

Housing Team Legal Bulletin

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Tolerated Trespassers Goodbye and Good Riddance!

As indicated by the DCLG in correspondence with James Stark on behalf of the North West Housing Law Practitioners Group on 18th May 2009, Schedule 11 of the Housing and Regeneration Act 2008 has been brought into force today.

The relevant statutory instruments are *Housing and Regeneration Act 2008 (Commencement No. 5) Order 2009* and *The Housing (Replacement of Terminated Tenancies) (Successor Landlords) (England) Order 2009*. [see also [Housing and Regeneration Act 2008](#)].

As indicated in [the letter from the DCLG on Monday](#) paragraphs 3(3), 8(3) and 14(3) of Schedule 11 have not been brought into force. The effect of this is that Section 9(4) Housing Act 1988 and Section 85(4) Housing Act 1985 will not be amended

SUMMARY

1. It is explicitly made clear (in respect of secure, assured, introductory and demoted tenancies) that the tenancy ends at execution of the order rather than on the date that possession is to be given up, thus preventing the creation of any new tolerated trespassers.
2. All tolerated trespassers as from today so long as they meet the relevant conditions will have replacement tenancies. Precisely which type of tenancy will depend upon their landlord as at today's date in the usual way – hence secure for local authority, assured for RSL etc.

The conditions are:

- (a) that it remains the only or principal home of the ex-tenant or at least one joint ex-tenant and has done so throughout the period between the tenancy coming to an end and the commencement date – save that any period where a tenant has been evicted and a warrant set aside and the tenant restored does not count and if this straddles the commencement date the new tenancy starts on the date the tenant is restored.

- (b) the ex-landlord or successor landlord is entitled to let the property.

- (c) the parties have not entered into a new tenancy before the commencement date.

- (d) generally [save for the fact that any changes made during the limbo period apply and any arrears of rent or mesne profits are treated as having arisen under the new tenancy] the terms and conditions remain the same and the tenancy is the same form of tenancy as the tenancy it is replacing e.g. secure or assured.

3. The court can still make a discharge order and an order imposing separate conditions under Section 9(2) or 85(2) (i.e. prompt payment) and Section 9(4) or 85(4) (full payment before execution of the order) when it makes a possession order and does not have to wait to see whether the prompt payment terms were complied with. The court now retains its full flexible discretion on discharge whilst the amendments that have not been brought into force would have abolished the power to make discharge orders in advance
4. Amendments are made to Sections 85(3) and 9(3) to remove the anomalous reference to mesne profits
5. Transitional provisions are made to the effect that the changes to Section 82 etc do not apply to possession orders made before the date of commencement save where (i) they continue to apply to a new tenancy under para 20 i.e. where a pre-existing possession order is deemed to apply to a replacement tenancy and (ii) where the tenancy had not ended before the date of commencement in which case the tenant retains their original tenancy.
6. Any possession order – unless rescinded or discharged is to be treated so far as is practicable as still applying but now to the replacement tenancy
7. The tenancies are to be treated as one continuing tenancy for the purposes of (i) succession (ii) qualifying period for right to buy and discount and (iii) for Ground 8 Schedule 2 Housing Act 1985. NB due to an oversight which the Government is seeking to remedy a former secure and now a replacement assured tenant will lose their preserved

right to buy unless they apply back to court to discharge the original possession order and reinstate their original tenancy

8. For “relevant claims “ e.g. for breaches of tenancy by either party that are brought after the commencement date or before and not finally determined as at that date – the court MAY order that they are to be treated as the same tenancy or as continuing throughout the termination period – the interesting question will be how this jurisdiction is to be exercised.

INTRODUCTORY AND DEMOTED TENANCIES

The provision that the parties have not entered into a new tenancy before the commencement date arguably renders the majority of the introductory and demoted tenancy provisions otiose. It is impossible to be a tolerated trespasser following the end of an introductory or demoted tenancy as there is no extended discretion. Any arrangement such as a suspended order by consent must create a new tenancy and if the trial period or 12 month demoted period has ended that must be a secure tenancy or assured tenancy. If that is wrong that it should be noted that any trial period or demoted 12 month tenancy period is to be treated as having commenced again on the creation of the new replacement tenancy.

There is one potentially alarming consequence of the unnecessary amendments to the introductory and demoted tenancy regime. If the introductory or demoted tenancy does not come to an end until execution then it is arguable that due to the extension of the trial period or demoted period by the issue of proceedings that the tenant whose order is not enforced by the authority is trapped permanently as an introductory or demoted tenant . That cannot surely have been Parliament's intention.¹

PRACTICAL CONSEQUENCES – the return of N28 and suspended possession orders

Since the decision of the House of Lords in [Knowsley Housing Trust –v- White](#) anecdotal reports suggest landlords are seeking to obtain these orders on the basis that postponed orders are no longer necessary.

It is suggested that this should be opposed for the following reasons:

- (a) The tenant under a suspended order may only find out that he is to be evicted when he receives a notice of eviction. Apart from the administrative act of issuing a warrant for possession the court may have no involvement at all.
- (b) Contrast this with the postponed order. The practice direction requires the landlord to give notice to the tenant of a proposed application; it requires the judge being asked to fix a date to be informed of any known issues such as housing benefit problems. The judge can order a hearing of the application if there are issues of concern.
- (c) Moreover, when a hearing is ordered the scrambled last minute application to suspend may be avoided. Indeed a postponed possession order is in accordance with the spirit of the Act which is to prevent eviction from a tenant of their home without good reason and provides for effective judicial involvement throughout the process.
- (d) The real objection for landlords is that they at present have to pay two fees rather than one, as they cannot apply for a date to be fixed and a warrant at the same time (see Ord 26 r 17).

Also note it is arguable that the SPO eviction procedure can no longer be held to be in accordance with Article 8 ECHR. The Court of Appeal authority to that effect [St.Brice –v- Southwark LBC judgment](#) is now doubtful in the light of ECHR authority that Art 8 requires that an independent and impartial tribunal decides that your eviction is proportionate even when your right to occupy has ended. The ruling in [St. Brice](#) that your Art 8 rights are satisfied by a fair hearing at possession stage but not at actual eviction stage is surely questionable.

In any event, practitioners should ensure that whatever types of order the court proposes, a discharge provision is included in the order – so that on payment of all the arrears and costs the possession order will be discharged. Otherwise the order may remain in effect and, for example, prevent a tenant exercising their Right to Buy without returning to court.

James Stark, 20th May 2009

* Garden Court North will be running a course on “**Possession Orders, the new law and the consequences of the abolition of tolerated trespassers**” in the summer. Details will be announced shortly.

¹ Thanks to Jane Petrie of Sheffield Hallam University for alerting me to this problem