HLPA CONFERENCE 2019
SEMINAR DEFENDING POSSESSION PROCEEDINGS

Possession Claims Case law Update

Representatives

In *Ojo and Opaleye v McAuliffe* Legal Action April 2019 p.40, the Claimant instructed *Landlord Advice UK* (described as non-Solicitors Regulation Authority(SRA) regulated paralegal firm) to act in a possession claim based on a section 8 and section 21 notice. The address for service in relation to the claim was Landlord Advice's address. At the hearing the Claimants were represented by an unregulated representative who had been instructed by a separate firm of solicitors. The District Judge stayed the claim for 2 months pending the Claimants proving an address for service that was either their own or of a person who had authority to conduct litigation. It appeared that Landlord Advice had conducted litigation unlawfully and those solicitors had been responsible for instructing the unregulated representative to attend the hearing. The unregulated representative was not acting under the supervision of a person who was authorised to conduct litigation and therefore did not have a right of audience.

Succession

Lambeth LBC v Casey Legal Action July/August 2019 p.43, in this case he succeeded to a tenancy of a two bedroom property. Possession was sought under Schedule 2, Grounds 13 and 15A. It was argued that the property was more extensive than reasonably required, however Ms Casey argued that she used the second bedroom to look after her cousin's son and intended to foster children in the near future. It was also argued that the property, by having a wet room, low kitchen units and high electrical sockets, was substantially

different from an ordinary dwelling house and had been designed to make it suitable for occupation. Both arguments were rejected by Deputy District Judge Walder who held there was no evidence that the property had been designed for occupation by a disabled person. There is no evidence of high electrical sockets or that the kitchen had low units. Moreover, the wet room was not accessible by a physically disabled person as the entrance had not been widened. It was also found that Ms Casey's intention to use the second bedroom was genuine.

In *Yildiz v Hackney LBC* [2019] EWCA Civ 1331, CA, a claim for possession was brought against the Mr Yildiz who had succeeded to his father's tenancy of a four bedroom property. Possession was claimed under Schedule 2, Ground 15A. The issue was whether the Court was entitled to dispense with notice requirement to serve a valid notice, under section 83(1) (b). It was held by the Court of Appeal that a correct interpretation of Ground 15A as a matter of statutory construction there was a time limit built in, with respect of the serving of a notice that could not be dispensed with.

The issue in *Simawi v Haringey* [2019] EWCA Civ 1770, CA, 31 October 2019 was whether the succession provisions under section 88 Housing Act 1985 were discriminatory as they provided that if there had already been one assignment of a joint tenancy on death, there could not be a further assignment by way of succession, whereas an assignment on divorce did not count (the death-divorce dichotomy). It was argued that the difference in treatment engaged article 8 and article 14 ECHR. In the alternative it was held that the Judge at first instance has been entitled to hold that the impugned measure was not manifestly without reasonable foundation. The appeal had not directly challenged the judge's assessment.

Licence

In *Mohamed v Barnet LBC* [2019] EWHC 1012 (QB) Thornton J dismissed an appeal where Ms Mohamed had argued that she had been granted a secure licence of temporary accommodation. On appeal Thornton J held that the property had been leased to the local authority with provision for the lessee to obtain vacant possession from the landlord on expiry of a specified period when required by the lessor and that under HA 1985 Sch 1 para 6 the licence granted was not secure because the 2015 licence made provision for the letting agent to recover possession from Barnet on giving 14 days' notice. As the 2015 licence was for an indeterminate term, it was not necessary for the licence to make further provision for the letting agent to recover possession on the expiry of a specified period. Permission has been granted for an appeal against the decision to the Court of Appeal.

Section 21

Kaur v Griffith Legal Action September 2019 p.43, Ms Griffith had been granted an assured shorthold tenancy and on the same day the gas appliances were subject to a gas safety check and a certificate was provided. A second check of the gas appliances was undertaken on the 21st January 2018 and the relevant certificate confirmed that the appliances were safe, the certificate was given to Mr Griffith on the same day. A possession claim was defended on the basis that the section 21 notice was invalid because the second gas safety check had taken place more than 12 months after the previous check. District Judge Coffey set aside the possession order. The section 21 notice was invalid because the most recent check of the gas appliance had taken place more than 12 months after the previous check. The Gas Safety (Installation and Use) Regulations do not point to this requirement and there is nothing in the assured

shorthold tenancy notices and prescribed requirements that prevents possession being ordered.

In terms of failure to serve a gas certificate and the ability of the landlord to rectify the situation the judgment in *Caridon Property Ltd v Shooltz* [2018] EW Misc p.9(cc), April 2018 Legal Action 37 has been followed in the case of *Trecarrel House Limited v Rouncefield* Legal Action May 2019 p.42. An application for permission to appeal has been granted and the hearing is due to take place in January 2020.

Parr v Sebastian Pillai Legal Action June 2019 p.44, Ms Parr was granted an assured shorthold tenancy of a flat and paid a deposit to the landlord. The deposit was protected with the deposit protection service. A year later the prescribed information was provided. On the 9th July 2014 the flat was purchased by Mr and Mrs Sebastian Pillai. On the 11th September 2014 the DPS was transferred from an account in the original landlord's name to the new landlords. On the 7th May 2015 the tenancy became periodic. Mrs Sebastian Pillai did not give Ms Parr the prescribed information. There is then a claim based on a section 21 notice and a possession order was made. On appeal His Honour Judge Gerrard allowed the appeal on the basis that Mrs Sebastian Pillai was treated as having received the deposit when it was transferred into her own account with the DPS. This triggered an obligation for her to re-serve the prescribed information. Section 215B did not apply because she had not previously provided the prescribed information.

Livewest Homes Ltd v Bamber [2019] EWCA Civ 1174 Ms Bamber was an assured shorthold tenant of a flat. Livewest, her landlord, was a registered provider of social housing. The tenancy was for a fixed term of 7 years, but

could be terminated by Livewest giving 2 months' notice in the first 18 months of the term is satisfied that there had been a breach of the tenancy. After complaints of antisocial behaviour a s21 notice was issued to operate the break clause. The Court of Appeal dismissed the second appeal. It was held that a failure to serve a notice under s21 (1B) should only prevent a possession order being made when the fixed term of an assured shorthold tenancy has expired by effluxion of time. This is because the purpose of a s21 (1B) notice is to inform a tenant that the fixed term tenancy will not be renewed at the end of the contractual term. The Parliamentary debates prior to the passing of the Localism Act 2011 which added the sub-section demonstrated that it was not intended such information was required to be given on the tenancy's termination by service of a break notice.

Immigration status/Discrimination Claim

R (Goloshvili) v Secretary of State for the Home Department [2019] EWHC 614 Ms Goloshvili had entered the UK and was granted leave to remain as a student. A private landlord, Mr Bardi, granted her an assured shorthold tenancy but then contacted the Home Office requesting they serve a notice of letting to a disqualified person under the Immigration Act (1A) 2014 as he did not believe that she had a right to rent the premises. The Home Secretary served a notice on Mr Bardi and as a result he made a claim for possession relying on Ground 7B. In the interim Ms Goloshvili requested that the notice be withdrawn. This was refused and she made a challenge by way of judicial review. Eventually the Immigration Agency accepted that she had leave to remain in the UK and a right to rent. It withdrew the notice. There was then an argument brought by her to say that the service of the notice had been in breach of the Equality Act 2010 s.13, 19 and 29. This claim was dismissed on the basis that it could not fall within these provisions as it was served a

Minister of the Crown under an enactment and such enactments were excluded from the application of the Equality Act 2010 by Schedule 3 para 17.

Cause of action estoppel

In *Salix Homes v Mantato* [2019] EWCA Civ 445 the former landlord Salford City Council had obtained a postponed possession order on a secure tenancy for a money judgment for non-payment of rent. There was non-compliance with the postponed order and a warrant for possession was issued and subsequently suspended on terms. A number of years later in March 2015 Salix Homes obtained the reversion of the tenancy following a stock transfer. In March 2017 they served Mr Mantato with a notice seeking possession relying on Housing Act, Schedule 2, Grounds 10 and 11. In June 2017 the Court made a suspended order and a money judgment. Mr Mantato did not keep to the terms of the suspended order and a warrant was obtained and then executed. Later that day Mr Mantato paid all of his arrears of rent and legal costs. He then applied to set aside the warrant on the grounds that Salix Homes were estopped by cause of action estoppel from bringing the claim. A Deputy District Judge set aside the warrant and ordered that Mr Mantato be readmitted to the property.

The Court of Appeal allowed an appeal finding that the facts entitling Salix Homes to possession were not the same as those that entitled Salford to the original possession order. Further rent had since become due and unpaid and the grounds for possession relied on were under a different statute. It was held that the fact that the landlord may not need to bring fresh proceedings for possession does not give rise to cause of action estoppel. In certain circumstances it might give rise to an argument that the claim was an abuse of process but that was a different test. One factor that would be relevant to

whether an abuse of process argument could succeed was the fact that the assignment does not, unless the terms of the assignment specifically provide, include the benefit of the possession order granted to the previous owner (see *Chung Kwok Hotel Co v Field (No.1)* [1960] 1 WLR 1112.

Warrants/Oppression

Francis v Wandle Housing Association Legal Action March 2019 p.41, Ms Francis was an assured tenant of the Association. They obtained a suspended possession order due to rent arrears. The order was made in January 2017. Whilst there was initial compliance by October 2017 Ms Francis had stopped making payments. Unknown to the Association Ms Francis' mental health had begun to deteriorate and as a result she stopped working and stopped opening letters. By April 2018 she had moved back to live with her mother. On the 12th May 2018 Ms Francis was sectioned under the Mental Health Act 1983. She presented with strong paranoia and delusional beliefs. On the day she attended A&E her mother telephoned the Association to say that Ms Francis was having a mental health crisis. The operator said that she would have to speak to the housing officer responsible and would be unable to do so without Ms Francis authorising her mother to speak on her behalf. A few days later an eviction took place. An application was made to set aside the warrant post execution on the grounds of oppression. An application was made for an injunction to prevent the re-letting of the property. A medical report was obtained that concluded Ms Francis had lacked capacity to conduct the proceedings from January 2018. Deputy District Judge White set aside the warrant on the footing that by the date of the eviction the Association were aware that Ms Francis had been sectioned and was unlikely to have capacity and they had been asked to postpone the eviction. In the circumstances pursuing the eviction without bringing these matters to the attention of the

Court was oppressive. In any event it was found that Ms Francis had lacked capacity from January 2018 and steps that had been taken in the proceedings after that date had no effect as she did not have a litigation friend.

Lambeth LBC v Greenland Legal Action July/August 2019 p.43 Ms Greenland had been the secure tenant and was subject to a suspended possession order due to the behaviour of her son. The order prevented her son from returning to the property. There was then a series of further allegations relating to the incidents on the estate. Ms Greenland admitted that her son had attended the property in breach of the order for 4 days but otherwise denied that he son was responsible for the antisocial behaviour. Lambeth applied for permission to issue a warrant under CPR 83.2. District Judge Swann refused to grant permission for the warrant to be issued. The anonymous hearsay evidence relied on by Lambeth did not establish that Ms Greenland's son had been responsible for the antisocial behaviour. The admission of Ms Greenland was not of itself sufficient to justify permission for the warrant to be issued.

Warrants/Equality Act

In *Powell v Dacorum BC* [2019] EWCA Civ 23 the Court of Appeal rejected arguments based on a failure to comply with the public sector Equality Act duty at the warrant stage.

In *Paragon Asra Housing Ltd v Neville* [2018] HLR 39, the Court of Appeal held that following the making of a suspended possession order, at the warrant stage a threshold had to be applied to any application to introduce arguments as to lawfulness under section 15/35 Equality Act 2010. The threshold criteria being that it had to be shown that there was a "*material change in circumstances"* since the making of the possession order. In that case on the

facts it was held that there had been no material change. The Supreme Court in January this year, rejected an application for permission to appeal holding that the application did not raise an arguable point of law which ought to be considered at the time and even if it did "*this was not the right case in which to decide it*".

Possession/S149

Forward v Aldwyck Housing Group Ltd [2019] EWCA Civ 1334 involved an appeal which relied on a failure to comply with the public PSED. It was dismissed on the basis that there had been a failure on the part of the Appellant to adduce any evidence at trial to support his assertion that his drug use, nuisance and antisocial behaviour had been caused by his mental health. It was found that although the PSED assessment before trial had been inadequate, this did not mean that the defence was bound to succeed. The trial Judge was entitled to rely on a substantial body of other evidence that suggested Mr Forward had been complicit in drug use at the flat. It was found the Judge was entitled to find that the only reasonable way of alleviating the nuisance was to evict. It was also found that while the trial Judge ought to have recognised that there had been a failure to comply with section 149 this did not undermine the decision. The Court of Appeal dismissed a second appeal finding that there is no general rule that a defence to a possession claim must succeed where there has been a breach of the PSED. The Court may make a possession order if satisfied that compliance with the PSED would have made no difference to the landlord's decision to seek possession. The trial Judge's decision that the Association had no other viable option was justified on the facts.

London and Quadrant Housing Trust v Patrick [2019] EWHC 1263 (QB) an injunction was granted against Mr Patrick for antisocial behaviour and he was eventually sentenced to 4 weeks imprisonment for breach of the injunction suspended for a year. A mandatory possession claim was brought under HA 1988 CHC 2 Ground 7A. Shortly before the hearing an Amended Defence was filed setting out that he suffered from mental impairment and arguing there had been a failure to comply with section 149. At first instance it was held by His Honour Judge Saggerson that even if there had been a failure to comply with PSED the failure did not prevent him from making a possession order on a summary basis. Reference is made to the impact on Mr Patrick's neighbour. On appeal Turner J dismissed the appeal holding that the PSED had not been triggered until the Association had been provided with medical evidence 2 days before the hearing and they could not be criticised for not undertaking a more formal and analytical type of assessment. In any event it was found that any alleged failure did not necessarily prevent the Court from making a possession order. It was held that in an appropriate case where the breach of the PSED is not material the Court is entitled to make a possession order. It was held that the failure had been subsequently rectified by a proportionality and equality assessment.

Seminar Discussion

To what extent has austerity impacted on possession claims based on rent arrears and what can we as lawyers, do to combat this?

Austerity policies brought in by successive governments since 2010 are widely accepted to have had a significant impact on those reliant on benefits and social

housing. We in practice regularly see the results of this. Frequent issues that arise include:

1. Rent arrears due to delays (of often up to six weeks) in the (re)assessment and award of Universal Credit. This is a particular issue in ground 8 cases which still appear to be being used.
2. Similarly harsh benefit sanctions, bedroom tax and caps on Local Housing Allowance have led to the increase of arrears.
3. Other wider austerity policies also impact on the way in which possession claims are being dealt with – for example closure of public libraries, cuts to support and advice services. It is notable that UC applications have to be made online but what if the applicant does not have access to the internet.
4. Cuts to legal aid. Have these led to a reduction in the number of people seeking legal advice? And what about those cases where the arrears are due to benefits issues but the lawyer is not covered to investigate those?
5. Reduction in the availability of social housing and affordable rents. Has this maybe had a positive impact in terms of how courts are dealing with these cases as the impact of eviction is greater?

Rent Levels

A new formula has been finalised and due to come into force on the 1st April 2020 in relation to rents in social housing (see *Rents for Social Housing from 2020: Government Response to Consultation) February 2019 and Rent Setting Social Housing (England) (House of Commons, Library Briefing Paper No.SN01090, 11 March 2019)*. There is a new formula for calculating social rents. The new formula will allow for the taking into account of property values and income levels in the area. There will be some flexibility as to the

rent that can be charged and some rent caps. It remains to be seen if this will result in significant increases in rent.

Points for discussion – how can we fight back against these effects?

Universal Credit

- Advance payments and budgeting loans, whether they are effective.
- Delays between assessment and actual payment to the landlord where payments are to be made direct.
- Re-assessment based on change in circumstances causing problems.
- Whether the *live service for claimants at risk of eviction* assists– *landlord escalation routes for universal credit live – universal credit live service telephone line*.

Issues in relation to discretionary housing costs

With the advent of the Homelessness Reduction Act in April 2018 many local authorities are now seeking to prevent eviction from private rented accommodation by paying off arrears. Substantial sums have been expended. Reliance on discretionary housing payments also features in any possession cases. Issues arising:

- Whether delays in assessment of DHP could give rise to a public law defence in relation to social landlords.
- Whether it could be argued that a delay in assessments could be raised in a Ground 8 case (see *North British Housing v Matthews* [2005] HLR 17).
- The extent to which DHP payments are being used in the medium term rather than as a short term measure to allow persons to move to cheaper accommodation.

- Whether a possession claim could be adjourned pending a judicial review in relation to a failure to assess a DHP claim.
- Variations between different local authorities who all should have their own DHP policy and are entitled to increase the amount allocated by Central Government by 150%.

Other tactics

- How are you as practitioners assisting clients who are experiencing benefit problems leading to rent arrears?
- Has anyone tried advising clients to apply as homeless to obtain prevention assistance – has this been effective?
- Have practitioners seen a difference in the number of ground 8 cases being brought – increase or decrease?
- To what extent has using public law arguments in rent arrears cases been effective?
- Could we make more of the rent arrears protocol in these cases?
- Any other tactics?

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