

Succession to social tenancies

The recent Court of Appeal judgment in [Turley v \(1\) Wandsworth LBC \(2\) Secretary of State for Communities and Local Government \[2017\] EWCA Civ 189](#) highlighted the restrictive nature of succession rights to social tenancies. [Andy Lane](#) considers the case, the current position as it applies to such tenancies in England¹, and changes to come.

Introduction

It used to be the case that secure tenancies allowed much wider rights of statutory succession upon the death of the tenant than the more restrictive arrangements in place for assured tenancies.

Housing associations and other private registered providers, however, frequently made provision for family members beyond spouses and civil partners to “succeed” within the terms of their tenancy agreement, but these were not statutory successions and enforcement of such arrangements was not always enforced².

At the time of the Coalition Government in 2010, the government did not consider ‘automatic’ succession to family members other than spouses and civil partners to be inappropriate for much needed social tenancies (unless expressly provided for by the landlord³).

The Localism Act 2011 therefore introduced important succession changes from 1 April 2012, a process which is to be continued by further reforms to be found in the Housing & Planning Act 2016.

The Current Position

Today therefore the position is more nuanced, albeit straightforward in the general approach to succession.

Periodic Tenancies⁴

Both secure and assured tenancy succession rights are restricted to spouses and civil partners (and those living together as if in one of these arrangements⁵) who were occupying the relevant premises as their only or principal home immediately before the tenant’s death: s86A(1) Housing Act 1985/s17(1) Housing Act 1988.

That is subject to a number of caveats:

¹ Succession rights in Wales are provided for at s87 Housing Act 1985

² If they were in any contentious situation, it would normally be by way of the Contracts (Rights of Third Parties) Act 1999 if disputed

³ See [‘Local Decisions: A fairer future for social housing’](#) consultation (November 2010)

⁴ Flexible tenancies are secure tenancies, and so the succession provisions of s86A apply

⁵ S86A(5) Housing Act 1985/S17(4) Housing Act 1988

- (a) It being a sole tenancy. If a joint tenancy, the surviving tenant becomes the sole tenant under the common law doctrine of survivorship⁶.
- (b) For tenancies granted on or after 1 April 2012⁷, if there is no spouse, etc. entitled to succeed then if a term of the tenancy agreement allows for some other person to succeed (e.g. carer, wider family members, etc.) then that provision applies and the tenancy will vest in the qualifying person at the time of death: s86A(2) Housing Act 1985/s17(2) Housing Act 1988
- (c) There are no statutory succession rights available if the deceased tenant was himself or herself a successor⁸ (which includes by way of the doctrine of survivorship referred to at (a) above) unless the tenancy agreement makes express provision to the contrary: s86A(3)(4) Housing Act 1985/s17(1D)(1E) Housing Act 1988.
- (d) The exclusion of wider family members from 'automatic' succession to secure tenancies ('family members' including those living together as husband and wife, or as if they were civil partners⁹), unless provided for in the tenancy agreement, does not apply to those tenancies granted before 1 April 2012: S160(6)(a) Localism Act 2011.
- (e) It follows, common law spouses and those living together as if civil partners, where the secure tenancy began before 1 April 2012, must have lived with the deceased tenant for the 12 months prior to the death: s87(b) Housing Act 1985.

In broad terms therefore, secure tenancy succession requirements have been brought in line with those in place already for assured tenancies, common law arrangements for secure tenancies are equated to legal relationships (as they already were for assured tenancies), and tenancy provisions extending statutory rights are given statutory force and constitute a statutory succession.

Fixed term assured tenancies

If there is an assured fixed term tenancy of not less than two years, and the (deceased) had a sole tenancy then the position for periodic tenancies and as described in paragraphs (a)-(c) applies: s17(1B) Housing Act 1988.

Turley facts

Turning therefore to the facts before the Court of Appeal earlier this year, Susan Turley was the long-term partner of Roger Doyle. They had four children and in 1995 they moved into a four-bedroom house. Mr Doyle was the sole (secure) tenant.

The landlord was the London Borough of Wandsworth. Susan and Roger's relationship broke down 2010 and in December of that year he moved out (though without giving up the tenancy), leaving her living in the flat with the younger children, then aged 17 and 15.

⁶ *Solihull MBC v Hickin* [2012] UKSC 39; [2012] 1 WLR 2295; [2012] HLR 40

⁷ Localism Act 2011, ss160(6)(a), 161(7)(a)

⁸ As defined at s88 Housing Act 1985/s17(2)(3) Housing Act 1988

⁹ Housing Act 1985 s113(1)(a)

He came back in January 2012, but he was by then seriously ill and died on 17 March 2012.

The succession argument

Ms Turley was not entitled to succeed to Mr Doyle's tenancy on the simple reading of the legislation. It was a pre-1 April 2012 tenancy and at the time of his death, they had not been living together as husband and wife for the required 12-month period.

It was argued on her behalf that this difference in treatment between a spouse and common law spouse was discriminatory and without justification.

To avoid a breach of her Convention rights (art.8¹⁰ and art.14¹¹), it was said that the succession provisions of the Housing Act 1985 had to be construed, in accordance with section 3 of the Human Rights Act 1998:

"(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

so as to accord her a right to succeed to the tenancy (or that Wandsworth was in any event obliged by section 6 of the 1998 Act¹² to grant her a fresh secure tenancy of the flat).

The Decision

As with the court below, this argument was not accepted.

Lord Justice Underhill delivered the main judgment of the court and began by assuming the 12 months' distinction was prima facie discriminatory and so turned to consider whether the provision was a proportionate means of achieving a legitimate aim.

Dealing with these issues in logical order, he confirmed that the distinction between spouses and common law relationships had a legitimate aim:

"19...it is plainly legitimate to seek to limit rights of succession to family members whose relevant relationship is of a permanent character. And it is also plainly legitimate (subject to the issue of proportionality) to treat that

¹⁰ *Right to respect for private and family life*

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

¹¹ *Prohibition of discrimination*

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

¹² (1) *It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*

requirement as sufficiently satisfied in the case of legal spouses, whose relationship is inherently permanent in character, but not by other relationships which do not involve the same formal commitment."

Moving to the question of the proportionality of the 12-month qualification period for a common law spouse, and whether that was manifestly without reasonable foundation:

- (a) Regard was had to an earlier succession case, *Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271; [2003] 1 WLR 617, and the comments of Brooke LJ at [631A]:

"It appears to me that this is pre-eminently a field in which the courts should defer to the decisions taken by a democratically elected Parliament, which has determined the manner in which public resources should be allocated for local authority housing on preferential terms."

- (b) A relatively wide margin of appreciation was appropriate.

- (c) The changes brought in by the Localism Act 2011, and ultimately the Housing & Planning Act 2016, did not undermine the legitimacy of the pre-1 April 2012 regime. Lord Justice Underhill concluded:

"31. ...Ms Walker's evidence was that the Government took the straightforward view that the entire package of changes to succession rights introduced in 2012, of which the removal of the twelve-month condition was only part (and not the most significant part), should apply prospectively only, so as to avoid unsettling existing legal rights and expectations. Mr Lask summarised the effect of the evidence in his skeleton argument as follows:

"It was ... reasonable to maintain a bright line between existing and new tenancies. Had Parliament sought to introduce exceptions to the rule (e.g. for unmarried partners), this would have created further difficulties. It would have undermined legal certainty for both landlords and tenants, and could have impacted adversely on the rights of other family members under the preferential succession rules in [the 1985 Act]. Maintaining that bright line does not preclude landlords from granting new tenancies to persons left in occupation where they consider it appropriate to do so."

I cannot regard such an approach as manifestly without reasonable foundation."

It was therefore decided that even if the position of spouses and common law spouses was analogous for art.14 purposes, which was not formally determined, the difference in treatment was justified and proportionate¹³.

To come...

The Housing & Planning Act 2016 (s120 and Schedule 8) makes further changes to succession rights for secure, introductory and demoted tenancies.

They will, when brought into force, amend the Housing Act 1985 further so as to bring the succession provisions for pre-1 April 2012 secure tenancies in line with those for tenancies granted since that date.

¹³ See *Swift v Secretary of State for Justice* [2013] EWCA Civ 193; [2014] QB 373 ¶¶33-40

The Act's explanatory notes explain the purpose of the changes in this way:

"The statutory rights of other family members to succeed to a secure tenancy granted before 1 April 2012 are changed. The changes made by this Schedule mean that family members will not have an automatic right to succeed to a lifetime tenancy if they lived with a lifetime tenant for 12 months or more. Instead, under this section, local authorities will have discretion to grant them succession rights. Where the deceased tenant had a lifetime tenancy, persons other than spouses and partners who qualify to succeed cannot be given a lifetime tenancy and must be given a five year fixed term tenancy. The terms and conditions of the new tenancy will be the same and any outstanding possession order will continue to apply."

[Changes will also be made to the legislation in Wales, though by a different statutory route]

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