

Housing Team Legal Bulletin

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[The newsletter concentrates on one case this month but it is a very important case for those advising registered social landlords and their tenants].

White v. Riverside Housing Assoc.

[2005] EWCA Civ 1385.

Validity of rent increase – Change of date for increase from that specified in tenancy agreement without contract being varied – Estoppel by convention

Facts

In a claim for possession based on rent arrears the tenants argued, as a preliminary issue, that a proportion of the rent claimed as arrears was not rent that was “lawfully due” on the basis that rent increases notified by the housing association were invalid since the notices issued to tenants did not conform to the contractual rent variation date contained in the tenancy agreement.

Riverside consulted with its tenant participation forum and having done so decided to change the rent variation (increase) date from the first Monday in June each year to the first Monday in April each year. The judge at first instance held that the rent increases were valid on the basis that this was a rent review clause and time was not of the essence. Mr and Mrs White appealed on the grounds that the presumption that time was not of the essence did not apply to the date of an increase merely the operation of a rent review mechanism and Riverside cross-appealed against the judge’s other findings including that they could not rely on estoppel by convention as they were seeking to use it to found a cause of action.

Outcome

The appeal was allowed. The presumption that time was not of the essence did not arise in a case such as this which was concerned with a clear contractual term stipulating the date that the rent could be increased from as otherwise the whole purpose of the clause would be negated. The cross-appeal was also dismissed on all ground including the estoppel point. The Court of Appeal, whilst expressing sympathy, for the housing association (who indicated that the decision would cost them £7-£10 million) were bound to do so as any other result would over-turn the long-standing law that estoppel by convention can only be used as a shield and not a sword.

Comment

This case is of crucial importance to registered social landlords letting on assured tenancies and their tenant’s. It is understood that Riverside may not be the only landlord to have sought to bring their rent variation date forward without a proper variation of the tenancy terms. Tenant’s advisors should check the validity of any rent increases and that they are in accordance with the tenancy agreement. If not validly varied the “new” rent charged is not the rent

that is “lawfully due” and the increased element cannot be relied upon to establish a ground for possession. This may extinguish arrears or reduce them to a level where the Section 9 Housing Act 1988 powers assist e.g. for the registered social landlords relying on Ground 8.

Tenants who may have “overpaid” should ascertain the amount of overpayment and then refuse to pay until that has been cleared. It may well be that they can claim back the overpaid rent, as money had and received, although the Court of Appeal raised the possibility that the housing association could rely upon estoppel by convention as a defence in such a case. It seems to me however that it is difficult to characterise a tenant’s acceptance that his social landlord would not unlawfully put the rent up as a common assumption about the validity of a rent increase.

Moreover, it should be remembered that these tenancy agreements were drafted by the housing associations and imposed on their tenants. There cannot seriously be a suggestion of parties of equal bargaining power electing to treat their contract terms as meaning something other than what they say by way of an estoppel by convention.

Advisers should consider also if there has been a breach of the commonly included clause that the rent will not be increased more than once in every 12 months. The rent account will tell you whether this has occurred. Note that where the tenancy agreement makes any provision for the increase in rent the statutory procedure under s13 Housing Act 1988 does not apply (s13(1)(b)).

To the Lords?

Leave to appeal was refused by the Court of Appeal. It is understood that a Petition to the House of Lords for leave has been lodged. The Housing Corporation has declared an interest in the case such as to seek to intervene at petition stage but it is understood that this has been rebuffed by the Judicial Office.

It will be interesting to see whether the Lords decides to become involved and consider the longstanding position that estoppel by convention cannot be used to found a cause of action. Whatever the eventual outcome the lesson surely for housing associations is that they will be and should be kept to the terms of the contracts they have drafted and imposed on their tenants.

(The tenants were represented by Jan Luba QC and Adam Fullwood of Counsel and Tony Fearnley of [Stephensons Solicitors](#)).

> Click [here](#) to download full judgment from www.gcncchambers.co.uk

James Stark
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