

HOUSING BENEFIT AND RENT ARREARS

This article is based on a presentation by the author at a shrieval training day in Glasgow in February 2007.

The latest statistics show that local authorities and housing associations raised almost 25,000 eviction actions in Scotland in 2005.¹ Around 96% of cases were for non-payment of rent. Around one third of actions resulted in decree; and out of that number one third of households were physically ejected or abandoned their tenancy – some 3,000 households in total.

There are no centrally held statistics on evictions in the private sector – however the data available confirms that actual evictions rates in the private rented sector are significantly higher *pro rata* than in the social rented sector.²

The Scottish Parliament recognised that delays in the payment of housing benefit resulted in needless private sector evictions, and so gave effect to section 12 of the Homelessness etc., (Scotland) Act 2003.

Section 12 of the 2003 Act amends the Housing (Scotland) Act 1988 and requires the court to take into consideration the extent to which the failure to pay rent is due to a failure or delay in the payment of housing benefit. Importantly, this change means that mandatory ‘Ground 8’ eviction actions – where there are at least 3 months of arrears – are now discretionary and subject to a ‘reasonableness’ test where arrears are due to housing benefit delay or failure.

It is important therefore to recognise the pivotal role that housing benefit plays in the majority of eviction actions, both in the social and private rented sectors.

This article will focus on the most common areas where tenants can get into difficulty with housing benefit and rent arrears. The perspective will be from the viewpoint of how tenants can protect their legal position and pay their rent and arrears. If they can do that, they should be able to avoid eviction. Three topics will be examined:

- (1) late claims and backdating,
- (2) overpayment of housing benefit, and
- (3) discretionary housing payments

(1) Late claims and backdating

When a tenant applies for housing benefit it will take several weeks for that application to be determined. The national target is 36 days, which is a little over 5 weeks.³ It is not uncommon for a claim to take 8 weeks. In practice many tenants will get a housing benefit application when they make a claim for social security benefit at the DWP. Unfortunately some will omit to return their housing benefit application to the Council, or fail to provide the necessary supporting evidence.

¹ See <http://www.scotland.gov.uk/Resource/Doc/1033/0039931.doc> (Scottish Executive Homelessness Monitoring Group Discussion Paper: *Preventing Homelessness – addressing rent arrears*, September 2006).

² *Ibid.*, para 7.

³ http://www.dwp.gov.uk/mediacentre/pressreleases/2004/june/framhb_ctb240604.asp

Where claimants fail to apply on time they can request housing benefit to be backdated for up to 52 weeks if they can show that they would otherwise have been eligible *and* have ‘*continuous good cause*’.⁴ Good cause is not defined in the 2006 Housing Benefit Regulations, but has been developed as a concept from various decisions of the Social Security Commissioners – the leading one being R(S) 2/63.⁵ The classic test approved in that case is as follows:

“ ‘ Good cause’ means, in my opinion, some fact which, having regard to all the circumstances (including the claimant’s state of health and the information which he had received and that which he might have obtained) would probably have caused a reasonable person of his age and experience to act (or fail to act) as the claimant did.”

Thus tenants may be able to seek backdated benefit if, for example –

- a close relative died and they were unable to deal with the claim,
- a serious domestic emergency affected his or her ability to claim,
- they had been ill or incapacitated,
- they had been given misleading advice by an advisor or official, or
- they had difficulties communicating because there were learning, language or literacy difficulties, or they are deaf or blind and had no one else to help them.⁶

If a tenant only has good cause for part of a backdated period they can only get housing benefit backdated for that period. Importantly, tenants have to apply in writing to claim backdated benefit. The onus is on them.

Tenants can get free help in Glasgow from a local law centre (there are 6 in Glasgow), local money advice agency, Shelter Housing Aid Centre, or local CABx.⁷ Glasgow City Council also employs money advisors and welfare rights officers who can provide free help; as indeed do some housing associations, including the GHA. Local authorities receive 100% Central Government subsidy on claims correctly backdated – so there is no cost to the Council here.

(2) Overpayment of housing benefit⁸

Overpayment of housing benefit can be a complex area, and indeed a factor which can result in tenants being unable to meet ongoing rent. To take an example case:

Mr Jones was originally receiving income support, however in 2005 his entitlement ceased. Instead he became eligible for incapacity benefit. Later in 2006 the Council wrote to him intimating an overpayment decision based upon the fact his entitlement to income support ceased in 2005. The Council assumed no entitlement – and to be fair this is usually because the claimant

⁴ Regulation 83(1), Housing Benefit Regulations 2006 (SI 2006/213).

⁵ For a summary of the approach of local authority HB assessment officers on backdating see: <http://www.londoncouncils.gov.uk/doc.asp?doc=17627&cat=2299>

⁶ See further the comments of the Social Security Advisory Committee on ‘good cause’ here: <http://www.ssac.org.uk/pdf/pubs/backdate.pdf>

⁷ The locations of free legal & money advice centres in Glasgow can be found here: <http://www.glasgow.gov.uk/en/Residents/YourHome/HousingOptions/FurtherAdvice/Money/>; and <http://www.govanlc.com/glasgow.htm>

⁸ For recent DWP Guidance see: <http://www.dwp.gov.uk/hbctb/circulars/2006/a13-2006.pdf> ;and <http://www.dwp.gov.uk/advisers/ni260/>

fails to tell provide evidence to the contrary. An overpayment decision for £1200 was issued. The Council then proceed to recover this overpayment by way of deductions to current housing benefit at the standard rate of £8.70 per week.⁹ The overpayment creates an additional shortfall of around £35 per month to rent. Understandably, Mr Jones' housing association landlord enrolls an incidental application to recall the sist and move for decree as arrears are increasing.

The first observation we can make here is that the local authority will usually reduce the level of deductions for claimants not in receipt of income support to the minimum level of deduction which is £2.90 per week – if the tenant can show hardship. If a tenant is facing eviction, is on incapacity benefit, and is repaying an overpayment of benefit, the Council is generally sympathetic and should reduce the deduction rate. But the tenant needs to ask for this in writing and provide evidence of hardship. Securing a reduction will prevent rent arrears increasing.

The second observation that can be made is that it is often possible to challenge the legal basis of an overpayment decision. Importantly, when an overpayment decision is being challenged the local authority must stop deductions pending any appeal before the Social Security Tribunal. Returning to the case example of Mr Jones, it will be apparent that he has an underlying entitlement to housing benefit. In other words when his benefit changed from income support to incapacity benefit he would still be eligible for 80% of his previous housing benefit award.

The problem Mr Jones will have is that this issue might only come to light in 2007 when he obtains legal advice on the application to recall the sist. The Appeal Regulations provide that a claimant has one month to challenge a decision unless he or she can show that it is in '*the interests of justice*' to allow a late appeal.¹⁰ The interests of justice is narrowly defined in the Regulations to mean circumstances where (a) the applicant, or partner or dependent of the applicant, has died or suffered serious illness, (b) the applicant was not resident in the UK or (c) normal postal services were disrupted.¹¹

Accordingly, it may be impossible to submit a late appeal. The solution, which many tenants and advisors may be unaware of, is to submit an '*any time revision*' in terms of Regulation 4(2) of the 2001 Housing Benefit & Council Tax Benefit (Decision and Appeal) Regulations.¹² Regulation 4(2) provides that:

An original decision may be revised or further revised by the relevant authority which made the decision, at any time by that authority, where that decision
(a) arose from an official error; or

⁹ 2006/07 benefits rate are available at:

http://www.dwp.gov.uk/mediacentre/pressreleases/2005/dec/ben_rates.pdf Deductions can be higher where fraud is alleged.

¹⁰ Housing Benefit & Council Tax Benefit (Decisions and Appeals) Regulations (the '2001 Regulations') (SI 2001/1002).

¹¹ Regulations 19 of the 2001 Regulations, *cited supra*. If a late appeal is eligible it must be submitted within one year after the last date for appeal.

¹² The 2001 Regulations, *cited supra*.

(b) was made in ignorance of, or was based upon a mistake as to, some material fact and as a result of that ignorance of or mistake as to that fact, the decision was more advantageous to the person affected than it would otherwise have been but for that ignorance or mistake.

Here tenants can argue that the local authority has made its overpayment decision based upon ignorance of a material fact, namely their underlying entitlement to housing benefit. Separately, the tenant can also argue that the local authority has failed to apply the law correctly as it ought to have carried out an off-set calculation in terms of Regulations 104 of the 2006 Housing Benefit Regulations. There is case law to support this proposition, namely Social Security Commissioner's decision CH/4943/2001, which is reported at 2003 Greens Housing Law Reports 65. Commissioner Jacobs held that local authorities had to ascertain what a tenant would have been entitled to during the disputed period, and deduct that sum from the overpayment.

To summarise then, many tenants may be able to challenge overpayment decisions, and in so doing, be in a much better position to meet their ongoing rent and arrears. In the example of Mr Jones, a successful challenge would have saved £960, and resulted in no deductions from housing benefit.

(3) Discretionary housing payments

Discretionary housing payments are something which many tenants and indeed some advisors may not be aware of. Discretionary housing payments are not payments of benefit. Instead they are free standing payments to be made at the discretion of local authorities from funding provided by Central Government. They are made in addition to housing and council tax benefit.

The DWP has issued guidance on the operation of discretionary payments for councils.¹³ In general, discretionary payments can be claimed by someone who is eligible for housing benefit in respect of help with housing costs. Housing costs includes council tax liability and eligible rent. A wide discretion is given to local authorities on who should receive these payments.

Glasgow City Council has an application form for these payments, which is available online.¹⁴ The Council gives the following non-exhaustive examples of the circumstances in which it may make discretionary payments available:

- The Rent Officer has restricted the amount of rent to be used in the assessment of Housing Benefit because he/she has decided that the rent which a claimant has agreed to pay the landlord is too high.
- A claimant is not entitled to full Housing or Council Tax Benefit because his/her income is above the Income Support level but is having difficulty making ends meet due to an illness affecting a member of the household which is leaving him/her short of money.

¹³ Guidance is available online here: <http://www.dwp.gov.uk/housingbenefit/manuals/dhpguide.pdf>

¹⁴ <http://www.glasgow.gov.uk/NR/rdonlyres/2E7D2B7C-C61D-4325-BEB7-0C816191D38E/0/W5172.pdf>

- A claimant has just started work and has had his/her Housing Benefit or Council Tax Benefit reduced but is finding it difficult to make ends meet because he/she has new expenses, such as buying overalls, tools or other equipment needed for his/her job.

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