cornerstone barristers

A look ahead to 2020

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Fitness for human habitation and no fault repossessions

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Homes (Fitness for Human Habitation) Act 2018

- Came into force on 20 March 2019
- Applies to all new tenancies granted after that date (<7 years)
- From 20 March 2020 it will apply to all existing tenancies

Landlord and Tenant Act 1985

- **8 Implied terms as to fitness for human habitation.**
- (1) In a contract to which this section applies for the letting of a house for human habitation there is implied, notwithstanding any stipulation to the contrary -
  - (a) a condition that the house is fit for human habitation at the commencement of the tenancy, and
  - (b) an undertaking that the house will be kept by the landlord fit for human habitation during the tenancy

Previously: section 8

- (3)This section applies to a contract if -
  - (a) the rent does not exceed the figure applicable in accordance with the subsection (4), and
  - (b) the letting is not on such terms as to the tenant's responsibility as are mentioned in subsection (5)

Previous section 8 was toothless

Date of making of contract	*Rent limit*
Before 31st July 1923	In London: £40
	Elsewhere: £26 or £16 (see Note 1)
On or after 31st July 1923 and before 6th July 1957	In London: £40
	Elsewhere: £26
On or after 6th July 1957	In London: £80
	Elsewhere: £52

LTA section 10: Fitness for human habitation

- In determining for the purposes of this Act whether a house is unfit for human habitation, regard shall be had to its condition in respect of the following matters—
  - repair
  - stability
  - freedom from damp
  - internal arrangement
  - natural lighting
  - ventilation
  - water supply
  - drainage and sanitary conveniences
  - facilities for preparation and cooking of food and for the disposal of waste water

section 10: Fitness for human habitation

- and the house shall be regarded as unfit for human habitation if, and only if, it is so far defective in one or more of those matters that it is not reasonably suitable for occupation in that condition.

The new standard

- Section 10 is amended so the existing standard is s.10(1) and at the end of that subsection is added
  - Any prescribed hazard
- Section 10(2) then defines a hazard by reference to section 2 of the Housing Act 2004 ie the Housing Health and Safety Rating System

What must be present?

- One of the matters in s.10 (a deficiency in those matters)
- Which make it not reasonably suitable for occupation

Edwards v. *Etherington* (Ry. & M. 268; S. C., 7 D. & R. 117)

There the defendant, who held a house as tenant from year to year, quitted without notice, on the ground that the walls were in so dilapidated a state that it had become unsafe to reside in it; and Lord Tenterden, at Nisi Prius, held these facts to be an answer to an action by the landlord for use and occupation: telling the jury, that although slight circumstances would not suffice, such serious reasons might exist as would justify a tenant's quitting at any time, and that it was for them to say whether, in the case before them, such serious reasons existed as would exempt the defendant from the plaintiff's demand, on the ground of his having had no beneficial use and occupation of the premises.

Smith v Marrable 152 E.R. 693

- Evidence was given to shew that the house was in fact greatly infested by bugs. The Lord Chief Baron, in summing up, stated to the jury, that in point of law every house must be taken to be let upon the implied condition that there was nothing about it so noxious as to render it uninhabitable; and that if they believed that the defendant left the plaintiff's house on account of the nuisance occasioned by these vermin being so intolerable as to render it impossible that he could live in it with any reasonable comfort, they ought to find a verdict for the defendant.

Wilson v Finch Hatton (1877) 2 Ex D 336

- The drains, which were old brick drains, were much out of repair; that there was a cesspool under the pantry, and a considerable amount of stagnant sewage matter under the basement floor
- Is it not, then, clear, that the tenant is entitled to find the drains in such a condition that she and her family and servants can safely enter and live in the house? However, on the contrary, when she entered she found that there were strong and noisome odours in the house, and that there was, under the rooms in the basement, a deposit of filth and foecal substance, which it was absolutely necessary to remove before the house could be safely occupied by any one.

Hussein v Mehlman

- [1992] 2 E.G.L.R. 287
- Serious breaches of s.11
- Tenants suffered real hardship as a result of the breach and were dprived of an essential part of what they had contracted for

Ahmed v Murphy

- [2010] EWHC 453 (Admin)
- They require the landlords to maintain the premises in the state of repair that it was in at the time of the grant of the tenancy in 1974 but they do not require the landlords to undertake any improvements save as are necessary to keep the premises in a state fit for human habitation. Thus, in these premises, there was an obvious and essential need to provide facilities for cooking, to repair the ceilings, to eradicate the damp, to provide a hot water supply and to decorate the common parts and the exterior of the premises. These obligations would not extend to providing central heating, partitioning or any other improvements, refurbishment or development works. If the landlords wished to carry out any such additional work, this could only be undertake with the agreement of the tenant, which he would not be obliged to provide.

So what does it mean today?

- The condensation came about from the warm air of the environment in the rooms reaching the cold surfaces of the building. The moisture of the condensation was then absorbed by the atmosphere, and transferred to bedding, clothes and other fabrics which became mildewed and rotten. There was evidence that carpets and curtains had been ruined - but such damage in the living room and hall could well be attributable to the water penetration. There was evidence which the judge accepted that a three-piece suite in the living room was ruined by damp so that it smelt and rotted and had to be thrown out. The evidence of the plaintiff and his wife was that, because of the appearance and smell, they hardly used the living room, took visitors to the kitchen and sent the children up to their parents' bedroom to watch television. I would conclude that, by modern standards, the house was in winter, when, of course, the condensation was worst, virtually unfit for human habitation.

Common parts

- Where a dwelling is part of a larger building—a room, for example, in a home in multiple occupation, a flat in a purpose-built block or a house that has been converted into flats—amendment 4 would extend the implied covenant of fitness, so that the whole dwelling would be fit for habitation, including any part of the building in which the landlord has an estate or an interest. That would include, for example, the outside walls and roof of a block of flats, and the internal common parts where the landlord owns the block.

Common parts

- If the common parts are in such a state that they present a risk to the health or wellbeing of the occupiers of the dwelling, the landlord will be required to take remedial action, subject to any exceptions available under, for example, the main amendments that we have made to clause 1. Amendment 4 is necessary to give effect to the purpose of the Bill, because without it the implied covenant would be restricted to the extent only of the demised property—that is, the flats—and would not catch, for example, fire safety hazards in the common parts.

Defences

- Breach the duty of the lessee to use the premises in a tenant-like manner
- Destruction or damage by fire, storm, flood or other inevitable accident
- Anything which the lessee is entitled to remove from the dwelling
- Breach of any obligation imposed by any enactment
- Consent of a superior landlord where consent has not been obtained following reasonable endeavours to obtain it

What does tenant-like mean now?

- "Little jobs around the house"
- Not causing damage
- Keep ventilated/heated
- Allow access
- Express terms of the tenancy
- Correlative implied terms??
- A likely battleground

Access

- New section 9A(7)
- *In a lease to which this section applies of a dwelling in England, there is also implied a covenant by the lessee that the lessor, or a person authorised in writing by the lessor, may enter the dwelling for the purpose of viewing its condition and state of repair*
  - *At reasonable times of day*
  - *On 24 hours notice*

Abolition of section 21?

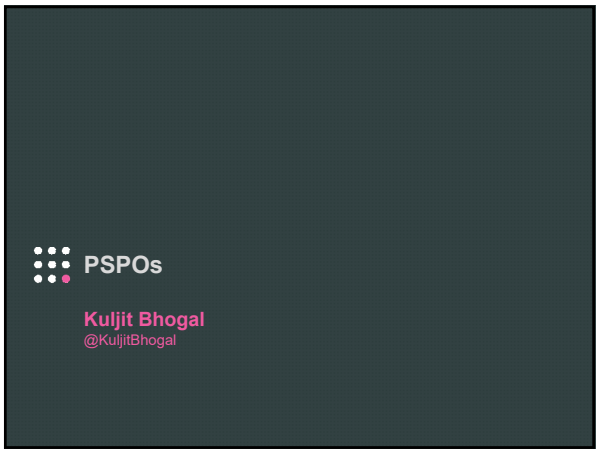
- Government is consulting on this
- Consultation closes on 12 October 2019
- Government has indicated it intends to take this action probably by 2020
- https://www.gov.uk/government/consultations/a-new-deal-for-renting-resetting-the-balance-of-rights-and-responsibilities-between-landlords-and-tenants

What effect would this have?

- No more assured shorthold tenancies
- Either fixed term or periodic
- Improved (from whose point of view?) grounds for possession
- Proposal for accelerated court proceedings for mandatory grounds – no hearing required
- Impact on RPs who may use the s21 procedure for starter tenancies
- Need to review eviction procedures

What effect would this have?

- Easier to see why A was evicted
- Fewer issues with validity of notices (lost opportunity to prevent homelessness?)
- Arguments about fairness of eviction with no hearing?



What are Public Spaces Protection Orders and why do you need to know about them?

- Anti-Social Behaviour, Crime and Policing Act 2014, ss. 59-75
- Control of public space
- Maximum duration of 3 years (s.60)
- Evidence base*
- Consultation*
- Proportionality*
- Breach can result in a FPN up to £100 or prosecution with a fine up to £1000

* Differs from old orders

Old orders have transitioned to be treated as PSPOs - but the transitioned orders **expire in October 2020**

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Not a LA? Why they are relevant for you

- They attach to public spaces – and will be relevant the areas where your properties/service users are located
- If you know what the powers are, you can ask your LA to use them
- You may be consulted about whether a PSPO should be made/varied/extended
- Role for local ASB/multi-agency/safeguarding panels

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What were the old orders?

- Gating orders
  - Relevant to areas which are currently gated off to prevent (for example) access, congregating, fly tipping, rough sleeping
- Drinking in Public Spaces Orders ('DPPOs')
  - Very common in town centres
- Dog control orders ('DCOs')
  - Requirements to keep a dog under control, out of children's play areas, on a lead, to pick up and dispose of faeces, maximum number of dogs walked by a single person

PSPOs are not limited to these types of behaviour

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Behaviour addressed by PSPOs

Behaviour addressed by PSPOs

- Dog control – e.g. Richmond Upon Thames (*Summers*)
- Public urination and ASB involving pedicabs (e.g. cycling on pavements and playing music) – Camden LBC
- Legal highs and 'laughing gas' – Lambeth LBC
- 'Street gambling' on the Southbank and Westminster Bridge – Westminster CC & Lambeth LBC
- Congregation, drop off and pick up of migrant workers seeking casual labour – Brent LBC, or congregation in communal areas of blocks of flats
- Restriction on protests and vigils in "buffer zone" outside Marie Stopes abortion clinic in Ealing (*Dulgheriu*… and possibly elsewhere)

The test – s.59

Two conditions:

- Activities carried on in a public place within the authority's area have had a detrimental effect on the quality of life of those in the locality (or are likely to have that effect), AND
- The effect, or likely effect of the activities:
  - Is, or is likely to be persistent or continuing
  - Such as to make the activities unreasonable, AND
  - Justifies the restrictions imposed

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The restrictions – s.59(5)

- Only those that are reasonable to impose in order to:
  - Prevent the detrimental effect from continuing, occurring or recurring
  - Reduce the detrimental effect or reduce the risk of continuance, occurrence or recurrence

Human rights

- In deciding whether to make, vary or discharge a PSPO, the LA must have regard to Article 10 (freedom of expression) and Article 11 (freedom of assembly) set out in the European Convention on Human Rights

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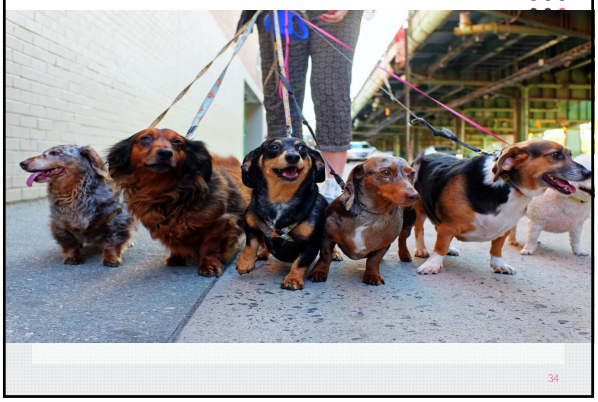

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Summers v Richmond Upon Thames LBC

Dog control, leads, clearing up after dogs, maximum number of dogs walked by one person

[2018] EWHC 782 (Admin), May J

Key facts:

- Two articles: one to provide for dogs to be kept under proper control, use of leads in certain defined areas, use of a lead if directed to use one, disposal of faeces, ban on dogs on certain areas
- 'Proper control' article referred to out of date charity
- Maximum number of dogs to be walked by one person restricted to 4 (with up to 18 licences allowing up to 6 dogs to be walked)
- Neighbouring boroughs had introduced maximum 4 dog rules, lots of open spaces, royal parks, professional dog walkers coming into area

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Summers v Richmond Upon Thames LBC

- **"Locality"**

"those in the locality" must be construed as meaning some, but not necessarily all, of those within the locality, whether as residents, visitors or workers [24]

- **"Persistent"**

was an ordinary English word "commonly understood to mean 'continuing or recurring, prolonged' [27], we argued it meant 'more than once' and relied on Ramblers Association v Coventry CC [2008] EWHC 796 (Admin), accepted by Judge

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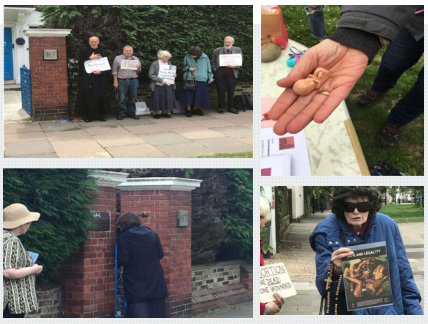

(c) Kuljit Bhogal

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Dulgheriu & Orthova v Ealing LBC

Abortion clinics, safe zones, designated area for protests

Court of Appeal, [2019] EWCA Civ 1490 21 Aug 2019

Judgment on interim applications for suspension, anonymity and a protective costs order:
[2018] EWHC 1302 (Admin), 24 May 2018 Holman J

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Dulgheriu & Orthova v Ealing LBC

"Detrimental effect"

- LAs have "wide discretion" to identify the relevant behaviours, based on local knowledge [§47]

"Those in the locality"

- A 'loose' expression - left open & undefined [§41]
- For local authorities to identify relevant persons [§47]
- Can include occasional visitors e.g. tourists, shopping centers, hospitals and abortion clinics [§43]
- AS LONG AS the detrimental effect on them "is, or is likely to be, of a persistent or continuing nature"
- Depends on all the evidence and circumstances

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Further reading…

- The Anti-Social Behaviour, Crime and Policing Act 2014, Part 4, Chapter 2, ss 59-75
- Statutory Guidance for Frontline Professionals, August 2019, section 2.5
- LGA guidance on PSPOs for councils, February 2018
- *Cornerstone on Anti-social Behaviour*, 2nd Ed., May 2019, Chapter 7

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Up-coming cases of interest

Dean Underwood

Kingston RLBC v T [2019] EWHC tbc (Ch)

- K seeking declaration it has not overcharged tenant (T) for water / sewerage charges
- Claim premised on arguments that K has acted 'on behalf of' Thames Water ('TW'), or as TW's agent and either:
  - agreement in *Jones v Southwark LBC* [2016] EWHC 457 (Ch) distinguishable
  - *Jones* wrongly decided
- In any event, K argues, agreement between K and TW not one of sale and purchase, so K not a 'person' to whom s.150 Water Industry Act 1991 and Water Resale Orders apply
- T not overcharged: T charged the same by K as liability to TW
- Claim before the High Court October 2019

Adesotu v Lewisham LBC [2019] EWCA Civ 1405

Essential facts:

- L offered A s.193(2) accommodation
- A was required to accept or reject offer
- L gave A two days to do so
- A asked for and was given more time
- A did not accept the offer
- A did not say she needed more time
- L decided its duty had ceased
- Decision upheld on review
- On appeal, A claimed discrimination
- HHJ Luba QC: County Court did not have jurisdiction to hear discrimination claims
- Related grounds of appeal struck out

Held on appeal:

- Subject to exceptions, ss.113-114 EA 2010 required a County Court claim
- No applicable exceptions: s.204 appeal was not a judicial review: *Hamnett v Essex CC*
- Also, no jurisdiction under s.204 to make necessary findings: *Bubb v Wandsworth CC*
- *Bubb* not overruled by *CN v Lewisham LBC*
- Time given to A was academic: A had had time to raise the issue on review and had not. It did not 'arise from' the review: *Abed v Westminster CC*

R (Mohamed) v Wimbledon Mags' Court etc [2019] EWHC tbc

Essential facts:

- M alleged to have committed offences under s.72(1) HA 2004 (failure to license various HMOs)
- Informations laid on 6.1.17, alleging offences on 7.7.16 and 4.8.16
- LHA had known of M's offences beforehand
- M invited court to treat proceedings as a nullity because:
  - court could not have been satisfied, on informations laid, that offences could be made out
  - proceedings were time-barred: s.127 Magistrates' Court Act 1980

Held at first instance:

- Informations complied with r.100 MCR 1981 and r.7 CrPR and gave the court sufficient info to issue summonses
- M had since been given sufficient details of LHA's case to enable him to meet prosecution case
- s.72(1) offence was a continuing offence, committed each day HMOs remained unlicensed
- Proceedings not statute barred, nor had LHA delayed unreasonably

Issue on appeal:

- Above findings now challenged in Divisional Court judicial review

Waltham Forest LBC v Marshall [2019] UKUT tbc (LC)

Essential facts:

- M failed to license a property subject to selective licensing
- W imposed financial penalty of £5000 for offence under s.95(1) HA 2004
- Penalty was fixed in accordance with W's published enforcement policy
- Policy provided a penalty matrix, dividing penalties into 6 bands, depending on seriousness of offence, aggravating features etc
- M appealed to FTT against amount of the penalty

Held at first instance:

- Penalty reduced by 70%, from £5000 to £1500, i.e. disapplying W's policy

Issue on appeal:

- On re-hearing, to what extent is FTT bound to follow and apply LHA's lawfully-adopted and unchallenged policy?
- Consider, e.g. *R (Westminster CC) v Middlesex Crown Court* [2002] EWHC 1104 at [21]: "… it must accept the policy and apply it as if it was standing in the shoes of the council .."

Trecarrell House Ltd v Rouncefield [2020] EWCA Civ tbc

Essential facts:

- L granted T an AST
- Gas safety certificate given not before T took up occupation, but before L served s.21 notice
- T defended claim, citing s.21A HA 1988 and Reg 2, AST Notices and Prescribed Requirements (England) Regs 2015:
  - certificate must be given "… before [T] occupies those premises …"
- DDJ made possession order:
  - no certificate required as no gas appliances in property
  - certificate served before notice had cured L's breach

Held on appeal:

- HHJ Carr allowed T's appeal
- *Caridon Property Ltd v Schooltz* considered
- Breach could not be cured by late service of certificate
- Effectively, AST becomes fully assured

Issue on second appeal (listed 28-29.1.20):

- Central issue: can L serve valid s.21 notice if gas safety certificate not given before T occupies?

Luton Community HT Ltd v Durdana [2020] EWCA Civ tbc

Essential facts:

- Possession claim on Ground 17 (tenancy induced by fraud)
- L's general policy to repossess in event of fraud
- T suffered from PTSD and her daughter from cerebral palsy
- Expert evidence: eviction would cause T's condition to deteriorate and have devastating effect on T's children
- T alleged L had breached PSED, and so not reasonable to order possession

Held at first instance:

- Grant of tenancy induced by T's lies
- But, L had not properly considered impact of repossession on s.149 objectives or need to promote them
- PSED breach was complete defence
- *Forward v Aldwyck HG Ltd* and *Barnsley MBC v Norton* distinguished
- Further, not reasonable to repossess

Issue on appeal (listed 4.2.20):

- Interplay between PSED and court's discretion to make possession order

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