

Property Newsletter

DATE

September 2010

VOLUME

#22

The members of Hardwicke's Property Team have specialised skills and experience in all aspects of the law relating to Real Property, Landlord & Tenant, Housing and other property-related subjects.

Telephone

020 7242 2523

Email

enquiries@hardwicke.co.uk

Practice Director

Amanda Illing

Senior Practice Manager

Paul Horsfield

Practice Manager

Annabelle Lock

Assistant Practice Manager

Michelle Robinson

Article: Mortgage Repossessions and Tenants

On 1 October 2010 the Mortgage Repossessions (Protection of Tenants etc) Act 2010 will come into force and provide limited respite for tenants who find themselves threatened with the prospect of losing their home when a lender takes action against their borrower or landlord.

The Act applies to mortgage possession claims where a property which either includes or comprises residential premises is let on an 'unauthorised' tenancy, that is, a relevant tenancy which is precluded by the terms and conditions of the mortgage. Tenancies covered are protected or statutory tenancies (within the meaning of the Rent Act 1977) and assured tenancies (including non-assured shortholds under the Housing Act 1988 and, of course, from 1 October 2010 this will include tenancies with an annual rent of up to £100,000.¹). The statutory definition of 'dwelling-house' in section 3 specifically provides that the Act applies to a part of a building used for residential purposes even where it is contained in commercial property.

In essence, the Act provides the court with the discretion to grant tenants a two month period in which to find alternative accommodation. Upon an application by the tenant, the court may upon making a possession order postpone the date of possession or, at a later hearing, stay or suspend the execution of the order for a period not exceeding two months where it is satisfied that the tenant has already asked the lender to give a written undertaking in similar terms. A stay or suspension cannot be granted where the original order was postponed under the Act.

¹ Pursuant to the Assured Tenancies (Amendment) (England) Order 2010, SI 2010/908

Hardwicke

The court may make its order conditional upon the tenant making payments to the lender. At first blush, it seems likely that the court will ordinarily require the tenant to pay the monies due as rent under the unauthorised tenancy agreement to the lender. However, where a postponed order has been made, the lender would not be a mortgagee in possession and such payments to the lender would not have the effect of discharging the tenant's contractual liability for rent. (Contrast with the position where the landlord's entitlement to rent ceases once the mortgagee serves a notice pursuant to section 98(1) of the Law of Property Act 1925 of his intention to take possession of the Property.)

Factors of which the court must consider include the circumstances of the tenant, whether any terms of the tenancy have been breached, the nature of any such breaches and the extent to which it would have been reasonable for the tenant to have avoided or remedied any such breaches.

Solicitors approached by tenants on receipt of a CPR rule 55.10 notice or s.2(4) notice (see below) will need to advise tenants of their right to make an application and the need to act quickly if they wish to delay a potential eviction. The Act presumably envisages that the tenant will have exhibited a copy of the tenancy agreement to the application and/or confirmed in supporting evidence whether the terms of the agreement have been complied with.

It should be noted that this Act only applies to unauthorised tenancies and does not affect the parties' rights where the tenant wishes to assert that the tenancy is binding on the mortgagee.

Further Notice to Occupiers

The Act also introduces a mandatory hurdle before a warrant of possession can be executed. Section 2(2) states:

The order may be executed –

- (a) only if the mortgagee gives notice at the property of any prescribed step taken for the purpose of executing the order, and*
- (b) only after the end of a prescribed period beginning with the day on which such notice is given.*

Currently, the subordinate legislation, Dwelling Houses (Execution of Possession Orders by Mortgagees) Regulations 2010 (SI 2010/1809), means that a notice in a prescribed form must be served 14 days prior to any warrant being executed, which sets out the relevant contact details for the lender, should the tenant wish to exercise their rights under the Act. The Act does not prohibit any step being taken in the enforcement of the order for possession, so the lender can apply for the warrant and then serve the requisite notice. Indeed, the prescribed form (Schedule 4 of the Regulations) provides for exactly that scenario.

Mohammed Zaman QC	1985 (2009)
Simon Buckhaven	1970
Stephen Lennard	1976
Robert Leonard	1976
Wendy Parker	1978
Richard Buswell	1985
Karl King	1985
Michelle Stevens-Hoare	1986
Steven Woolf	1989
Sara Benbow	1990
Daniel Gatty	1990
Rupert Higgins	1991
Arthur Moore	1992
Kerry Bretherton	1992
John de Waal	1992
Andrew Skelly	1994
Alexander Bastin	1995
Edward Rowntree	1996
Brendan Mullee	1996
Nicola Muir	1998
Alison Meacher	1998
Alastair Redpath-Stevens	1998
Andrew Lane	1999
Sarah McCann	2001
Dean Underwood	2002
Michael Wheeler	2003
Morayo Fagborun-Bennett	2004
Phillipa Harris	2005
Andy Creer	2005
Philip Fellows	2007
Laura Tweedy	2007

Hardwicke

Hardwicke Building,
New Square,
Lincoln's Inn,
London
WC2A 3SB
Telephone 020 7242 2523
Facsimile 020 7691 1234
DX LDE 393
Email enquires@hardwicke.co.uk
www.hardwicke.co.uk

Solicitors acting for lenders will no doubt add the service of the section 2(4) notice to the growing procedural checklist for regaining possession. This follows the changes to CPR part 55 in October 2009 to include the service of a notice on the local housing department and provision of form N123 (mortgage pre-action protocol checklists) at the hearing, and, more recently in May 2010, the requirement to service notice of the proceedings to other registered charge holders (CPR rule 55.10(2)(c)).

This article was written by Andy Creer.

Did you see...? Recent cases you may have missed

***Somerfield Stores Ltd v Spring (Sutton Coldfield) Ltd (In Administration)* [2010] EWHC 2084**

Renewal of Business Tenancies – Objection to Renewal – Intention to Redevelop

T, the tenant under three leases of a supermarket complex, requested new tenancies under the Landlord and Tenant Act 1954. *L*, the landlord, opposed the grant of new tenancies on the ground set out in s 30(1)(f) of the 1954 Act, ie that on termination of the current tenancy it intended to redevelop the site. *T* applied for summary judgment and argued that *L* had to demonstrate that it had formed a subjective intention to redevelop at the date of the summary judgment hearing.

HELD (on appeal): The date of the hearing at which *L* must prove the necessary intention is always the date of the substantive trial of the grounds of objection. This included a preliminary issue hearing but not a summary judgment application. When assessing a summary judgment application *L* only needs to show a real prospect of being able to establish the necessary intention at the substantive hearing.

***Solihull Metropolitan Borough Council v Elaine Hickin* [2010] EWCA Civ 868**

Secure Joint Tenancy – Operation of Survivorship

C let a house to *W* and *H* under a secure joint tenancy. *H* and *W* separated but *W* continued to reside in the house with her daughter, *D*. Following *W*'s death, *C* served notice to quit on *H* and issued possession proceedings against *D*. *C* said that on *W*'s death, her interest passed to *H* by survivorship. It was therefore entitled to possession as *H* no longer resided in the house. *D* said that she was entitled to succeed her mother as she was her daughter and the only person residing with her at her death.

HELD (on appeal): On *W*'s death the tenancy of the house vested in *H* by operation of the doctrine of survivorship. Since *H* did not reside in the property, the tenancy ceased to be a secure tenancy and was therefore effectively determined by the notice. *D* was not entitled to remain in the house once the notice had expired.

Case summaries by Philip Fellows.