paper_baker_W17 (Legal aspects of Housing, Land and Planning)

Effective housing measures- myth or progress?

The UK government has proposed a range of measures intended to provide housing and to protect mortgage owners from eviction. This paper considers whether some of these measures are effective. It will focus on considering the effectiveness of the role of the new Homes and Communities Agency (HCA) and the Tenant Services Authority (TSA), the new social housing regulator created under the Housing and Regeneration Act 2008 (HRA). The paper will discuss by what means the HCA grants public funding to recipients on the condition that the recipient provides social housing and the limitations on such funding. The question is whether the use of its apparent investment budget per year will be more commercially viable than under the previous regime. The liability to repay grants is similar to the rules under the old Housing Corporation, but there are some differences which may be an effective contribution towards maintaining homes, whereas whether the TSA will really change the current regime is still to be seen. This paper considers when payments can be made and who has the statutory obligation to make repayments, and problems that may arise from this arrangement.

It will then discuss the effectiveness of the new pre-action protocol for mortgage arrears possession claims introduced on 19 November 2008; and the impact of the lack of available legal aid for tenants and mortgagees and recent government proposals. This paper will concludes that it has potential for a real impact on protecting mortgage defaulters facing eviction and homelessness but requires the co-operation of the mortgage industry.

It will then discuss the impact of the lack of available legal aid for tenants and mortgagees through recent government proposals and conclude that the situation is dire indeed.

In league with the above points the paper will also discuss briefly that certain credit measures are also essential to the viability of the housing market.

Key Words: Housing, tenants, mortgagees, arrears, possession proceedings, pre-action protocol, legal aid.

The UK government has proposed a range of measures intended to provide housing and to protect mortgage owners from eviction. The questions are whether they are improvements on current measures, and whether such measures can be effective independently of a common ethos. How can they ensure that no-one or even most people are not homeless, if there is no legal aid available for housing matters, and credit measures too pricey for the many? The paper will therefore focus on evaluating the role of the new Homes and Communities Agency (HCA) created under the Housing and Regeneration Act 2008 (HRA); the effectiveness of the new pre-action protocol for mortgage arrears possession claims introduced on 19 November 2008; and the impact of the lack of available legal aid for tenants and

mortgagees through recent government proposals. It will also argue that certain credit measures are also essential to the viability of the housing market.

So, firstly, I will consider the role of the changes to the Housing and Regeneration Act 2008 (HRA)[1]. The Housing and Regeneration Act received royal assent on 22 July 2008 after much debate and amendment. The Act aims to cater for the current and future housing needs of the population by providing an additional 240,000 new homes per year by 2016. However the Act has arrived at a difficult time of economic uncertainty and commercial risk associated with investment are higher.

The HRA has a wide ranging set of objectives. These include

- Improving the supply and quality of housing in England
- Securing the regeneration or development of land or infrastructure in England.
- Supporting in other ways the creation, regeneration or development of communities in England or their continued well-being.

The HCA grants public funding to recipients on the condition that the recipient provides social housing.

The question is whether the use of its investment budget will be more commercially viable than under the previous regime. The liability to repay grants is similar to the rules under the old Housing Corporation, but there are some differences. This paper considers when payments can be made and who has the statutory obligation to make repayments, and problems that may arise from this arrangement.

One of the most distinctive changes with this Act is that the funding and regulation of social housing have now been separated. The funding role has now passed to the Homes and Community Agency (the HCA). It used to be administered by the Housing Corporation and English Partnerships. These bodies no longer exist. Its funding powers are wider than the former Housing Corporation. The regulation of social housing will be undertaken by the Tenant Services Authority (TSA) which commenced operation on 1 December 2008.

The HCA has a broad remit. It is not just concerned with funding which includes grant-making and investments, but with regeneration and with a range of activities that were previously dealt with by the Department for communities and Local Government. It can do “anything it considers appropriate for the purposes of its objects or for purposes incidental to those purposes” and “aims to improve the supply and quality of housing in England”. It has the specific role of dealing with matters that include new affordable housing and the delivery of decent homes through private financial initiative, arms-length management organisation and large scale voluntary transfers. The HCA also has planning functions where it can act as a local planning authority for an area that the secretary of State decides is

an area suitable for development. The HCA has a reserve power to may act independently of the local planning authority. This may be an effective function if it fails to reach agreement with the local planning authority.

The HCA has the power to provide financial assistance such as grants, loans indemnity or guarantee investment or incurring expenditure for the benefit of the party in question on the terms such as repayment without interest. The assistance is made available to any person. It is available to any provider of social housing whether or not it is registered. The question is whether this wide power will lead to a more creative and effective measures of delivering social housing, and whether public funding will be invested wisely.

The liability to repay grants is different from the earlier regimes. Not only does the receiver of a grant, that is, the registered provider, have to repay it, the person to whom the grant-aided property has been transferred, will have an obligation to repay it. The amount that has to be repaid is subject to a statutory ceiling. This reflects changes in the market value of property. However if the new Tenant Services Authority, the new social housing regulator is taking regulatory action it can stop the HCA from paying a grant to that person.

The TSA regulates registered social landlords (RSL's) and later this definition will be replaced with that of registered providers of social housing both no-profit and profit making. It also will set a far more extensive range of key standards for registered providers concerning allocations, consultation, complaints, rent levels, maintenance, tenant involvement, anti-social behaviour, the landlord's contribution to the environment and estate management and all matters concerning the financial and other aspects that arise when regulating a registered provider. However it will only regulate those matters concerning the provision of social housing and therefore it will not interfere with other matters that for profit organisations may be engaged in.

One innovative feature of the Act is its requirement for sellers of new build residential property to supply the purchaser with a sustainability certificate before the sale is agreed. The Act makes obtaining sustainability certificates mandatory. The certificate concerns an assessment by an authorised assessor of the sustainability of materials used in the construction of the property. The materials include services, equipment and fittings provided in the property and other aspects of the design and construction of the property. The rating is made against the Code for Sustainable Homes.

Pre-action protocol for possession claims based on mortgage arrears or home purchase plan arrears

Another measure which provision aim to protect mortgage borrowers facing eviction for mortgage default is the pre-action protocol for possession claims based on mortgage arrears or home purchase plan arrears (but not to those requiring the payment of interest) regarding residential property[2]. This will be referred to as the rent arrears pre-action protocol. There had again been much consultation with various interested bodies prior to its coming

into effect on 19 November 2008. The overall message of the protocol is that ‘the court takes the view that starting a possession claim is usually a last resort and that such a claim should not normally be started when a settlement is still actively being explored’. This is stated under the heading Alternative Dispute Resolution but it should be highlighted by being stated in the Aims section in paragraph 2. The protocol particularly emphasises that there should be fair and reasonable communication between both parties towards attempting to resolve any financial difficulties the borrower may be facing in paying the mortgage at every step, both prior to and after the claim.

The protocol specifically states in paras 2.1 (1) and (2) respectively that lenders or home purchase providers must act ‘fairly and reasonably with each other in resolving any matter concerning mortgage or home purchase plan arrears’ and they must ‘encourage more pre-action protocol between them in an effort to seek agreement between the parties’. Para 2 also requires that where the lender or home plan provider is aware that the borrower may have difficulties in reading or understanding the information provided any communication be fair, reasonable and not misleading, and that reasonable steps be taken to ensure that the borrower understands the relevant material.

It is particularly welcome in the current economic recession that the protocol extends not just to first charge mortgages for the purchase of their homes, but also to second-hand and subsequent secured loans. Para 3.1(1)-(3) makes it clear that these must be mortgages either regulated by the Financial Services Authority [FSA] or those regulated under the Consumer Credit Act [CCA] 1974 on residential property. It also concerns ‘unregulated mortgages’, but this phrase is undefined in the Act. This lack of interpretation will no doubt assist means many vulnerable mortgagees. It will include those mortgages where the buyer is not the occupier of the property.

The protocol also sets out requirements in para 5.1 regarding the information that must be provided to the borrower. This concerns all information that the borrower may need to know such as:
(a) the total amount of the arrears;
(b)the total outstanding of the mortgage or the home purchase plan; and
(c)whether interest or charges will be added, and if so and where appropriate, details or an estimate of the interest or charges that may be payable.

Problems with mortgagors have often arisen because of the mortgagee’s failure to respond promptly to queries by mortgagees. 5.5 is therefore very welcome. It is very clear in stating that if the lender does not agree to any proposal for payment made by the borrower it should give reasons in writing to the borrower within 10 business days of the proposal.

The lender cannot pressure the borrower under the protocol through requiring quick responses to its proposals. Under para 5.6 it has to set out its proposal clearly and in detail stating all its implications. It must then give the borrower a reasonable period of time in which to consider such proposals.

Under para 5.7, where the borrower fails to comply with an agreement, the lender cannot immediately institute possession proceedings. It should explain to the borrower in writing that it intends to start a possession claim unless the borrower remedies the breach in the agreement within 15 business days of its letter.

Even then where the 15 days have passed, there seems to be a loophole in favour of the mortgagee, because under para 6.1, if the borrower has not complied with the agreement, the lender should still not consider instituting possession proceedings, if a borrower can show the lender that he has –
(1)submitted a claim to an insurer under a mortgage payment protection policy and has provided all the evidence required to process a claim;
(2)a reasonable expectation of eligibility for payment from the insurer; and
(3)an ability to pay a mortgage instalment not covered by the insurance.
The lender should not start possession proceedings.

In addition, if the borrower can show that he has, or will be taking reasonable steps to market the property at an appropriate price, and in accordance with reasonable professional advice, the lender should consider postponing starting a possession claim. In the case where the lender has agreed to postpone starting a possession claim, the borrower must not stop marketing the property. He must continue to take all reasonable steps actively to market the property (para 6.2).

If the lender decides not to postpone the start of a possession claim, it should inform the borrower of the reasons for this decision at least 5 business days before starting proceedings (6.4). However this will not be enough to comply with the protocol and impress the court, if the lender has not observed other provisions, such as the 15 days notice and demonstration by the borrower of factors under para 6.1.

Under para 7, if the parties are discussing settlement then the lender should not start a possession hearing. The protocol refers to actively exploring settlement. This could presumably be interpreted to mean that correspondence must be recent and the parties must clearly not be stalling for time. Discussion between the parties may include options such as:
(1)extending the term of the mortgage;
(2)changing the type of a mortgage;
(3)deferring payment of interest due under the mortgage; or
(4)capitalising the arrears.

The ‘may’ indicates that court will expect that other options also be explored if they are raised. The protocol does not require the lender to give reasons why it has not explored one of these options, but if one is suggested

by the borrower, then the lender must either consider it, or give reasons for its rejection within ten business days. The effectiveness of this provision therefore depends upon whether the borrower has sought and been given sound advice. Of course, mortgagees in financial trouble cannot afford to do so, but the court can assist in these matters as I will discuss below.

Even if the borrower has complied with the provisions of the protocol, the borrower can still stall the possession proceedings by making a genuine complaint to the Financial Ombudsman Service (FOS) about the potential possession claim. However the provision only states that the lender should consider it.

Although all these provisions seem to favour the borrower, there is the anomaly whereby if a lender does not intend to await the decision of the FOS, it should give notice to the borrower with reasons that it intends to start a possession claim at least 5 business days before doing so. Surely this contradicts the purpose of the protocol and the intent of 8.1

Given the above the protocol does not appear to be a toothless tiger. It states that the parties must provide evidence that they have followed the protocol if the court requests it. The court also has the power to stay proceedings under the Civil Procedure Rules 26.4 (2) (b. This may be used to stay possession proceedings until the parties have considered options for enabling the payment of the mortgage. The protocol therefore seems to take into account the court's powers in not providing a sanction for breach of the protocol. The problem is that because there is no sanction under the protocol the courts do not have to stay possessions whereas they would if the protocol imposed sanctions- but then it starts looking like legislation. Perhaps that is what is needed-not merely guidance, but mandatory provisions with penalty sanctions. There still seems some way to go before justice for the many is assured.

Given the direction of legal aid reforms in the UK proposed by the Legal Aid Commission (LSC), justice for the many, for tenants, for mortgagees, for the homeless and for the vulnerable, will become a rare commodity. It has become common knowledge that legal aid cuts in recent years has seen the closure of a large number of legal aid firms specialising in housing and crime, and an increase in unrepresented local authority possession hearings, but even more is yet to come. In the Civil Bid rounds for 2010 contract: a consultation (October 2008) the LSC proposes to end all housing only, benefits only and debt only contracts. Contracts will only be given to those carrying out work in all three areas and to those carrying out both family and housing work. The LSC favourite seems to be a one stop shop. This is based on LSC research (Civil Bid rounds for 2010 contract: a consultation paras 1.3 and 3.4 -6) that people suffer problems in clusters, such as housing debt and benefits problems together. The LSC's proposals are criticised by writers in the prominent UK Journal of Legal Action (Gareth Mitchell and Stephen Pierce, p. 6-9 March-p. 8-11 April 2009) on the basis that they do not reflect the experience of lawyers working in legal aid areas of law such as housing, and that they will lead to a further reduction in the number of

quality suppliers of legal aid. In my experience over a number of years working in legal matters, such as housing, benefits and debt, a number of housing issues that may lead to possession proceeding concern other matters not involving debt or benefits, for example, anti-social behaviour issues, unpermitted guests, overcrowding or lack of maintenance of the property or the owner may require the property. Many mortgagees have also been left out of the picture. Most needing advice on how to preserve their home will not taking housing benefit, but they will most likely need debt advice. So the problem may not be as simple as the LSC's research may show (Causes of Action Report 2006-Legal Research Centre). While the pros and cons of whether client problems arise in clusters will continue to be debated, the more pressing issue is whether these one stop shops will deliver quality advice. The fixed fee rates that legal aid pays are very low. For example, for work that does not yet require representation in a court hearing, currently £174 for a housing case, £167 for a benefits case and debt is £200 per matter whether the amount of work required is 2 hours or 50. On this basis, the LSC argument is that supply of social welfare law should be in the hands of the few large suppliers. The opposing argument is that the only organisations that will thrive and expand are those in the private sector which pay low salaries, and therefore attract inexperienced and poorly supervised advisers, whereas there is no need for a one stop shop, since solicitors can refer work quickly through email and the internet to quality specialists. Such joint working schemes across internets with the client only needing to actually visit one of the firms, should help the client more effectively (Mitchell and Pierce, p.9-11 April, Legal Action 2009).

If the average person cannot obtain quality legal advice, then he may end up being worse off than he was without such advice. Further, a reduction in fixed fee payments for legal aid and the concentration of power in the hands of few scattered legal aid providers will not make it accessible to all who can ill afford to travel or are too ill or disabled to travel. The prediction is not too promising at present for ensuring housing for all.

New social housing developments, and cash flow is essential to the viability of the construction industry which services the housing industry. The developer/employer may protect its position in case of contractor insolvency through re-negotiation and close consideration of the construction contract. We have looked at the position of funding public and private projects under the H & R Act 2008. However, we have not considered the fate of the non-government aided lender for housing developments in recent times. Developments are complex matters involving many professional teams, including local planning authorities. His loan does not have the same repayment options and protection as it would if obtained through the HCA. There are standard options available to protect such lenders when faced with distressed buildings and struggling borrowers, such as refinancing, the provision of additional finance or restructuring, involving writing off some of the debt- or exchanging debt for equity- though the latter is not advisable when faced with a likely insolvent borrower. Strict enforcement of repayment is not desirable, but for different reasons to those discussed regarding mortgagees. It may trigger provisions which give parties the right

to end contracts, whereas a project needs to be successfully completed if the advanced funds are to be recovered. What therefore is of overriding importance today is to seek new ways of building co-operation and assistance to all in the team that makes up the housing development. This is essential to ensure adequate cash flow and to enable the lender to recover its loan.

So, overall, there are advances in the provision of funding measures for the provision of financial assistance for housing such as grants, loans indemnity or guarantee investment or incurring expenditure for the benefit of the party in question on the terms such as repayment without interest. The Pre-action protocol for possession claims based on mortgage arrears or home purchase plan arrears again is an improvement, as it attempts to regulate mortgagors in co-operation with the courts, which have the option of meting out sanctions for breaching the protocol. But this is not ideal. Sanctions should be stated in the protocol, or even better, legislation should make this clear. The increasing decrease in provision of legal aid assistance for housing tenants with rent arrears and mortgagees will not, in my view, promote a stable society. I do not consider that one stop shops will prove economically advantageous- as inexperienced advisors may generate more legal problems, which will require quality advice to resolve, and therefore the expenditure of more legal aid costs. On the other hand, it may prove very costly for many legal aid firms to restructure, in order to provide the cluster work the LSC requires to obtain funding. There is arguably some progress towards effective housing under the H & A Act, but this is overshadowed, in my view, by the large backward step taken by the LSC' s proposals- but bear in mind that I have not covered all possible measures in the H & A Act.

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