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Social Housing Focus

Social housing tenancy fraud update

It is now over 6 months since the Prevention of Social Housing Fraud Act 2013 came into force and this seemed like a timely opportunity to review the most interesting provisions of the new(ish) Act and consider what has been going on in the months leading up to and since its implementation.

The Act makes it a criminal offence for a secure or assured tenant in social housing to sub-let or part with possession of the whole or (without the landlord's written consent) part of the rented premises, or to cease to use it as their principal home, knowing that this is in breach of the terms of their tenancy agreement. A further, more serious offence is committed if they do so dishonestly.

It is thought that the more serious offence requiring proof of dishonesty will apply the pre-existing test for dishonest conduct created by the Judge in the 1982 case of *R v Ghosh*, the essence of which is whether "reasonably and honest people" would consider the conduct to have been dishonest. It is difficult to give precise expectations as to what this might mean in context, but most commentators agree that the more flagrantly a tenant has profited from the unlawful subletting, and the greater lengths they have gone to to conceal their actions, the more likely there is to be a finding of dishonesty.

The Act also gives the Court broad powers to put in place Unlawful Profit Orders in civil or criminal proceedings to enable landlords to recoup from the tenant such amounts of the unlawful profits of the subletting as the Court thinks fit.

The Act also amends s.15 of the Housing Act 1988 so that an Assured Tenant who unlawfully sublets or parts with possession loses their security of tenure and (unlike under the pre-existing law) they cannot recover that Assured status by moving back into the property before any Notice to Quit has been served.

The Act also of course provides tenants with a number of Defences to prosecution, including that they had acted under a threat of violence to themselves or a family member, that they had obtained the consent of the landlord to their actions, or that the person in actual occupation is a person with a lawful right to have the tenancy transferred to them (e.g. pursuant to an order made under the Family Law Act 1996 or similar).

The implementation and enforcement of the Act relies on close cooperation between local authorities and providers of social housing. The local authority will be the entity with the power to launch criminal prosecutions (in which the landlord may also seek an Unlawful Profit Order as discussed above) but the responsibility will remain with the landlord to take any civil action necessary to recover possession of the premises from the offending tenant.

Whilst there can be little doubt that the Act was intended to address a real problem (the Audit Commission calculating in 2012 that around 98,000 homes were unlawfully occupied) it is not yet clear to what extent the Act will prove either a deterrent or a useful weapon to local authorities and housing providers to tackle this problem, prevent unlawful profiteering and free up housing stock for those genuinely in need of it.

Certainly, at least in our region, local authorities and housing associations appear to have embraced the new legislation as an opportunity to review their current awareness of their exposure to potential housing fraud, and in some instances have actively begun collaborating in organisations such as the Yorkshire & Humber Tenancy Fraud Forum which encourages the sharing of good practice and knowhow between authorities, providers and "external" contributors such as ourselves and the Chartered Institute of Housing. However, local authorities (and the providers) are all feeling the squeeze of tightened budgets and running investigations and prosecutions can be a costly exercise.

We understand that some potential prosecutions under the Act are now being put in train and so we might hope that within the next 6 months we may see some case law reported that will give greater guidance and some concrete examples of how the Act is going to be applied.

In the meantime, we would encourage social housing providers to continue to review housing stock with a view to identifying possible exposure to fraudulent subletting or tenants not in occupation, and where civil proceedings are brought, to consider also applying for an unlawful profits order to seek to recover from the tenant some of the money they will have made from abusing the provider's asset in this way. At the same time, consider entering into an appropriately drafted data-sharing agreement with the local authority to maximise the possibility of successful collaborative enforcement action in the future, and do report any identified or suspected instances of unlawful subletting or parting with occupation to your local authority, who may be willing to take action under their new powers.

Andrew Digwood

Also in this issue

"May you live in interesting times"

It may be an urban myth that the above heading is an ancient Chinese curse, but, curse or not, Housing Associations are now facing a number of challenges.

We are constantly hearing positive things about the economy, about growth and headlines have appeared "*Associations will House 1 in 5 by 2003*" (NHF) and "*Development to Increase by 55%*" (Savills).

The affordable homes programme round 2 for 2015/2018 has been revealed and it certainly is a new era for house building. There have been some alarmist comments, but the considered response is that it is probably what most landlords were looking for, meeting locals needs and priorities, addressing demographic challenges and ensuring value for money etc.

The three year programme from 2015 allows more scope for planning and allocates 1.7 billion for Landlords outside London. The new scheme will avoid the "dash for cash" that characterised round one and receiving 50% of grant at start on site and the remainder at completion reflects a better level of risk sharing and is certainly going to be better for cash flow. As usual, it is far from perfect, but it is not the horror that some alarmists would have had us believe.

There is also the positive suggestion that the Right to Contest Scheme will result in more public land coming forward for re-development more quickly and at the right price. This is a scheme whereby developers or social landlords can submit a challenge to the Government to release any central government land or buildings in England and re-development even if they are currently in use. Prior to January these challenges were only possible if the site was not in use. There are promises that there will be a website with a detailed list of identified sites which will be a major step forward. However, quite how it will pan out in practice is yet to be determined. The meaning of "vital for operational use" or other "overriding reasons" has yet to be clarified and, if there is no full transparency, opportunity for governmental fudge is obvious.

To set against the optimistic headlines we have others such as "*we are running out of bricks*" (Daily Telegraph 30 April 2014). It appears that brick manufacturers have de-commissioned kiln capacity and have not yet taken it out of mothballs to meet the sudden upsurge in demand for bricks. It would be a shame if something as simple as a lack of bricks contributed to a significant shortfall in the delivery of new homes in the short term.

The changes to accountancy rules which have been mooted could result in Associations having to re-value significantly downwards items on their balance sheet. Again this has yet to be fully sorted out and may not be the issue that the alarmists would have us believe.

Again, the shake up of government bonus scheme incentivising house building has met with dismay in the north east as the new homes bonus adjustments are alleged to be costing 12 councils in that area approximately 13 million pounds. The amount that they will lose per dwelling and potential formula funding is more than they will receive in the new homes bonus per building. Not all Councils are adversely affected and this is yet another indication that not everything in the garden is rosy.

The universal credit scheme will, when finally and fully implemented, provide a significant challenge for Housing Management. Most Associations are implementing strategies to minimise the damage, but most are agreed that there is bound to be an increase in arrears which should be manageable with pro-active management of the tenants and their bank accounts!

However, other changes are destined to worsen the impact of arrears on Associations. The proposal that the housing element of universal credit could be cut for some claimants is bound to have a detrimental impact if the Department of Work and Pensions do not accept changes to the hard line proposal that part-time workers judged to be doing too little to find full time work can have their benefit for housing costs sanctioned. Previously such sanctions only applied to out of work benefits such as jobseekers allowance or employment support allowance. A tenant working less than 35 hours a week at minimum wage would not be eligible for JSA or ESA, so such a sanction would apply to the housing element.

Recent changes to the County Court fee structure (and indeed to the structure of the County Court system itself) have, effectively, lumped together possession and arrears proceedings with other types of Court proceedings with the net result that the fees for arrears/possession proceedings have increased by over 150%. There is no suggestion that there will be a concomitant improvement in speed or any other aspect of the service provided. It is simply another overhead to be faced by the Associations.

It is clear that there are certainly significant challenges facing Associations but there are also significant opportunities. The contribution of the Housing Association movement to the provision of housing in this Country will continue to be vital. Well run Associations who have managed their assets prudently in the past will be in a good position to accept those challenges.

Douglas Oliver

Charitable providers

Payments to board members and staying on the right side of the law

Social housing providers with charitable status are required to comply with charity law in terms of making payments to their Board members.

Board members of charitable providers are charity trustees at law and charity law does not allow charity trustees to receive unauthorised personal benefits from the charity. Charity trustees who receive unauthorised benefits commit a breach of trust and may, in some circumstances be held accountable to pay back to the charity any unauthorised benefits received.

Here we explain the general legal principles charitable providers should be aware of before making payments to any of their Board members to stay on the right side of the law. The law is different depending upon the type of payment the charitable provider is proposing to make:

Expenses
The law entitles charity trustees to claim legitimate expenses while engaged on trustee business. The principle is that no trustee should be out of pocket and therefore charitable providers can pay their trustees reasonable expenses.

Expenses are refunds of legitimate payments which a trustee has had to make personally in order to carry out his or her trustee duties. Expenses' claims, as good practice, should be supported by receipts and bills where possible. Examples of expenses include travelling costs to and from trustee meetings. This could include the cost of using public transport or petrol allowance. Reasonable costs of postage, telephone calls, costs of meals whilst on charity business are also classed as legitimate expenses.

It is advisable that the charitable provider has an Expenses Policy to make it clear what is recoverable as an legitimate expense and what is not, and it is also advisable that this received by all of the trustees and that all trustees are asked to sign a declaration that they have read and understood it.

Provision of Services
The Charities Act 2011 gives charitable providers power to pay trustees for providing services to the charity which includes goods supplied in connection with a particular service. This statutory power allows charity trustees or persons connected with them (including family members or businesses) to receive payment for the provision of goods or services to the charity provided certain conditions are fulfilled:

Examples of services that may be provided by a trustee in return for payment under the power in the Charities Act include the delivery of a lecture, the use of a trustee's firm for a building job, a piece of research work, occasional use of the trustee's premises or facilities, providing specialist services such as estate agents, land agents, consultancy work.

If the charitable provider already has a power to pay its trustees for services, then the statutory power is additional to any other form of authority for the payment of services. Where a power in the charitable provider's governing document is more restrictive than the statutory power, then the charitable provider can rely on the statutory power provided there is no prohibition against payment for services. If the governing document contains a prohibition which restricts the statutory power then this must be addressed before using the statutory power. Professional advice should be obtained.

Before a payment can be made validly using the statutory power, there are conditions to meet including the requirement to have a written agreement between the charitable provider and the trustee or connected person who is to be paid. This agreement should set out the exact or maximum amount to be paid. At no time can a majority of the Board members be paid for the supply of services to the charity using the statutory powers. The trustee who it is proposed will receive the payment may not take part in the decision making process and the un-conflicted trustees must be satisfied that the payment of that Board member for that amount and for supplying that service is in the best interests of the charity.

In deciding whether to remunerate, charitable providers are also advised to have regard to the Charity Commission's guidance, which can be found on its website.

The Homes and Communities Agency's regulatory framework which sets standards for Social Housing Providers should also be considered. The HCA requires that providers have effective governance arrangements that deliver their aims, objectives and intended outcomes for tenants and potential tenants in an effective transparent and accountable manner. Governance arrangements must therefore ensure that providers adhere to all the relevant legislation, comply with their governing documents and all regulatory requirements, are accountable to tenants, the regulator and relevant stakeholders. Charitable providers must therefore ensure that any payments made to Board members are lawful.

Paying trustees for acting as trustees
The statutory power to pay trustees for the provision of services (as above) cannot be used for paying Board members of charitable providers simply for acting as charity trustees or pursuant to a contract of employment with the charity. Charitable providers cannot do this without requisite authority in the charity's governing document and it is common for their governing documents to contain a specific prohibition against this. Charitable providers should therefore seek professional advice and liaise with the Charity Commission and the HCA before paying any of their Board members simply for acting as Board members or pursuant to contracts of employment with the charity.

Gerry Morrison & Sarah Greendale

Rent arrears claims: Doing the right thing

In these times of austerity, many within society have struggled to make ends meet. It is, therefore, unsurprising that there has been an increase in the number of tenants who have fallen into rent arrears with Landlords faced with the difficult task of recovering possession of the property.

Unlike private landlords, social housing landlords, who are already subject to wide ranging regulations and guidance are required to adhere to the Pre-Action Protocol for Possession Claims based on Rent Arrears ("the Possession Protocol"). The purpose of this article is to provide a brief recap on the Protocol so as to help Social Housing Landlords avoid inadvertently falling foul of the Protocol.

The Possession Protocol applies to residential possession claims brought solely on the basis of rent arrears by social landlords such as Registered Social Landlords and Housing Action Trusts and also private registered providers of social housing.

The aim of the Possession Protocol is to encourage pre-action contact between Landlords and Tenants and enable Court time to be used more effectively. The Protocol sets out the steps that parties should take when rent payments are missed and rent arrears begun to accrue.

Compliance with the Protocol is straightforward with the steps to be taken reflecting the steps that most Social Housing Landlords would ordinarily take when faced with a tenant who has defaulted in their rent payment obligations. The Possession Protocol states that Landlords should:

- contact the defaulting tenant at the earliest opportunity to discuss the cause of the non-payment of rent and seek to establish whether the tenant is entitled to any benefits that would help with the rent
- provide the tenant with rent statements showing all rents due, details of when payments fell due and how much, and a running total of the arrears
- try and agree an affordable repayment plan with the tenant
- assist the tenant in any claim for housing benefit
- advise the tenant to seek legal and financial assistance from external agencies

If a Landlord considers it necessary to issue notice upon a defaulting Tenant of the Landlord's intention to issue proceedings, before proceedings are issued, the Landlord should take further steps to try and reach an agreement with the Tenant which provides for the payment of rent and arrears before a possession claim is issued.

If the Tenant complies with such an agreement, the Landlord must postpone the issue of court proceedings. If the Tenant thereafter fails to adhere to the agreement, the Landlord should not rush to Court, rather the Tenant should be provided with a further opportunity to comply with the agreement.

If proceedings are issued, the Tenant can still avoid a possession hearing taking place by entering into an agreement to pay the rent and a reasonable sum towards the arrears. In such circumstances, the Landlord should agree to postpone court proceedings. If the Tenant fails to adhere to this agreement, the Possession Protocol dictates that the Landlord should give the Tenant the opportunity to remedy its breach, rather than simply applying to reinstate the proceedings.

If a Landlord does not follow the Protocol, the Court may impose sanctions, specifically an order for costs against the Landlord and/or in cases where possession is not sought solely on one of the mandatory grounds set out in Schedule 2 Housing Act 1988, the Court may adjourn strike out or dismiss the claim. Many Landlords subject to the Possession Protocol will already have procedures in place which, whether deliberately or by coincidence, satisfy the requirements of the Possession Protocol, thereby avoiding these sanctions. Nonetheless, it is worthwhile reviewing internal procedures concerning repossession claims and ensuring all relevant personnel are familiar with the Possession Protocol to ensure compliance.

Chris Drinkall

And finally…

Tom Morrison, Partner and member of Rollits' Social Housing Team, was previously published in the New Law Journal discussing data protection and freedom of information compliance issues in the context of the Social Housing sector.

Tom's article can be found at **rollits.com/newlawjournal0313**

Information

If you have any queries on any issues raised in this newsletter, or any social housing matters in general please contact Douglas Oliver on 01904 688537 or email douglas.oliver@rollits.com.

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice. We hope you have found this newsletter useful.

If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

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Hull Office
Wilberforce Court, High Street,
Hull HU1 1YJ
Tel +44 (0)1482 323239

York Office
Rowntree Wharf, Navigation Road,
York YO1 9WE
Tel +44 (0)1904 625790

www.rollits.com