Transfer of tenancies and occupation orders under the Family Law Act 1996 and their interplay with housing and rent provisions

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There are often scenarios when making applications for occupation orders under the Family Law Act 1996 in relation to how they relate to types of tenancies and housing provisions, particularly when considering the role of the landlord and the impact of an occupation order on the tenancy itself. This article aims to examine occupation orders and transfer of tenancies within a family context and look at how they affect the rights and obligations of landlords or homeowners under TOLATA 1996 and other provisions of property law, within a private ownership or tenancies.

Occupation orders

There are four main provisions for occupation orders under the Family Law Act 1996 ('FLA 1996'): s 33, s 35, s 36 and s 37. The focus here is s 33 which is the most common provision and requires the applicant to have an 'beneficial interest or contract or by virtue of any enactment . . . a right to remain in the property'. This includes 'home rights', established under s 30 FLA 1996 which are established when the applicant is married or civilly partnered to the respondent who has an existing interest in the property. If making an application under s 33 on the establishment of home rights, it is worth remembering that these can be lodged with the land registry if the property is owned to prevent a sale without the knowledge of the spouse with home rights.

Orders under s 33 may provide for the expulsion of the respondent from the property, allow the applicant to occupy the property or in another way regulate the occupation of the property. The meaning of the wording of s 33 allows for a broad range of property rights which include freehold or leasehold ownership, a contract eg, a licence or lease, or a right under an enactment or statute. It is important to note however, that this interest must be previously established which may cause issues for those parties who believe they have an interest by virtue eg, of a common intention constructive trust. If the applicant relies on this, unless the same has been

previously proved, a reliance on this interest would be problematic when applying for an occupation order under s 33. There can be ancillary orders attached to an occupation order under s 39 and s 40 of the FLA 1996 which provide that the home rights of the applicant may not to be extinguished on divorce, and that the respondent be ordered to continue meeting the outgoings on the property respectively.

Any landlord or mortgage lender has a right to be notified of an application under s 33 and an order under that provision cannot be made without such notice. The question therefore becomes, what impact may that application have on the landlord or mortgage lender? There are three important provisions of the FLA 1996. The first is s 30(3), which provides that payment or tender of the rent or mortgage by a person with a right to occupy under the FLA 1996 is as good as if it was done by the contracting tenant or borrower. Therefore, if mortgage arrears arose and the lender sought possession, it would be possible to invoke the protection of the jurisdiction to postpone possession under s 36 of the Administration of Justice Act 1970 on the grounds that, even though the borrower could not pay off the arrears in a reasonable time, another person with the right to occupy was able to pay off the arrears. The second is s 30(4), which provides that occupation by another person with a right to occupy is sufficient occupation for the purposes of the Housing Act 1985 or the Rent Act 1977, so that statutory security of tenure can be preserved even if the original tenant is not in occupation. The third is s 30(5), which provides that where another party with a right to occupy pays the mortgage, the lender can treat it as a payment from the borrower, and so no new rights would be created as against the lender. The overall effect in practice is that the landlord or lender simply has to accept the new occupier as if they were an original tenant or borrower.

The length of occupation orders then becomes relevant when looking at the impact on lenders or landlords. It is right to say that s 33 orders can be made indefinitely or until further order, however in practice this is often 6 or 12 months for the purpose of providing a temporary solution until divorce or civil claims can be initiated to provide permanent resolution. It is worth noting that orders under s 35 and s 36 (where the applicant does not have an existing right to occupy), the orders are time limited to 6 months and can be extended only once for a further 6 months, meaning the maximum time is 12 months, cementing them as a temporary solution following relationship breakdown.

When examining the impact of these provisions on property claims, the next stage is to examine how these provisions within the Family Law Act 1996 affect ongoing property rights. Broadly, the FLA 1996 creates a scheme for acquiring rights in relation to property that is separate from, and parallel to, the jurisdiction under the Trusts of Land and Appointment of Trustees Act 1996 that allows co-habitants to argue that they have a beneficial interest in a property under a common intention constructive trust. Indeed s 39(4) of the FLA 1996 explicitly states that any occupation order does not affect any future claim for a beneficial interest in the property. However, an occupation order may be evidentially very important. Normally, the fact that one co-habitant has paid the mortgage, or other bills in relation to the property, or has paid for repairs to the property, will evidence pointing towards a common intention that the property is to be beneficial co-owned. However, if such payments were only made as a result of an order under s 40(1) of FLA 1996 compelling one party to make such payments or carry out repairs, that party could fairly say that the payments did not reflect any such intention. The position will be different where one party voluntarily makes mortgage payments even though they are not the borrower: in that case s 30(5) provides that although the lender can treat those payments as coming from the borrower, that does not stop the paying party from using those payments as evidence of a common intention of co-ownership.

Transfer of tenancies

The court has the power to transfer tenancies from one or two names to another

under Sch 7 of the Family Law Act 1996 upon divorce or breakdown of the relationship, which is a significant intrusion into the law of property. This applies to certain tenancies – assured shorthold tenancies, private tenancies, and Housing Act tenancies, but does not include property owned under long leaseholds. It is worth noting that because assured tenancies and Rent Act tenancies (which are valuable because of succession rights and rent controls) can only be ended in a limited number of ways per the Housing Act 1988, Para 7 of Sch 7 provides that a Sch 7 order does everything that is needed to bring the old tenancy to an end and grant the new tenancy without the need to do so via the property courts, again an example of the impact this Schedule has on existing property law. Schedule 7 applies to any family or relationship where the parties are cohabiting under a tenancy. A transfer of tenancy order does not necessarily need to be predicated by domestic abuse, distinct from s 33 above which establishes that the court must first look at the balance of harm test before making an occupation order, however, a strict reading of Sch 7 does not impose the same requirements. Instead, the factors that apply are those under s 33(6) including housing need and financial resources and in addition, the court must look at the context in which the tenancy was granted to either or both parties. Importantly, the court can also consider conduct under transfer of tenancy which is where an argument in relation to domestic abuse would usually be advanced as a reason for transferring the tenancy to the victim. The provisions of Sch 7 interplay with other areas of family law, including eg, where the parties are divorcing, a tenancy can be transferred per Matrimonial Causes Act 1973 ('MCA 1973') – however, bringing the same claim under the Family Law Act 1996 is likely to be a quicker process than financial remedies if a transfer is urgently required. However, of course the ambit of the MCA 1973 is much wider to include other types of ownership and property.

The landlord again has to be right to be notified of an application under Sch 7 and can ask to intervene if there is an impact. The impact is greater here than it is when an occupation order is made, because the landlord's contractual and proprietary relationship with the original tenant is brought to an end, and the landlord can only look to the new tenant to comply with the obligations to pay rent, repair the property and so on. For this reason, para 5(c) of Sch 7 requires the court to consider the parties' suitability as tenants. If for example a party was not able to pay the rent, or would not pass the Right to Rent checks under the Immigration Act 2014, that would be a strong reason not to transfer the tenancy.

Some divorcing couples might seek to take a cooperative approach and simply provide for the transfer or tenancies as part of the settlement of their matrimonial proceedings, without seeking an order under Sch 7. However, care must be taken. In *Crago v Julian* [1992] 1 All ER 744 Mr Julian agreed as part of the divorce settlement to transfer his protected tenancy to his ex-wife, but no deed was ever entered into. Six years later, the landlord sought to terminate the tenancy on the basis that Mr Julian, still the legal tenant, was no longer living there and so had forfeited his statutory protection. The Court of Appeal held that, since a tenancy must be assigned by deed, Mr Julian remained the tenant. Mrs Julian had no defence to the possession claim and lost her home of 25 years. Those advising separating couples should ensure that either the necessary deeds are entered, or a statutory order transferring the tenancies obtained from the court.

Case study 1

Annie and Robbie live together (unmarried) in privately rented accommodation in Robbie's sole name. There is a heated argument and Robbie hits Annie across the face and the relationship ends. Annie wishes to remain living in the property without Robbie. What orders should she apply for to remain living in the property?

- Occupation order under s 36 Family Law Act 1996 because she is a cohabitant and thus only has an implied license to occupy under Robbie's tenancy. That is not enough to establish

an interest for the purposes of s 33. This means her order will be time-limited to 6 months, with one extension if applied for of 6 months. During those 6 months, A would need to make the appropriate claims she wished to make in property law if she sought to establish an interest in the property. There is no reason this cannot be done whilst the application for transfer is ongoing.

- Apply for transfer of tenancy under Sch 7 under Para 5, Sch 7 as a cohabitant. An existing interest is not required for this, and she can apply immediately for the tenancy to be transferred to her sole name, if she can show that she would be able to meet the rental and other obligations under the tenancy. This is probably the better option, since it gives Annie a tenancy in her own right.
- Without either of these orders, Annie would be very vulnerable to a possession claim brought by Robbie: he could likely establish that in the course of the argument he had given Annie a sufficiently clear oral notice to quit terminating her implied licence. Unless she could establish some other property right, Annie would then be a trespasser and could be evicted on minimal notice by Robbie. It would be open to Annie to argue that the tenancy is held on trust for the purposes of her occupation and so that she has a right to occupy under s 12 of Trusts of Land and Appointment of Trustees Act 1996, and if she were successful that would be both a defence to the possession claim and a basis for making a longer occupation order for the duration of the tenancy under s 33 of the Family Law Act 1996. However this would be a long and evidentially difficult process, and is only likely to be worthwhile if the tenancy is one with strong statutory protection.

Case study 2

Annie and Robbie live together in privately rented accommodation under a joint periodic tenancy. There is a heated argument and Robbie hits Annie across the face and the relationship ends. Annie wishes to remain living in the property without Robbie, however Robbie threatens to quit the tenancy and have Annie evicted. What is the impact and available remedies for this?

- Annie is in a potentially vulnerable position. In *Sims v Dacorum Borough Council* [2014] UKSC 63 the Supreme Court confirmed that for a periodic tenancy (whether the tenancy was originally, say, a weekly tenancy, or became a statutory periodic tenancy on the expiry of a fixed term), one tenant can serve a notice to quit and bring the tenancy to an end even if the other tenant wishes the tenancy to continue. This was also held not to be incompatible with the tenant's rights under the Human Rights Act 1998. Therefore Robbie can bring the tenancy to end by serving a notice to quit on the landlord, and after that notice expires both he and Annie will be trespassers and vulnerable to eviction by the landlord.
- Family Law Act remedies, this comes up a bit short. The FLA 1996 does not have, in black and white, the ability to specifically prevent the respondent from quitting the tenancy on a jointly owned property. Therefore, if a party has been subject to a threat to quit the joint tenancy, they should immediately apply to the family courts and invoke ex parte occupation order proceedings to obtain an order securing the applicant's right to occupy. However, this does not resolve the issue of the property stipulations of the tenancy, therefore, what the family court can do is use its inherent jurisdiction to make an injunction under the standard civil American Cyanamide test (there is no need to go to the High Court for this, it is covered in the family court per s 31E Matrimonial and Family Proceedings Act 1984) to make an injunction preventing the unilateral surrender of the tenancy – this was established by *Bater and Bater v Greenwich London Council* [1999] 2 FLR 993. This sounds convoluted, but essentially the applicant should go to the Family Court for an ex parte occupation order and seek a provision to be

included in the order that prevents the respondent from unilaterally quitting the tenancy.

Public law tenancies

Briefly, there are of course scenarios where the applicant or respondent are renting from a local authority or housing association, and a change in the tenancy or exclusion via an occupation order can have knock-on consequences for findings of voluntary homelessness and ability of the other party to rehouse with the assistance of the local authority. It is important to obtain written evidence from the local authority or housing association to confirm their position if one party is eg, excluded under an occupation order and whether this would allow the excluded party to rehouse or not. It is common that an occupation order, if the tenancy is unaffected, would not allow the excluded party to rehouse as they would have a subsisting tenancy and would therefore be 'housed' per the local authority. However, if the tenancy is transferred, this position may change, and it is important to seek written confirmation from the local authority or housing association as to whether and where the other party could obtain alternative housing following the loss of the tenancy. Under s 175 of the Housing Act 1996, anyone who is likely to become homeless within 56 days is classed as threatened with homelessness, and so the relevant local authority has a duty under s 195 of the same act to take reasonable steps to assist them. In practice, local authorities face high levels of demand with very limited resources, and sometimes need to be pressed hard to act ahead of time, rather than waiting for an eviction to take place.