

November 2011

AFTER THE RIOTS: IN THE AFTERMATH SHOULD YOU LOOK TO EVICT?

In August 2011, England was shocked to the core when rioting broke out across towns and cities up and down across the country. Horrifying images of looting and burning buildings were streamed across the world and the Prime Minister declared that people who “loot and pillage their own community” should be evicted from their social landlord housing. Several months on, and in the cold light of day, we look at the practicalities facing landlords who may wish to take action against those caught up in the riots.

A Registered Provider may seek possession under Ground 2 for secure tenants and Ground 14 for assured tenants when there has been a conviction by a member of the household for a criminal activity within the locality of the property. With possession proceedings brought on account of a rioting conviction, the key word is likely to be “locality” and landlords must look at where the criminal act took place. There is no statutory definition of locality and any doubt as to if the conduct occurred in the locality will be decided by the Judge. Registered Providers should be prepared to file evidence on locality and put forward submissions as to why areas fall within the locality if there may be any doubt.

Registered Providers also need to look at the tenancy agreement to see if any of the behaviour complained off falls within a tenancy breach. A breach of tenancy may give rise to a ground for possession under Ground 1 for secure tenants and Ground 12 for assured tenants. It's quite normal for the tenancy agreement to have a term controlling the tenants conduct and that of their household though usually this is limited to behaviour within the “locality” of the property but some agreements may go further and prohibit bad behaviour in a specific area for example. This in itself raises a debate that such a provision goes beyond an ordinary landlord and tenant relationship and I would expect a Court to question the reasonability of relying on such a wide term.

Even if a ground for possession is established, the Court still has to consider whether it is reasonable to make a possession order and what type of possession order to make. The Court may make an outright possession order, a suspended/postponed order, adjourn the case or make no order at all. When considering what order to make, the Court will consider such factors such as the seriousness of the offence, pattern of offending, personal circumstances of the defendant and the relationship (or lack of one) between the offences and the landlord-tenant relationship.

What is reasonable?

Was this a one-off incident by a family member and out of character of an ordinarily trouble-free tenant? Is it reasonable to ask the Court to make a possession order against an ordinarily trouble free tenant whose 13 year old son has been convicted of stealing six bottles of water from a looted corner shop? Likewise, is it reasonable to make a possession order against a tenant who knowingly stored looted items in their property and who has a previous history of anti-social behaviour in the area?

Each case needs to be looked at on an individual basis and Registered Providers must be careful not to issue possession proceedings as a “kneejerk” reaction. The full circumstances of the conviction must be

LIVERPOOL

Horton House, Exchange Flags, Liverpool L2 3YL
0151 600 3000

MANCHESTER

55 King Street, Manchester M2 4LQ
0161 836 8800

PRESTON

7-8 Chapel Street, Preston PR1 8AN
01772 823921

looked at and considered.

Remember - social housing tenancy is a privileged position ...

Likewise, occupiers of social housing need to remember that having the long-term security of a social housing tenancy is a privileged position and, as the ever increasing waiting lists in our area show, there is not enough social housing to go around. Tenants need to be reminded that a social housing tenancy is a valuable commodity and is it really worth losing for the sake of throwing a brick or storing a looted flat screen television?

If you would like more information related to evictions please contact:



Melanie Dirom

Associate, Social Housing team

Tel: 0151 600 3178

Email: melanie.dirom@brabnerscs.com

ARE YOUR TENANCY SIGN-UP PROCEDURES UP-TO SCRATCH?



Are your tenancy sign-up procedures up-to-scratch? All too often, giving a tenancy to a new tenant is just seen as an administrative chore, even though it may be the first time that the landlord has met the new tenant face-to-face. As long as the allocations officer completes the paperwork where required and gets the tenant's signature, that's fine.

Such a narrow approach can cause pitfalls, and incur unnecessary time and expense later. If a tenant's support needs are not considered and met from the start, housing management problems can result, requiring expensive interventions later on. If repairs are ignored or, even worse,

noted as required but never dealt with properly, an expensive disrepair claim can occur several years later. The claim will be supported by damning sign-up sheets showing that the landlord knew about the repairs needed, but failed to do them.

Sometimes, it will be obvious that the tenant is incapable of meeting their obligations under the tenancy, or can't even understand it, but the paperwork will be completed regardless.

A recent case in the Upper Tribunal, *Wychavon -v- EM* [2011] UT, found that mental capacity issues could even prevent the rent from being met by Housing Benefit (HB). The (private) landlord had appealed against the decision of the Tribunal that he was not entitled to HB. The tenant was profoundly disabled and could not communicate at all, and a statement to that effect had been put on the tenancy agreement instead of her signature. At the time there was no order in place from the Court of Protection, so that nobody had power to sign contracts on her behalf. She was incapable of being a party to any agreement including a tenancy. Because of this, Judge Mark in the Upper Tribunal found that there was no liability to pay rent and no entitlement to HB.

This decision was not tested on appeal to the Court of Appeal, and it is possible that if there had been one, the final outcome would have been different. Judge Mark had distinguished the circumstances from two earlier decisions by the Upper Tribunal's predecessor, the Social Security Commissioners. Because of his decision, the current law is now that lack of capacity can lead to no entitlement to HB, unless someone else signs the tenancy and has authority to do so.

LIVERPOOL

Horton House, Exchange Flags, Liverpool L2 3YL
0151 600 3000

MANCHESTER

55 King Street, Manchester M2 4LQ
0161 836 8800

PRESTON

7-8 Chapel Street, Preston PR1 8AN
01772 823921

If a Local Authority HB Department applied this, together with the rules on decision reviews and overpayments, there is nothing to stop a landlord being asked to reimburse HB already paid, several years later. This would be an unexpected and potentially substantial debt for the landlord.

Tenants' apparent lack of capacity can also present problems if problems occur later in the tenancy and legal proceedings are necessary. As the court confirmed in *Wookey v Wookey* [1991], injunctions will not be granted against tenants who cannot comply or understand them. Possession proceedings will be prolonged and much more expensive, if tenants are mentally incapable of instructing a solicitor and the Official Solicitor has to be involved to protect their interests. The County Court may require the Court of Protection to be used instead, for issues such as gas access and hoarding. Even if a tenant proves to have capacity, instructing an independent psychiatrist to resolve doubts will involve delay and expense.

Wise landlords will ensure that they have clear procedures ...

Wise landlords will ensure that they have clear procedures, on what to do if the tenant appears to have a significant mental impairment or support needs at the time of signing up. Many people have low-level mental health problems, so it will be important to distinguish those from more significant ones that bring their mental capacity into question or raise support needs. A blanket policy applied to anyone with mental health problems would risk being seen as discriminatory and unjustified, so a reasonable, pro-active and proportionate approach should be taken according to that tenant's individual circumstances. Housing management colleagues should be consulted if the tenant may have difficulty complying with tenancy terms, including nuisance and gas access.

If capacity is an issue, the officer should consider if the mental impairment prevents the person from making a specific decision on whether to accept the tenancy, and should consider whether the tenant can:

- Absorb basic information about the pros and cons?
- Retain the information for long enough to process it?
- Weigh up the pros and cons against his or her own value system and arrive at a decision?
- Communicate his or her decision?

If in doubt, expert advice should be taken from the tenant's GP, psychiatrist or Social Services, and clear records kept so that decisions taken can be justified if questioned later. Social Services may need to be asked for a new or updated Community Care Assessment.

If the tenant proves not to have capacity and no-one else has legal authority to sign agreements for him or her, the landlord will need to consider asking Social Services to apply to the Court of Protection for such authority, as well as ensuring that any tenancy-related support needs are identified and met.

For more information on tenancy sign-up procedures please contact:



Andrew Brodie
Solicitor, Social Housing team
Tel: 0151 600 3045
Email: andrew.brodie@brabnerscs.com

LIVERPOOL

Horton House, Exchange Flags, Liverpool L2 3YL
0151 600 3000

MANCHESTER

55 King Street, Manchester M2 4LQ
0161 836 8800

PRESTON

7-8 Chapel Street, Preston PR1 8AN
01772 823921

NEGLIGENT HOUSING CONSULTANTS DEFEAT £16 MILLION STOCK TRANSFER CLAIM

In a recent High Court ruling in the case of *Community Gateway Association Ltd v Beha Williams Norman Ltd* [2011] EWHC 2311, housing consultants avoided having to pay £16 million in damages for negligent professional services provided in connection with a stock transfer.

The Claimant, Community Gateway Association Ltd (“the Association”), was a housing association looking after transferred housing stock for Preston local authority (“the Authority”).

In order for the housing stock to be transferred to the Association, the Authority had to have the support of the relevant tenants by securing votes on an ‘offer’ put forward by the Authority. The offer contained promises to the tenants to improve their dwellings by way of an £80 million repair and improvement programme within the first five years following the transfer.

The defendant, Beha Williams Norman Ltd, was instructed initially by the Authority and later by the Association, to provide specialist housing consultancy and advisory services in relation to the transfer of the housing stock. This was to include advise on a business plan,

cash flow, financial matters generally and a valuation of the housing stock.

The Association brought proceedings against the defendant for breach of contract and breach of duty for providing allegedly negligent advice.

The Association alleged that the defendant company failed to identify the true value of the works that had been offered to tenants and, in particular, failed to appreciate that the proposed budget of £80 million could be inadequate and that additional works needed to be costed to determine the business plan funding requirements. As a result, it was argued that the Association had lost, or had lost the opportunity of securing, the additional funds required to deliver the promises made to tenants, which was calculated at approximately £16 million.

To succeed in a claim for negligence, the Association had to show that:

1. The defendant owed a duty of care
2. There had been a breach of that duty
3. The breach had caused damage or loss to the Association; and
4. The damage was foreseeable.

The claim was dismissed on the grounds that (3) above could not be established. Whilst it was held that the defendant had failed to act with reasonable care and skill by asserting that sufficient funds were available to cover the business plan and had thereby breached the duty of care it owed to the Association, it could not be shown that there was any loss caused by the breach. This was because the additional works that had been promised were not works which any individual tenant was entitled to insist upon, but were more in the nature of a “wish-list” of works.

Whilst this claim ultimately failed on its facts, it acts as a strong reminder to professional services firms that they may be sued for careless work in connection with stock transfers. It also highlights the risks that are run by a social landlord engaging in this type of litigation.

LIVERPOOL

Horton House, Exchange Flags, Liverpool L2 3YL
0151 600 3000

MANCHESTER

55 King Street, Manchester M2 4LQ
0161 836 8800

PRESTON

7-8 Chapel Street, Preston PR1 8AN
01772 823921

For more information related to this case or similar issues you may wish to discuss please contact:



Josephine Sharrock
Solicitor, Social Housing team
Tel: 0151 600 3094
Email: josephine.sharrock@brabnerscs.com

THE RENEWABLE HEAT INCENTIVE – A LOAD OF HOT AIR?



The Renewable Heat Incentive (RHI) is similar to the Feed-in Tariff (FIT) and will provide financial support to generators of renewable heat and encourage the switch from fossil fuels to renewable sources. The scheme will pay different tariffs for different technologies over a 20-year period, and the Government claims it will provide a 12 per cent return on the original cost of installing the technology. Unlike FITs, the RHI will be paid for by the

Treasury and not energy users.

There are three steps to the RHI:

1. You install in a property renewable heat systems such as solar thermal panels, heat pumps or a biomass boiler
2. You measure how much heat your renewable energy systems produce
3. You get paid a fixed amount based on that output, the type of technology and the size of the system (for a period of 20 years)

In the first phase of the scheme, support will be targeted in the non-domestic sectors – industrial, commercial or public sector installations. These sectors are being targeted first as they contribute 38% of the UK's carbon emissions. The second phase, planned for 2012, will see the scheme expanded to include more technologies as well as support for domestic households.

The commencement of the RHI has been delayed a number of times but formal approval has now been provided, subject to a reduction in the biomass tariff. The scheme will now launch once the revised Regulations have been passed through Parliament, which is expected to be by the end of November 2011.

What is the 'non-domestic' sector and how do Social Landlords fit into this?

A non-domestic installation is a renewable heat unit that supplies heat to a building which is not used as a domestic premises and would include one boiler serving multiple homes such as a district heating scheme. A domestic installation is defined as being a single renewable heat installation serving a single domestic premises, i.e. a single house or flat. This means that a Social Landlord installing renewable heat equipment in individual households would not be supported through the RHI from the start of the scheme (although such schemes will be eligible under phase 2), but those installing a renewable district or common heating system serving multiple dwellings would be eligible immediately.

Too late for Renewable Heat Premium Payments?

A forerunner to the RHI is the Renewable Heat Premium Payments (RHPP) which is a system of grants to assist towards the cost of installing eligible technology which will then be eligible for RHI. A small proportion of grant payments were made available to Social Landlords on competitive application, but there a one-month opportunity to apply and this closed on 15 September 2011. However, Social Landlords who did not

LIVERPOOL

Horton House, Exchange Flags, Liverpool L2 3YL
0151 600 3000

MANCHESTER

55 King Street, Manchester M2 4LQ
0161 836 8800

PRESTON

7-8 Chapel Street, Preston PR1 8AN
01772 823921

apply for these payments, or those who find their bid is rejected, are still eligible to apply for the RHI as long as the equipment meets certain conditions.

What are the key aspects of the RHI?

- Technologies supported in the first phase include solid and gaseous biomass, solar thermal, ground and water source heat, biomethane projects and energy from waste
- The installation must be accredited by Ofgem, i.e. to confirm the technology is eligible for support and correct metering arrangements are in place
- Payments are calculated by multiplying the appropriate tariff (depending on the technology and size of the installation) by the metered amount of eligible renewable heat generated
- Payments are made over a period of 20 years and adjusted annually in line with inflation
- Participants must be the owner of the equipment and retain the rights and liabilities of it. Equipment must have been new and completed and first commissioned after 15 July 2009
- Participants must meet various obligations including specific maintenance requirements, measurement and reporting on fuel use, and submission of regular meter readings
- For small and medium sized installations (up to 45KWth) installers and equipment must be certified under the Microgeneration Certification Scheme
- Larger installations of 1 MWth capacity will have to report quarterly.

Start now and have a continuous income stream for the next 20 years ...

Social Landlords who choose to install an eligible renewable district heating system could do so now and come within the first Phase of the RHI scheme and claim the tariffs that follow, thereby creating a continuous income stream for the next 20 years. This could be a good opportunity for Landlords to consider the replacement of uneconomical communal systems with more efficient systems with the capital outlay justified by the receipt of guaranteed financial support for the next 20 years. If the right systems and technologies are utilised, now really could be a good time to "go green".

If you would like more information on renewable heat and how you can start to have new income stream please contact:



Claire Gregory

Head of Environment and Regulatory
Tel: 0151 600 3284 (Liverpool) or 0161 836 8858 (Manchester)
Email: claire.gregory@brabnerscs.com

HAVE YOUR TENANTS GOT GREEN FINGERS?



The popularity of allotment gardening has increased exponentially in the last ten years but just like the social housing sector, demand still outstrips supply. The bigger picture is that the volume of allotments available for let have been falling since their hey day when they played a starring role in the 'Dig for Victory Campaign' in the Second World War. In 2009, approximately 100,000 people were estimated to be on waiting lists for allotments nationally and a report produced by the New Local Government Network claimed that some people on waiting lists waited for decades before receiving an allotment.

Allotment gardening is a great social leveller. Unlike Skiing or horse riding, allotment gardening is an affordable aspiration even for those of modest means and is currently considered by many to be a trendy means of recreation. Local Authority allotment rents rarely exceed fifty

LIVERPOOL

Horton House, Exchange Flags, Liverpool L2 3YL
0151 600 3000

MANCHESTER

55 King Street, Manchester M2 4LQ
0161 836 8800

PRESTON

7-8 Chapel Street, Preston PR1 8AN
01772 823921

pounds per year for a standard sized allotment (250 m2 or “ten poles”). In relative terms, allotment gardening is a relatively inexpensive activity and this contributes to its popularity.

Health benefits

Although traditionally, allotment land has been provided by local authorities in pursuance of their statutory obligation to provide allotment land, given the current supply and demand issues, there have been an increasing number of private players entering the market. The law describes such allotments as “private” or “parochial” and given the health benefits gardening provides and the potential for increasing the well-being of tenants, Registered Providers are increasingly viewing the letting of land for gardening purposes as an attractive proposition.

In recent times, there is an increase in popularity for the letting of land for community gardens and community orchards. It seems like that this trend will increase even further depending on the progress through Parliament of the Localism Bill.

Before committing to an allotment/community garden or community orchard letting, registered providers should make a sober assessment of the risks and should ensure that these risks are mitigated against.

Outlined below are some useful points to be aware of:

- **Not For Profit:** Ensure that the letting prohibits the growing of produce for sale or for commercial activity otherwise the law may interpret the letting as an agricultural tenancy which would bring with it brings a raft of regulatory requirements designed for more commercial horticultural lettings.
- **Security of Tenure:** Ensure that no security of tenure is granted, particularly where the tenant is a collective of individuals. The law often regards a “body” of persons as a “business” making a tenancy into a business tenancy in which case it is necessary to take steps at the outset to prevent security of tenure from arising.
- **Legal Identity:** Ensure that the tenant is a legal person. If the tenant is a group of individuals acting collectively carry out due diligence to establish that a legal identity exists.
- **Public Liability Insurance:** Ensure that the site is covered by adequate insurance at all times.
- **Suitability:** Carefully select the site - do not let a site which is known to be contaminated. Carry out contamination verification checks. It may not be appropriate to let land with a short or medium term development horizon.
- **Consent to Disposal:** Ensure that the relevant TSA consent to the land disposal is obtained.
- **Determination and compensation:** The Allotment Acts set out some very specific requirements as to notice to determine and compensation for determination. In most cases, 12 months notice is required and depending on circumstance compensation equivalent to the value of crops in the land. A rent rebate may also be payable.

For more information on using land for allotments or issues related to this article please contact:



Thomas Starkey
Solicitor, Social Housing team
Tel: 0151 600 3185
Email thomas.starkey@brabnerscs.com

LIVERPOOL

Horton House, Exchange Flags, Liverpool L2 3YL
0151 600 3000

MANCHESTER

55 King Street, Manchester M2 4LQ
0161 836 8800

PRESTON

7-8 Chapel Street, Preston PR1 8AN
01772 823921

COMMUNITY ASSET TRANSFER – WHAT’S IN IT FOR SOCIAL HOUSING PROVIDERS?



Government Policy

The push from Government for the transfer of public sector property assets from local authorities to third sector organisations originated with the publication in May 2007 of “Making Assets Work”. Government agreed with the review team’s three main conclusions, particularly that the benefits of community management and ownership of public assets can outweigh the risks and opportunity costs in appropriate circumstances.

Subsequently, the Localism Bill was introduced on 13 December 2010. This seeks to encourage these transfers by introducing a Community Right to Buy scheme providing communities with a time window in

which to put together bids to take over important local amenities and buildings. The Bill has successfully passed through the House of Commons and is currently at the Report stage in the House of Lords.

Opportunities & Threats

There are potential opportunities and threats offered by the Localism Bill, particularly at a time when Councils are considering the closure of some buildings and the cessation of some services. On one hand, transfer to the community may be seen as an opportunity to deliver services through alternative service means whilst, on the other, there may be strong community support for the retention of an asset that, for financial reasons, Councils would wish to see disposed of.

Communities will benefit by having more local say in how facilities are run and what services are provided from the facility – run by the community, for the community. This has the added benefit for the Council that the local community will have more empathy for the building and look after it, as well as using the facility to look after members of the community themselves – this should reduce the call on other Council services.

Our Experience

Many Councils have started developing Community Asset Transfer (CAT) strategies and a number have published their approved strategies. Most authorities are making a list of community buildings available and taking a reactive approach if external organisations come forward with an interest in a building. Others are developing relationships with individual groups and organisations to take over specific facilities – usually a single building but a number are now also looking at multiple assets being taken over. Some are proactively putting community facilities out to public offer and seeking applications from voluntary and charitable organisations and those with a long term commitment to sustainable communities such as the local social housing providers.

In some cases, innovative offers are being negotiated to make the transition from Council to community management as sustainable as possible, from initial pump-prime funding to generous financial support over several years. Property ownership can be medium to longer term leasehold arrangements at nominal rents through to full freehold transfer.

The benefit of registered social housing providers being involved in operating community facilities such as community halls and community centres is their ongoing commitment to the sustainability of the communities that they work in and their established expertise, in property management and maintenance services. They will be in a position to work in partnership with local communities to develop community led programmes, projects and facilities which address the needs of local people. Social housing providers will, in turn, benefit from being close to the needs and requirements of local people and supporting community engagement and development.

LIVERPOOL

Horton House, Exchange Flags, Liverpool L2 3YL
0151 600 3000

MANCHESTER

55 King Street, Manchester M2 4LQ
0161 836 8800

PRESTON

7-8 Chapel Street, Preston PR1 8AN
01772 823921

CAT affords a once-in-a-generation opportunity for community groups and social housing providers to take a leading role in delivering community development services. It is a tangible example of how power and responsibility can be shifted so that individuals and communities have more power to take decisions and solve problems themselves.

However, the financial arrangements necessary to deliver CAT are critical and remain the biggest challenge facing community groups and the social housing providers that support them.

If you would like more information on CATs or any issues raised in this article please contact either:



Alistair Fletcher

Partner
Head of Social Housing
Tel: 0151 600 3082
Email: alistair.fletcher@brabnerscs.com



Keith Mitchell

Broadland Consulting
Tel: 07500 883171
Email: keithmitchell@broadlandsconsulting.com

This article is for general purposes only and should not be used for any other purpose

If you no longer wish to receive the bulletin please let us know by return e-mail to
bcnewsandevents@brabnerscs.com

Brabners Chaffe Street is a Limited Liability Partnership



LIVERPOOL

Horton House, Exchange Flags, Liverpool L2 3YL
0151 600 3000

MANCHESTER

55 King Street, Manchester M2 4LQ
0161 836 8800

PRESTON

7-8 Chapel Street, Preston PR1 8AN
01772 823921