

Possession Action Against Former Tenants

It has long been held under the Common Law of England and Wales that a Joint Tenancy Ends when one of the Joint Tenants gives notice to quit. This puts any former Tenant remaining in occupation in a precarious position as an action for Possession can be issued by the Landlord who is entitled, again at common law to a Mandatory Order.

Attempts by aggrieved former Joint Tenants to challenge this legal principle have in the past been unsuccessful. The advice we and others have given is that Housing Staff should request or encourage the tenant to serve a Notice to Quit in the legitimate expectation that once a Notice has expired they will be entitled to Possession. This has been particularly useful where for example an abuser has remained in occupation of family accommodation.

There are, of course, grounds for Possession in cases of domestic violence (Ground 2A [Secure Tenancies] and Ground 14A [Assured Tenancies]). However, these grounds are difficult to use particularly as they rely upon the willingness of the victim to give evidence in Court to obtain the necessary Possession Order. Also as the granting of a Order is in the discretion of the Court we have rarely recommended its use.

It now looks as though the advice we have given in the past will need to be revised in the light of a European Court of Human Rights (ECHR) Decision made on the 13th May 2008, in the case of *McCann v the United Kingdom*. The case concerned Birmingham City Council who, having received a Notice to Quit from one of two Joint Tenants, then issued Possession proceedings against the former Joint Tenant in the County Court. Although the Authority were successful on Appeal and a Judicial Review was dismissed, the matter was referred to the European Court of Human Rights.

In brief, the decision that has just been issued by the ECHR means:

- 1) Article 8 (The Right to Respect for the Home) applies notwithstanding that under domestic law the ex-tenant has no right to continue in occupation.
- 2) The Notice to Quit and issuing of Possession proceedings interfered with the right to respect for the home.
- 3) The interference had a legitimate basis in that it aimed to protect the rights of the Local Authority to regain Possession.
- 4) The question remained however, as to whether the interference was proportionate i.e. could it be justified.
- 5) The Local Authority used a summary procedure which, in effect, denied the ex-tenant any opportunity for the proportionality of the Possession action being determined by an independent tribunal. This was held to be a breach of article 8.

This case is going to impact on Local Authority Landlords at this point rather than Registered Social Landlords. The latter have not (yet) been classified by the Courts as Public Authorities and should therefore for now escape the provisions of the Human Rights Act.

For Local Authority Landlords, in addition to the option of Judicial Review, it is now going to be open to an aggrieved ex-tenant to defend a Claim for Possession on the basis that the action is unjustified in the particular circumstances of his/her case.

It seems that the Court is going to have to consider some fairly wide ranging issues where proportionality is raised. These could well include: the "fault" of the ex-tenant, the background to their domestic relationship, the need for accommodation to support contact arrangements and of course the Court

may want to receive evidence in relation to residency issues. It appears to me that this is another way of introducing the “reasonableness test” with which we are familiar in standard Possession cases.

It was said in the European Court that such challenges would be exceptional however I believe otherwise. If they become routine they will clearly absorb time and resources which hard pressed Authorities may struggle to meet.

Peter Whitehead
Managing Director

