The dispossessed?

Jon Holbrook assesses the ability of councils to bring possession proceedings against tenants involved in the recent riots

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In the wake of the riots that swept through several cities in August, the Prime Minister stated that people who "loot and pillage their own community" should be evicted from council houses. A number of authorities, including Wandsworth, Westminster, Greenwich, Hammersmith and Fulham, Nottingham and Salford have either served eviction notices or said they will consider serving them in an attempt to evict those involved in the riots.

The desirability of the proposal has provoked much comment but this article considers the legal issues that are most likely to arise when possession proceedings are brought against council tenants who either rioted or who live with family members who did. Although concerned primarily with council tenancies, similar issues would arise for housing associations and private landlords as the legislation is materially the same under the Housing Acts 1985 and 1988.

Locality

Since it was introduced by the Housing Act 1996 (HA 1996), local authority landlords have been able to seek possession under Ground 2, Sch 2, of the Housing Act 1985 (HA 1985), on the basis of a conviction for criminal activity. The pre-condition being that: "the tenant or a person residing in or visiting the dwelling-house…(b) has been convicted of…(ii) an indictable offence committed in, or in the locality of, the dwelling house."

With possession proceedings brought on account of the riots the key word is likely to be "locality" and it will clearly rule out any "rioting tourists", unless, for example, they were convicted for handling stolen goods in or nearer to home. The word "locality" is wider than the notion of "vicinity" that appeared in earlier drafts of the legislation. Whether a rioter committed an offence in the locality of his council house is a question of fact. The answer will usually be clear, but for crimes committed in the "fuzzy edges" of the locality the issue will be decided by the judge (*Manchester CC v Lawler* [1998] EWCA Civ 470).

Breach of a tenancy term

Landlords may be able to evict tenants who rioted away from their locality by relying on a different ground for possession, namely Ground 1. The pre-condition being that "an obligation of the tenancy has been broken".

Ground 1 will be relevant for those landlords with tenancy agreements that oblige their tenants or tenants' family members not to engage in the sort of behaviour that took place during the riots. For example, Wandsworth's tenancy agreement forbids a tenant or his household from doing "anything which causes or is likely to cause a nuisance to anyone living in the borough of Wandsworth" or which causes "damage to property belonging to other people or council property in the borough of Wandsworth". Unlike Ground 2, these contractual obligations are not confined to prohibiting anti-social behaviour within the locality.

Reasonableness

When possession is sought under either of the above two grounds the judge will have to consider whether it is reasonable to make a possession order (HA 1985, s 84(2)(a)). This requires the judge "to take into account all relevant circumstances as they exist at the date of the hearing…in a broad, common sense way…giving weight as he thinks right to the various factors in the situation" (*Cumming v Danson* [1942] 2 All ER 653, p655, CA). With possession proceedings brought on account of the riots the following factors are likely to be particularly relevant:

- Dealt with by the criminal law. Tenants are likely to claim that an appropriate penalty has been considered and imposed by the criminal law and hence that the tenant should not be penalised twice for the same conduct.
- Landlord's strategy. Under the Crime and Disorder Act 1998 (CDA 1998) local authorities are under a duty to "formulate and implement a strategy for the reduction of crime and disorder" in their area (s 6). A similar obligation is imposed by HA 1996, s 218A, which also applies to housing associations, although the obligation here only relates to "anti-social behaviour" which is defined more

narrowly than under CDA 1998. The need for a strategy for crime reduction strengthens the local authority's basis to evict even though the offender has already been dealt with by the criminal law because Parliament has given local authority landlords a particular role in tackling anti-social behaviour. The argument for eviction may be strengthened if the required strategy specifically provides for evictions to counteract anti-social behaviour. The authority may be able to produce evidence of the effectiveness of previous evictions.

- A pattern of behaviour. Some tenants will be able to establish that their or their family member's involvement in a riot was out of character in the context of several years as a trouble-free council tenant. On the other hand, the council may be able to show a pattern of anti-social behaviour or a more general failure to accept the responsibility of being a tenant. For example, the tenant with high or long-standing rent arrears may support the conclusion that he is generally irresponsible (aside from the fact that rent arrears can be a ground for eviction in its own right).
- Homelessness. Evicting somebody from a council house is unlikely to render him homeless in the park-bench sense, even if the authority then finds that person intentionally homeless under homelessness legislation. Such a person will, as the Prime Minister said, "have to find housing in the private sector". In any event a judge considering a possession claim should not become too "involved with the possible outcome of an application" as a homeless person (*Bristol CC v Mousah* [1997] EWCA Civ 1081, (1998) 30 HLR 32).

A suspended order?

If satisfied that it is reasonable to make a possession order the judge has to consider whether to suspend its execution (HA 1985, s 85(2)). A suspended possession order is more likely if:

- The criminal behaviour was a one off.
- The person responsible is genuinely repentant. If the offender was a household member of the tenant then this would need to be shown by both the offender and the parent/tenant who failed to exercise appropriate control over the household.
- The circumstances that gave rise to the criminal behaviour have materially changed. This could be because the offender no longer lives with the tenant or because he can demonstrate improved behaviour.

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It is likely to take several months before these possession claims can be concluded in the county court during which time the defendant with a good case for not being evicted should be able to do what the court requires, namely produce "cogent evidence which demonstrates…a sound basis for the hope that the previous conduct will cease" (*Sandwell MBC v Hensley* [2007] EWCA Civ 1425, [2008] All ER (D) 34 (Jan)).

Possession by consent?

Where the tenant has produced cogent evidence that the previous conduct will not be repeated, the parties may invite the court to make a suspended possession order but two important points arise.

First, since the court has to be satisfied that it should make a possession order, it is not possible to have a possession order "by consent" (*Wandsworth LBC v Fadayomi* [1987] 3 All ER 474, [1987] 1 WLR 1473). But it is possible for the landlord to accept a schedule of admissions from the tenant as a basis for inviting the court to conclude that a suspended possession order is appropriate.

Second, landlords should ensure that any schedule of admissions provides a full and complete summary of the material facts upon which the possession order has been made. Landlords who accept too many of the tenant's denials merely to avoid a trial can cause problems in the event of the landlord needing to enforce the order. For on a subsequent application to suspend the warrant the tenant may claim that the order was obtained on a basis that understates the true basis for the order being made.

Justice delayed is justice denied

A few days before the riots broke out the government launched a consultation on its proposal to introduce a new mandatory right to possession for anti-social behaviour. What motivates the government is its concern "about a possession process that is dragging on for many months and sometimes longer". The housing minister notes that "too often the needs and rights of victims, who have sometimes had to endure intolerable behaviour for years on end, seem at the moment to be only a secondary concern". (See *A new mandatory power of possession for anti-social behaviour*, August 2011.)

Accordingly, the government proposes to take the existing discretionary element away from judges by requiring them to make possession orders that cannot be suspended where "anti-social behaviour or criminal behaviour has already been proven by another court".

But for now anti-social behaviour cases will be dealt with within the rubric of discretionary grounds. Judges will need to manage these cases robustly having regard to the overriding objective of CPR 1.1 to prevent the delays that are always the enemy of justice. NLJ

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