

# Private Landlords Beware

Charles Ward analyses *Hickey v London Borough of Haringey*

**W**hen Vinayak Patel leased 57b Muswell Hill Road, Muswell Hill, to the London Borough of Haringey for temporary housing, he could hardly have expected that he might be landed with a sitting tenant.

Yet this is a possible outcome for any private landlord leasing to a local housing authority following the Court of Appeal's decision in *Hickey v London Borough of Haringey*, *The Times*, 5 June 2006.

One reason why many private owners prefer to lease to a council or registered social landlord instead of letting on the open market is peace of mind. In return for a lease of, say, three years, the council or housing association will guarantee an uninterrupted income stream, vacant possession at the end of the lease and delivery of the property back to its owner in a habitable condition. The owner is not faced with the prospect of agent's fees, interviewing and assessing prospective tenants or the ongoing responsibilities of property management. And if things go wrong it will be the social landlord which will have the headache and expense of sorting it out, not the owner. And the current demand for socially rented accommodation means that social landlords are now prepared to pay something approaching a market rent for the properties they lease.

It is a puzzling decision in which academic legal argument seems to have triumphed over practical expediency. In legislating to make it possible for private owners to lease to social landlords without risk, Parliament could hardly have intended the conveyancing trap into

which both owner and council fell. It is also fair to say that even the most experienced conveyancer would not have foreseen that a standard residential lease would fall foul of Paragraph 6 of Schedule 1 of the Housing Act 1985, which is supposed to guarantee vacant possession against an occupational sub-tenant in circumstances where an owner has leased a residential property to a council landlord on a short term arrangement.

## The Facts

The facts of *Hickey* were that by lease dated 4 July 1996, Mr Patel leased the second floor flat at 57b Muswell Hill to Haringey for a term ending 18 September 1997 at a monthly rent of £606.67. The lease restricted use of the premises to temporary housing accommodation in accordance with Paragraph 6 of Schedule 1 of the 1985 Act. The council were permitted to sub-let the premises only to someone requiring temporary accommodation without security of tenure. The council also had the right to terminate the lease at any time on giving not less than four weeks' notice to Mr Patel. However, that right was not mutual.

On 14 January 1997, during the currency of that initial lease, the council sub-let the premises to the defendant Julie Hickey. She was 26 years old with two children aged seven and four. She occupied under a standard two page tenancy agreement which made clear that the property was leased by the Council from a private landlord and that no security of tenure was conferred. Miss Hickey's occupancy of the premises then continued for more than six years. In the meantime Mr Patel granted the council a series of three year renewal leases.

Unfortunately, during her occupancy Ms Hickey fell into serious rent arrears and the council served on her a common law notice to quit requiring her to vacate on 29 September 2003. However, she remained in occupation and on 4 December 2003 Haringey issued possession proceedings in Clerkenwell County Court on the basis that her sub-tenancy had been terminated by notice. By that time the rent arrears had accumulated to £5,358.46. A preliminary issue then arose requiring judicial interpretation of Paragraph 6 of Schedule 1.

The general rule is that (with some exceptions) all council tenants have lifetime security of tenure under the Housing Act 1985. It means that once a council dwelling has been let, a council can only recover possession if it can prove specific statutory grounds such as rent arrears, anti-social behaviour, property damage or other tenancy breaches. Even when such grounds have been proved the court retains a discretion whether to grant possession and will generally only do so as a matter of last resort. The position of council tenants is therefore substantially more secure than that of post-1989 private residential tenants occupying on the basis of assured shortholds terminable on as little as two months' notice. However, lifetime security does not apply where a local authority is obliged to grant a tenancy to comply with its homelessness obligations. Whether that exception applied in the *Hickey* case was disputed.

Paragraph 6 of Schedule 1 of the Act provides another exception which states:

- "a tenancy is not a secure tenancy if -
- a) the dwellinghouse has been leased to the landlord with vacant possession for

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use as temporary housing accommodation,

- b) the terms on which it has been leased include provision for the lessor [meaning the owner] to obtain vacant possession from the landlord [being the council] on the expiry of a specified period or when required by the lessor;
- c) the lessor is not itself a body capable of granting secure tenancy [not itself a public sector landlord]; and
- d) the landlord has no interest in the dwellinghouse other than under the lease in question or as a mortgagee."

Counsel for Miss Hickey took two technical points on Paragraph 6 of Schedule 1. He said, firstly, that the latest renewal lease granted by Mr Patel was not 'with vacant possession' in compliance with sub-paragraph (a) as by that time Miss Hickey was already in occupation. The Court of Appeal rejected that argument, Sir Martin Nourse declaring, "it is clear that sub-paragraph (a), as applied to the present case, is concerned only with the position as between Mr Patel and the Council. You only have to look at the head lease to see that, as between the two of them, the premises have been leased to the council with vacant possession. The actual occupation of the defendant at any given time is immaterial."

However, counsel had more success with the second point, which concerned sub-paragraph (b). He argued that the form of head lease executed by Mr Patel in favour of the council was not compliant with sub-paragraph (b) as it did not contain provision allowing Mr Patel to terminate at any time. The court saw two possible ways in which sub-paragraph (b) could be interpreted, namely:

**The first interpretation** – the head lease must either include provision for Mr Patel to obtain possession on the expiry of a specified period [being the term of the lease] or it must allow Mr Patel to obtain vacant possession when required by him. On this interpretation sub-paragraph (b) is satisfied because the head lease includes provision for Mr Patel to obtain vacant possession at the end of the lease.

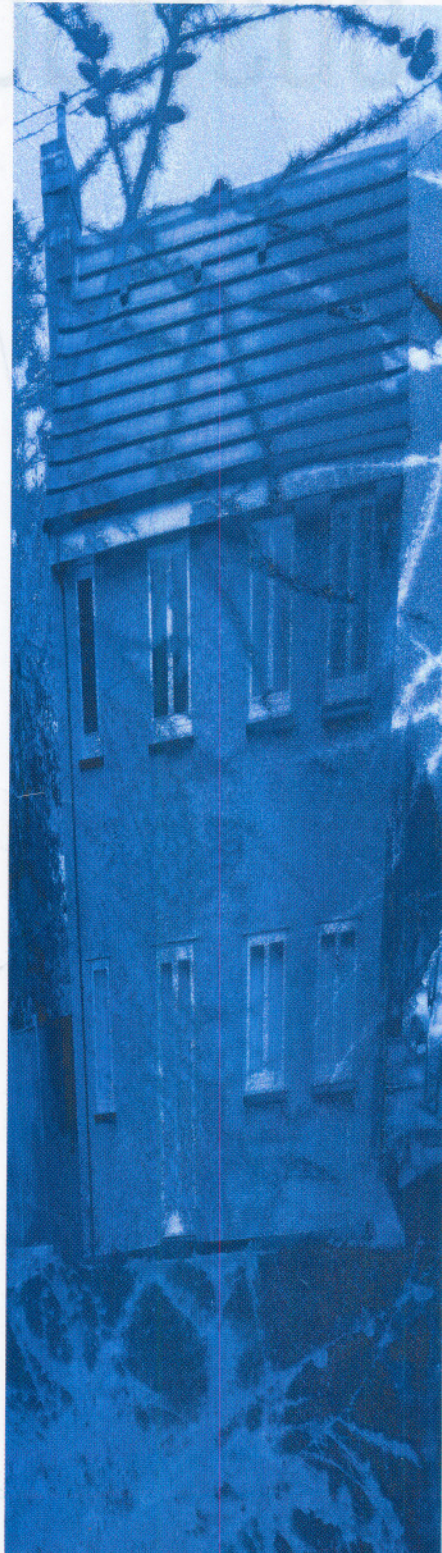
**The second interpretation** – the head lease must include a single provision for Mr Patel to obtain vacant possession either on the expiry of the lease or when required by him [in other words an extremely loose break-clause]. On this view sub-paragraph (b) was not satisfied because the head lease only allowed Mr Patel to obtain vacant possession at the end of the lease.

The court accepted that either interpretation was possible but preferred the second interpretation on the basis of a strict grammatical construction of sub-paragraph (b). Therefore the head lease was not

compliant with sub-paragraph (b) and, unless the tenancy was otherwise exempted under the homelessness exception, Miss Hickey qualified as a secure tenant.

## Interpreting the judgment

As this appeal related to a preliminary point of law, the substantive issues have yet to be determined. However, in giving Miss Hickey



the possibility of having acquired secure tenant status in this situation, the court has also raised many other unanswered questions, for instance:

- What are the implications for private owners who have already leased their properties to local authorities for temporary housing? The expectation must remain that in most cases they will get back their properties with vacant possession, in full repair and without problem. But suppose there is a problem? How many of those standard residential leases actually contain the termination provisions required by the Court of Appeal to comply with sub-paragraph (b)? And what would be the position if the council-lessee was unable to recover possession from its sub-tenant before the contractual expiry of the head lease? The occupant might theoretically lose their secured-tenant status on the re-transfer of the landlord's interest back to the private owner. But what would the occupant's new status be? Would it be assured-shorthold giving the owner the right to repossess on as little as two months' notice? Or would it be a basic assured tenancy carrying lifetime security under Part I of the Housing Act 1988. Either way, the owner would have the problem of recovering possession
- What are the implications for the council lessee? It would be torn between its contractual obligation to deliver vacant possession back to the property owner and its landlord obligation to its secure sub-tenant. And what guarantees could it ever give property owners in the future?
- And what are the implications for conveyancers? The immediate lesson from the Hickey case is that future leases from private owners to councils must now contain a break-clause entitling the owner to repossess at any time on notice. But how is that break-clause to be framed? And what guarantee is there that your drafting will find favour with a county court judge as being compliant with Para 6? And there is also a deeper and more subtle message coming out of the Hickey decision. It reveals the thought processes which our highest judges are now adopting towards the interpretation of housing legislation; it is an interpretation which suggests that any perceived legislative ambiguity will be resolved in favour of a defaulting subtenant instead of the private landowner who leased their property to a public institution in good faith. The message is clear.

Until the law is straightened out, the safest advice which a conveyancer might give anyone proposing to lease their property to a social landlord is, "Don't!". ■

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