Succession to secure tenancies: a 'tenancy for life after life'

The Housing and Planning Act 2016 will introduce significant amendments to the rules concerning succession to secure tenancies under the Housing Act 1985. These changes will deepen and lengthen the impact of the 'phasing out' of secure tenancies for life under the 2016 Act, and will replace the succession regime introduced by the Localism Act 2011. The impact of these changes means that, whereas 'tenancies for life' often transpired in practice to be 'tenancies for life after life' over successive generations, the end of that era is now dawning.

The Housing and Planning Act 2016

When they are brought into force, s. 120 and Schedule 8 to the Housing and Planning Act 2016 will provide that any new succession after the commencement of the reforms will be for a fixed term of 5 years only. Whereas at present the tenancy is deemed to vest in the successor upon the death of the tenant (i.e. the old tenancy continuing to exist in the name of the successor), under the new rules the old tenancy will come to an end on the death of the tenant and a new tenancy will be created. The new tenancy will have the same terms as before, *"except that the terms are confined to those which are compatible with a tenancy for a fixed term of 5 years"*: s. 89(2A) and (2B) of the 1985 Act as amended.

Perhaps more significantly, the reforms will apply to all existing secure tenancies regardless of when the tenancy itself was created. That is because the 2016 Act will remove the distinction introduced by the Localism Act 2011 between tenancies entered into before and after 1 April 2012: s. 86G(8) of the 1985 Act as amended. Local authorities will however still be permitted to extend succession rights in the tenancy agreement. The effect will be that when any secure tenant dies after the 2016 Act has come into force, there will be no succession to anybody other than a spouse, civil partner or person living with the tenant as a partner – unless (i) there is no spouse/civil partner qualified to succeed and (ii) the council has contractually provided for succession by other family members through the inclusion of an express term in the tenancy agreement.

The fact that this may cause particular and unexpected hardship for the relatives of tenants who hold pre-April 2012 secure tenancies was dismissed by the then-Housing Minister Brandon Lewis when introducing the provisions into the draft Housing and Planning Bill in March 2016:

> *"We therefore propose that the succession rights for secure tenancies granted before April 2012 be aligned with those granted after that date. The amendments will deliver a consistent approach across all secure tenancies and ensure that common-law partners are put on an equal footing with married couples and civil partners. Other family members who may have had an expectation of succeeding to a secure tenancy granted before April 2012, having lived with the tenant for at least 12 months, will lose their statutory right to succeed. We do not think that it is right that those who may not need social housing, because, for example, they can rent or buy privately, should have the automatic right to succeed to a social home when nearly 1.4 million households are on council waiting lists."*[1]

[1] See Housing of Commons Library Briefing Paper, Succession Rights and Social Housing (England), Number 01998, 17 March 2016, p. 10.

The former criteria for pre-April 2012 tenancies will continue to apply only in Wales, where s. 87 of the 1985 will continue in force in its current form.

Dealing with practicalities

As yet there has been no word from the Government on the intended timeframe for implementation of these provisions. Further, it is unclear whether or how much advance notice will be given ahead of the introduction of the commencement order, there being no minimum period required: s. 216(3) of the 2016 Act.

The 2016 Act is not entirely clear as to the mechanisms which will apply to the 5-year fixed term tenancies which will arise upon the death of the tenant. In particular, the Act is silent as to whether successors will be entitled to a review and re-grant of further secure tenancies once the initial 5-year term has expired. Section 89(2B) will provide only that the "*the parties and terms of [the new tenancy] are the same as those of the tenancy that it replaces, except that the terms are confined to those which are compatible with a tenancy for a fixed term of 5 years.*"

Read literally, this could mean that there is no entitlement to a review upon expiry because, of course, 'old style' secure tenancies (i.e. 'tenancies for life') did not provide for review as a term of the tenancy. However, under the 1985 Act as amended the general duty to conduct a review before the end of the term of fixed term secure tenancies is expressed to apply to "*the landlord under a fixed term secure tenancy of a dwelling-house in England*": s. 86A. If "*a fixed term tenancy*" is understood as encompassing 'any' fixed term tenancy granted under the Act, then this will surely be taken to include the 'new' tenancy granted upon succession pursuant to s. 89(2A). This reading of the Act is supported with reference to a number of other provisions which provide for the automatic grant or creation of 5-year fixed term tenancies in various circumstances (ss. 81A(4) and 86D(5)). This suggests that the Act's general 'default option' will be for the grant of a 5-year fixed term tenancy, providing parity among all tenants as regards review and potential grant of a further tenancy if they are deemed to meet whatever qualifying criteria will apply to the review process.

When local authorities exercise their discretion to grant a secure tenancy under the 1985 Act as amended, they will be able to choose between tenancies of 2 and 10 years' fixed term: ss. 81A(1) and (2) and s. 86A(5).[2] This would mean that, whereas a successor is only entitled to a 5-year fixed term tenancy upon the death of the tenant, he may be given a longer or a shorter tenancy upon review. In deciding on the length of a further tenancy following review, local authority landlords will be required to consider any available Ministerial Guidance (s. 81A(5)). However they will also be entitled to adopt their own policies, which could make specific provision as regards successor tenants.

Like the old rules, when a 'new' tenancy arises following succession pursuant to s. 89(2A), the new tenant is himself defined as a successor. In other words, if he dies before the expiry of the 5-year term his spouse or civil partner (or any other relative who would otherwise qualify under the terms of the tenancy agreement) will not be

[2] The review process introduced by the 2016 Act is discussed in detail in Richard Hanstock, "Phasing out tenancies for life" in Cornerstone Barristers' Special Edition Housing Newsletter on the Housing and Planning Act 2016, May 2016.

entitled to succeed regardless of whether or not they fulfil the residence criteria: s. 88(ba) as amended. However it is unclear what will happen if, at the end of his 5-year term, the successor is still alive and is granted a further tenancy upon review. Will s. 88(ba) continue to apply so that the 'new' tenant is still defined as a successor? Or is the slate wiped clean by the grant of a new tenancy, such that the rights of succession apply afresh as if there had never been a succession?

S. 88(ba) is expressed to apply where "*the tenancy arose by virtue of s. 89(2A) (fixed term tenancy arising in certain cases following succession to periodic tenancy)*". But upon review, the local authority may "*offer to grant a new secure tenancy of the dwelling-house at the end of the current tenancy*": s. 86A(5). On a plain reading of the Act, it would appear that following the grant of a "*new*" tenancy under s. 86A(5), "*the tenancy*" held by the tenant for the purposes of s. 88 is not the same one which "*arose by virtue of s. 89(2A)*" and therefore a new right to succession would apply.

It will certainly be open to local authorities to adopt a generous approach in setting their own policy, i.e. to decide that if a successor tenant is granted a new tenancy upon review, they will as a matter of policy grant the new tenancy free of any restriction on the right to succeed. It is less clear whether it would be permissible to decide this question the other way however. This appears to be an area where guidance from the Secretary of State and/or courts may be required notwithstanding that it is likely to be some years after the introduction of the new rules before a would-be successor find himself in a position to raise this argument.

Succession and social need

The 2016 Act did not introduce any equivalent provisions into the Housing Act 1988, so that succession rules for tenants of housing associations and other registered providers of social housing will remain unchanged. Those rules are (s. 17 Housing Act 1988) that a spouse, civil partner or person living with the tenant as a partner may succeed, with the possibility to extend succession rights to other relatives under the terms of the tenancy agreement. Those who do succeed to an assured tenancy will not necessarily be subject to fixed terms or future review of their tenancies, and may therefore enjoy a significant advantage over council tenants in the same situation.

The 2016 Act therefore takes its place among the growing range of provisions which distinguish the rights and entitlements of local authority tenants from those of housing associations. Many will consider this unfortunate. For example in 2006 the Law Commission recommended elimination of the disparity in succession rules between secure council and assured housing association tenancies. The Commission recommended the creation of single social housing tenancy, and took the view that allowing only one statutory succession to a tenancy was "*too restricted*". Under their proposals, a further succession would be allowed to a "*reserve successor*", following the death of a "*priority successor*".[3] Those proposals accepted the statute's preference for protecting the surviving spouse or civil partner (the "*priority successor*"), while recognising the need for some flexibility to account for carers, adult children or other relatives (the "*reserve successor*") who had made their home with the tenant in certain circumstances.

[3] Summarised in the Housing of Commons Library Briefing Paper, Succession Rights and Social Housing (England), Number 01998, 17 March 2016, p. 15.

Given where we are now in 2016, those proposals appear almost as the relics of a lost age. But perhaps the same can be said of the original succession rules for pre-April 2012 tenancies, given the generosity they demonstrated towards a large and broadly-defined group of "*family members"* including step-children, relatives of the "*half-blood"* and relations by marriage: s. 113 of the 1985 Act. Back in 1985, it may have been thought that only small numbers of relatives would co-habit with tenants and meet the qualifying criteria. In contrast, the Minister's remarks quoted above seemed to suggest that the current Government viewed the rules as a form of loophole allowing 'undeserving' relatives to retain occupation of council properties over the generations. Predictably, over the years certain newspapers have shared this view.[4]

No doubt the rules on succession are perceived as unfair by those waiting on housing allocation lists as much as by 'failed successors' facing eviction from their family homes. However there appears to have been no recognition by the Government of 'increased' (although there are no known available figures to support this) or 'excessive' numbers of successions as a symptom of housing shortage rather than its cause. The Minister suggested that relatives succeeding to pre-April 2012 tenancies are amongst those who do "*not need social housing"*, but plainly this begs the question as to why so many working-age adults are living in their parents' spare bedrooms rather than buying or renting their own properties as the Government seems to believe they should.

In ***Thurrock BC v West*** [2013] HLR 5 the Court of Appeal held that the position of 'failed successors' in precisely this situation was so unexceptional that it could not amount to an arguable defence to a claim for possession. Mr West would have fulfilled the qualifying criteria to succeed but for the fact that the late tenant had herself been a successor. It is clear from the facts as described in the judgment that a significant (albeit not the only) reason for Mr West having taken up residence with his family in his elderly grandparents' council property was for lack of affordable housing elsewhere [para. 16]:

> *"…He described his work and that of his partner, which in both cases was part-time. He said that they were both of limited means and, if the Property was taken away from them, not only would it cause great disruption but it would also mean that they would be homeless and the three of them would need to be re-housed by the Council. He said they would not have the means to rent on the private market, and that taking away his tenancy would cause him detriment…"*

In other words, lack of alternative accommodation was a key reason that Mr West – a healthy young adult in a two-income household – found himself in the position to satisfy the residence criteria necessary for succession. The Court held these facts did not reach the threshold of even a seriously arguable Article 8 defence [paras. 21-36]. Rather, it was precisely the ordinariness of these circumstances which weighed against Mr West and his family:

> *"There is, however, nothing exceptional in this context about the housing needs of a couple who have limited financial means and are the parents of a young child. Indeed, such a family unit is entirely typical of*

[4] The Daily Mail, "£9 billion worth of council homes are inherited by 90,000 people who don't need government help", 19 October 2010.

those with a need for social housing. They are no less typical because […] they have not defaulted on any financial obligations or committed any nuisance or other wrongdoing as occupiers and they have had a long association with the locality. The fact that they have occupied the Property for some time is in itself irrelevant since Parliament has limited the number of successions to a secure tenancy however long a person's association with, and emotional ties to, a property, and that legislative policy does not infringe Art.8 ."

This reasoning was recently upheld in strong terms by the Court of Appeal in ***Holley v LB Hillingdon*** [2016] EWCA Civ 1052, in a judgment handed down on 1 November 2016.[5] The case also concerned a 'failed successor', who would have met the qualifying criteria but for the rule against second succession. He had raised a proportionality defence to a claim for possession, relying upon the length of his residence in his late grandmother's flat (some 37 years) and a history of depression and anxiety. The Court affirmed the decision of the court below that those circumstances were neither exceptional nor of "*anything like sufficient weight"* to render a decision to seek possession unreasonable [19]. Hillingdon had filed evidence regarding the shortage of social housing in its area, and it would have "*undermined one of the fundamental principles of the respondent's allocation scheme, namely the prioritising of those in greatest need*" to have preferred the Appellant over the other 1,161 households waiting for a three-bedroom property.

What's next?

It is without question that the impact of the 2016 Act will be to move, overnight, thousands of occupants of council properties across the country into Mr West's position by removing their entitlement to succession at a stroke. But as there is nothing unlawful about Parliament's decision to limit the persons and occasions for automatic succession to secure tenancies (***Wandsworth LBC v Michalak*** [2002] EWCA Civ 271, para. 41), 'failed successors' will be likely to try to oppose claims for possession of their homes by challenging the exercise of councils' discretion to evict them.

Although the ruling in ***Holley*** is authoritative as to the limits of Article 8 / proportionality defences, highlighting the attractiveness of Equality Act defences for defendants to possession claims, there is in my view fertile ground for challenges which may occupy the courts in the coming years.

Consider for example the situation of a pre-April 2012 secure tenant with a long-term terminal illness, who has the misfortune to die the week after the commencement of the Act rather than a week beforehand. There will be no legal obligation for the local authority to grant a new tenancy to a "*family member"* who would have succeeded – and who has always had a legitimate expectation of succeeding – but for the date of the tenant's death. However it seems almost inevitable that the 'failed successor' in those circumstances will raise an Article 8 defence to the claim or plead a public law challenge to the lawfulness of the council's application of its policy.

Local authorities will therefore need to carefully consider the application of their existing 'discretionary succession' or housing allocation policies in such cases, preferably in advance of the issuing of the claim so that

[5] Ranjit Bhose QC and Emma Dring of Cornerstone Barristers acted for LB Hillingdon in this case**.** A summary of the judgment is available on Cornerstone Barristers' website.

the its decision-making process and the evidence which underpins it will be apparent to the court. The landlord should explain both why any defined exceptions contained within the policies do not apply to the family in question and why a general exception to the policy should not be made in such unusual circumstances, especially when the occupants also have known vulnerabilities, disabilities or other reasons why eviction would cause particular hardship.

Local authorities would generally be well-advised to adopt or review policies to address the situation of 'second successors'. In the past these policies were often referred to misleadingly as 'second succession' policies. However it is important to remember that there is of course no such thing as a 'second succession', only the grant of a new tenancy on a discretionary basis. In consequence there can be no agreement with the 'second successor' to exclude or reserve their usual statutory rights of succession.

That said, it should be remembered that from now on, where 'discretionary succession' is permitted, only the spouse or civil partner of the new tenant would be entitled to succeed unless the local authority has chosen to extend rights of succession to other relatives under the terms of the tenancy agreement. Further, all 'secure tenancies' will be fixed term tenancies, so that a local authority granting a new tenancy to a 'failed successor' on a discretionary basis will be able to choose the length of the fixed term (or introductory) tenancy provided (s. 81A).

Conclusion

Although it is yet unknown when they will come into force, the undeniable impact of the new succession rules will be a sharp and sudden jump in the number of persons who are no longer entitled to remain in occupation of council properties following the death of their loved ones. As each of those occupants searches for a way to retain access to social housing, it is highly likely that the county courts hearing claims for possession concerning 'failed successors' will be required to consider ever-greater numbers of challenges concerning the lawfulness of local authorities' housing allocation schemes and the exercise of their discretion to seek possession. Whether the county courts are the appropriate forum, with the appropriate level of expertise, time and resources to deal with these challenges, may be a discussion for another day.

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