

Housing Team Legal Bulletin

Issue 2. September 2005



Case law update

Tolerated Trespassers : Lambeth LBC and Hyde Southbank Ltd v O'Kane, Helena Housing Ltd v Pinder & Others [2005] EWCA Civ 1010, 28.7.05

This is the latest in a long line of decision from the Court of Appeal dealing with the legal status of the tolerated trespasser, a concept first applied by the Court of Appeal in *Burrows v London Borough of Brent* [1996] 62 P&CR 57. In each case an order for possession had been obtained against a secure tenant on a suspended basis whose terms had then been breached.

In *O' Kane* it was argued that the landlord's actions of serving notices of increase in 'rent' and granting a decorating allowance indicated the creation of a new tenancy, to which Mr. O'Kane was entitled to succeed to after his partner's death.

In *Pinder* the local authority had served statutory notices of rent increase over a number of years before the housing stock was transferred to Helena Housing. The effect of the notices was that occupiers paid an increase "rent" every year in line with all the other tenants. They all continued to enjoy exclusive possession of their homes. It was argued that this was only consistent with the creation of a new tenancy applying *Street v Mountford* [1985] AC 805.

The Court dismissed all the appeals. Arden LJ, giving the judgement of the court, reiterated the point that a tolerated trespasser who was a former secure tenant is in a special position, as they are able to make an application to the court at any time prior to execution of a warrant to revive their tenancy under s.85(2) or (4) Housing Act 1988. The Court further held that it was bound by the Court of Appeal's earlier decision of *Marshall v Bradford* [2002] HLR 22, that once a suspended possession order has been breached, and the occupier is a tolerated trespasser, then a landlord cannot of its own motion waive the effect of the breaches so as to revive the tenancy; such a tenancy may only be revived on application to the court under s.85(2) or (4) Housing Act 1988 (paras 22, 58). The Court suggested that if *Marshall* was inconsistent with the House of Lords' own decision in *Burrows*, only the House of Lords could now rectify that (para 59).

Arden LJ focused on the speech of Lord Browne-Wilkinson in *Burrows* where he said that it is not enough that the facts are consistent with a new tenancy; they must actually force that conclusion (para 64). She was unmoved in the face of the difficulties that were caused where, in practice, it would be difficult for a tolerated trespasser to make an application to the courts under s.85 HA 1988 to revive their former tenancy, for example, if there had been a former joint tenant who was now either absent or dead (para 67).

There is clearly tension in the Court's judgment, as Arden LJ later acknowledges (para 68) that if a landlord and a tolerated trespasser know that revival is in law or practice impossible, that might lead the court to find that the parties must have intended to create legal relations when for instance the charge for occupation was increased, whilst at the same time holding that the revivability of a 'limbo' tenancy is not a precondition for a finding that there cannot be a new tenancy. It was also observed that for two of the Appellants in the instant case, there had been a practical loss of revivability, and yet found that there had been no new tenancy created when charges for occupation were increased (para 70).

The acts of increasing the charge for occupation and granting a decorating allowance in the respective cases were regarded only as an indication of the former landlord's continued forbearance to evict, or as a desire to maintain the property.

The position that the law has now reached with the tolerated trespasser concept threatens the basics of landlord and tenant law as represented by *Street*. The attempt by the Appellants' to redraw the balance of interests between tolerated trespassers and the former public sector landlord more in favour of the occupier, were not successful although the Court has given some cause for optimism by stating that they may be able to persuade the House of Lords of their argument. Watch this space! [NB judgment in this case is available to download on http://www.gcnchambers.co.uk/index.php/gcn/news/tolerated_trespassers_judgment_handed_down]

Homelessness inquiries : Cramp v Hastings Borough Council, Phillips v LB Camden [2005] EWCA, 29.7.05

The Court of Appeal considered the extent of the duty of a local housing authority to make inquiries under s.184 Housing Act 1996 to investigate an application for assistance under Part VII of that Act. In each case, the decision by the housing authority had been upheld on internal review under ss.202/203 HA 1996, but successfully appealed to the County Court under s.204. The housing authority had, in the Hastings' case, obtained permission to appeal to the Court of Appeal, and Camden had applied for permission to appeal to the Court of Appeal. The Court was also concerned to review the circumstances in which the much higher threshold for bringing a second appeal (reiterated in *Uphill v BRB (Residuary) Ltd* [2005]EWCA Civ 60) after an appeal to the County Court, would be met in homelessness cases.

Allowing the housing authorities appeals, the Court noted at paragraph 57 that in each case, the Appellants to the County Court (the applicants under Part VII) had argued that the housing authority had erred in law in failing to make certain inquiries, whilst the applicants' solicitors had not themselves invited the housing authority at any time prior to their appeal against the reviewed decision to make such inquiries. It was held that:

"58. In each case it was for the council to judge what inquiries were necessary, and it was susceptible to a successful challenge on a point of law if and only if a judge in the county court considered that no reasonable council could have failed to regard as necessary the further inquiries suggested by the appellants' advisers."

In finding that Camden was entitled to permission to appeal, unusually, the Court found an important point of practice which required stating by the courts, namely:

"68. Although a decision of a judge in the county court has no binding force in precedent terms, these two cases evidence a worrying tendency in judges at that level to overlook the fact that it will never be easy for a judge to say that an experienced senior housing officer on a homelessness review, who has considered all the reports readily available, and all the representations made by the applicant's solicitors, has made an error of law when she considered that it was unnecessary to put in train further detailed inquiries, not suggested by the applicant's solicitors, before she could properly make a decision on the review. The need to correct that tendency raises an important point of practice. The duty to decide what inquiries are necessary rests on her, and her decision will be a lawful decision unless no reasonable council could have reached the same decision on the available material.

The decision serves to re-emphasise the need for practitioners to suggest inquiries that a housing authority ought to make, at an early stage in an application under Part VII, and describes the limited circumstances in which a challenge through lack of inquiry may be brought.

Protected Tenancies : Secretarial Nominee Co v Thomas & Ors [2005] EWCA Civ 1008, 29.7.05.

In this matter, the Court of Appeal considered the transitional provisions in the 1988 Housing Act which protect former Rent Act protected tenancies. It agreed that where a tenant A with a protected tenancy was granted a new joint tenancy with B after 15th January 1989, the new joint tenancy would be a protected tenancy, under the transitional provisions. Equally, where A and B were subsequently granted a joint tenancy with C, the tenancy ABC would also be protected.

However, if A left the property, and a tenancy was granted by the landlord to B or Band C as the case may be, the tenancy would no longer be protected under the 1988 Act transitional provisions, as:

"It is for the sake of (the original protected tenant), and no other that the transitional protection of a protected tenancy is extended. The statutory language shows that the protection is for a particular person."