Large scale voluntary transfer: not all honey and roses

Jan Luba Q.C.
Two Garden Court Chambers

In our last issue Ian Doolittle and James Driscoll introduced readers to the background of the current programme for transfer of council housing to new freehold owners (Large scale voluntary transfers of local authority housing: a new social rented sector? (2000) 4 L. & T. Rev. 99). In this follow-up, Jan Luba Q.C. takes a further look at some of the more problematic implications of the process for landlord and tenant law.

Introduction

Far from slowing-down the programme of disposing of tenanted local authority housing stock to new owners, which had been put in train by the Conservatives, the incoming Labour Government has speeded it up. As Doolittle and Driscoll note, the present administration has recently set out—in the Green Paper *Quality & Choice: A Decent Home for All* (DETR April 2000)—its plans to "expand and modernise" that transfer programme (para. 7.16) so that from next year around 200,000 tenanted dwellings per annum can leave council ownership (para. 7.19). By 2004 this rate of transfer will produce a situation in which most social housing is no longer council-owned.

Although the case for transfer is put on the basis that it will attract much needed new (private) finance that can be used to improve the condition of the housing stock, the effect of transfer is a once-and-for-all loss of council housing. The alternative vehicle for managing and financing council housing stock improvement—the Housing Action Trust (HAT)—will not be further encouraged. At the end of a refurbishment programme undertaken by a HAT the tenants could elect to return to the council as their landlord. Not so with "voluntary transfer" of council housing.

Indeed, the term "voluntary" transfer may be misleading. The sitting tenants concerned are not "volunteering" to leave council housing. The notion that they might choose to leave had its legal crystallisation in the statutory vehicle of "Tenant's Choice" contained in Part IV of the Housing Act 1988. Despite the investment of hundreds of thousands of pounds in promotional and advertising literature for the Tenant's Choice programme, and the recruitment of a cohort of staff by the Housing Corporation to manage it, the scheme failed. Only one small group of Westminster City Council tenants used it to opt out of council ownership. So redundant was the notion that the great mass of council tenants would willingly choose new landlords that Part IV was repealed by the Housing Act 1996.

The term "voluntary" in fact relates to freedom of choice for council *landlords*. A council landlord is not required (yet) to put its tenanted housing stock up for sale but it may do so if it chooses. Many authorities have been through much heart-searching on the issue of whether to sell. Witness the turmoil now in Birmingham where the City Council is debating whether to sell-off the largest stock of municipal housing in England and Wales.

Tenant choice

As Doolittle and Driscoll explain, the statutory framework for voluntary transfer requires the consent of the Secretary of State, who must be satisfied that the majority of the particular council's tenants are not opposed to the change of ownership (Housing Act 1985 Sched. 3A). It is therefore essential that a council proposing a sale can (in tandem with the prospective purchaser) make the transfer sufficiently attractive that tenants will vote for it.

But what has the tenant to gain? Most tenants of local authorities enjoy security of tenure as "secure" tenants, protected by arguably the most generous charter of rights available in the residential sector (Part IV of the Housing Act 1985). That security is lost on transfer. The tenants will, at best, be assured tenants of the purchaser. Likewise, the statutory obligation on a council to

Large scale voluntary transfer: not all honey and roses

Jan Luba Q.C.
Two Garden Court Chambers

In our last issue Ian Doolittle and James Driscoll introduced readers to the background of the current programme for transfer of council housing to new freehold owners (Large scale voluntary transfers of local authority housing: a new social rented sector? (2000) 4 L. & T. Rev. 99). In this follow-up, Jan Luba Q.C. takes a further look at some of the more problematic implications of the process for landlord and tenant law.

Introduction

Far from slowing-down the programme of disposing of tenanted local authority housing stock to new owners, which had been put in train by the Conservatives, the incoming Labour Government has speeded it up. As Doolittle and Driscoll note, the present administration has recently set out—in the Green Paper *Quality & Choice: A Decent Home for All* (DETR April 2000)—its plans to "expand and modernise" that transfer programme (para. 7.16) so that from next year around 200,000 tenanted dwellings per annum can leave council ownership (para. 7.19). By 2004 this rate of transfer will produce a situation in which most social housing is no longer council-owned.

Although the case for transfer is put on the basis that it will attract much needed new (private) finance that can be used to improve the condition of the housing stock, the effect of transfer is a once-and-for-all loss of council housing. The alternative vehicle for managing and financing council housing stock improvement—the Housing Action Trust (HAT)—will not be further encouraged. At the end of a refurbishment programme undertaken by a HAT the tenants could elect to return to the council as their landlord. Not so with "voluntary transfer" of council housing.

Indeed, the term "voluntary" transfer may be misleading. The sitting tenants concerned are not "volunteering" to leave council housing. The notion that they might choose to leave had its legal crystallisation in the statutory vehicle of "Tenant's Choice" contained in Part IV of the Housing Act 1988. Despite the investment of hundreds of thousands of pounds in promotional and advertising literature for the Tenant's Choice programme, and the recruitment of a cohort of staff by the Housing Corporation to manage it, the scheme failed. Only one small group of Westminster City Council tenants used it to opt out of council ownership. So redundant was the notion that the great mass of council tenants would willingly choose new landlords that Part IV was repealed by the Housing Act 1996.

The term "voluntary" in fact relates to freedom of choice for council *landlords*. A council landlord is not required (yet) to put its tenanted housing stock up for sale but it may do so if it chooses. Many authorities have been through much heart-searching on the issue of whether to sell. Witness the turmoil now in Birmingham where the City Council is debating whether to sell-off the largest stock of municipal housing in England and Wales.

Tenant choice

As Doolittle and Driscoll explain, the statutory framework for voluntary transfer requires the consent of the Secretary of State, who must be satisfied that the majority of the particular council's tenants are not opposed to the change of ownership (Housing Act 1985 Sched. 3A). It is therefore essential that a council proposing a sale can (in tandem with the prospective purchaser) make the transfer sufficiently attractive that tenants will vote for it.

But what has the tenant to gain? Most tenants of local authorities enjoy security of tenure as "secure" tenants, protected by arguably the most generous charter of rights available in the residential sector (Part IV of the Housing Act 1985). That security is lost on transfer. The tenants will, at best, be assured tenants of the purchaser. Likewise, the statutory obligation on a council to

charge only a "reasonable" rent has no application to a purchaser.

True it is, that the purchaser may be able to offer improvements to the stock that the council could not otherwise immediately finance. But most local authorities have had rolling programmes of improvements for decades and still maintain them today (as many a frustrated right-to-buy purchaser has found when excluded from a programme upgrading the neighbouring homes still occupied by council tenants).

These considerations suggest that it is only after a most careful exposition of the options that tenants should be invited to decide whether to change their landlord.

Recognising the inevitable conflict of interest which arises if the necessary information is being provided to tenants by the council and the purchaser, who are promoting the sale, many authorities have taken to appointing "Tenant's Friends" who can provide the necessary "impartial" information and evaluation of the options. But there is no statutory duty to make such appointments and no minimum level of provision required. Indeed, there is some difference of opinion as to whether the "Friends" should confine themselves to advising about the merits or benefits of a particular transfer proposal or whether they may properly set out all the respective benefits of all alternative options for tenants (including transfer to a wholly different purchaser or no sale at all). Perhaps most importantly of all, there is very rarely any parity between what the landlord council and the purchaser are prepared to spend (on officer-time or legal advice and other direct expenditure in promoting the transfer) and the amount made available to those independently advising tenants.

Tenant Responses

The programme of transfers has been running sufficiently long for early evaluations to be made of the experiences of the tenants who have been transferred. The DETR's published research (*Views on the Large Scale Voluntary Transfer Process*, May 2000) found that most tenants were satisfied with their new landlords. But these are early days. There was already "some evidence that tenant satisfaction ratings among LSVT tenants may decline once initial (and frequently extensive) improvements have been made" and that, in particular, there were concerns about the quality of repairs and routine maintenance services provided by some purchasers compared

.... ..ndlords. Of course, as indicated above, there is no going-back.

Scepticism about the long-term benefits of transfer and growing concern about the way that the process of tenant "consultation" is being handled in prospective transfer areas has given new impetus to pressure groups such as Defend Council Housing (see *On the Defensive*, Inside Housing, February 11, 2000). It may accordingly be expected that future transfer proposals may be ever more closely scrutinsed.

The gremlins

One aspect of the transfer programme which certainly requires more attention in the future is the legal impact of change on the sitting occupiers of the stock being sold.

For example, it is often suggested that on transfer the tenants will be "cushioned" or "protected" from the loss of secure status and their Tenant's Charter of associated statutory rights. The purchaser will sometimes even go so far as to "guarantee" a minimum package of rights for the sitting tenants.

Such guarantees are, of course, normally unenforceable. In any event they are usually offered to the council which is selling rather than to the tenants who are having their homes sold—as such they are enforceable, if at all, only by the vendor. In future transfers careful attention will need to be given to the question of inclusion of these guarantees in the formal contract of sale so that they might later be directly relied upon by the tenants. Even then the tenants would need to have recourse to the Contracts (Rights of Third Parties) Act 1999.

Of course, a council proposing to ensure that its tenants really are fully protected in the hands of the new purchaser could easily achieve that end for itself. The statutory mechanism for uniform variation of the tenancy agreements of secure tenants (Housing Act 1985, s.103) could be utilised (in the lead-up to any transfer) to produce a "beefed-up" tenancy agreement setting out as a matter of contract the very "rights" the purchaser was suggesting would be honoured. The writer is not aware of this having been done thus far by any of the transferring councils.

This leads on to another aspect of the transfer programme which needs closer scrutiny—the relationship between "old" and "new" tenancy agreements. The legal mythology which surrounds large scale transfer would lead us to believe that at the point of sale there occurs a

magical transmogrification. Under it the tenants cease to hold their homes on the terms of their current tenancy agreements but instead come to hold them on the terms of a new tenancy granted by the purchaser. As any property lawyer will know, this is a nonsense. The buyer takes subject to the existing leases. The sitting tenant continues to hold under the contractual terms of the previous lease unless and until he or she agrees new terms with the new landlord. No doubt, if the legal position were widely understood, some tenants might decline to accept the new terms and stick with their "old" ones. Many would (and do) agree to change. But there is a more practical problem. Such is the number of sitting tenants in the stock now being transferred that it is administratively difficult to ensure that each and every one of them actually signs up to new conditions after transfer. As a result, some purchasing landlords will have sought (or will in future seek) to enforce their "new" tenancy agreements, on the "assumption" that those conditions are binding, against some of those tenants who have never expressly agreed the new terms. Such litigation will, of course, be thwarted as soon as the tenant in question gets appropriate legal advice.

And these are not the only legal issues that need to be carefully addressed before the transfer programme is yet further enlarged. There are worse "skeletons" in the transfer cupboard.

Many of the now transferring local authorities have, for over a decade, been using routine possession proceedings as an arm of their rent collection strategies. The most common outcome has been a suspended possession order—possession to be given if the current rent together with a fixed instalment towards the arrears (and costs) is not paid on each and every rent day. Literally hundreds of thousands of such orders have been made since the introduction of statutory security of tenure for council tenants in 1980—some orders making provision for such small instalments that it would take months or years for the arrears to clear. Inevitably, over such long time spans, many orders are not strictly complied with. However, the effect of a single breach is to cause the tenancy to end (Housing Act 1985 s.82 and *Thompson v. Elmbridge BC* [1987] 1 W.L.R. 1425) with subsequent purported rent payments being made and accepted (unknowingly) only to satisfy liability for mesne profits. The end-product of this routine use of suspended possession orders is now hundreds (or more likely thousands) of former tenants in possession of council properties in any particular local authority's stock. The superior courts are presently having to deal with the legal consequences of the fact that so many of these tolerated trespassers currently live in council housing (see, for a recent example, *Pemberton v. Southwark L.B.C.* [2000] 3 All E.R. 924.

What then happens to all these trespassers when the stock is transferred? Does the purchaser offer them all new tenancies? Or is the purchaser buying with, in effect, vacant possession and the right to eject the trespassers? Even if the approach is simply one of laissez-faire, what happens if one of these occupiers exercises the preserved right to buy or seeks to enforce a perceived right to have repairs carried out? These issues might be easy to tackle if vendor-councils had sound record-keeping systems allowing them to regularly identify and distinguish the current "tenants" from the "former tenants". Sadly most do not.

Conclusion

Well over half a million council homes will have been sold to new landlords before the dream of a single form of housing tenancy operating across the social/public sector becomes a statutory reality. For the successful operation of the transfer programme between now and then, it will be essential that those involved start to grapple with some of the legal difficulties canvassed in this article.

charge only a "reasonable" rent has no application to a purchaser.

True it is, that the purchaser may be able to offer improvements to the stock that the council could not otherwise immediately finance. But most local authorities have had rolling programmes of improvements for decades and still maintain them today (as many a frustrated right-to-buy purchaser has found when excluded from a programme upgrading the neighbouring homes still occupied by council tenants).

These considerations suggest that it is only after a most careful exposition of the options that tenants should be invited to decide whether to change their landlord.

Recognising the inevitable conflict of interest which arises if the necessary information is being provided to tenants by the council and the purchaser, who are promoting the sale, many authorities have taken to appointing "Tenant's Friends" who can provide the necessary "impartial" information and evaluation of the options. But there is no statutory duty to make such appointments and no minimum level of provision required. Indeed, there is some difference of opinion as to whether the "Friends" should confine themselves to advising about the merits or benefits of a particular transfer proposal or whether they may properly set out all the respective benefits of all alternative options for tenants (including transfer to a wholly different purchaser or no sale at all). Perhaps most importantly of all, there is very rarely any parity between what the landlord council and the purchaser are prepared to spend (on officer-time or legal advice and other direct expenditure in promoting the transfer) and the amount made available to those independently advising tenants.

Tenant Responses

The programme of transfers has been running sufficiently long for early evaluations to be made of the experiences of the tenants who have been transferred. The DETR's published research (*Views on the Large Scale Voluntary Transfer Process*, May 2000) found that most tenants were satisfied with their new landlords. But these are early days. There was already "some evidence that tenant satisfaction ratings among LSVT tenants may decline once initial (and frequently extensive) improvements have been made" and that, in particular, there were concerns about the quality of repairs and routine maintenance services provided by some purchasers compared to those of former council landlords. Of course, as indicated above, there is no going-back.

Scepticism about the long-term benefits of transfer and growing concern about the way that the process of tenant "consultation" is being handled in prospective transfer areas has given new impetus to pressure groups such as Defend Council Housing (see *On the Defensive*, Inside Housing, February 11, 2000). It may accordingly be expected that future transfer proposals may be ever more closely scrutinsed.

The gremlins

One aspect of the transfer programme which certainly requires more attention in the future is the legal impact of change on the sitting occupiers of the stock being sold.

For example, it is often suggested that on transfer the tenants will be "cushioned" or "protected" from the loss of secure status and their Tenant's Charter of associated statutory rights. The purchaser will sometimes even go so far as to "guarantee" a minimum package of rights for the sitting tenants.

Such guarantees are, of course, normally unenforceable. In any event they are usually offered to the council which is selling rather than to the tenants who are having their homes sold—as such they are enforceable, if at all, only by the vendor. In future transfers careful attention will need to be given to the question of inclusion of these guarantees in the formal contract of sale so that they might later be directly relied upon by the tenants. Even then the tenants would need to have recourse to the Contracts (Rights of Third Parties) Act 1999.

Of course, a council proposing to ensure that its tenants really are fully protected in the hands of the new purchaser could easily achieve that end for itself. The statutory mechanism for uniform variation of the tenancy agreements of secure tenants (Housing Act 1985, s.103) could be utilised (in the lead-up to any transfer) to produce a "beefed-up" tenancy agreement setting out as a matter of contract the very "rights" the purchaser was suggesting would be honoured. The writer is not aware of this having been done thus far by any of the transferring councils.

This leads on to another aspect of the transfer programme which needs closer scrutiny—the relationship between "old" and "new" tenancy agreements. The legal mythology which surrounds large scale transfer would lead us to believe that at the point of sale there occurs a

Large scale voluntary transfer: not all honey and roses

Jan Luba Q.C.
Two Garden Court Chambers

In our last issue Ian Doolittle and James Driscoll introduced readers to the background of the current programme for transfer of council housing to new freehold owners (Large scale voluntary transfers of local authority housing: a new social rented sector? (2000) 4 L. & T. Rev. 99). In this follow-up, Jan Luba Q.C. takes a further look at some of the more problematic implications of the process for landlord and tenant law.

Introduction

Far from slowing-down the programme of disposing of tenanted local authority housing stock to new owners, which had been put in train by the Conservatives, the incoming Labour Government has speeded it up. As Doolittle and Driscoll note, the present administration has recently set out—in the Green Paper *Quality & Choice: A Decent Home for All* (DETR April 2000)—its plans to "expand and modernise" that transfer programme (para. 7.16) so that from next year around 200,000 tenanted dwellings per annum can leave council ownership (para. 7.19). By 2004 this rate of transfer will produce a situation in which most social housing is no longer council-owned.

Although the case for transfer is put on the basis that it will attract much needed new (private) finance that can be used to improve the condition of the housing stock, the effect of transfer is a once-and-for-all loss of council housing. The alternative vehicle for managing and financing council housing stock improvement—the Housing Action Trust (HAT)—will not be further encouraged. At the end of a refurbishment programme undertaken by a HAT the tenants could elect to return to the council as their landlord. Not so with "voluntary transfer" of council housing.

Indeed, the term "voluntary" transfer may be misleading. The sitting tenants concerned are not "volunteering" to leave council housing. The notion that they might choose to leave had its legal crystallisation in the statutory vehicle of "Tenant's Choice" contained in Part IV of the Housing Act 1988. Despite the investment of hundreds of thousands of pounds in promotional and advertising literature for the Tenant's Choice programme, and the recruitment of a cohort of staff by the Housing Corporation to manage it, the scheme failed. Only one small group of Westminster City Council tenants used it to opt out of council ownership. So redundant was the notion that the great mass of council tenants would willingly choose new landlords that Part IV was repealed by the Housing Act 1996.

The term "voluntary" in fact relates to freedom of choice for council *landlords*. A council landlord is not required (yet) to put its tenanted housing stock up for sale but it may do so if it chooses. Many authorities have been through much heart-searching on the issue of whether to sell. Witness the turmoil now in Birmingham where the City Council is debating whether to sell-off the largest stock of municipal housing in England and Wales.

Tenant choice

As Doolittle and Driscoll explain, the statutory framework for voluntary transfer requires the consent of the Secretary of State, who must be satisfied that the majority of the particular council's tenants are not opposed to the change of ownership (Housing Act 1985 Sched. 3A). It is therefore essential that a council proposing a sale can (in tandem with the prospective purchaser) make the transfer sufficiently attractive that tenants will vote for it.

But what has the tenant to gain? Most tenants of local authorities enjoy security of tenure as "secure" tenants, protected by arguably the most generous charter of rights available in the residential sector (Part IV of the Housing Act 1985). That security is lost on transfer. The tenants will, at best, be assured tenants of the purchaser. Likewise, the statutory obligation on a council to