

## Housing Associations Bulletin

July 2010

### Housing Associations Bulletin

Welcome to the latest edition of Lindsays Housing Associations Bulletin. This issue picks up on the human rights case referred to in our last newsletter. We also comment on serving Notices of Proceedings, conversion to SSST and Minutes for Recall.

#### Human Rights

In our last issue we commented on the decision of the High Court in England that a Registered Social Landlord (RSL) is a public authority within the meaning of the Human Rights Act 1988 and therefore decisions of RSLs can be open to judicial review. Since our last newsletter the matter has been further considered in the Court of Appeal in England in the case of Weaver -v- London and Quadrant Housing Trust. The Trust appealed against the decision of the earlier court holding that it was a public authority in terms of Section 6(3)(b) of the Human Rights Act 1998. The appeal was dismissed. The court held that "in determining whether a body was a public authority, the courts should adopt a factor based approach". This required the court to have regard to all of the factors which may cast light on whether the particular function under consideration was a public function or not and weigh them in the round.

There is no single test of universal application. The court went on to say that in applying the test a broader more generous application should be adopted. The factors to be taken into account included the extent to which the body was publicly funded, or was exercising statutory powers, or was taking the place of central government or local authorities, or was providing a public service. It held that the provision of social housing was a public function. There was significant reliance on public finance. The Trust operated in close harmony with local government. The provision of subsidised housing was a function which could be properly described as governmental. The Trust was acting in the public interests and had charitable objectives. Importantly the act of terminating the tenancy itself was a public act as it was so bound up with the provision of social housing.

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“ Are RSLs public authorities in terms of the Human Rights Act 1988?

What are the tests?

What has the Scottish Parliament decided? ”

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In terms of this case, the first issue is deciding whether a housing association is a hybrid authority carrying out some public functions. If it is, then the next issue which has to be considered is whether the act complained of is a private or a public act. In this case the judge took the view that the act of terminating a tenancy was a public act.

Although this case is not binding in Scotland it is potentially of huge significance. We would not be surprised to see similar challenges in Scotland. The newly formed UK Supreme Court decided not to review the decision further, and the decision of the Court of Appeal is now final.

This case, along with the cases of McCann and Doherty, appear to have opened up the possibility of credible defences being adduced in what previously would have been regarded as un-defendable cases.

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### Classification of Housing Associations

The Scottish Parliament considered amendments to the Public Services (Scotland) Bill 2010. Following the refusal of the amendments, Housing Associations will not be included on the list of public bodies. If the amendments had been passed, it could have seen a further layer of regulation on Housing Associations.

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### Terminating Commercial Leases

In a recent case in the Appeal Court and the Court of Session the court had to consider whether a Notice to Quit served by Sheriff Officers constituted a valid notice. Section 4(4) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 provides that "any notice served under sub-section (2)... shall be sent by recorded delivery and shall be sufficiently served if it is sent to the tenants' last business or residential address in the United Kingdom..." The tenants served irritancy notices on the sub-tenants by Sheriff Officers. They then sought a court order for removal. The Sheriff granted this order and the sub-tenants appealed to the Court of Session submitting that the Sheriff had erred in holding that the pre-irritancy notice which had been served by Sheriff Officers was nevertheless capable of constituting a valid notice. The court held that the 1985 Act required the notice to be served by recorded delivery and service by Sheriff Officer was not competent. The appeal was allowed and the action was dismissed leaving the sub-tenants in situ.

**“ Following the refusal of the amendments, Housing Associations will not be included on the list of public bodies. ”**

In our view this case is restricted to notices served in terms of the 1985 Act. It does not apply to residential tenancies and in particular Scottish Secure Tenancies or Short Scottish Secure Tenancies. It also, in our view, does not apply to Assured and Short Assured Tenancies. It is however important should you have commercial tenants and need to serve irritancy notices on them.

**“ In commercial leases  
can Notices to Quit  
be served by Sheriff  
Officers? ”**

### Services of Notices in Terms of 2001 Housing Act

Although the case referred to above does not in our view apply to SST's the case of Glasgow Housing Association Limited -v- Heather Du does and is important in considering the terms of notices to be served by you. The case concerned the terms of a Notice of Proceedings for Recovery of Possession served by Glasgow Housing Association. The statutory style provides for information to be inserted at two points. In this case the Association narrated in full grounds 1, 5 and 9 after the words "raise proceedings for possession of that dwellinghouse on the following grounds" at the end of the first paragraph in the Notice. However after the words "We also inform you that we are seeking possession under the above ground for the following reasons" they simply inserted the word "OVERCROWDING". The case was heard by the Sheriff and an argument was submitted that the Notice was incompetent. The Sheriff upheld this argument and the action was dismissed. The Association appealed. The appeal was refused and the dismissal was upheld. The crux of the matter is that the court took the view that if the grounds are to be narrated in full after the words "on the following grounds" then reasons must be given after the words "for the following reasons". The Sheriff Principal stated the following:

"In my view if the Appellants had followed their verbatim narrative of the statutory grounds with more detailed reasons in what the learned Sheriff regarded as an optional part of the statutory form the Notice specific to this case could not have been so readily criticised. Thus, the Appellants might have gone on to say in the 'reasons' part of the Notice that in relation to paragraph 1 the amount of rent arrears at a particular date; in relation to paragraph 5, whether it was that the tenant had been absent for six months or that her principal home was elsewhere and provided an address; or in relation to paragraph 9, the formula upon which they regarded the house as overcrowded. However, like the learned Sheriff, in my view the word 'OVERCROWDING' which is the extent of 'reasons' set forth by the Appellants in their Notice conveys nothing of the tests set out in Section 135 or how the Appellants alleged they had been breached."

He continued as follows:

"I agree with the learned Sheriff that if the part of the 2001 Notice requiring a statement of 'ground(s)' is completed by a narrative of the reasons giving rise to the

assertion that they fall within one or more of the numbered paragraphs (being specified) in Part 1 of the Schedule 2 then the Notice would comply with the statutory requirement to that effect. Alternatively, in my view, if the landlord narrated the ground(s) verbatim then went on to narrate the reasons why the landlord took the view they give rise to the ground(s) specified in the prior part of the Notice, then the Notice would comply with the statutory requirements...Taking as an example the use by the appellants of the word 'OVERCROWDING', as a statement of a 'reason' that would, in my view as it was in the view of the learned sheriff, be wholly inadequate as a statement of a 'reason' as to how the particular 'ground' set out in paragraph 9 has arisen."

The Sheriff Principal concluded that if grounds are to be narrated in full then detailed reasons must be given in the following passage. We accordingly recommend that if you are to rely on and narrate grounds in full, then detailed reasons are given in the following section of the Notice.

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### Short Scottish Secure Tenancy converted from a Scottish Secure Tenancy

The recent Glasgow Sheriff Court case of South Lanarkshire Council v McKenna (April 2010) was concerned with whether the term of a Short Scottish Secure Tenancy, converted from a Scottish Secure Tenancy, must be for a minimum period of six months, or whether the term of the earlier Scottish Secure Tenancy continues by tacit relocation so as to define the termination date of the Short Scottish Secure Tenancy.

An ASBO was granted on 5th October 1997. The Council converted the SST to a SSST by notice on 5th March 2009. The issue that arose is "what is the termination date of the SST". The Sheriff concluded that upon conversion to a Short Scottish Secure Tenancy, the term is varied to a term of not less than six months. The Sheriff also stated "This would apply irrespective of the term of the original lease".

The Sheriff also considered what would happen to the term of the lease if the Tenancy was to revert back to a Scottish Secure Tenancy from a Short Scottish Secure Tenancy. He concluded that, while there was no express statutory provision confirming this, he felt that the term would revert back to the originally agreed term in the original Scottish Secure Tenancy. He also noted that the Act does not expressly state that "the term of the Short Scottish Secure Tenancy (which must be for a minimum period of 6 months) continues when the Short Scottish Secure Tenancy is superseded by a Scottish Secure Tenancy."

**“ The Sheriff concluded that upon conversion to a Short Scottish Secure Tenancy, the term is varied to a term of not less than six months. The Sheriff also stated “This would apply irrespective of the term of the original lease”. ”**

It therefore seems that if a Scottish Secure Tenancy is converted to a Short Scottish Secure Tenancy, then the exit is varied to a term not less than six months. If it reverts back to a Scottish Secure Tenancy, this case suggests that the term of the lease reverts back to the original term.

It remains to be seen whether or not this case will be appealed to the Sheriff Principal, or whether or not other Sheriffs are likely to adopt similar reasoning in other such cases.

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## Minute for Recall

### Definition of Application

A recent Glasgow Sheriff Court decision of Sheriff Principal Taylor in *West of Scotland Housing Association v Daly* is of relevance to all summary cause and small claim actions, including evictions and pursuing arrears. The case related to a Minute for Recall, which allows Defenders (and indeed Pursuers) to apply to have a Decree recalled, if they fail to appear, or be represented, at the hearing in which the Decree was granted. The rule states that "A party may apply for recall in the same action on one occasion only." The case centred on the interpretation of this rule and whether or not 'apply' could be construed as meaning 'granted' or whether it had to be interpreted as meaning an application only even if it was never granted or heard in Court. Sheriff Principal Taylor held that the rule should be given its more literal interpretation and stated that the rule would have been clearer if it had stated "A party may lodge a minute for recall of a decree in the same action on one occasion only." This decision affirmed the decision in Glasgow Sheriff Court of Sheriff Principal Bowen in *Reid Furniture* (1999). Both of these cases are only binding within the Sheriffdom of Glasgow and Strathkelvin. However one would expect the decisions to be of importance throughout Scotland and clarifies that a party can only lodge a minute for recall on one occasion and that it does not matter whether or not the minute for recall was heard in Court or decided upon by a Sheriff.

### Competent to recall decree granted at Pre-Proof Hearing

Another Glasgow Sheriff Court decision in *Glasgow Housing Association Ltd v Duffy* clarifies that it is competent to seek a recall of a decree if decree has been granted at a Pre-Proof hearing. There is no specific rule that allows a pre-Proof hearing to be fixed in Summary Cause actions and there is an argument that this is incompetent. It was held in this case however that a pre-Proof hearing was a 'continued hearing' under the rules, and accordingly it was held in this case that a pre-Proof hearing was a 'continued hearing' under the rules, and accordingly it was competent to seek to recall a decree granted at a continued hearing.

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