

Human Rights defences in possession cases

Ian Alderson, Social Housing Partner, looks at the way recent Supreme Court decisions have changed the law concerning the availability of human rights defences in possession cases based on mandatory grounds for possession.

The Supreme Court's decisions were in the following cases:

1. *Pinnock -v- Manchester City Council*
2. *London Borough of Hounslow -v- Powell*
3. *Leeds City Council -v- Hall*
4. *Birmingham City Council -v- Frisbee*

The first case was a demoted tenancy anti-social behaviour (ASB) where the judgment was given on 3 November 2010. Judgements on the other three cases were given on 23 February 2011 and involved a non-secure tenancy granted under the homelessness legislation and two introductory ASB cases.

The principles set out in these judgments will also apply to other possession claims based on mandatory grounds, including Ground 8 (rent arrears), the assured shorthold ground and some trespasser cases (such as left in occupation cases). They are not relevant to cases brought on discretionary grounds, where the court has to be satisfied that it is reasonable to make a possession order.

All of these cases concerned Article 8 of the European Convention on Human Rights, which states:

- Any interference with a person's home must be:
 - ... in accordance with the law and ... necessary in a democratic society in the interests of ... the economic well-being of the country, for the prevention of disorder or crime ... or for the protection of the rights of others.*

Pinnock imported case law on Article 8 from the European Court of Human Rights into domestic UK law. The consequence is when a court is asked to make a possession order in respect of someone's home in favour of a "public authority" (this includes most housing associations): "the court must have the power to assess the proportionality of making the order and, in making that assessment, to resolve any relevant dispute of fact".

In other words, a mandatory ground for possession is no longer mandatory.

The judgments gave guidelines on how this would work in practice:

- Proportionality will be supported by the landlord's property rights and housing management duties
- Court will only consider proportionality if raised by the Defendant and in "highly exceptional cases". Courts should weed out weak Article 8 defences at an early stage
- Proportionality is more likely to be an issue if the defendant is vulnerable
- When considering proportionality, the court will pay regard to procedural safeguards, such as the giving of reasons and the right to a review or appeal.

The Supreme Court made some interesting comments about introductory tenancies, which are likely to apply to starter tenancies:

- Courts should recognise that different types of tenants enjoy different levels of security of tenure
- Landlords can require from tenants "a high standard of behaviour during the probationary period" and probationary tenants have to earn the right to a lifetime tenancy
- If there are complaints of ASB, the landlord does not have to prove that they are well founded to justify ending the tenancy.

This suggests that the seriousness of ASB and the standard of proof required to justify terminating a starter tenancy is lower than that required to obtain an outright possession order against an assured or secure tenant.

The judgments make it clear that Article 8 defences should only go to a full hearing (let alone succeed) in very rare cases. How this will work in practice remains to be seen. District Judges will have to be decisive to weed out weak cases. Further case law may be required to enable this to happen to the extent envisaged by the Supreme Court.



For more information about the issues in this article please contact Ian Alderson on 0151-600 3317 or ian.alderson@brabnerscs.com.

Leases, Enfranchisement and Extension

Nick Wheeler, Associate, in the Social Housing team at Brabners Chaffe Street, looks at the problem of leases getting close to their lifespan and the importance of knowing what to do in those circumstances.



“Dwindling assets”... “depreciating interests”... not very welcome words at any time, but particularly not so when times are hard and when a full understanding and control of housing stock with prudent financial planning are so important for social landlords.

Some wise flat owners have already become alert to the fact that a relatively low number of years remains on their lease terms and have taken steps to do something about it. The problem, however, does not just lie with one-off individual dwellings or, indeed just flats. Lease terms may be running low in years on houses and apartment blocks and it is time for all registered providers to consider their own property portfolios in detail – particularly those in the North West.

According to the statistics, there are nearly one million houses that are owned leasehold (rather than freehold) in England and Wales. These are to be found predominantly in the Midlands and North West of England with significant concentrations in London and Wales. Statistics also suggest that there are nearly two million flats which are owned leasehold.

Many leases granted in the 1960's, the 1970's and the 1980's are now getting close to a critical stage in their lifespan. In those decades, lease terms were often for periods of 75 and 125 years. It is widely accepted that most lenders and scrupulous buyers are reluctant to lend on or purchase such property. However, two Acts in particular, the Leasehold Reform Act 1967 and the Leasehold Reform, Housing & Urban Development Act 1993 give tenants of flats and houses the ability to address this growing issue. Much of the legislation has received statutory amendment but the general position is that the Leasehold Reform Act 1967 grants tenants of houses the right to ‘enfranchise’ – that is to say purchase the freehold, or seek an extended lease – and Part 1 of the Leasehold Reform, Housing & Urban Development Act 1993 provides for similar rights for tenants of flats let on long leases.

How may this affect social landlords?

Well, of course, many social landlords own dwellings occupied by people on long leases such as people who have exercised rights under the right to buy or right to acquire or who may have fully staircased up to 100%. These people may seek claims to enfranchise. Secondly, and crucially, social landlords may themselves own qualifying interests.

Certainly, recent caselaw has proved very important in determining a ‘head’ tenant’s right to claim a new long lease of a flat. Social landlords quite regularly fit the description of ‘head tenant’ given that they may own a leasehold interest of a whole building such as an apartment block – out of which is then granted individual tenancies to tenants. Two cases in particular have proved significant: Earl Cadogan v 26 Cadogan Square Limited and Howard de Walden Estates Limited v Aggio. Despite the House of Lords acknowledging that legal and technical issues could arise, the Court acknowledged the two head tenant claimants’ rights to make claims for new long leases of individual dwellings within buildings which were held under head leases and which contained other property other than the subject flats. Importantly, the Court recognised that there was no residency test with the requirement instead being that the tenant must have owned the lease for 2 years prior to making the claim and further that the lease was originally granted for a term of longer than 21 years. The rights for claims in relation to lease extensions of houses also contain similar requirements.

Since 2002 and subject to meeting various criteria, acquiring freehold interests in houses has become a much easier option than seeking lease extensions.

And price? The premium payable in enfranchisement and lease extension cases will be determined by several factors. These include the length of the current lease term, ground rents payable and market values amongst other factors. In the absence of agreement between the parties, a dispute over the price payable can be referred to the leasehold valuation tribunal.

Although the legal process can take several months to conclude, it pays to act early in dealing with this issue, not least because premiums payable can increase the longer dwindling lease terms are left. The relatively low current property values present another incentive to act now.

Brabners Chaffe Street has a wealth of experience in this area. Together with the assistance of a recommended valuer, we are best placed to assist with this important area of law.



For more information or advice about leases please contact Nick Wheeler on 0151 600 3383 or nick.wheeler@brabnerscs.com

Consumer Credit - *what's that got to do with Social Housing?*

No doubt you've heard of the Consumer Credit Act (CCA), but you don't think of it in the context of Social Housing. However, surprising as it may seem, the CCA may be relevant to some of the activities undertaken by providers of Social Housing. Stephen Roper, Partner, and specialist in consumer credit law, looks at how the CCA can apply to Social Housing.

Basically, the CCA applies where there is a "consumer credit agreement". This term is given a special meaning by the CCA and goes beyond what most people might think. In essence, the CCA may apply wherever any form of financial accommodation is given (not only to individuals but also some partnerships and unincorporated associations).

Where this might be particularly likely to apply for Social Housing providers is where tenants are given time to pay off money which is otherwise due - for example, being given time to pay rent arrears or, where a large one-off service charge becomes due (such as after major maintenance work), allowing tenants to make payments of that in instalments.

Whether the CCA will in fact apply will depend on the specific circumstances. There are some exemptions which apply to certain types of arrangements. Whilst a number of arrangements typically entered into by Social Housing providers would have benefited from these exemptions in the

past, the nature and extent of the available exemptions has changed as a result of new laws that came into force on 1 February 2011.

If the CCA does apply, there are several implications. You may have to observe strict requirements regarding the form and content of agreements, comply with certain requirements about providing documents and information relating to those agreements and have a CCA licence. Failure to observe the requirements of the CCA could result in your agreements being unenforceable and may in some circumstances constitute a criminal offence.



To discuss any of these issues in more detail or for a free initial consultation please contact Stephen Roper on 0151 600 3466 or stephen.ropers@brabnerscs.com

Changes to the Legal Aid and Conditional Fees – help or hindrance?

Catherine Moore, Solicitor in Brabners Chaffe Street's Social Housing team looks at how the changes to Legal Aid will impact the Social Housing sector.

The Ministry of Justice (MoJ) published two consultations papers on 15 November 2010. The MoJ aims to implement £350 million cuts to legal aid. The specific proposals for housing cases include:

Cases that will continue to attract public funding

- Possession proceedings
- Disrepair counterclaims in rent arrears possession cases
- Homelessness appeals
- Serious housing disrepair cases where the litigant is not primarily seeking damages, but is seeking a repair of such significance that without it the life or health of the litigant or their family may be at serious risk
- ASB proceedings.

Cases that will not be eligible for public funding include:

- To enforce a right to buy
- Non-serious disrepair cases and where the primary remedy sought is damages

- An action for re-housing (a term that is not defined in the consultation paper)
- Claims for breach of the covenant for quiet enjoyment, nuisance and trespass.

The consultation papers do not mention unlawful eviction claims, which are likely to continue to attract public funding.

Changes to Conditional Fee Agreements (CFAs)

The second consultation, Reform of Civil Litigation Funding and Costs in England and Wales, deals with CFAs in the light on Lord Justice Jackson's recent report on costs. Currently, defendants can be liable for success fees under CFAs, which uplift normal legal costs by a percentage and can act as a disincentive to claimants and their lawyers showing restraint over costs.

What is proposed?

- Abolishing success fees
- Allowing contingency fees, under which

the Claimant's lawyers take a proportion of damages as fees

- Further encouragement to parties to make and accept reasonable offers
- To introduce a new test to make costs more proportionate to the level of damages.

Where does this leave you, if the proposals are adopted?

- Less cases will be legally aided
- The abolition of success fees and the introduction of contingency fees may lead to tenants and their lawyers being more careful about costs and litigation generally.



If you would like further information or advise about these changes please contact Catherine Moore on 0151 600 3184 or catherine.moore@brabnerscs.com

Asbestos: What you need to know...

Most Registered Providers are aware of the Control of Asbestos Regulations 2006 and the imposition of liability on a Registered Provider as 'dutyholder' for the common parts of domestic buildings (i.e. halls, stairs, lift shafts and roof spaces). Practically though the Regulations still continue to pose difficulties for Registered Providers in performance of the obligations. Claire Gregory, Associate, and Head of Environment and Regulatory at Brabners Chaffe Street looks at the latest issues.

The duty to manage

The first thing to understand is what the Regulations actually require. The overall duty created is one to 'manage' asbestos. It is not a duty to survey or an absolute duty to remove all asbestos. 'Management' includes but is not limited to: periodic identification, condition monitoring, taking appropriate actions, information distribution and compliance with removal and disposal obligations when applicable.

The initial step is to identify any asbestos present and Registered Providers should review their housing stock and create an Asbestos Register of affected properties. The Register should be kept up-to-date and so it would be advisable to review this whenever acquisitions or disposals of stock take place or otherwise on an annual basis. As a general rule, properties built in compliance with the 2000 Building Regulations (or later) should not by law have asbestos in their building fabric, however, even as late as the 1980's asbestos was still a commonly used building material due to its fire resistant properties.

The survey

Unless there is suitable survey expertise within the organisation, most Registered Providers identify asbestos by way of survey from an external licensed professional (who will usually as part of their survey report also recommend appropriate action). Entry to the premises will be needed, and so you may wish to serve courtesy notices on tenants to keep them informed - but delicate wording is advised to avoid unnecessarily creating a panic reaction from sensitive tenants. Areas which cannot be accessed should be presumed to contain asbestos.

This can then form the basis of an Asbestos Management Plan detailing proposed actions for each identified area. Actions need not be significant and will be based on the condition of the asbestos and the level of risk presented by that condition. Action may therefore range from removal or encapsulation works to simple monitoring. The Plan must also be kept updated. In ensuring that the Plan is kept up-to-date, you may wish to survey annually to report any condition changes although general observations by tenants, maintenance and repair teams or other internal parties may suffice in ensuring compliance, provided that such observations are recorded and documented accordingly.

How to comply

Administrative housekeeping is an integral part of demonstrating compliance and it is for the Registered Provider to decide on how to ensure this is at its most effective. Depending on your organisation structure you may wish to adopt group policies and have a Central Asbestos Register managed by an appointed member of staff (the

representative dutyholder for the Registered Provider). You may wish internally to allocate day-to-day manager(s) who have more knowledge of the properties in question and who then report back to the representative dutyholder or alternatively, you may wish location offices to register and manage their own properties. However it is structured, it must be clearly communicated who has such responsibilities.

Communications and information sharing is also a vital part particularly when instructing parties to undertake works or considering the health and safety risks of persons at the property. Works should be carried out by a licensed professional and as asbestos is a controlled waste, all necessary disposal licences and transfer notes should also be kept as part of the administration to again evidence compliance and avoid action under strict waste regulation.

Managing tenants

Finally, managing the relationship with tenants while not a statutory obligation is an often forgotten part of this process, particularly as although the regulations require Registered Providers to be responsible for common parts, there may be practical considerations where asbestos could also be present in the parts demised to the tenant. Practically the Registered Provider may wish to take over such responsibility to ensure that they are not exposing themselves to other liability risks. This is significant where removal works may be required as there may be health risks for the tenant by virtue of occupation or if they attempt removal works themselves. Depending on the extremity of condition, there is a risk that the property may be considered under the Defective Premises Act or it may be simply to protect the asset value of the property for the Registered Provider and its funders.

If you have any concerns or require advice on how to enter a property it is important that you seek professional advice, please contact either Claire Gregory or Julie Goulbourne and we will be pleased to help you.



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