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Summer's Last Hurrah

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Gimme Shelter: But Cash Only, Please

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A recent case addressed landlords' refusal to accept Section 8 vouchers. The issue before the Court in *People v. Commons W.*, 2023 N.Y. Slip Op. 23213, (N.Y. Sup. Ct. 2023) was whether New York's source of income antidiscrimination statute (Executive Law § 296(5)(a)(1)) violates the Fourth Amendment. Judge Mark Masler, writing for the Cortland County Supreme Court, held that New York's Executive Law § 296 violates the Fourth Amendment to the extent it restricts or prohibits a landlord's ability to refuse to rent or lease housing accommodations to persons using Section 8 vouchers for their source of income.

Section 296 of New York's Human Rights Law (Executive Law Article 15) states that it is an unlawful discriminatory action to "…refuse to sell, rent, lease or otherwise to deny…a housing accommodation because of…[one's] lawful source of income. [1]" Respondents in the case own and operate various rental properties in Ithaca, New York, but do not participate in the Section 8 program. The State filed suit against the respondents, asserting that because Section 8 vouchers constitute a lawful source of income, respondents' failure to accept such vouchers "…constitutes impermissible source of income discrimination in violation of the Human Rights Law.[2]" Among other relief, including restitution for those affected, the State sought a permanent injunction enjoining respondents from refusing to rent or lease to persons using Section 8 vouchers.

The respondents contended that, because the program is voluntary, the source of income antidiscrimination statute's requirement to accept the vouchers unconstitutionally compels respondents to participate in the Section 8 program. Under the Section 8 program, participating landlords must enter into a Housing Assistance Payment ("HAP") contract with a Public Housing Agency ("PHA"). The HAP contract requires that landlords consent to inspections of both the prescribed unit and the premises as determined by the PHA. It also requires access to all accounts or other records of the landlord relevant to the HAP contract. Respondents argued that forcing landlords to participate in the Section 8 programs violates the Fourth Amendment because it forces landlords to suffer warrantless searches of their rental property as well as their records.

The Court agreed, stating that landlords cannot accept a Section 8 voucher without participating in the Section 8 program. In requiring respondents to accept Section 8 vouchers, the Human Rights Law compels landlords to participate in the Section 8 program. Thus, respondents' property and records are subject to warrantless searches. Citing precedent, the Court maintained that a law cannot "coerce property owners into consenting to warrantless inspections in derogation of their constitutional rights by conditioning their ability to rent real property on providing such consent" [3]. Here, because the Human Rights Law requires landlords to

accept Section 8 vouchers, the law unconstitutionally requires landlords to waive their Fourth Amendment rights. Therefore, the Court dismissed the State's petition with prejudice.

[1] N.Y. Exec. Law § 296(5)(a)(1).

[2] *People v. Commons W.*, 2023 N.Y. Slip Op. 23213, (N.Y. Sup. Ct. 2023).

[3] *Id*. citing *Sokolov v Village of Freeport*, 52 N.Y.2d at 345-347 (N.Y. 1981).

Building Safety Act 2022: What Lenders Need to Know


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The enactment of the Building Safety Act 2022 (the “Act”) in the United Kingdom brings about significant changes to building safety regulations. While the Act primarily aims to enhance building safety standards, it also introduces various new challenges for lenders who finance construction projects. Lenders may now face additional responsibilities, liabilities and considerations to ensure compliance with the new legislation.

Extended Liability for Lenders

Under the Act, lenders may find themselves subject to increased liability for the safety of buildings. The Act introduces a "duty-holder" framework, where various parties involved in a construction project have specific responsibilities for ensuring building safety. Lenders may be designated as duty-holders, responsible for ensuring that adequate funding is allocated for remediation and compliance with building safety requirements. Consequently, lenders may face legal obligations and potential financial liabilities if their funded projects fail to meet the prescribed safety standards.

Extended Limitation Periods

The limitation period is the time period within which a party can bring a claim against another for damages, and where a claim is brought after the expiry of such applicable limitation period, this can serve as a defence for the defendant.

The Act has increased the limitation period for bringing claims to unprecedented levels. The limitation period for prospective claims (that is, claims accrued after the Act took effect on 28 June 2022) has been raised from six years to fifteen years, and the limitation period for retrospective claims where the cause of action accrued before 28 June 2022 has now been raised to thirty years. This would mean that there could be claims brought in respect of historic defects dating back to 1992.

Requirement for Safety Case Reports

Another significant change introduced by the Act is the requirement for the production and maintenance of a safety case report for higher-risk buildings. A higher-risk building is defined under the Act as a building containing at least two residential units and at least 18 metres high or with at least seven storeys and is of a description specified in relevant regulations (subject to certain specific exclusions).

Lenders will need to review these reports carefully to assess the safety risks associated with the projects they finance. These safety case reports will contain vital information about the design, construction and maintenance of the building, as well as potential fire and structural risks, and it must be made available to the Building Safety Regulator on request. It is important that lenders thoroughly analyse these reports to evaluate the risks involved and make informed decisions about their financial involvement.

Impact on Financing Arrangements

The Act grants the Secretary of State the power to issue "stop notices" and "compliance notices" to halt or rectify construction work on unsafe buildings, respectively. Such regulatory interventions can disrupt project timelines, impact cash flow, and even lead to potential defaults on loan repayments. Lenders should include appropriate clauses in loan agreements to address these risks, such as provisions for reviewing safety case reports and monitoring compliance with building safety obligations.

Review of Existing Loan Portfolios

The extension of the limitation period means that a comprehensive review of a lender's existing loan portfolio may need to be conducted. Lenders should assess the safety risks associated with the buildings they have financed in the past, particularly those classified as higher-risk under the new legislation. Such review will help identify any potential safety issues, the need for remedial actions and the allocation of resources for building remediation. It is essential for lenders to proactively manage these risks and engage with borrowers to ensure compliance with the enhanced safety standards.

Closing Thoughts

The Act brings about significant implications for lenders involved in financing construction projects. It is crucial for lenders to establish robust processes to review safety case reports, monitor compliance, manage liabilities and collaborate closely with borrowers to ensure adherence to the new building safety standards. By actively addressing these key issues, lenders can mitigate potential risks as well contribute to the overall improvement of building safety in the UK construction industry.

Loans Are Not Securities

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We have a final answer to the question of whether a term loan is a security. Recently, the Second Circuit Court of Appeals affirmed the District Court's decision in the Kirschner Case that a term loan is not a security. We have ben closely following this case, which has been working its way through New York federal courts for years, and you can find our updates here.

This case has been described as "a potential gamer changer" and even "an existential threat" to the syndicated loan market given the potential consequences it would have to the syndicated loan market if state and federal securities laws were to be applicable to that market. The case has received a lot of attention over the last few months as the participants in the $1.4 trillion loan market have sat up and taken notice on the developments as the Second Circuit heard oral argument and has made certain requests for additional briefing.

Significantly, following a hearing, the Second Circuit entered an order asking the U.S. Securities and Exchange Commission ("SEC") to submit "any views it wishes to share" on whether the loans in the Kirschner case are securities. Much was made of what the SEC might say and what that statement would mean for the Court's decision. In the end, following multiple motions for extensions of time from the SEC, the SEC ultimately declined to submit a legal brief on the subject.

The Loan Syndications Trading Association ("LSTA") has also been quite vocal in this case. As it said in a statement when the opinion was issued, "Maintaining the characterization of Term Loan Bs as non-securities has been a central focus of the LSTA for years. We are gratified that the SEC declined to submit a brief and that the Court adopted the long-standing view that loans." The LSTA also submitted a very thorough and thoughtful amicus brief with the Second Circuit Court of Appeals during the briefing period of the appeal which set forth its view that term loans are not securities and explaining the consequences that a determination otherwise would have for the entire syndicated loan market – borrowers, agents, lenders and others alike.

The Kirschner case in question involved a broadly syndicated $1.775 billion term loan. The credit agreement also facilitated the creation of a secondary market for the notes. Following certain legal struggles, Millennium filed for bankruptcy seeking relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. The litigation we have been following began in the course of the Chapter 11 proceedings. As part of the proceedings, the plaintiff in the case was appointed trustee of the Millennium Lender Claim Trust ("Trust"). The ultimate beneficiaries of the Trust are lenders who purchased notes and have claims in the bankruptcy proceedings.

Litigation ensued in New York federal court, culminating in a decision by the District Court in May of 2020 granting defendants' motion to dismiss, which

thereby dismissed the plaintiff's state-law securities claims because it concluded that plaintiff failed to plead facts plausibly suggesting that the Notes are "securities" under the standard set forth in the Supreme Court decision *Reves v. Ernst & Young*, 494 U.S. 56 (1990). The plaintiffs timely appealed bringing the case before the Second Circuit Court of Appeals, which for our non-lawyer readers is a Court that is second only to the Supreme Court.

The decision issued turned principally on whether the Court found that the plaintiff in the case "plausibly suggested that the notes are "securities" under *Reves*" and the Court held that he did not. The relevant test that the Supreme Court set forth in *Reves* is a 4-factor test that is meant to distinguish between notes that are issued for investment purposes, for which securities laws would apply, and those that are for a commercial or consumer context, for which they would not. The Court applied the 4-factor test and analyzed each factor against the facts in the case. Ultimately, the Court determined that the District Court had ruled properly and affirmed its decision in the published opinion.

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