

GAS LEAKS

by Peter Marcus, barrister

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Peter Marcus explains how to advise landlords on gaining access to properties for mandatory gas inspections when the tenants won't let them in

INTRODUCTION

Most people know that carbon monoxide can kill, but it can come as a surprise to hear how often and how easily. Over 30 people every year die in their own homes from carbon monoxide poisoning, while many more suffer temporary or permanent brain damage.

The usual suspect is a badly fitted or maintained gas appliance - a blocked flue, a cracked or damaged gas pipe. And the solution should be easy - check the appliance regularly, and any problems will be spotted and quickly repaired.

If you're a landlord, and the victim of the gas leak or explosion is a tenant, you may well be liable. And not just in the civil courts, where debilitating brain injury can lead to six or seven-figure damages awards. In the criminal courts, failure to check gas appliances or negligent fitting can qualify as gross negligence manslaughter, leading to prison sentences for landlords, agents and gas fitters alike.

THE GAS REGULATIONS

Since the late 1990s, landlords have been under an express legal obligation to check all properties with gas appliances at least once every 12 months. Regulation 36 of the Gas Safety (Installation and Use) Regulations 1998 forces landlords to ensure the safety of gas installations in tenanted properties. Failure to conduct regular checks - inspection and, if necessary, servicing - by CORGI-registered fitters is a criminal offence, and brings with it a hefty fine.

So, what's the problem? If landlords conduct annual checks, all will be well. So runs the theory.

However, in practice, many public landlords - whether local authorities or housing associations - have thousands, if not tens of thousands of properties. And there will, it seems, always be a hard core of tenants who simply won't let the landlord in.

Why would tenants stop their own landlord inspecting their own home to protect their own health? Well the vast majority don't, but those who do have a variety of reasons for resisting inspections. They may be vulnerable in all kinds of ways, and fail to understand the importance of the gas checks. They may lead chaotic lives and not be able to organise themselves to arrange an appointment. Or they may, it is often speculated, have things going on at home they don't want their landlords to know about.

Frustrated landlords often imagine rooms piled high with stolen goods, forests of cannabis plants and perhaps an unauthorised sub-tenant or three.

The Regulations, to a point, anticipate problems with access. The landlord is no longer guilty of an offence if, according to reg.39, it has taken 'reasonable steps' to conduct the inspection.

There is no strict guidance on what such 'reasonable steps' might be. However, it is commonly assumed, and informally implied by the HSE, that the liability for the reg.36 offence is discharged by, say, a series of letters asking the tenant to honour an appointment, or contact the landlord to arrange a different time or date. The succession of letters typically moves from polite, through assertive, to warning, not only about the dangers of gas poisoning and explosions, but about the likelihood (and liability for mounting costs) of legal action if no response is forthcoming.

To ensure such steps are genuinely reasonable, the letters should offer a flexible range of appointment times (eg out-of-office hours or weekends for tenants who work, particularly shift-workers). Further, the letters should ideally



be combined with visits to the property by contractors, preferably at different times on different days of the week. A final (say third or fourth) letter should be hand-delivered by someone - probably a housing officer, or professional process-server - who can give evidence of delivery by witness statement or affidavit, should later court action be necessary.

The snag is that, for the landlord, it doesn't end there. The obligation to inspect annually continues, and not only in law. Increasingly landlords are worried that a less than 100 per cent annual inspection rate will impact badly on Audit Commission housing inspections.

Infamous recent cases of housing associations and local authorities that have received poor Inspection ratings have been due at least in part to being badly organised when it came to gas inspections. And of course poor Audit Commission ratings at inspection can mean that millions - sometimes hundreds of millions - of pounds of government funding is lost.

Meanwhile the Housing Corporation has an additional regulatory role in ensuring that housing associations comply with the annual gas checks.

LEGAL SOLUTIONS

This then is where landlords turn to their lawyers for legal answers. The first thing landlords will be told is that to use forced entry (or to use, for example, skeleton keys to get into the property) is disastrous. Not only is it an act of trespass. It may also qualify as a criminal offence under the Criminal Law Act 1977.

The two safer options that landlords usually end up using are either injunction or possession.

Injunctions

Mandatory injunctions for tenants to permit entry can be - and usually are - granted in the county court on the basis of the Gas Regulations and any relevant clause in the tenancy agreement which allows the landlord entry for general repairs or, with rare foresight, specifically for gas inspection. For public landlords, the relevant

Housing Act provisions permitting entry may also be cited: s.54 Housing Act 1985 for local authorities to "survey and examine", or the more helpful s.16 Housing Act 1988 for housing associations ("registered social landlords") to "exact repairs". For any private or public tenancy where the repairing obligations in s.11 Landlord and Tenant Act 1985 apply, cite the s.11(6) LTA 1985 implied covenant permitting the landlord entry "for the purpose of viewing [the] condition and state of repair" of the premises.

The injunction process requires strict procedure to be followed, including affidavits from process-servers or housing officers proving service of documents to the tenant or, with the court's agreement, 'substituted service' if the tenant proves elusive or simply won't come to the door. Once the injunction is granted compelling the tenant to arrange an appointment and permit entry, if the tenant then breaches the injunction by continuing to prevent the landlord's entry, this is then contempt of court, and must go back to court for a committal hearing, where a circuit judge may mete out the ultimate penalty of imprisonment, or may give a suspended prison term or fine.

In practice, many landlords find that, once the injunction papers are served, and even more so with committal papers, tenants are frightened into co-operation by the prospect of legal action, imprisonment or merely by the shock of being formally 'doorstepped' by a daunting pile of legal papers.

Yet, legally this is a blind alley. What the judge cannot do at any stage of the injunction process is to permit the landlord to force entry - none of the statutory authorities (s 54 HA1985, etc) allow entry to be forced, and what constitutes 'forcible entry' can be held to mean pretty much any attempt to enter against the tenants' will, never mind drilling out locks.

In other words, if the tenant still resists, even in the face of prison, the landlord must try something else.

Possession

Taking possession proceedings against a recalcitrant tenant is, in terms of gas inspections,



the worst of all worlds. Yes, the very end result is indeed entry into the home. But in the process a household - and usually a vulnerable one, often with children involved - is rendered homeless and more often than not will have to be immediately re-housed, possibly by the same landlord (though this would not necessarily apply in the case of a private landlord, or some housing associations). Most judges will realise this and order execution of possession to be suspended, in the hope that this shocks the tenant into cooperation. But again, some tenants just can't be shocked.

Meanwhile, both the Housing Corporation and the Audit Commission hold a very low opinion of landlords who take the possession route to gas inspection access. At the end of the day, it's the wrong tool for the job.

The third way: EPA 1990

My advice to landlords needing access to gas inspections is to take a sideways look at the problem. As none of the landlord-tenant powers will safely and lawfully get them in to inspect the gas, approach it from a different route - not landlord and tenant law at all, but rather statutory nuisance environmental law.

On the basis that checking gas installations is the subject of this HSE legislation, use this to argue that an unchecked property is a health risk waiting to happen. In other words, a statutory nuisance, under s 79 of the Environmental Protection Act 1990.

The legal argument is that, as a key part of the definition of statutory nuisance is a situation 'prejudicial to health', defined by the Act (s 79(7)) as something 'injurious, or likely to cause injury, to health', therefore, a property with unchecked gas is not likely to be a statutory nuisance. It is one already. On this basis, the EPA's summary proceedings for statutory nuisance impose a duty on a local authority that is satisfied of the existence of statutory nuisance to serve an abatement notice on the 'person responsible for the nuisance', ie, the tenant. Typically this will give the tenant 14 days to comply as directed in the abatement notice, which will be something to the effect of 'open the door and let us in' or, more prosaically, for

the tenant to have contacted their landlord, arranged a firm appointment, and for successful inspection to be confirmed to the local authority by the landlord.

Once 14 days have elapsed without response, not only has the tenant committed an offence, but, more practically, the local authority officer who served the notice can go to a local magistrate and get a warrant for entry 'if need be by force' (under para 2(3) of Sched. 3, EPA1990).

Not only is this therefore an absolutely lawful way of gaining entry by force. It is also largely free of charge, as the entry warrant is the criminal courts' response to an offence and not a costly action in civil law.

Public landlords should be aware that the regulatory bodies, particularly the Audit Commission and Housing Corporation, are very cautious about EPA1990 forced entry being used as a blunt instrument, or too early on in the process. However, backed by legal advice and a sound preliminary process of warning and cajoling, there is absolutely nothing wrong with it. A landlord, particularly a public one, which has weighed up the relative cost to its other rent-payers of expensive injunction or possession proceedings, and has, perhaps with fellow landlords in the same area, invested in basic legal advice, should be able to show with ease that their method is lawful, economic and effective.

Not just for local authorities

I have often heard it said that the EPA route only applies to local authority landlords. In fact there is no reason why a housing association - or for that matter an ALMO, an LSVT or a private landlord - cannot go to their local authority's environmental department and 'satisfy' the local authority of the existence of statutory nuisance, which is all that is needed to impose the s 80 (1) EPA1990 duty on the local authority to serve the abatement notice.

It may be that some agreement, protocol or service-level agreement will have to be negotiated between the landlord and the local authority about paying for officer time, but this should be only a very small matter. Enlightened social landlords in the same local authority area



may even like to co-ordinate their efforts and speak to the local authority en masse. This will cut costs further in terms of block-booking warrant-signing at the magistrates' court, and in sending out the officers to the properties (accompanied, it is recommended, not only by the gas-fitters but also by locksmiths and police officers, and maybe even support staff from, for example, social services, if there are known vulnerability problems).

Some landlords may still be nervous about going straight from warning letters to forced entry, in which case they may like first to try the injunction route, and then use a suspended committal order in response to a breach of injunction as extra evidence to present to the magistrates.

Doing both will certainly get the intended result, will prevent any risk of being sued or prosecuted for wrongful entry, and will get plus points from the Audit Commission at the next inspection. And we all know what points mean.

PRACTICE POINTS

It may be worth advising your client that they may like to try the following non-legal methods to cut down on legal costs and improve their gas-access performance results:

- Forewarn tenants that gas inspections are pending. Place an article about gas safety in the local papers, or the tenants' newsletter, or put posters up near the housing office explaining what is involved.
- Use as much other local media as possible - radio, even TV if available.
- Emphasise to tenants how painless the gas inspection will be - give a time estimate of the visit in minutes.
- At least one landlord currently promises that all tenants co-operating before a certain advertised date will be entered in a free raffle for valuable prizes. (Consider the cost of a telly or holiday in Benidorm against a £1,000 injunction hearing - it's worth it!)

- Landlords can flag up gas inspections in a wide variety of ways - on rent statements, franking machine post-marks, etc
- The legal section may want to speak to the local chief clerk at the magistrates' court to forewarn them about warrants, and maybe see what kinds of evidence will be necessary to satisfy the magistrate.
- Landlords may wish to consider getting the gas fitters, when asking the tenant to sign off their gas inspection, to ask about any other outstanding repairs they can report to the landlord. If the tenant signs that there are none, this can be used to head off future dis-repair claims.
- Advise landlords never to use skeleton keys to get access to tenants' homes
- Advise landlords never to use the 'I'm sure I can smell gas through the letterbox' ruse to get Transco to cut the gas off - this is sometimes used by landlords, but is extremely irresponsible and almost certainly unlawful.
- Landlords may consider sending tenants text message reminders of gas inspection visits.
- Landlords ought to be aware that some tenants' refusal to allow access can be a symptom of their vulnerability. Consider having a social, health or other support worker standing by on forced entry if you suspect that the tenant may need such support or reassurance.

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