Neutral Citation Number: [2019] EWHC 332 (Admin)

Claim No. CO/2580/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT AT LEEDS

Leeds Combined Court Centre,
The Courthouse,
1 Oxford Row,
Leeds, LS1 3BG.

Date: 06/03/2019

Before:

HIS HONOUR JUDGE KLEIN SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

HUMBER LANDLORDS ASSOCIATION	**Claimant**
- and -	
HULL CITY COUNCIL	**Defendant**

- -
- -

Jonathan Manning (instructed by **Bury & Walkers LLP**) for the **Claimant**
Wayne Beglan and **Alex Williams** (instructed by **Legal Services, Hull City Council**) for the **Defendant**

Hearing date: 12 February 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HIS HONOUR JUDGE KLEIN

HH Judge Klein:

1. This is the judgment in a judicial review claim, which was begun on 3 July 2018, for an order quashing the decision of the Defendant's ("the council's") cabinet to approve a new housing enforcement policy, its Private Sector Housing Enforcement Policy 2018-2022 ("the Policy"), on 23 April 2018. HH Judge Saffman gave permission for the claim to proceed, on all grounds, on 6 August 2018.

2. The Claimant ("the Association") has a particular interest in the Policy because, as it explains in its Statement of Facts and Grounds for Judicial Review ("the Grounds"):

> "The Association is a representative organisation for private landlords and letting agents in the Hull area. It was formed over 30 years ago with the aim of improving standards in private rented accommodation, and has been recognised by [the council] as a consultee in relation to housing matters."

3. By the Policy, the council has sought to set out how it intends to carry out its obligations under Part 1 of the Housing Act 2004 ("the 2004 Act"); in particular, how it intends to enforce housing standards and to address hazardous housing conditions.

4. By the Grounds, the Association challenges the decision to approve the Policy (and, in fact, the Policy itself) on 6 grounds; namely, that:

   i) the council has decided to adopt a policy (i) of taking formal enforcement action by way of serving improvement notices in every case except (a) for the most insignificant of "hazards" (as defined in the 2004 Act) or (b) where a landlord is a member of the council's own new accreditation scheme ("new HALS") which does not exist, (ii) for the purpose of protecting tenants from retaliatory evictions by landlords if tenants make complaints to the council. The decision is unlawful because it (i) purports to give effect to a purpose (that is, the protection of tenants from retaliatory evictions) which is not a permitted purpose under Part 1 of the 2004 Act,[1] (ii) is contrary to the 2004 Act, (iii) only permits one form of formal enforcement action; namely, the service of an improvement notice and (iv) prevents the council considering the merits of each particular case;

   ii) the adoption of the Policy has fettered the exercise of the council's discretion, because the council has decided to take formal enforcement action by way of serving improvement notices in every case except (i) for the most insignificant of "hazards" or (ii) where a landlord is a member of new HALS;[2]

   iii) the council has failed to take into account statutory Enforcement Guidance (issued under section 9 of the 2004 Act) and the Enforcement Concordat,[3] to

[1] In his oral submissions, Mr Manning, who appeared for the Association, accepted that the risk of retaliatory eviction is a factor which could be taken into account in a particular decision under the Policy.
[2] This seems to be a different formulation of parts of Ground 1.
[3] Mr Manning explained that, in fact, the Enforcement Concordat has been replaced by the Regulators' Compliance Code in relation to certain regulatory functions. However, as he also pointed out, and as I set out below, it, rather than the Regulators' Compliance Code, is referred to in the Enforcement Guidance.

which I make further reference below, and the Policy is inconsistent with it, in any event;[4]

iv) the council has no evidence of the number of retaliatory evictions in Hull and so has no evidence that there is a real risk of such evictions. It is unlawful, therefore, for the Policy to give the risk of retaliatory eviction "overwhelming weight";

v) the council gave too much weight to a landlord's membership of new HALS, because membership of that scheme is the "only exception to the general policy", which I understand to be the taking of formal enforcement action, save in the case of the most insignificant of hazards. Further, by approving the Policy, the council is wrongly trying to compel landlords to join new HALS;

vi) therefore, the decision to adopt the Policy was perverse; particularly in circumstances where new HALS is not operational. The decision to adopt the Policy (the purpose of which is to prevent retaliatory evictions) was also perverse because the Policy can only prevent retaliatory evictions from premises let on assured shorthold tenancies and only for a period of 6 months (because that is the effect of the Deregulation Act 2015 (which is intended to protect against such evictions)).

Part 1 of 2004 Act and statutory guidance

5. Part 1 of the 2004 Act provides, by section 1(1):

> "…for a new system of assessing the condition of residential premises, and…for that system to be used in the enforcement of housing standards in relation to such premises."

6. By section 1(2) of the 2004 Act:

> "The new system…operates by reference to the existence of category 1 or category 2 hazards on residential premises."

7. As Mr Manning explained in his skeleton argument:

> "Part 1 reforms the law in relation to the fitness for human habitation of residential accommodation. It introduced an entirely new, risk-based, fitness regime by reference to the ascertainment of risks posed to occupiers from certain shortcomings in the property they occupied. The new regime - the "Housing Health and Safety Rating System" or "HHSRS" - operates by reference to the existence of "category 1" or "category 2" "hazards" on residential premises."

8. By section 5 of the 2004 Act, if a hazard is calculated as being so serious as to fall into category 1, a local housing authority must take appropriate enforcement action, which can be the service of an improvement notice under section 11 of the 2004 Act,

[4] In his oral submissions, Mr Manning made particular reference to the requirement of the Enforcement Concordat for a proportionate approach in decision-making.

a prohibition order under section 20 of the 2004 Act, a hazard awareness notice under section 28 of the 2004 Act, emergency remedial action under section 40 of the 2004 Act, an emergency prohibition order under section 43 of the 2004 Act, a demolition order under section 265 of the Housing Act 1985, or the declaration of the area in which the premises concerned are situated as a clearance area under section 289(2) of the Housing Act 1985.

9. By section 7 of the 2004 Act, a local housing authority may take the following enforcement action where a hazard is calculated as falling into category 2: the service of an improvement notice, the making of a prohibition order, the service of a hazard awareness notice, the making of a demolition order or the making of a slum clearance declaration.

10. Under section 9 of the 2004 Act, the Office of the Deputy Prime Minister gave guidance to local housing authorities, to which they are required to have regard, about, in particular, "their functions under [Chapter 1 of Part 1 of the 2004 Act] in relation to the inspection of premises and the assessment of hazards". That guidance, published in February 2006, is the Housing Health and Safety Rating System - Enforcement Guidance ("the Enforcement Guidance") , which provides as follows:

> "Formal and informal enforcement action
>
> 2.15 The Housing Renewal circular emphasises the importance of private sector strategies which encourage co-operation between the local authority and the community to help keep homes in good repair. Over time, successful housing strategies should lead to a reduced need for formal enforcement action to deal with properties that fall below acceptable standards. Nonetheless, enforcement is a legitimate element of a housing renewal strategy.
>
> 2.16 Authorities are likely to find formal enforcement particularly important in the case of rented properties and HMOs in the private sector, where some of the worst housing conditions are to be found (though poor conditions in any part of the housing stock should not go unaddressed). Enforcement policies should take account of the circumstances and views of tenants, landlords and owners. Policies should also provide for consultation with social services, tenancy support, housing needs and housing management officers, where there are vulnerable occupants, for the purposes of agreeing a suitable approach to hazards.
>
> 2.17 Local authorities are encouraged to adopt the Enforcement Concordat, which provides a basis for fair, practical and consistent enforcement. It is based on the principle that anyone likely to be subject to formal enforcement action should receive clear explanations of what they need to do to comply and have an opportunity to resolve difficulties before formal action is taken. The current Concordat can be found on the Cabinet Office website.

> 2.18 Where an owner or landlord agrees to take the action required by the authority it might be appropriate to wait before serving a notice unless the owner fails to start the work within a reasonable time. The authority will need to take its own view of what is reasonable in the circumstances. Where RSLs have a programme of works to make their stock decent, it would also be appropriate to liaise with the landlord over any works necessary to deal with category 1 and 2 hazards in advance of the planned improvements. An alternative approach where a landlord agrees to take remedial action quickly and the authority is confident that this will be done, would be for authorities to use the hazard awareness notice procedure. This would provide a way of recording the action, and would provide evidence should the landlord fail to carry out remedial works or carry them out inadequately. (See Part 5, "Hazard awareness notices".)
>
> 2.19 However, there may be circumstances in which authorities do not wish to delay in beginning formal enforcement action. This is likely to arise where the authority considers that there is a high risk to the health or safety of the occupant, and there are concerns that the owner or landlord will not co-operate. This may include cases where the HHSRS assessment reveals category 2 hazards and where the current occupants are vulnerable, or where occupancy factors (for example in hostels for special groups) appear to the authority to increase the risk.
>
> 2.20 Accreditation schemes or housing forums are a useful means of working informally with private sector landlords. A number of local authorities have already begun to develop closer working relationships with individual private landlords through such arrangements. They enable authorities to provide support to landlords and to raise the standards of management and property condition. Landlords will also benefit from better access to information on their obligations in relation to tenants and can receive help in dealing with problems which arise with tenants and properties."

The Policy

11. The council's stated objective of the Policy was:

> "…to improve the quality, choice and standards in housing, improving the quality of the street scene and improving residents' satisfaction with their neighbourhood as a place to live. It goes further in that the aim is to reduce the risks to health and safety of persons living in and visitors to their homes. The council will use all available legislation to ensure that the private housing stock within the city of Hull is safe, well managed, maintained in good repair, not overcrowded and does not pose a statutory nuisance…", (Section 1 of the Policy).

12. The Policy was said to be intended to cover:

> "…the way in which the council will deal with statutory nuisance from property hazards and amenity standards in the home which affect the health, safety, comfort and convenience of occupiers, visitors and the public…", (Paragraph 2.1).

13. To this end, the Policy explained that:

> "…the council has had regard to the Regulators' Compliance Code, which requires a risk-based approach and proportionality to regulatory enforcement. The council supports responsible landlords who are prepared to commit themselves to managing and maintaining their properties in accordance with modern acceptable standards. It does this through supporting a range of schemes including the Hull Accredited Landlord Scheme (HALS)", (Paragraphs 2.1-2.2).

14. The council acknowledged a range of actions available to it to achieve the Policy's stated objective and that, in deciding what enforcement action, if any, to take, the council would carry out a risk/benefits analysis. By the Policy, the council explained that:

> "…Appendix 1 of this policy details the range of proactive and statutory actions to improve housing standards that are available. The extent of enforcement will be related to the risk posed by the condition or situation and the likely benefits achieved by compliance. The council will take a consistent approach in similar circumstances…", (Paragraphs 3.1-3.3).

15. However, the council also acknowledged, by the Policy, that:

> "The council will act formally in most cases. Exceptions to this are where the landlord/agent is accredited", (Paragraph 3.6).

16. In Appendix 1, the Policy sets out the actions available to the council. Broadly, Appendix 1 differentiates between (i) informal action and (ii) other action (including formal enforcement action in the case of hazards identified under the HHSRS).

17. The Policy provides, at Appendix 1, that:

> "There are a number of actions officers may take and these will depend on the circumstances of the case:
>
> Take no action - where premises are found to be satisfactory.
>
> Take informal action - informal action will be taken in relation to accredited landlord properties or where insignificant

> category 2 hazards are found and recommendations are being made.[5]
>
> Take formal enforcement action - this action will normally be the first course of action following the inspection unless the property is accredited. Where an officer identifies an imminent risk of serious harm the officer will make every effort to contact the owner in order to give them the opportunity to remedy the situation within a short timescale",[6] (Appendix 1, paragraph 1.2).

18. Appendix 1 lists formal enforcement action as including (amongst other actions):

    i) the service of a hazard awareness notice;

    ii) the service of an improvement notice under sections 11 or 12 of the 2004 Act;

    iii) making a demolition order under section 265 of the Housing Act 1985 as amended.

19. Appendix 1 further qualifies when informal action will be taken as follows:

> "The situations where informal action may be appropriate include:
>
> Where landlords are accredited.
>
> Where the local authority is making a recommendation", (emphasis added) (Appendix 1, paragraph 2.2).

20. Before considering the different methods of informal action and formal enforcement action, the Policy further provides, at Appendix 1, that:

> "There are a number of options. Factors which may affect the choice of enforcement action include the statutory obligations of the council, the seriousness of the offence or the degree of risk to health and safety, the record of the responsible person in

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[5] Appendix 1 explains that: "whilst it is not possible to be prescriptive in describing all hazards which the…council would deem to be significant, factors that may be considered to assist in the determination of which hazards are deemed to be significant include…whether there are multiple hazards within the property, whether there is a vulnerable individual or group in occupation or likely to be an occupation, [and/or] whether or not it is reasonable to assume the conditions are likely to deteriorate in the next 12 months".

[6] Appendix 1 continues, in relation to the taking of formal enforcement action with respect to hazards identified under the HHSRS: "Where practicable landlords and/or agents will be given 24 hours' notice of the council's intention to carry out an inspection of the property as per the requirements of section 239 Housing Act 2004. If the landlord/agent or representative wishes to attend the inspection they must also provide the tenant with the necessary notice. After the inspection, whilst on site, the council will discuss the findings of the inspection and the possible options to reduce or remove the hazards, if requested to do so by the landlord/agent or representative and it is practicable to do so. This is only available when the landlord/agent or representative attends the property for the inspection. The council will score the hazards using the [HHSRS] and serve any relevant notices as soon as is practicable. It should be noted, however, that any works discussed with the landlord/agent or their representative will be before the deficiencies have been scored under the [HHSRS] and this could impact upon the assessment", (Appendix 1, paragraph 3.2).

> relation to managing property or in the case of licensing whether the person is regarded as fit and proper, public interest and concern, the views of occupiers and owners, whether the landlord is accredited, the likely effectiveness of various enforcement options, the views of other agencies…, the frequency of any breach, whether the property is subject to licensing, [and] the consequences of non-compliance",[7] (Appendix 1, paragraph 1.3).

21. Accreditation under the Hull Accredited Landlord Scheme (HALS) was expressed elsewhere in the Policy to confer a number of benefits including that:

> "…the Private Housing (Environmental Health) team will not, on receipt of a service request, immediately carry out a full inspection of the dwelling. The team will refer the request directly to the accredited landlord so that they can respond in the first instance (unless the tenant requests that the council visits). Only if the tenant is not satisfied with the landlord's response will the council then visit the dwelling", (Paragraph 4.2).

The officer's report

22. When it approved the Policy, the council's cabinet had before it a report ("the Report"), dated 22 April 2018, from the council's City Manager, Neighbourhoods & Housing; Alan Richmond. Mr Richmond said, as follows, in the Report:

> "[Since the adoption of the council's current policy (referred to, in this judgment, as the Former Policy)] there have been a number of legislative changes affecting private housing including the Deregulation Act 2015, the Housing & Planning Act 2016 and the extension of mandatory licensing of Houses in Multiple Occupation…The existing policy has therefore been reviewed to consider all of these changes and associated regulations…
>
> The proposed policy…has been reviewed having regard to the Better Regulation Delivery Office Regulators Code statutory guidance and the Housing, Health & Safety Rating Enforcement Guidance…In addition to the legislative changes, the council also proposes to remove the informal stage within

[7] Mr Manning says, in his skeleton argument, of this list, that it: "must be read in the context of the new policy as it has been explained by the officers of the authority [in the Report and in their witness statements]. It cannot be read as conferring a free-standing discretion to use informal action wherever an individual officer considers it appropriate. That would be a continuation of the discretion available under former policy which has been quote "removed", as the new policy, Report and witness evidence makes quite clear. Indeed, the entire rationale for implementing the new policy was to prevent retaliatory eviction by pursuing formal enforcement through [improvement] notices. As a result, the authority must intend [this paragraph] to apply in cases where the discretion remains available i.e. where the hazard is insignificant or the landlord is HALS accredited. Were that not so, the change of policy would be a complete fiction…"

the current policy for landlords who are not accredited with the council and make a charge for certain services it provides.

The council's Private Housing (Environmental Health) service discharges the council's statutory functions in relation to housing hazards and housing conditions which are prejudicial to health. The service also administers a landlord accreditation scheme,…HALS which has been subject to a review through a Task & Finish Group during 2016-17, the period that new legislative changes have been introduced. It is proposed that further work is undertaken to review the detail of any changes to the scheme before it is introduced, including the option to charge an annual fee…

[It is recommended] that the…Policy…[is] approved [and] that cabinet considers acceding to the request that the implementation date for [the Policy] be deferred pending the update of the current accreditation scheme.

The Deregulation Act 2015 has introduced provisions designed to protect tenants against unfair eviction where they have raised a legitimate complaint about the condition of their home…Under the current…policy…the council takes informal action with a landlord where there is no imminent risk or conditions prejudicial to health and where there is no history of non-compliance from the landlord. A letter and schedule of works is sent to the landlord identifying those Category 1 and Category 2 housing hazards (under the Housing, Health & Safety Rating System, Housing Act 2004) which need to be addressed and requiring the landlord to confirm when the works will be undertaken. The council has a statutory duty to deal with Category 1 hazards and a discretionary power to deal with Category 2 hazards. Under the current policy it states that the council will take action in relation to significant Category 2 hazards. This is also proposed in the new policy. Having an informal action does not then afford the tenant any protection against unfair eviction. This is only afforded with a section 11 notice…or section 12 notice. It is therefore proposed that the informal stage is withdrawn from the policy instances where Category 1 or significant Category 2 hazards exist. An exception to this scenario could be in relation to a landlord accredited by the Council. However, there must be robust arrangements in place to ensure that this does not result in unfair eviction and that the landlord removes any identified hazards…

The [council's environmental health] service in the main delivers a reactive service apart from mandatory licensing and inspections of properties owned by accredited landlords…The service also operates a self-regulation landlord scheme separate

> to accreditation which it proposes to discontinue and review the existing accreditation scheme…
>
> The current policy of sending a letter with an informal schedule of works to the property owner originates from the Housing Act 1985…The requirement for the council to [so act] was removed with the introduction of the Housing Act 2004. This informal stage was still practised under the current…policy. However, it is proposed that the…Policy removes this stage due to the provisions within the Deregulation Act 2015. It is proposed that there will be an exception to this where a landlord is accredited. On developing the accreditation scheme, it will consider how this is robustly monitored…
>
> The council would only serve statutory notices when it is satisfied that there is a Housing Act 2004 Category 1 hazard or significant Category 2 hazard. Tenants are protected from unfair eviction as statutory notice served."

The council's former housing enforcement policy

23. Before the approval of the Policy, the council had its Private Sector Housing Enforcement Policy 2012-2016 ("the Former Policy"). Appendix 1 to the Former Policy provided that:

> "There are a number of actions officers may take and these will depend on the circumstances of the case:
>
> Take no action - where premises are found to be satisfactory. Where appropriate this will be confirmed in writing.
>
> Take informal action - informal action will normally be the first course of action following the inspection unless one or more of the factors referred to in the below paragraph apply.
>
> Take formal enforcement action - this action will normally be taken where there is an imminent risk of serious harm, the conditions are injurious to health (where statutory nuisance is involved), when the informal approach has failed or when the property is required to be licensed but is not and the landlord has not responded to a request to license the property or has other licensed properties. It may also be taken when an informal approach to an owner has previously regularly failed to result in a successful response. Where an officer identifies an imminent risk of serious harm the officer will make every effort to contact the owner in order to give them the opportunity to remedy the situation."

Witness evidence

24. The Association's chairperson, Mr Danny Gough, and vice-chairperson, Mr Ian Denston, have made witness statements. In their evidence, they mainly complain about the council's proposals for new HALS and, in the case of Mr Gough, about how the council engaged with stakeholders in developing its proposals.

25. On the council's behalf, witness statements have been made by Mr Richmond and by Susan Roberts, the council's Housing Service Policy & Practice Manager.

26. In his witness statement, Mr Richmond explains that taking informal action is time-consuming and costly. He says:

> "…The service annually sends out approximately 500 informal letters with schedule of works. These are very detailed, time-consuming and potentially result in numerous revisits by officers to check the progress of any remedial works. If the works are not undertaken, there is delay with the works and/or notices subsequently served, this will extend the period of time for which the hazard(s) exist."

27. He continues:

> "The [council's] Charges Policy 2018-19 sets out the council's approach to cost recovery and [the Policy] outlines the circumstances where the service will serve statutory notices under [the 2004 Act] - for Category 1 hazards and exercising the council's discretionary power for Category 2 hazards…The tenant is then afforded security of tenure for 6 months if they have followed the process required through the introduction of the Deregulation Act 2015. The…Policy still allows for an informal approach - where the landlord is accredited through [HALS], where the hazard is not a Category 1 or significant Category 2 hazard, or where the landlord meets the officer at the property to discuss the hazard and the landlord can remedy the hazard before the statutory notice is served."

28. Ms Roberts says, in her witness statement:

> "The informal stage (letter and schedule of works) as carried forward by the council from the previous "Minded to take Action" notices was still practised under [the Former Policy]. However, the council has removed this stage under [the Policy] having had consideration of the provisions within [the 2004 Act] as above (sections 5 and 7) and provisions and purpose of the Deregulation Act 2015…
>
> [The Policy] removes the informal letter and schedule of works where Category 1 or significant Category 2 hazards exist in all cases. Informal action is still an option to the council where the Category 2 hazard is deemed to be insignificant and recommendations are being made to the landlord or where the landlord is accredited with the council under HALS…

> [In drafting the Policy, council officers] considered that by taking an informal action in the first instance through a letter and schedule of works to address a Category 1 hazard or significant Category 2 hazard that it was leaving tenants, who had complained to the landlord about a housing hazard prior to contacting the council, without the six-month protection from [retaliatory eviction]…
>
> [In addition to evidence nationally of the risk of retaliatory eviction,] there is also anecdotal verbal evidence from officers…of cases where tenants are concerned about being evicted following their complaint to the council…[Ms Roberts then refers to three incidents]. Officers have also regularly verbally reported tenants' expressed fears and concerns of eviction following a complaint to the…Environmental Health service."

Discussion

29. Much of the Association's objection to the Policy is based on the following proposition; that, for the future, the council's policy will be to take formal enforcement action in all cases, except where the hazard found to exist is an insignificant category 2 hazard or the landlord is a member of new HALS.

30. The council disputes the Association's interpretation of the Policy and so I need to determine what is the proper interpretation of the Policy.

31. It is not disputed, in this case, that the proper interpretation of the Policy is a matter for the court, by reference to the terms of the Policy itself, against the admissible factual background. Such an approach is uncontroversial. For example, in *R (Adath Yisroel Burial Society) v. Inner North London Senior Coroner* [2018] 3 WLR 1354, where the Defendant contended that she did not apply her policy rigidly in practice, the Divisional Court (Singh LJ and Whipple J) said, at [46]-[47]:

> "The defendant suggests that in practice she does not apply the policy as rigidly as might appear to be the case on its face. In particular, in her detailed grounds, her detailed grounds addendum and her letter of 3 January 2018 she said that the policy operated in ways that were different in practice. Nevertheless, the difficulty is that the policy as promulgated on 30 October 2017 says what it says on its face. Other people are entitled to rely upon what it says and to regulate their affairs accordingly. This is important not only for members of the public but also for those who have to apply the defendant's policy, namely her own officers.
>
> We therefore agree with Mr Grodzinski that this court must consider the policy as it was published, drawing on *Tesco Stores Ltd. v. Dundee City Council (Asda Stores Ltd. intervening)* [2012] PTSR 983, para.18, where Lord Reed JSC said: "policy statements should be interpreted objectively in

> accordance with the language used, read as always in its proper context.""

32. There is one matter which must, clearly in my view, inform the proper interpretation of the Policy. As I have indicated, under section 5 of the 2004 Act, "if a local housing authority consider that a category 1 hazard exists on any residential premises, they must take the appropriate enforcement action in relation to the hazard", so that if the council considers a category 1 hazard exists, it is obliged to take what, in the present case, has been referred to as formal enforcement action.

33. Considering the Policy as a whole, I have concluded that its proper interpretation is as follows:

    i) In the case of a hazard which the council considers to be a category 1 hazard, the council will normally take formal enforcement action. Subject to the requirements of section 5 of the 2004 Act, a particular reason why it may not take formal enforcement action if a category 1 hazard exists in fact, is if the landlord of the premises in question is a member of new HALS[8] (see Paragraph 3.6, Appendix 1, paragraph 1.2, Appendix 1, paragraph 1.3 and Appendix 1, paragraph 2.2 in particular);

    ii) In the case of a hazard which the council considers to be a significant category 2 hazard, the council will normally take formal enforcement action. It may not take formal enforcement action, having regard to all the circumstances of the case; in particular, having regard to those matters set out in Appendix 1, paragraph 1.3. In considering all the circumstances of the case, a factor of particular weight will be the landlord's membership, if any, of new HALS (see Paragraph 3.6, Appendix 1, paragraph 1.2; Appendix 1, paragraph 1.3 and Appendix 1, paragraph 2.2 in particular);

    iii) In the case of a hazard which the council considers to be an insignificant category 2 hazard, the council will normally take informal action, but this depends on all the circumstances of the case (see Appendix 1, paragraph 1.2 and Appendix 1, paragraph 1.3 in particular);

    iv) In deciding which of the otherwise legitimate courses to take, the council will carry out a risks/benefit analysis (see Paragraphs 3.1-3.3 in particular);

    v) The council will aim for a consistency of approach (see Paragraphs 3.1-3.3 in particular);

    vi) Formal enforcement action is not limited to improvement notices.

34. Mr Manning submitted that, both in the Report and in their witness statements, the council's officers have interpreted the Policy differently. I agree with Mr Beglan (who, with Mr Williams, appeared for the council) that, and as is indicated in *Adath Yisroel*, how a council officer interprets a policy is no guide to the proper interpretation of that policy, which is a matter for the court considering that policy

[8] Whilst it is right that the Policy refers mainly to an accreditation scheme, I accept that the context in which the Policy was drafted, considered and approved means that the references to accreditation are to new HALS, which was the only accreditation scheme which was expected to exist during the life of the Policy.

against the admissible factual background. It may well be that, if council officers act in a way which is inconsistent with the Policy as I have interpreted it, complaint can be made about that particular conduct but that is not a matter for this judicial review.

35. Mr Manning suggested that what, as it turns out, is my interpretation of the Policy cannot be right because that interpretation means that "the change of policy would be a complete fiction".

36. I disagree. Under the Former Policy, normally a council officer would first take informal, rather than formal action, save in limited circumstances, in which case the normal course was formal enforcement action. Under the Policy, the council's normal course is adjusted in favour of formal enforcement (rather than informal) action.

37. It follows, from what I have said, that I reject the contention that, on the proper interpretation of the Policy, for the future the council's policy will be to take formal enforcement action in all cases, except where the hazard found to exist is an insignificant category 2 hazard or the landlord is a member of new HALS.

38. The Association's interpretation of the Policy underpins its complaint that, by the Policy, the council has fettered its discretion.

39. Relying on *R (West Berkshire DC) v. Secretary of State for Communities and Local Government* [2016] 1 WLR 3923, Mr Beglan suggested that (i) any complaint that a decision-maker has unlawfully fettered itself by its policy can only be made by way of a challenge to an actual instance when the policy has been applied and (ii) this is because, in the application of every policy, a decision-maker is constrained by the requirements of reason, fairness and good faith.

40. I disagree with the first of Mr Beglan's propositions and, whilst the second of his propositions is right as a matter of generality, it does not preclude a challenge to a policy on the ground that it unlawfully fetters a discretion.

41. In *Adath Yisroel*, the Divisional Court said, at [77]-[78]:

> "It is a well-established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of decision-makers.
>
> "The principle was stated in the following way by Lord Browne-Wilkinson in *R. v. Secretary of State for the Home Department, Ex p. Venables* [1998] AC 407, 496-497:
>
> > "When Parliament confers a discretionary power exercisable from time to time over a period, such power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way in which he will exercise his power in the future. He cannot exercise the power nunc pro tunc. By the same token, the person on whom the power has been conferred cannot fetter the way he

> will use that power by ruling out of consideration on the future exercise of that power factors which may then be relevant to such exercise."
>
> These considerations do not preclude the person on whom the power is conferred from developing and applying a policy as to the approach which he will adopt in the generality of cases: see *R. v. Port of London Authority, Ex p Kynoch Ltd*. [1919] 1 KB 176; *British Oxygen Co Ltd v. Board of Trade* [1971] AC 610. But the position is different if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised. If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful…"

42. In *West Berkshire DC*, Laws and Treacy LJJ (with whom the Master of the Rolls agreed) said, at [16]-[22]:

> "It is important first to notice a distinction in this area of the law which is at the core of the debate in this appeal. It is between these two principles. (1) The exercise of public discretionary power requires the decision-maker to bring his mind to bear on every case; he cannot blindly follow a pre-existing policy without considering anything said to persuade him that the case in hand is an exception. See *British Oxygen Co Ltd v. Board of Trade* [1971] AC 610 , in which Lord Reid and Viscount Dilhorne cited the classic authority of *R. v. Port of London Authority, Ex p. Kynoch Ltd.* [1919] 1 KB 176, 184, per Bankes LJ.
>
> But (2): a policy-maker (notably central government) is entitled to express his policy in unqualified terms. He is not required to spell out the legal fact that the application of the policy must allow for the possibility of exceptions. As is stated in De Smith's Judicial Review, 7th ed (2013), paragraph 9-013:
>
> > "a general rule or policy that does not on its face admit of exceptions will be permitted in most circumstances. There may be a number of circumstances where the authority will want to emphasise its policy…but the proof of the fettering will be in the willingness to entertain exceptions to the policy, rather than in the words of the policy itself."
>
> Both of these principles - the rule against fettering discretion, and the liberty (generally) to express policy without acknowledging exceptions - apply whether or not the policy-maker and the decision-maker are the same or different persons. If it were otherwise, neither would have any integrity as a principle. We have expressed them in general terms; their

> application in the planning field's statutory context requires further elaboration.
>
> The rule against fettering discretion is a general principle of the common law. It is critical to lawful public decision-making, since without it decisions would be liable to be unfair (through failing to have regard to what affected persons had to say) or unreasonable (through failing to have regard to relevant factors) or both…
>
> The second of our two principles is that a policy-maker is entitled to express his policy in unqualified terms. It would surely be idle, and most likely confusing, to require every policy statement to include a health warning in the shape of a reminder that the policy must be applied consistently with the rule against fettering discretion...A policy may include exceptions; indeed the WMS did so, allowing a five-unit threshold for certain designated areas in place of the ten-unit requirement. But the law by no means demands that a public policy should incorporate exceptions as part of itself. The rule against fettering...[is a requirement] which the law imposes upon the application of policy. It follows that the articulation of planning policy in unqualified or absolute terms is by no means repugnant to the proper operation of those provisions.
>
> That is not to say that the potential contents of a public policy are subject to no legal constraints. The basic tests of reason and good faith apply; and where, as here, the policy is elaborated in a statutory context, the policy-maker cannot promote an outcome which contradicts the aims of the statute. Mr Forsdick characterised this limitation as an instance of the rule in *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997, that a statutory discretion must be deployed to promote the policy and objects of the Act…"

43. The decisions in the House of Lords in *Venables* and in the Court of Appeal in *West Berkshire DC* are not inconsistent. Rather, as Mr Manning suggested, they both show that whether a policy unlawfully fetters a decision-maker is a matter of degree. Generally, a policy may be unqualified (and does not need to come with any "health warning"). It does not follow from the unqualified terms of a policy that the decision-maker has fettered itself. However, there are cases where, on the proper interpretation of a policy, the decision-maker has fettered itself to act in only one way in a particular circumstance come what may. In that case, the policy is liable to be challenged on the ground that it amounts to an unlawful fetter.

44. As it happens, because of the conclusion I have already reached about the proper interpretation of the Policy, it must follow that it is not an unlawful fetter on the council's discretion. Nevertheless, the conclusion I have reached on the parties' competing arguments on this point does provide a second basis for the conclusion that the Policy does not amount to an unlawful fetter. Even if my interpretation of the

Policy is wrong, its terms are not so clearly prescriptive as to amount to an unlawful fetter on the council's discretion.

45. The Association also complains that, in adopting the Policy, the council's cabinet took into account irrelevant factors or had regard to improper motives; namely:

    i) a wish to protect tenants from retaliatory evictions;

    ii) a wish to compel landlords to join new HALS.

46. A policy, an aim of which is to make it less, rather than more, likely that a landlord can seek a retaliatory eviction, does promote the policy and object of Part 1 of the 2004 Act, and is unobjectionable,[9] and so a wish to protect tenants from retaliatory evictions is not an irrelevant factor.

47. The clear purpose of Part 1 of the 2004 Act (see, for example, section 1(1) of the 2004 Act) is to require local housing authorities to monitor the housing stock in their area and to take appropriate steps to reduce the incidence of sub-standard housing, so that the quality of the housing stock in their area is improved.

48. In 2009, 31% of Hull's private housing stock failed to meet the government's Decent Homes Standard; a figure which exceeded the national average. In 2017-2018, the council served 709 notices on landlords, relating to the state of premises; a figure which was higher than in each of the four previous years. As the Report makes clear, to identify sub-standard housing, the council depends on tenants' complaints. This is consistent with Ms Roberts' witness statement. So a policy, an aim of which is to promote tenant complaints, furthers the purpose of Part 1 of the 2004 Act. Parliament has recognised, in the Deregulation Act 2015, that, nationally, there is a risk of retaliatory eviction if a tenant complains about sub-standard housing and, under that Act, Parliament has taken steps to reduce that risk, so as to make tenant complaints more likely. Because it is more likely that the council will be able to reduce the extent of sub-standard housing in its area, and so the purpose of Part 1 of the 2004 Act will be promoted, if it receives more, rather than fewer, tenant complaints and because it is reasonable to suppose, in the light of the Deregulation Act 2015, that the likelihood of tenant complaints increases the lower the risk of retaliatory eviction, a wish to reduce retaliatory evictions was a legitimate factor for the council's cabinet to take into account and that wish was not an improper motive for the policy change.

49. Nor is it objectionable that the council wishes to encourage membership of new HALS.[10] As the Enforcement Guidance recognises, accreditation schemes provide a useful mechanism for driving up housing standards and so the promotion of new HALS is capable of promoting the purpose of Part 1 of the 2004 Act.

50. The Association also complains that the council failed to take into account the Enforcement Guidance and the Enforcement Concordat and that the Policy is inconsistent, in fact, with the Enforcement Guidance and Enforcement Concordat (in particular, the requirement for a proportionate approach to decision-making).

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[9] See, in this context, the reference in *West Berkshire DC* to *Padfield*.

[10] I cannot derive, from my interpretation of the Policy, that the council wishes to compel, rather than merely encourage, membership of new HALS.

51. I disagree. The Report indicates that the Enforcement Guidance (which summarises, at paragraph 2.17, the relevant features of the Enforcement Concordat) was taken into account. More importantly, in accordance with the Enforcement Guidance:

    i) the Policy promotes co-operation between the council and tenants because the risk of retaliatory evictions is capable of being controlled;

    ii) the Policy promotes co-operation between the council and landlords because it encourages landlords to join new HALS;

    iii) before the Policy was adopted, stakeholders were consulted;

    iv) the Policy identifies when a hazard might be a significant category 2 hazard by reference to the degree of risk to the actual occupier(s) of the relevant premises;

    v) the Policy recognises that in such cases, normally formal enforcement action will be taken; and,

    vi) the Policy encourages membership of an accreditation scheme.

52. Consistently with the Enforcement Concordat, the Policy, in particular:

    i) sets out a consistent approach to enforcement, by setting out the course which the council will normally take;

    ii) sets out a fair approach to enforcement, because it permits the council's officers to consider the particular circumstances of each case within the limits of the 2004 Act;

    iii) sets out, in Appendix 1, paragraph 3.2, a practical mechanism for landlords to be given a clear explanation of what hazards have been found and how those might be remedied;

    iv) allows landlords at risk of formal enforcement action to be given an opportunity (within the limits of the 2004 Act) to remedy the hazards which have been found; not only expressly, in Appendix 1, paragraph 3.2, but also because the council's officers retain a discretion in relation to enforcement mechanisms (within the limits of the 2004 Act), as I have already explained.

53. The Association also complains that the decision of the council's cabinet to adopt the Policy was perverse because new HALS does not exist yet.

54. I can see the good practical sense in bringing new HALS into operation (or existence) at the same time as the Policy comes into operation. However, it does not follow that, because new HALS is not operational yet, the decision to adopt the Policy was perverse. In the light of my interpretation of the Policy, it is sufficiently flexible to permit the taking into account, in a particular case, (i) that new HALS is not operational and (ii) any membership of an existing accreditation scheme.

55. The Association also complains that the decision of the council's cabinet to adopt the Policy was unlawful because:

i) "overwhelming weight" was given to new HALS which is the "only exception to general policy";

ii) the Policy impermissibly gives "overwhelming weight" to the risk of retaliatory evictions and there was no evidence before the council's cabinet that that risk is real in Hull;

iii) under the terms of the Deregulation Act 2015, retaliatory evictions can only be prevented in certain circumstances, when certain steps are taken by a local housing authority (in particular, the service of improvement notices) and only for a limited time.

56. I have already concluded that a wish to encourage membership of new HALS and a wish to protect tenants from the risk of retaliatory eviction were relevant considerations in the decision of the council's cabinet to adopt the Policy.

57. It is not disputed, in this case, that "a decision will be unlawful when manifestly disproportionate weight has been given to an otherwise relevant consideration"[11] (see, for example, *R (Gallagher) v. Basildon DC* [2010] EWHC 2824 (Admin) at [38], [41], to which Mr Manning referred me). By this, I take the parties to accept that a court will only intervene when the weight a public authority has given to a relevant consideration is irrational. As Lord Keith explained in *Tesco Stores Ltd. v. Secretary of State for the Environment* [1995] 1 WLR 759, 764G:

> "…it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the Wednesbury sense…"

58. The short answer to the Association's first and second complaints noted in paragraph 55 above is, as Mr Beglan said in his skeleton argument, that, on my interpretation of the Policy, in it "overwhelming weight" is given neither to a landlord's membership of new HALS nor to the risk of retaliatory eviction.

59. The third complaint noted in paragraph 55 above is really no more than that, because the measures in the Deregulation Act 2015 to combat retaliatory evictions have limited ambit and provide protection only for a limited time, the council's cabinet acted perversely in adopting a policy by which the risk of retaliatory evictions is capable of being reduced where that is possible. The fact that the ambit of the Deregulation Act 2015 is limited does not mean that there is no case where the risk of a retaliatory eviction cannot be reduced. Nor does it follow, from the fact that the ambit of the Deregulation Act 2015 is limited, that the risk of retaliatory eviction cannot be reduced in many cases where let residential premises are blighted by a hazard. I simply do not follow how, just because it is only possible to minimise the risk of retaliatory eviction in limited circumstances and for a limited period, it is perverse to adopt an otherwise apparently unobjectionable policy, (particularly where, as is apparently the council's case, the "vast majority of relevant service requests

[11] See paragraph 74 of Mr Manning's skeleton argument; from which, as it happens, I deduce that it is not disputed that, in deciding whether or not to take formal enforcement action, a local housing authority may take into account a landlord's membership of its accreditation scheme.

relate to assured shorthold tenancies" (see the council's Pre-action Protocol response)).

60. It follows, from all I have said, that I have concluded that the Association has failed to establish that the council has erred and the claim must be dismissed.