

Unfinished business

Housing associations' compliance with the rent arrears pre-action protocol and use of Ground 8

Summary

In recent years the Government has taken steps to address concerns about unnecessary and premature use of court action by social landlords in dealing with rent arrears. In October 2006, the rent arrears pre-action protocol was introduced, setting out the steps landlords must take before resorting to court action.

However Citizens Advice believes there remains unfinished business. Some housing associations continue to choose to seek possession for rent arrears using the mandatory Ground 8. This allows them to obtain outright possession wherever an assured tenant is in arrears of at least eight weeks at the time notice is served and at the time of the proceedings. Use of this ground prevents the court from exercising discretion based on the circumstances of the case, and it is not an option available to local authority landlords.

CAB research indicates that the pre-action protocol has had a broadly positive effect in preventing unnecessary court action, although the extent of compliance varies. In contrast however, the continued use of Ground 8 by a minority of housing associations, in some cases as a matter of routine, is resulting in some vulnerable tenants facing the risk of losing their homes. This might have been avoided if discretionary grounds had been used.

In the context of the Government's homelessness prevention agenda this report recommends that:

- the pre-action protocol is more thoroughly embedded in court procedures to reduce variation in practice
- the use of Ground 8 by housing associations is discontinued.

Inside

<input type="checkbox"/> Introduction	Page 2	<input type="checkbox"/> Housing associations' use of Ground 8	Page 0
<input type="checkbox"/> Who is facing court action for rent arrears?	Page 0	<input type="checkbox"/> Conclusions and recommendations	Page 0
<input type="checkbox"/> The rent arrears pre-action protocol	Page 0		

Introduction

The introduction of a rent arrears pre-action protocol in October 2006 was one of the final pieces in the jigsaw of reforms which have been put in place in recent years. The reforms aimed to achieve a cultural shift in the way social landlords manage rent arrears. The impetus was the fact that possession actions and evictions by social landlords had more than doubled in the decade to 2003. This was despite explicit requirements to use possession action only as a last resort.

CAB advisers expressed concerns that they were regularly seeing clients facing court action before all avenues for dealing with arrears had been exhausted. In 2003, Citizens Advice published an evidence report detailing the problem and making a number of recommendations for reform.¹ At the same time Shelter published a report along similar lines.² Both organisations are funded by the Department for Communities and Local Government to deliver the National Homelessness Advice Service, a key aim of which is to support the Government's homelessness agenda.

The Government response to these reports was very positive, and many of our recommendations have now been adopted including:

- a requirement for all social landlords to report on the number of tenants evicted
- publication of a good practice guide on *Improving the Effectiveness of Rent Arrears Management* (ODPM 2005), the content of which reflects the view of the Housing Corporation and the Government that possession action and eviction should only be used as a last resort
- a rent arrears pre-action protocol which codifies the actions that social landlords must take before resorting to court action.

Between 2004 and 2007 there has been a 17 per cent reduction in the number of housing association evictions for rent arrears, from 10,498 in 2004/05 to 8,661 in 2006/07.³

Unfinished business

There remains however one significant recommendation from the CAB report which has not been addressed. This is that housing associations should cease taking possession action using mandatory Ground 8. Ground 8 is one of grounds for possession of an assured tenancy listed in the Housing Act 1988 Schedule 2.⁴ Use of this ground enables housing associations to bypass the role of court discretion and obtain outright possession, wherever an assured tenant is in arrears of at least eight weeks at the date on which notice is served and at the date of the proceedings. It also effectively bypasses the pre-action protocol which cannot be invoked by the court to prevent an order being granted. In contrast, the use of Ground 8 is not an option available to local authority landlords.

Citizens Advice believes that the continued use of Ground 8 by housing associations is not consistent with the general direction of the measures outlined above. Moreover the Court of Appeal ruling (*North British Housing Association v Matthews* (2004) EWCA Civ1736) has demonstrated that housing associations do not necessarily have measures in place to ensure Ground 8 is only used as a last resort as required by the Housing Corporation. North British chose to seek possession using Ground 8 against a tenant whose rent arrears were due to a refusal by the housing benefit department to backdate her housing benefit claim. The judge decided that as Ground 8 had been used, he had no power to adjourn the case pending the decision on the backdating appeal. In fact the tenant's appeal was successful shortly after the hearing, enabling her to pay off her

1 Possession action – the last resort?, Citizens Advice, 2003

2 Housekeeping: preventing homelessness through tackling rent arrears in social housing, Shelter, 2003

3 Housing Corporation RSR database, Table 57.

4 Under section 8 of the Housing Act 1988 there are 17 separate grounds which a landlord can use to seek possession of a property. (perhaps insert a link).

arrears in full, but too late to save her tenancy.

Regrettably the Housing Corporation did not respond to this court decision by issuing further regulatory guidance on Ground 8. This was despite the judge's concluding remarks recommending that the Housing Corporation expand its advice about the need for effective liaison with housing benefit departments because of the "potentially draconian" impact of the Ground 8 provisions.

As it stands, the Housing Corporation guidance is minimal in the extreme, requiring no more than would be expected under the rent arrears pre-action protocol where a discretionary ground is used:

"Before using Ground 8, associations should first pursue all other reasonable alternatives to recover the debt." (Housing Corporation Regulatory Circular 02/07)

We believe the Court of Appeal decision strengthens the argument for urgent reform on this issue and we welcome the fact that the Law Commission's draft Rented Homes Bill on tenancy reform would achieve this. Unless this Bill becomes law however, housing associations remain free to take the decision to use Ground 8.

Aims of the report

Given the raft of reforms that have taken place since publication of our 2003 report, we felt it would be valuable to revisit some of the issues:

- to see whether there are any differences in the profile of tenants facing court action for rent arrears
- to get some early feedback about the impact of the pre-action protocol
- in the light of these reforms to look in more detail at housing associations' continued use of Ground 8.

Citizens Advice Bureaux across England and Wales which provide advice in their local county courts on rent possession days, were asked whether they would take part in a monitoring exercise of housing association possession cases in the early months of 2007.⁵ Shelter Housing Aid Centres delivering a similar service were also contacted. As a result 23 bureaux and five Shelter Housing Advice Centres agreed to take part. Between them they operated in 25 courts spread across England (although there were none in inner London or in Wales). Eighty three monitoring forms were completed as a result.

In addition we undertook detailed interviews with 12 of the CAB court desk advisers in order to get a better understanding of the issues involved.

We also contacted 31 housing associations which bureau evidence indicated were using Ground 8, and asked them to complete a brief questionnaire about their policy and practices on the use of Ground 8.

This report is based on the findings from this work, together with evidence submitted by bureaux across England and Wales during 2007, about housing association practices in handling arrears and possessions. During 2006/07, bureaux in England and Wales dealt with 31,839 enquiries relating to housing association rent arrears, of which 8,517 related to possession action or eviction.

Who is facing court action for rent arrears?

Advisers completed monitoring forms with 83 tenants from 38 housing associations, who attended court to face possession action for rent arrears in January or March 2007.

In many respects the profile of these clients reflected those reported in our 2003 report. There were nearly twice as many women (63 per cent) as men (35 per cent), and more

⁵ The monitoring was restricted to housing associations because of the report's particular focus on the use of ground 8.

than one third (40 per cent) were lone parents. As lone parents make up only 18 per cent of housing association tenants⁶, this suggests that they are disproportionately likely to accrue rent arrears and face court action as a result.

Nearly half of the tenants (43 per cent) were working. Again this is greater than the percentage of housing association tenants overall who are in work (34 per cent).⁷ However it is consistent with other research which indicates that "increases in the levels of serious rent arrears in recent years were in part due to rising levels of tenant employment which, due to its frequently low-paid and erratic nature, paradoxically increased tenants' vulnerability to serious rent arrears".⁸ Recent research by the Institute for Public Policy Research has also found that the proportion of households which remain poor even with someone in work, has increased over the last decade.⁹

The average rent (£74.01) and average level of rent arrears (£1,157) were, not surprisingly, somewhat higher than our 2003 figures of £62.35 and £1,072.32 respectively. However in terms of the number of weeks' rent owed, the figures showed a slight fall, from an average of 17 weeks in 2003 to 15.6 weeks in 2007. As in the 2003 report, the range in the amount of rent owed was striking, with six tenants facing possession for arrears of under £250 whilst four had arrears in excess of £2,500.

An interesting difference between the two surveys is the increase in the number of tenants with assured shorthold tenancies facing possession action. In the 2003 survey

this accounted for 11 per cent of tenants whereas in the 2007 survey this had risen to 33 per cent. It is likely that this reflects the growing use of assured shorthold tenancies by housing associations, rather than that possession action is now taken more quickly for assured shorthold tenants, since there was little difference in the level of arrears at which action was taken.

In 49 per cent of cases the outcome of the hearing was that an order for possession was made, although in only 9 cases (11 per cent) was outright possession granted. Where discretionary rather than mandatory grounds are used, the court may decide to adjourn the case, either to a "fixed date" if the judge feels there is not enough information or there are outstanding issues such as a housing benefit claim to be resolved, or "on terms" where the judge considers that a possession order is not justified on the facts. A decision to adjourn may therefore indicate that the landlord has not used court action as a last resort. As many as 44 per cent of the cases in the survey were adjourned – a higher percentage than in our 2003 survey (29 per cent).

Advisers considered that over half of the tenants (57 per cent) would be assessed as being in priority need under homelessness legislation if they became homeless. Interestingly (although the figures are small), tenants who were considered likely to be in priority need were more likely to have their case adjourned whilst those not in priority need were more likely to receive a postponed possession order.

⁶ Survey of English Housing, 2005/06, DCLG

⁷ Survey of English Housing 2005/06, DCLG

⁸ Pawson et al, *The use of possession actions and evictions by social landlords*, ODPM, (2005)

⁹ Graeme Cooke and Kayte Lawton, *Working out of poverty: a study of the low paid and the working poor*, IPPR, 2008

The rent arrears pre-action protocol

The pre-action protocol, introduced in October 2006, puts teeth into the various measures aimed at encouraging social landlords to make possession action the last resort. The protocol provides the court with sanctions which can be used against any social landlord who unreasonably fails to comply with the terms of the protocol. In such circumstances the court may impose an order for costs and/or, in cases other than those brought on mandatory grounds, adjourn, strike out or dismiss claims.

The content of the rent arrears pre-action protocol is closely based on the ODPM's good practice guidance *Improving the Effectiveness of Rent Arrears Management* (2005), and the Housing Corporation Regulatory Circular *Tenancy Management: Eligibility and Evictions* (02/07). Key elements of the protocol include requirements for:

- early contact by the landlord where the tenant falls into arrears
- landlord and tenant to try to agree an affordable payment plan
- the landlord to be able to demonstrate that reasonable steps have been taken to ensure information has been appropriately communicated to any tenant who has difficulty in reading or understanding information
- direct payment of the arrears to be made from the tenant's benefit where appropriate
- the landlord to offer assistance with a housing benefit claim
- possession proceedings not to be started where the tenant can demonstrate that they have provided all the evidence necessary to process a housing benefit claim and the tenant has paid other sums not covered by housing benefit

- the landlord to advise the tenant to seek assistance with debt problems from a CAB or other advice agency
- the landlord to advise the tenant to attend the hearing
- the landlord to postpone court proceedings where the tenant complies with an agreement to pay current rent plus an amount off the arrears.

A positive impact

Overall, the county court advisers interviewed were very positive about the impact which the pre-action protocol had had on social landlords' pre-court practices. Many commented that the protocol had resulted in landlords taking a more holistic approach, looking at the tenant's situation in the round and exploring alternative options before considering court action.

"More socially aware than they were before – they're looking more at the whole situation that the client's in rather than just rent arrears."

"They're making an effort now. They're taking their time to actually go into what the client's problems are, can they help, can they go round and talk to the client, can they put something forward."

"I think they've got better at talking to clients...we tended to come in and sometimes the first time the client had seen anybody from the housing association was when they were face to face in court."

"It's made our association more diligent about complying with negotiation beforehand."

"They try and make sure that all the housing benefit is sorted and the client realizes the seriousness of it."

Several advisers could point to specific changes in practice such as, for example, employing an in-house welfare benefits officer to help tenants with housing benefit and other benefits problems. They also commented that there was much more communication going on between housing associations and the CAB and other local agencies. One housing association had started funding a part-time post at the local CAB, and another CAB was running regular surgeries at a housing association, and was hoping to set up another two.

One adviser commented that the major housing association in their area was very aware of the protocol and always had a copy of it with them at court. They had referral arrangements with the bureau for debt clients at an early stage, and details of the CAB were publicised in the association's newsletter.

Other examples of good practice mentioned were:

- Delaying, or ceasing court action once the CAB has become involved: "They know that the client will then be more likely to concentrate on priority debts including rent, rather than spending money on non-priority debts."
- Being open to negotiation: "They are very reasonable about setting payments and negotiating. We had one case where they wanted £20 a week because the person was employed but when they saw their financial statement they settled for just £5 a week."
- Proactively helping clients with their housing benefit claims: "I did feel they went the extra mile with them, they actually drove the client down to the housing benefit department."

Advisers noted that an effect of the protocol was a drop in the number of cases reaching court.

"There certainly has been a drop in the number of housing associations coming to court...it's the odd day now that you see a housing association whereas they used to be there a lot."

This is supported by the Court Service rent possession figures. These show a drop of 4 per cent in claims issued and 11 per cent in orders made when Quarters 1-3 of 2007 are compared with the same Quarters in 2006 – the period immediately before the pre-action protocol came into effect.¹⁰

This positive response, however, was not universal. Some advisers felt that the pre-action protocol had made very little difference to some associations' poor practices. This included taking a minimalist approach to compliance. For example, to fulfil the requirement to encourage tenants to seek advice, some were simply adding a sentence on the bottom of a standard letter saying "seek independent advice". Others considered it sufficient to have made one unsuccessful attempt to try and contact the client by phone.

One adviser commented that she was still seeing cases coming through with the same problems and the housing associations hadn't followed any of the procedures in the protocol. This included directly contravening the protocol by, for example, telling tenants that they didn't need to go to court:

"'Oh don't go to court, there's no need for you to go to court'...housing officers discourage them from going to court."

District judges' application of the protocol

Most advisers were also positive about the role of district judges, commenting that they seemed to be very conscious of how housing associations were supposed to be behaving towards their tenants. One adviser reported that the judge would look at the case file in depth before the hearing, and ask for

¹⁰ Ministry of Justice mortgage and landlord possession statistics, standard procedure. These figures include possession action by private landlords but the bulk of the "standard procedure" cases will be housing associations.

clarification on any point that was not clear. Another commented that the judge asked questions to both the housing association and the tenant, and if the judge was not happy for any reason, they would send the client out of court to speak to either Shelter or the CAB before resuming the case.

The majority of advisers noted that judges appeared to be satisfied with anecdotal evidence from tenants and landlords indicating compliance, and did not require written evidence such as housing benefit statements.

Such a pro-active approach was not universal however. Several advisers commented that a judge would not actually mention the protocol in court or spend time going through each of the requirements to make sure that landlords had fulfilled their duties. Instead, it was left to the tenant or their representative to raise an objection.

"If you don't bring it up, they don't. It will only come up if someone raises it."

Overall, there appeared to be considerable variation in how judges were applying the protocol, even between judges within the same court. One adviser noted that between the three district judges sitting at the local county court, one would ask very searching questions, and the others would ask very few, if any.

Compliance with specific elements of the protocol

In the client monitoring exercise, advisers were asked to assess for each of ten specific aspects of the protocol, whether or not they were observed, or whether it was not possible to tell. From this it was possible to compare how well the various elements of the protocol were being observed by housing associations.

Once again there was evidence of considerable variation. The elements of the protocol where compliance was greatest were:

- contacting the tenant to discuss the causes of their arrears and their financial circumstances
- attempting to agree an affordable arrangement to repay the arrears.

Arguably such steps have traditionally been included in social landlords' rent arrears procedures, so adhering to them should not have involved the need for any change in policy or practice.

At the other extreme, compliance was weakest on the requirements relating to housing benefit. These are the need to liaise with the housing benefit department and ensure housing benefit problems were resolved before taking enforcement action. Advisers also felt that these elements were least well observed. One adviser commented that only a few housing officers were checking whether the tenant was receiving their full housing benefit entitlement, as if they thought it was "too much like hard work".

Also not well observed was the provision of appropriate support for tenants who were vulnerable and/or had difficulty reading or understanding information given.

These findings are also reflected in the case evidence submitted by bureaux across England and Wales relating to the pre-action protocol, where most highlighted poor practices around housing benefit or meeting the needs of vulnerable clients, as the following cases demonstrate.

A CAB in North London reported the case of a Chinese single parent with a young baby who had been placed in temporary accommodation with a housing association. She was in receipt of income support and full housing benefit but had received a summons for possession for rent arrears of £6,000. The housing association had not liaised

with her to make an affordable arrangement to pay off the arrears. The bureau contacted the housing benefit department asking for the benefit to be backdated from when her statutory maternity pay had stopped. They also asked for an explanation of the irregular housing benefit payments and the three overpayments which were being recovered. Further investigation indicated that the housing association may have been posting the overpayments to the wrong client account.

A CAB in Hertfordshire reported the case of a 21 year old man who was unable to read or write. He was in receipt of income support and full housing benefit but got into rent arrears when the Jobcentre to which he reported was changed. He was unaware that this would lead to his housing benefit being stopped. The council wanted evidence that he was still receiving income support before they could reinstate his housing benefit. He had a social worker who was helping him with his benefit claims but poor communication between the social worker and the housing association resulted in him receiving a summons for possession for rent arrears.

A CAB in Surrey reported a 22 year old single parent who was unable to read or write so her correspondence was sent to her father's partner. The housing association was taking court action for possession because of arrears which had accumulated during her tenancy a year earlier. They claimed they had resorted to this action because they had been unable to contact the client, but it appeared that the procedure of sending letters to her father's partner had not been followed. Even after making contact, they refused to withdraw the court action although they did advise her to get advice from a CAB.

A CAB in Devon reported a client with poor literacy skills who received a notice of eviction as a result of a previously suspended warrant for rent arrears. The housing association had refused to accept direct payment of housing benefit despite his request. His confusion about when his housing benefit and incapacity benefit were received had led to his rent arrears. There had been no pre-action intervention and the housing association had given him no support regarding budgeting.

There has however been relatively little bureau evidence submitted to Citizens Advice on the pre-action protocol over the first year of its operation. This is a further indication of its positive impact as bureaux are far more likely to submit evidence where a policy or practice is causing problems.

Taken as a whole, this evidence suggests that the pre-action protocol is working as intended by increasing the likelihood that social landlords will only take possession action as a last resort. However it is clear that, in these early months, there was considerable variation in the level of compliance, both between housing associations and in terms of the different elements of the protocol itself.

There was also variation in the extent to which the protocol had become appropriately embedded in court practices, with some district judges appearing to be considerably more pro-active than others. It is worth noting that a limitation of this monitoring exercise is that it only included courts where there was an advice desk and therefore where it might be expected that issues around adherence to the protocol would be more actively pursued. If the full benefit of the protocol is to be felt, it will be important that the Ministry of Justice gives the protocol a high visibility and ensures that all judges have guidelines about how to enforce it.

Housing associations' use of Ground 8

The pre-action protocol appears to have had a positive impact on housing associations' rent arrears recovery practices. However, there remains significant unfinished business in terms of the continued use by a minority of associations of the mandatory Ground 8 to recover arrears.

This practice has been controversial for a number of reasons. Historically, social landlords have relied on discretionary grounds when seeking possession on the basis of rent arrears. Indeed in the case of secure tenants possession action on the basis of rent arrears can *only* be taken on discretionary grounds. (Secure tenants are local authority tenants, and tenants of registered social landlords whose tenancy commenced before 15 January 1989.)

However lettings by housing associations (and private landlords) after January 1989 are on the basis of assured tenancies as introduced by the 1988 Housing Act. A key purpose of that legislation was to stimulate the growth of the private rented sector by deregulating rents and making it easier for private landlords to evict their tenants and regain their property should they wish to do so. Thus the Act includes both discretionary (Grounds 10 and 11) and a mandatory ground (Ground 8) for possession on the basis of rent arrears. Ground 8 requires the court to grant possession where it is proved that there were at least two months rent arrears, both at the date of the service of the notice and at the date of the hearing itself.

It is arguable that it was never Parliament's intention that Ground 8 should be used by social landlords. Its use means the district judge has no power to take into account whether there are any mitigating circumstances. However, in recent years CAB advisers have increasingly reported cases where housing associations have used this ground.

The use of Ground 8 by housing associations is a cause for concern on a number of fronts:

- It prevents independent scrutiny by the courts as to the reasonableness of the landlord's claim for possession.
- At a practical level, it reduces the scope of advisers to help tenants avoid possession. Many tenants cannot reduce the level of arrears to below eight weeks rent, and no other measures to reduce or manage the arrears can stop the action going ahead. As such, it does not support the Government's homelessness prevention agenda. Current Department of Work and Pensions proposals to reduce housing benefit backdating to a maximum of three months will exacerbate this problem.
- It effectively enables housing associations to sidestep of the pre-action protocol. This includes requirements to ensure that any housing benefit issues are resolved, that affordable payment arrangements are offered or that referrals to independent advice are made before court action is started.
- It is unfair in that some social housing tenants face a greater risk of eviction for rent arrears, simply because they rent from a housing association which has a policy of using Ground 8.
- It conflicts with the Government's declared intention to move towards a single social housing tenure. The Law Commission's draft Bill Rented Homes on tenancy reform would remove any mandatory grounds for possession from the standard social housing tenancy.
- It sits uncomfortably with other policy developments in housing dispute resolution, especially the Law Commission's proposals for shifting housing jurisdiction from the county courts to a new property and land tribunal under recent reforms to the tribunals system.

Yet despite its controversial nature, there is little hard evidence available on the extent of its use. There are no figures on the number of housing associations which have adopted a policy of using Ground 8, nor does the Housing Corporation collect statistics on the frequency with which possession is sought on Ground 8 and the number of evictions which result. More detailed statistics on eviction activity are published by the National Assembly for Wales, and these indicate that use of Ground 8 is increasing rapidly in Wales. The percentage of outright possession orders granted against assured tenants of Registered Social Landlords on mandatory grounds doubled between 2004/05 and 2005/06 – from 13 per cent to 26 per cent of all orders granted.¹¹

Extent of use

From the various sources of evidence used in this research, it seems clear that Ground 8 is only used by a minority of housing associations. When asked why this might be, CAB advisers commented that most housing associations did not view the use of Ground 8 as being consistent with their wider social role.

"Most of them have a position that they are social landlords...they have quite a social conscience."

"The main housing association in our area is very responsible...it's not their policy to use Ground 8."

"Morally they think it's not the right ground for a housing association to use."

In only seven of the 83 cases in the monitoring exercise was Ground 8 relied on in court. Therefore in order to get more detailed information about its use, we contacted 31 housing associations which CAB evidence indicated were using Ground 8, and asked them to complete a short questionnaire.

Twenty six housing associations replied, of whom six said that they did not in fact use Ground 8. Of the remaining 20, which between them account for over 114,000 general needs tenancies,¹² four housing associations said that they had been using Ground 8 as a means of evicting their tenants for over five years. Ten had been using it for between two and five years, and two had started to use it in the last two years. Four did not reply to this question.

The responses show a striking variation in the manner and frequency with which Ground 8 is used. Associations were asked – for the most recent year for which they had data:

- in what percentage of rent arrears possession cases involving assured tenancies was Ground 8 relied on in court
- how many assured tenants were evicted on Ground 8
- what percentage this was of all assured tenants who were evicted.

The results are detailed in Table 1.

Of the 20 housing associations who reported using Ground 8, only ten provided full sets of figures. It must be of concern that half of the associations using this controversial remedy were not able (or willing) to provide statistics on its use, especially as this included two associations which claimed to use Ground 8 routinely.

As the table shows, there was significant variation in the extent to which housing associations reported relying in court on Ground 8. At one extreme, two associations did so in at least half of their rent possession cases, and Ground 8 cases made up the majority of their evictions for rent arrears. On the other hand six of the ten housing associations which supplied figures used Ground 8 in no more than five cases. Three associations had not gone on to evict any tenant once possession had been granted. The

¹¹ *Social landlords possessions and evictions in Wales 2005/06*, National Assembly for Wales, 2006

¹² *The Directory of Social Housing 2008*

number of evictions ranged from nil to 26, again showing significant variation. In fact this table probably underestimates the full extent of the variation amongst the housing associations surveyed, as the two associations which claimed to use Ground 8 "routinely", and therefore could be expected to show the highest figures, did not provide any statistics.

Differences in approach

Most of the associations said they did not use Ground 8 routinely and several gave examples of when Ground 8 would be used. These included:

- where the association considered that the arrears were due to an intentional act or omission, including failure by the tenant to assist in the processing of a housing benefit claim
- a history of non-payment of rent over a sustained period of time, or where a tenant has repeatedly gone into high arrears
- where there had been no contact with the client, or any discussion of the arrears

- where all other means of pursuing the arrears have been exhausted
- when they considered the tenancy was beyond salvage
- where tenants were unwilling to enter into a repayment arrangement or had a long history of failed arrangements
- where there were nuisance problems coupled with rent arrears.

All but three of the housing associations also stated that they had safeguards in place that the housing officer had to follow before serving a notice on Ground 8. These included:

- complying with the requirements in the pre-action protocol including vulnerability checks and referral to advice
- authorisation from a senior manager, and justification from the housing officer as to why it is appropriate to use Ground 8
- ensuring that Ground 8 notices are served with a leaflet explaining its significance.

Table 1 Housing associations' use of Ground 8

Housing association	Percentage of rent arrears possession cases where G8 was relied on	Number of assured tenants evicted on G8	G8 evictions as percentage of all tenants evicted
A	1	0	0
B	1	0	0
C	0.1	1	0.01
D	3	1	3
E	5	0	0
F	5	3	15
G	6.66	1	0
H	20	19	34.5
I	50	4	67
J	75	26	93

As one housing association officer commented:

"There will be more safeguards and additional debt advice (following introduction of the pre-action protocol) but we intend to continue using Ground 8 until forbidden to do so in law."

Whilst all these measures suggest careful practice, it is difficult to argue that they demonstrate more than what is now required by the pre-action protocol for any court action. Interestingly none of the responses referred to a previous history of court action and suspended orders as being a reason for finally resorting to Ground 8. Rather it would appear that, in given circumstances, notice is served using Ground 8 as soon as a decision to take court action is made, although several associations stated that they would serve notice on the discretionary rent arrears Grounds 10 and 11 as well, keeping their options open by only making a decision when they got to court as to which ground they would rely on.

In contrast to the majority practice, two associations stated that they routinely used Ground 8 whenever they were able to do so.

This picture of two very different approaches to the use of Ground 8 is also reflected in the views of the advisers, who commented that most associations did not use it routinely. Advisers thought that such associations tended to use Ground 8 in situations where their motivation was clearly to get rid of the tenant, perhaps because there was a history of anti-social behaviour and it was easier to evict on rent arrears grounds, or in circumstances where they had not managed to make contact and the arrears were out of control.

"Because they have a particularly difficult tenant and they wanted rid of that tenant – often a single person causing trouble."

"Basically they wanted her out and they didn't give her the benefit of the doubt. The paperwork said that they had tried to help the client beforehand, but the client said otherwise. The client claimed they were being vindictive and wanted her out ... perhaps due to client's previous drug abuse. Three of them actually came to the hearing, it was very intimidating to be honest."

"There are about four or five major housing associations in the city. Two use it – but not for every case. Those two use it in about 50 per cent of cases. One of them has definitely increased their use of it since having been taken over in a merger. I think they use it on the cases where there's not much contact with the actual tenant and they fear that it's about to go out of control."

In contrast, advisers also reported that a few associations used Ground 8 wherever this was a legal option regardless of the circumstances of the case.

"They would rather rely on their own efforts and methods (to recover arrears) and if these don't work and they then decide to go to court, they will only go under Ground 8 (and not 10 and 11)."

One adviser commented that all the cases he had seen recently were Ground 8 –

"A quick way of getting rid of the tenants if I can be blunt. A quicker and harsher way of getting their clients out."

Ground 8 and the pre-action protocol

No housing association said it planned to increase the use of Ground 8 as a means of avoiding the need to comply with the pre-action protocol, although one housing association commented that they had considered whether the protocol would cause such delays that Ground 8 should be used to avoid it, but they had decided that "the

protocol mostly reflected our existing good practice so [any] delays would be manageable".

All but three housing associations stated that they had reviewed their procedures on the use of Ground 8 to ensure that they complied with the new pre-action protocol. One stated that they had carried out a full review of their practices, implementing more safeguards and providing additional debt advice. Another had extended their preventative work, employing two part time welfare benefit advisers. Some of the advisers interviewed also commented that associations were particularly careful to follow the protocol where they were using Ground 8.

Ground 8 in practice

Whilst housing associations' answers to our questionnaire indicate that most aim to take a careful and considered approach to the use of Ground 8, case evidence from bureaux suggests that practice can be different, and adherence to the protocol may be inadequate.

A CAB in West London reported a single woman working for an agency and struggling to cope on a low wage. As a result her rent payments had been irregular and arrears had built up, and the housing association had issued notice on Ground 8. The bureau carried out a benefits check and found that she was entitled to housing and council tax benefit which she had not been claiming. She also had a number of other debts which the bureau helped her with. The bureau contacted the association and pointed out that there is in place a pre-action protocol to be followed before seeking possession for rent arrears. They were simply informed that Ground 8 is always used.

There is always the risk that, in bypassing judicial discretion, cases where there has been a failure of housing association procedure can fall through the net:

A CAB in Kent reported that one local housing association usually adopted a cautious approach to the use of Ground 8. However in a recent case there appeared to have been little attempt to engage with the client who was on guarantee pension credit and usually received full housing benefit. The latter had been stopped pending investigation, but before the issue was resolved, the association issued notice on Ground 8. The adviser contacted the officer responsible who said it was a general policy that they could use their discretion to instigate proceedings on Ground 8. The association has a direct referral system to CAB debt advice through the Financial Inclusion Fund but this had not been used in this case.

As with the pre-action protocol, CAB evidence again suggests that some associations are particularly failing to identify where there are issues of tenant vulnerability or unresolved benefit problems:

A CAB in Hertfordshire reported the case of a young family where a 21 year old, the eldest of four siblings, inherited the tenancy on the death of their mother. He had been in receipt of income support but had stopped signing on, resulting in housing benefit being stopped and rent arrears accruing. His siblings believed he was depressed and this is why he stopped signing on. A housing officer attempted to visit on one occasion only but did not get to meet him and did not leave a card. The association did not appear to have taken any action to investigate the cause of the rent arrears nor did it seek to advise him on how to resolve the issue despite the fact that the age of the clients and their family history made them vulnerable. The association sought possession under Ground 8 and the case was heard in his absence but was adjourned on the grounds that the notice had been incorrectly served. The

judge was also concerned that the association had failed to advise the tenant of his right to a 'litigation friend'.

A CAB in West Yorkshire reported a single parent with ongoing debt problems as a result of anxiety/depression. She had been in employment and up to date with her debts. However following a period of ill health, she got into rent arrears. The bureau and the client contacted the association to explain the circumstances, and that the client had applied for income support and therefore full housing benefit. Despite this the association appeared unable to give a positive response and obtained possession under Ground 8.

A CAB in Hampshire reported a couple in low paid work and with dependent children who had been issued notice under Ground 8. The client was unable to reduce her rent arrears to less than eight weeks rent before the hearing because her working tax credit had been stopped due to a change in her circumstances. In the meantime the client had an income of only £400 per month. The bureau had unsuccessfully tried to negotiate with the association to withdraw Ground 8 and rely on Grounds 10 and 11 instead. The client was extremely concerned that she and her children would be made homeless.

Use of Ground 8 can also undermine the welfare to work agenda, as tenants in low paid and irregular work may be particularly at risk of falling into arrears:

A CAB in North Yorkshire reported a client in low paid work who had accumulated over eight weeks rent arrears amounting to around £550. He had offered to pay an additional amount in repayment but the housing association had refused and would not

discuss how they could work with him to recover the arrears. Instead they chose to go directly for a Ground 8 possession order which would have resulted in him becoming homeless and probably losing his job. It was only after the intervention of the bureau that they agreed to allow the client to pay an additional £10 per week on top of his rent, and to suspend further action.

A CAB in East London reported a single parent who got into arrears when she first took up low paid and sporadic work after years of unemployment. She was poorly advised by Jobcentre Plus that all benefits would stop when she started work and therefore she did not apply for housing benefit. The arrears resulted in the housing association obtaining possession under Ground 8. She faced eviction was worried her child would be taken into care and was left very wary of trying to work again.

In their interviews, the court desk advisers commented that clients were often unaware of the implications of facing possession action under Ground 8, and were extremely upset when this was explained.

"I suppose really deep down, everyone has a sort of concept of fairness and if they're in a Ground 8 situation and it's not their fault, like housing benefit or something, then they struggle to reconcile what's going on with their innate sense of fairness."

"The majority of my clients have no idea. All they know is that they're being evicted...they don't know the rules and regulations. Most of them are so disillusioned by their housing association that it just sort of adds to their disillusionment."

"The association does send out covering letters pointing out that it is a mandatory Ground 8 application the judge has no discretion and the only way to avoid possession is to get the arrears down. But some are incapable of understanding this. If they do understand, it creates an enormous amount of distress especially if they can't see a way of reducing the arrears."

"A lot of people don't read all of the paperwork and if they do they don't understand it or they react too late to it. And then it dawns on them that there's nothing I can do."

Fuelling homelessness?

It seems reasonable to assume that a housing association's motivation for using Ground 8 is that it provides certainty that they will be able to evict a tenant in circumstances where, had a discretionary ground been used, outright possession might not have been granted. On this, there would appear to be considerable agreement with the view from advisers. The latter were clear that, in many of the Ground 8 cases they saw, the circumstances were such that they believed they would have been able to prevent an outright order being granted, had a discretionary ground been used.

"Probably the majority of them. In my experience there's usually some defence."

"You've then got a bit more leeway...to see if you can sort something out..."

"Where arrears are ten weeks, I would usually expect a suspended or postponed order on an affordable level of repayments (if a discretionary ground were used)."

"I did have one case with a vulnerable young woman with mental health problems on Ground 8. The judge was very upset that he did not have any

discretion and gave an order for the ushers to ensure that the CAB adviser saw her before she left court."

Conclusions and recommendations

The evidence outlined in this report suggests that the rent arrears pre-action protocol has had a positive effect in helping ensure that housing associations only take possession action for rent arrears as a last resort. A significant amount of variation in practice remains however, between housing associations, between courts, and in the extent to which there is compliance with the different elements of the protocol. **Citizens Advice therefore recommends that the Ministry of Justice works with the Judicial Studies Board and the Housing Corporation to explore ways to promote the protocol and to ensure that its requirements are embedded in training for judges and therefore in court practice.** This is likely to be the most effective way of ensuring compliance in the longer term.

However, within the broader objective of making possession action the last resort, Citizens Advice believes that there remains unfinished business as long as housing associations continue to use Ground 8. It seems unarguable from the evidence of this report that the use of Ground 8 by housing associations is resulting in some households becoming homeless where this would not otherwise have been the case. This sits very uneasily with wider Government housing policy which makes homelessness prevention a key priority. Added to this is the inequity to tenants resulting from the fact that only a minority of housing associations use this ground and within this minority, the frequency with which it is invoked ranges from the exception to the norm.

We therefore believe that it is now imperative that action is taken by the Housing Corporation, the Department for Communities and Local Government and ultimately parliament, to end housing associations' ability to use Ground 8. The majority of associations and indeed all local authority landlords manage to function effectively with regard to the recovery of arrears without using this ground. There can therefore be no justification for a minority taking an approach which effectively bypasses the role of the court to exercise independent scrutiny over action by landlords, and which can have such devastating consequences for the tenants involved. Where associations are concerned that without the use of Ground 8 they will have difficulty in evicting tenants in cases where there have been repeated breaches of orders, then they already have available to them the option to ask the court to make this a final order, stating that the tenant can make no further application to the court to suspend or postpone a warrant without leave of the court.

Whilst the use of Ground 8 by housing associations remains we recommend that:

- the Housing Corporation amend the *Regulatory Circular 02/07 Tenancy management: eligibility and evictions* to positively discourage the use of Ground 8, as being in conflict with wider Government policy on sustainable communities and the prevention of homelessness
- the Housing Corporation (and its successor) collect and publish annual statistics on the extent to which housing associations a) serve notices citing Ground 8, b) rely in court on Ground 8 and c) evict tenants following the use of Ground 8.

Written by

Liz Phelps

Published by

Social Policy Department
Citizens Advice
115-123 Pentonville Road
London N1 9LZ
Telephone 020 7833 2181
Fax 020 7833 4371
www.citizensadvice.org.uk
Registered charity number: 279057