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Know the rules and play the game

Procurement, Data Protection and the Companies Act 2006 can all cause problems for Housing Associations. Awareness of the rules of each area can enable you to avoid being penalised and may even open up opportunities.

Public sector procurement decisions, including those within the housing sector, are continually being reviewed and challenged under the Public Contracts Regulations 2006. These new regulations see a distinct change in the procurement regime from the former 1990s regulations. Recent high profile cases have highlighted the importance of getting the procurement process right. Planning from beginning to end is vital to avoid being in breach of the Regulations and to get the best outcomes.

Some contracting bodies have tried to abuse what they perceive as potential loopholes in the 2006 Regulations. This is a high risk strategy as contracts which appear to be trying to avoid the Regulations can and will be challenged through the Courts. Properly managed and understood, procurement under the 2006 Regulations provides an opportunity for a contracting body to get what it wants, and set out clear terms for dealing with private sector providers to prevent unplanned renegotiations and extensions.

Data Protection has been making the headlines recently. The Information Commissioner has proved that he will enforce breaches of the Data Protection Act 1998. Data protection applies to everything from data held on computers to paper records including dealing with employees, tenants and the public in general. It is vital that a system of management of such data is in place as the potential penalties for any Housing Association that breaches any of the duties under the Act can be serious including damages claims. Housing Associations can hold, use and even share personal information if they do it properly. With the regulator on the look-out for infringers, it makes legal and financial sense to make sure that any data held are being managed effectively and within the scope of the Act.

The Companies Act 2006 is entering its final stage of implementation which is due on 1 October 2009. The process of replacing the 1985 Act and other legislation began in 2007. Whilst some major changes for directors, secretaries and members of all companies have been in effect since 2007 and 2008, the 2009 changes will radically alter how new companies are formed and how all companies deal with their constitutions. Companies House itself is undergoing major changes, with new powers for the Registrar and changes to the names and designs of the forms with which company officers will currently be familiar. Company officers need to be aware of their responsibilities and ensure that the company is being governed in accordance with the new Companies Act regime. Using the new rules can make company governance quicker and easier but there are new checks and balances in the 2006 Act and awareness of these is vital.

Forbes is holding an informative seminar on Procurement, Data Protection and the Companies Act at the Bridgewater Hall Manchester on 24 September 2009 including contributions from the Information Commissioner's Office and procurement advisors.

If you would like to register your interest to receive further details nearer the time please contact Helen Gorrell on 01254 222394 or email helen.gorrell@forbessolicitors.co.uk

Promotions in the housing team

Congratulations to Stuart Penswick and Elizabeth Bower who have both been promoted to Partners of the firm.

Stuart heads up the Housing Litigation Team, which acts for a number of Housing Associations and Local Authorities on contentious legal matters.

Elizabeth works as part of the Defendant Insurer Team and handles a wide variety of employers' liability and public liability claims with a particular specialism in housing matters.

John Barker, the firm's Managing Partner comments,

"Our specialist housing team is growing from strength to strength and these promotions are a refection of the firm's commitment to the sector and the expertise both Stuart and Liz have developed. We now act for over 55 housing associations and have the strength and depth to offer expert advice on all areas of housing law."

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Judicial Review available in Manchester Court

Before 21 April 2009 any proceedings for Judicial Review brought in the Administrative Court would have to be commenced and heard in London. From that date it became possible to issue such proceedings out of four regional centres in Manchester, Leeds, Cardiff and Birmingham. This represents a vote of confidence in the quality of justice outside the capital delivered by solicitors, the bar and the judiciary. it is also likely to make the logistics of hearings much easier for litigations outside London and may well speed up the time between issue of a claim and the hearing.

The Court is there to hear challenges to the decisions of public bodies, which includes central government departments, local authorities, schools, and NHS trusts in relation to their public functions.

As far as Judicial Review is concerned all eyes in social housing are on the eagerly anticipated judgment of the Court of Appeal in *R (Weaver) v London & Quadrant Housing Trust.*

The decision at the centre of the storm was LQHT's decision to use the mandatory Ground 8 (rent arrears) to secure a possession order against its tenant. The tenant argued that she was owed a legitimate expectation that this would not happen and the decision to use this method of eviction should therefore be quashed and all subsequent actions in reliance on that decision declared null and void.

The High Court ruled that social landlords, including privately incorporated and charitable RSLs, can be and often will be "public authorities" within the meaning of s6(3)(b) of the Human Rights Act 1998 and therefore amenable to conventional judicial review. This obviously has far-reaching implications in terms of RSLs ensuring firstly that they have policies and procedures which are not only sufficient for statutory bodies such as the TSA/HCA, but also that they will stand up to scrutiny by High Court Judges! Also, they should be actually sticking to the policies and procedures that they have. There are also implications for social landlords' abilities to obtain covert evidence for use in court proceedings, and there are potential cost implications for what should be fairly ordinary proceedings such as Accelerated Possession and eviction of unlawful occupiers.

At first instance the tenant lost on the basis that although Judicial Review proceedings were available, on the facts there was no legitimate expectation.

The landlord appealed against the finding that it (and other social landlords) are amenable to Judicial Review. The appeal was heard in February 2009 but we are still waiting for the judgment to be handed down.

In the meantime, Circle 33 Housing Trust is facing Judicial Review proceedings from a number of its tenants about a closure of warden controlled housing. That claim has been stayed pending the outcome of the LQHT appeal, but the tenants' solicitor has vowed to fight on even if LQHT are successful.

Judicial review proceedings being heard in the region with which the Claimant has closest connection may result in greater local publicity for hearings, as the local press and public will find it easier to attend and follow the proceedings. It has been suggested that local access might actually lead to an increase in the number of claims being brought. That remains to be seen. The outcome of the above cases might lead to a number of claims being brought against housing associations and Forbes are here to assist with any such issues that may arise.

For further information or advice please contact Robin Stephens on 01254 222366 or email robin.stephens@forbessolicitors.co.uk

Stop press

Abolition of Tolerated Trespassers

As of the 20 May 2009 Tolerated Trespassers will no longer exist. The troubled concept was given the final push when Schedule 11 of the Housing and Regeneration Act 2008 was implemented.

So long as certain conditions are met all pre-existing Tolerated Trespassers will become new tenants on broadly the same terms as before. The home must have been the former Tolerated Trespassers only or principal home throughout the termination period and the former landlord must have been entitled to let the premises and he and the former tenant must not have not entered into another tenancy in the meantime.

Schedule 11 is not straightforward but what is clear is that Tolerated Trespassers are no more.

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Duty of care to tenants

The Court of Appeal's decision in the case of X & Y (Protected Parties Represented by their Litigation Friend The Official Solicitor) v Hounslow London Borough Council (2009) EWCA Civ 286 reversed the previous decision which had originally substantially altered the liabilities of housing authorities and landlords, in that they were considered to be under a duty of care to their tenants.

The Facts

The local authority was appealing against the High Court's decision to find that they owed the tenants a duty of care to protect them from criminal acts and that they had negligently failed to do so.

X and Y were a married couple and both had learning difficulties. In the course of the summer of 2000, the pair were befriended by a group of youths and it appeared that X and Y's flat was being used by the youths as a place to take drugs, store stolen goods and generally misbehave. On one weekend in November however, the instances of behaviour became significantly worse. Effectively, X and Y were both (along with Y's children) imprisoned in their own homes by the group of youths and were assaulted, abused and made to perform degrading acts. Their possessions were thrown over the property's balcony and they were forced to eat and drink harmful substances and liquids.

In the previous month a social worker, who had been assigned to work with X and Y, became aware of the fact that X had been assaulted by one of the youths in a local fast food restaurant and that this individual regularly stayed at the property overnight in order to prevent X from complaining to the Police. These issues were reported by the social worker to the Police, who declined to take any action unless X and Y complained personally.

The social worker had also contacted the relevant department at the local authority, who in turn had made arrangements for a child protection meeting to take place. Contact was also made with the Council's housing department and the social worker informed them that X and Y were vulnerable individuals and that their long-standing application for re-housing should be considered immediately. A meeting was therefore arranged with the Council's housing officers, which had been scheduled for three days after the events in question took place. It was also noted in the case that the social worker had not requested emergency interim housing for X and Y before the meeting, as she had not foreseen them being assaulted in their own home.

At the initial hearing, X and Y argued that the local authority should have foreseen that they were in imminent physical danger and should have re-housed them. It was held by the High Court that the Council did indeed owe such a duty of care to the pair and that this duty had been breached by the Council in not moving X and Y before the incident occurred.

The Appeal

The appeal brought by the Council was on the grounds that they in fact owed no duty of care in the circumstances. X and Y contended that the local authority had recognised that they were in immediate danger, that they needed to be re-housed and that the pair were both relying on such a move. They also submitted that these factors gave rise to a duty based primarily upon an assumption of responsibility to take reasonable steps to move them into new accommodation.

The Court of Appeal ruled in favour of the Council and consequently reversed the decision to award a substantial level of damages awarded to X and Y. It was held that it was clear from the evidence presented that the local authority, the housing department and the social worker, in carrying out their duties as they did, were merely seeking to carry out their statutory duties under the National Assistance Act 1948 and the Housing Act 1996. It had not been contended by X and Y that the Council was in breach of any statutory duty actionable by a private law claim for damages and accordingly, the Council's exercise of its duties did not give rise to a duty of care. It was the court's view that there was no one individual or organisation who assumed the same kind of responsibility as that which arises from a relationship between doctor and patient.

As an alternative position, the court ruled that if there was indeed a duty of care owed to X and Y, then it could only have been assumed by the social worker, given that she had not specifically requested emergency housing accommodation for the pair. On this point the court stated that there had been absolutely no suggestion that the social worker had breached this duty (if it had been in existence) and had behaved impeccably throughout her dealings with the case. It had also never been alleged by X and Y that she had behaved in a negligent manner towards them. Therefore, in light of the fact that the Council did not have the closest connection to the problems facing the couple, they could not have been considered as having assumed this duty.

Conclusion

The case is significant for landlords not just because of the potential levels of damages involved in instances with such severe and troubling circumstances, but also because guidance has been provided for determining whether such organisations would owe a duty of care to their tenants.

The decision of the Court of Appeal indicates that, provided a local authority carries out its statutory duties in a satisfactory manner, there should be no actionable breach of a duty of care.

For further information on these issues, please contact Stuart Penswick on 01772 220200 or email stuart.penswick@forbessolicitors.co.uk

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Temporary Pause in Anti-Social Behaviour

In light of the recent introduction of premises closure orders (PCO) to the 'toolkit' for preventing anti-social behaviour, there have been a number of instances where the courts have sought to establish their use and how they can properly function. One such instance is the High Court's ruling in Dumble v Commissioner of Police of the Metropolis which considered whether a period of 16 days could satisfy the requirement of permanent cessation in order to prevent a PCO being granted. Rulings such as this will have a considerable influence on how this new device will operate.

The Facts

Dumble (D) appealed by way of case stated against a decision by the magistrates' court to allow an application for a PCO by the police commissioner in respect of premises occupied by D as a tenant.

The premises consisted of a particular flat located within a three storey block of six flats. The magistrates' court found that the flat in question had been used in connection with the unlawful use of Class A drugs, with a number of people visiting at all hours of the day and night. Drug paraphernalia had been found in the stairwell of the block and members of the public had been subjected to disorder and nuisance. As a consequence, the police commissioner had served a closure notice on the premises and subsequently applied to the court for a PCO under the Anti-Social Behaviour Act 2003, section 2.

It was noted by the magistrates' court that since the closure notice had been served, there had been no further incidents. However, the court judged that on the evidence before it, the terms of the Act had been satisfied and that it was appropriate to make a PCO.

D appealed and the issues for the High Court to address were whether on the finding of fact and evidence submitted it was reasonable to conclude that the premises was associated with occasions of disorder or serious nuisance, and whether it was reasonable to conclude that a PCO was necessary to prevent the occurrence of such behaviour.

The Appeal to the High Court

D contended that the magistrates' court had erred in finding that the terms of section 2(3)(b) and 2 (3)(c) were satisfied. The section states that:

"The magistrates' court may make a closure order if and only if it is satisfied that each of the following paragraphs apply-

…(b) the use of the premises is associated with the occurrence of disorder or serious nuisance to members of the public;
(c) the making of the order is necessary to prevent the occurrence of such disorder or serious nuisance for the period specified in the order.

D submitted that these terms had not been satisfied as there had been no further incidents since the closure notice had been served, that the period of 16 days between the service and the court hearing was more than a temporary hiatus from the previous circumstances and that irrespective of this, the making of the PCO was not necessary for the protection of the public.

The High Court dismissed D's appeal. They held that in determining whether the terms of section 2(3)(b) were satisfied, three principles should be considered; if the disorder or serious nuisance had permanently ceased, the terms could not be satisfied; a pattern of disorderly use and disturbance was likely to be material; a temporary hiatus would not deprive the court of the power to make a PCO.

It was further stated by the High Court that although there had been no further incidents, it was highly likely that following the service of the PCO the situation would improve as anyone who entered the premises, other than the owner or occupier, would be committing a criminal offence. The 16 day period was no more than a passing state of affairs so, therefore, the making of the PCO was justified and it was appropriate to find in favour of the Police Commissioner on both points.

Conclusion

The decision reached by the High Court in this case gives a wider scope for the potential use of PCOs to prevent anti-social behaviour. Those wishing to prevent the implementation of such methods will now have to show to a court a greater length of time than 16 days where no anti-social behaviour has taken place, in order to prevent a PCO being granted. The result may be an increase in the overall use of PCOs in the future.

For further information on these issues, please contact Stuart Penswick on 01772 220200 or email stuart.penswick@forbessolicitors.co.uk

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Race relation laws

A cautionary note for ongoing relationships between Councils and Housing Associations must be issued following a recent decision of the Employment Appeals Tribunal. Leeds City Council has lost its appeal against a tribunal judgment which will see the authority face allegations of racial discrimination from an employee of its arm's-length management organisation.

The council claimed it should not be held responsible for the employees of ALMO West North West Homes. It had been alleged that racist bullying had taken place between December 2006 and January 2007. The complaint was made by a principal regeneration officer at the ALMO, who alleged that he was racially abused by the one of the council's employees.

Leeds Council was named alongside the ALMO, who was the employer in the case, but the council applied last July to be excluded. All three respondents denied any wrongdoing.

In September, the Employment Tribunal Judge at Leeds Employment Tribunal rejected the Council's plea, describing the council's relationship with the ALMO as 'extremely close', and said that the ALMO employees were treated on the same basis as employees of Leeds City Council staff.

The council's appeal was heard recently at the Employment Appeal Tribunal in London, but it was dismissed again. Leeds City Council was obviously disappointed with the judgment and are currently considering what their next step will be. It is thought the council may make an appeal to the Court of Appeal. If no more appeals are lodged, a full tribunal date will be set to decide the issues in the case.

Peter Byrne, Head of Employment law at Forbes Solicitors said he was unaware of any other case that had tested the relationship between an ALMO and a council in this way. Race relations laws allows for employers to be considered vicariously responsible for the actions of third parties, and this appears to be the logic behind this decision, although it is still a difficult case to advise upon. All parties to this type of arrangement need to ensure that staff receive full equality/equal opportunity training, and they put it into practice to avoid potential claims

For further information or advice please contact Peter Byrne on 01254 222362 or email peter.byrne@forbessolicitors.co.uk

Breach of gas safety rules

A landlady from London has been ordered to pay a fine of £5,000 and costs of over £3,700 by a court, for failing to ensure that regular checks were made to gas appliances in properties that she rented out in Wandsworth. Aruna Pravin Kukadia pleaded guilty to a breach of Regulation 36(3) of the Gas Safety (Installation and Use) Regulations 1998. It is clear that this case and the verdict reached are of great significance to landlords across the country.

The Facts

In May 2006, the Health and Safety Executive (HSE) received a complaint from an individual relating to a heating system in a property being responsible for carbon monoxide leaks. The HSE investigation found there was insufficient evidence to prove this claim, but a number of letters were sent to the defendant requesting the disclosure of the annual safety check records for the system as part of the enquiry.

When these records were obtained, the HSE found that there were two instances where no annual check could be provided: for 2002/2003 and 2005/2006. At both of these times, the property was in occupation. At the hearing, the HSE stated that the defendant rented out 23 other properties in the London area and similar failures had been found at a number of them. It was also said that in 2004 she had been given a range of HSE advice in the form of advice and leaflets, which advised her on the importance of carrying out such checks. In one instance, the HSE had to use an Improvement Notice in order to ensure that one of the houses had a safety check carried out.

It was for these lapses in following the Gas Safety (Installation and Use) Regulations 1998 which led to the case being brought against the defendant.

Summary

This case emphasises the importance of carrying out gas safety checks at properties which are rented out to individuals. Failure to do so can not only lead to a substantial fine for landlords, but also has the potential of causing serious injuries to tenants, their families, guests and neighbouring properties.

Even in difficult economic times, it remains vital for landlords to make sure that all gas appliances are checked to a safe standard on an annual basis and that each check is accurately recorded. By spending money on such maintenance, landlords could avoid paying out larger amounts through fines in the future.

For further information on these issues, please contact Stuart Penswick on 01772 220200 or email stuart.penswick@forbessolicitors.co.uk

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EVENTS

Chartered Institute of Housing Conference 16th-18th June 2009 Harrogate International Centre

Forbes Solicitors will be exhibiting at this three day conference devoted to housing. It covers strategic issues and provides a focus for networking and sharing best practice.

Please come a see us on Stand 231, Hall M.

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The Power of the ASBO: Ten Years On

A decade after the introduction of the Anti Social Behaviour Order (ASBO) into the practitioner's toolkit, its use by the courts to deal with problematic conduct remains strong and with regularity.

One recent example of this was in Leeds City Council v Fawcett [2008] EWCA Civ 597, where the tenant of the Council appealed against the granting of an ASBO. Fawcett (F) had been in a relationship with a neighbour (N) and a dispute between them had been taken by the court as the starting point of the anti social behaviour. The conduct of F included the harassment and intimidation of other neighbours and culminated in him holding a knife to the throat of one. Under the terms of the ASBO, F was banned from a geographical area which included N's home.

F appealed that the judge had acted disproportionately in barring him from N's home and submitted that the terms should be varied to allow him to visit. The appeal was dismissed, with the court holding that F's anger stemmed from his relationship with N and allowing him back would suit neither F (who risked five years imprisonment for breaching the ASBO) nor the neighbours (who risked further violence and damage to their property). Similarly strict verdicts on the use and variation of ASBOs were reached in R (on the application of Cooke) v DPP [2008] EWHC 2703 and Leeds City Council v RG [2007] EWHC 1612.

These decisions are just some examples of where ASBOs have been used effectively to deal with anti social behaviour in our communities. The courts have been prepared to use this tool in order to deal with difficult behaviour on housing estates and appear willing to do so in the future. ASBOs have and will in the future, provide housing practitioners with a viable device for dealing with challenging tenants.

A full copy of this article by David Maguire of Forbes Solicitors can be found in the May edition of ASB Focus newsletter: **http://www.respect.gov.uk/members/article.aspx?id=9848.**

Know the rules and play the game

As discussed in the opening article, we are holding an informative seminar covering a number of issues which affect housing associations.

The seminar will take place on Thursday 24th September 2009 at the Bridgewater Hall, Manchester and issues covered will include:

- Procurement
- Data Protection
- Companies Act

Make sure you're up to date with the latest regulations and don't get caught out!

We are currently planning the seminar programme and will be bringing together a unique blend of leading consultants including a representative from the ICO.

If you would be interested in receiving further details please drop us an email **helen.gorrell@forbessolicitors.co.uk** and full details will be sent nearer the time.

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