

HPLA 19th November 2014: Housing Law Update**Statutory Developments in Housing Law**

1. The aim of this paper and the accompanying presentation is to discuss some of the most significant and interesting statutory developments in the field of housing law over the last year.

Anti-social Behaviour, Crime and Policing Act 2014

2. The new Anti-social Behaviour, Crime and Policing Act (“ASBCPA 2014”) received royal assent on 13th March 2014. The most significant changes in relation to housing law which it introduces relate to new grounds for possession and injunctions. (The Act also amends the law in relation to closure orders: that topic is beyond the scope of this paper.)

Grounds for possession

3. Currently, a possession order can be made on the basis of anti-social behaviour against secure tenants under Grounds 1 and 2 of Schedule 2 to the Housing Act 1985 (“HA 1985”) and against assured tenants under Grounds 12 and 14 of Schedule 2 to the Housing Act 1988 (“HA 1988”). All of these grounds are discretionary.
4. This Act introduces a new mandatory ground for possession against both secure and assured tenants in addition to new discretionary grounds.
5. The new mandatory ground: section 94 ASBCPA 2014 introduces a new ground via a new section 84A HA 1985 for secure tenancies. Section 97 ASBCPA 2014 introduces a corresponding new ground for assured tenancies (new Ground 7A of Schedule 2 HA 1988). These provisions came into force on 20th October 2014 in relation to England and on 21st October 2014 in relation to Wales (*Anti-Social Behaviour, Crime and Policing Act 2014 (Commencement No. 7, Saving and Transitional Provisions) Order 2014/2590* and *Anti-Social Behaviour, Crime and Policing Act 2014 (Commencement No. 2 and Transitional Provisions) (Wales) Order 2014/2830* respectively).
6. Subject to a human rights, disability discrimination, or public law defence, and subject to the landlord’s compliance with the notice and any review requirements, the court must award possession where one of five conditions is satisfied. The conditions are as follows:
Condition 1 is that-
(a) the tenant, or a person residing in or visiting the dwelling-house, has been convicted of a serious offence, and

(b) the serious offence—

- (i) was committed (wholly or partly) in, or in the locality of, the dwelling-house,*
- (ii) was committed elsewhere against a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house,*
or
- (iii) was committed elsewhere against the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and directly or indirectly related to or affected those functions.*

Condition 2 is that a court has found in relevant proceedings that the tenant, or a person residing in or visiting the dwelling-house, has breached a provision of an injunction under section 1 of the Anti-social Behaviour, Crime and Policing Act 2014, other than a provision requiring a person to participate in a particular activity, and—

- (a) the breach occurred in, or in the locality of, the dwelling-house, or*
- (b) the breach occurred elsewhere and the provision breached was a provision intended to prevent—*

- (i) conduct that is capable of causing nuisance or annoyance to a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house, or*
- (ii) conduct that is capable of causing nuisance or annoyance to the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions.*

Condition 3 is that the tenant, or a person residing in or visiting the dwelling-house, has been convicted of an offence under section 30 of the Anti-social Behaviour, Crime and Policing Act 2014 consisting of a breach of a provision of a criminal behaviour order prohibiting a person from doing anything described in the order, and the offence involved—

- (a) a breach that occurred in, or in the locality of, the dwelling-house, or*
- (b) a breach that occurred elsewhere of a provision intended to prevent—*
 - (i) behaviour that causes or is likely to cause harassment, alarm or distress to a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house, or*
 - (ii) behaviour that causes or is likely to cause harassment, alarm or distress to the landlord of the dwelling-house, or a person employed (whether or not by the*

landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions.

Condition 4 is that—

(a) the dwelling-house is or has been subject to a closure order under section 80 of the Anti-social Behaviour, Crime and Policing Act 2014, and

(b) access to the dwelling-house has been prohibited (under the closure order or under a closure notice issued under section 76 of that Act) for a continuous period of more than 48 hours.

(7) Condition 5 is that—

(a) the tenant, or a person residing in or visiting the dwelling-house, has been convicted of an offence under—

(i) section 80(4) of the Environmental Protection Act 1990 (breach of abatement notice in relation to statutory nuisance), or

(ii) section 82(8) of that Act (breach of court order to abate statutory nuisance etc.), and

(b) the nuisance concerned was noise emitted from the dwelling-house which was a statutory nuisance for the purposes of Part 3 of that Act by virtue of section 79(1)(g) of that Act (noise emitted from premises so as to be prejudicial to health or a nuisance).

7. In order to obtain possession on this ground, the landlord must have complied with the relevant notice requirements. The court cannot dispense with notice where the landlord is relying on this ground. Landlords of secure tenants must serve a notice complying with the requirements of the new section 83ZA HA 1985, which is introduced by section 95 ASBCPA 2014. Landlords of assured tenants must serve a notice in accordance with section 8 HA 1988, which has been amended by section 97 ASBCPA 2014.
8. Landlords of secure tenants must also comply with the new section 85ZA, which enshrines the right to a review of the decision to seek possession on the new ground. The review process is governed by the *Absolute Ground for Possession for Anti-Social Behaviour (Review Procedures) (England) Regulations 2014 SI 2554*. These set out what information an application for a review must include (regulation 2). The tenant has the right to an oral hearing (regulation 3). The review can be conducted by an officer or employee of the landlord but they must be “*of greater seniority than the person who made the original decision*” (regulation 5). There is no corresponding statutory right to review for assured tenants although the Home Office’s *Statutory Guidance for*

Frontline Professionals, issued in July 2014, states that “we would expect housing associations to offer a similar non-statutory review procedure”.

9. The Act also confirms that the new ground is “*subject to any available defence based on the tenant’s Convention rights*” (section 94 ASBCPA 2014). In the author’s view, it must also be subject to a public law and/or disability discrimination defence. When considering or presenting any such defence, it is useful to be aware of the Home Office guidance which emphasises that “*the new absolute ground is intended for the most serious cases of anti-social behaviour and landlords should ensure that the ground is used selectively*”.
10. Discretionary grounds: the Act also introduces two new discretionary grounds for possession based on anti-social behaviour. These apply to both secure and assured tenancies and came into force on 13th May 2014 (*Anti-Social Behaviour, Crime and Policing Act 2014 (Commencement No. 2, Transitional and Transitory Provisions) Order 2014/949* and *Anti-Social Behaviour, Crime and Policing Act 2014 (Commencement No. 1 and Transitory Provisions) (Wales) Order 2014/1241*).
11. Firstly, section 98 of the new Act amends Schedule 2 to both HA 1985 and HA 1988 to enlarge the current Grounds 2 and 14 so as to allow for the court to grant possession, if it would be reasonable to do so, where the tenant or a person residing in or visiting the property:

...has been guilty of conduct causing or likely to cause a nuisance or annoyance to the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord’s housing management functions, and that is directly or indirectly related to or affects those functions.
12. Secondly, section 99 of the new Act amends Schedule 2 to both HA 1985 and HA 1988 to introduce a new Ground 2ZA and Ground 14ZA respectively. This applies to England only. It allows for possession to be granted where:

The tenant or an adult residing in the dwelling-house has been convicted of an indictable offence which took place during, and at the scene of, a riot in the United Kingdom.
13. A “riot” is defined by section 1 of the Public Order Act 1986 as “*where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of*

them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety”¹.

Injunctions

14. The other aspect of this Act which is particularly important to housing practitioners concerns injunctions. The new civil injunction will replace the current “civil” or stand-alone ASBOs and the ASBI. The provisions are not yet in force but are expected to be introduced in around January 2015.

15. The county court or High Court (or, in the case of a youth, the Youth Court) may grant an injunction under section 1 ASBCPA 2014 where two conditions are met:

[...]

(2) The first condition is that the court is satisfied, on the balance of probabilities, that the respondent has engaged or threatens to engage in anti-social behaviour.

(3) The second condition is that the court considers it just and convenient to grant the injunction for the purpose of preventing the respondent from engaging in anti-social behaviour.

16. What constitutes anti-social behaviour will depend on the context:

- i. In a non-housing context, such as in the street or in a shopping centre, anti-social behaviour means “*conduct that has caused, or is likely to cause harassment, alarm or distress to any person*” (section 2(1)(a) ASBCPA 2014).
- ii. In a housing context, anti-social behaviour means “*conduct capable of causing nuisance or annoyance to a person in relation to that person’s occupation of residential premises*” (section 2(1)(b) ASBCPA 2014) or “*conduct capable of causing housing-related nuisance or annoyance to any person* (section 2(1)(c) ASBCPA 2014). “*Housing-related*” means “*directly or indirectly relating to the housing management functions of (a) a housing provider, or (b) a local authority*” (section 2(3) ASBCPA 2014). Only social landlords, local councils, or the police can apply for this second type of injunction whereas organisations such as Transport for London and the Environment Agency (as well as social landlords, councils, and the police) can apply for the first.

¹ For further discussion of the new grounds, see Jan Luba QC, “*The new Anti-social Behaviour Act 2014 – what it means for landlords and tenants: Part 1*”, (2014), 18(3) *Landlord & Tenant Review* 87 and “*The new Anti-social Behaviour Act 2014 – what it means for landlords and tenants: Part 2*”, (2014), 18(5) *Landlord & Tenant Review* 165.

17. The terms of the injunction can prohibit the respondent from doing something and/or require him or her to do something (section 1(4) ASBCPA 2014). They can exclude the respondent from his or her home (section 13 ASBCPA 2014). They can be granted against anyone aged 10 or over (section 1(1) ASBCPA 2014). They can last indefinitely, in the case of an adult, or for up to 12 months in the case of a youth (section 1(6) ASBCPA 2014).
18. Breach of an injunction will be a contempt of court. An adult can be punished by up to 2 years in prison or an unlimited fine. The sentencing options for a youth are more varied, and include supervision, a curfew, an activity requirement, or detention. The court can also simply give the respondent a warning.
19. Breach of an injunction can also be the basis of an application for possession on the new mandatory ground, as set out above.
20. A Ministry of Justice consultation on legal aid for injunctions is happening now. The proposal is that applications for and appeals against injunctions will be dealt with under civil legal aid but committals will fall under criminal legal aid. This is clearly problematic, in the author's view, as it means that criminal practitioners who may well not know much about housing law – and in particular the new mandatory ground for possession – will be dealing with breaches. It also means that clients are likely to be denied continuity of representation. The deadline for responding is 1st December 2014. The link is provided in the slides accompanying this paper.

Immigration Act 2014

21. The Immigration Act 2014 (“IA 2014”) received royal assent on 14th May 2014.
22. The provisions relevant to housing come into force on 1st December 2014 in the following areas: Birmingham, Dudley, Sandwell, Walsall, and Wolverhampton.
23. The Act prohibits persons with no leave to be in the UK from entering into residential tenancy agreements.
24. Section 21 IA 2014 stipulates who will be forbidden from entering into such an agreement:
 - (1) *For the purposes of this Chapter, a person (P) is disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement if-*
 - (a) *P is not a relevant national, and*
 - (b) *P does not have a right to rent in relation to the premises.*

(2) *P does not have a 'right to rent' in relation to premises if-*

- (a) *P requires leave to enter or remain in the United Kingdom but does not have it, or*
- (b) *P's leave to enter or remain in the United Kingdom is subject to a condition preventing P from occupying the premises.*

(3) *But P is to be treated as having a right to rent in relation to premises (in spite of subsection (2)) if the Secretary of State has granted P permission for the purposes of this Chapter to occupy premises under a residential tenancy agreement.*

[...]

(5) *In this section, 'relevant national' means*

- (a) *a British citizen,*
- (b) *a national of an EEA state other than the United Kingdom, or*
- (c) *a national of Switzerland.*

25. A residential tenancy agreement is defined at section 20 IA 2014:

[...]

(2) *'Residential tenancy agreement' means a tenancy which-*

- (a) *grants a right of occupation of premises for residential use,*
- (b) *provides for payment of rent (whether or not a market rent), and*
- (c) *is not an excluded agreement.*

26. "Excluded agreements" are specified at Schedule 3 IA 2014. They include:

- i. Social housing. This includes accommodation provided pursuant to Part 6 or 7 of the Housing Act 1996.
- ii. Care homes.
- iii. Hospitals, hospices, and other accommodation relating to healthcare provision.
- iv. Hostels and refuges.
- v. Accommodation from or involving local authorities.
- vi. Accommodation provided by virtue of immigration provisions.
- vii. Mobile homes.
- viii. Tied accommodation.
- ix. Student accommodation.
- x. Long leases.

27. Section 22 IA 2014 prohibits the letting of premises to disqualified persons:

(1) *A landlord must not authorise an adult to occupy premises under a residential tenancy agreement if the adult is disqualified as a result of their immigration status.*

[...]

- (3) *There is a contravention of this section in either of the following cases.*
- (4) *The first case is where a residential tenancy agreement is entered into that, at the time of entry, grants a right to occupy premises to-*
- (a) a tenant who is disqualified as a result of their immigration status,*
 - (b) another adult named in the agreement who is disqualified as a result of their immigration status, or*
 - (c) another adult not named in the agreement who is disqualified as a result of their immigration status (subject to subsection (6)).*
- (5) *The second case is where-*
- (a) a residential tenancy agreement is entered into that grants a right to occupy premises on an adult with a limited right to rent,*
 - (b) the adult later becomes a person disqualified as a result of their immigration status, and*
 - (c) the adult continues to occupy the premises after becoming disqualified.*
- (6) *There is a contravention as a result of subsection (4)(c) only if-*
- (a) reasonable enquiries were not made of the tenant before entering into the agreement as to relevant occupiers, or*
 - (c) reasonable enquiries were so made and it was, or should have been, apparent from the enquiries that the adult in question was likely to be a relevant occupier.*

28. The responsibility of preventing such lettings falls prima facie on the landlord. However, the landlord can agree in writing with an agent that the agent will come under the obligation to comply with the prescribed requirements, where the agent is acting in the course of a business. In such a case, the agent will be responsible for any contravention (section 25 IA 2014) and the landlord will be excused from paying any penalty (section 24(2)(b) IA 2014). It appears though that the landlord will still be responsible where the agent has complied with the prescribed requirements and properly advised the landlord of the outcome in a reasonable time (section 26 IA 2014 and *Draft Code of Practice on illegal immigrants and private rent accommodation* (October 2014)).

29. If a landlord (or agent) breaches this provision then they can be served with a notice requiring payment of a fine up to £3000 (sections 23 and 25 IA 2014).

30. However, landlords or agents will have a “*statutory excuse*” where they have complied with all the prescribed requirements (section 24(2)(a) and section 26(2) IA 2014). These are set out in the *Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) Order 2014*. The landlord (or, if responsible, the agent) must:

- i. Obtain certain documents from all prospective adult occupiers or, if the occupier has an outstanding application with the Home Office, obtain a “*Positive Right to Rent Notice*” from the Landlord Checking Service.
 - ii. Take all reasonable steps to verify the authenticity of the document.
 - iii. Take a copy of the document and record the date on which the copy was taken.
 - iv. Retain the copy for not less than one year after the tenancy agreement ends.
 - v. Take all reasonable steps to identify any additional occupants of the property at the time that the occupier or prospective occupier enters into the tenancy agreement.
31. If the occupier’s right to remain in the UK is of limited duration, then the landlord’s duty does not end there: he must go on to perform follow up checks at prescribed intervals, which will be the longer of one year from the time the prescribed requirements were last complied with or the remainder of the tenant’s leave or validity period (section 27 IA 2014). If it transpires that the tenant no longer has leave to be in the UK, then the landlord has to report him to the Home Office. If he doesn’t, he will lose his statutory excuse (section 24(6) IA 2014).
32. If the landlord is served with a civil penalty notice, then he has 28 days to object to it in writing (section 29 IA 2014). If the notice is upheld, the landlord can appeal to the county court on the grounds that he is not liable to pay the penalty; he has a statutory excuse; or the penalty is too high (section 30 IA 2014).
33. No formal changes are made to possession law by this Act: the *Draft Code of Practice on illegal immigrants and private rented accommodation* (October 2014) confirms that “*the landlord is not required to take any steps to remove the occupier, even if checks reveal that a sitting occupier no longer has a right to rent*”. Indeed, the landlord may not be able to take steps to evict the tenant if, for example, any fixed term tenancy has not elapsed.
34. In addition to the Code of Practice referred to above, the Home Office has also produced a *Prototype Anti-Discrimination Code* (31 October 2013). The purpose of this document is to “*provide landlords and agents with guidance on how to avoid a civil penalty for renting premises for the use as their only or main home by an illegal migrant, in a way that does not result in unlawful race discrimination*”. The fact that such guidance is necessary is, it is suggested, something of a reflection on the nature of the Act itself.

Deregulation Bill

35. As of 6th April 2007 landlords have been required to protect their tenants' deposits within initially 14, subsequently amended by the Localism Act 2011 to 30, days of receipt. Section 213 of the Housing Act 2004 (as amended) ("HA 2004") details the way in which deposits must be protected. Section 215 HA 2004 sets out the sanctions for non-compliance with those requirements.
36. In June 2013, the Court of Appeal decided the case of Superstrike Ltd v Rodrigues [2013] EWCA Civ 669. This concerned a fixed-term assured shorthold tenancy which had been entered into before 6th April 2007 but which had become a statutory periodic assured shorthold tenancy after 6th April 2007 (in January 2008). The landlord had received a deposit from the tenant at the beginning of the original fixed-term tenancy and had never protected it. In June 2011 the landlord sought possession on the basis of a section 21 notice. The Court of Appeal held that the statutory periodic tenancy which arose in January 2008 was a new tenancy and that the deposit had been "received" again upon the commencement of this new tenancy. The requirements of the Housing Act 2004 therefore applied to it. As it had not been protected, the section 21 notice was of no effect.
37. This judgment was interpreted by many as meaning that when a fixed-term tenancy became periodic, the landlord had to re-serve the prescribed information. An example of that principle being applied is the case of Gardner v McCusker, which was reported in the July/August 2014 edition of Legal Action. In that case, a Deputy DJ at Birmingham County Court dismissed the possession claim on the basis that, pursuant to Superstrike, all the requirements of section 213 HA 2004 arose again when the fixed-term tenancy became periodic. There had been no repeat compliance and therefore the landlord could not rely on the section 21 notice.
38. The government is using the Deregulation Bill, which is currently going through Parliament, to reverse the effect of the Superstrike decision. Firstly, a proposed new section 215B HA 2004 stipulates that where a tenancy deposit has been received by a landlord in connection with a fixed term shorthold tenancy on or after 6th April 2007, the landlord has complied with the requirements of section 213 HA 2004, and a statutory periodic tenancy arises, then the requirements of section 213 HA 2004 are treated as if they have been complied with in relation to the new statutory periodic tenancy. The effect will be the same where the fixed term tenancy has been replaced by a new fixed term or periodic tenancy with the same landlord, tenant, and property (proposed section 215B).

39. The amendment to the bill also clarifies the situation in relation to tenancies where a fixed-term tenancy began prior to 6th April 2007 and a periodic shorthold tenancy arose on or after that date. Landlords must comply with the section 213 HA 2004 requirements, but will have 90 days from the commencement date of the Deregulation Act to do so (proposed section 215A).
40. Pursuant to the proposed new section 215D HA 2004, these new provisions, if enacted, are to be treated as having had effect since 6th April 2007 except where a claim under section 214 HA 2004 or section 21 HA 1988 has settled or been finally determined before the commencement date. If proceedings have been instituted, but not settled or determined, before the commencement date, and the court makes an order in the landlord's favour, then the court must not order the tenant to pay the landlord's costs in so far as they are attributable to the proceedings under section 214 HA 2004 or section 21 HA 1988.
41. However, uncertainty remains. The Act still does not address what happens where a deposit is taken in respect of a tenancy which was granted before 6th April 2007 and became periodic before that date. The author has had a case on this point where the court held that the section 213 requirements did apply but the amendments proposed by the Deregulation Bill might be seen to lean against such an interpretation.
42. Finally, one case to be aware of in relation to tenancy deposits is the Administrative Court decision in R (Tummond) v Reading County Court [2014] EWHC 1039 (Admin). This concerned the issue of whether the landlord can rely on a section 21 notice which is served at the commencement of the tenancy and before the deposit has been protected. In that case, the tenancy commenced on 18th December 2012 and a section 21 notice was served on the same day. The deposit was received on 22nd December 2012 and protected on 2nd January 2013. The landlord brought possession proceedings on the basis of the section 21 notice served on 18th December 2012. A possession order was made. Permission to appeal was refused and the claimant brought a claim for judicial review of that refusal. The claim was dismissed. Hamblen J held that the case did not fall within the exceptional circumstances required for the Administrative Court to judicially review a circuit judge's refusal of permission to appeal. In any event, it was found that there was no error of law. The landlord could not be sanctioned for non-compliance as there had been no non-compliance: the deposit had been protected in the requisite timeframe. Hamblen J stated that "*one can 'hold' the deposit 'in accordance with an authorised scheme' before the deposit is protected*" where the landlord was contractually obliged by the tenancy agreement to protect the deposit in an authorised scheme.

A look ahead

43. There are three private members' bills currently making their way through Parliament which are of particular interest to housing practitioners.

Tenancies (Reform) Bill

44. Sarah Teather's Tenancies (Reform) Bill was presented to Parliament on 2nd July 2014 and is due to have its second reading on 28th November 2014.

45. This seeks to tackle the practice of private sector landlords evicting tenants in response to a report of disrepair. The bill has not yet been published so its exact provisions are not yet clear. In her Guardian article on the subject (*Guardian Professional*, 27th October 2014), Sarah Teather says that it will prevent a landlord from relying on a section 21 notice "within six months of receiving an improvement or hazard awareness notice". However, the briefing notice issued by the House of Commons library (*Retaliatory eviction (England)*, 7th November 2014) suggests that the restriction could be triggered not just by action by the council but also where the tenant complains in writing of a defect which would give rise to the repairing duty under section 11 of the Landlord and Tenant Act 1985.

Affordable Homes Bill

46. Secondly, there is Andrew George's Affordable Homes Bill. This has two primary provisions.

47. Firstly, it seeks to introduce three new exemptions to the bedroom tax:

- i. For households where an adaptation has been made to the dwelling to provide assistance to meet a disability need of a member of the household and the claimant has provided evidence: of the disability need; that an adaptation has been made to meet the need; and that the cost of the adaption is not less than an amount that would be prescribed by regulations.
- ii. Where an additional bedroom is needed for a member of the household who receives Disability Living Allowance or the Personal Independence Payment and who is not reasonably able to share with their partner or sibling.
- iii. For households where neither the landlord nor the local authority has made a reasonable offer of alternative accommodation.

48. The second main provision is for a review to be undertaken of the availability of affordable homes and intermediate housing.

49. This bill had its second reading in September 2014, when it was passed by 306 votes to 231. However, much to its sponsor's chagrin, it has since been adjourned for a Money Resolution to be provided.

Carers Bedroom Entitlement (Social Housing Sector) Bill

50. This bill is sponsored by Barbara Keeley. It is another attack on the bedroom tax. It seeks to exempt from the tax households with only one spare bedroom where a member of the household is entitled to carer's allowance or requires overnight care.

51. The bill will receive a second reading on 21st November 2014.

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