Emsleys
SOLICITORS & PROPERTY SPECIALISTS

HOUSING LAW
For Housing Professionals

enewsletter
Winter 2003 Issue No.2

Introduction

Welcome to the second edition of Emsleys' quarterly newsletter for Registered Social Landlords. Our newsletter was designed following consultation with our RSL clients, who despite representing a varied cross section of the sector, had very similar requirements from an updating service.

The Newsletter is disseminated to nominated Housing Managers and Housing Officers of all our RSL clients, and is subsequently archived on our website. The Newsletter offers a Frequently Asked Questions Service, with responses returned to enquirers and included in subsequent bulletins. They will also be archived by category on our website in due course.

It is hoped that the bulletin will be a useful tool to Housing Professionals and provide the opportunity for a forum for topics of the day to be discussed. Comments and suggestions are positively encouraged, to ensure that we continue to deliver what our clients need.

John Murray, Leeds, November 2003.

LEGAL NEWS

Pre Action Protocol for Housing Disrepair Cases

From 8 December 2003 a pre action protocol will apply to housing disrepair cases in the Civil Courts.
The protocol sets out what the Courts expect the parties in such cases to have done before issuing proceedings.

The protocol applies to claims for breach of repairing obligations in the tenancy and to personal injury claims caused by housing disrepair.

It covers claims for damages and for works to be done.

It does not apply to disrepair counterclaims in possession actions and it does not apply to statutory nuisance cases in the Magistrates' Court.

If parties do not follow the protocol, the Court will be able to penalise those shortcomings in terms of costs orders. The Lord Chancellor's Department, which has developed the protocol in consultation with housing law practitioners, wants to ensure that:-

- Court proceedings are a last resort in disrepair cases
- landlords and tenants exchange information fully before proceedings are issued
- landlords and tenants are as clear as possible about each other's cases before Court action starts.

Tenants should give landlords notice of claim as soon as possible. The protocol includes 2 standard letters which achieve this.

A "letter of claim" sets out full details of the tenant's claim; it's a formal letter before action. If the tenant isn't able to assemble all the information that is needed for a "letter of claim" early on in the case, the protocol recommends use of an "early notification letter", which at least puts the landlord on notice of disrepair and provides basic details of the case.

Both letters contain requests for disclosure by the landlord of relevant documents including the tenancy files. Both letters also contain details of a surveyor or similar expert that the tenant proposes.

The landlord is expected to reply to the first letter (whichever one is used) within 20 working days. If that's not possible the landlord should seek an extension of the time period for response.

If agreement is not reached on repairs within that initial 20 working day period, the tenant is entitled to instruct his/her proposed expert to carry out an inspection. The landlord is allowed to propose an alternative expert or alternative terms of instruction for the tenant's proposed expert.

Landlords can instruct their own experts, but the protocol suggests that in such a case both experts inspect at the same time. The protocol is designed to promote the use of one expert instructed by both parties on common terms, to save costs, time and areas of dispute.The disrepair protocol raises serious issues for RSLs.

Consequently Emsleys propose to provide in 2004 comprehensive training to our clients on all aspects of the protocol, standard documentation and tactics to deal with disrepair claims.

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CASE LAW

McDonald v Fernandez (2003) Court of Appeal

- A notice under s 21 1988 Housing Act against an assured shorthold tenant must comply with all the requirements of the Act to be valid;
- Where an assured shorthold tenancy is periodic at the date the s 21 notice is served, the notice must expire on the last day of a period of the tenancy;
- The notice must either specify the right date or describe to the tenant how that date may be calculated;
- The Court has no power to 'forgive' defects in a s 21 notice that does not fully comply with the legal rules.

Hackney LBC v Frimpomaah (2003) High Court

- Once a warrant for possession of premises let on a secure tenancy had been executed, there was no power for the Court to order the tenant's re-admittance to their home, unless there has been fraud, oppression, abuse of process, or an application to set the original possession order aside under CPR 39.3.
- The same applies to assured tenancies.

Paddington Churches HA v Nazli Aydin (2003) Barnet County Court

- The Association obtained a suspended possession order, and then a warrant. The housing officer told the tenant that she would not be evicted if she cleared her arrears in full.
- She borrowed the money and paid the full arrears amount at the post office the day before the eviction; her friend faxed the post office receipt to the Association.
- The housing officer at the scene of the eviction did not believe that the money had been paid or that the receipt had been faxed. The warrant was executed.
- The Court set the warrant aside: this was a clear case of oppressive conduct by the landlord.

London & Quadrant Housing Trust v Ison (2003) Romford County Court

- There is still no clear Court of Appeal decision on whether the Court can, against the wishes of the landlord, adjourn a possession claim brought on Ground 8 of the assured grounds for possession, to allow the tenant the chance to sort out Housing Benefit issues;
- An Association can agree to an adjournment for this purpose;
- The Circuit Judge sitting in the Ison case held that the Court did not have the power to order such an adjournment.
- Further, the common Defendant's tactic of requesting the adjournment before the Claimant had presented its evidence as to the arrears was "artificial and fallacious".

Ealing HA v McKenzie (2003) Court of Appeal

- The Association let a flat to Mrs M who lived there with her husband. Due to domestic violence she left the flat, and made it clear she was not returning.
- The Association offered her another flat, which she signed up for. A week later she was given a termination form to sign for the first flat;
- She gave notice using that form but it did not expire on the correct day.
- The Court of Appeal held that signing up for flat number 2 did not amount to a surrender of the tenancy of Flat 1, the termination notice that she then gave to the Association did form the basis of a surrender, on the date that the notice was signed.

Chief Constable of Lancashire v Lisa Marie Potter (2003) High Court

The Police applied for an Anti Social Behaviour Order (ASBO) against the Defendant, a street prostitute working in central Preston.

- The first condition for an ASBO- behaving in an anti social manner- was met if either there was conduct that had caused harassment or distress to members of the public, or if there was conduct likely to have such an effect;
- In relation to either type of behaviour, the Court had to be satisfied beyond reasonable doubt that the elements of the condition were made out;
- If a Defendant's conduct contributed to a wider social problem in the locality (here, street prostitution and associated drug use), that could amount to behaving in an anti social manner although it would not do so in all cases.
- It was not necessary to prove intent to cause harassmentor to prove that the defendant was acting in conjunction with others.

Khatun & Others v Newham LBC (2003) High Court

- The Unfair Terms in Consumer Contract Regulations 1999 apply to tenancy agreements.
- Standard tenancy agreements must therefore be in plain language;
- Any tenancy term that is regarded as unfair under the tests set out in the Regulations will be unenforceable, unless it is individually negotiated with the tenant, or unless it does no more than reflect the law under a statute.

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Legislation:

Anti-Social Behaviour Bill

The Bill went through the report stage in the House of Lords on 3 November 2003.

The Bill contains a wide range of measures, including:

- An obligation on landlords including RSLs to prepare and publish an ASB strategy
- The extension of injunctions under s 152 1996 Housing Act to RSLs
- A new remedy in the County Court: a demotion order, which has the effect of demoting a secure tenancy to an introductory tenancy, and of demoting an assured tenancy to an assured shorthold: there must have been anti-social behaviour and it must be reasonable to make the order
- In relation to possession proceedings on the grounds of nuisance, a requirement that the Court has specific regard to the effects of the nuisance on others when deciding what is a reasonable order to make.

Guidance:

The Housing Corporation has issued its "Charter for Housing Association Applicants and Residents" (August 2003), as part of its regulatory role.

The Charter covers wide subject area, including possession action: "Your housing association must only take action to evict you from your home as a last resort, where there is no reasonable alternative. You are entitled to know what your housing association's policies are and how eviction is dealt with."

The Charter also points out that tenants are entitled to see copies of Associations' policies on repair and maintenance, and that Associations must have a strategy on anti-social behaviour.

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