

Tolerated trespassers: successor landlords



Robert Latham considers the effect of the draft Housing (Replacement of Terminated Tenancies) (Successor Landlords) (England) Order 2009 (the Successor Landlords Order), which provides for the creation of a new replacement tenancy for tolerated trespassers where there has been a change of landlord.¹

Introduction

Nothing relating to tolerated trespassers is simple. The Housing and Regeneration Act (H&RA) 2008 received royal assent on 22 July 2008. The relevant provisions of the H&RA, ie, s299 and Schedule 11, were discussed by the author in 'Tolerated trespassers: the long goodbye', February 2009 *Legal Action* 33. As at 22 April 2009, the latest indication from Communities and Local Government (CLG) is that the provisions will be brought into effect in 'early May' but 'not before 7 May'.²

H&RA Sch 11 Part 1 provides that secure tenancies (and the associated introductory and replacement tenancies) will continue until any possession order is executed. This will avoid the problem of tolerated trespassers for the future.

H&RA Sch 11 Part 2 provides that on the commencement date, an existing tolerated trespasser will occupy under a new replacement tenancy, which will be subject to any subsisting possession order, provided that three conditions are satisfied:

- The 'home condition' requires the 'ex-tenant' to have occupied the dwelling as her/his only or principal home at all material times during 'the termination period' (ie, the period during which the occupant was a tolerated trespasser).
- The 'ex-landlord' and the ex-tenant must not have entered into a new tenancy in the interim.
- The ex-landlord must still be able to let the dwelling.

Thus, the provisions as enacted originally do not extend to 'successor landlords', namely where there has been a change of landlord.

When enacting the H&RA, parliament recognised that there was unfinished business in respect of successor landlords: Sch 11 para 24 made provision for the 'appropriate national authority' (the secretary of state in England and the Welsh ministers in Wales) to introduce by Order appropriate

modifications to Part 2 of Schedule 11 in respect of such cases.

On 1 December 2008, H&RA s299 and Sch 11 Part 2 were brought into force for the sole purpose of enabling the appropriate national authorities to introduce such Orders (see article 4(4) of the Housing and Regeneration Act 2008 (Commencement No 2 and Transitional, Saving and Transitory Provisions) Order 2008 SI No 3068).³ On 24 March, CLG published the draft Successor Landlords Order. The Order only relates to England. A parallel draft Order to the same effect is to be laid before the National Assembly of Wales. Article 2 of the Successor Landlords Order specifies the modifications which are made to H&RA Sch 11 Part 2 in successor landlords cases. In order to analyse the effect of these changes, it is necessary to annotate the original provisions. An explanatory memorandum explains what these modifications seek to achieve.⁴ CLG plans to issue non-statutory guidance to assist social landlords to implement the provisions.

Who is affected?

Articles 2 and 3 of the Successor Landlords Order extend the provisions of Sch 11 Part 2 to all successor landlords cases, including where there has been a subsequent transfer to another landlord. The provisions apply largely to stock transfers from local housing authorities (LHAs) to registered social landlords (RSLs). The Successor Landlords Order also extends to boundary changes where one LHA is substituted for another. In addition, the Order even extends to a transfer from RSL to LHA (the modified paragraph 17), albeit that CLG is unaware of any cases of such transfers.

CLG estimates that between 70,000 and 80,000 tolerated trespassers could benefit from the Successor Landlords Order. However, CLG concedes that there is no data available to confirm these figures.⁵ The

Successor Landlords Order depends on successor landlords being able to distinguish between their tenants and their tolerated trespassers. If successor landlords are unable to do so, they will be unable to identify which of their tenants occupy under the new replacement tenancies.

The Successor Landlords Order makes provision for where the original tenancy was either an assured or assured shorthold tenancy and for stock transfers between RSLs. The explanatory memorandum suggests that there is no case-law on whether or not an assured shorthold tenant may become a tolerated trespasser. The preferred view is that *Knowsley Housing Trust v White* [2008] UKHL 70, 10 December 2008 had resolved this issue. An assured shorthold tenancy is a particular type of assured tenancy; either tenancy continues for so long as the tenant remains in occupation of the dwelling.

The reason for CLG's excess of caution may be rather to avoid the need to prune Sch 11 Part 2 of those provisions relating to assured tenancies which have now been made superfluous by the House of Lords' decision in *Knowsley*. The inclusion of this superfluous material merely adds to the difficulties of those seeking to construe the legislation.

The Successor Landlords Order will not apply where the former tolerated trespasser has been granted a new tenancy by the successor landlord before the commencement date; however, such tenants may be at a distinct disadvantage:

- The successor RSL may have granted an assured shorthold tenancy to the tolerated trespasser who had initially been a secure tenant. The replacement tenancy under the Successor Landlords Order would be an assured tenancy.

- The tolerated trespasser who benefits from the replacement tenancy will retain his/her preserved right to buy. When the tolerated trespasser was granted a new tenancy (whether assured or assured shorthold) that preserved right was lost.

Where such tenancies were granted, it is unlikely that the RSL advised the tolerated trespasser that s/he might be better advised to make an application under Housing Act (HA) 1985 s85 to revive his/her original tenancy. In *Helena Housing Ltd v Pinder* [2005] EWCA Civ 1081, 28 July 2005; [2006] HLR 2, it was accepted that it was open to a tolerated trespasser to make such an application even where there had been a transfer from a LHA to a RSL. Were the application to succeed, what had been originally a secure tenancy under HA 1985 would revive as an assured tenancy under HA 1988. It is arguable that the grant of a new

tenancy would not preclude such an application to revive the original tenancy where the tenant was prejudiced by the conduct of his/her landlord.

The replacement tenancy

The policy objectives behind the modifications in the Successor Landlords Order are as follows:

- to provide, as far as possible, that both landlord and tenant are in the same position as they would have been had the tenant not become a tolerated trespasser, and that neither is disadvantaged by the changes; and
- to ensure that the provisions in relation to successor landlords cases are kept as close as possible to the provisions for other existing tolerated trespassers in Sch 11 Part 2.

In a stock transfer between a LHA and a RSL, the replacement tenancy will be as follows:

- an assured tenancy where the original tenancy was a secure tenancy;
- an assured shorthold tenancy where the original tenancy was an introductory tenancy; and
- a demoted tenancy will usually arise where the original tenancy was a demoted tenancy (the modified paragraph 17 of Schedule 11).

Schedule 11 para 21 provides that the new tenancy and the original tenancy are to be treated as the same for certain purposes, for example, rights of succession and the right to buy. Paragraph 21(3) permits a court to order that the new and the original tenancy are the same and continuous for the purposes of a 'relevant claim'. This may be a claim for breach of contract or statutory duty which extends to the 'termination period' when the tenant was a tolerated trespasser.

Article 6 of the Successor Landlords Order modifies Sch 11 para 21 to make similar provision where there is a successor landlord. However, the successor landlord will not be liable for any claim arising before the stock transfer unless the rights and obligations under the original tenancy transferred to the successor landlord.

Conclusions

The transitional provisions in Part 2 of Schedule 11 are unnecessarily complicated and are more so now given the modifications in respect of successor landlords. CLG rejected the simple solution of reviving the tenancies of all existing tolerated trespassers which had been recommended by both the Housing Law Practitioners

Association and Shelter.

It is to be hoped that RSLs and LHAs will adopt a practical solution: where there is any doubt about whether or not an occupant was a tolerated trespasser on the commencement date, the landlord should give him/her the benefit of the doubt. It is in the interests of both parties to proceed on the assumption that the original tenancy subsists rather than grapple with the problems.

- 1 Available at: www.opsi.gov.uk/si/si2009/draft/pdf/ukdsi_9780111476826_en.pdf.
- 2 Information provided to the author by CLG.
- 3 Available at: www.opsi.gov.uk/si/si2008/pdf/uksi_20083068_en.pdf.
- 4 Available at: www.opsi.gov.uk/si/si2009/draft/em/ukdsiem_9780111476826_en.pdf.
- 5 See para 7.6 of the explanatory memorandum, note 4.

Robert Latham is a barrister at Doughty Street Chambers, London. He is Legal Aid Barrister of the Year 2008.



Recent developments in public law



Kate Markus and Martin Westgate continue their six-monthly series surveying recent developments in public law that may be of more general interest to *Legal Action* readers. They welcome short reports from practitioners about unreported cases, including those where permission has been granted or that have been settled.

PRACTICE AND PROCEDURE

Regionalisation of the Administrative Court

The new regional Administrative Court venues started to operate on 21 April 2009 (see also April 2009 *Legal Action* 24). A new Practice Direction (PD) 54D *Administrative Court (Venue)* has been inserted into the Civil Procedure Rules (CPR).^{*} Claims may now be issued either at the Royal Courts of Justice in London or one of the district registries in Birmingham, Cardiff, Leeds or Manchester. The general expectation is that proceedings will be administered and decided in the region

with which the claimant has the closest connection, subject to a number of qualifying factors including the following:

- the reasons for a party's preference;
- the location of the defendant;
- the location of the claimant's legal representative;
- the ease and cost of travel;
- alternative means of attending a hearing (for example, via videolink);
- media interest;
- the time within which it is appropriate for the proceedings to be determined;
- the capacity and workload of the court where the claim is issued;

- whether there are other cases which the claim should be determined with; and
- whether the claim raises devolution issues.

Excepted claims, which must always be issued and determined in London, are specified in PD 54D paragraph 3.1 and include the following:

- control orders and other proceedings relating to terrorism or where a special advocate is to be instructed;
- confiscation and forfeiture proceedings;
- proceedings under the Proceeds of Crime Act 2002;
- extradition proceedings;
- proceedings which must be heard by a Divisional Court; and
- proceedings relating to the discipline of solicitors.

Urgent applications outside London must be made to the designated judge in the relevant district registry.

CASE-LAW

Irrationality

■ **R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs** [2008] UKHL 61, 22 October 2008, [2008] 3 WLR 955
This case involves the Chagossians and their