

MEETING OF THE Executive DECEMBER 2008

EFFECTIVE DECISION MAKING AROUND WHEN AND HOW TENANCIES ARE TERMINATED

ORIGINATOR : GENERAL MANAGER, ADVISORY AND
ASSURANCE AND CHIEF OPERATING OFFICER

Purpose

The purpose of this paper is to promote discussion on a possible change to the process by which the Corporation terminates tenancies. In essence, it is proposed that the decision of when to terminate be centralised and that 90 day notices become the principal means by which terminations are effected. The key determinant of whether to terminate would be Corporation policy. Currently the key determinant of whether to terminate is the likely response of the Tenancy Tribunal to an application for termination.

Key Concepts

- Centralise the decision to terminate to the “Director Operations” level.
- Once the decision making process is centralised to the “Director Operations” level, it is possible for the Corporation to confidently apply its own policy in exercising the discretion to terminate by a 90 day notice.
- Before changing to the new process, it is critical that the Corporation establish clear, fair and robust policies about when and how tenancies are terminated.
- All termination decisions, including those initiated by the Investigations Committee, would go through the same centralised decision making process.

Facts and Assumptions

There are a number of independent strands of thinking that lead to the need for a centralised decision making process around terminations. These strands are premised on a number of facts and assumptions. Some are referred to below. The key strands in support of a centralised decision making process are:

1. Judicial Review / Media Criticism

The decision to terminate a tenancy is significant to the tenant concerned. This is because (a) losing one's home and community is ordinarily distressing and (b) having a Corporation tenancy generally equates with receiving a housing benefit (IRR) that is not otherwise available.

In nearly every case of a Corporation initiated termination, the Corporation will have exercised a discretion in reaching the decision.

Because the decision to terminate is significant to the tenant and because the decision involves the exercise of a discretion, the Courts will be prepared to intervene and review the decision by way of a judicial review.

Where a decision is made to use a 90 day notice to terminate a tenancy, the decision is one that could be judicially reviewed. Similarly, where a decision is made to apply to the Tenancy Tribunal for a termination order, the decision is also one that could be judicially reviewed.

If a decision is reviewed, the Court will be looking at the consistency of decision making, how the decision fits with the policies and processes in place, the application of principles of natural justice, the presence of malice, ulterior motives etc.

The Corporation is currently vulnerable to being challenged in its decision making around terminations. Anecdotally, it is known that the Corporation does not apply consistent approaches to terminations, Corporation staff are sometimes motivated by ulterior considerations, there may be components of malice in decisions, principles of natural justice are not applied.

Centralised decision making coupled with the application of clear, fair and robust policies around decisions on terminations ought to address the risks associated with a tenant seeking a judicial review of the Corporation's decision to terminate. Similarly, the risk of media criticism around termination decisions is also reduced.

2. Corporation Status

The Corporation is the government's sole social housing agent with responsibility for around 67,000 tenanted properties. It pursues a number of government housing objectives and serves its tenants and the communities in which its tenants reside.

The Corporation carefully selects its tenants in accordance with policies agreed by the Crown. It seems to follow that the Corporation should similarly carefully determine which tenants remain in its houses. At present this is not the case. The final determination of whether a tenant should remain in a Corporation house is left to the Tenancy Tribunal. There is no need for this to be the case. The situation occurs as the consequence of a voluntary relinquishment of responsibility by the Corporation.

The Corporation's status is such that it should be taking responsibility for determining which tenants remain in its houses. The Corporation should not be surrendering this responsibility to the Tenancy Tribunal except in rare cases. It is demeaning for the Corporation's status when it is unable to efficiently recover its houses from tenancies that the Corporation no longer wants. (eg Salt, Ellis)

3. Tenancy Tribunal Not Best Forum to Decide

The Tenancy Tribunal is not the best forum to decide termination questions given that the Corporation is a social landlord trying to achieve the best outcomes for its tenants and the wider community. This is because:

- The Tenancy Tribunal can only apply the Residential Tenancies Act (RTA). In essence, the RTA is a piece of public law legislation designed to address the relative disparity of contracting power between landlords and tenants. The Act addresses tenancy and property management issues and is premised on the notion that the landlord is motivated to maximise rental profits in a market situation. The Corporation is a social landlord and is not trying to maximise rental profits. The Corporation frequently has to address community and government housing objectives that involve much more than tenant and property management issues. In short, the RTA has deficiencies from a social housing landlord's perspective. The RTA does not accommodate landlords with very large portfolios or those obliged to house people in greatest need or those who charge a social rent.
- Even in dealing with tenant and property management issues, the RTA does not envisage that the principal means of terminating a tenancy should be by way of an application to the Tribunal. The RTA correctly envisages that most landlord terminations will occur by way of the 90 day notice provision. Most private sector landlord initiated terminations occur by way of 90 day notices with applications to the Tribunal reserved for urgent or complex (claims for damages) terminations. For the most part, the Corporation does not terminate by way of 90 day notices and instead terminates by way of application to the Tribunal.
- The Tribunal's Adjudicators have limited understanding of the Corporation's role and its social objectives. The Adjudicators are there to find legal solutions to strictly tenancy problems. The Adjudicators are not well placed to find satisfactory social outcome solutions.
- The Tribunals' decision is public.
- The Tribunal is expensive in terms of both management time and legal resource. And if the decision is appealed the expense and time delays can rapidly escalate.

Centralised decision making will allow the Corporation to by-pass the Tribunal in all but the most urgent terminations.

4. Prevent Abuse of Tribunal Process and Bullying of Tenants

Anecdotally, it appears to be a relatively common practice for Tenancy Managers to obtain a termination order from the Tribunal as a means of tenant management. Having obtained the order, the Tenancy Manager is in a strong position to negotiate with the tenant to get what the Corporation needs. If the Tenancy Manager gets what

is needed the termination order is not enforced and is allowed to lapse. This practice is objectionable for two reasons:

- First, it constitutes an abuse of a judicial process. Adjudicators have complained on numerous occasions that the Corporation obtains from the Tribunal termination orders that it then fails to enforce. It is likely that the Adjudicators would be much more upset if they knew that in some cases the orders were obtained simply as a negotiating ploy.
- Second, it creates a potential for abuse of power by the Tenancy Manager. It effectively puts the Tenancy Manager into the position of being able to say to the tenant, 'start seeing things my way or you'll be gone.' The Corporation has never intended that a Tenancy Manager be able to negotiate in this way.

Current Process

- If the Tenancy Manager believes that there are grounds to terminate under the Residential Tenancies Act (RTA), they may apply to Tenancy Tribunal;
- If the Tenancy Tribunal agrees with the Corporation, it grants a termination order. The Corporation then decides whether to enforce that order;
- If the Tenancy Tribunal does not agree with the Corporation, it declines to grant the termination order. At this point the Corporation is precluded from terminating the tenancy by giving the tenant a 90 day notice as do so could be considered retaliatory by the Tenancy Tribunal.

Proposed New Process

- If the Tenancy Manager believes that there are grounds to terminate according to the Corporation policy, they may apply to the centralised Corporation decision making body.;
- If the decision making body agrees that the tenancy ought to be terminated in accordance with policy, it then makes a decision as to the most appropriate means of effecting the termination. The choice would be between a 90 day notice or an application to the Tribunal. Most terminations can be by way of 90 day notice with applications to the Tribunal being reserved for the most obvious and urgent cases (assaults on staff, "P" labs etc);
- In most cases, once an interim decision has been made to terminate a particular tenancy, the decision making body would seek input from the tenant prior to a final decision being made.
- If a tenancy is being terminated by way of a 90 day notice and the tenant becomes difficult in the interim (eg stops paying rent, causes damage etc), the Corporation can apply to the Tribunal for a more immediate Tribunal ordered termination without invalidating the 90 day notice.

Range of Situations Where Terminations Occur

The Corporation terminates tenancies for reasons that range from “no tenant fault” to “extreme tenant fault”. Examples along this fault range include:

- Re-development – The Corporation wants to end a tenancy so that it can re-develop the property. No question of tenant fault. Current practice is that the Corporation would terminate by a 90 day notice. Under the proposed change this practice would continue.
- Neighbouring Corporation tenants fighting with each other. It is possible that neither tenant is guilty of any actionable RTA fault in respect of the fighting. The only solution may be to move one of the tenants. If both tenants decline relocation, current practice could see the Tenancy Manager left with no option but to become opportunistic and seize upon some incident (eg rental arrears) to apply to the Tenancy Tribunal for termination. This approach can lead to three unfavourable outcomes. First, the Corporation may perform poorly at the Tribunal hearing because the grounds for termination may not be as strong as they ordinarily would be. Second, the relationship between the tenant and the Corporation may be strained by the confrontational act of seeking termination via the Tribunal. Third, the tenant with the greatest need to retain their tenancy at the particular location may be the one that has their tenancy terminated. Under the proposed change, if the only solution to the fighting was to terminate one of the tenancies, the Corporation would assess a number of factors, (eg which tenant had the greatest need to remain tenanted at the location) and then decide which tenancy was to be terminated by a 90 day notice.
- Anti- social behaviour. This is ordinarily a tenant fault situation. Where a tenant or their family or their visitor are causing extreme disruption and disturbance to the neighbours, current practice is to apply to the Tribunal for termination. This approach can be unsatisfactory for the following reasons. The outcome is uncertain. It is distressing for neighbours to give evidence against the tenant. The process can damage both the Corporation / tenant relationship and the Corporation / community relationship. The process can be lengthy particularly if the parties appeal decisions that go against them. The process can be expensive in management time and can result in media and political interest. Under the proposed change the Corporation would decide whether the tenant had gone beyond what was acceptable to the Corporation in terms of anti social behaviour and, if they had, terminate the tenancy by a 90 day notice.
- Serious criminal behaviour by the tenant, for example assault on Corporation staff or the manufacture of the drug known as “P”. Current practice is to seek immediate termination by application to the Tribunal. Under the proposed change, this practice would continue as the preferred method of termination in most cases.
- Fraud, for example where a tenant significantly misled us as to their financial position at the time they were being considered for allocation of a Corporation house. Current practice is that the tenant would, depending on evidential factors, be prosecuted under the Crimes Act for fraud and they may have their tenancy terminated either by application to the Tribunal or by a 90 day notice. Under the proposed change the tenant would still be prosecuted for fraud but in most cases the tenancy would be terminated by 90 day notice given that it provides a more certain outcome (and less cost and fuss) than applying to the Tribunal.

Advantages and Disadvantages of Proposed Change

Advantages

- Corporation Status – The Corporation ought to decide on its own criteria who gets to retain their tenancy and who does not. At present the Tribunal plays a large part in the decision. It is demeaning to the Corporation's status as a major Crown Entity if the Corporation is not able to efficiently and effectively recover its house from a tenant that on all measures should not be in possession. The Salt case is an example of how the Tribunal (and the Corporation's reliance on the Tribunal process), has caused the Corporation to look ineffectual in the eyes of the public.
- Risk – The Corporation is sometimes inconsistent in its decision making around whether to make an application to the Tribunal and sometimes allows ulterior motives or malice to be part of the decision making process. It is only a matter of time before the Corporation receives some unwanted attention via a Ministerial, the media or a judicial review.
- Tribunal Wrong Venue – There are a variety of reasons why the Tribunal is frequently not the best venue to determine whether a tenancy should be terminated.
- Prevent Abuse of Termination Process – The Corporation sometimes obtains a termination order from the Tribunal for the purpose of negotiating or extorting some concession from the tenant. The Corporation has never intended that a Tenancy Manager should hold this type of power over a tenant and there must be a concern that the power is on occasions abused.
- Build Communities – The Corporation is moving to place greater emphasis on the goal of 'building communities' as opposed to simply 'providing a house'. Enhancing the Corporation's ability to terminate tenancies that don't meet the Corporation's criteria is something that ought to assist this new goal. Anti social tenants can quickly and efficiently be moved on where that is what the Corporation decides.
- Better Social Outcomes – Where terminations are based on the Corporation's termination criteria it ought to be possible to terminate and get the best social outcome in the circumstances. Where terminations are based on an application to the Tribunal there will be a greater emphasis on property management issues.

Disadvantages

- Amount of Work Required – Before the Corporation can centralise the decision making process around terminations, it must first establish a comprehensive array

of criteria and processes. This is a very large piece of work that will involve the Corporation thinking about things it has not previously had to.

- Responsibility – With power comes responsibility. When the Corporation assumes the power of deciding which tenant retains their tenancy, the Corporation will also assume a responsibility for the outcomes of its decisions. For example, the Corporation will find itself balancing the rights of two neighbouring tenants or balancing the rights of a dysfunctional disadvantaged tenant against the rights of the immediate community to be free from disturbance and disruption.
- Political and Media Pressure – Once it is known that the Corporation decides who remains as a tenant and who doesn't, it is likely that there will be attempts to influence the Corporation's decision making process. To counter this pressure it will be important to have robust, transparent and fair criteria and processes. It may also be necessary to have some form of an appeal or review system.
- There is a possibility that some Tenancy Managers may feel disempowered if they are no longer permitted to directly apply to the Tribunal for a termination.

Conclusion

There is reason to centralise the decision making process around terminations. This action alone will remove a number of risks to the Corporation. And if the process is centralised, there is an opportunity to make far greater use of the 90 day notice provision. But before the Corporation can adopt this new approach, it must first establish robust, transparent and publicly acceptable processes around how the Corporation will determine issues around terminations. There are many advantages to be had from making use of the 90 day notice provision provided the use is supported by well thought out policy and process.

It is easy to visualise how the Corporation may look in three years time with the proposed change in place. The Corporation will be making very little use of the Tribunal for terminations. There will be a system in place where the corporation can efficiently determine on its robust and publicly accepted criteria whether a tenancy will continue or not. The Corporation will have means to keep political and media pressure from the process. While it is easy to visualise the substantial benefits that could come from the change, the policy and process work that needs to be done to set the change in place is substantial.

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