Human Rights and Tolerated Trespassers

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Introduction
The Housing and Regeneration Act 2008 (the “2008 Act”) abolished, or at least attempted to prevent the creation of further “Tolerated Trespassers” but it appears that the Tolerated Trespasser has risen from the dead in a different guise.

What is a Tolerated Trespasser?
The concept of Tolerated Trespasser was one that led to a considerable amount of case law following the House of Lords’ decision in Burrows –v- The London Borough of Brent. Most of the problems were removed by the 2008 Act. However, the Human Rights Act 1998 (the “1998 Act”) and the affect of a proportionality defence (if successful) is likely to reintroduce the concept. An explanation of what is a Tolerated Trespasser, the effect of the 2008 Act, and the difficulties created by Defences raised under the 1998 Act are set out below.

Burrows –v- The London Borough of Brent
In this case, Miss Burrows was a secure tenant. The Court made an order for possession but before the order was due to take effect an agreement was reached for Miss Burrows to make regular payments towards her rent and arrears. Miss Burrows failed to comply with her agreement and was evicted. Miss Burrows sought an injunction and unsuccessfully argued that the agreement had revived her secure tenancy. On appeal it was held that the tenancy had come to an end on the granting of the possession order in accordance with section 82 of the Housing Act 1985 (as it was then). A tenant could apply under section 85 of the Housing Act 1985 to postpone the date for possession and revive a tenancy, but an agreement with a landlord did not revive the tenancy or create a new one. Ms Burrows was therefore a trespasser who Brent had allowed to remain in possession.

Put simply, a person became a tolerated trespasser once a possession order took effect. They were a trespasser because their tenancy agreement had come to an end either on the date for possession, or breach of a suspended possession order, and were tolerated as the landlord had not evicted. The concept only applied to secure tenancies although at the time the 2008 Act was passed it was thought that is applied to assured tenants.

Many tolerated trespassers were created as a result of orders for possession not being enforced. However, whilst former tenants were allowed to remain, difficulties arose because on becoming a tolerated trespasser the former tenant could no longer rely on the terms of their tenancy agreement. For example, they could not bring a claim for disrepair based on breach of covenant. On the other hand, a landlord could not rely on the terms of the tenancy agreement, and for example, could not seek an injunction compelling the former tenant to grant access to the premises. Also, in certain circumstances the tenancy could not be revived. The Courts attempted to alleviate part of the problem by creating Postponed Possession Orders (PPO’s) or the No Date Possession Orders.

The Act
Part 1 of Schedule 11 to the 2008 Act amended the Housing Acts 1985, 1988 and 1996 to provide that where a possession order has been made against a secure assured or demoted tenant the tenancy does not end until the date the tenant is evicted (unless the tenant ends the tenancy before that date). The Act therefore prevents the creation of tolerated trespassers where there is statutory protection. Part 2 of the Schedule dealt with those tenants who had already become tolerated trespassers and provided that a new tenancy would arise on the commencement of the Act.

As a result for those who are secure, assured or demoted tenants the concept of tolerated trespasser will no longer apply. However, where a tenant is a non-secure or non-assured tenant or the original tenancy has ended the tolerated trespasser may be back as a result of the Human Rights Act 1998.

The Human Rights Act 1998
How does the Human Rights Act 1998 reintroduce the concept of the tolerated trespasser? Take for example, a situation that occurs regularly in practice. A property is let to joint tenants. One tenant no longer wishes to reside at the property, perhaps due to relationship breakdown, and serves a Notice to Quit. That brings the tenancy to an end. The remaining tenant does not wish to vacate and the landlord brings possession proceedings. As a matter of domestic property law, the remaining tenant has no defence. However, the Court has to consider whether the making of a possession order is proportionate
If the Court considers that it is not proportionate then it can refuse to make a possession order. The tenancy is at an end as a result of one tenant serving a Notice to Quit, but the other tenant remains. What is their status? The Court does not have the power to reinstate the tenancy or force the landlord to grant a new tenancy. The tenant will therefore be a trespasser albeit tolerated by the Court not the landlord.

This could arise in other situations. If a tenant sub-lets a property so that their tenancy is no longer an assured or secure tenancy, the landlord can serve a Notice to Quit, ending the contractual tenancy. If the tenant is successful in raising a proportionality argument, again, the tenant will be able to remain as a trespasser. Alternatively, on the tenant’s death a son or daughter may seek to succeed to the tenancy but for example would be prevented from doing so where there has already been a succession. As a matter of domestic law there will be no defence to possession proceedings. However, there may be cases where the Court considers that it is not proportionate to make a possession order allowing the successor to remain in occupation as a tolerated trespasser.

**The Future**

Whilst Parliament’s intentions were clear - the abolition of the Tolerated Trespasser, it seems that the unintended consequences of the Human Rights Act 1998 and the ability of the Court to now test the proportionality of the decision to evict means that the Tolerated Trespasser remains alive and kicking.

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