

Sub-letting & unlawful profit orders

Getting over the line



The Speakers

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What are we talking about? The roadmap

- **We are talking about**
 - Sub-letting
 - Unlawful Profit Orders
 - How to qualify, how to obtain and how to calculate
 - Getting the evidence
 - The importance of trial
 - Gathering evidence
- **We are not talking about**
 - Tort of Deceit, Compensation/Confiscation orders, disgorgement of profits
 - Are Manchester United back?

*Poplar HARCA v
Begum* [2017]
H.L.R. 42
Mr Justice Turner

40...I would stress that it is not compassionate to allow profiteering fraudsters indefinitely to continue to occupy premises and thereby exclude from such accommodation more needy and deserving families.

What is sub-letting?

- Ends security of tenure permanently (not shared ownership)
- Allied to “only or principal home” question
- Common law tenancy needs to be determined
- Different approach between fixed-term/periodic tenancies
- Unlawful profit orders available

Some case examples

- Brent LBC v Cronin (1998) 30 H.L.R. 43
(T suffers from epilepsy and temporarily vacates flat, agreeing orally for a couple to occupy it for money. L seeks possession, claiming T had sublet. L's appeal allowed: sub-tenancy created; trial judge had been wrong to concentrate on T's state of mind)
 - short-term nature of sub-let irrelevant
 - Key issue: was a (sub) tenancy created?
- Ujima Housing Association v Ansah (1997) 30 H.L.R. 831
(T sublets flat under s 20 HA 1988. L seeks possession. Held – whether T remained in occupation of the flat as his principal residence is an objective question).
 - Temporary absence does not necessarily mean no longer “only or principal home”: *Crawley Borough Council v Sawyer* (1987) 20 H.L.R. 98
 - Burden on T to show OOPH if absent from premises
 - Objective test: presence of furniture not necessarily determinative
 - Pre-PSHFA

Two more...

- Hussey v London Borough of Camden (1995) 27 H.L.R. 5
(L seeks possession alleging that T, secure tenant, had sublet to X. L unable to prove tenancy agreement between T and X or that rent was paid. Held – T's appeal allowed; L had ceased to occupy but had not relinquished possession)
 - Re parting with possession
 - "A lessee cannot be said to part with the possession of any part of the premises unless his agreement with his licensee wholly ousts him from the legal possession of that part." - *Stening v. Abrahams* [1931] 1 Ch. 470 at 473
- Lambeth LBC v Vandra [2006] H.L.R. 19
(L grants T secure tenancy; L later visits and discovers 5 unknown occupants, locks on internal doors, and no sign of T. Four of the occupants claim to pay rent to X, who T says was a house-sitter. Held – L's appeal allowed. Not unreasonable to infer that T had sublet whole property, despite T's explanation)
 - Absence from property case: explanation called for by T
 - Inferences may be drawn - absence of direct evidence not fatal

Unlawful Profit Orders

The Legislation

- Prevention of Social Housing Fraud Act 2013
- Can be obtained in criminal proceedings – section 4
- Can also be obtained in civil proceedings – section 5
- In latter case, this can be as part of a possession claim or separate
- Can obtain in both criminal and civil proceedings

Qualifying conditions Sections 4 & 5

- In criminal proceedings: section 4
 - Will occur after sections 1/2 conviction (sub-let/parting with possession)
 - Same method of calculation as in civil courts
 - Preference given to UPOs though can be fined as well
- In civil proceedings: section 5
 - In breach of express/implied term sub-let or parted with possession of whole/part (without written permission for secure tenancies)
 - Ceased to occupy as only or principal home
 - Received money from conduct
 - NOT shared ownership leases or PRS properties

How much?

Poplar HARCA v Begum [2017] H.L.R. 42

- The amount payable under an unlawful profit order must be such amount as the court considers appropriate, having regard to any evidence and to any representations that are made by or on behalf of the offender or the prosecutor – criminal or civil UPO
- What monies received by unlawful activity
- Less what rent paid during that period
- Housing benefit can be ignored (or rather treated as income received)
- *“A very considerable proportion of tenants in socially rented homes are in receipt of Housing Benefit and those who have their rents paid for them are those in the best position to be able to benefit from unlawful profiteering of this type. To disregard housing benefit under Step 1 but include it to the ill-gotten advantage of the fraudster under Step 2 would be to thwart the obvious intention of Parliament to provide a mechanism with which to strip him of his spoils.”*
Turner J at 43

Obtaining evidence

Various means

- Use of the Civil Procedure Rules – especially Parts 18 and 31
- Understanding of the Data Protection Act 2018 (Schedules 1-2)/UK GDPR
- Data sharing – see ICO's Data Sharing Code of Practice
- Prevention of Social Housing Fraud (Power to Require Information) (England) Regulations 2014/899
- Pre-action correspondence/(caution) interviews

Evidential rules and submissions

- **Absence of witness**
 - *UK Insurance Ltd v Stuart John Gentry* [2018] EWHC 37 (QB)
- **Inferences / lack of direct evidence**
 - *Lambeth LBC v Vandra* [2006] H.L.R. 19
 - Absence of direct evidence not fatal
 - Alternative explanation does not necessarily mean case not proved
 - Inferences can be drawn on balance of probability from primary facts
- **Must be obtained pre-trial:**
 - *Southwark LBC v Ibidun* [2018] H.L.R. 5 at paras. 40-46

R (The Good Law Project) v Minister for the Cabinet Office

[2022] EWCA Civ 21

The general rule is that the evidence of a witness is accepted unless given the opportunity to rebut the allegation made against them, or there is undisputed objective evidence inconsistent with that of the witness that cannot sensibly be explained away so that the witness's testimony is manifestly wrong.

Lord Burnett, LCJ at para. 86

Evidence Gathering



The pathway to finding 'the sublet'



Key connections



On site evidence



Internal systems



Partnership working

Witness Statements Basic Principles

- ✓ Choose your witnesses carefully
- ✓ Prepare the statements properly
- ✓ Ensure witnesses know their role/purpose
- ✓ Remember the hearsay notice
- ✓ Consider remote trials/CVP evidence
- ✓ Eye for detail

Who is to give evidence?

- What do you need to prove?
- Who is the best person to provide the evidence?
- Is corroboration advisable/available?

Some guidance

With thanks to John Munkman (barrister)/Civil Litigation Brief

- Take witness statements early. Do not assume a case will settle.
- Memories lapse with time.
- Be aware of the possibility that there is no property in a witness. The other side could interview a witness.
- Allow the witness to tell their story first, taking notes.
- When the outline is clear take the statement in chronological order.
- Amplify details when necessary.
- Test doubtful points by searching questions.
- Have “**all the right facts in the right order**”.
- Have explanation of any technical material as part of the text to clarify, not as a footnote.
- Each state of the evidence should be rounded off and completed before going on to the next.
- The use of sub-headings is often of great emphasis.

The pathway to finding 'the sublet'

- Internal communication
 - Housing Officer
 - Operative
 - Asset officer
- Requesting information from Regen Team
 - Possible abandonments
 - Non-engagement
 - Key indicators of subletting

On site evidence

- Time & asking the right questions (consider the circumstances)
- Photos – padlocks, build-up of post, key objects
- Property/block layout
- Names/descriptions
- Vehicle registration
- Outstanding repairs
- Access systems (fob entry)

Best practice – Pocket notebook

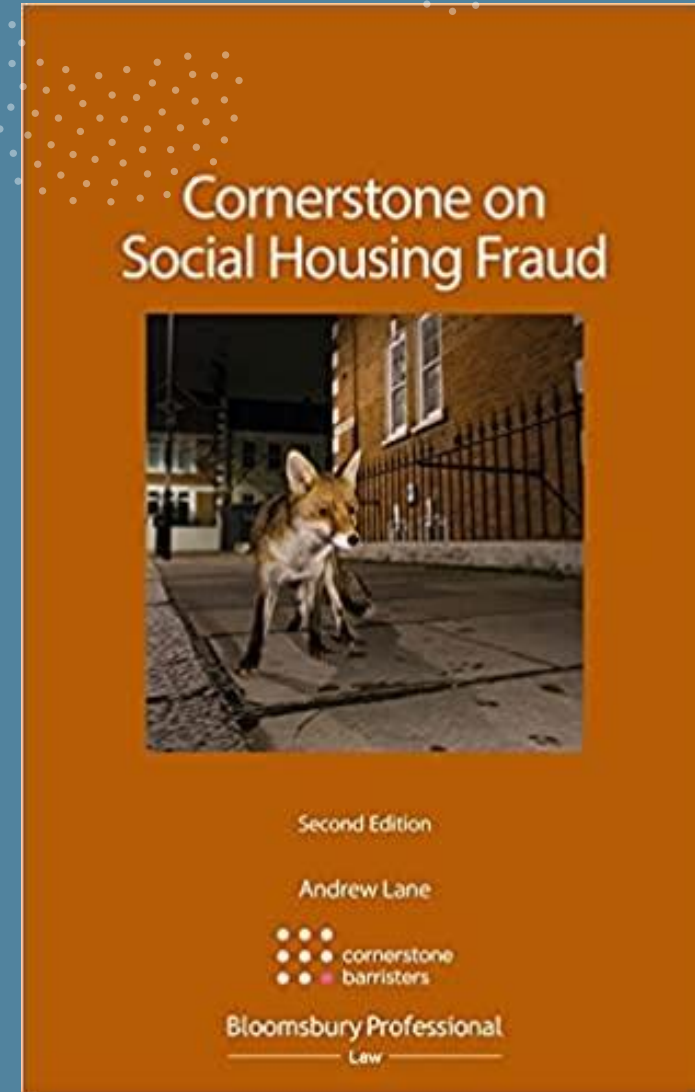
Internal system

- Gas inspections
 - Outstanding repairs
 - Correspondence
 - ID documents
 - ASB
 - Rent account information
 - Access issues
 - Request for extra fobs
- Next appointment for possible jobs/regen (consultations)/gas inspections

Partnership working

- Obtaining further evidence
 - Further linked address
 - Site visits to linked address
 - Joint court attendance
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- Lessons learned.

The book club – Week 1



Questions?
Over to you

