Sub-letting: have you got the best evidence?

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Andy Lane of Cornerstone Barristers considers some of the issues arising, and the court procedures available to, social landlords taking possession action because the tenant is believed to have sub-let or parted with possession of the demised premises

Introduction

It is trite law that:

1. If a tenant does not reside in their demised premises as their only or principal home then security of tenure comes to an end[1].

2. If they have in fact sub-let or otherwise parted with possession of the whole of the demised premises then that security of tenure is not only lost but it cannot be regained (save by the grant of a fresh tenancy)[2].

3. The remaining common law tenancy can thereafter be determined by means of the service of a notice to quit[3].

Sub-letting is a reasonably straightforward concept[4], but 'parting with possession' is not always so easy to explain or demonstrate.

In the Privy Council case of Lam Kee Ying v Lam Shes Tong [1975] A.C. 247 Sir Harry Gibbs said at [256C]

"A covenant which forbids a parting with possession is not broken by a lessee who in law retains the possession even though he allows another to use and occupy the premises. It may be that the covenant, on this construction, will be of little value to a lessor in many cases and

[1] Sections 79 and 81 Housing Act 1985 (secure tenancies)/Section 1(1)(b) Housing Act 1988 (assured tenancies): only one of a joint tenant needs to so reside and there can be occupation by a tenant's spouse/civil partner

[2] Section 93(2) Housing Act 1985/Section 15A Housing Act 1988

[3] The tenancy being determined at the expiry of the notice to quit: *Hussey v Camden LBC* (1995) 27 HLR 5, CA

[4] It is an objective test and largely a question of fact for the judge - *Brent LBC v Cronin* (1998) 30 HLR 43 at [46-7]

will admit of easy evasion by a lessee who is competently advised, but the words of the covenant must be strictly construed, since if the covenant is broken a forfeiture may result."

The potential difficulties with this concept were starkly to the fore in *Hussey v Camden LBC* (1995) 27 HLR 5 at [10] where the tenant succeeded in his appeal despite the evidence available to the local authority:

"As summarised by Mr Bhose, there was proof before the judge that there were periods when Mr Hussey was not living at his flat but, on the contrary, was living elsewhere; that during such periods someone else was living at the flat…"

As for the only or principal home context, in *Crawley BC v Sawyer* (1988) 20 HLR 98 the tenant left his flat to go and live with his girlfriend, told his landlord that he was living there and that they intended to purchase her home, and had his electricity cut off at his flat. A notice to quit was served and he returned to live at the flat, following a relationship breakdown, some 10 days after the notice to quit had expired.

The Court of Appeal confirmed that the trial judge was entitled to find despite all this that the tenant was still living at the flat as his only or principal home, his occupation of his girlfriend's premises being of a temporary nature[5]:

"In the present case the learned judge was, on the evidence, in my view well entitled to hold that throughout the period the premises the subject of the action were occupied by the defendant as a home. The only question which really arose is whether it was occupied as a principal home. The learned judge considered the question. He came to the conclusion which he did on the basis that the defendant had left to live with his girlfriend but with no intention of giving up permanent residence of Cobnor Close.

Some criticism is made of that wording, but we are not analysing a judgment which was carefully prepared and delivered after reservation. It is in my view unjustified to latch on to sentences in a short extempore judgment and try to find on them an argument that the learned

[5] Parker LJ at [102]

judge misdirected himself in law. The situation, which the judge was entitled to take into account, was that he had before him the evidence of the defendant, who asserted throughout that he had every intention of returning and not merely that he had not abandoned the flat. He said in his evidence-in-chief: "I accept I was not there but I had every intention to return." He again said he had every intention to return somewhat later on and that he did not intend to give up the flat. He was staying with his girlfriend helping her to buy a house. I fail myself to understand how he could have been a tenant in common, and the matter was not investigated. The learned judge was entitled to take the view that he was there on a temporary basis and that his principal home throughout remained the premises the subject of the action."

The need to ensure that the best evidence is before the court is therefore, unsurprisingly, of critical significance.

2013 Legislation

Unlawful sub-letting has been a real issue for social landlords for many years[6], as well as other example of social housing fraud[7]. It was felt to be such a problem that the Coalition Government took over a Private Member's Bill in 2012[8] and enacted the Prevention of Social Housing Fraud Act 2013 ("the Act")[9].

Some cases are very straightforward, albeit contested. For example, I represented a housing association in their possession claim against a tenant of a one-bedroom flat. Aside from evidence of his use of other premises (including ownership of one), even more tellingly the association had obtained documentary evidence of tenancy agreements the tenant had provided to two persons in respect of the demised premises. He admitted one (she slept in the bedroom, he in

[6] Estimates at the time the Prevention of Social Housing Fraud Act 2013 received royal assent on 31 January 2013 put the number of unlawfully sub-let social housing dwellings at around 98,000

[7] Such as obtaining a tenancy (allocation or homelessness) by fraud, false succession claims, fraudulent right to buys, mutual exchanges with consent obtained by fraud, assignment without consent (or where consent obtained by fraud) and benefit fraud (such as in relation to housing benefit & council tax support)

[8] Presented by Richard Harrington MP on 20 June 2012

[9] The Act extends to England and Wales and was brought fully into force in England on 15 October 2013: Commencement Order

the lounge he said) but denied the other. Unfortunately for him, when his bank accounts were obtained these showed regular monthly payments being received from both individuals.

At trial he did not attend but sent a friend with a bottle of pills and a note to explain he had a "sports injury" and could not sit for long periods. He wanted an adjournment, which was unsurprisingly declined by the judge, and a possession order was ultimately (and inevitably) obtained.

Not every case is as clear or obvious, but even those that are, are often only so because of the hard work of the landlord, their lawyers and any investigators in obtaining the necessary evidence.

This article highlights the question of that evidence collation, particularly through the courts, but before considering that issue will briefly build on the overview of the relevant legislation referred to above.

Pre-Act

Possession action, following proper service of a valid notice to quit, was the main remedy employed by social landlords prior to 15 October 2013 in sub-letting/parting with possession cases (and, in reality, still is).

There were claims for unjust enrichment or in fraudulent misrepresentation, criminal prosecutions under the Fraud Act 2006 and sections 171 (allocations) and 214 (homelessness) of the Housing Act 1996, and recovery provisions under the Proceeds of Crime Act 2002, but these were comparatively few and far between.

The 'landscape' in respect of sub-letting and parting with possession cases has however been simplified and clarified by reason of the Act's introduction.

Post-Act Picture

Sections 1 and 2 of the Act create two new **criminal offences** in respect of secure and assured tenancies[10] respectively, though this is outside the purview of this article.

In civil proceedings, by application or as part of possession or other

[10] This does not apply to shared ownership tenancies

proceedings, section 5 enables landlords to seek an **unlawful profit order** against tenants who have sublet their homes in breach of their tenancy agreements in return for payment. Landlords can in effect recover the 'profit element'[11].

Crucially, section 6 also provides (by the insertion of section 15A into the Housing Act 1988) that an assured tenant who sub-lets or parts with the whole of their dwelling will no longer be able to regain their security of tenure by moving back into the property (prior to the expiry of any notice to quit served). This has brought assured tenants in line with the position long applicable to secure tenants of local authorities.

The ever-impressive House of Commons Library produced an excellent briefing note on the Act in 2014.

Investigation Powers

The Prevention of Social Housing Fraud (Power to Require Information) (England) Regulations 2014[12] ("the Regulations") came into force on 6 April 2014.

It makes express provision for powers to require information to be produced for housing fraud investigation purposes.

Prior to this social landlords used the comparatively limited data sharing powers and ability to request information under the Data Protection Act 1998[13], and the surveillance powers to be found under legislation such as the Regulation of Investigatory Powers Act 2000.

The Regulations enable an authorised officer (usually employed by a local authority) to require banks, building societies, other providers of credit, telecommunications providers and utilities companies to provide information that is reasonably required for the purpose of preventing or detecting fraud under the Act[14].

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[11] The maximum amount recoverable defined at section 5(6)

[12] SI No. 2014/899 - made under sections 7, 8 and 9(2)(b) and (c) of the Act

[13] Sections 29 and 35, and Schedule 2 (paragraph 6) – see Tenancy Fraud & Data Sharing" by the CIH (February 2012)

[14] Paragraph 4

The operation of this power is unsurprisingly not without its caveats and "hurdles". Paragraph 4 of the Regulations says for example (with my emphasis in underlining):

"(5) An authorised officer shall not, in exercise of those powers, require any information from any person by virtue of that person falling within paragraph (3) unless it appears to that officer that there are reasonable grounds for believing that the person to whom it relates is—

(a) a person who has committed, is committing or intends to commit an offence listed in section 7(7)[15] *of the Prevention of Social Housing Fraud Act 2013; or*

(b) a person who is a member of the family of a person falling within sub-paragraph (a)."

It is an offence under paragraph 5 of the Regulations to not provide, intentionally delay, etc. the information requested. However, the application of the Regulations runs, in my experience, relatively smoothly and is especially useful with regard to bank statements and details.

It does not though assist in obtaining information from third parties, such as a "reluctant" sub-tenant, who are unrelated to the tenant.

[15] *(7) In this section "housing fraud investigation purposes" means purposes relating to the prevention, detection or securing of evidence for a conviction of—*

(a) an offence under this Act;

(b) an offence under the Fraud Act 2006 relating to the unlawful sub-letting or parting with possession of the whole or part of a dwelling-house let by a local authority, a private registered provider of social housing or a registered social landlord,

(c) an offence under the Fraud Act 2006 relating to an application for an allocation of housing accommodation under Part 6 of the Housing Act 1996,

(d) an offence under the Fraud Act 2006 relating to an application for accommodation, or for assistance in obtaining accommodation, under Part 7 of the Housing Act 1996 [or under Part 2 of the Housing (Wales) Act 2014],

(e) an offence under the Fraud Act 2006 relating to—

(i) a claim to exercise the right to buy under Part 5 of the Housing Act 1985,

(ii) a claim to exercise the right to acquire under section 16 of the Housing Act 1996, or

(iii) a claim to exercise the right to acquire under section 180 of the Housing and Regeneration Act 2008, or

(f) an associated offence in relation to an offence mentioned in any of paragraphs (a) to (e).

Court Processes

That is where effective use of court procedures may assist “fill in the gaps” and strengthen the evidence to its optimum effect.

Pre-Action: most of the realistic actions available through the civil courts relate to the post-issue period, though **pre-action disclosure** is available pursuant to CPR 31.16.

Any application for pre-action disclosure:

(a) can only be made against a would-be (likely) party,
(b) must identify the documents or class of documents to be disclosed (which would have been disclosable under standard disclosure if proceedings had been issued), and
(c) will only be considered if it is desirable to:

   i. dispose fairly of the anticipated proceedings;
   ii. assist the dispute to be resolved without proceedings; or
   iii. save costs.

This option is however unlikely to be taken up in most sub-letting cases, not only because of the powers already available to a social landlord to obtain information (see above – this would often include a transcript of an under caution interview with the would-be defendant), but also because it is unlikely that the required evidence could be identified with sufficient clarity or satisfy (c) above.

Post-issue: the landlord in any event has often determined to issue proceedings (in some instance after offering the defendant an ‘amnesty’ against prosecution, etc. if she/he would simply give back the keys and surrender the demised premises with vacant possession) and has three primary options available to them, which are generally under-used, to improve further their case.

Firstly, there is the Part 18 Request for Further Information procedure. Its purpose is to clarify a party’s case and the relevant matters in dispute.

For example, I have one case where the defence is in essence a bare denial of sub-letting, but does not respond at all to the matters used to support the

landlord's case. It is therefore not known, to give three instances:

- What the defendant says about monthly payments going into her account.
- How long she spends (and what she does) in another country, where her husband and business are.
- What she lived on for a 3-year period when she was not working and was not in receipt of social security benefits.

The solicitors for the local authority submitted a Request for Further Information to the defendant's solicitors, but they declined to answer it. An application for an order requiring a response to the Request was therefore made to the court and granted.

It is important to note:

i. A preliminary written request should always be made first, providing a date when a response is expected and confirming that the Request is made under Part 18.

ii. The Request should be proportionate and with a genuine view of knowing the case the first party has to meet.

iii. Such a Request should comply in full with the Practice Direction to Part 18.

iv. Any Response should be verified by a statement of truth.

v. If the second party objects to complying with the Request (including on the basis that it would be disproportionately expensive), or any part of it, then they should inform the first party promptly.

vi. If no response at all is made, and at least 14 days was given to respond, then the first party can seek an order without a hearing, and without serving the application on the second party.

vii. A court granting an order under Part 18 can make it subject to conditions, and with

the application of a sanction for failure to comply.

viii. The court can make a Part 18 order of its own initiative.

ix. A Request is necessarily made post-statement of case, but may be made prior to statements being served and more than once.

x. The Part 18 procedure is only available against a party, but that does not prevent any landlord writing to a witness or would-be witness, such as an alleged sub-tenant, seeking answers to specified questions. Those answers may be helpful in cross examination of that individual, and a failure to respond may be argued as showing, for example, a degree of collusion or complicity with the defendant.

In many instances allied to the Part 18 process is the availability of the two other options alluded to above.

That is, the power under CPR Part 31 for a court to order **specific disclosure** of identified documents or classes of documents (31.12), or **disclosure against a person who is not a party** (31.17).

The former is somewhat self-explanatory and enables the landlord to seek disclosure of documents not identified during the standard disclosure process (though an application can be made prior to the time for standard disclosure).

It has been my experience that whilst separate applications pursuant to CPR 31.12 are not common in subletting/parting with possession cases the power is sometimes exercised 'by the back door' by identifying requested documents in the usual direction for standard disclosure.

The latter application under CPR 31.17 is available to a party where the documents sought are likely to support the case of the applicant or adversely affect the case of another party, and disclosure is *"necessary in order to dispose fairly of the claim or to save costs"*.[16]

[16] There is a strong public interest in the court having before it all the relevant evidence and

Unlike the Part 18 or 31.12 procedures, an application under 31.17 is expressly aimed at non-parties.

For example, it may seek the bank accounts of the alleged sub-tenant, or details in relation to where they claim to have lived at the relevant time (such as household bills).

As always, it is sensible to first seek the required information without recourse to the courts, any application being very much a last resort.

Finally, it is worth reminding the reader of a fourth option – the ability to **witness summons** an individual to attend court to give evidence or produce documents in court (CPR 34.2), or call the other party's (identified) witness where they were not otherwise going to be called (CPR 33.4).

One has to be careful in the use of these powers of course because it can backfire and end up strengthening the case of the defendant.

documents: *Mitchell v News Group Newspapers Ltd* [2014] EWHC 1885 (QB) ¶ 14-15

For example, in a recent succession possession claim the defendant had not called any evidence from his siblings, adult children, partner or ex-wife to support his claim to have lived with his mother, the tenant, for at least 12 months prior to her death.

The local authority in that case did not seek to witness summons these persons but rather were able to successfully raise their non-attendance or involvement with the defendant in cross examination.

It is perhaps a power most frequently considered in the case of "neighbours", otherwise reluctant to come forward and confirm the information they have previously given to the landlord.

However, it also has obvious application for professional persons, such as housing benefit officers[17].

Conclusion

This article is not intended to be a definitive guide to everything a social

[17] A process frequently used at the old Shoreditch County Court in possession claims based on rent arrears, where it was generally accepted the real issue was delayed housing benefit claims

landlord can do to determine the strength of its case in a sub-letting/parting with possession scenario[18], but does seek to address some options available to them to bolster their case (or even determine that the merits do not justify action)[19].

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[18] For example, there is the availability of a Notice to Admit Facts under CPR 32.18 (see CPR Part 32)

[19] Information on the amount of Local Authorities' fraud work can be obtained under Local Government Transparency Code 2015 and the Local Government Counter Fraud and Corruption Strategy 2016-19 has recently been produced