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Vulnerable tenants

Peggy Etiebet and Kuljit Bhogal



Introduction

With thanks to Ryan Kholi and Emma Dring

Who is a 'vulnerable' tenant?



- **Mental health problems**/learning difficulties
- Physical disabilities
- Alcohol/substance misuse
- **Age** (elderly/young people)
- Care leavers
- Asylum seekers
- Former rough sleepers
- Ex-offenders
- Victims of DV

What issues arise?



- Setting up the tenancy
- Difficulties maintaining a tenancy
- Extra considerations when seeking possession



Setting up the tenancy

Minors (1)



- Cannot hold a legal estate in land (including a tenancy), but can hold an equitable interest.
- Can grant a licence – but only if conditions for granting a tenancy are not met (e.g. no exclusive occupation)
- Any tenancy will be held on trust.
 - Express trust deed
 - Trust arises by implication upon attempt to grant a tenancy.

Minors (1)



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Minors (3)



- What about succession?
 - Minor can succeed to a tenancy, but tenancy will be an equitable tenancy:
 - *RB Kingston upon Thames v Prince* [1999] 1 F.L.R. 593.
 - Consider whether referrals need to be made (e.g. child social services).

Persons lacking capacity (1)



- As with minors, persons lacking mental capacities can validly enter into contracts for necessities.
- Contract entered into by someone lacking capacity is valid and enforceable unless they can show:
 - They did not understand what they were doing
 - The other party knew of their incapacity.

Persons lacking capacity (2)



- Is there a deputy or someone with LPA? If so, they can sign tenancy agreement on behalf of P.
- They can also terminate a tenancy on behalf of the tenant, if necessary.
- If there is a concern about capacity, consider need for issue-specific capacity assessment, to determine how to proceed.

Persons lacking capacity (3)



- An application can be made to the CoP for authorisation to sign the tenancy agreement on behalf of P.
- Will require:
 - COP1 application form
 - COP3 capacity assessment
 - COP24 witness statement dealing with reasons for application, consultation carried out and why in P' s best interests



Maintaining the tenancy

Outcomes



"When I met Peter, he was in over £6000 rent arrears and at risk of losing his home. I helped him reduce his debts by helping him claim Income Support, backdated Housing Benefit and setting up direct payments for his rent arrears. They also helped him relocate to another area in Borough, where he is now happy and has found new friends". **Officer from Sustain, LB Southwark.**

Offering Support



- Do you know what to do if you know or suspect a tenant to be vulnerable?
- What is the cause of the arrears?
- Do you have a vulnerable tenant's policy in place?
- How would you differ in your treatment of a vulnerable tenant when it comes to your rent arrears protocol?
- If the nature of their vulnerability makes it difficult for them to attend the rent office to make payment, what “reasonable adjustments” are in place? What reasonable adjustments can you make?

Tackling Anti-Social Behaviour



- Victim or perpetrator?
- Is there a diagnosed medical condition causing ASB?
- Anti-Social Behaviour Personality Disorder
- What is the nature of the ASB and the impact on neighbours
- Proportionality of action
- Information sharing protocol with Social Services
- Referral for treatment

Vulnerable Tenants and ASB



- Has sufficient time been given for engagement/treatment?
- Keep vulnerable tenant ASB cases under review
- Encourage neighbours to continue keeping diary sheets of incidents
- A stepped approach to tenancy enforcement
- Consider whether cogent evidence has been presented by the date of trial which demonstrates that the ASB is unlikely to recur



3. Hoarding

Problems for landlords



- Increased fire risk.
- Increased risk of infestations (rodents/insects).
- Neighbour complaints - smell/ unsightly rubbish.
- Increased disrepair - issues not reported, repairs can't be completed.
- Gas and electrical safety checks – criminal liability.
- Risk of structural damage (cause by weight and volume of items), associated threat to adjacent properties.

Problems for tenants



- Family strain/conflict.
- Isolation.
- Inability to cook/clean/bathe.
- Personal injury (tripping).
- Increased risk of death by fire - they can't easily leave the property.
- Increased risk to safety as emergency services (fire, ambulance) cannot gain access.
- Distress.

Recommended approach



- Not helpful to go in and clear a property likely to exacerbate problem and/or mental health.
- Avoid using the word ‘hoarding or ‘rubbish’; use ‘stuff’ or something neutral.
- Couch intervention in terms of assisting tenant to prevent ‘further interference’ in their lives.
- More effective to reduce risk to an acceptable level rather than trying to resolve completely.

Things to consider (1)



- Set up a multi- agency hoarding protocol.
Examples: Merton/Circle, Islington, Haringey.
- Engage other services: social services, mental health teams, GP, environmental health, animal welfare, fire brigade ...
- Consider capacity assessment – do decisions need to be taken in tenant's best interests?
Does any application need to be made to CoP?

Things to consider (2)



- Should alternative accommodation be offered?
- Is there a need to make a safeguarding referral (either in relation to the tenant or other individuals living with him/her)?
- Are there family/friends that could be enlisted to help?

Other powers that may be available



- Mental Health Act 1985: s.2, 135 – sectioning and warrant to remove from home for detention/assessment.
- Public Health Act 1936 – s. 83/94 – filthy or verminous premises/articles/persons.
- Anti-social behaviour, Crime and Policing Act 2014 – injunctions (but note issues with capacity/compliance).
- Housing Act 2004 – hazard assessments.



Ending the tenancy



1. Minors

Minors (1)



- If a tenancy has been granted to a minor, the landlord cannot terminate it until the trust is brought to an end (breach of trust):
 - *Alexander-David v LB H&F* [2009] EWCA Civ 259
- This appears to be the case even if the minor has since become an adult:
 - *LB Croydon v Tando* (Croydon County Court, 2012)

Minors (2)



Ways to get round the problem:

1. Grant a licence instead of a tenancy (but take care that it really is a licence);
2. Apply to court to bring the trust to an end (if the tenant is now 18);
3. Apply to court to be removed as a trustee under ToLATA 1996 (if the tenant is still a minor).

Minors (3)



- A litigation friend will be necessary. Is there anyone suitable?
- Bear in mind need to involve other services:
 - Social services
 - Homeless persons unit
- Best interests of the child – s. 11 children Act?
- Remember – age is a protected characteristic under the Equality Act!



Equality Act 2010 & Article 8

Thanks to Ryan Kohli and Emma Dring

Equality Act 2010



- Discrimination
- Public Sector Equality duty (PSED)
- Assessors

Protected characteristics



- Age
- Disability
- Sex

Section 6 – Disability:

- (1) A person (P) has a disability if—
 - (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Meaning of disability (1)



- ‘substantial’ means more than minor or trivial s.212(1) EA 2010
- ‘impairment’ includes long term medical conditions such as asthma and diabetes, and fluctuating or progressive conditions such as rheumatoid arthritis or motor neurone disease
- Automatic protection for those with certain conditions (e.g. HIV/AIDS, multiple sclerosis), Sch1, para. 6

Meaning of disability (2)



- Certain conditions **NOT** to be regarded as impairments for EA 2010 purposes:

Regulation 3:

- Addiction to alcohol, nicotine or other substances not medically prescribed

Regulation 4

- Tendency to set fires / steal
- Tendency to physical or sexual abuse of other persons
- Exhibitionism
- Voyeurism

EA 2010 (Disability) Regulations 2010

Discrimination



Disability discrimination (s. 15)

A discriminates against B if he:

- treats B unfavourably *because of something arising in consequence* of B's disability, and
- cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(unless A did not know, and could not reasonably have been expected to know that B was disabled).

Akerman-Livingstone v Aster [2015]

UKSC 15



- A stronger right than Art 8
- Burden of proof works differently to normal:
 - Tenant sets out facts giving rise to possibility of disability discrimination
 - Burden shifts to landlord to show that no unfavourable treatment/disproportionate means
- Generally can't be dealt with summarily
-

Akerman-Livingstone - contd.



- What are the landlord's objectives?
- Is there a rational connection between the objectives and the eviction of the tenant
- Is eviction no more than is necessary to accomplish objectives – could lesser steps could be taken?
- *** Does eviction strike a fair balance between the objectives & any disadvantages caused to the tenant as a disabled person? ***

PSED – When does it apply?



1. When public authorities exercise their functions.
2. When bodies who are not public authorities exercise ‘public functions’. Same test as under HRA 1998.
 - Weaver v L&Q [2010] 1 WLR 363,
 - R (Macleod) v Peabody [2016] EWHC 737
3. Policies and individual decisions: Pieretti v Enfield [2010] EWCA Civ 1104

PSED – what does it require?



- Have “due regard” to various needs. Includes:
 - Removing/minimising disadvantages that are connected to the protected characteristic;
 - Taking steps to meet the different needs of persons who share a protected characteristic
 - Taking account of disabled persons' disabilities.
- Process, not outcome: see *R (Hurley & Moore) v SSBIS* [2012] EWHC 201 (Admin)

PSED – some basic principles



- Discharge duty at time decision is made.
- Duty must be “exercised in substance, with rigour, and with an open mind”. Not ‘box ticking’.
- The duty is non-delegable.
- Duty is a continuing one.
- No duty to expressly refer to PSED and criteria, but doing so reduces scope for argument
- Good practice to keep records demonstrating consideration of the duty.

PSED - how to comply?



- Best practice is to carry out an assessment.
- Integrate in to procedures, consider use of a template – but avoid ‘stock phrases’.
- Assessment should also address issues relevant to discrimination.
- Assess before deciding to issue possession claim, not in response to defence.

What should the assessment include? (1)



1. Set out what decision is being made (e.g. whether to serve NTQ, issue possession claim)
2. Say what information has been considered (e.g. housing file, medical info received, and legal reps)

What should the assessment include? (2)



1. Summarise background facts.
2. Identify protected characteristic, proceed on assumption it applies (e.g. disability) – note importance of disregarding any treatment which is being received.
3. Summarise any medical evidence available.

What should the assessment include? (3)



4. Make express reference to s. 149.
5. Summarise what steps have already been taken to address the issues giving rise to the possession proceedings.
6. What will the consequences be for the tenant?

What should the assessment include? (4)



7. What particular difficulties would this tenant face, given his protected characteristic?
8. Will the aims set out in s. 149 be promoted? If not, why is it still considered appropriate to take action? Why would it be proportionate?

PSED - what if duty is not discharged before proceedings are issued?



- Barnsley MBC v Norton [2011] EWCA Civ 834
- R (on the application of West Berkshire DC) v Secretary of State for Communities and Local Government [2016] EWCA Civ 441
- Mahamoud v Kensington and Chelsea RLBC CoA [2015] EWCA Civ 780 – s.11 CA, paragraph 70

One to watch

- Davies v Hertfordshire (to be heard 24 or 25 October 2017), Tara and Andy

Whether breach of s.11 CA or s.149 can be a defence to a possession claim

Assessors (1)



Section 114(7) EA 2010

*‘(7) In proceedings in England and Wales on a claim within subsection (1), the power under section 63(1) of the County Courts Act 1984 (appointment of assessors) **must** be exercised unless the judge is satisfied that there are good reasons for not doing so’.*

CPR 35.15

- Enables a High Court or County Court Judge to call in aid a specially qualified assessor and to *‘hear or dispose of the cause or matter wholly or partially with their assistance’*

Assessors (2)



An assessor

- Can prepare a report on any matter at issue in the proceedings
- Can attend the whole or part of any trial to advise the court
- Has a judicial role and is not the same as an expert witness
- Does not give oral evidence and cannot be cross examined, their function is to 'educate' the Judge to enable her to reach a properly informed decision

Assessors (3)



- Do you need one?
- Can add to expense and delay –overriding objective, often both parties are funded by the taxpayer

Notes to CPR 35.15 suggest:

‘An assessor is likely to be of assistance in a case raising complex technical issues. However, normally the use of an assessor in addition to the parties’ expert witnesses would not be cost effective except in the heaviest of cases’

Article 8



Thurrock v West [2012] EWCA Civ 1435

- The circumstances will have to be exceptional to substantiate an art.8 defence.
- Court must summarily consider whether the defence as pleaded is seriously arguable. If not, must be struck out/dismissed.
- Even if defence established, won't operate to give defendant an unlimited and unconditional right to remain.

Particular application to vulnerable tenants?



- Lord Neuberger in Manchester City Council v Pinnock [2011] PTSR 61 agreed with EHRC submissions that:
- “proportionality is more likely to be a relevant issue in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty”, and
- “the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases”

Contact details



'Knowledgeable, approachable, solid and dependable' Legal 500

Kuljit Bhogal

kuljitb@cornerstonebarristers.com

Switchboard: 020 7242 4986

Mobile: 07967 048861

Clerk

Elliot Langdorf

Elliotl@cornerstonebarristers.com

Assistant Clerk

Alex Hill

Alexh@cornerstonebarristers.com

Kuljit Bhogal



Contact details



peggye@cornerstonebarristers.com

Switchboard: 020 7242 4986

Clerk

Elliot Langdorf

Elliotl@cornerstonebarristers.com

Assistant Clerk

Alex Hill

Alexh@cornerstonebarristers.com

Peggy Etiebet





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