HOUSING LAW PRACTITIONERS ASSOCIATION

Renting Homes (Wales) Bill

Submission of the Housing Law Practitioners Association (HLPA)

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About HLPA

The Housing Law Practitioners Association (HLPA) is an organisation of solicitors, barristers, advice workers, environmental health officers, academics and others who work in the field of housing law.

Membership is open to all those who use housing law for the benefit of the homeless, tenants and other occupiers of housing. It has members throughout England and Wales.

HLPA has existed for over 25 years. Its main function is the holding of regular meetings for members on topics suggested by the membership and led by practitioners particularly experienced in that area, almost invariably members themselves. Presently, meetings the take place every two months and are regularly attended by c.100 practitioners.

The Association is regularly consulted on proposed changes in housing law (whether by primary and subordinate legislation or statutory guidance). HLPA's Responses are available at www.hlpa.org.uk.

Membership of HLPA is on the basis of a commitment to HLPA's objectives. These objectives are:

- To promote, foster and develop equal access to the legal system.
- To promote, foster and develop the rights of homeless persons, tenants and others who receive housing services or are disadvantaged in the provision of housing.
- To foster the role of the legal process in the protection of tenants and other residential occupiers.
- To foster the role of the legal process in the promotion of higher standards of housing construction, improvement and repair, landlord services to tenants and local authority services to public and private sector tenants, homeless persons and others in need of advice and assistance in housing provision.
- To promote and develop expertise in the practice of housing law by education and the exchange of information and knowledge.

Justin Bates is the author of this paper. He is a barrister at Arden Chambers (London & Birmingham) and the vice-chair of the HLPA. He is the Deputy General Editor of the Encyclopedia of Housing Law and the author or co-author of various other books on housing law and local government law.

Introduction

1. The Association is delighted to be asked to give evidence to the National Assembly on the Renting Homes (Wales) Bill. It has consistently called for the Renting Homes Bill to be adopted by the Westminster Parliament[1] and expressed strong support for what is now the Renting Homes (Wales) bill in August 2013 in response to the consultation paper *Renting Homes: A Better Way for Wales*.[2] Our view is that the Bill will do much to simplify the law, to the advantage of both landlords and tenants.

2. The Association recognises the demands on members of the Committee and will not seek address every aspect of the Bill. This evidence addresses the following issues, which seem to the Association to be particularly troubling the committee[3] and attempts to identify areas of potential litigation and to suggest proposals to avoid the same.

Contractual terms

3. We are generally supportive of the proposal for prescribed terms and written contracts as we believe that this will bring clarity and certainty for both landlords and tenants.

Written statement of contract

4. We have a concern about cl.34 of the Bill.

5. As it presently stands, it appears to provide that, if a landlord has failed to provide a "written statement of contract"[4], then, after a set period of time,[5] the tenant can apply to court for a declaration as to the terms of the contact and an order that the landlord provide such written terms.

6. We are concerned about how this is to be enforced in practice. In particular, we doubt that legal aid will be available to enable occupiers to engage lawyers to make such an application on their behalf.

[1] See, by way of recent example, its evidence to the CLG Select Committee investigation into the Private Rented Sector, January 2013.
[2] HLPA submission, August 2013.
[3] Particularly having regard to the oral evidence it received from the Minister for Communities and Tackling Poverty, April 22, 2015, the transcript of which is available online and which has been considered when preparing this submission.
[4] which, in substance, is the rental contract itself, including the fundamental and supplementary terms – see cls.31, 32
[5] presently 14 days from the occupation date – cl.31(1)

7. The Bill already envisages that such hearings may be contentious (*e.g.* as to whether there were modifications or whether there was some default on the part of the tenant – cls.34(2), (4)) and we have concerns about legally represented landlords being able to "bamboozle" unrepresented occupiers. Furthermore, putting the onus on the occupier to make the application depends in large part on the occupier already being aware that s/he has such rights. It is our experience that very few tenants will have such knowledge.

8. A more effective way of putting the onus on the landlord to provide this information might be to introduce a prohibition on exercising a right to possession unless the material has already been provided. Such prohibitions are increasingly common in housing law, see, *e.g.* the prohibition on using s.21, Housing Act 1988 where a property is an unlicensed HMO or where there has been a failure to comply with aspects of the Tenancy Deposit rules (Housing Act 2004, in both cases), and are already found elsewhere in the Bill (cl.46).

Name and address of landlord

9. Clause 39(1) requires the landlord to give the occupier notice of an address for service of documents in the United Kingdom. Failure to comply leaves the landlord liable to pay compensation (cl.40).

10. It appears that this is intended to replace the obligations presently found in ss.47, 48, Landlord and Tenant Act 1987. If that is correct, then cl.39 does not fully achieve this end. Breach of ss.47, 48, 1987 Act is "enforced" by the prohibition on the landlord being lawfully entitled to certain monies (including rent in some circumstances) unless the information is provided. It is not clear to the Association why this prohibition is removed and replaced by a financial penalty.

11. Furthermore, cl.39(2) only seems to require a new landlord (*e.g.* where there has been a sale of the reversion) to give the occupier notice of the change in identity of the landlord. Again, compensation is payable in default (cl.40). This appears to have two flaws. First, why does the new landlord only have to give details of his "identity" and not his address for service of documents in the UK? Secondly, it is presumed this provision is intended to replace s.3, Landlord and Tenant Act 1985; but if that is correct, why is the sanction different? In particular, s.3(3) provides that until notice of assignment is given, both the old and new landlord remain liable on *e.g.* repairing covenants. That is an important safeguard for tenants as it prevents disreputable landlords from avoiding liability by simply assigning their interest.

Fit for human habitation

12. We very much welcome cl.91 as a considerable improvement over s.8, Landlord and Tenant Act 1985. The failure of the Westminster Parliament to update the rent levels in s.8 in line with inflation has been criticised by both the Law Commission and the Court of Appeal[6] and the Assembly is to be congratulated on addressing this lacuna. It is only primary legislation which can ensure that property is required to be fit for human habitation, as common law is inadequate for these purposes.[7] We can see no basis at all for suggesting that a landlord should be able to let a property which is not fit for human habitation (especially where public money is paid to that landlord, *e.g.* by way of housing benefit).

13. We do suggest, however, that there should be further provision made in the Bill to assist with determining whether a property is fit for human habitation. Clause 94 contains power to prescribe matters to which regard must be had, but:

(i) there should be a "default" or "fall-back" position, in the event that no matters are ever prescribed (or once prescribed are later repealed), see, for example, s.10, Landlord and Tenant Act 1985;

(ii) it is not clear whether cl.94 is intended to confer power to prescribe *guidance* or an (exhaustive?) list of factors which will constitute "unfitness".

14. Likewise, it would be of assistance to landlords, tenants and the courts if there were to be power[8] to issue guidance as to what constitutes "reasonable expense" for the purposes of cl.95 (the exceptions to cl.91) (*e.g.* is it a subjective test based on the impecunious nature of this landlord, even if the rack rents / reversionary interest are very valuable? Or is it an objective test for the court?).

Possession

Terms of suspension

15. Chapter 10 (possession proceedings) largely follows the existing law. We wonder if cl.207(5) might, however, benefit from further consideration. A power to impose conditions as part of a suspended possession order is unremarkable and unobjectionable. But are those conditions intended only to be negative (*e.g.* do not cause any further anti-social behaviour) or might they also be positive (*e.g.* attend alcohol counselling)? The latter are now expressly provided for in anti-social behaviour injunctions (see Pt.1, Anti-Social Behaviour, Crime and Policing Act

[6] *Issa v Hackney London Borough Council* (1997) 29 H.L.R. 640, which also deals with the Law Commission report.
[7] *Hart v Windsor* (1844) 12 M. & W. 68, *Cruse v Mount* [1933] Ch. 278, *Sleafer v Lambeth LBC* [1960] 1 Q.B. 43.
[8] Or even a duty.

2014), with provisions for, *e.g.* ensuring funding is identified. Is it intended to allow positive conditions? If not, this should be made clear.

Absolute ground for possession

16. We have very real concerns about cls.208 and 209. We do not see any need for the absolute ground for possession and are unaware of any evidence which demonstrates why it is necessary to abandon the "reasonableness" criteria which has been in place since at least 1915.

17. Assuming, however, that the Committee is not with us on that point, we are concerned about cl.208(2) which appears to assert that a court *must* make a possession order *unless* a defence based on the European Convention of Human Rights is made out. The reason, one imagines, is that a disproportionate interference with the rights of the occupier(s) would be unlawful – see s.6, Human Rights Act 1998.

18. But there are other defences which are similarly unlawful. Suppose, for example, that an occupier wished to argue that his eviction on a mandatory ground amounted to, *e.g.* disability discrimination? Such discrimination is prohibited by the Equality Act 2010 and not (necessarily) by the Human Rights Act 1998. Suppose further that the occupier wishes to argue that the decision to institute possession proceedings was made in bad faith (*e.g.* by personal animus on the part of a housing officer). That is plainly a valid public law defence, but not covered by the 1998 Act. Likewise, a defence based on a failure to comply with a published (and statutory) policy.

19. It *might* be said that these defences could be raised under cl.209(4). But this is not clear and, if that is what is intended, then cl.208(2) should be amended to ensure that no doubt arises. The same issues arise under cl.211.

Retaliatory eviction

20. Whilst we welcome cl.213 (restriction on retaliatory eviction for, in effect, asserting repairing rights), we suggest it is far too limited. Retaliatory eviction can (and does) occur for a variety of reasons, *e.g.* in *Chapman v Honig* [1963] 2 Q.B. 502 the landlord served Notice to Quit on a tenant who had given evidence in another tenant's claim for trespass against the landlord. A more general "bad faith" defence would, we suggest, be preferable.

Children as tenants

21. We understand that c.230 has been controversial, *i.e.* allowing children aged 16 and 17 to become contract holders.

22. The reality is that public authorities (both local authorities and other social landlords) already grant tenancies to such children (usually as part of their homelessness duties). The difficulty comes not in the grant, but that very few, if any, local authorities understand the complex nature of the trust arrangement which is imposed by law in such cases.[9] Simplifying the arrangement will be of enormous assistance to authorities.

Publicity and public information

23. Finally, although this is outside the scope of the Bill, the Association would urge that sufficient funds be earmarked for a substantial and sustained advertising campaign once the Bill becomes an Act and, again, ahead of the commencement date. This is a significant change in housing law in Wales – probably the most significant change since the Housing Act 1988 – and all parties (landlords, tenants, agents, lawyers) will need to be made aware of the fundamental nature of the changes.

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[9] See *Minor Tenants*, Arden QC, Knight, Journal of Housing Law, 2014, pgs.37 and 62 (Pts.1 and 2 of the article).