined by the strength of the evidence of the experts and as such it may be prudent for the landlord to have the premises inspected by an environmental health officer.

A detailed record should be kept of any refusal by the aggrieved person to provide access to the premises, especially during the 21 day notice period.

Finally, the landlord should obtain legal advice. This is particularly important if it is anticipated that the aggrieved person will prosecute.

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Enforcement of possession orders via the High Court

We previously set out a summary of the process for expediting an eviction by transferring the proceedings to the High Court so as to be able to obtain a writ of possession, and then use a private High Court Enforcement Officer (HCEO) firm to carry out the actual eviction (see here – http://publications.trowers.com/HLU_Summer_2014/)

The High Court has, in Partridge v Gupta [2017] EWHC 2110 (QB), given further guidance on the procedure to follow, more particularly in respect of Civil Procedure Rule (CPR) 83.13(8)(a) namely, the nature of the notice to be given to a tenant and any other occupiers of the property/land. In essence, a landlord must seek permission from the High Court to be able to obtain a writ of possession. In order to do so the landlord must (save for where the defendant is a trespasser), satisfy the court "that every person in actual possession of the whole or any part of the land ('the occupant') has received such notice of the proceedings as appears to the court sufficient to enable the occupant to apply to the court for any relief to which the occupant may be entitled".

What, therefore, is sufficient notice? Simply being aware of the making of the possession order or, being served with the application for permission to issue the writ of possession/ a notice of hearing if the application is listed for a hearing?

In this case Mr Gupta (the landlord) had pursued a possession claim against Mr Partridge (the tenant - who resided at the demised property with his wife and children) and obtained an outright possession order pursuant to section 21 of the Housing Act 1988. Mr Partridge had actively been involved in the possession proceedings, having defended the mandatory possession claim, and then (unsuccessfully) pursing an application for permission to appeal the making of the possession order. It could therefore be concluded that he was fully aware of the existence and implications of the possession order.

Mr Gupta subsequently instructed a HCEO to apply to transfer the proceedings to the High Court for enforcement purposes; which they did by way of an application in the County Court pursuant to Section 42(2) of the County Courts Act 1984 seeking permission to transfer the case. The application was supported by a witness statement confirming, amongst other things, that notice had been given in accordance with the CPR to the occupants of the intention to transfer execution to the High Court. Such notice informed of (1) an application for permission to transfer enforcement to the High Court (2) an application for permission to issue the writ (following permission to transfer) (3) of the impending eviction.

The County Court eventually gave permission and transferred the matter to the High Court, whereupon the HCEO issued, as they are permitted to do, a without notice application for a writ of possession. That application was also supported by a witness statement confirming "notice of this application has been given to each and every person in actual possession of the whole or part of the said land, namely Mr Michael Partridge, one Other and "The Occupiers" by notice in writing on 23 March 2016, sent by first class prepaid post and that no application for relief had been made by any such person".

The High Court judge, being satisfied the rules on notice had been complied with, gave permission to issue and seal a writ of possession. The writ was executed shortly thereafter and Mr Partridge and his family were evicted. No notice of the eviction was given.

Mr Partridge subsequently applied to the High Court to set aside the order giving

permission to issue the writ, arguing that CPR 83.13(8)(a) required actual notice to be given of the hearing of the application for permission to issue the writ. His application was dismissed and he appealed.

His appeal to the High Court was also dismissed. It was held that the letter sent by the HCEO on 26 March 2016 (which informed of the application to transfer, to apply for a writ, and of the impending eviction) had been sufficient notice. Further, that "notice of proceedings" does not necessarily require either the service of a formal notice of application for permission or even a more informal intimation by letter or other communication that the application will be heard on a particular day or at a particular time. Either would be sufficient, but neither is required by the rule provided that notice is sufficient to enable the occupant(s) to apply for relief.

The High Court went on to give further key guidance by confirming:

1. A sole occupant/ defendant who is the subject of the possession order and has full knowledge of the possession proceedings, should be provided with a reminder of the terms of the possession order and a request that possession is given up under the order. However, the decision confirms that, "if there was any doubt about whether this was sufficient [notice], it could be resolved by saying in the same communication that permission to apply for a writ of possession will be sought from the court in due course if possession is not delivered up and that the eviction will follow."
2. If a sole occupant/ defendant did not play any part in the possession proceedings, it would nevertheless be sufficient notice if he/she is sent a letter or other suitable form of communication confirming the points set out at bullet point 1 above.
3. If there are other occupants in the property (other than the defendant to the possession proceedings), they should be written to, either by name (if known) or addressed to "The Occupants", and informing of (1) the making of the possession order (2) an application for permission to transfer enforcement to the High Court (3) an application for permission to issue the writ (following permission to transfer) and (4) of the impending eviction.

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Should the lease address or current address be stated on a notice to quit?

The Court of Appeal has handed down guidance as to the validity of a notice to quit which was sent to a tenant's address as set out in the lease rather than the current address provided to the Landlord.

Grimes v The Trustees of the Essex Farmers and Union Hunt [2017] EWCA Civ 361 centres around an agricultural tenancy which the Grimes family had held for a number of years.

Renegotiations took place in 2005 and agreements were entered into which saw the tenancy continue until 30 September 2012. During the renegotiation period, Mr Grimes moved from Glebe Way to Maple Way in Burnham-on-Crouch. Both agreements listed Mr Grimes' address as being Glebe Way. Mr Grimes notified the Landlord of his new address in December 2006, when the first rental payment became due.

A number of years passed and in 2011 the Landlord served a notice to quit on Mr Grimes. The Landlord sought possession on 30 September 2012. The notice was delivered to the Glebe Way address.

Negotiations took place but were ultimately unsuccessful and the property was let to a third party. Mr Grimes subsequently brought a claim for wrongful dispossession and damages on the basis that the notice was sent to the wrong address.

As always, the wording of the notice provision was key. In this case, it stated:

"Either party may serve any notice on the other side at the address given in the Particulars or such other address as has previously been notified in writing".

The validity of the notice therefore turned on the interpretation of this wording. At first instance, the trial judge interpreted the wording literally: good (effective) notice could be made by serving notice at either Glebe Way or Maple Way.

The Court of Appeal however, reconfirmed that Courts must "consider the contract as a whole and, depending on the nature, formality and quality of drafting of this contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning".

Applying what would seem to be a common sense approach, the Court of Appeal held that the only valid address could be the current one, as it substituted the previous one. The notice was therefore deemed to be invalid.

This case reinforces the importance of scrutinising the wording of clauses and ensuring absolute compliance to avoid the possibility of possession proceedings failing.

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Service of injunction orders by alternative methods

The Court of Appeal in Mohamed Abdulrahman v Circle 33 Housing Trust Limited (2017) considered whether service of an injunction order through an individual's letterbox was valid service and whether a Judge was entitled to commit the Appellant to prison when the injunction order was breached.

The Respondent, Circle 33 Housing Trust Limited ("Circle"), granted the Appellant Mr Mohamed Abdulrahman ("Mr Abdulrahman") an assured non-shorthold tenancy of a flat. The flat shared a communal front door and communal letterbox with the flat next door. In 2014, Mr Abdulrahman subjected his neighbour to anti-social behaviour which included changing the locks and putting superglue through the lock on the communal door.

In June 2015, Circle applied for, and was granted an injunction order, prohibiting Mr Abdulrahman from engaging in anti-social behaviour, and also including a clause that Mr Abdulrahman was not to block Circle's employees or contractors from accessing the property during reasonable hours to carry out repairs. The injunction order stated that the order should be served on Mr Abdulrahman by inserting it through the communal letterbox and this was done.

In October 2015, Circle applied to commit Mr Abdulrahman to prison for breaching the injunction order when he waived his walking stick and shouted abuse at contractors employed by Circle. Mr Abdulrahman had also refused access to an employee of Circle when they attended the property, having written to Mr Abdulrahman the week before confirming the appointment. Whilst the employee was outside the property, they found an un-opened letter containing the injunction order on the floor.

The Judge found that Mr Abdulrahman had breached the injunction order twice and committed him to prison for 28 days, suspended for two years. Consequently, Mr Abdulrahman appealed against this committal order on the basis that the injunction order had been inadequately served.

The Court of Appeal considered rule 81.8 of the Civil Procedure Rules (CPR), which states in particular that:

(1) In the case of a judgement or order requiring the person not to do an act, the Court may dispense with service of a copy of the judgement or order...if it satisfied that the person has had notice of it -

(a) By being present when the judgment or order was given or made;

The rule goes on to state that the Court may dispense with service if the Court thinks that it is just to do so, it may make an order "in respect of service by an alternative method or at an alternative place".

Applying CPR 81.8, the Court of Appeal stated that the Judge was entitled to dispense with service by the usual route and make an order in respect of service by alternative method or at an alternative place. The Judge had the authority to make an order that the injunction order would be personally served if put through Mr Abdulrahman's letterbox. The Court of Appeal pointed out that Mr Abdulrahman had been in Court when the injunction order had been granted and was aware of the terms of the order.

This case helps clarify the difficulties arising from alternative methods of service of orders and demonstrates that attempts at evading service will not result in the defendant avoiding a committal order.

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No obligation to review decision to apply for possession

In the case of Aaron Harris v Hounslow LBC [2017] EWCA Civ 1476 the Court of Appeal decided that a secure tenant was not entitled to a statutory review of Hounslow London Borough Council's (the Council) decision to apply for a possession order because he had applied for the review outside the seven day period as set out by Section 85ZA(2) Part IV Housing Act 1985. The Council therefore had no obligation or power to conduct the review.

The facts of the case are that Mr Harris and his visitors to the block of flats in which he lived were causing nuisance to neighbours. The complaints consisted of noise emanating from Mr Harris' flat, an excessive number of visitors congregating in the stairwells, smoking, drinking and drug-taking. The Council served a noise abatement notice and Mr Harris entered into an acceptable behaviour contract. However, the complaints continued, resulting in Mr Harris breaching both the noise abatement notice and the acceptable behaviour contract. In November 2015 the Magistrates' Court made a three month closure order in relation to the property.

On 23 December 2015 the Council served Mr Harris with notice that it was seeking possession (Notice) relying on the mandatory Ground 84A. The Notice specified that Court proceedings for possession would commence after 25 January 2016. Mr Harris had the opportunity to request a review of the Council's decision within seven days (section 85ZA (2) Housing Act 1985). He should have therefore made this request by 30 December 2015.

Mr Harris failed to request a review, but on 4 January 2016 his legal advisers asked for an extension of time in which to do so. The Council refused but decided to carry out a review in any event, after which it confirmed its decision to apply for possession.

Possession proceedings were subsequently issued and in October 2016 the District Judge held that that the Council should have granted an extension of time to Mr Harris. He went on to find that the procedural defect had been cured by the Council's subsequent decision to undertake the review in any event.

After the possession order was made, Mr Harris appealed and questioned whether:

1. the Council had the power to agree to accept an out of time request for a statutory review; and
2. if not, then he argued that the Council had an obligation to serve a fresh NOSP if Mr Harris' failure to make the request in time was beyond his control.

The Court of Appeal held that in relation to the Council's power to agree to accept out of time requests for review, the Notice given under section 83ZA had to be served within three months of the closure order being made. That section also contemplated that the Notice would give a date after which proceedings for possession could be commenced. The purpose of the procedure was to deal with serious cases of anti social behaviour which affected Mr Harris' neighbours and it was therefore likely that any responsible landlord would specify as short a time as possible. Secure tenancies are usually given on weekly terms and therefore the date was likely to be 28 days after the giving of the Notice. However, there was no express power in section 83ZA to extend either the time within which the request for a review should be made or the time by which the review had to be concluded.

The Court of Appeal held that the provisions were designed to tackle serious anti social behaviour and the fact that the Housing Act 1985 specified a seven day time limit underlined its importance. It was therefore

unrealistic to presume that the Council would allow more time than was necessary on the off chance that Mr Harris would fail to exercise his statutory right. It would also place unnecessary strain on the Council's resources if they had to deal on a case by case basis with applications for extensions of time. Accordingly, a tenant who requested a review outside the seven day period was not entitled to a statutory review and a landlord had no power or obligation to conduct one.

In relation to the allegation that the Council should have served a fresh Notice if Mr Harris' failure to make the request was outside his control, it was held that a landlord had no power to conduct a review if a request was made out of time because Parliament had made that choice.

Furthermore, it was held that a landlord could not have a duty to serve a fresh Notice if it had not been asked to do so and Mr Harris had failed to do so in this case. A landlord could not therefore have a duty to serve a fresh Notice unless there was some ground for supposing that a review might lead to a different decision being made, and for that purpose a landlord would need to know the ground upon which the review was being sought. No such grounds had been given by Mr Harris in this case.

The Court of Appeal therefore held that the Council could not be criticised for rejecting the request for a review in the absence of any indication of any ground upon which the review had been requested and there was no good reason for the Council to have served a new Notice.

Many registered providers will continue to offer a tenant the opportunity of a review out of time to prove reasonableness to the Court in mandatory grounds for possession, however it is clear from this case that there is no obligation to do this, neither is there an obligation to serve a new Notice if the failure to request a review is beyond their control.

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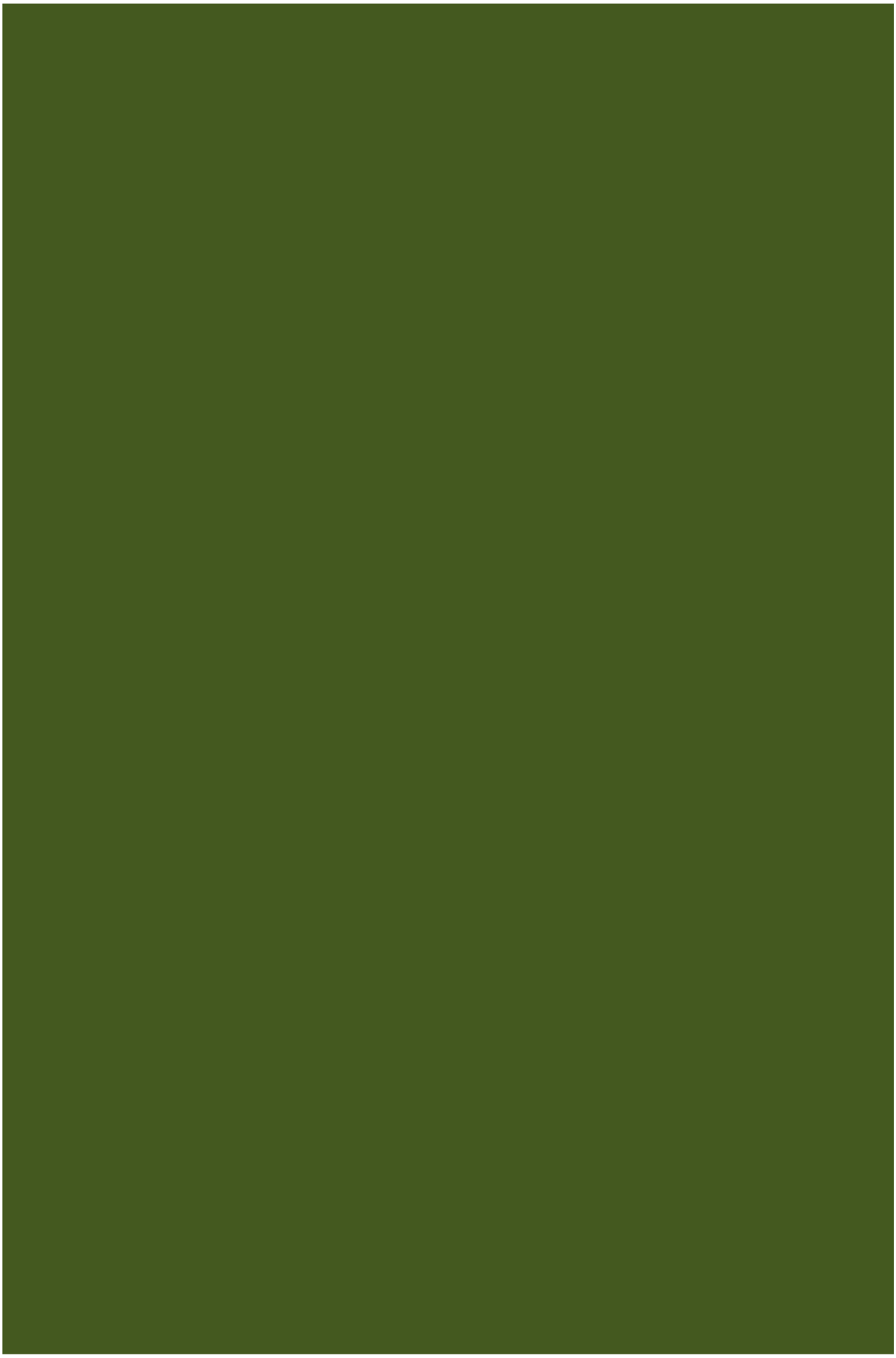

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