Repossession of Residential Property: Protection of Tenants

Consultation response from Shelter Scotland, November 2009

1. Introduction

Shelter Scotland strongly supports the intention behind this paper: to provide adequate protection to tenants who are the innocent victims of their landlord's failure to pass the rent on to the lender. We have pressed this matter in both England and Scotland and are pleased that the Scottish Government has recognised the need to take action.

However, we are not persuaded, at this stage, that the Scottish Government has adequately reviewed all of the potential options for action in this area; so, in this response we have been unable to follow the structure set out in the consultation.

We do not see this observation as a reason for further delaying legislative action, although we recognise that there are at least three potential legislative vehicles in the next six months. However, we do strongly recommend that the Scottish Government seek to convene a meeting of those members of the Repossessions Working Group who have expressed an interest in this area. We regard that as more likely to lead to robust and consensual proposals on the way forward.

2. Principles

Before commenting on the Bill in detail we thought it would be useful to set out some principles:

- That there is no fault of the part of the tenant and that the term 'unauthorised tenant' should not be used[1].
- That the tenant entered into a contract in good faith, has maintained his or her part in that contract and therefore should not be penalised for failings on the part of the landlord. Specifically, we believe that the tenant should be allowed to see out the tenancy in the terms, for the duration and at the rent agreed with the landlord.
- That responsible lenders will see the merit in retaining tenants who are paying rent at market levels and that the lender should be entitled to receive that rent where the borrower is failing to pass it on.
- That the lender should be entitled to bring an action to court, following the normal procedure to end residential tenancies.

[1] This confusion is compounded in paragraph 10 where the paper talks of the proposal not extending to tenants who do not have the authority of the borrower.

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In this, we are arguing simply that a tenant in this situation should receive no better or worse treatment than a tenant in any other situation.

3. Options

In the course of discussing this area of policy we have identified a number of potential options for action:

a) Consolidation of case law in this area into statute such that it is set out clearly that where a tenant is found to be in situ, then a separate action must be taken under the Housing (Scotland) Act 1988. In our case-work, when we have alerted creditors to this provision, we have found them generally happy to follow this process but, of course, that is only the minority of the cases in which we are involved. Paragraph 4 of the consultation paper recognises the case law but the paper does not then go on to say **how** it has been taken into account.

b) Alteration of the grounds on which a possession action can be founded. Ground 2 of schedule 5 of the 1988 Act is the ground which allows a property to be possessed when the borrower has defaulted on the mortgage. This ground is currently mandatory – i.e. the Sheriff has no discretion to determine the way in which it is exercised. If it were made discretionary then it would allow the courts to take account of the circumstances in which possession was sought, including those in which a tenant was unexpectedly discovered in situ.

c) Strengthening the information provided to tenants. Section 4 of the Mortgage Rights (Scotland) Act 2001 requires creditors to serve a notice to 'occupiers' where possession action is being taken. However, it is widely believed that tenants do not open these letters. Improvements could include: addressing the letter to 'tenant or occupier'; ensuring that it is clearly marked 'This is not a circular' or something similar and ensuring that standard notices are written more accessibly.

d) Ensuring that tenants in this situation are given additional entitlements in court proceedings. This is the gist of proposals 1 and 2 in the consultation paper so we say more about this below.

e) Requiring lenders to take on the obligations of the tenancy. In the instance where a tenant had been authorised by the lender it would generally be the case that the tenancy would be seen out or the property sold with a sitting tenant (or action taken under ground 2, as above). This would extend those rights to tenants whose landlord had failed to notify the lender. This is proposal 3 in the consultation paper.

The overall point here is that only some of these options – and we are not pretending that they are exhaustive – have been covered in the covered in the consultation or, as far as we know, in earlier discussion, so it is difficult to be confident that the optimal arrangements have been set out.

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4. Detailed commentary

Proposal one revolves around giving tenants an entitled residents status. The paper is ambiguous as to how this should be done. Paragraph 7 implies that this might be done through a blanket designation which would require no action on the part of the tenant. We understand this to be the intention of the proposal. However, paragraph 10 says 'If an unauthorised tenant did seek to be designated an entitled resident….'. This suggests that the designation has to be triggered by action on the part of the tenant.

If the former intention is true then it would be useful to understand how such a designation would work in practice. It is not clear how tenants would *know* about these entitlements in order to benefit from them, since the whole point is to ensure that tenants are informed well in advance that they may need to move. It would seems necessary to us to require lenders, as a matter of course, to have to check that a person other than the borrower is not in the house; and, having made these checks, to engage with that person on the action taking place.

If it is the latter – that designated status is only secured by application – which turns out to be the case then it is not clear how they will know to apply. By its very nature this is a group of tenants who are in the dark about what is happening to them. If they do not know that their landlord is having action taken against why would they seek entitled residents status? This is crucial since everything else rests on this status – the right to make representation and the discretion of the Sheriff to grant more time. So it is entirely likely that the decree would be granted against the landlord with the tenant still unaware of what is happening.

Similarly, powers of recall may not be exercised. As we understand it, there is no systematic way in which a tenant in this situation will be notified about any post-decree enforcement. That is, one could still see the situation when the first a tenant knew about any action was on returning home from work one evening to find Sheriff Officers had changed locks. This is compounded by some drafting difficulties in section 6 of the Homeowner and Debtor Protection Bill which may need to be looked at in stage 2.

To some extent, things might be improved by ensuring that letters at both initiation stage and post-decree stage were served on the property and marked for occupier or tenant (as described above in section 3). But one still could not be confident about these being opened.

That is one big issue. The second relates to the Sheriff's discretion. Paragraph 6 of the paper suggests that sheriffs will have discretion to decide a period of grace from a few days to a few months. But paragraph 4 says that the proposals will seek to build on current case law (eg Tamroui v Clyesdale Bank plc) – it is not clear **how,** if at all, this is done. The case law says that if a lender finds a tenant in a property in which they are seeking possession, then they have to take out a separate action under section 18 of the 1988 Act in which ground 2 would apply. If that were the case then the usual notice period would be 2 months through a section 33 notice. If that is the case, then that constrains the discretion of the Sheriff[2].

[2] From Shelter's perspective, this constraint has a benign consequence but it is one we should acknowledge explicitly.

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A third issue relates to voluntary surrender. The application for entitled residents status would only apply if a case were in court. In the case of voluntary surrender this would not apply. We appreciate that the proposed affidavit requires a borrower to confirm that a property is unoccupied but we can think of a number of instances when this might not apply.

Finally, we are disappointed that proposal 3 in the paper has been given so little attention. In line with section 2 above, this seems to us to be a favourable option. If there are practical difficulties with pursuing such an option it would have been useful to see these rehearsed. We also wonder if, lenders are reluctant to become default landlords then the involvement of as hybrid social-private agency (such as Orchard and Shipman) might overcome some of the problems.

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