



Resolving housing issues

the latest news and advice on social housing

WHAT WE DO

Marsons is well respected in housing management litigation, social housing property and development services. The team is listed in respected client guides such as Legal 500 and Chambers directories as social housing lawyers of note in London and the South East.

We handle all aspects of housing litigation and property for the social housing sector.

We add value to our services – our client benefit from free daily telephone advice, free surgeries at client's offices, free legal updates and training in housing law for housing officers and managers, housing support workers and other ancillary staff. We hold regular seminars and training courses open to all in the social landlord sector.

In this Issue

We highlight some of the recent developments that have an impact on possession proceedings – issues which affect all our readers and remind you about the importance of Gas Servicing.

Mandatory Possession Claims and Public Law Defences

In the Summer 2009 edition of our newsletter, we highlighted the increasing use of public law defences, i.e. issues based on Article 8 of the European Convention on Human Rights (given effect in domestic law by the Human Rights Act 1998) and on traditional judicial review grounds.



Since the end of 2010, UK Supreme Court decisions in *Manchester City Council -v- Pinnock*, *Hounslow LBC -v- Powell*, *Leeds City Council -v- Hall* and *Birmingham City Council -v- Frisby*, have finally cemented the use of public law defences in claims for possession brought under the 'mandatory grounds' where previously, the Court would have to make an order for possession unless there were technical defects in the claim.

A Landlord may obtain possession on mandatory grounds where:-

- The tenant is not in occupation of the property; and/or there is unauthorised occupation/sub-letting
- Where a tenancy or licence is excluded from the provisions of the Protection from Eviction Act 1977
- A Section 21 Housing Act 1988 Notice has been served in respect of an assured shorthold tenancy or demoted assured shorthold tenancy
- The Landlord relies on Ground 8 to Schedule 2, Housing Act 1988 for rent arrears
- A local authority landlord serves a

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Social Housing Update: Impact of Public Law Defences and Equality Act 2010 on Possession Claims – details at page 7

Mandatory Possession Claims and Public Law Defences

notice under section 128 Housing Act 1996 requiring possession

- Notice to quit served by one tenant on a landlord to terminate a joint tenancy at common law

In other words standard possession proceedings taken by every social housing landlord, where the tenant has with the exception of a Public Law Defence as detailed below, no defence to the proceedings.

The effect of the Court of Appeal decision in *London & Quadrant Housing Trust -v- Weaver*, is that public law defences are applicable to private registered providers of social housing (formerly RSLs) and Housing Associations in possession claims brought under mandatory grounds.

Summary of the Supreme Court judgments in *Pinnock*, *Powell Hall* and *Frisby* is as follows:-

- Possession claims based on mandatory grounds can be challenged on human rights grounds using the Human Rights Act, and on judicial review grounds as we have already seen in ordinary possession proceedings. Courts must consider whether it is “proportionate” to make an order for possession of ‘the home’ of an occupant of premises.
- The County Court has to consider the issue of “proportionality” only if it is raised by the occupant/defendant.
- The Court need only consider the issue if it meets a very high threshold of being “seriously arguable”.
- If all of the above criteria are met, the County Court must first consider whether or not the defence is arguable and only then whether it might succeed otherwise the Court must dismiss the defence.

The guidance concludes that the threshold for raising an ‘arguable case’ on proportionality grounds

is a high one which would only succeed in a small proportion of cases; and that in the overwhelming majority of cases, the landlord (local authority or private registered provider of social housing) would not need to explain or justify the reasons for seeking a possession order.

Marsonstips

- Tighten your housing management policy and procedures to give you a reasonable chance of “seeing off” a seriously arguable public law defence. We can help you with this so please ask one of our team if you have any queries about what you need to do.
- Keep records and notes of all action taken, meetings attended, telephone calls made and received and meetings with tenants. They will be useful evidence in seeing off defences both on public law and judicial review grounds.

Unauthorised Occupation/Sub-letting

Unauthorised occupation and sub-letting continue to be of great concern not only to landlords, but also to central Government to the extent that the previous Government considered making unauthorised sub-letting a criminal offence.

The Government has allocated funds to social landlords in order to tackle this problem. It is hoped that the thousands of properties believed to be illegally occupied within the social rented sector can be recovered and freed up and offered to eligible applicants.

We at Marsons have successfully assisted our clients to recover a substantial number of properties that have been sub-let or occupied without the landlord’s permission. We can help you to deal with these problems.

Legal Basis for Seeking Possession

Secure Tenant

Under the Housing Act 1985 S.93(2) – the secure tenant loses his security

of tenure forever if he no longer occupies as his only or principal home.

In principle, it is easier to recover possession from a secure tenant who has parted with possession and has sub-let the whole of the premises due to the irretrievable loss of security of tenure under S.93(2) Housing Act 1985.

Generally however, when convincing evidence has been gathered, and the offending tenant finds that the net is closing in on them, our experience is

Unauthorised Occupation/Sub-letting contd.

many return the keys to the property, before possession proceedings are commenced. Some will still defend the possession claim, although many of them fail to turn up at the initial hearing.

Credible evidence from thorough investigations before commencing possession proceedings, often leads to an outright order for possession being granted at the initial hearing. This inevitably brings about a considerable saving in costs.

Assured Tenant

An assured tenants under the Housing Act 1988 can regain their security by moving back in to occupy as their only or principal home.

Once you have confirmed your suspicions, we can seek possession for you but the rules are different depending on the type of tenancy.

The tenancy remains secure or assured only if, and so long as, the tenant occupies the premises as their only or principal home. If the security of tenure condition is breached by the tenant subletting or moving out, serve Notice to Quit – when this expires, the tenancy is terminated.

Goodhousekeeping Procedures

If you suspect illegal occupation or subletting, how can you confirm your suspicions and gather sufficient evidence to be successful at Court?

- Visit the premises as soon as you receive the first complaint or have reason for suspicion
- Use staff who know the tenants to carry out tenancy audits or stock condition surveys. Early morning or late evening visits are more likely to be effective than random visits during the daytime. Overtime/out of hours payments will be money well spent.
- When you visit the premises, ask the occupant for a copy of the Tenancy Agreement. Get them to sign something so you can compare their signatures with the tenant's signature on your Counterpart Tenancy Agreement.
- Ask the occupant to give details of any members of the tenant's family who moved

into the premises with the tenant at the start of the tenancy (if relevant).

- Ask the occupant to confirm other information on the tenant's application form, e.g. previous address, name and address of next-of-kin; and similar questions. An unauthorised occupant is unlikely to be able to answer such questions easily.
- Speak to neighbours and ask whether the current occupant is the original tenant and, if not, when the tenant was last seen.
- Ask for any sub-tenancy agreements from the occupants (if available), or any other evidence of rent payment in the absence of a written agreement.
- Obtain current voters register entries from the local authority.
- Use a reputable credit check agency or agencies to obtain information. Process servers and other private investigators may also be able to provide assistance.

A word of caution

As a claim for possession for subletting or non occupation brought in reliance on a Notice to Quit is a mandatory claim, a public law defence should always be anticipated as it is the only way to defeat the claim. However, such a defence will only succeed in exceptional circumstances.

To be safe and as a belt and braces approach, it is best to serve a notice to quit **and** a notice seeking possession based on breach of the conditions of the tenancy to give the landlord the best chance of success in the Possession Claim.

Housing Association Mergers -The effect on Secure Tenancies

We recently concluded a case which raised questions about the status of secure tenancies, when two or more housing associations merge.

The tenant had initially occupied the property under a joint secure tenancy agreement, with her former partner, commencing in October 1987. When that relationship ended, the tenant's former partner assigned his interest in the property to the tenant by executing a deed of assignment. Consequently, the tenant became the sole secure tenant of the property.

As the sole tenancy was created by way of an assignment, the tenant was considered to be a successor under section 88(d)(i) of the Housing Act 1985, which provides that there can only be one succession to a secure tenancy.

The tenant died in November 2007, leaving her new partner in occupation of the property. The couple were living together immediately prior to the tenant's death.

Following the tenant's death, her new partner sought to succeed to her tenancy. He was advised that he was not eligible to succeed to the tenancy as there had already been one succession and no further successions to the tenancy were permitted.

Possession proceedings were issued against the partner who vigorously defended them. **At one hearing, a duty solicitor acting on behalf of the partner, claimed that the tenancy was not a secure but an assured tenancy.**

The duty solicitor noted that the landlord who had originally granted the



secure tenancy had merged with another housing association in 2006. He argued that the effect of the merger was to turn the secure tenancy into an assured tenancy. This was because, since the Housing Act 1988 came into force, housing associations have been prohibited from granting secure tenancies. Consequently, as the tenancy was now an assured tenancy, a further right of succession was created upon the merger in 2006. This meant that the partner satisfied the criteria for succession under Section 17 of the Housing Act 1988, as he had lived with the tenant during the 12 months leading up to her death.

After hearing this argument the judge adjourned the proceedings and granted permission for the partner to amend his defence, so as to fully explain his right to succession.

Our client had a number of secure tenancies in existence prior to the merger in 2006 and therefore needed clarification of their status. If those tenancies were indeed assured tenancies, this could have had far reach-

ing consequences for the tenants in terms of the rent payable and diminished statutory framework rights, including the right to buy and the right to succession.

We argued that any secure tenancies in existence before the merger remained secure pursuant to paragraph 4(a) to Schedule 18 of the Housing Act 1988. Any secure tenancies created by housing associations before the Housing Act 1988 came into force remained secure even though housing associations were no longer able to create secure tenancies after that. **The tenant's partner's defence was dismissed and our client was granted an outright possession order.**

Conclusion

Any secure tenancies created by housing associations before the coming into force of the Housing Act 1988, will not be affected by any merger or amalgamation.

Marsons Solicitors



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- Advice ■ Possession proceedings ■ Anti-social behaviour remedies
- Access injunctions ■ Leasehold disputes ■ Tenancy documentation
- Regeneration and development ■ Acquisitions and disposals



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X and Y -v- Hounslow LBC [2009] - Social Landlords do not owe a duty of care to their Tenants.

The above case was first reported in 2008. The facts are as follows:-

X and Y were a married couple and occupied a Council flat with their two young daughters.

X and Y were vulnerable adults with learning difficulties. Their eldest daughter was also vulnerable and had learning difficulties.

The couple, and in particular X, befriended a group of local youths. The youths later took advantage of the couple and used their property as a place to live, take illicit drugs and store stolen goods.

One weekend, X and Y were subjected to a sustained and violent assault by the youths. This involved X and Y being imprisoned in their home, where they were physically and sexually abused.

Prior to the weekend of violence, X and Y's Social Worker wrote to the Council's Housing Department, expressing concerns about the couple and their two daughters. She expressed concerns about the family's safety as a result of the youths exploitation of them and recommended that the couple be moved out of the immediate area. However, the Council failed to act upon these concerns. Following the assault, X and Y brought an action against the Council

for negligence and breach of duty of care. The action was brought on the grounds that the Council had had a duty to re-house the couple as the assault upon them, was reasonably foreseeable but failed to do so.

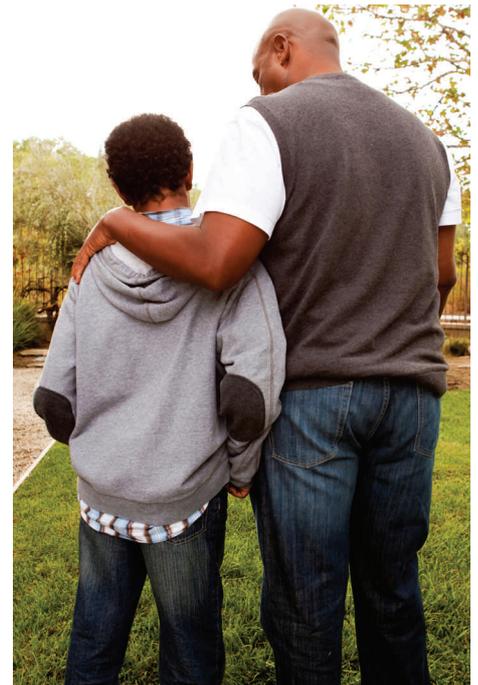
X and Y were initially successful in the High Court which found that the Council had a duty of care to X and Y to re-house them and that the abuse they suffered was reasonably foreseeable. The Council successfully appealed to the Court of Appeal.

The Court of Appeal concluded that the Council had no duty of care to re-house X and Y. In providing X and Y with housing and with a Social Worker, the Council was merely carrying out a statutory function. **The Court of Appeal said that no common-law duty of care could be attached to that statutory function as the Council had not assumed responsibility for the couple's safety. In addition, although the assault upon the couple was reasonably foreseeable, this was not sufficient to attach a duty of care upon the Council.**

The Current Situation

X and Y have now made an Application to the European Court of Human Rights. The Application remains pending, while the Home Secretary is

given the opportunity to consider settling the case, or defending the Application in the European Court. If X and Y succeed in the European Court, this could have wide ramifications for Social Landlords. This could lead to guidance being given to Social Landlords as to the priority they should give to ASB cases where there is a clear risk posed by a third party to an individual's personal safety and the Landlord is aware of that risk. This could eventually lead to a change in the law, requiring Social Landlords to warn individuals where the landlord is aware of any threats posed to someone's personal safety.



Legalsurgeries

ANOTHER WAY OF HELPING YOU "RESOLVE HOUSING ISSUES"

We come to your offices and give on the spot advice and assistance. The service is currently being offered free of charge.

Contact our administrator, Lynn O'Conor, for details:
lynn.oconor@marsons.co.uk

Gas Servicing

The Gas Safety (Installations and Use) Regulations 1998 require a landlord to arrange gas safety checks of all pipe work, appliances and flues which the landlord owns and provides for the tenant's use. These checks must be carried out every 12 months by a Gas Safe registered engineer.

Under the provisions of the GS(I&U)R 1998, if the landlord fails to carry out these checks, it could be liable for any loss or injury caused as a result of faulty gas installations. In addition, a landlord may be prosecuted and if convicted liable to a fine of up to £15,000 and/or imprisonment. If a person dies as a result of a Gas Safety Check not being carried out a landlord could be prosecuted under the Corporate Manslaughter and Corporate Homicide Act 2007.

[The Corporate Manslaughter and Corporate Homicide Act 2007](#)

The Act came into force on 6th April 2008.

Section 1(1) of the Act reads as follows:-

1. The Offence

- (1) *"An organisation to which this Section applies is guilty of an offence in the way in which its activities are managed or organised -*
- (a) causing a persons death*
 - (b) amounts to a gross breach of the relevant duty of care owed by the organisation to the deceased"*

Charities and limited corporations - including those limited by guarantee can be prosecuted under the Act. This includes housing associations and private registered providers of social housing (PRPSH). If convicted of an offence under Section 1, the Court may impose an unlimited fine.

Section 1(3) of the Act provides that:-

- "1.(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in sub-section (1)".*

To guard against breaching Section 1 of the CMCHA 2007, PRPSH and Housing Associations must diarise annual gas safety checks and make regular follow-ups where a tenant fails to allow access for these checks to be carried out. Court proceedings should be commenced against any tenant who persistently fails to allow unreasonable delays in allowing access/

Any attempts to gain access to properties should be clearly documented as well as any letters or telephone calls made to the tenant. Any contact with the tenant should warn them of the possible consequences of failing to provide access for gas safety checks.

In our experience the majority of our letters before action threatening an injunction result in access being given. In the very few cases where an injunction is needed, it provides an effective remedy and ensures the safety of the offending tenant and those living around him. We can do this for you for a fixed fee.

Free Seminar

Social Housing Update: Impact of Public Law Defences and Equality Act 2010 on Possession Claims

12th July 2011

9am to 2pm

Hardwicke Chambers, Hardwicke Building, New Square, Lincolns Inn, London, WC2A 3SB

Lunch included

Open to all in the social housing sector

Contact Kelly McCallum at Kelly.mccallum@marsons.co.uk or Lynn O'Connor at lynn.oconor@marsons.co.uk to reserve your place.

Meet the Team

Steven Adabadze

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Steven qualified as a Solicitor in April 2004 and joined Marsons May 2004. Prior to qualification Steven worked for some 12 years 'on the front line' of housing; serving as a Development Officer, Housing Officer, Estate Manager and Deputy Area Manager for Local Authorities, RSLs and a Housing Charity. This has given him a unique insight into the practicalities and pressures faced by our clients on a day to day basis and the ability to offer wholly pragmatic solutions to those issues.

He has an excellent record of successfully prosecuting nuisance and ASB cases to Trial and defending Claims of breach of contract and negligence. Steven is also a skilful negotiator and recently negotiated settlement of an ASB Possession Claim resulting in an Outright Possession Order being made at a 45 minute hearing instead of a 3 day Trial.

Steven conducts training on behalf of Marsons in Essential Housing Law and Anti-Social Behaviour Law and intends to extend the Training to cover Housing Disrepair and Workshops for Housing Officers/Managers in preparing basic Particulars of Claim and Witness Statements.

Steven has comprehensive experience of all areas of housing litigation and has a particular interest in disrepair (where he is the firm's 'go to' man), unauthorised subletting and public law defences. Steven is a member of the Social Housing Law

Claire Pennycard

Paralegal

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Claire has been employed by Marsons since 1997 and has specialised in social housing litigation since 1999. Claire has handled literally thousands of rent arrears proceedings, claims under s. 21 Housing Act 1988 and gas safety injunctions. Additionally she undertakes trespasser proceedings, debt recovery work and regularly advises clients regarding enforcement procedures. Claire also has experience as County Court advocate.

Bernadette Reid

Solicitor

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Bernadette is a senior solicitor and she has specialised in housing for ten years and has worked in house as well as in private practice.

Much of Bernadette's experience has been gained in litigation, in particular ASB possessions, demotions, injunctions and ASBOs. She also advises on general housing management issues, including family intervention, tenancies, debt proceedings, the granting of tenancies and licences to minors and succession rights. Following her experience working in local authority, she is able to advise on homelessness appeals in the County Court and judicial review applications.

Bernadette is a keen advocate and is known for her ability to form good relationships with clients. She currently holds the post of Treasurer for the Midlands Committee of the Social Housing Law Association.

Greg Bush

Partner and Head of Property

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Greg has 23 years experience in law. He has specialised in property law and conveyancing and has practiced law in both England and South Africa. He is dual qualified and admitted in both jurisdictions.

Greg adopts a robust commercial approach to property matters and his relationship with clients results in effective communication with clear instructions and understanding as to client expectations. Our clients appreciate the cost effective service delivered on time and in a user friendly manner by Greg. Greg conducts all legal work involved in the acquisition and development of land. The property team provides conveyancing services for Right to Buy, Shared Ownership and Key Worker schemes as well as other types of buyer initiatives to diverse organisations within the social housing sector.