

# Housing Team Legal Bulletin

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## “Entrenched tolerated trespassers”

Practitioners have recently been faced with the problem of the “entrenched tolerated trespasser” who has been treated as if they have lost all their rights under Section 85 (2 & 4) Housing Act 1985.

A challenge to the concept of the entrenched tolerated trespasser was raised in :

**Helena Housing Limited –v- Mower & Molyneux** 28 Nov 2007, HHJ Mackay at Liverpool County Court

This was a hearing of a preliminary issue in two conjoined cases. The facts were straightforward. Both Mrs Mower and Mr Molyneux had fallen into arrears in respect of their tenancies. In each case a suspended possession order was made on grounds of arrears of rent in the 1193 form of N28. This form of order, modelled on the traditional suspended order provided not only for possession to be postponed on the basis of the payment of the current rent plus payment of a sum off the arrears includes the term “**When you have paid the total amount mentioned, the plaintiff will not be able to take any steps to evict you as a result of this order**”. Neither tenant complied initially with the terms of the order for possession.

Both then began to do so and after a stock transfer from St. Helens Borough Council to Helena Housing Limited, in 2003 both paid off their arrears of rent and went into credit. HHL stated that they considered offering both tenants new assured shorthold tenancies but in fact did not do so.

Mrs Mower sought to exercise her Right to Buy but this was rejected on the grounds that she was an “entrenched tolerated trespasser” following the decisions in [Marshall –v- Bradford MBC \[2002\] HLR 22 judgment](#), [Swindon BC –v- Aston \[2002\] EWCA Civ 1850 judgment](#). Mr Molyneux fell into further arrears of rent and relying upon the above cases and [London & Quadrant Housing Trust –v- Ansell \[2007\] EWCA Civ 326 judgment](#). Helena Housing

Limited alleged that he was a mere trespasser and could be evicted at their will.

Mr Molyneux sought to defend the possession claim against him and Mrs Mower sought a declaration that upon payment off of the arrears in 2003 the effect of the term in the order that once the arrears were paid off was that by virtue of Section 85(4) Housing Act 1985 the order for possession was discharged arguing that the above cases which had held otherwise were wrongly decided as the Court of Appeal had not, in any of the three cases had its attention directed to the earlier decision of the Court of Appeal in [Payne –v- Cooper \[1958\] 1 QB 174](#) .

There in a Rent Act case, considering the extended discretion, which is in identical form to Section 85 Housing Act 1985, the Court of Appeal held that although a literal reading of the words might suggest otherwise, that the effect of such a term in the order, having been included in the County Court Rules draft orders was to discharge the order for possession, there being no other source of the power to make such an order than the discharge power contained within the section and that it would be a wholly unwarranted technicality to require the tenant to return to court to obtain another order.

Mr Molyneux and Mrs Mower invited the court to decline to follow [Marshall, Aston and Ansell](#) on the basis set out by the Privy Council in [Baker -v- The Queen](#) that where an inferior court was faced with two directly conflicting decisions of a higher court it was entitled to choose the decision that appeared to it to be the most logical.

HHJ Mackay decided to apply [Payne-v- Cooper](#) and declined to follow the decisions that led to entrenched tolerated trespasser status. He held that had the question been simply a conflict between [Payne](#) and [Marshall](#) he might have been minded to leave the question to the Court of Appeal. Considering the decision in [Swindon BC-v- Aston](#), however, and the obvious injustice this could cause where a tolerated trespasser who had sought to remedy their default

would be in limbo forever and unable to retain their tenancy status and the Court of Appeal's own serious concerns expressed pithily by Stanley Burnton J in **Ansell** that the legislation and authority had compelled a finding that could not have been Parliament's intention he held that the effect of the order was to discharge the order for possession when the arrears were paid off.

He commented that although the **Payne -v- Cooper** approach might be regarded as overly favourable to tenants that as **Marshall** had led to a line of authority with such logical difficulties and giving rise to unfairness that **Payne-v- Cooper** was much more in accord with Parliament's attention and should be followed.

Helena Housing Limited was given permission to appeal on or before 7<sup>th</sup> January 2008 and the orders stayed in the meantime. On 21<sup>st</sup> December 2007 Helena Housing Limited advised the Defendant's solicitors that they did not intend to appeal this decision.

#### **COMMENT**

HHJ Mackay's decision is a welcome return to orthodoxy. Until **Marshall** suggested otherwise, public sector landlords and tenants always read the provision that a tenant could not be evicted after paying off all the arrears as self-evidently being intended to discharge the order. A tenant who had remedied the default in the opportunity provided by the suspended order, so long as it was not enforced in the meantime was entitled to be treated as if the order had not existed.

Since the extended discretion was created in 1919 the courts have stressed the need to adopt a "purposive" approach giving judges the widest possible discretion to deal with the infinitely varied circumstances of each case. The law has run into difficulties when the Court of Appeal has sought limit or narrow this discretion as in **Marshall** and **Aston** by adopting an overly "literal" construction to these provisions – an approach that was rejected expressly by the Court of Appeal in **Payne -v- Cooper**. The **Marshall** approach also sat very uneasily with another decision of the Court of Appeal in **Manchester City Council -v- Finn** where

the word postpone in Section 85(2) had been given such a "purposive" approach that it had been construed to include bringing forward.

It is suggested that practitioners should now seek to confront any "entrenched tolerated trespassers" case with **Payne -v- Cooper** and the decision of HHJ Mackay. Although Helena Housing Limited has declined the opportunity it has been given to appeal it is to be hoped that the Court of Appeal will soon have an opportunity to close off the blind alley of authority down which **Marshall** has led them.

The transcript of the judgment of HHJ Mackay has been requested .

[James Stark](#), instructed by Tony Fearnley of [Stephensons Solicitors](#), represented Mrs Mower and Mr Molyneux.

#### **Other case updates**

The Court of Appeal has just granted permission in **Gilboy v Liverpool CC** (Waller LJ on 19/12/07). (Article 6 challenge to demoted tenancies [background](#))

HH Judge Mackay granted permission to Court of Appeal on 5/12/07 in **South Liverpool Housing v Ireland** (Public Law Defences in County Court Possession Proceedings).

In **Knowsley Housing Trust v Julie White**, leave to appeal to the House of Lords has now been granted (tolerated trespassers and assured tenancies [background](#))

#### **CPD Training**

Garden Court North will publish our housing law training programme for 2008 later this month.