

Trespass

Introduction

Difficulties arose in a recent Trespass Claim for Possession and highlighted complex legal arguments around suggestions of misrepresentation and the consideration of reasonableness.

The Trespass Action was against a brother and sister who were children of a former tenant.

Background

The circumstances leading to the tenant surrendering the tenancy were that he had met a new partner and moved into her address, leaving his adult children at the property. The father had made enquiries into the possibility of the children taking over the tenancy, however this was not viewed as a formal application but was rather considered as a general enquiry. The father was then advised by the landlord that it was 'not possible' for the children to take over the tenancy.

As a result of this advice, the father sent a letter to the landlord indicating that as his children could not take over the tenancy he wished to surrender it. Upon expiry of the tenancy the children remained in the property, and consequently Trespass Possession Proceedings were commenced shortly after.

At the hearing, both Defendants were represented by Counsel, who entered a Defence on their behalf. In essence the Defence was :

- The Association had made a misrepresentation by not advising the father that he was entitled to make a formal Application for the tenancy to be assigned to his children.
- The Association could not, in any event, unreasonably refuse a request to assign the tenancy.

The defence referred to the following parts of the Housing Act 1988:

Section 15(1)(a) states that it shall be implied into every assured tenancy that the tenant shall not assign a tenancy without the consent of the landlord.

Section 15(2) goes on to say that Section 19 of the Landlord and Tenant Act of 1927 (which states that consent to assign ought not be unreasonably withheld etc) shall not apply to a term which is implied into an assured tenancy by subsection (1) above.

The defence also cited 2 case law authorities:

- ***Peabody Donation Fund v Higgins***
- ***Sanctuary Housing Association v Baker***

In ***Peabody v Higgins***, the assignment was held valid, despite the fact that the tenancy prohibited the assignment and in ***Sanctuary v Baker*** a fraudulent assignment was also held valid.

Based on the facts and submissions presented, the Judge decided that there had been a material misrepresentation which induced the tenant to surrender the tenancy. The material misrepresentation had been ***not advising*** the tenant that he had the ***right*** to request an assignment of his tenancy to his children. The Judge commented that, in this instance, the material misrepresentation was not in fact a fraudulent misrepresentation and there was no criticism of the landlord in that respect. However, the Judge stated that the tenant was entitled to go to the landlord to seek advice on procedural and legal points such as this, and as the tenancy was surrendered on the basis of the misrepresentation, the Judge held that the deed of surrender was in fact void and the father remained a tenant.

The Judge further held that on his interpretation of Section 15 the landlord could not unreasonably oppose consent to assign. The Judge stated that even an express term in the tenancy agreement could not override the implied term in Section 15. The view taken by the Judge in respect of Section 15 is highly questionable however this in itself did not change the fact that there had been a misrepresentation.

Points arising

What this means for landlords:

- There is a duty of care to advise tenants **correctly** of their legal rights as well as their legal responsibilities.
- Wrong advice may result in a material misrepresentation and any documents created as a result may be set aside
- When receiving a request for an assignment, it is important to consider **all** the circumstances

Yolanda Dann

This bulletin is intended to give an overview of the issues involved, however if you require further advice on trespass and/or assignment please contact the Office.

