

TOLERATED TRESPASSERS ARE NO MORE

Prince Evans acts in landmark House of Lords Decision

In far reaching Judgments made on 10th December 2008, the House of Lords ruled that a tenant remains an assured tenant, notwithstanding that there was an effective suspended possession order and the tenant had acted in breach of the terms of that order.

In overturning a series of Court of Appeal decisions, the House of Lords found that assured tenancies under Housing Act 1988 do not end as a result of an order for possession but only when the order is executed (i.e. the date the landlord recovers possession of the property via a Bailiff's Appointment) or the tenant otherwise vacates. This also applies to outright orders for possession. **(Knowsley Housing Trust -v- White)**

Furthermore a secure tenant who has repeatedly breached the terms of a suspended possession order but subsequently made full payment of the arrears and the landlord's costs, so as to make the order unenforceable, can make an application to vary, discharge or rescind the order and revive the tenancy under sections 85 (2) or 85 (4) Housing Act 1985. If the application is successful the tenant can, for example, pursue a claim for disrepair.

The Law Lords concluded that the decision in Swindon Borough Council -v- Aston was wrong as it condemned the tenant to "the purgatory of being a permanent tolerated trespasser". This ends the so-called "Swindon -v- Aston Trap". **(Porter -v- Shepherd's Bush Housing Association)**

In addition, a tenant can rely on a notice exercising a right to buy, as the right is revived retrospectively and with immediate effect when the order for possession was discharged. **(Honeygan-Green -v- London Borough of Islington)**

The reasons for the House of Lords concluding that an assured tenancy only ended when the possession order was executed were expressed by Lord Neuberger as: -

1. It would not otherwise be entirely easy to characterise the status of a tenant.
2. The invention of the tolerated trespasser under the Housing Act 1985 has led to difficulties and uncertainties as to his or her rights and obligations against the Landlord.
3. The Court retains very wide powers to vary or discharge the possession order and to stay or suspend its execution which points firmly to the conclusion that an assured tenancy does not end until those powers are at an end that is until the execution of the order.

These cases will have enormous significance both for Landlords generally, not just those dealing with disrepair and right to buy claims, and for the estimated 750,000 tenants who were previously believed to have been considered to be “tolerated trespassers”. Read in conjunction with the provisions on tolerated trespassers in the Housing and Regeneration Act 2008, expected to come into force next April, it must be concluded that the concept of tolerated trespassers is no more.

If you have any queries concerning the above cases or wish to receive a copy of the Judgments please contact Partner, Robert Jennings, Head of Prince Evans’ RSL Housing Management Litigation Team, (rjennings@prince-evans.co.uk) or Jeremy Teall (jteall@prince-evans.co.uk) on 020 8567 3477.