

## Unlawful Profit Orders

*There have been substantial gains recovered by social landlords through the unlawful profit orders regime introduced by the Prevention of Social Housing Fraud Act 2013. [Kuljit Bhogal](#) provides a helpful review of their place in the sub-letting work of such landlords.*

### Introduction

The consultation paper which led to the Prevention of Social Housing Fraud Act 2013 estimated that there were at least 50,000 social housing homes in England which were being unlawfully occupied.

The Act was the government's response to the problem: it created two new criminal offences and the ability to seek an unlawful profit orders in the criminal or civil courts.

A number of prosecutions have been brought and unlawful profit orders have been obtained by both local authorities and housing associations. However, it remains as difficult as ever to prove the sub-letting has taken place.

### The criminal offences

The offences are in respect of secure and assured tenancies (where the landlord is a private provider of social housing (in England) or a registered social landlord (in Wales)).

It is an offence to sub-let or part with possession of the whole or part of a dwelling-house without the landlord's consent (s1(1) or s2(1)). The tenant must cease to occupy the dwelling-house as his only or principal home and must know that his conduct is in breach of his tenancy. What follows is that the tenant must know that his conduct is in breach of his tenancy. This includes a situation where the tenant 'deliberately shuts his eyes' to the truth: per Lord Reid in *Warner v Metropolitan Police Commissioner [1969] 2 A. C. 256 at 279; Atwal v Massey (1972) 56 Cr. App. R. 6, DC*.

A second offence is created where there is dishonesty in addition to the above (s1(2) or s2(2)).

The offences will not be committed where sub-letting or cessation of occupation is as a result of violence or threats of violence to the tenant of his household by a person residing in, or in the locality of, the dwelling-house.

The punishment for the summary offence is a fine not exceeding level 5 on the standard scale (currently £5000). The dishonesty offence is an either way offence which carries a maximum sentence of two years imprisonment and/or a fine. An unlawful profit order may also be made upon conviction.

Local authorities have the power to prosecute the offences and proceedings must be brought within 6 months beginning with the date on which evidence sufficient to warrant the proceedings comes to the prosecutor's knowledge (s3).

### Unlawful profit orders ('UPOs')

A number of UPOs have been made by the courts. They are available in both criminal and civil proceedings. They require a tenant to pay the landlord an amount representing the profit made by them as a result of the sub-letting/parting with possession of the whole of the demised premises.

In criminal proceedings a UPO can be made where a tenant is convicted of an offence under ss1 or 2. If the court chooses not to make a UPO it must give reasons for that decision when passing sentence.

Sections 4(6) and 5(6) set out how the amount payable in a UPO is to be calculated in criminal or civil proceedings. In summary the court must determine the total amount the tenant has received as a result of his conduct and deduct from that amount any amount paid as rent (including service charges) to the landlord. Where an offender has insufficient means to pay both a UPO and a fine, the UPO must take preference (s4(8)-(9)).

In civil proceedings, the court has the power to make a UPO where the tenant is in breach of an express/implied term of the tenancy by sub-letting or parting with possession of the whole/part of the dwelling-house, has ceased to occupy as only or principal home and has received money as a result of his conduct. For assured tenancies the landlord must be a private registered provider of social housing or a registered social landlord, and the tenancy cannot be a shared ownership lease.

The Prevention of Social Housing Fraud (Power to Require Information) Regulations 2014 (SI 2014/899) allow a local authority officer to require information from a list of specified persons (e.g. banks and utility companies) for the purpose of preventing, detecting or securing evidence in respect of social housing fraud.

### Conclusion

Whilst some social landlords have successfully obtained UPOs they have not been sought as often as one would expect given the prevalence of social housing fraud.

It is unusual to be able to evidence the sub-letting with a tenancy agreement between the tenant of the property and his/her sub-tenants (although I have certainly had cases where the agreement has been available). Proving the underlying sub-letting or parting with possession remains as challenging as ever and evidence gathering remains an important part of bringing a successful claim. If you are considering bringing a prosecution or a civil claim we are happy to advise on gathering evidence and making the best use of evidence, including hearsay evidence.

[Andy Lane](#) wrote in the last newsletter about the question of evidence in sub-letting cases. His article can be found [here](#)

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