

**9<sup>TH</sup> NOVEMBER 2005**

**“TENANCIES AND MINORS”**

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## **“TENANCIES AND MINORS”**

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## SECTION ONE

### MINORS AS TENANTS/LICENSEES

“...there is ample reason to conclude that minor children are not “non-persons” in the law of landlord and tenant, let alone the law of property generally. The modern tendency of the law is to recognise that children are indeed people.” Mrs Justice Hale in *Royal Borough of Kingston Upon Thames v Prince* [1999] 1 FLR 593

#### (i) CAPACITY

##### 1. Minors and contracts

In order to enter into a contract, a minor must at least be old enough to understand the nature of the transaction and, if the transaction involves obligations on the minor of a continuing nature, the nature of those obligations

In order for the contract to be binding, it must be a contract for necessities. A wide meaning has been given to this; it seems to extend to contracts for the minors benefit.

Contracts not involving necessities are in fact voidable contracts. At common law the minor's contract is voidable at his own option i.e not binding on the minor but binding on the other party.

##### 2. Tenancies

- (a) Common Law – Same as any other contract involving a minor: voidable at the minor's option  
Note that he may be liable for rent even during his minority up to the point that he chooses to exercise that option provided that he goes into occupation. See Chitty on Contracts at 8- 033 (refers to Irish caselaw on this point). Also position taken by the Law Commission in their Report on Minors' Contracts.

(b) Statutory Law

s1(6) of the Law of Property Act 1925

“A legal estate .....is not capable of being held by an infant”

Paragraph 2 of Schedule 1 to the Trusts of Land And Appointment of Trustees Act 1996

“Where, after the commencement of this Act, a legal estate in land would, by reason of intestacy or any other circumstances not dealt with in paragraph 1, vest in a person who is a minor, if he were a person of full age, the land is held in trust for the minor”

(c) Overall effect

A minor can be granted an equitable tenancy/interest in land

**(ii) SUCCESSION**

*Royal Borough of Kingston Upon Thames v Prince [1999] 1 FLR 593*

“It has been established for some time, apparently uncontroversially, that a minor can succeed to a statutory tenancy under the Rent Acts: see *Portman Registrars v Mohammed Latif [1987] 6 CL 217*.....his[the judge’s] reasoning was that a statutory tenancy is not an interest in land and a minor does have the capacity to contract for necessities such as lodging.”

Hale J

*Newham LBC v Ria [2004] EWCA Civ 41*

*Prince* was reaffirmed. The court made comments as to the notion of the landlord being the trustee when there is no express provision to that effect as “curious”. The court could not entertain the idea of the estate being suspended or in limbo until a minor reached majority either.

**(iii) SOLUTIONS**

Sadly, one size does not fit all. It depends on the circumstances!

- (a) An “adult” holds the legal estate on trust for the minor until he reaches majority. Practical issues arise:

Who should the “adult” be? Simple when there is an “estate” after a death but what about in other circumstances? Should it be the landlord? *Ria* (supra) disapproves of this idea although it may occur by default e.g. accidental granting of tenancy to a minor will lead to equitable tenancy with landlord as trustee.

- (b) A Deed of Trust – who should be the trustee? Relative, social worker or probation officer, bank, solicitor are all options
- (c) A Licence Agreement – No need for a trustee but what about exclusive possession?
- (d) Contract stating that the minor will be granted a tenancy when he turns 18 (Law Commission suggestion recited in *Prince* (supra))
- (e) Guarantors – some advantages such as the possibility of suing for unpaid rent or damages for other breaches

#### **(iv) ENFORCEMENT**

Comments of Hale J in *Prince* (supra)

“.....the minor successor may not be able to pay the rent or otherwise discharge the obligations of the tenancy. The landlord will then be able to bring it to an end and obtain possession under one of the mandatory grounds.”

“The 1985 Act itself protects the social landlord if a survivor other than a spouse is overhoused after the tenant’s death.... The court may order possession if it considers it reasonable to do so and is satisfied that suitable alternative accommodation will be available where the tenant has succeeded to a periodic tenancy as a member of the deceased tenant’s family other than as spouse (provided that proceedings were taken between six and twelve months after the death).”

Of course, there may need to be a litigation friend appointed for the minor in such circumstances.

## **SECTION TWO**

### **TENANTS MINORS**

#### **(i) ANTI-SOCIAL BEHAVIOUR ORDERS**

##### **Magistrates Court**

Unlike injunctions (see below), anti-social behaviour orders in the Magistrates Court are an appropriate remedy for nuisance children as they can be made against any person aged 10 or over. In addition, amendments to the Crime and Disorder Act 1998 made by the Anti-Social Behaviour Act 2003 means that the categories of body able to make such applications has been significantly expanded to RSL's, County Councils and Housing Action Trusts.

The court does have to consider the interests of the child but the caselaw indicates that the balance of the community interests and the child is an equal one and not weighted either way. There are various procedures in place that are affected by a minors age e.g that evidence should be given on oath unless they are aged under 14, if they are under 16 the parent or legal guardian must attend but interestingly unlike normal youth courts there are no reporting restrictions.

##### **County Court**

As indicated below in injunctions, generally injunctions are not appropriate for minors. However, there is a pilot scheme in place to allow a relevant authority to apply under section 1B of the 1998 Act to join a child to principal proceedings in the County Court (e.g possession proceedings) for an Anti-Social Behaviour Order. The scheme is running from 1/10/04 to 31/3/06 but only in the following courts:

Bristol  
Central London  
Clerkenwell  
Dewsbury  
Huddersfield  
Leicester

Manchester  
Oxford  
Tameside  
Wigan  
Wrexham

Provision is made for the child to act through a litigation friend or the Official Solicitor if no-one else is willing.

It is too early to assess what impact the scheme will have at this stage.

## **(ii) POSSESSION ORDERS – CHILDREN’S CONDUCT**

*Darlington BC v Sterling [1996] 29 HLR 309*

The tenant had two children, a son aged 13 and a daughter aged 12. Possession proceedings were commenced. The district judge found that the son had been guilty of anti-social behaviour including lighting fires, throwing stones, threats with knives and assaults. In considering the question of reasonableness, the judge concluded that the tenant had done her best to control her son and would face difficulties in finding new accommodation. Nevertheless he granted an order for possession because the tenant’s neighbours should not have to endure such behaviour. The Court of Appeal stated that the decision was not one which could “by any stretch of the imagination, be described as plainly wrong”.

*Kensington and Chelsea LBC v Simmonds [1996] 29 HLR 507*

The tenant resided at the property with her son aged 13. The judge found as a fact that the son and his friends had caused nuisance and annoyance to neighbours in a period of four months; he also found that the son had used racist language on at least two occasions which had caused offence. He accepted that the tenant found it very difficult to her son. He made a suspended possession order for one year and 14 days. The tenant appealed on the basis that she had not breached the terms of the tenancy agreement because she could not be said to have “allowed” her son to commit the acts of nuisance.

Held: (1) If the tenant’s son used racial abuse towards the neighbours on only one unheralded occasion, then it could not be said that the tenant “allowed” her son to do so, but as the conduct continued over a period of

months, the judge was not precluded from finding that the tenant had allowed her son to misconduct himself.

(2) The extent of personal blame on the tenant's part is a relevant consideration in determining whether or not a possession order should be made and the terms of any such order; where a tenant had tried and failed to control his or her child a possession order may still be granted; the court had to consider not only the interests of the tenant and her family but also the interests of the neighbours; it would be quite intolerable if the neighbours were deprived of all possibility of relief merely because the tenant next door was incapable of controlling his or her household.

*West Kent Housing Association Ltd v Davies [1998] 31 HLR 415*

The tenants were married and had five children. The eldest son, 15, had special educational needs. The anti-social behaviour complained of was repair of motor vehicles by the father and son, threats by the mother to neighbours and racial harassment by the son to a neighbour's five year old daughter. The judge found that the son had made such racially abusive remarks although he also found that the tenants did not approve nor were they party to his conduct. He also found that the mother had made threats to neighbours although they had now moved off the estate. The judge oddly refused to grant possession. The Court of Appeal unsurprisingly held that the judge was wrong and that in fact it would normally be unreasonable not to order possession. Such an order is necessary to preserve the interests of the landlord and its other tenants in the quality of life and in the maintenance of physical and mental health on the estate. The court reluctantly agreed that a suspended possession order was appropriate because by the time of the appeal, no further breaches had been alleged and the family had particularly difficult family circumstances.

*Newcastle CC v Morrison [2000] 32 HLR 891*

The tenant was a single parent with three sons aged 18, 17 and 6 by the time of trial. There was a catalogue of appalling behaviour over a period of more than six years. The tenant did not contest the truth of the allegations but argued it was not reasonable to make a possession order. The judge dismissed the claim for possession. The Court of Appeal allowed the appeal and stated that it was wrong to see the question of reasonableness as turning on the notion of that there was an alternative remedy such as an injunction.

*Greenwich LBC v Grogan [2001] 33 HLR 140*

The tenant was 17 year old who was convicted of receiving stolen goods which were two boilers which he had kept in his flat. The boilers belonged to the landlord and had been stolen from flats in the tenant's block. He was sentenced to 6 months in a young offenders institution. The landlord claimed possession. The judge accepted that the tenant was vulnerable and there was no further evidence of anti-social behaviour on his part after the conviction. The judge granted an outright possession order. The Court of Appeal held that on the facts of the case, the balance lay in favour of suspending the possession order; the defendant was trying to live a life free of crime and if he were evicted there were a serious possibility that he would revert to a criminal lifestyle; it was in the public interest and the interest of the community for him to have the opportunity to remain in the flat.

*Portsmouth CC v Bryant [2000] 32 HLR 906*

The tenant became the guardian of her two grandsons who were aged 15 and 13 at the time of serving of the NSP. At trial, the judge found that the grandsons had caused nuisance and annoyance to the neighbours. They had abused, threatened and spat at neighbours, including against one neighbour for ten years. The judge made a suspended order against which the tenant appealed. The tenant appealed on the basis it was necessary for the landlord to show fault on the tenants part and that she had allowed the conduct.

Held: (1) No personal fault on the tenants part is required to bring a possession action based on nuisance but the extent of personal fault is relevant to reasonableness.

(2) Even if the tenant could not be said to have allowed the grandsons misconduct, she had not been misled or prejudiced by the form of the notice; it recited Ground 2 which does not require the misconduct of others to be allowed by the tenant. Although she had knowingly connived or tolerated their behaviour, she had closed her mind to it and had to accept some responsibility for it.

**(iii) INJUNCTIONS**

These are considered inappropriate by the courts. See:

*Wookey v Wookey; Re S (a minor) [1991] 3 All ER 365*

In *Re S* the sister of a violent and unruly 15 year old boy brought an action for assault against him for assault and sought a non-molestation order. The judge refused to grant the injunction and the sister appealed. The Court of Appeal held that where a person under a disability (i.e. a minor) understood the order but the court was prevented from committing him to prison e.g because he was under 17, the court should investigate whether it was feasible to enforce the injunction by means of a fine in which case the penal notice should be accordingly adapted. However, if the minor was still of school age or unemployed, it would be inappropriate to grant an injunction.

*Harrow LBC v G [2004] EWHC 17 (QB)*

G was a schoolboy aged 14 who lived in a property owned by the Council with his single mother and siblings. The Council was seeking possession against the mother. It also made an application for an injunction against G under section 152 of the Housing Act 1996. It was granted along with a power of arrest. G appealed that the injunction was unenforceable and so ought not to have been granted. The appeal was allowed. G was too young to be sent to prison for contempt and in the absence of evidence to the contrary, common sense would dictate that he would have no source of income or goods that could be sequestered. The injunction should not have been granted.

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**9<sup>th</sup> NOVEMBER 2005**

**“TOLERATED TRESPASSERS”**

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## **TOLERATED TRESPASSERS**

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### **Key Cases**

1. Burrows v Brent LBC [1996] 4 All ER 577 – concept of Tolerated trespasser
2. Stirling v Leadenhall Residential 2 Ltd [2001] 3 All ER 645 – Assured tenancies
3. Lambeth LBC v O’Kane; Helena Housing v Pinder [2005] EWCA Civ 1010 – Creation of new tenancies
4. Pemberton v Southwark LBC [2000] 3 All ER 924 – Right of TT to sue in nuisance
5. Lambeth LBC v Rogers (2000) 32 HLR 361 – Unenforcability of disrepair covenant
6. Manchester CC v Finn [2003] HLR 41 – possession against TT
7. Sheffield CC v Hopkins [2002] HLR 12 CA – Variation to Possession order
8. Swindon BC v Aston [2003] HLR 42 – what happens when arrears are paid in full on suspended PO
9. Hawkins v Newham LBC [2005] EWCA Civ 451 – creation of new tenancy when arrears paid in full on SPO
10. Brent LBC v Knightley (1997) 29 HLR 857
11. Dunn v Bradford MDC; Marston v Leeds CC [2002] EWCA Civ 1137 – revival of tenancy for disrepair claim
12. Marshall v Bradford MDC – Disrepair and TT

## 1. The Tolerated Trespasser

“...a recent, somewhat bizarre, addition to the dramatis personae of the law” (*Per Clarke LJ, Pemberton v Southwark LBC*)

**A tolerated trespasser is someone who remains in occupation of the property after the date for possession under the possession order. In the case of a suspended possession order this will be from the date of the first breach of the terms of suspension.**

**Whilst a tolerated trespasser, the occupier enjoys none of the statutory rights conferred upon secure or assured tenants (i.e. security of tenure, right to assign, right to buy, right of mutual exchange or succession).**

**Furthermore none of the covenants in the former tenancy are enforceable.**

### Local Authority Secure Tenants

Under s.82(2) Housing Act 1985 where a landlord obtains an order for possession, the secure tenancy ends on the date on which the tenant is to give up possession under the order.

Absolute possession order – the date on which the tenant is to give up possession under the order

Suspended possession order – the date upon which the tenant fails to comply with the terms of the order.

From this point, if ‘tenant’ remains in occupation they become a ‘tolerated trespasser’ (*Burrows v Brent LBC*).

## Assured Tenants

### (i) Periodic Assured Tenancy

s.5 HA 1988 provides that a periodic assured tenancy can only be brought to an end by a Landlord only by means of an order of the Court.

### (ii) Fixed Term Tenancies

A possession order will bring the tenancy to an end, if the fixed term tenancy is determined in any other way (apart from surrender) a statutory periodic tenancy arises).

### (iii) Statutory Periodic Tenancy

Under s.7(7) Housing Act 1988

(a) a court may make an order for possession on grounds relating to a fixed term tenancy which has come to an end, and;

(b) where it does so, any statutory periodic tenancy which has arisen on the ending of the fixed term tenancy shall end on the day on which the order takes effect.

Thus all of the assured tenancies come to an end in the same circumstances as a secure tenancy i.e.

Absolute possession order – the date on which the tenant is to give up possession under the order

Suspended possession order – the date upon which the tenant fails to comply with the terms of the order.

As before, from the date on which the tenancy comes to an end the ‘tenant’ becomes a tolerated trespasser.

*Examples*

*T granted periodic Assured Tenancy by L on 1<sup>st</sup> January 2002. T falls into arrears and on 1<sup>st</sup> June 2003 L obtains order for possession to take effect on 1<sup>st</sup> July 2003 but suspended on terms that T pays current rent plus weekly contribution to arrears.*

*(i) T misses first payment under terms of SPO, from 1<sup>st</sup> July 2003 T is a 'tolerated trespasser'.*

*(ii) T misses payment due on 1st December 2003. From 1<sup>st</sup> December 2003 T is a tolerated trespasser.*

## 2. Loss of Rights

**Whilst a tolerated trespasser, the occupier enjoys none of the statutory rights conferred upon secure or assured tenants (i.e. security of tenure, right to assign, right to buy, right of mutual exchange or succession). Furthermore none of the covenants in the former tenancy are enforceable, which most significantly means that all express and implied repair covenants are unenforceable. However the tolerated trespasser does have sufficient interest in the property to bring an action in nuisance.**

Although a tolerated trespasser loses all of the rights described above the Court of Appeal has held that a tolerated trespasser, whilst living at the property, does have the exclusive right to occupy the property and therefore sufficient locus to bring an action in nuisance where this right is interfered with by premises or property over which the Landlord has control (*Pemberton v Southwark LBC*). The facts in *Pemberton* were that P, the tolerated trespasser brought an action in nuisance against her Local Authority Landlord. She alleged that her flat was infested with cockroaches which had entered the flat from the common parts of the building. At first instance the Court held that P did not have an interest in land to bring the action. The Court of Appeal overturned this decision holding that P did have sufficient interest and that although the Landlord had no obligation to repair the flat it was obliged to conduct itself in relation to the remainder of the property (i.e. the communal parts of the block) in such a way that it did not create a nuisance.

*Example*

*On 1<sup>st</sup> June 2002, L (a registered social landlord) grants a periodic assured tenancy to T. T falls into arrears and on 1<sup>st</sup> June 2003 a possession order is granted to take effect on 1<sup>st</sup> July 2004 but suspended on terms that T pays current rent plus weekly contribution to arrears. T misses payment due on 1<sup>st</sup> December 2004. T brings disrepair claim in July 2005 relying upon express/implied terms of tenancy and Defective Premises Act. Claim is for (a) specific performance, and (b) damages for disrepair:*

*(i) From January 2005.*

*Application can be made to strike out action as T has been a tolerated trespasser since 1<sup>st</sup> December 2004.*

*or*

*(ii) From June 2003.*

*T is a tolerated trespasser from 1<sup>st</sup> December 2004, therefore application can be made to strike out the claim for specific performance as there is no existing repair obligation, and to strike out the damages claim from 1<sup>st</sup> December 2004. There is a valid claim for damages between the period June 2003 – 1<sup>st</sup> December 2004.*

### 3. Applications to reinstate the tenancy

**Until the possession order is executed, the court can by variation of its order change the date on which possession is to be given and thereby revive a secure or assured tenancy which has already been terminated. The revival of the tenancy is retrospective. In considering whether to accede to such an application each case turns on its own facts but the most important questions will be the extent to which the tolerated trespasser has complied with the court's order and any reasons for failure to comply.**

**Where a possession order ceases to become enforceable either through the passage of time or because the order provides for this, the tenancy does not automatically revive, an application under s.85(2)/s.9(2) is still required.**

#### The Power to revive the tenancy

Where possession is obtained upon any discretionary ground, under s.85(2) HA 1985 (Secure Tenancies)/s.9(2) HA 1988 (Assured tenancies), at any time before the execution of a possession order, the court may:-

- (a) stay or suspend execution of the order, or;
- (b) postpone the date of possession.

For such period as the court thinks just.

A tolerated trespasser can therefore apply back to the Court at any stage to vary the Suspended possession order the effect of which was described by Chadwick LJ in *Marshall v Bradford MDC*:

“what is needed, in a case where the tenancy has been brought to an end under the provisions of section 82(2) of the 1985 Act, is a further order under s.85(2) , varying the conditions in the original order or postponing the date of possession.....The secure tenancy revives because the effect of a further order under section 85(2) is that the possession order is treated as having been varied *ab initio*, so that, thereafter, it has effect as if the new date were the date on which the tenant was required to give up possession in pursuance of the order. There is then no date on which the tenancy has been brought to an end under section 82(2) of the Act.”  
*(Marshall v Bradford MDC [2001] EWCA Civ 594).*

The position is no different for Assured tenants.

Where a tolerated trespasser discharges the arrears under the Suspended Possession Order, the tenancy will not automatically revive. The tolerated trespasser must make an application to the court to revive the tenancy.

Often the wording of a possession order will provide that it ceases to be enforceable after the arrears have been cleared and is thus not dependent upon compliance with the conditions of the order being complied with but the overall arrears being paid off. Where a tolerated trespasser clears the arrears in this situation, the tenancy does not automatically revive (*Marshall v Bradford MDC*) and an application to the Court is still required under s.85(2)/s.9(2). The Court cannot discharge or rescind the order under s.85(4)/s.9(4) as the conditions of the order have not been complied with. It is however possible that a Court in these circumstances will be more willing to find that a new tenancy has been created (*Swindon v Aston*).

### The Exercise of the Court's discretion

The decision of the Court whether to vary the possession order and thus revive the tenancy is a matter for the court's discretion to be exercised according to the circumstances of each case. Clearly the most important question for the Court is the extent to which the tolerated trespasser has complied with the court order. It is to be remembered that if the order is varied it will be completely retrospective and thus the tolerated trespasser will become a revived tenant for the entire period.

“If the tenant has complied with the agreed conditions, there can be little doubt that the court would make the required order” (*Burrows v Brent LBC*).

### Lambeth LBC v Rogers

In October 1992 L obtained a possession order against R suspended on terms as to payment off of the arrears (£871.70) plus current rent. She breached the terms of the order in December 1992. In May 1994 L reached an agreement with R regarding payment of the arrears, she continued to make erratic payment of the arrears funded by Housing Benefit. In September 1996 she commenced proceedings for disrepair. L defended this claim on the ground that she had been a tolerated trespasser since December 1992. In September 1997 R applied to discharge the possession order or for variation of the date for possession. In April 1998 L entered into a written agreement with R in which R acknowledged that she owed £2,051 in arrears and agreed to pay her current rent plus £16 pw. Towards the arrears. R complied with the terms of the agreement.

The District Judge held that in the light of her compliance with the 1998 agreement she was likely to continue to comply with her obligations. He therefore postponed the

date for possession thereby reviving the tenancy back to 1992, and awarded damages for disrepair.

The Court of Appeal upheld the District Judge's decision, the discretion afforded to the District Judge is a very wide one. Simon Brown LJ commented that "...without the benefit of the [1998] agreement and indeed, several months' satisfactory compliance with it, she could hardly have expected to succeed upon such an application".

#### 4. Agreements with tolerated trespassers

**In the absence of special circumstances an agreement by a Landlord with a tolerated trespasser, not to enforce strictly the possession order does not create a new tenancy or licence and as long as the tolerated trespasser complies with the terms of the agreement the Landlord is prevented from enforcing the possession order and the tolerated trespasser is likely to succeed in an application to vary the possession order.**

**Care should be taken in drafting such an agreement to make clear that no new tenancy is created by the agreement, and consideration should be given to whether it should be a condition of the agreement that the tolerated trespasser waives any right to bring a disrepair claim during the period prior to the agreement.**

The above statements of the law derive from *Burrows v Brent LBC* and *Marshall v Bradford MDC*.

The recent Court of Appeal decision in *Lambeth LBC v OKane; Helena Housing v Pinder*, makes clear that it will be very exceptional for a Landlord's actions in taking 'rent' from a tolerated trespasser and even issuing tenancy conditions, to amount to the grant of a new tenancy. The facts must force the conclusion that a new tenancy has been granted (paragraph 64, per Arden LJ).

Examples of where a new tenancy was found to have been granted are *Swindon BC v Aston* and *Stirling v Leadenhall*. *Swindon v Aston* was distinguished in *Lambeth v OKane*, as Mr Aston had cleared all of the arrears but could not apply to discharge the order under s.85(4) as he had not complied with the terms of the tenancy, and

furthermore the landlord was seeking to enforce a term found only in terms sent to the tolerated trespasser after the former tenancy ceased to be capable of being revived.

In *Stirling* an increase in the charge for use and occupation created a new tenancy.

However in that case the landlord conceded that this created a new tenancy and the

Court of Appeal in *Lambeth LBC v O'Kane*, seem to doubt whether but for that

concession the Court would have found that. Further that case is distinguishable since

the possession order there could not be revived.

In the light of this line of authority it is inadvisable for a Landlord to make written

agreements with a tolerated trespasser. However if a Landlord wishes to do this:

- (a) The agreement should make clear that it is not intended to create a new tenancy;
- (b) Consideration should be given to making it a condition of such an agreement that the tolerated trespasser waives his right to bring any disrepair claim up to the date of the agreement (this is a process approved of by the Court of Appeal in *Lambeth LBC v Rogers*).

### *Examples*

*T granted periodic Assured Tenancy by L on 1<sup>st</sup> January 2002. T falls into arrears and on 1<sup>st</sup> June 2003 L obtains order for possession to take effect on 1<sup>st</sup> July 2003 but suspended on terms that T pays current rent plus weekly contribution to arrears, T misses first payment under terms of SPO, from 1<sup>st</sup> July 2003, T continues to miss payments making sporadic payments. On 1<sup>st</sup> July 2004 L reaches agreement with T for payment of the arrears. T complies with terms for a period of six months and then issues a disrepair action in January 2005 claiming damages back to the start of the tenancy. L makes an application to strike out the claim based on the fact that T is a tolerated trespasser. T applies for an order varying the possession order and/or a declaration that a new tenancy has been granted from the date of the agreement (01/07/04)*

- (i) There is a valid disrepair claim in any event for the period between the start of the tenancy in January 2002 and 1<sup>st</sup> July 2003.*
- (ii) From July 2003 T is a tolerated trespasser and pending the outcome of the application to vary the possession order/declare new tenancy the application to strike out this part of the claim is a good one;*
- (iii) It is unlikely that a new tenancy has been created unless the circumstances force that conclusion;*
- (iv) If the Court agrees to vary the possession order then the tenancy is retrospectively revived and T will be a tenant for the whole period from the start of the tenancy.*

## **5. Possession Proceedings against a tolerated trespasser**

**Where there is an enforceable suspended possession order which has not been complied with by the tenant, an application for a warrant for possession is the appropriate method of obtaining possession. Possession proceedings issued under the Housing Acts will fail since a tolerated trespasser is not a secure/assured tenant.**

**Where there is a SPO which T has not complied with but which is unenforceable, the Landlord can either (i) apply to vary the suspended possession order, or (ii) grant a new tenancy and wait for a future breach.**

**Where a SPO has been made on grounds of rent arrears, a Court has discretion to allow the Landlord on application to vary the terms of the SPO,**

It is not infrequently the case that possession proceedings will be issued pursuant to the discretionary grounds under the HA 1988 or 1985 where there is already a historic SPO which has not been complied with. Such proceedings must fail since the tolerated trespasser is not a tenant. The occupier may seek to use this mistake as proof that that he has at some stage been granted a new tenancy by the Landlord and that the issue of new possession proceedings under the Housing Acts is an acknowledgement of that. Such an argument would seem unlikely to succeed in the absence of special circumstances in the light of the decision in *Lambeth v OKane*. However as a matter of precaution where faced with this scenario, I would suggest applying for a warrant under the existing possession order, and adjourning the new possession proceedings (as opposed to simply withdrawing them).

### Unenforceable SPO

Where there is an unenforceable SPO, as in *Marshall v Bradford MDC*, and no new tenancy has been granted, a potential difficulty arises. An application under s.85(4)/s.9(4) to revive the tenancy will not be possible because the terms of the SPO have not been complied with. The landlord could make an application under s.85(2) HA 1985/s.9(2) HA 1988 to vary the terms of the order, but query whether it is in the Landlord's interest to seek to revive the tenancy retrospectively? The only alternative is to grant a new tenancy, wait for breach and enforce (not an attractive option).

### Taking action against a rent defaulting tolerated trespasser for anti-social behaviour

Occasionally the situation arises whereby the possession order against the tolerated trespasser was based upon rent arrears whereas the tolerated trespasser is now engaging in serious anti-social behaviour but now paying the rent and arrears under the court's order (albeit that he remains a tolerated trespasser). The Landlord can apply for a warrant due to breach of the SPO on the grounds of rent arrears, and if the Tolerated Trespasser applies to vary the possession order under s.85(2) HA 1985/s.9(2) HA 1988, the Landlord can cross apply to defend the application and/or include a condition that the occupier does refrain from such behaviour (*Sheffield CC v Hopkins*, *Manchester CC v Finn*). It is a matter for the Court's discretion in deciding whether to allow that issue to be raised, and in deciding the court must have regard to the following considerations laid out in *Sheffield v Hopkins*:

- (i) That the discretion should be used to further the policy of the Housing Acts, reinforced by the ECHR. The Court should bear in mind that the occupier should not be deprived of their home unless there is a very serious breach of the occupier's obligations;
- (ii) The overriding principles under part 1 Civil Procedure Rules;
- (iii) The need for the tenant to have clear notice of the allegations being made, even though what is being relied upon is not contained in the original order for possession;
- (iv) The fact that the Landlord did or did not include the allegations in the original possession application or sought to have a condition inserted relating to ASB. If such allegations were raised at the previous proceedings this is a factor in favour of the Court allowing the issue to be raised.
- (v) Whether the allegations are in respect of incidents before or after the original possession order. The discretion should be exercised more readily where the incidents allegedly occurred after the order.

*Example*

*T granted periodic Assured Tenancy by L on 1<sup>st</sup> January 2000. T falls into arrears and on 1<sup>st</sup> June 2001 L obtains order for possession to take effect on 1<sup>st</sup> July 2001 but suspended on terms that T pays current rent plus weekly contribution to arrears, T misses first payment under terms of SPO and has been sporadic in making rent payments since.*

*In June 2004 L having served a NOSP based on rent arrears and anti-social behaviour, issues possession proceedings under the Housing Act 1988 without seeking legal advice. Solicitors are then instructed who discover the previous SPO, which has been breached.*

*Possession proceedings under the Housing Act 1988 must fail since T is a tolerated trespasser and not an assured tenant.*

*The possession proceedings should be adjourned generally with liberty to restore. An application should be made by L for a warrant to enforce the original possession order. If T applies to vary the possession order under s.9(2), L should cross-apply to rely upon anti-social behaviour either in opposition to the application and/or to vary the suspended possession order to include a condition as to future behaviour.*

## 6. Large Scale Voluntary Transfer of Housing Stock

**Where there is a transfer of housing stock from a local authority Landlord, the status of any person who was a tolerated trespasser with the local authority is ambiguous. If he has been given a new assured tenancy to sign then may be an assured tenant and any previously obtained possession order will be of no effect, and although the previous arrears are likely to be recoverable, they cannot form the basis of a possession order. If no new tenancy has been granted resort must firstly be had to the deed of transfer to ascertain whether the deed transfers to the new Landlord the benefit/right to enforce any possession order obtained by the local authority.**

Where there is a large scale voluntary transfer of housing stock from a Local Authority to a private landlord, all of the previous tenants of the Local Authority become Assured Tenants as the Landlord no longer fulfils the Landlord condition under s.80 Housing Act 1988 for a secure tenancy.

But what is the status of those who were tolerated trespassers of the local authority prior to transfer? Two initial questions arise:

- (i) Has the new Landlord granted an assured tenancy?
- (ii) What happens to possession orders obtained prior to the transfer?

### Grant of a new tenancy?

Often the new landlord will send out copies of new tenancy conditions for signing by the newly acquired occupiers of the properties which have been transferred. If the occupier who was previously a tolerated trespasser with the local authority has signed such a tenancy with the new Landlord it is arguable that the occupier has been granted a new assured tenancy. *Lambeth v OKeefe*, *Helena Housing v Pinder*, would appear to cast doubt over that, however the point did not arise for consideration by the Court of Appeal.

It can be said with relative confidence that it is highly unlikely that anything less than a signed tenancy agreement will amount to the granting of a new tenancy.

If a new assured tenancy is held to have been granted to a person who was previously a tolerated trespasser of the local authority although it may be that the arrears accumulated under any previously obtained possession order will be recoverable (assuming the deed purports to transfer the benefit of the possession order and any money judgement), those previously accumulated arrears cannot be used as a ground for possession since they are not arrears arising from the new assured tenancy.

### What happens to a possession order obtained by the Local Authority?

Does the benefit of the possession order transfer to the new landlord? The starting point must be the transfer deed. Does the transfer deed purport to transfer the benefit of the possession order and/or payments for occupation?

If it does.....

In *Knowsley Housing Trust v Revell; Helena Housing Ltd v Curtis* [2004] EWCA Civ 496 the Court of Appeal commented that following a LSVT, the new landlord can take over possession proceedings by applying under CPR 19.4 for an order to substitute itself as Claimant for the Local Authority.

However this case was concerned with proceedings prior to any possession order having been obtained, is the position the same where the local authority has already obtained the possession order prior to transfer? Some commentators have expressed the view that such orders cease to be enforceable by the new landlord ('Tolerated Trespassers and Stock Transfers; Bright [2005] JHL 15).

In *Helena Housing v Pinder*, the deed of transfer purported to transfer the benefit of existing procedures and orders for possession and money judgements obtained by the local authority against tenants and other occupiers. A possession warrant was obtained by Helena Housing in respect of a possession order obtained by the local authority prior to transfer and although the case turned upon different issues, this process did not attract comment. The Court of Appeal holding that:

“.....in the normal way, a 'limbo tenancy' (that is a tenancy enjoyed by a tolerated trespasser before his tenancy came to an end as a result of the tenant becoming liable to give up possession) does not cease to be capable of being revived...simply because the landlord's housing stock has been transferred to a landlord who cannot fulfil the 'landlord' condition for a secure tenancy” (*Lambeth LBC v O'Kane; Helena Housing v Pinder, per Arden LJ*, - note however this was a point which was conceded and no argument was heard on the point).

This is the only current caselaw of which the author is aware on this point, and is supportive of the argument that where there is a LSVT, if the deed of transfer purports to transfer the benefit of the possession orders, the new landlord can seek to enforce the possession order and that the tolerated trespasser can apply to 'revive' the tenancy to an assured tenancy.

If the transfer deed does not purport to transfer the benefit of a previous possession order, then the solution would appear to be to make arrangements with the local authority for a further deed of transfer to be prepared which it is likely the authority will be agreeable to.

There are still some unanswered questions. In whose name should the application to enforce the possession order be made. Can an application be made under CPR 19.4 to substitute the new Landlord for the local authority after the possession order has been made?

*Example*

*LA grant secure tenancy to T in January 1992. In July 2000 a SPO is obtained on grounds of rent arrears, terms of suspension are payment of rent plus weekly contribution to arrears. T breaches terms of suspension and becomes a tolerated trespasser from 1<sup>st</sup> October 2000 (when he misses the first payment). On 1<sup>st</sup> January 2001 there is a LSVT of LA's Housing stock to RSL, which includes T's property. T, along with all other occupiers is sent a copy of RSL's terms and conditions of assured tenancy. As at the 1<sup>st</sup> January 2001 T has accumulated arrears of 'payment for occupation and use' of some £2,000.*

*On 1<sup>st</sup> January 2002, RSL sends NOSP under s.8 HA 1988, on grounds of rent arrears including £2000 incurred prior to 1<sup>st</sup> January 2001 and a further £1500 incurred after this date. Possession proceedings are issued by the RSL on 1<sup>st</sup> March 2002.*

*Questions for consideration*

- (i) Have the arrears been transferred under the deed of transfer between LA and RSL?*
- (ii) Has a new assured tenancy been granted by RSL to T?*
- (iii) If so is NOSP and/or the possession proceedings valid in including £2000 arrears prior to 1/1/2001?*
- (iv) If no new tenancy has been granted, does the deed of transfer purport to transfer the SPO?*
- (v) Can RSL apply to enforce the SPO? If so in whose name?*