

Assured Tenancies, Succession and the £25,000 Annual Rental Limit

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Introduction: the problem

When the Housing Act 1988 introduced assured tenancies, those tenancies at high rateable values were excluded from the protection conferred on assured tenants. The Act excluded "a tenancy under which the dwelling house has for the time being a rateable value which (a) if it is in Greater London exceeds £1,500 and (b) if it is elsewhere exceeds £750".¹ The Rent Acts had similarly excluded large and valuable properties from protection, the rationale in both cases being, no doubt, that the purpose of protection (whether under the Rent Acts or under the Housing Act) was to give a degree of security to those occupying "ordinary" accommodation as opposed to very large or luxury accommodation. The figures used in the Housing Act were the same as had been used in the Rent Act 1977.² However, whereas protection under the Rent Acts depended on the rateable value on "the appropriate day" that day being set by reference to when the tenancy commenced, the exclusions in the 1988 Act depended on the rateable value "for the time being".

Domestic rates were abolished on April 1, 1990 and replaced by the community charge (the now infamous "poll tax"). Rateable values could thus no longer be a measure of the value of a property. The Government therefore introduced a rental limit to replace the previous rateable value limits. Provision was made for the substitution of rental limits for rateable value limits by s.149 of the Local Government and Housing Act 1989 which enabled

the making of Regulations so that the Secretary of State, effectively, could substitute for references to rating a reference providing for some other factor in its place.³

The existing para.2 of Sch.1 to the 1988 Act was therefore replaced by the Rating (Housing) Regulations 1990^{3a} which provided that:

"2(1) A tenancy—

- (a) which is entered into on or after the 1st April 1990 (otherwise than, where the dwelling house had a rateable value on the 31st March 1990, in pursuance of a contract made before the 1st April 1990), and
- (b) under which the rent payable for the time being is payable at a rate exceeding £25,000 a year "

is excluded from the assured tenancy regime.

Provision was made in the 1988 Act that the Secretary of State could alter the amounts, including the rental limit, in paras 2 and 3A of Sch.1 to the Act.⁴ However, the rental value limits have not been increased some 18 years since they were initially introduced. It has been estimated that using the Retail Price Index £25,000 in 1990 would equate to nearly £40,000 now. Of course, inflation in domestic rents and property prices is far higher than the RPI.

The differential impact of rent increases

In many—probably most—parts of the country an annual rent of £25,000 will only be charged on either a luxury property or a very large one. However, there

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¹ Housing Act 1988 Sch.1 para.2.

² Rent Act 1977 s.4.

³ Local Government and Housing Act 1989 s.149(2).

^{3a} Rating (Housing) Regulations 1990 (SI 1990/434).

⁴ Housing Act 1988 s.1(2A).

are parts of London, and possibly other areas in the South East, where a rent of £25,000 per annum no longer means that the property is particularly luxurious or spacious. This is notably the case in areas such as Notting Hill and Holland Park, and probably areas such as Camden, Islington and parts of Westminster as well. What all of these areas have in common is, historically, a high proportion of privately rented accommodation and, in the 1960s and 1970s, a large number of then Rent Act protected tenancies. Notting Hill may now be the gentrified haunt of celebrities, politicians and many of the very rich, but turn the clock back 40 years and the position was very different. Slum and sub-standard accommodation was common, and the area was still affected by the legacy of *Rachman*. Of course, the first Rent Act was introduced by Harold Wilson's government partly in response to *Rachmanism*.

Although relatively few in number, there still exist Rent Act protected tenancies which commenced in, or not long after, that era. More common are assured tenants who have succeeded to the Rent Act protected tenancies of their spouse, civil partner or family member such as their late parents.⁵ Some of those tenants now find themselves with rental levels set by the Rent Assessment Committee over £25,000 per annum. Many others face this possibility in the fairly near future, unless of course the threatened economic recession has the effect of depressing residential rents. Official figures are not so far available⁶ but, anecdotally, in the Royal Borough of Kensington and Chelsea there have been at least four occasions (and almost certainly many more) in the last year when rents for assured tenancies have been increased from a level well below £25,000 per annum to levels above that limit. All of these cases concerned flats with at least two bedrooms, but none was either enormous or luxurious. One of these was occupied by an assured tenant who had succeeded to his late father's Rent Act protected tenancy which had commenced in the early 1970s.

If property and rental prices continue to rise, an increasing number of tenants, in ever wider geographical areas, will fall out of protection. Is there any way in which this can be avoided?

Cadogan (1998) and Morris (2002)

These cases concerned the power of the Rent Assessment Committee, to whom disputes over

⁵ Rent Act 1977 Sch.1; Housing Act 1988 s.39(2) and (3); Housing Act 1988 Pt 1 Sch.2; Civil Partnership Act 2004 Sch.8 para.13(3).

⁶ Although the writer is attempting to obtain these.

assured tenancy rents are referred, to increase the rent above the £25,000 limit. In *R. v London Rent Assessment Panel Ex p. Cadogan*⁷ the tenant sought to argue that the Rent Assessment Committee did not have power to set a rent in excess of £25,000 per annum since that would have the effect of removing the protection which the tenant would otherwise have under his (then) assured tenancy. Kay J., however, held that the Rent Assessment Committee could set a rent above £25,000.

Section 14(1) of the Housing Act 1988 sets out the basis upon which the RAC shall determine the rent and provides:

"Where, under sub-section (4)(a) of sub-section 13 above a tenant refers to a Rent Assessment Committee a Notice under sub-section (2) of that section, the Committee shall determine the rent at which, subject to sub-sections (2) and (4) below, the Committee consider that the dwelling house concerned might reasonably be expected to be let in the open market by a willing landlord under an assured tenancy."

The section goes on to set out the attributes of such an assured tenancy. Kay J. held that the notional assured tenancy referred to must have the attributes of an assured tenancy, except the rent limit. Thus the Rent Assessment Committee could set a rent above £25,000.

In *R. (on the application of Morris) v London RAC*⁸ (which concerned a Notice under Sch.10 to the Local Government and Housing Act 1989) the Court of Appeal followed the same reasoning. The tenant sought to argue that the Notice proposing a new rent was invalid because the new rent proposed was over £25,000. In this case Mummery L.J. held:

"I would also uphold the decision of Hooper J that both this Notice and the subsequent determination of the Committee on the rent of the flat (ie. a rent over £25,000 per annum) were valid ..."⁹

He applied the reasoning of Kay J. in *Cadogan* on similarly worded legislation (s.14(1) of the Housing Act 1988) and held that the Committee was not

⁷ *R. v London Rent Assessment Panel Ex p. Cadogan* [1998] Q.B. 398.

⁸ *R. (on the application of Morris) v London RAC* [2002] EWCA Civ 276; [2002] H.L.R. 48.

⁹ *R. (on the application of Morris) v London RAC* [2002] EWCA Civ 276 at [14].

prohibited from assessing the rent of the flat held on an assured tenancy at a figure in excess of the qualifying limit of £25,000 per annum. The rent under an assured tenancy is to be determined by the Committee without any reference to that limitation and, if the determination exceeds that limitation, the assured tenancy would come to an end.

It was submitted in this case that the rent proposed in the Notice proposing a new rent must be for "that tenancy" meaning an assured monthly periodic tenancy, and that an annual rent in excess of £25,000 would not be such a rent since the tenancy would then no longer be an assured monthly periodic tenancy. However, Mummery L.J. held that:

"In my judgment the principal submissions are based on a misreading of the statutory provisions. There is nothing in the provisions establishing or supporting a statutory principle of 'once an assured tenancy, always an assured tenancy'. The provisions of Schedule 10 (of the 1989 Act) relied upon do not set a ceiling of £25,000 on the amount of the annual rent which may be validly proposed or which the Committee may validly determine. The case advanced by Mr Morris would, if accepted, produce the surprising conclusion that a tenant could remain in a high value property at less than the proper open market rent determined by the Committee. If the rent is determined by the Committee at a figure exceeding £25,000, the landlord is not prohibited by statute from recovering it: the result is that the tenancy will simply cease to qualify for protection as an assured tenancy."¹⁰

In view of the above, it seems most unlikely that any court will in future depart from this reasoning, since to do so would effectively set a "cap" of £25,000 on rents under (former) assured tenancies. It therefore follows that if a Rent Assessment Committee determines a rent higher than £25,000 per annum (or in the unlikely event that landlord and tenant agree such a rent) the tenancy ceases to be an assured tenancy and the landlord can obtain possession by service of a Notice to Quit complying with the provisions of the Protection from Eviction Act 1977 followed by ordinary possession proceedings.

However, it is suggested that there may be two ways in which such an outcome could be avoided. The first

applies only to assured tenants by succession. The second could apply all assured tenants.

The first argument—is an assured tenant by succession to a Rent Act tenancy within Schedule 1 to the Housing Act 1988?

As noted above, Sch.1 para.2(1) provides that:

"A tenancy

- (a) which is entered into on or after the 1st April 1990 ... and
- (b) under which the rent payable for the time being is payable at a rate exceeding £25,000 per year "

is not an assured tenancy.

It could be argued that a tenancy by succession is not one "entered into" because such a tenancy is a deemed statutory grant which takes effect by operation of law. "Entered into" suggests a voluntary agreement between two parties whereas a tenancy by succession is, in effect, imposed on the landlord. The landlord does not "enter into" the tenancy because by operation of the statute it takes effect automatically. It has been held that such a tenancy (by succession) is the creation of a new interest rather than a simple continuation of the old interest.¹¹ Nonetheless, the creation of a new interest does not necessarily mean that the new interest is "entered into".

This argument raises other potential difficulties and has yet to be tested in court. Nonetheless, if accepted it could be held that an assured tenancy by succession remains an assured tenancy notwithstanding a rent above the £25,000 limit.

The second argument—the position under the Human Rights Act 1998

Can the tenant rely on a breach of Art.8 of the European Convention on Human Rights, or on a breach of Art.1 of the First Protocol? In general, the courts have been reluctant to uphold HRA arguments in relation to issues of possession or security of tenure. In *Harrow LBC v Qazi*¹² the House of Lords held by a majority that Art.8 could not be relied upon to defeat proprietary or contractual rights

¹⁰ *R. (on the application of Morris) v London RAC* [2002] EWCA Civ 276 at [18].

¹¹ *N&D (London) v Gadson* (1991) 24 H.L.R. 64 at 74.

¹² *Harrow LBC v Qazi* [2004] 1 A.C. 98.

to possession. Subsequently the Strasbourg Court dismissed a challenge to this decision as inadmissible.

However, in *Lambeth LBC v Kay; Leeds CC v Price*¹³ the House of Lords held¹⁴ that the *Qazi* principle, that Art.8 could not found a defence to a claim for possession brought in accordance with the domestic law of property, had to be modified, albeit that a high threshold has to be overcome before Art.8 can be successfully invoked. It is necessary for a seriously arguable point to be raised that the law which enables the court to make the possession order violates the convention right, in which case the county court should either give effect to the law in a way which is compatible with Art.8, or adjourn the proceedings to enable the compatibility issue to be dealt with in the High Court.¹⁵ Subsequent cases show the courts' reluctance to uphold arguments based on Art.8.¹⁶

Against this background what are the prospects of an argument that the £25,000 limit is an infringement of Art.8?

It is first necessary to argue that the £25,000 rental limit is an unjustifiable interference with convention rights by a public authority. On the face of it an eviction is an interference with Art.8 rights requiring justification. Arguably, so would the loss of security consequent upon a rent increase to over £25,000. It is arguable that there is also an interference with Art.1 of the First Protocol, where the rent was initially below the £25,000 limit, but owing to some act of outside interference (such as determination of the Rent Assessment Committee) the tenant would then lose security.

Having established that there is a potential breach it is necessary to ask whether the interference with convention rights is justified. The courts, as has been seen above, give a wide measure of discretion to the state in deciding what is necessary and justifiable. However, the argument in relation to the £25,000 limit is somewhat different. There is no dispute that when the limit was introduced it was justified. But the limit now has a disproportionate impact on tenants who stand to lose protection not through any voluntary act (such as choosing to rent at a figure above £25,000) but entirely owing to the external

factors of rent inflation and the lack of indexation of the £25,000 limit.

It will of course be necessary to overcome the hurdle that when the original legislation was framed the limit could have been subject to indexation, but this was not done. Similarly, it is necessary to overcome the argument that the limit could have been subsequently increased, but has not been,¹⁷

It is also arguable that the limit is discriminatory further to Art.14 (taken together with Art.8) since it adversely affects those living in areas such as London. Although geographical difference does not necessarily fall within Art.14 it has been held¹⁸ that geographical difference can in some circumstances give rise to a claim of discrimination.

It is suggested, however, that arguments under Art.8 (and Art.14 and Art.1 First Protocol) are most compelling when applied to assured tenants by succession. The entire purpose of the scheme of statutory succession is to give a high degree of protection to family members living in the family home. Effectively, given the inevitable effect of rent inflation, that protection is time-limited, which was never Parliament's intention when the original succession provisions in the Rent Act 1977, and the subsequent Housing Act 1988 amendments, were introduced.

The Art.14 argument may also be strengthened by the fact that the regime under the Rent Acts distinguished between London and the rest of the country (setting a higher rental limit in London) whereas the £25,000 annual limit is uniformly applied across the country.

Although the court must strive to produce a convention compliant reading of the legislation, it is suggested that an argument that the £25,000 limit involves an infringement of convention rights has merit, and will no doubt in due course be advanced in an appropriate case, as increasing numbers of tenants, and particularly assured tenants by succession, find their rents raised above the £25,000 limit.

¹³ *Lambeth LBC v Kay; Leeds CC v Price* [2006] 4 All E.R. 128; [2006] H.L.R. 22.

¹⁴ Following *Connors v UK* (2004) 40 E.H.R.R.189.

¹⁵ *Lambeth LBC v Kay; Leeds CC v Price* [2006] H.L.R. 22 per Lord Hope at p.431.

¹⁶ See *Desnousse v London Borough of Newham LBC* [2007] 2 All E.R. 218; *Doherty v Birmingham CC* [2006] All E.R. 349.

¹⁷ The Department for Communities and Local Government state in a letter to the writer that they are keeping the matter "under careful consideration".

¹⁸ See for example *Gudmundsson v Iceland* (1996) 21 E.H.R.R. CD 89.