cornerstone barristers

Key developments in 2017 … and a look forward to 2018

Kelvin Rutledge QC & Dean Underwood

Homelessness and allocations

In Parliament

Homelessness Reduction Act 2017

- Adopted Private Member's Bill "to make provision about measures for reducing homelessness and for connected purposes."
- Received Royal Assent on 27 April 2017 but not yet in force.
- Amends Housing Act 1996, Part 7
- Based in part on Housing (Wales) Act 2014
- Main focus on "prevention" & "relief"
- Introduces important new duties

Homelessness Reduction Act 2017
Policy drivers

- Last 20 yrs: LA stock ↓ 2m, RP stock ↑ 1.5m
- Welfare benefit cuts
- Housing crisis: private rents ↑
- TA provided by London LAs 75% of all England figure

Homelessness Reduction Act 2017
Main duties

1st s.184 2nd s.184 3rd s.184

56 days 56 days

Homelessness and allocations
In the courts

PSED – a victory for common sense
Hackney v Haque [2017] H.L.R. 14

Essential facts

- A reviewing officer decided that the room secured for the appellant, a person with disability, was suitable.
- In particular, the officer stated that the room was of ample size but was cluttered with the appellant's belongings, some of which could be put into storage.
- He concluded by stating that he had had regard to "the Equalities Act 2010".
- A circuit judge allowed his appeal holding that the decision letter failed to demonstrate sufficient evidence of compliance with the public sector equality duty.

Held

- Allowing Hackney's appeal, a reviewing officer is not always required to spell out his reasoning as to whether the public sector equality duty is engaged and if so with what precise effect, although such an approach may put the issue of compliance with the duty beyond reasonable doubt.
- In cases where an applicant's criticisms of the suitability of his accommodation derive from precisely identified aspects of his disabilities and their alleged consequences, an officer considering those objections in a focused manner would be likely to comply with the public sector equality duty even if unaware of its existence as a separate duty.

The door shuts on Article 6 ECHR … again!
Poshteh v Kensington & Chelsea RLBC [2016] UKSC 36

Essential facts

- P made Part 7 application
- PTSD due to imprisonment in Iran
- Refused final offer under s193 HA96
- Windows reminded her of prison cell
- P appealed decision that duty ended
- Rejected by County Court and Court of Appeal
- Permission to appeal to Supreme Court:
  - should it depart from decision that Article 6 ECHR does not apply to Part VII decisions
  - had RO applied the right test?

Held

- *Ali v Birmingham CC* [2010] UKSC 8 was intended to settle A6 issue
- No Grand Chamber decision on point
- No clear and constant line of ECHR decisions to the contrary
- *Ali* remained good law
- Viewing decision as a whole, the RO had applied the right test
- Benevolent approach to decision letters affirmed: *Holmes-Moorhouse v Richmond upon Thames LBC* [2009] UKHL 7

The door shuts on Article 6 ECHR … again!
Poshteh v Kensington & Chelsea RLBC [2016] UKSC 36

"The scope and limits of the concept of a "civil right", as applied to entitlements in the field of public welfare, raise important issues as to the interpretation of article 6 , on which the views of the Chamber are unlikely to be the last word. In my view, this is a case in which, without disrespect to the Chamber, we should not regard its decision as a sufficient reason to depart from the fully considered and unanimous conclusion of the court in *Ali v Birmingham City Council [2010] 2 AC 39* . It is appropriate that we should await a full consideration by a Grand Chamber before considering whether (and if so how) to modify our own position."

"In my view, the appeal on this issue well illustrates the relevance of Lord Neuberger's warning in *Holmes-Moorhouse [2009] 1 WLR 413* (see para 7 above) against over-zealous linguistic analysis."

per Carnwath SCJ

Out-of-borough placements … a real education!
R (E) v Islington LBC [2017] EWHC 1440 (Admin)

Essential facts

- M, disabled DV victim, homeless
- Daughter, E, in Islington school
- ILBC accepted s193 duty
- Accommodated M out-of-borough
- But did not 'ensure' E's education
- No education for E for whole term
- Then, short-notice return to Islington
- Again, no adequate arrangements made for E's education
- E claimed breach of ECHR P1,A2
- ILBC denied primary responsibility for out-of-borough education

Held:

- E was denied right to education
- ILBC had duty to ensure E's welfare on delegation of powers: s11 CA04
- ILBC primarily responsible for guaranteeing in-borough and ensuring out-of-borough education
- ILBC had corresponding duty to make contemporaneous records explaining:
  - likely impact of transfer on child
  - decision that receiving borough would secure the child's education

Out-of-borough placements … a real education!
R (E) v Islington LBC [2017] EWHC 1440 (Admin)

"… any local authority contemplating the transfer of a school-age homeless child into temporary accommodation out of borough is under a *Nzolameso* duty to make contemporary records of its decision-making and its reasons, capable of explaining clearly how it evaluated the likely impact of the transfer on the educational welfare of the child, in accordance with its primary obligation under section 11(2)(a) . In addition, however, by virtue of section 11(2)(b) , it must be able to demonstrate, by reference to written contemporaneous records, the specific process of reasoning by which it reached the decision (if it did) that the authority to which it was delegating its housing obligations would secure the child's educational welfare, either through making appropriate arrangements for school admission, or by making available alternative educational provision under section 19 of the Education Act 1996."

per DHCJ Ben Emmerson QC

Southwark stars shine on
R (XC) v Southwark LBC [2017] EWHC 736 (Admin)

Essential facts:

- Allocation scheme
- Priority Star system
- Additional preference given for community contribution
- X, disabled, carer for disabled son
- Assessed as non-priority Band 4
- Claimed indirect discrimination, in breach of s19 Equality Act 2010
  - disabled persons and women with caring responsibilities less likely to be able to work or volunteer in the community

Held:

- Priority Star system discriminated indirectly against women and disabled:
  - disabled and women less likely to obtain one or both stars
- But scheme had a legitimate aim:
  - creation of sustainable and balanced communities
  - encouraging community contribution
- and Priority Star system was a proportionate means of achieving it

Southwark stars shine on
R (XC) v Southwark LBC [2017] EWHC 736 (Admin)

"Meeting the test which I have found is applicable, however, requires that the measure adopted must be the least intrusive which could be used without unacceptably compromising the objective. It must also be shown … that in adopting the measure they struck a fair balance between securing the objective and its effects on the claimant's rights.

I can see no measure less intrusive, less likely to be detrimental to the claimant, which would not undermine the legitimate objective identified by the council and to which I have referred above. … The wider the class the less valuable the benefit of being within it.

Even though this allocation scheme does, in my judgement, discriminate against those with the sort of disabilities of which the claimant complains and against women, … in my judgement the defendant has shown that it has adopted a scheme which was the least intrusive possible and which struck the right balance."

per Graham J

Victory for local democracy in Ealing
R (H) v Ealing LBC [2017] EWCA Civ 1127

Essential facts:

- Ealing LBC allocation policy
- Working Household Priority
- 15% kept for working households
- Judicially reviewed
- Alleged indirect discrimination against women, disabled, elderly
- s19 Equality Act 2010
- Articles 8 and 14 ECHR
- Also alleged breach of PSED and s11 Children Act 2004
- WHP Scheme quashed at trial

On appeal:

- Appeal allowed
- Unacceptable incursion into practical running of allocation scheme
- Failed adequately to address the scheme's 'safety valves'
- Decision on PSED upheld
- But Ealing LBC left to address PSED breach in scheme review
- Whether allocation schemes fall outside Article 8 left doubted

Housing management

R (Turley) v Wandsworth LBC [2017] EWCA Civ 189
A succession of legitimate policies

Essential facts:

- T and D unmarried couple
- D the sole tenant
- T and D broke up; D moved out
- D moved back in Jan 2012
- D died March 2012
- T wanted to succeed D as tenant
- Section 87, Housing Act 1985
- T neither spouse nor civil partner
- T had not resided with D for 12 months before death
- Alleged discrimination: Arts.8 & 14

Held, on appeal from dismissal of JR:

- Pre-2012 policy requiring relationship permanence was legitimate
- So too treating marriage and civil partnership, but not others, as sufficiently permanent
- 12-month residence condition was best, if blunt, marker of permanence
- Change in law did not render previous policy unjustifiable
- Prospective-only amendment of law not manifestly without reasonable foundation

R (Turley) v Wandsworth LBC [2017] EWCA Civ 189
A succession of legitimate policies

"I find it impossible to say that the imposition of the twelve-month condition was manifestly without reasonable foundation as a criterion for demonstrating the necessary degree of permanence and constancy. The fact that a couple have been living together for a minimum period of time is plainly the best available objective demonstration that their relationship has the necessary quality of permanence and constancy. The choice of 12 months as the period cannot be said to be without reasonable foundation: indeed if it were much shorter, its value as a marker of a permanent relationship would be slight. … It is true that it is, as Knowles J observed, something of a blunt instrument, but that is very often the case with a bright-line rule. And it is important to appreciate that local authorities *347 are not precluded from granting a tenancy to a person left in occupation by the death of a secure tenant, including a common law spouse who cannot satisfy the twelve-month condition, if for particular reasons they consider it right to do so. "

per Underhill LJ

SPOs, UPOs and … Potemkin villages
Poplar HARCA v Begum [2017] EWHC 2040 (QB)

Essential facts:

- Assured tenants, 2 children
- Receiving full Housing Benefit
- Sublet 2 bedroom flat: £400pm
- Retained 1 locked bedroom
- Served with NTQ and NSP
- Subtenants unlawfully evicted
- Tenants moved back in with children
- Police raid 6 months later
- Drugs and dealing paraphernalia

- At trial, Recorder makes SPO
- Refuses the claim for UPO

On appeal:

- SPO overturned
- Flawed exercise of discretion
- Possession and UPO granted

SPOs, UPOs and … Potemkin villages
Poplar HARCA v Begum [2017] EWHC 2040 (QB)

"The appellant … works with the local housing authority to provide affordable housing to those unable to obtain accommodation in the open market. I pause to note that there is a very long waiting list indeed for such accommodation and that those who secure it should be expected to be slow to abuse the benefits and advantages which it brings."

"I would stress that it is not compassionate to allow profiteering fraudsters indefinitely to continue to occupy premises and thereby exclude from such accommodation more needy and deserving families. In particular, in this case, there was a complete dearth of material which could amount to cogent evidence that the respondents would mend their ways in future."

"I am satisfied that the total amount referred to under step 1 does not exclude the element of Housing Benefit. … The inclusion of the word "total" indicates that the gross receipts secured and consequent upon the dishonest relinquishment of possession should be considered under step 1. To hold otherwise would be to render all but nugatory the clear purpose of the section."

Per Turner J

A duty-dependent dwelling?
Dacorum BC v Bucknall [2017] EWHC 2094 (QB)

Essential facts:

- B applied as homeless
- Accommodated under s188
- Dacorum accepted s193 duty
- B remained in same flat
- She later rejected PRS offer
- Dacorum served NTQ
- NTQ omitted prescribed info.
- Possession granted nonetheless
- B did not occupy “dwelling”
- Not entitled to 1977 Act protection
- *R(N) v Lewisham LBC* [2014] UKSC 62 applied

On appeal:

- s193 accommodation not necessarily let as “dwelling”
- Depends on circumstances
- Each case fact specific
- Letting for indeterminate period likely to be of a “dwelling”
- B, left in occupation for indeterminate period, occupied flat as “dwelling”
- Entitled to 1977 Act protection
- Appeal allowed

A duty-dependent dwelling?
Dacorum BC v Bucknall [2017] EWHC 2094 (QB)

"I do not accept … that if accommodation is being provided pursuant to the full housing duty it is automatically to be treated as occupied as a dwelling. … : the change in the duty does not necessarily change the dwelling/non-dwelling status of occupation, which depends on the purpose of occupation, not the duty itself. … Each case will be fact specific. … the critical factor will be the purpose for which the applicant is permitted to continue to occupy the property. This will depend primarily on the terms which will accompany the notification of the s.184 decision, not the length of occupation which in fact continues thereafter. If the occupant is permitted to stay in the accommodation for an indefinite further period, that is likely to lead to the conclusion that the continued occupation is as a dwelling, notwithstanding any avowed intention by the local authority to offer him or her another property at some uncertain point in the future. If the occupier is told that he or she can stay in the property for the time being pursuant to the local authority's acceptance that it must house them, they are justified in treating it as their home if they stay for more than a short period. It is the indefinite nature of the period of continued occupation offered which matters."

Per Popplewell J

Housing & Planning Act 2016 – into the long grass

- Starter homes (Pt 1)
- Rogue landlords & property agents in England (Pt 2)
- VRTB (Pt 4)

Licensing under the Housing Act 2004

Cohesive living lives on
Nottingham City Council v Parr [2017] EWCA Civ 188

Essential facts:

- 2 houses let to students
- Limited floor space in loft rooms
- Licence prohibited use of rooms for sleeping
- FTT allowed appeal
- Houses had enough shared space to counter bedrooms' size and, living "cohesively" students would use that space
- Condition in one licence varied: use as bedroom only by full-time student living there for 10m maximum
- UT upheld that condition on appeal and applied it to second house

On appeal:

- Condition not outside ambit of s67: nothing inimical to HMO regime in investigating occupiers' characteristics
- Condition did not allow students to live in substandard accommodation. UT entitled to find that, with shared space, rooms were not substandard.
- Condition was not irrational. UT had not attempted to define "cohesive living" as a concept; and the regime was merely intended to ensure the *availability* of adequate facilities, not to compel occupiers to use them.

The relevance of planning
Waltham Forest LBC v Khan [2017] UKUT153 (LC)

Essential facts:

- Borough-wide selective licensing scheme
- K, professional landlord
- Converted 2 properties into flats
- No planning permission
- Applied for a Part 3 licence
- Licences granted for 1 year
- K expected to regularise planning position within the year
- On appeal, FTT held: planning compliance irrelevant to licensing
- Licences extended to 5 years

Held on appeal:

- FTT wrong to hold K's compliance with planning requirements irrelevant to licensing
- In light of selective licensing aims, not possible to hold otherwise
- Concerns of licensing and planning control overlapped
- Legitimate for LHA to consider planning status when considering licence application and terms
- Permissible to refuse to determine application until position regularised

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Key developments in 2017 … and a look forward to 2018

Kelvin Rutledge QC & Dean Underwood

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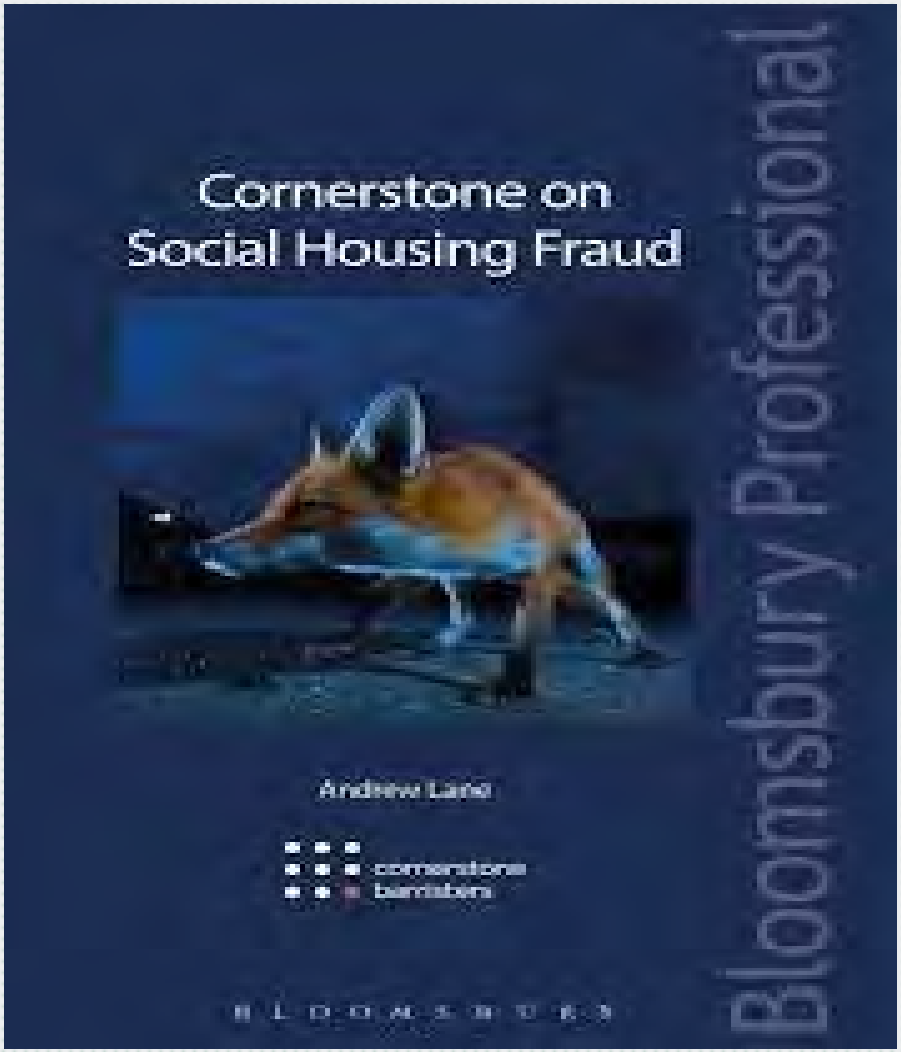
Plenary session: Tenancy management, fraud & enforcement

Catherine Rowlands & Andy Lane

The shameless plug….



Social Housing Fraud

- Allocation
- Sub-letting
- Parting with Possession
- Right to Buy/Right to Acquire/Shared Ownership
- Succession

Getting the Property back

- Amnesty

- Rescission
- Ground 5/Ground 17
- NTQ

Rescission (1)

- False representation/fraud (can be common mistake)
- Common law (equitable) remedy
- Discretionary
- Damages alternative
- Affirmation
- Killick v Roberts [1991] 1 W.L.R. 1146: no ground 5

Rescission (2)

"29 In my judgment, the express wording of section 82, when read with section 84, is a negative enactment in Coke's sense. It clearly shows that Parliament intended to take away from landlords the right to bring secure tenancies to an end by rescission, whether for misrepresentation or on any other ground. Schedule 2 provides a detailed and exhaustive code of the grounds on which a landlord may bring a secure tenancy to an end and obtain an order for possession. It is to be assumed that Parliament decided on policy grounds that a landlord should be able to bring a secure tenancy to an end and obtain an order for possession where it has been induced to grant a tenancy by a fraudulent misrepresentation, but not where it has been so induced by an innocent or negligent misrepresentation." (emphasis added)

[Dyson LJ in *Islington LBC v Uckac & another* [2006] EWCA Civ 340; [2006] 1 WLR 1303; [2006] HLR]

Rescission (3)

- Relevant to RTB/RTA/Shared Ownership (?)
- Lapse of time
- Restoration to pre-contract position
- *Salt v Stratsone Specialist Ltd* [2015] EWCA Civ 745; [2015] 2 CLC 269

Possession Ground – Schedule 2

“The tenant is the person, or one of the persons, to whom the tenancy was granted and the landlord was induced to grant the tenancy by a false statement made knowingly or recklessly by

(a) the tenant, or

(b) a person acting at the tenant's instigation.”

[Ground 5 Housing Act 1985/Ground 17 Housing Act 1988]

Key Points

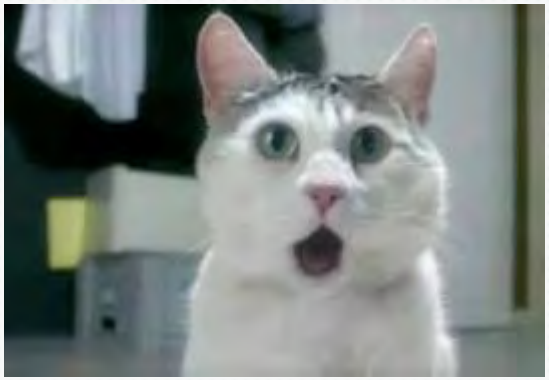
- Applies to omissions
- Statement can come from a 3rd party
- There must be reliance
- Public policy relevant to reasonableness
- Rescission not available

Key Authorities

- *North Hertfordshire DC v Carthy* [2003] EWCA Civ 20
- *Islington LBC v Uckac & another* [2006] EWCA Civ 340; [2006] 1 WLR 1303; [2006] HLR 35
- *Merton LBC v Richards* [2005] EWCA Civ 639; [2005] H.L.R. 44
- *Waltham Forest LBC v Roberts* [2004] EWCA Civ 940; [2005] HLR 2
- *Rushcliffe BC v Watson* (1991) 24 H.L.R. 124, CA.
- *Lewisham LBC v Akinsola* (2000) 32 HLR 414

Southwark LBC v Erekin [2003] EWHC 1765 (Ch)

- Appeal against HHJ Cotran
- Fraudulent housing application
- 18 months imprisonment
- Ground 5 satisfied
- No PO – children



- “19 I think there may be reasonable disagreement as to the outcome of the balancing exercise in this case, but in my view there is nothing to suggest that the learned judge exceeded the generous ambit which is given to him in deciding issues like this. For that reason I will dismiss this appeal.”

Sub-letting/Parting with Possession

- Can be an offence: PSHFA 2013 (ss. 1 & 2)
- Can occupy “through” spouse/civil partner
- Security of tenure cannot be regained: ss15A/93
- NTQ with NSP in alternative
- Fixed term tenancies different!

Evidence

- Part 18 Request for Further Information
- Data Protection Act 1998 – ss29 & 35
- Prevention of Social Housing Fraud (Power to Require Information) (England) Regulations 2014
- Witness Summons/Disclosure

Key Authorities

- *Brent LBC v Cronin* (1998) 30 HLR 43
- *Ujima Housing Association v Ansah* (1997) 30 HLR 831
- *Hussey v London Borough of Camden* (1995) 27 HLR 5
- *Lambeth LBC v Vandra* [2005] EWCA Civ 1801; [2006] HLR 19

Loyalty to Wayne

Case No: QB/2017/0113

Neutral Citation Number: [2017] EWHC 2040 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

IN THE MATTER OF AN APPEAL
FROM THE COUNTY COURT AT CENTRAL LONDON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/08/2017

Before :

MR JUSTICE TURNER

Between :

Poplar Housing & Regeneration Community Association Limited	**Appellant**
- and -	
(1) Ms Afsana Begum	**Respondents**
(2) Mr Mohammed Rohim	

Dean Underwood and Liam Wells (instructed by Capsticks LLP) for the Appellant
Martin Hodgson (instructed by Moss & Co Solicitors) for the Respondents

Hearing dates: 20th July 2017

Judgment

Succession

- Limited statutory rights of succession
- Rescission
- Set Aside
- Ground 5/17

It’s a crime…

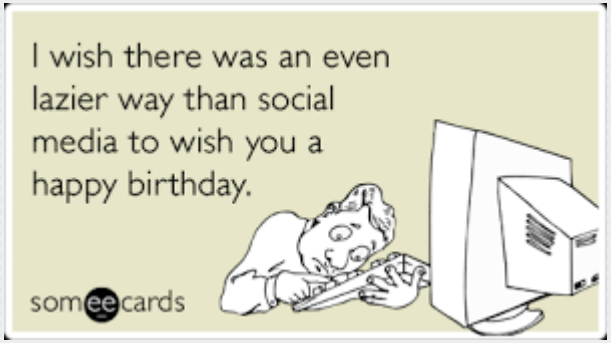
- Housing Act 1996 – ss. 171 and 214
- Fraud Act 2006 – ss. 1-4

- Prevention of Social Housing Fraud Act 2013 – ss. 1 and 2
- Proceeds of Crime Act 2002 – s.6

Thank you for listening

For all the most up-to-date information…

LinkedIn



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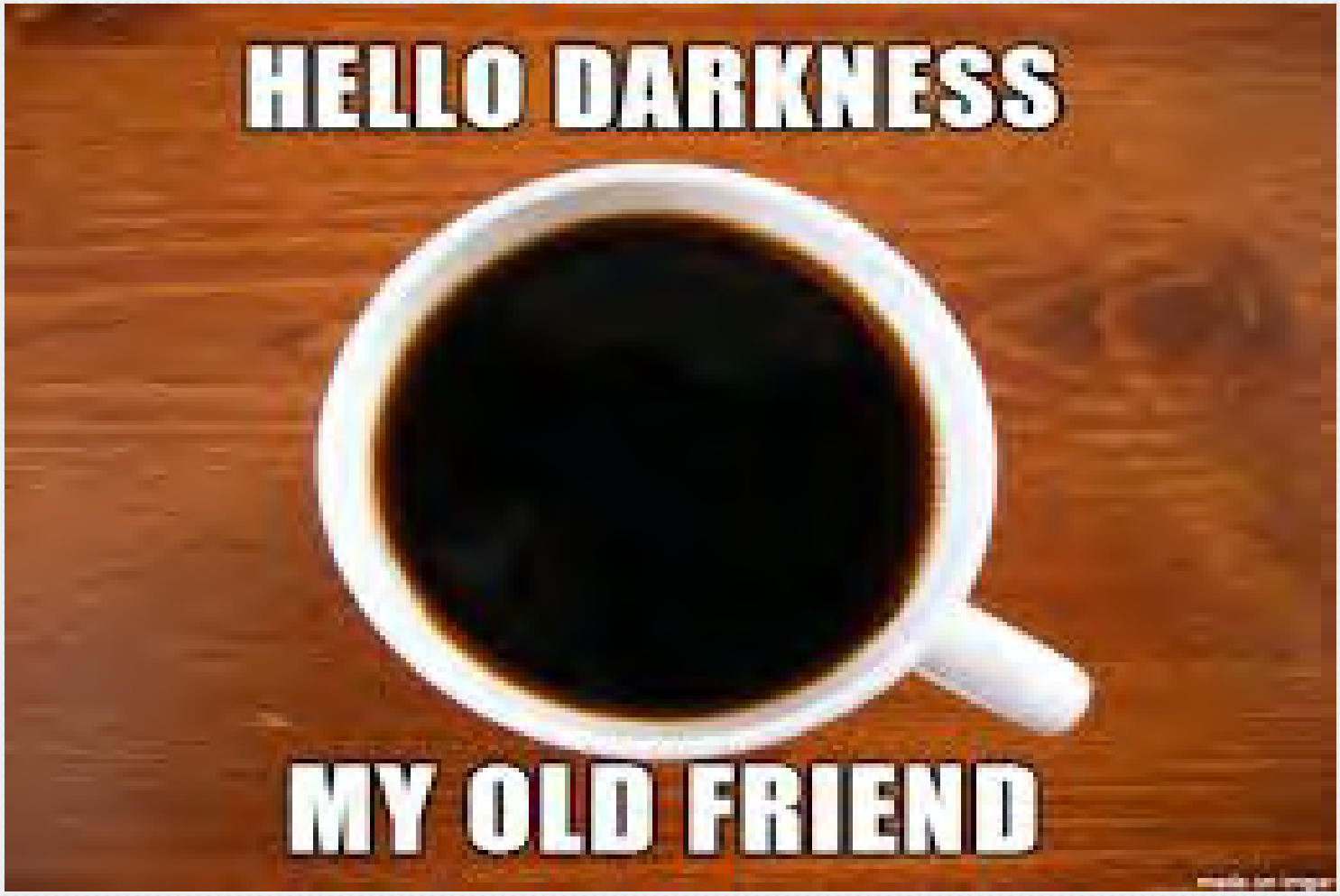
And breath out…



Cornerstone Housing

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Vulnerable tenants

Peggy Etiebet and Kuljit Bhogal

Introduction

With thanks to Ryan Kholi and Emma Dring

Who is a ‘vulnerable’ tenant?

- **Mental health problems**/learning difficulties
- Physical disabilities
- Alcohol/substance misuse
- **Age** (elderly/young people)
- Care leavers
- Asylum seekers
- Former rough sleepers
- Ex-offenders
- Victims of DV

What issues arise?

- Setting up the tenancy
- Difficulties maintaining a tenancy
- Extra considerations when seeking possession

Setting up the tenancy

Minors (1)

- Cannot hold a legal estate in land (including a tenancy), but can hold an equitable interest.
- Can grant a licence – but only if conditions for granting a tenancy are not met (e.g. no exclusive occupation)
- Any tenancy will be held on trust.
  - Express trust deed
  - Trust arises by implication upon attempt to grant a tenancy.

Minors (1)

- Cannot hold a legal estate in land (including a tenancy), but can hold an equitable interest.
- Can grant a licence – but only if conditions for granting a tenancy are not met (e.g. no exclusive occupation)
- Any tenancy will be held on trust.
  - Express trust deed
  - Trust arises by implication upon attempt to grant a tenancy.

Minors (3)

- What about succession?
  - Minor can succeed to a tenancy, but tenancy will be an equitable tenancy:
    - *RB Kingston upon Thames v Prince* [1999] 1 F.L.R. 593.
  - Consider whether referrals need to be made (e.g. child social services).

Persons lacking capacity (1)

- As with minors, persons lacking mental capacities can validly enter into contracts for necessaries.
- Contract entered into by someone lacking capacity is valid and enforceable unless they can show:
  - They did not understand what they were doing
  - The other party knew of their incapacity.

Persons lacking capacity (2)

- Is there a deputy or someone with LPA? If so, they can sign tenancy agreement on behalf of P.
- They can also terminate a tenancy on behalf of the tenant, if necessary.
- If there is a concern about capacity, consider need for issue-specific capacity assessment, to determine how to proceed.

Persons lacking capacity (3)

- An application can be made to the CoP for authorisation to sign the tenancy agreement on behalf of P.
- Will require:
  - COP1 application form
  - COP3 capacity assesment
  - COP24 witness statement dealing with reasons for application, consultation carried out and why in P's best interests

Maintaining the tenancy

Outcomes

"When I met Peter, he was in over £6000 rent arrears and at risk of losing his home. I helped him reduce his debts by helping him claim Income Support, backdated Housing Benefit and setting up direct payments for his rent arrears. They also helped him relocate to another area in Borough, where he is now happy and has found new friends". **Officer from Sustain, LB Southwark.**

Offering Support

- Do you know what to do if you know or suspect a tenant to be vulnerable?
- What is the cause of the arrears?
- Do you have a vulnerable tenant's policy in place?
- How would you differ in your treatment of a vulnerable tenant when it comes to your rent arrears protocol?
- If the nature of their vulnerability makes it difficult for them to attend the rent office to make payment, what "reasonable adjustments" are in place? What reasonable adjustments can you make?

Tackling Anti-Social Behaviour

- Victim or perpetrator?
- Is there a diagnosed medical condition causing ASB?
- Anti-Social Behaviour Personality Disorder
- What is the nature of the ASB and the impact on neighbours
- Proportionality of action
- Information sharing protocol with Social Services
- Referral for treatment

Vulnerable Tenants and ASB

- Has sufficient time been given for engagement/treatment?
- Keep vulnerable tenant ASB cases under review
- Encourage neighbours to continue keeping diary sheets of incidents
- A stepped approach to tenancy enforcement
- Consider whether cogent evidence has been presented by the date of trial which demonstrates that the ASB is unlikely to recur

3. Hoarding

Problems for landlords

- Increased fire risk.
- Increased risk of infestations (rodents/insects).
- Neighbour complaints - smell/ unsightly rubbish.
- Increased disrepair - issues not reported, repairs can’t be completed.
- Gas and electrical safety checks – criminal liability.
- Risk of structural damage (cause by weight and volume of items), associated threat to adjacent properties.

Problems for tenants

- Family strain/conflict.
- Isolation.
- Inability to cook/clean/bathe.
- Personal injury (tripping).
- Increased risk of death by fire - they can’t easily leave the property.
- Increased risk to safety as emergency services (fire, ambulance) cannot gain access.
- Distress.

Recommended approach

- Not helpful to go in and clear a property likely to exacerbate problem and/or mental health.
- Avoid using the word ‘hoarding or ‘rubbish’’; use ‘stuff’ or something neutral.
- Couch intervention in terms of assisting tenant to prevent ‘further interference’ in their lives.
- More effective to reduce risk to an acceptable level rather than trying to resolve completely.

Things to consider (1)

- Set up a multi- agency hoarding protocol. Examples: Merton/Circle, Islington, Haringey.
- Engage other services: social services, mental health teams, GP, environmental health, animal welfare, fire brigade ...
- Consider capacity assessment – do decisions need to be taken in tenant's best interests? Does any application need to be made to CoP?

Things to consider (2)

- Should alternative accommodation be offered?
- Is there a need to make a safeguarding referral (either in relation to the tenant or other individuals living with him/her)?
- Are there family/friends that could be enlisted to help?

Other powers that may be available

- Mental Health Act 1985: s.2, 135 – sectioning and warrant to remove from home for detention/assessment.
- Public Health Act 1936 – s. 83/94 – filthy or verminous premises/articles/persons.
- Anti-social behaviour, Crime and Policing Act 2014 – injunctions (but note issues with capacity/compliance).
- Housing Act 2004 – hazard assessments.

Ending the tenancy

1. Minors

Minors (1)

- If a tenancy has been granted to a minor, the landlord cannot terminate it until the trust is brought to an end (breach of trust):
  - *Alexander-David v LB H&F* [2009] EWCA Civ 259
- This appears to be the case even if the minor has since become an adult:
  - *LB Croydon v Tando* (Croydon County Court, 2012)

Minors (2)

Ways to get round the problem:

1. Grant a licence instead of a tenancy (but take care that it really is a licence);
2. Apply to court to bring the trust to an end (if the tenant is now 18);
3. Apply to court to be removed as a trustee under ToLATA 1996 (if the tenant is still a minor).

Minors (3)

- A litigation friend will be necessary. Is there anyone suitable?
- Bear in mind need to involve other services:
  - Social services
  - Homeless persons unit
- Best interests of the child – s. 11 children Act?
- Remember – age is a protected characteristic under the Equality Act!

Equality Act 2010 & Article 8

Thanks to Ryan Kohli and Emma Dring

Equality Act 2010

- Discrimination
- Public Sector Equality duty (PSED)
- Assessors

Protected characteristics

- Age
- Disability
- Sex

<u>Section 6 – Disability:</u>

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Meaning of disability (1)

- ‘substantial’ means more than minor or trivial s.212(1) EA 2010

- ‘impairment’ includes long term medical conditions such as asthma and diabetes, and fluctuating or progressive conditions such as rheumatoid arthritis or motor neurone disease

- Automatic protection for those with certain conditions (e.g. HIV/AIDS, multiple sclerosis), Sch1, para. 6

Meaning of disability (2)

- Certain conditions **NOT** to be regarded as impairments for EA 2010 purposes:

Regulation 3:

- Addiction to alcohol, nicotine or other substances not medically prescribed

Regulation 4

- Tendency to set fires / steal
- Tendency to physical or sexual abuse of other persons
- Exhibitionism
- Voyeurism

EA 2010 (Disability) Regulations 2010

Discrimination

Disability discrimination (s. 15)

A discriminates against B if he:

- treats B unfavourably *because of something arising in consequence* of B's disability, and
- cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(unless A did not know, and could not reasonably have been expected to know that B was disabled).

Akerman-Livingstone v Aster [2015] UKSC 15

- A stronger right than Art 8
- Burden of proof works differently to normal:
  - Tenant sets out facts giving rise to possibility of disability discrimination
  - Burden shifts to landlord to show that no unfavourable treatment/disproportionate means
- Generally can't be dealt with summarily
-

Akerman-Livingstone - contd.

- What are the landlord's objectives?
- Is there a rational connection between the objectives and the eviction of the tenant
- Is eviction no more than is necessary to accomplish objectives – could lesser steps could be taken?
- *** Does eviction strike a fair balance between the objectives & any disadvantages caused to the tenant as a disabled person? ***

PSED – When does it apply?

1. When public authorities exercise their functions.
2. When bodies who are not public authorities exercise ‘public functions’. Same test as under HRA 1998.
   - *Weaver v L&Q* [2010] 1 WLR 363,
   - *R (Macleod) v Peabody* [2016] EWHC 737
3. Policies and individual decisions: *Pieretti v Enfield* [2010] EWCA Civ 1104

PSED – what does it require?

- Have “due regard” to various needs. Includes:
  - Removing/minimising disadvantages that are connected to the protected characteristic;
  - Taking steps to meet the different needs of persons who share a protected characteristic
  - Taking account of disabled persons' disabilities.
- Process, not outcome: see *R (Hurley & Moore) v SSBIS* [2012] EWHC 201 (Admin)

PSED – some basic principles

- Discharge duty at time decision is made.
- Duty must be “exercised in substance, with rigour, and with an open mind”. Not ‘box ticking’.
- The duty is non-delegable.
- Duty is a continuing one.
- No duty to expressly refer to PSED and criteria, but doing so reduces scope for argument
- Good practice to keep records demonstrating consideration of the duty.

PSED - how to comply?

- Best practice is to carry out an assessment.
- Integrate in to procedures, consider use of a template – but avoid ‘stock phrases’.
- Assessment should also address issues relevant to discrimination.
- Assess before deciding to issue possession claim, not in response to defence.

What should the assessment include? (1)

1. Set out what decision is being made (e.g. whether to serve NTQ, issue possession claim)

2. Say what information has been considered (e.g. housing file, medical info received, and legal reps)

What should the assessment include? (2)

1. Summarise background facts.

2. Identify protected characteristic, proceed on assumption it applies (e.g. disability) – note importance of disregarding any treatment which is being received.

3. Summarise any medical evidence available.

What should the assessment include? (3)

4. Make express reference to s. 149.

5. Summarise what steps have already been taken to address the issues giving rise to the possession proceedings.

6. What will the consequences be for the tenant?

What should the assessment include? (4)

7. What particular difficulties would this tenant face, given his protected characteristic?

8. Will the aims set out in s. 149 be promoted? If not, why is it still considered appropriate to take action? Why would it be proportionate?

PSED - what if duty is not discharged before proceedings are issued?

- Barnsley MBC v Norton [2011] EWCA Civ 834
- R (on the application of West Berkshire DC) v Secretary of State for Communities and Local Government [2016] EWCA Civ 441
- Mahamoud v Kensington and Chelsea RLBC CoA [2015 EWCA Civ 780 – s.11 CA, paragraph 70

One to watch

- Davies v Hertfordshire (to be heard 24 or 25 October 2017), Tara and Andy

Whether breach of s.11 CA or s.149 can be a defence to a possession claim

Assessors (1)

Section 114(7) EA 2010

'(7) In proceedings in England and Wales on a claim within subsection (1), the power under section 63(1) of the County Courts Act 1984 (appointment of assessors) ***must*** *be exercised unless the judge is satisfied that there are good reasons for not doing so'.*

CPR 35.15

- Enables a High Court or County Court Judge to call in aid a specially qualified assessor and to '*hear or dispose of the cause or matter wholly or partially with their assistance'*

Assessors (2)

An assessor

- Can prepare a report on any matter at issue in the proceedings
- Can attend the whole or part of any trial to advise the court
- Has a judicial role and is not the same as an expert witness
- Does not give oral evidence and cannot be cross examined, their function is to ‘educate’ the Judge to enable her to reach a properly informed decision

Assessors (3)

- Do you need one?
- Can add to expense and delay –overriding objective, often both parties are funded by the taxpayer

Notes to CPR 35.15 suggest:

‘*An assessor is likely to be of assistance in a case raising complex technical issues. However, normally the use of an assessor in addition to the parties’ expert witnesses would not be cost effective except in the heaviest of cases’*

Article 8

Thurrock v West [2012] EWCA Civ 1435

- The circumstances will have to be exceptional to substantiate an art.8 defence.
- Court must summarily consider whether the defence as pleaded is seriously arguable. If not, must be struck out/dismissed.
- Even if defence established, won't operate to give defendant an unlimited and unconditional right to remain.

Particular application to vulnerable tenants?

- Lord Neuberger in Manchester City Council v Pinnock [2011] PTSR 61 agreed with EHRC submissions that:

- "proportionality is more likely to be a relevant issue in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty", and

- "the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases"

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Vulnerable tenants

Peggy Etiebet and Kuljit Bhogal

ANTI-SOCIAL BEHAVIOUR

Zoë Whittington & Ben Du Feu

Programme

- The 2014 Act in practice: how well is it working?
- Getting your remedy: best practice tips
- The teeth: possession orders & committals
- Case law update
- Any other questions

The 2014 Act in practice

Injunctions: what is working well?

- Largely continued as before in county court –
  - district judges familiar with tests
  - injunctions being granted without major difficulties
- Some attempts to defend injunctions on the basis that breach could lead to eviction, judges not being persuaded by this
- Some examples of mandatory grounds being pursued using a proven breach on an injunction

Injunctions: the challenges

- Limited use of positive requirements
  - Potential supervisors reluctant to commit
  - Lack of available support services
- Limited enforcement taking place
  - Resources
  - Lack of familiarity with committal process and cost
  - Lack of evidence to meet criminal standard of proof
- Youth injunctions
  - YOT unaware of their role and/or obstructive
  - Unclear whether YOT funding covers their role as statutory consultee
  - Youth court still unfamiliar with the powers & tests
- No standard forms

Closure orders

Closure orders ☺

- Being widely used
- Interesting uses
- Most common ground for mandatory possession

Closure orders ☹

- Being widely used
- Interesting uses
- Most common ground for mandatory possession

Mandatory grounds

Mandatory grounds ☺

- Being regularly used following conviction or a closure order

Mandatory grounds ☹

- Fewer examples of use following proven breach of an injunction (but that is in context of limited use of committals)

CPNs

CPNs ☺

- Increasingly used for low level ASB (instead of injunctions)
- Warning letter seems to be a good deterrent
- LAs can use across tenures
- Some interesting uses
- Serious penalties

CPNs ☹

- Clarity re evidence to show ‘detrimental impact’
- Few RPs have been designated to issue CPNs
- Inconsistent guidance, e.g DEFRA, CIEH

Getting your remedy: best practice


HOW TO SUCK EGGS
EGG
GRANNY
SUCKING AN EGG

ASB remedies

Two main remedies for ASB:

- **Injunction**
- **Possession**

Injunctions: what do you need to prove?

Two conditions to be met:

- **D has engaged, or threatens to engage in anti-social behaviour**

and

- **The court considers it is just and convenient to grant the injunction for the purpose of preventing D from engaging in anti-social behaviour**

Where applying for a power of arrest also need to prove:

- **Use or threatened use of violence against other persons**

  or

- **A significant risk of harm to other persons from D**

Where applying for positive requirements:

- **Court must receive evidence on suitability and enforceability of the requirement**
- **Before including two or more requirements the court must consider their compatibility with each other**

Possession: what do you need to prove?

Secure Tenants - Discretionary

- **Ground 1 – an obligation of the tenancy has been broken or not performed.**
- **Ground 2 - The tenant or visitor to the property is guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality or to the landlord affecting housing management functions. (In summary)**

  AND
- **Reasonableness.**

Possession: what do you need to prove?

Secure Tenants – Mandatory Grounds

CONDITION SATISFIED

1. **Conviction of a serious offence; or**
2. **Breach of injunction; or**
3. **Breach of CBO; or**
4. **Closure order in respect of property for more than 48 hours; or**
5. **Conviction for breach various abatement notice re statutory nuisance;**

SUBJECT TO any convention rights defence.

Which Court?

- County Court for adult injunctions & possession claims (High Court can also hear applications but most will be made in the County Court)
- Youth Court for those aged 10 and under 18
- Youth Court (initially) where there is a combination of youths and adults

Required Documents: injunctions

- Form N16A
- Draft Order, Form N16(1)
- Witness statements
- Notice of intention to rely on hearsay evidence (if relevant)
- Schedule of incidents (optional)

Required Documents: possessions

- Notice of Seeking Possession and Certificate of Service
- N5 – Claim Form
- Particulars of Claim
- Draft order
- Witness statements

What terms should you seek?

Terms of injunction or SPO should be:

- **Tailored to specific behaviour**
- **Proportionate to aims of clause**
- **Supported by evidence – KEY!**
- **Clearly expressed**
- **Use maps/plans to define areas**

What evidence do you need?

- Best evidence - witness statement from a named witness
- Hearsay - admissible in civil proceedings but notice must be given
- Two types:
  - Second-hand information
  - Anonymous hearsay
- Be cautious with hearsay, especially on w/o notice apps

- Other options:
  - witness statement with redactions
  - including info in ASB officer's statement

- Exhibit all contemporaneous (or at least closer in time to event evidence) e.g,
  - diary entries
  - officer’s notes
  - emails
  - letters

Witness statements - checklist

The basics

- Header
- Statement of Truth
- Paragraph numbers
- Chronological order
- Page numbers
- Numbered exhibits with front sheets (see later slide)
- Back sheet

Witness statements - contents

- Identify yourself
- Explain the connection between your organisation and the Defendant
- Who you have consulted/informed, exhibit the evidence
- The problem, explain why the ASB test is met
- Why you have applied without notice?
- Why is there urgency?
- Why are you seeking a power of arrest?
- What other attempts have been made to address the problem?
- Explain why a witness has not been named
- Explain the terms sought and proposed length of order

Exhibits

- Need a front sheet for each exhibit
- Tenancy agreement
- Maps/plans/photos
- Diary sheets/logs
- File notes/computer notes
- Letters/ABCs/NOSPs/NTQs
- Evidence of consultation

Service in injunction applications

Of the Application

- Personal service required: CPR 65.43(5)
- Except if going without-notice

Of the Order once made

- Personal service required: CPR 81.5
- Court can dispense with personal service if order contains prohibitions (only) and considers it just to do so (eg where D has been present when order was made) CPR 81.8(1)
- If there is a Power of Arrest, deliver copy to the Police station CPR 65.44(2)(b)

The teeth: possession & committals

SPOs: when will a court suspend?

- ***City Housing Trust v Massey*** **[2016] EWCA Civ 704**
  - **CA guidance given to clarify approach to suspension**
  - **Focus on future: cogent evidence conduct will cease**
  - **Evidence need not come solely from tenant himself**
  - **Court must be careful when framing terms not to expect social LL to do more than reasonable**
  - **Fact D found to have lied is not complete bar to SPO (although risk to D that court won't believe assurances re future conduct)**

SPOs: permission for warrant

- ***Cardiff CC v Lee*** **[2016] EWCA Civ 1034**
  - **Important case!**
  - **Now you must apply for and obtain court's permission to enforce a SPO under CPR rule 83.2 (N244 application)**
  - **Evidence of breach must accompany the application**
  - **Can be made without notice to tenant**
  - **Can be dealt with on papers but court can list for hearing**
  - **Change from previous understanding that SPOs could be enforced without permission by applying for warrant on N325 – this now only for outright POs**
  - **Decision may have significant resource implications**

Committal applications

Remember:

- **Criminal standard of proof**
- **Onus on the Applicant to get it right**
- **Procedure, procedure, procedure!**

First things first…

…get the injunction right!

Formalities: signed, sealed and delivered

- ***CPR 65.43 – 65.49 and PD 65***
- ***CPR 81.4 - 81.11 and PD 81***

Key requirements:

1. **Personal service**
2. **Penal notice**
3. **Power of arrest**

Formalities prior to committal applications

Dispensation of personal service: CPR 81.8

- *In the case of a judgment or order requiring a person not to do an act, the court may dispense with service … if it is satisfied that the person has had notice of it-*
    - *By being present when …given or made*
    - *By being notified of its terms by telephone, email or otherwise*

- *In the case of any … order the court may –*
    - *Dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or*
    - *Make an order in respect of service by an alternative method or at an alternative place*

Formalities prior to committal applications

Penal notices: CPR 81.9(1)

- **…a judgment or order to do or not do an act may not be enforced under rule 81.4 unless there is prominently displayed, on the front of the copy of the judgment or order served in accordance with this Section, a warning to the person required to do or not do the action in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets**

- **Exception: "an undertaking to do or not do an act which is contained in a judgment or order"**

Formalities prior to committal applications

Form of words recommended - PD 81(1)

- ***"If you, the within-named [ ] do not comply with this order you may be held to be in contempt of court and imprisoned or fined, or your assets may be seized"***

- **This form of words is <u>not</u> absolute - can be amended to fit the situation, but must be "substantially to the same effect"**

- **Consider also including the wording on cover letter on injunction to the Respondent**

Formalities prior to committal applications

Power of Arrest- CPR 65.44(2) and (3)

- **Each relevant provision of the injunction must be set out in a separate paragraph of the injunction**
- **The claimant must deliver a copy of the provisions to any police station for the area where the conduct occurred**
- **But – in respect of *ex parte* injunctions, the injunction must not be delivered to a police station before the defendant has been served with the injunction**
- **Re-deliver the order to the police if any of the provisions are subsequently discharged or varied**

Commencing committal applications

Routes to committal applications:

1. **Where power of arrest is attached to the Order, the police can arrest R of their own initiative if they have "*reasonable cause to suspect that R is in breach of the provision*" – s9(1) 2014 Act**

2. **If the person who applied for an injunction under s1 thinks that R is in breach of any of its provisions, they can apply for the issue of a warrant for arrest - s10(1) 2014 Act, CPR 65.46**

3. **Make committal application directly to court – CPR 81.10, CPR Part 23 (N244)**

S9 - Police arrest R for suspected breach

- Applicant likely to have little if any notice that R has been arrested
- Police effecting arrest must inform person who applied for the injunction - s9(2) 2014 Act
- But….R must appear at court within 24 hours of arrest. Often means Applicant has little or no notice of the hearing - s9(3) 2014 Act
- Committal must be deal with within 28 days of first appearance in court - CPR 65.47(3)

S10 – Application for Warrant

- **Applications for a warrant – CPR 65.46 and PD 65, para 2.1**
- **Must be supported by affidavit evidence *or* by oral evidence (written summary to be served on R at time of arrest)**
- **S10(3): Granted only if Judge has *"reasonable grounds for believing that the respondent is in breach of a provision of the injunction."***

CPR 81.10 - Making committal applications

- Must set out full grounds for application, including (separately and numerically) particulars of each alleged act of contempt – CPR 81.10(3)(a)
- Must be supported by affidavit evidence - CPR 81.10(3)(b), PD 81, para. 14.1
- Application must be served personally on R - CPR 81.10(4)
- Claim form must have "*prominent notice*" stating possible consequences of court making committal order and R not attending hearing – PD81, para. 12(4)

CPR 81.10 - Making committal applications

Useful to note:

- **Committal applications under the 2014 can now be dealt with by District Judges (under the 1996 Act they had previously been dealt with by Circuit Judges) – CPR 65.6(6)**

Affidavit evidence

- Form of affidavit – CPR 32.16 and PD 32, paras. 2-16
- Where witnesses will not be able to attend the hearing, serve hearsay notice per usual but ensure statement in affidavit form
- Fallback if not in affidavit form: witness attends court hearing and swears on her statement before the Judge

- Remember - evidence of conduct pre-dating 23 September 2014 not permitted - S21(7) 2014 Act

  "In deciding whether to grant an injunction under section 1 a court may take account of conduct occurring up to 6 months before the commencement day"

Presumption in favour of the Defendant

- *"The Convention rights of those involved should particularly be bourne in mind"* - PD 81, para. 9
- Relevant standard of proof is *"beyond reasonable doubt"*
- Court will usually refuse to hear grounds not set out in application notice, or evidence not in correct form - CPR 81.28(1)
- Defendant always entitled to give oral evidence & call other witnesses, even when she not has filed written evidence – CPR 81.28(2)
- Court will have regard to need for R to be legally represented, obtain legal aid, prepare defence and arrange for interpreter if necessary – PD 81, para. 15.6

Issues in committals

- **Representation for D's: Brown v Haringey LBC [2015] EWCA Civ 483**
- **Proceeding in absence: Sanchez v Oboz [2015] EWHC 235 (Fam)**
- **Sentencing**

Sentences for breach

- Sentence for breach of ASB injunction should follow sentencing guidelines for ASBO breach: (Amicus Horizon v James Thorley [2012] EWCA Civ 817*)*

- Sentencing Guidelines Council: Breach of an Anti-social Behaviour Order Definitive Guidance

Sentences for breach of injunction

- ***Gill v Birmingham CC*** **[2016] EWCA Civ 608**

  - **Confirms approach to sentencing when concurrent criminal proceedings alongside committal proceedings**
  - **First court to impose sentence may not take account of any sentence in other proceedings**
  - **Second court must take into account sentence in first proceedings to ensure D not punished twice for same**
  - **In this case the sentence imposed was held to be 'manifestly excessive' & Judge at first instance had not taken into account some relevant matters – sentence reduced from 14 months**

Sentences for breach of injunction

- All orders made in the civil courts for committal for contempt of court are published at:

  https://www.judiciary.gov.uk/subject/contempt-of-court/

- Significant custodial sentences are being given for serious breaches and/or for those repeatedly breaching.

Case law update

Reigate & Banstead Borough Council v Walsh

- [2017] EWHC 2221 (QB)
- Concerned email traffic sent by the Defendant to the Claimant.
- Voluminous and excessive nuisance emails.

  "Mr Smarty, your boss, will end up with bullets being fired at him. Then we apologise, you take a little shove under the bus."
- Taken to amount to physical threats. Recipients felt distressed.
- At time of application for final injunction and since the granting of an interim injunction, however, emails had ceased.

R&B v Walsh

- Question for court was whether in the circumstances injunctive relief was necessary.

- Held that it was because the probability and “overwhelming likelihood” was that the behaviour had ceased only because of the injunction and the sanctions that flow from a breach.
- Therefore appropriate and proportionate to continue the injunction and powers of arrest but for a time limited period of twelve months.

Birmingham v Padroe [2016] EWHC 3119 (QB)

- Respondent alleged to have engaged in “particularly unpleasant” anti-social behaviour by targeting elderly and vulnerable persons and charging them excessive sums for building works which were unnecessary/shoddy.

- Concerned the correct interpretation of section 21(7) of the ASBCPA 2014

- **“Anti-social behaviour will by its very nature generally involve a course of conduct. It is often the cumulative effect of anti-social behaviour over a period of time, rather than the individual acts, which causes serious harm. In many cases, there will be at least some interval of time between the earliest conduct complained of, and an application to the court for an injunction.”**

- Section 21(7) served a purpose as a transitional provision. To treat it as a section which requires the court to ignore any behaviour prior to 23rd September 2014 would lead to absurd results.

- Past behaviour may be probative of more recent behaviour: for example, as similar fact evidence which is probative of the identity of the perpetrator of the recent conduct, or as evidence which serves to rebut a defence of accident or innocent error.

- i) Where an application for an injunction under Part 1 of the 2014 Act is based
  - on an allegation of actual anti-social behaviour, as opposed to an allegation of
  - threatened anti-social behaviour, the applicant authority must satisfy the court
  - of the first condition under section 1(2) by proving on the balance of
  - probabilities that the respondent has engaged in anti-social behaviour which
  - occurred after 23rd September 2014. If such behaviour is not proved, the court
  - has no jurisdiction to grant an injunction.

- ii) Evidence of the respondent's conduct prior to 23rd September 2014 cannot in
  - itself satisfy the first condition. But (assuming there is no other bar to its
  - admissibility) such evidence may be taken into account by the court at the first
  - stage, where it is relevant (whether as similar fact evidence, or to rebut a
  - defence, or in any other way) to the issue of whether the respondent engaged
  - in anti-social behaviour after 23rd September 2014.

- iii) Evidence of the respondent’s conduct prior to 23rd September 2014 (again
  - assuming there is no other bar to its admissibility) may also be taken into
  - account by the court at the second stage, when considering whether it is just
  - and convenient to grant an injunction.

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Any questions?

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ANTI-SOCIAL BEHAVIOUR

Housing Conference 2017

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ANTI-SOCIAL BEHAVIOUR

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COURT OF PROTECTION & HOUSING OFFICERS

Peggy Etiebet

Mental capacity and housing officers

Mental Capacity and Housing Officers

- A housing officer may have to undertake a capacity assessment in relation to, for example:
    - granting or terminating a tenancy;
    - taking a homelessness application;
    - abiding by the terms of a tenancy agreement:
        - Keeping the home habitable and e.g. hoarding disorder;
        - ASB and (e.g.) paranoid schizophrenia or personality disorder;
        - Paying the rent and e.g. dementia
- Cf CoP 3 capacity assessment must be filled by e.g. a medical practitioner, social worker, OT nurse, psychologist.

General Points

- Capacity is **issue specific**
  - What are you trying to achieve?
    - Compliance with an injunction or term of the tenancy?
    - Terminate a tenancy?
    - Make a homelessness application?
- Capacity is **time specific**
  - Tenant may gain and lose capacity
    - e.g. schizophrenia, substance abuse, progressive dementia.
    - The effect of treatment/medication.
- Capacity is **decision specific**
  - Tenant may have capacity for one decision but not another
    - e.g. capacity to give access for inspection, but not to refrain from noise nuisance

The Principles

1. Starting point = **presumption of capacity**

   "A person must be assumed to have capacity unless it is established that he lacks capacity."

   s. 1(2) Mental Capacity Act 2005

2. Must first **try to help** a person to reach a decision:

   "A person is not to be treated as unable to make a decision unless all practicable steps to help him have been taken without success."

   s. 1(3) Mental Capacity Act 2005

3. Ability to decide at all, **not** ability to decide well:

   "A person is not to be treated as unable to make a decision merely because he makes an unwise decision."

   s. 1(4) Mental Capacity Act 2005

Providing help and support

- Referrals to GP / CAMHS / LA / SALT/other support services
  - Follow-ups and practical help in taking advantage of those referrals
- Use of communication aids (pictures, notebooks, large text)
- Attending at the right time for the person
- Use of personal visits to reinforce correspondence
- Staff training in communication skills
- Use/consideration of lesser steps e.g. warning letters
- Good practice in all cases – reinforces proportionality

The Diagnostic Test

Section 2(1) Mental Capacity Act 2005

"For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time—

1. ***he is unable to make a decision for himself in relation to the matter***
2. ***because of an impairment of, or a disturbance in the functioning of, the mind or brain."***

- There must be a causative relationship between the decision and the impairment.

The Diagnostic Test

- It does not matter if the impairment/disturbance is permanent or temporary (section 2(2) MCA).
- It may be temporary as a result of failing to take medication, substance misuse, intoxication or the effects of medication.
- Drink & drugs addiction/hoarding disorder: does the tenant have capacity to decide (not) to drink/do drugs in the first place?
- Paragraph 4.21-4.22 of the MCA Code of Practice, *'…sometimes people can understand information but an impairment or disturbance stops them using it…for example a person with the eating disorder anorexia nervosa may understand about the consequences of not eating. But their compulsion not to eat may be too strong for them to ignore.'*

The Diagnostic Test

- The party that wishes to rely on a lack of capacity must prove it on the balance of probabilities (section 2(4) MCA).
    - Often necessary for the housing officer to have a view on capacity so that their approach can be tailored to the situation.
- A lack of capacity cannot be established merely by reference to age, appearance, condition (section 2(3) MCA).

The Functional Test

- A person is unable to make a decision if he is unable to (section 3(1) MCA):
  - Understand the relevant information
  - Retain 3the information
  - Use or weigh it
  - Communicate the decision
- An explanation must be given to him appropriate to his circumstances using *simple language, visual aids or any other means* (section (2) MCA).
  - Draft questions in advance
  - Use IT – keyboards/screens

The Functional Test

- The ability to retain the information only for a short period does not deprive P of capacity. (section 3(3) MCA).

- The relevant information includes reasonably foreseeable consequences of deciding one way or another or failing to make a decision (section 3(4) MCA).

Effect of a Lack of Capacity

- Where a person lacks specific capacity, the ASB is a symptom of their mental health issues, such that the person cannot fairly be held to be responsible for his/her actions.

  *"If by reason of mental incapacity an offender is **incapable of complying** with an order, then an order is incapable of protecting the public and cannot therefore be said to be necessary to protect the public."*

  Cooke v DPP [2008] EWHC 2703 (Admin) *per* Dyson LJ at [10]

- This means: no ABC, no ASB injunction, no SPO…
  - No 'contempt of court' in breaching the injunction
  - Impact on proportionality of remedy sought
  - Therapeutic approach instead? Vulnerable / disabled?

Effect of a Lack of Capacity

- But still need to protect neighbours' rights.
- Can still get outright possession against a tenant that lacks specific capacity: the fact that a breach of tenancy arises from mental illness is not a bar to possession as it may not be unreasonable to take action against a breach of tenancy that is beyond the control of the tenant where the breach impacts on other people.
- Likely to need to provide assistance for the outgoing tenant – refer to ASC/transfer to supported accommodation.

Case study

- *Accent Peerless v Kingsdon* [2007] EWCA Civ 1314
- Tenants (mother & daughter) suffer from a mental illness:
  - hypersensitive to noise, propensity to exaggerate effects of noise, agoraphobia, tendency to misunderstand, chronic complaining…
- Tenants made repeated unjustified complaints to police & environmental health = ASB to neighbours
- Psychiatrist: tenants' conduct is a result of mental illness
- Judge: effect on neighbours untenable = outright possession
- Appeal: **likelihood of recurrence** important (not determinative)
  - Tenants **refused to accept treatment** for their illness
    - (& were presumed to have capacity to decide whether to do so)
    - No prospect of abatement therefore outright possession justified

Practical considerations

- The assessment record should:
  - State the decision being assessed.
  - Ask P the relevant question.
  - Record the information the tenant requires to make a decision
  - Set out the relevant principles and test.
  - Set out the ways in which the principles were abided by e.g. what time the visits were, how many were there, how long did they last, was there any effect of medication, who attended, how was P made comfortable?
  - What information was sought/obtained from friends/family/care workers?

Practical considerations

- The assessment record should:
  - Record exactly what the person said.
  - Evidence each element of the diagnostic and functional test.
  - Illustrate the analytical process by which the decision was arrived at and given reasons.
  - Explain if necessary why it is an incapacitated decision and not an unwise one.
  - Give the date the decision was arrived at especially if there are a number of meetings.

Lack of capacity & tenancy agreements

Tenancy Agreements

- The Mental Capacity Act 2005 does not enable a person to sign a legal document on P's behalf (where he is not deputy of property and affairs, does not have a relevant lasting power of attorney or has not been authorised by the CoP)
    - i.e. don't get family member to sign a tenancy agreement if P lacks capacity!

Does P have capacity?

- Does P have capacity to accept an offer to a tenancy?
- There is no set test for capacity to accept a tenancy.
- In relation to a supported living tenancy the court in *LB Islington v QR* [2014] EWCOP 26 found that the relevant information was:
  - Her obligations as tenant to pay rent, occupy and maintain the flat
  - The landlord's obligations to her under the contract
  - The risk of eviction if she does not comply with her obligations
  - The purpose of and terms of the tenancy to provide her with 24 hour support.

Application to the CoP

- Make an application to the CoP for an order authorizing the signing of the tenancy.

- http://www.mentalhealthlaw.co.uk/media/COP_guidance_on_tenancy_agreements_February_2012.pdf

Deprivation of liberty and housing officers

Deprivation of Liberty

- Identifying a possible deprivation of liberty in the home – is this anything to do with your housing officer?

- Very likely yes:
  - the local authority has a duty to investigate, support and refer to the Court of Protection where there is a possible DoL.
  - A social housing provider should co-operate to help identify possible DoLs.

Legal Framework

- Article 1 of the European Convention of Human Rights (“ECHR”) provides, *‘The States shall secure toe everyone within their jurisdiction rights and freedoms defined in Section 1 of the Convention’*

- This includes Article 5.

Legal Framework

- Article 5 of the ECHR provides, so far as is material,

'1. Everyone has to right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law….

(e) the lawful detention…of persons of unsound mind…

4. Everyone who is deprived of his liberty by arrest of detention shall be entitled to take proceeding y which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Legal Framework

- The Human Rights Act 1998 provides at section 6(1) that it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

Legal Framework

- The Mental Capacity Act ("MCA") provides at section 4A,

'(1) This Act does not authorise any person ("D") to deprive any other person ("P") of his liberty.

(2) But that is subject to (a) the following provisions of this section, and (b) section 4B.

(3) D may deprive P of his liberty if, by doing so, D is giving effect to a relevant decision of the court.

(4) A relevant decision of the court is a decision made by an order under section 16(2)(a) in relation to a matter concerning P's personal welfare.

(5) D may deprive P of his liberty if the deprivation is authorised by Schedule A1 (hospital and care home residents: deprivation of liberty).'

Legal Framework

- The MCA provides at section 64(5),

  '*In this Act references to deprivation of a person's liberty have the same meaning as in Article 5(1) of the Human Rights Convention'* and Section 64(6), *'For the purposes of such references, it does not matter whether a person is derived of his liberty by a public authority or not.'*

When is there a Deprivation of Liberty?

- There are three conditions must be satisfied for there to be a deprivation of liberty (*Cheshire West v P* [2014] UKSC 19):
  - an objective element of a person's confinement to a certain limited place for a not negligible length of time;
  - a subjective element i.e. that the person has not validly consented to the confinement in questions; and
  - the attribution of responsibility to the state.

Attribution of Responsibility to the State

- There will be an attribution of responsibility to the state (as relevant here):
  - if there is direct involvement e.g. the DoL occurs in a care home or hospital run by a public body or where the state is involved in some way e.g. through undertaking a needs assessment, preparing a care and support plan, providing services or a personal budget under the Care Act 2014.

Attribution of Responsibility to the State

- Where the state has violated its positive obligation to protect the applicant against interferences with her liberty carried out by private persons (*Storck v Germany* (2006) 43 EHRR 6).
  - The state is obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty which the authorities have or ought to have knowledge.

What does state attribution require?

- If the authorities, have or ought to have had knowledge, then the Article 5(1) positive obligation requires the state to:
  - investigate to determine whether there is in fact a derivation of liberty;
  - take reasonable and proportionate steps to bring it to an end e.g. by providing support services under the Care Act 2014; and
  - if there are no reasonable measures or if they are objected to then seek the assistance of the court in determining whether there is in fact a DoL and, if there is, obtaining authorisation for it (*A v A LA* [2010] EWHC 978 (Fam).

What does state attribution require?

- The Court of Appeal in *SSJ v SRK* [2016] EWCA Civ 1317 made clear that an authority has a duty to make an application to the Court of Protection to seek an order authorising the deprivation of liberty in a purely private care regime.

When does the state ‘ought to have knowledge’?

- It will depend on the facts of the case.
- In *SSJ v SRK* the state had the requisite knowledge through the civil court that awarded the personal injury damages, the CoP by appointing a deputy for property and financial affairs to manage his funds, the deputy/trustees/attorney who make decision in the person’s best interests and who ought to have informed the local authority.

When does the state ‘ought to have knowledge’?

- As regards housing officers the legal context will include:
  - The court in SSJ emphasised the need for protection of P’s on account of their extreme vulnerability.

When does the state ‘ought to have knowledge’?

- Local authorities have a duty to make or undertake to be made safeguarding enquires where they have reasonable cause to suspect that an adult in its area (whether or not ordinarily resident there)—
  - (a) has needs for care and support (whether or not the authority is meeting any of those needs),
  - (b) is experiencing, or is at risk of, abuse or neglect, and
  - (c) as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it (section 42 Care Act 2014).

When does the state ‘ought to have knowledge’?

- A local authority must make provision for ensuring co-operation with housing (section 6(4) CA).

- A local authority must co-operate with private registered providers of social housing where it considers it appropriate (section 6(2) and 6(3)(d) CA).

When does the state ‘ought to have knowledge’?

- In practice the role for a housing officer may include:
  - Identifying occupants whose living arrangements may amount to a deprivation of liberty e.g.:
    - where elderly relative may be locked in home/room for ‘own safety’ as dementia progresses and family member is sole care giver
    - Young person as grown and become an adult become more difficult for mother to care for.
  - Making a safeguarding alert/referral to adult social care.
  - Working with partner agencies to develop the least restrictive living arrangements.

What may amount to a deprivation of liberty at home?

It is case specific but may include:

- Use of medication to control behaviour
- Support with the majority of aspects of daily living on timetable set by others.
- Use of restraint e.g. locking in bedroom
- Use of real time monitoring with assistive technology e.g. door sensors, pendant alarm, GPS tracking
- Locked door to the property
- P is rarely left alone in and/or out of the property
- Restrictions on contact

cornerstone barristers

COURT OF PROTECTION & HOUSING OFFICERS

Peggy Etiebet

cornerstone barristers

Homelessness and allocations update

Catherine Rowlands

Allocations: cases

Let’s talk about allocations

Who needs a home when you can bring your own?!

R (Osman) v Harrow LBC [2017] EWHC 274 (Admin)

- Challenge to amendment to allocations scheme that gave priority to those in overcrowded private rented accommodation over those in overcrowded secure accommodation
- There were significant differences between the two groups even though similar
- *considerable weight is to be given to the decision of the Defendant as housing authority in making decisions which Parliament has entrusted to it*

R (Osman) v Harrow LBC [2017] EWHC 274 (Admin)

66 The differences as to tenure and security between the transfer and homeseeker groups are not in dispute and are on any view significant in terms of the willingness or realism of moving from one group to another. As Mr Allen explains in his witness statement, it had become apparent that applicants were not coming forward to be assisted with overcrowding through the homelessness route, which meant that children were remaining in overcrowded conditions for longer than they need, because applicants were declining properties in the hope of obtaining a secure tenancy under the Original Scheme. The intention was that by reducing the priority preference to the same as homeless cases the incentive to decline offers through that route would be removed. There is no evidence before the court to challenge that advice or its basis as reported by the officers. Moreover that was in my judgement a legitimate aim for the purposes of article 14 and otherwise.

Andean Fox

R (XC) v Southwark LBC [2017] EWHC 736

- Judicial review of S's allocations policy on basis it indirectly discriminated against disabled people
- "priority star" scheme for community contributions: C, disabled and caring for disabled son, couldn't contribute by voluntary work
- Had already complained to LGO
- Complained that local authority's response to her letter before action was to say she could do voluntary work

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R (XC) v Southwark LBC [2017] EWHC 736

- Response to letter before action was not a decision susceptible to challenge
- Although the letter was unfortunately grumpy in tone, that was because C was a repeat complainer

R (XC) v Southwark LBC [2017] EWHC 736

- Discrimination: Southwark argued need to look at the scheme in the round
- Judge referred to H v Ealing at first instance and agreed
  - In my judgement, it is perfectly plain that the effect of the priority star scheme in the present case is indirectly to discriminate against those with disabilities and against women. It is beyond argument, in my view, that to make available a benefit, here a “star” which increases the prospect of achieving preferential housing, which can more readily be acquired by those without a disability, is to discriminate against the disabled by subjecting them to a detriment.

R (XC) v Southwark LBC [2017] EWHC 736

- Discrimination: Southwark argued justification
- Common ground that 1) the policy had a legitimate aim, namely creation of sustainable and balanced communities and encouraging residents to make a contribution to the local community; 2) the priority stars had a rational connection to that objective.
  - “it is legitimate for local authorities to seek to ensure that their communities include a reasonable proportion of working members, people able to make a financial contribution to the maintenance of the community, and to encourage those willing to provide voluntary assistance to others in their neighbourhood. Giving a measure of priority to working households and to those who provide community services helps achieve those objectives.”

R (XC) v Southwark LBC [2017] EWHC 736

- Justification
  - *86 The real question is whether a priority scheme like the defendant's was the least intrusive measure which could be used without unacceptably compromising the objective. In my judgement it was.*
  - 92 Determining those matters in the context of housing allocation schemes is especially difficult. Every tweak to the scheme to benefit one individual or one class of applicant is likely to have an adverse effect on another; every exception to the operation of a preference may damage the achievement of the objective. The court inevitably concentrates on the circumstances of the claimant in front of it and it is easy to recognise the disadvantage that a claimant may suffer. But the local authority has to consider the position of all applicants and the court can have only the most attenuated understanding of their position.

Night heron

Subject to indirect discrimination?

R (H) v Ealing LBC [2017] EWCA Civ 1127

- 1 This appeal concerns the lawfulness of the housing allocation policy ("the Housing Policy") of the defendant Council ("Ealing") insofar as it sets aside a small but not insignificant proportion of lettings for "working households" and "model tenants". It is said that the working household priority scheme ("the WHPS") discriminates indirectly against women, the elderly and the disabled, and that the model tenant priority scheme ("the MTPS") (together "the two Priority Schemes") directly discriminates against non-Council tenants.
- 2 There are two questions for this Court. First, whether section 2 paragraph 2 of the Housing Policy was unlawfully discriminatory contrary to sections 19 and 29 of the Equality Act 2010 ("EA 2010") and Article 14 in conjunction with Article 8 of the European Convention on Human Rights ("the Convention"). Second, whether in adopting and maintaining the two Priority Schemes, Ealing was in breach of its public sector equality duty ("the PSED") under EA 2010 s.149 , as well as section 11 of the Children Act 2004 ("CA 2004").

R (H) v Ealing LBC [2017] EWCA Civ 1127

- "2. Applicants who work or adhere to the rules in conducting their Council tenancy
- 20% of lettings will be made available to applicants from working households and those Council tenants who comply with their tenancy agreement and pay their rent and council tax.
- Working households will only qualify if they have been employed for a minimum of 24 hours a week and for 12 out of the last 18 months. Evidence of employment will be required in the form of tax returns, copy of employment contract and/or any other suitable proof as requested.
- Ealing Council has a scheme which rewards good tenants who want the opportunity to seek a transfer. These transfer applicants are existing tenants who have demonstrated that they are "model" tenants by complying with their tenancy agreement for a specified period of time.
- In order to bid successfully for properties advertised as part of this scheme, Households:-
- a) Must not have rent arrears for the previous 12 months.
- b) Must not have breached their tenancy conditions for the previous two years.
- c) Must not have any anti-social behaviour record.
- Once tenants have been accepted for the scheme they must continue to comply with the above criteria until they are rehoused in order to remain with the scheme.
- Applications will be prioritised by band and date within that band…"

R (H) v Ealing LBC [2017] EWCA Civ 1127

- First ground of appeal:Judge took incorrect approach to establishing whether there was prima facie indirect discrimination for the purposes of section EA 2010 s.19 because he should have considered the Housing Policy "in the round".
- Ealing argued their Housing Policy contains a number of "safety valves", the effect of which is that each of the Protected Groups as a whole is not disadvantaged by the WHPS.

R (H) v Ealing LBC [2017] EWCA Civ 1127

- Held:

  "it is contradictory of Ealing to concede, on the one hand, that for the purposes of EA s19(2) the WHPS is a PCP, and, on the other hand, to seek to rely on Ealing's Housing Policy as a whole to rebut the PCP's discriminatory impact on the relevant Protected Groups. What this highlights is that the matters on which Ealing relies, the so-called safety valves, are matters which properly are relevant to justification under EA 2010 s. 19(2)(d) rather than the existence of indirect discrimination under EA 2010 s.19(2)(a)-(c) ."

R (H) v Ealing LBC [2017] EWCA Civ 1127

- Justification:
  - Ealing has a legitimate aim in encouraging tenants to work and to be well-behaved in relation to their tenancy, and the WHPS and the MTPS are rational means of achieving that aim.
  - it is necessary to take into the balance, when considering achievement of the legitimate aim of the WHPS, the effect on the Protected Groups as a whole under the entire Housing Policy for all Ealing's housing stock.

R (H) v Ealing LBC [2017] EWCA Civ 1127

- Remaining grounds dismissed:-
  - Article 14 and article 8 challenges not made out
  - PSED: Ealing accepted some problems but major review under way
  - CA s.11: statistics used to show no adverse effect

R (C) v Islington LBC [2017] EWHC 1288 (Admin)

1 In many parts of England and Wales there is an imbalance between the supply and demand for social housing. This is particularly acute in many of the London boroughs, including the London Borough of Islington, (hereinafter "the defendant"), where the supply is far outstripped by the demand for this type of housing accommodation. Inevitably, in these circumstances, local housing authorities can face difficult decisions when seeking to allocate social housing in a fair and appropriate manner.

2 Part VI of the Housing Act 1996 , as amended, (hereinafter "the 1996 Act"), makes provision for the allocation of social housing, and s.159(1) obliges local housing authorities to comply with those provisions. However, subject to those provisions, subs.(7) makes it clear, that a local housing authority may allocate this type of housing accommodation in such manner as it considers appropriate.

3 In addition, local housing authorities owe various statutory duties to homeless individuals within their area, under Pt VII of the 1996 Act. If the local housing authority is satisfied that an individual is homeless, eligible for assistance, has a priority need, and is not satisfied that he became homeless intentionally, then, under s.193(2) , it is under a duty to secure that accommodation is available for occupation by him.

4 However, just as there is no statutory duty to provide an applicant with social housing under Pt VI of the 1996 Act, likewise, there is no statutory duty to provide social housing to a homeless individual; albeit, s.166A(3)(a) obliges a local housing authority to frame its allocation scheme so as to secure that reasonable preference is given to people who are homeless. Therefore, unless the local housing authority decides to accommodate a homeless person by providing her with social housing, its duty is limited to securing that accommodation is available for occupation by her.

5 As social housing is, in general terms, let either under the secure tenancy provisions of the Housing Act 1985 , or the assured tenancy provisions of the Housing Act 1988 , it is understandably perceived, by those seeking to be accommodated by a local housing authority, to be the gold standard, whilst accommodation provided under Pt VII , is considered to be second best.

6 Inevitably, because of the imbalance between the supply and demand of social housing, those who are accommodated under Pt VII of the Housing Act 1996 may spend prolonged periods in such accommodation, which can lead to disputes in relation to the allocation of social housing. This case concerns one such dispute.

R (C) v Islington LBC [2017] EWHC 1288 (Admin)

- C, profoundly deaf, victim of domestic violence, moved into refuge with 3 children
- Was not awarded welfare points as being in need of settled accommodation ie council accommodation
- Argument rejected. Settled accommodation can be private sector – question of fact. Where she was living was sufficiently permanent to be settled.

R (C) v Islington LBC [2017] EWHC 1288 (Admin)

- Unlawful procedure for making direct offers
- Only came out in the course of submissions that in fact only 100 points needed for a direct offer
- Not clear that C had been considered for direct offer
- Ground upheld

R (C) v Islington LBC [2017] EWHC 1288 (Admin)

- Unlawful lettings policy: discrimination against homeless, victims of domestic violence, women
- Breach of s11 CA2004
- In comparison to those under the local lettings policy, C was disadvantaged
- It is for the court to determine proportionality
- LLP not complete bar to someone from outside
- Discriminatory effect recognised and monitored
- LLP could not be less intrusive and still achieve its aim

R (C) v Islington LBC [2017] EWHC 1288 (Admin)

- PSED had been sufficiently considered
- S11 was not breached by the introduction of the LLP as it had increased the supply of accommodation

- D ordered to pay 60% of C's costs

Cotopaxi

Homelessness update

Poshteh v Royal Borough of Kensington and Chelsea [2017] UKSC 36

- Another SC homelessness decision!
- SC goes against Strasbourg jurisprudence!!
- *Runa Begum* was correctly decided [phew!]

Poshteh v Royal Borough of Kensington and Chelsea [2017] UKSC 36

- Review of Suitability of accom
- Should A be entitled to an independent review of the decision in light of article 6 ECHR and *Ali v BCC*?
- As *Ali* was not a Grand Chamber decision, there was no need to depart from previous decision of the SC
- *Holmes-Moorhouse* warning against nit-picking re-iterated

Poshteh v Royal Borough of Kensington and Chelsea [2017] UKSC 36

- Nothing has changed
- …at least as far as homeless appeals are concerned…

LB Hackney v Haque [2017] EWCA Civ 4

- After *Hotak et al* what about the PSED?
- A had mental health problems, sought review of suitability of temp accom
- Review rejected but did not spell out whether A was disabled
- HHJ Luba QC allowed appeal on this ground
- Held:
  - What emerges as a general principle is the sharp focus required of the decision maker upon the relevant aspects of the PSED where it is engaged by the contextual facts about each particular case.

LB Hackney v Haque [2017] EWCA Civ 4

- The next question is what, in that context, does the PSED as set out in s.149 of the Equality Act require of the reviewing officer on the particular facts of this case? In my judgment, it required the following:
  - i) A recognition that A suffered from a physical or mental impairment having a substantial and long term adverse effect on his ability to carry out normal day to day activities; i.e. that he was disabled within the meaning of EA s. 6, and therefore had a protected characteristic.
  - ii) A focus upon the specific aspects of his impairments, to the extent relevant to the suitability of Room 315 as accommodation for him.
  - iii) A focus upon the consequences of his impairments, both in terms of the disadvantages which he might suffer in using Room 315 as his accommodation, by comparison with persons without those impairments (see s. 149(3)(a)).
  - iv) A focus upon his particular needs in relation to accommodation arising from those impairments, by comparison with the needs of persons without such impairments, and the extent to which Room 315 met those particular needs: see s. 149(3)(b) and (4).
  - v) A recognition that A's particular needs arising from those impairments might require him to be treated more favourably in terms of the provision of accommodation than other persons not suffering from disability or other protected characteristics: see s. 149(6).
  - vi) A review of the suitability of Room 315 as accommodation for A which paid due regard to those matters.

LB Hackney v Haque [2017] EWCA Civ 4

- RO was not bound to take A's assertions at face value
- He was not bound to ask whether A could be found more suitable accom
- Other issues than disability are still relevant
- There was no need to spell out whether A was disabled as long as letter shows sufficient recognition of that fact

LB Hackney v Haque [2017] EWCA Civ 4

Judicial notice can be taken of the fact that housing authorities experience grave constraints in finding appropriately located suitable accommodation for those applicants demonstrating priority need, and that many of them deserve more favourable than purely average treatment by reason of vulnerabilities, including protected characteristics of a type which engage the PSED. The allocation of scarce resources among those in need of it calls for tough and, on occasion, heartbreaking decision-making, but having to say no to those deserving of sympathy by no means betokens a failure to comply with the PSED.

Frigate bird and blue footed booby

Where else do your lectures on homelessness include pics of boobies?

R (oao Sambotin) v LB Brent (2017) EWHC 1190 (Admin)

- When is it possible to re-visit a s184 decision?
- Brent decide A is homeless, eligible, PN and NIH
- But has LC to Waltham Forest
- WF refuse the referral
- Brent then decide he's not eligible after all!
- A seeks judicial review of B's decision to re-open the s184 decision

R (oao Sambotin) v LB Brent (2017) EWHC 1190 (Admin)

- Held: a local housing authority is entitled to revisit a decision where either
  - (a) it has not completed its enquiries under section 184 of the Act
  - (b) it has made no final decision as to the nature of the duty it owes to A (*Crawley v B)*
  - (c) there had been fraud or deception or
  - (d) there had been fundamental mistake of fact

R (oao Sambotin) v LB Brent (2017) EWHC 1190 (Admin)

- Whether a final decision has been made is a question of fact – here it had
- There had not been a fundamental mistake of fact
- Query – how does this sit with the ban on assisting someone who is not eligible??

Cock of the Rock

Where else do your homeless lectures include …??

Trindade v LB Hackney (2017) EWCA Civ 942

- Good faith and ignorance of a relevant fact
- A left her own home in Sao Tome to move into precarious accommodation in London
- After sister lost her accommodation, A applied to Hackney and was found IH
  - *There is nothing to suggest that your client had an expectation that when she left Uba Flor for London she would have permanent housing in the UK. There was no offer of permanent housing made to your client by her sister*

Trindade v LB Hackney (2017) EWCA Civ 942

- Prospects of future housing (or job, etc) can only be a “relevant fact” if sufficiently sure, not mere aspiration
- The question of “good faith” is limited to matters which relate to her housing and prospects of accom – the fact A in good faith wanted medical treatment for her daughter is not relevant
- Anyone who acts in genuine ignorance of relevant fact will almost invariably have acted in good faith in relation to sorting out their housing needs.

Dacorum Borough Council v Bucknall (aka Acheampong) [2017] EWHC 2094 (QB)

- When do you need to comply with the Protection from Eviction Act 1977 to regain possession of temporary accom?
  - *R (N) v Lewisham London Borough Council:* SC held that section 188 temporary accommodation is not 'occupied as a dwelling' so PfEA did not apply
  - Dacorum had accepted full duty to A so this was accommodation provided under s193 to be occupied until permanent accommodation found

Dacorum Borough Council v Bucknall (aka Acheampong) [2017] EWHC 2094 (QB)

- The accommodation was more than merely “transient” and therefore occupied as a dwelling
- The Notice to Quit was invalid
- (She had refused suitable accommodation and Dacorum had discharged duty)

Darwin’s Finch

Evolve or perish

Hemley v Croydon LBC

- No transcript yet available, permission judgment on Bailii
- Pre-*Hotak* decision on vulnerability on A with chronic pain syndrome
- Both parties acknowledged that the decision in *Hotak v Southwark LBC* had changed the test for vulnerability established in *Pereira*. R contended that the review officer had, therefore, applied the wrong legal test. The local authority submitted that the judge had been overly critical of the review officer's decision and that, given his findings, the review officer would have come to the same conclusion even if he had applied the test in *Hotak* . It argued that the review officer had, accordingly, made no material error, and that his decision should be restored.

Hemley v Croydon LBC

- **Held:** Appeal dismissed.
- The Supreme Court's decision in *Hotak* had substantially modified the test in *Pereira* . *Hotak* established that a person might be vulnerable even if he could fend for himself; "vulnerable" for the purpose of s.189(1)(c) meant significantly more vulnerable as a result of being homeless; the correct comparator was not, per *Pereira* , an ordinary homeless person, but an ordinary person if they had been made homeless, *Hotak* followed, *Pereira* doubted.

Hemley v Croydon LBC

- Even the strongest person was likely to decline if made homeless, but to be vulnerable a person had to be more at risk of harm than ordinary people generally if they were made homeless, *Hotak* followed. Despite the care with which the review officer had considered the respondent's case, he clearly had applied the wrong legal test. His decision letter was replete with references to the respondent's ability to fend for herself compared to an ordinary homeless person, not an ordinary person. The instant court was not satisfied that the review officer was bound to have reached the same conclusion if he had applied the *Hotak* test.

Hemley v Croydon LBC

- It might be that a fresh consideration would lead to the same result for the respondent. The errors identified by the judge were contrary to the well-established principle that a benevolent approach should be adopted to such decision letters, and that nit-picking was not appropriate, *Holmes-Moorhouse v Richmond upon Thames LBC [2009] UKHL 7* considered. But for the substantial modification of the legal test, the appeal would have been allowed. However, since the court was not sufficiently confident that the review officer would have reached the same decision on the basis of the correct test, the matter had to be remitted for reconsideration.

Any questions?

Don’t be a booby – ask now!

cornerstone barristers

Housing Litigation: Public law and judicial review for social landlords: key concepts

Andy Lane & John Fitzsimons

Back to basics

- What is judicial review?

- Process by which High Court scrutinises legality of acts and decisions of public bodies, courts, tribunals

- Court has supervisory rather than appellate jurisdiction

- Process used to correct errors of law or decisions which are e.g. procedurally improper or perverse

- Not so much about outcome but legality of decision

Public bodies and functions

- Broadly, any body performing public duties or functions
  - from the obvious:
    - central government
    - local government
    - inferior courts and tribunals
  - … to the less obvious, e.g. registered providers of social housing
    - *Poplar HARCA v Donaghue* [2001] EWCA Civ 595; [2002] QB 48
    - *R (Weaver) v LQHT* [2009] EWCA Civ 587; [2010] 1 WLR 363
    - *R (McIntyre) v Gentoo Group Ltd* [2010] EWHC 5 (Admin); (2010) 154(2) SJLB 29
    - *R. (on the application of Macleod) v Peabody Trust Governors* [2016] EWHC 737 (Admin); [2016] H.L.R. 27
    - *Southern Housing Group v Ahern* [2016] EWCA Civ (still tbc)
- Key consideration:
  - extent to which body's activities are underpinned by statute or government authority or funding

William Davis J in R (on the application of Macleod) v Peabody Trust Governors (2016)

"It is important to note that the general principles enunciated by Elias J in *Weaver* have to be applied to the facts of each particular case. *Weaver* did not decide that all RSLs are public bodies. On the facts of this case I am not satisfied that Peabody was exercising a public function in relation to the tenancy of Mr Macleod. I take into account the following factors:

MacLeod (2)

Factors

- Peabody purchased the properties…using funds raised on the open market, not via any public subsidy or grant.
- Although the properties were not let at full market rent, it is not clear that they were pure social housing. The key workers for whom the property was reserved included those with a family income of up to £60000 per annum…
- Unlike the RSL in *Weaver,* Peabody had no allocation relationship with any local authority. It was not acting in close harmony with a local authority to assist the local authority to fulfil its statutory duty.
- Rents for the properties transferred are not subject to the same level of statutory regulation as social housing in general.

Grounds of challenge

- The three ‘i’s – the traditional formulation
  - illegality
    - *ultra vires*: decision maker acted beyond its powers
  - impropriety
    - procedural unfairness e.g. considering expectation give adequate

      * failing to consider relevant matters * irrelevant matters * breach of legitimate * failure to follow policy * failure to reasons etc
  - irrationality
    - *Wednesbury* unreasonableness: a decision to which no reasonable public body, in all the material circumstances, could have come
- Effect of HRA 1998? Proportionality as a new ground

Human Rights Act 1998

- Effect of HRA 1998. Proportionality as a new ground?

Procedure


ONE DOES NOT SIMPLY DO WORK
WITHOUT FOLLOWING THE PROPER PROCEDURE

Procedure

- Pre-action protocol
  - requires letter identifying act or decision in question, summary of material facts and grounds of challenge
  - should normally allow defendant 14 days to reply (though limitation continues to run)
- Issue of claim followed by:
  - application for permission: * granted if claimant has arguable case that a ground exists
    * considered on papers initially
    * right to renew application orally if refused on papers
  - judicial review itself, if permission is granted
- Procedure governed by Part 54 CPR and 54 PD
  - acknowledgement of service and summary grounds within 21 days of service

Limitation

- CPR 54.5:
  - claim must be filed promptly and in any event not later than 3 months after grounds first arose
  - time limit cannot be extended by parties
- Policy rationale:
  - need for finality of decision-making in public sector
  - need for decision makers to know with certainty when decisions are conclusive
- Query:
  - whether time limit compatible with Article 6 ECHR
- Issuing within 3 months does not necessarily mean promptly
  - consequent need for claimants to act with alacrity

Remedies

- Quashing order
  - quashing decision and remitting case to decision maker (cf. *Edwards v Bairstow* [1956] AC 14 HL)
- Prohibiting order
  - preventing decision maker from acting or continuing to act unlawfully
- Mandatory order
  - requiring decision maker to perform particular act or duty
- Declaration
  - determination of the rights of the claimant
- Injunction
  - requiring the decision maker to do or to refrain from doing a specified act
- Damages
  - broadly, only available in two cases: entitlement (1) in private law claim and (2) under HRA 1998

Relief is discretionary

- No right to a remedy: like permission, relief is discretionary
- Consequence: court may refuse remedy even if act or decision was unlawful
- Relief refused e.g. where:
  - claimant has delayed issuing unreasonably
  - claimant failed to comply with pre-action protocol
  - adequate, alternative remedy available
  - claimant's conduct renders relief inappropriate or unjust
  - academic: *O'Connor v Kensington and Chelsea RLBC* [2004] EWCA Civ 394; [2004] HLR 37

Judicial review in the county court

- Ordinarily an abuse of process:
  - *Clark v University of Lincolnshire & Humberside* [2000] 1 WLR 1988 CA
- Some proceedings now in county court by way of statutory appeal
  - e.g. homelessness appeals under the Housing Act 1996
- Public law defences to private law claims permitted
  - *Wandsworth LBC v Winder* [1985] AC 461
  - *e.g. Barber v Croydon LBC* [2010] EWCA Civ 51 [2010] HLR 26
- Relief still discretionary?
  - *Barnsley MBC v Norton* [2011] EWCA Civ 834; [2012] PTSR 36
  - *Southern Housing Group v Ahern* [2016] EWCA Civ (tbc)

Southern Housing Group v Ahern [2016] EWCA Civ…

Southern Housing Group v Ahern [2016] EWCA Civ…

Hackney LBC v Lambourne (1993) 25 HLR 172

- Temporary Homelessness accommodation
- Refused reasonable offer – NTQ served
- Breach of statutory duty challenge to NTQ + issue
- J refused strike out of defence: LA appeal allowed
- Public law challenge only where there are private law rights

Evans LJ in *Lambourne*

"It may be that in current circumstances the better and more convenient course is to permit the County Court Judge, in cases such as the present, to hear and determine what is in substance a judicial review application when it is directly related to the issues in the case before him. But the question has to be answered by reference to the authorities, in particular the House of Lords decisions in O'Reilly [1983] and Wandsworth L.B.C. v. Winder [1985] . And the question has to be, in the light of these authorities, whether the public law issue must be raised in separate proceedings, which follows if the "general rule" in O'Reilly applies, or may be permitted as a defence and counterclaim in this action, if the analogy with Winder holds good. In my judgment the answer should be based on the wider considerations to which I have referred, the strength of the dicta in O'Reilly in favour of judicial review applications being made in accordance with the rules provided for such applications, since 1981, seems to me to indicate that **such public law issues should not be raised in ordinary litigation, save to the extent that depriving the parties of any right to do so would infringe their "paramount right" to have recourse to the courts for the determination of their rights**, which was preserved by the House of Lords judgment in Wandsworth L.B.C. v. Winder.

Evans LJ in *Lambourne*

Unless the rights in question are private law rights, which they are not in the present case, then the public law issues should be decided by the appropriate tribunal; but potential injustice will be avoided if the order for possession (or perhaps, in certain cases, the claim for possession) is stayed until such time as any application for judicial review which the defendant may make has been heard."

Hertfordshire CCv Davies [2017] EWHC 1488 (QB)

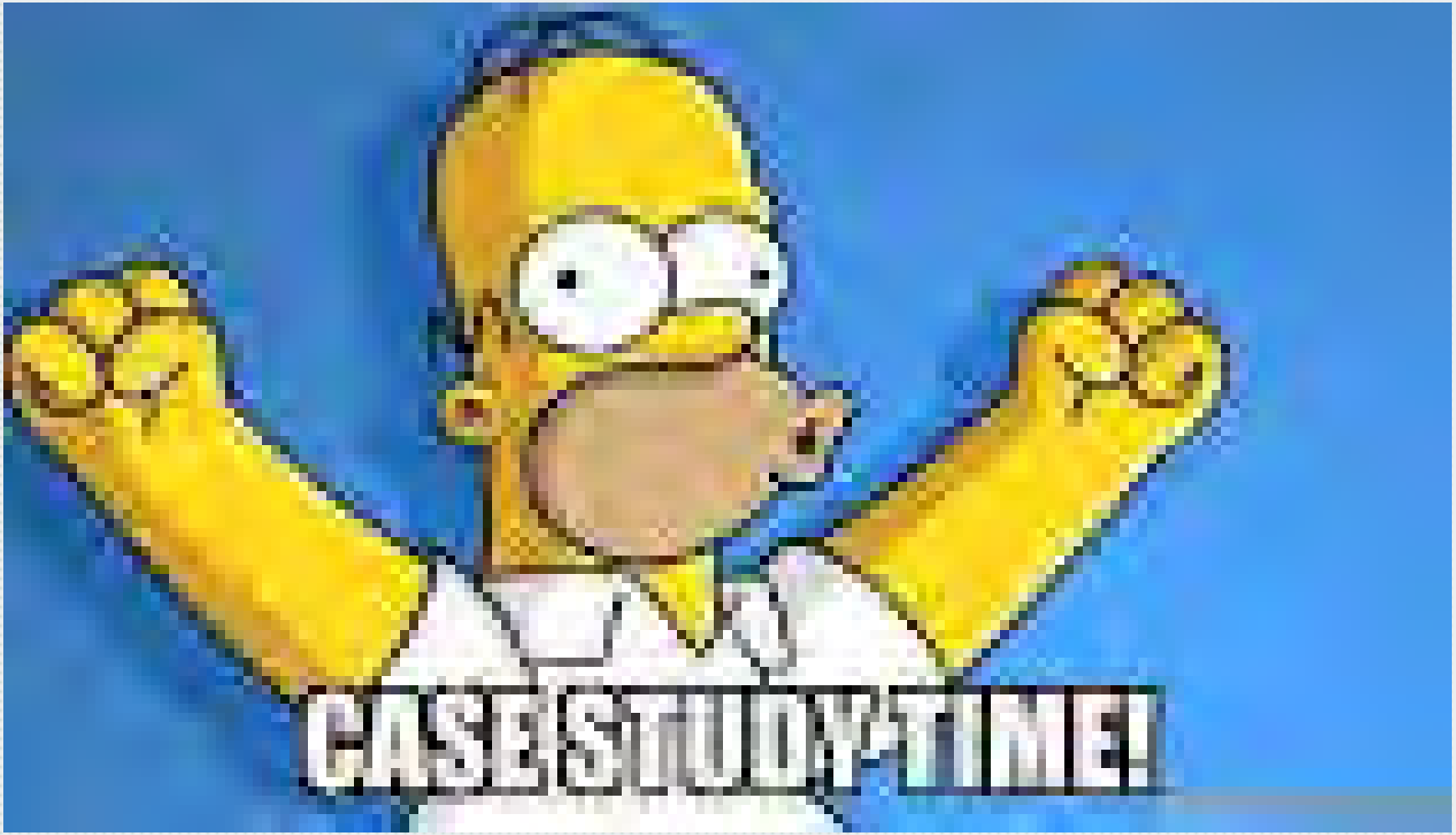
Common Issues

- PSED
  - *Barnsley MBC v Norton* [2011] EWCA Civ 834; [2012] PTSR 56
- Section 11 Children Act
  - *Mohamoud v RBKC* [2015] EWCA Civ 780; [2016] 1 All ER 988
- Policy
  - *Barber v Croydon LBC* [2010] EWCA Civ 51; [2010] HLR 26
- ECHR – esp art. 8 & art. 14
  - *Thurrock BC v West* [2012] EWCA Civ 1435; [2013] HLR 5

Mohamoud v RBKC – Sharp LJ

"70 If however, contrary to my view, there was a duty to conduct an assessment as the appellants assert, I do not think these facts show any basis for interfering with the possession orders that were made, as there is no link between the making of those orders, and a failure to conduct such an assessment. It would follow that a failure to comply with such a duty did not give rise to a defence to the claims in any event: see *Wandsworth LBC v Winder [1985] A.C. 461 HL* at 509E–F and *London Borough of Hackney v Lambourne (1993) 25 H.L.R. 172* at 181."

Case study



Case study

A housing association ('H') operates a starter tenancy programme, under which all new tenants are granted an assured shorthold tenancy for a fixed term of 12 months. The tenancy agreement provides that, if H has not served notice to extend the tenancy, or a notice requiring possession, or issued possession proceedings before the 12 months expires, the tenancy will automatically become a periodic, assured non-shorthold tenancy. It also provides that the tenancy will become fully assured if possession proceedings begun within the 12 months are dismissed; and that tenants may appeal a decision to take any of the above steps.

H has various housing management policies and procedures, including policies and procedures regulating how it will manage vulnerable tenants, anti-social behaviour and its internal appeal process. They provide, in particular, that H will provide starter tenants with floating support, if required, to help them sustain their tenancies, will interview tenants about any complaints received about their behaviour and will offer starter tenants a hearing if they wish to appeal a decision to serve them with notice or repossess their home.

Case study

In January 2017, H grants T a starter tenancy of one of its flats. T has a history of mental ill-health and alcohol abuse. In March 2017, H begins to receive complaints about peculiar and drunken night time behaviour on T's part, which prevents his neighbours from sleeping. One of H's officers tries to call T to discuss the complaints but is unable to reach him. Another officer calls the community mental health service and discovers that T is not presently in their care. Concerned about the effect of T's on-going anti-social behaviour, H serves T with notice requiring possession. In response, T calls his housing officer, denying any wrong-doing. He indicates that he wishes to appeal the decision to serve him with notice and the officer tells him to put his reasons in writing. T does not do so. In October 2017, H issues a claim for possession of T's home.

1. Can T defend the claim on public law grounds?
2. If so, on what grounds might he defend the claim; and what case law might he cite?
3. What might H have done better; and what might it do now to improve its position?
4. What are the potential consequences of H's default?

cornerstone barristers

Housing Litigation: Public law and judicial review for social landlords: key concepts

Andy Lane & John Fitzsimons

cornerstone barristers

Licensing the private rented sector:

Aspects of mandatory, additional and selective licensing under the Housing Act 2004

Dean Underwood

Introduction

- Aspects of mandatory, additional and selective licensing under the Housing Act 2004
  - topical issues: consultation, fees, the licensable Part 3 house etc
  - recent case law
  - information exchange
- Don’t turn off your phones!
- Take photos and tweet:
  - @deanunderwood01
- Any queries: deanu@cornerstonebarristers.com

What's it all about?

- Broadly, concerned with improving condition and management of privately rented accommodation in local authority areas
- Requires 'landlords' of privately rented accommodation:
  - in HMOs meeting prescribed, statutory descriptions;
  - in HMOs meeting a local authority-prescribed description in local-authority designated areas;
  - in other houses meeting a local authority-prescribed description in local authority-designated areas,

  to obtain and comply with a local authority licence to let the accommodation
- The licence gives the local authority a degree of control, exercised by use of licence conditions and penalties for non-compliance
- Three separate licensing schemes: mandatory, additional and selective licensing
- Works in tandem with housing strategy and the Housing Health and Safety Rating System, Empty Dwelling Management Orders etc, also introduced by 2004 Act.

What's it all about?

"[The Bill will] help to create a fairer and better housing market and to protect the most vulnerable in housing. Together with other Government measures on housing and planning, it will make a major contribution to achieving the aims of the sustainable communities plan. The Bill is big in vision, scope and size.

That is why we are determined to take action through the Bill to curb the activities of a rogue element by introducing much needed reforms to…the private rented sector…

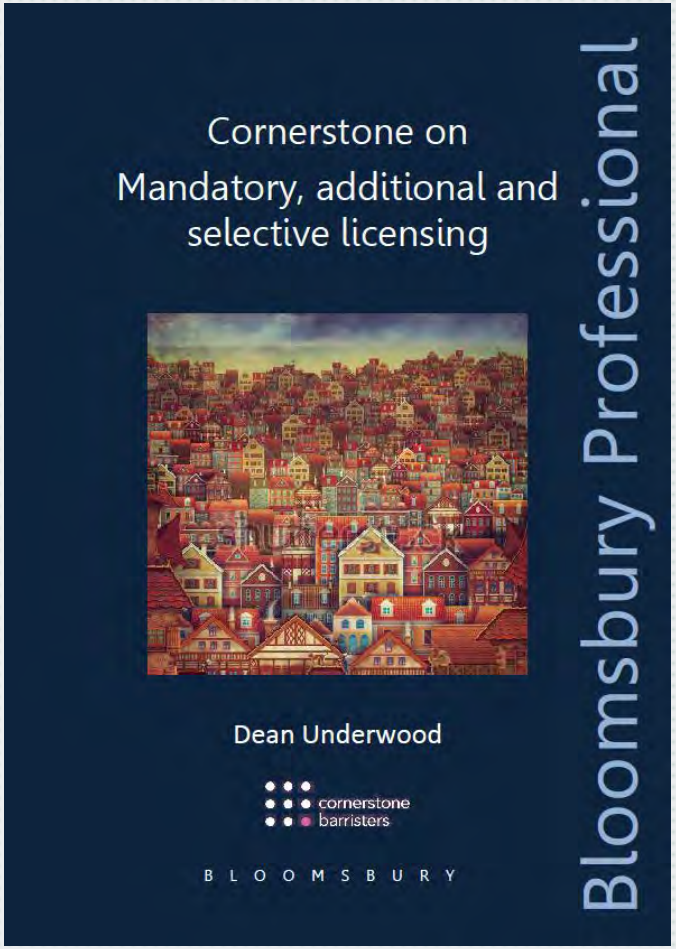
[The Bill will] give local authorities new powers selectively to license private landlords in such areas of low housing demand, or in other areas where there is a particular problem, perhaps of antisocial behaviour, for which licensing could be part of the solution. Local authorities will be able to set new and higher standards of management in such properties."

Minister for Housing and Planning, Keith Hill MP, introducing the Bill for second reading

[Hansard, 12.01.04, C.531, 536-537]

What's it all about? … A shameless plug

- A new book for your shelves …
- Cornerstone on Mandatory, Additional and Selective Licensing
- Published by Bloomsbury Professional
- Part of the 'Cornerstone on …' series
- Expected early 2018



Mandatory licensing

Part 2, Housing Act 2004:
Licensing of houses in multiple occupation

Mandatory licensing in overview

- Arguably, the most familiar licensing scheme – it is mandatory after all!
- In force for more than 11 years in England and Wales, since April 2006
- Governed by Part 2, Housing Act 2004
- Presently, restricted to larger HMOs which:
  - are 3 or more storeys high
  - contain 5 or more people in 2 or more households and
  - contain shared facilities such as a kitchen, bathroom or toilet
- Not quite that straightforward! …and statutory exemptions apply
- Government intends to extend scope of mandatory licensing by removing storey criterion
- Licence required if HMO not exempt; with criminal sanctions in default

Let’s start at the very beginning …

55 Licensing of HMOs to which this Part applies

(1) This Part provides for HMOs to be licensed by local housing authorities where–

(a) they are HMOs to which this Part applies (see subsection (2)), and

(b) they are required to be licensed under this Part (see section 61(1)).

(2) This Part applies to the following HMOs in the case of each local housing authority–

(a) any HMO in the authority's district which falls within any prescribed description of HMO,

(b) if an area is for the time being designated by the authority under section 56 as subject to additional licensing, any HMO in that area which falls within any description of HMO specified in the designation.

(3) The appropriate national authority may by order prescribe descriptions of HMOs for the purposes of subsection (2)(a).

(4) The power conferred by subsection (3) may be exercised in such a way that this Part applies to all HMOs in the district of a local housing authority.

What is a house in multiple occupation?

- Familiar concept: traditional bedsit accommodation, shared houses etc
- Main form of housing in PRS for those on low income, students, foreign nationals
- Estimated to be about 463,000 HMOs in England
- Sections 77 and **254** to 259**:** Meaning of “house in multiple occupation”

(1) For the purposes of this Act a building or a part of a building is a “house in multiple occupation” if–

(a) it meets the conditions in subsection (2) (“the standard test”);

(b) it meets the conditions in subsection (3) (“the self-contained flat test”);

(c) it meets the conditions in subsection (4) (“the converted building test”);

(d) an HMO declaration is in force in respect of it under section 255; or

(e) it is a converted block of flats to which section 257 applies.

What is a house in multiple occupation?

The standard test

(2) A building or a part of a building meets the standard test if–

(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;

(b) the living accommodation is occupied by persons who do not form a single household (see section 258);

(c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);

(d) their occupation of the living accommodation constitutes the only use of that accommodation;

(e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and

(f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

What is a house in multiple occupation?

The self-contained flat and converted building tests

(3) A part of a building meets the self-contained flat test if–

(a) it consists of a self-contained flat; and

(b) paragraphs (b) to (f) of subsection (2) apply (reading references to the living accommodation concerned as references to the flat).

(4) A building or a part of a building meets the converted building test if–

(a) it is a converted building;

(b) it contains one or more units of living accommodation that do not consist of a self-contained flat or flats (whether or not it also contains any such flat or flats);

(c) the living accommodation is occupied by persons who do not form a single household;

(d) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it;

(e) their occupation of the living accommodation constitutes the only use of that accommodation; and

(f) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation.

See further …

- Section 255 to 256: for HMO declarations and their revocation
- Section 257: concerning the status of converted blocks of flats
    - broadly, applies to poorly converted blocks of flats in which less than two thirds of the flats are occupied by owners
- Section 258: for persons not forming a single household
- Section 259: for persons treated as occupying premises as their only or main residence

Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006

3. Description of HMOs prescribed by the Secretary of State

(1) An HMO is of a prescribed description for the purpose of section 55(2)(a) of the Act where it satisfies the conditions described in paragraph (2).

(2) The conditions referred to in paragraph (1) are that—

(a) the HMO or any part of it comprises three storeys or more;

(b) it is occupied by five or more persons; and

(c) it is occupied by persons living in two or more single households.

Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006

(3) The following storeys shall be taken into account when calculating whether the HMO or any part of it comprises three storeys or more—

(a) any basement if—

(i) it is used wholly or partly as living accommodation;

(ii) it has been constructed, converted or adapted for use wholly or partly as living accommodation;

(iii) it is being used in connection with, and as an integral part of, the HMO; or

(iv) it is the only or principal entry into the HMO from the street.

(b) any attic if—

(i) it is used wholly or partly as living accommodation;

(ii) it has been constructed, converted or adapted for use wholly or partly as living accommodation, or

(iii) it is being used in connection with, and as an integral part of, the HMO;

Continued …

Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006

… continued

(c) where the living accommodation is situated in a part of a building above business premises, each storey comprising the business premises;

(d) where the living accommodation is situated in a part of a building below business premises, each storey comprising the business premises;

(e) any mezzanine floor not used solely as a means of access between two adjoining floors if—

(i) it is used wholly or mainly as living accommodation; or

(ii) it is being used in connection with, and as an integral part of, the HMO; and

(f) any other storey that is used wholly or partly as living accommodation or in connection with, and as an integral part of, the HMO.

The licence requirement

61 Requirement for HMOs to be licensed

(1) Every HMO to which this Part applies must be licensed under this Part unless–

(a) a temporary exemption notice is in force in relation to it under section 62, or

(b) an interim or final management order is in force in relation to it under Chapter 1 of Part 4.

(2) A licence under this Part is a licence authorising occupation of the house concerned by not more than a maximum number of households or persons specified in the licence.

(3) Sections 63 to 67 deal with applications for licences, the granting or refusal of licences and the imposition of licence conditions.

(4) The local housing authority must take all reasonable steps to secure that applications for licences are made to them in respect of HMOs in their area which are required to be licensed under this Part but are not. …..

Extension of mandatory licensing

- Prime Minister's speech, May 2015, announced Government intention to, "crack down on unscrupulous landlords who cram houses full of illegal immigrants, by introducing a new mandatory licensing scheme."
- Paper, August 2015: *Tackling Rogue Landlords and Improving the Private Rented Sector*
- Consultation from November to December 2015:
  - *Extending mandatory licensing of Houses in Multiple Occupation (HMOs) and related reforms: a technical discussion document*
- Aim?
  - "… to make it easier for local authorities to raise standards in smaller HMOs where there is a need for improvement and identify the rogues who currently operate below the radar …"
- Government response in October 2016 noted strong support for extending scope by:
  - removing storey criterion, so all HMOs occupied by 5 persons or more in more than one household are included; and including flats above and below business premises
- Further, intention to clarify by Regulations that the minimum room size of 6.5m^2 for sleeping accommodation applies to all HMOs

Recent cases: Cohesive living lives on Nottingham City Council v Parr [2017] EWCA Civ 188

Essential facts:

- 2 houses let to students
- Limited floor space in loft rooms
- Licence prohibited use of rooms for sleeping
- FTT allowed appeal
- Houses had enough shared space to counter bedrooms' size and, living "cohesively" students would use that space
- Condition in one licence varied: use as bedroom only by full-time student living there for 10m maximum
- UT upheld that condition on appeal and applied it to second house

On appeal:

- Condition not outside ambit of s67: nothing inimical to HMO regime in investigating occupiers' characteristics
- Condition did not allow students to live in substandard accommodation. UT entitled to find that, with shared space, rooms were not substandard.
- Condition was not irrational. UT had not attempted to define "cohesive living" as a concept; and the regime was merely intended to ensure the *availability* of adequate facilities, not to compel occupiers to use them.

Recent cases: a declared success for Hertfordshire
Hertfordshire Council v Rohde [2016] UKUT 39 (LC)

Essential facts:

- 1960s semi-detached house
- Inspection in 2014: 3 lockable bedrooms, occupied by three men
- HMO declaration made under section 255
- Rohde appealed to FTT
- FTT inspected in February 2015
- HMO found in poor condition, but lack of evidence of anyone living there
- FTT concluded: no evidence of occupation by more than 2 people on date of inspection
- Declaration revoked

Held on appeal

- Aside from failing to consider and reverse LA's decision, FTT made decision solely on evidence obtained from inspection in February 2015
- Should have taken into account all evidence available to LA when it made declaration, as well as that obtained subsequently
- FTT also failed to consider the 'significant use' test in section 255, or the presumption (section 260) that the test is met unless the contrary is shown
- Declaration confirmed

Not-so-recent cases

London Borough of Islington v Unite Group plc [2013] EWHC 508 (Admin) [2013] HLR 33

Westlaw UK summary:

For the purpose of deciding whether a HMO required a licence from the local authority under the Licensing of HMOs (Prescribed Descriptions) (England) Order 2006 Article 3, it was the HMO that had to comprise three storeys and not the building in which the HMO happened to be found. The Order was not intended to apply to purpose-built flats in tower blocks.

Bristol City Council v Digs (Bristol) Limited [2014] EWHC 869 (Admin) [2014] HLR 30

Westlaw UK summary:

The word "storey" in the Licensing of HMOs (Prescribed Descriptions) (England) Order 2006 Article 3 should ordinarily be understood as meaning the whole floor, namely the space on a given level within a building. Stairs between floors could not, in themselves, be "storeys" unless they were within Article 3(3)(f) because they were used as living accommodation, or were used as an integral part of the house in multiple occupation.

Additional licensing

Part 2, Housing Act 2004:
Licensing of houses in multiple occupation

Additional licensing in overview

- Part 2, Housing Act 2004 gives local authorities power to introduce licensing schemes for HMOs not covered by mandatory licensing
- Intended to target poorly managed HMOs and those whose occupants are causing problems to others in the community
- Whether a HMO is included in a scheme depends on the local authority designation, e.g.
  - Newham LBC included all HMOs in a borough-wide scheme, subject to statutory exemptions
  - Hounslow LBC included only HMOs of 2 or more storeys, occupied by 4 or more people in two or more households
- Consultation required before designation; and either General Approval or Secretary of State confirmation of designation
- Licence required if HMO falls within the designation: see section 61 (*ante*)
- About 1/3 of London local authorities running additional licensing schemes

Back to the beginning …

56 Designation of areas subject to additional licensing

(1) A local housing authority may designate either–

(a) the area of their district, or
(b) an area in their district,

as subject to additional licensing in relation to a description of HMOs specified in the designation, if the requirements of this section are met.

(2) The authority must consider that a significant proportion of the HMOs of that description in the area are being managed sufficiently ineffectively as to give rise, or to be likely to give rise, to one or more particular problems either for those occupying the HMOs or for members of the public.

Continued …

Consultation requirements

…continued

(3) Before making a designation the authority must–

(a) take reasonable steps to consult persons who are likely to be affected by the designation;

(b) consider any representations made in accordance with the consultation and not withdrawn.

(4) The power to make a designation under this section may be exercised in such a way that this Part applies to all HMOs in the area in question.

(5) In forming an opinion as to the matters mentioned in subsection (2), the authority must have regard to any information regarding the extent to which any codes of practice approved under section 233 have been complied with by persons managing HMOs in the area in question.

(6) Section 57 applies for the purposes of this section.

Further considerations: sections 57 and 58

- When exercising power under section 56, local authorities must:
  - ensure that exercise of their power is consistent with their overall housing strategy
  - seek to co-ordinate their approach with their approach to homelessness, empty properties and anti-social behaviour affecting the private rented sector
  - not make a designation unless they have considered whether there other effective methods of dealing with the problem
  - consider that the designation will significantly assist them to deal with the problem.
- Designations require either General Approval or Secretary of State confirmation
- *The Housing Act 2004: Licensing of Houses in Multiple Occupation and Selective Licensing of Other Residential Accommodation (England) General Approval 2015*
  - In force on 1st April 2015 and revoked the 2010 General Approval
  - General Approval granted for additional licensing schemes, subject only to condition that the local authority has consulted persons likely to be affected by them, under section 56(3)(a), for not less than 10 weeks.

Duration, review and revocation

- Section 60 of the 2004 Act
- Designation may last no longer than 5 years from the date on which it comes into force
- Otherwise, designation comes to an end on the date it specifies
- Local authorities must from time to time review the operation of the designation
- Local authorities may revoke a designation following a periodic review

Not-so-recent cases

R (Regas) v Enfield LBC [2014] EWHC 4173 (Admin); [2015] HLR 14

Westlaw UK summary:

A local authority's consultation on a proposal to designate the entire borough for additional licensing of houses in multiple occupation and selective licensing of private rented sector properties had been inadequate because it had not involved potentially interested parties in adjoining parts of the neighbouring boroughs and had not lasted long enough.

R (East Midlands Property Owners Ltd) v Nottingham City Council [2015] EWHC 747 (Admin)

Concerning fees (though not in respect of HMO licensing):

R (Hemming (t/a Simply Pleasure Ltd)) v Westminster CC [2015] UKSC 25 [2015] 2 WLR 1271

Selective licensing

Part 3, Housing Act 2004:
Licensing of other residential accommodation

Selective licensing in overview

- Sections 79-81, Housing Act 2004 give local authorities power to introduce selective licensing schemes for other houses falling outside of Part 2
- Originally intended to address the impact of poor quality private landlords in areas of low housing demand; and anti-social tenants
- Conditions for introducing scheme now extended by 2015 Regulations
- *But* borough-wide schemes no longer approved generally
- Consultation is required before designation, as with additional licensing
- In designated areas, private landlords must obtain a licence
- Enforcement action available in default of a licence or attainment of acceptable management standards

When does Part 3 apply?

79 Licensing of houses to which this Part applies

(1) This Part provides for houses to be licensed by local housing authorities where–

(a) they are houses to which this Part applies (see subsection (2)), and

(b) they are required to be licensed under this Part (see section 85(1)).

(2) This Part applies to a house if–

(a) it is in an area that is for the time being designated under section 80 as subject to selective licensing, and

(b) the whole of it is occupied either–

(i) under a single tenancy or licence that is not an exempt tenancy or licence under subsection (3) or (4), or

(ii) under two or more tenancies or licences in respect of different dwellings contained in it, none of which is an exempt tenancy or licence under subsection (3) or (4).

Continued …

When does Part 3 apply?

(3) A tenancy or licence is an exempt tenancy or licence if —

(a) it is granted by a non-profit registered provider of social housing,

(b) it is granted by a profit-making registered provider of social housing in respect of social housing (within the meaning of Part 2 of the Housing and Regeneration Act 2008), or

(c) it is granted by a body which is registered as a social landlord under Part 1 of the Housing Act 1996 (c. 52).

(4) In addition, the appropriate national authority may by order provide for a tenancy or licence to be an exempt tenancy or licence–

(a) if it falls within any description of tenancy or licence specified in the order; or

(b) in any other circumstances so specified.

(5) Every local housing authority have the following general duties–

(a) to make such arrangements as are necessary to secure the effective implementation in their district of the licensing regime provided for by this Part; and

(b) to ensure that all applications for licences and other issues falling to be determined by them under this Part are determined within a reasonable time.

The licence requirement

85 Requirement for Part 3 houses to be licensed

(1) Every Part 3 house must be licensed under this Part unless–

(a) it is an HMO to which Part 2 applies (see section 55(2)), or

(b) a temporary exemption notice is in force in relation to it under section 86, or

(c) a management order is in force in relation to it under Chapter 1 or 2 of Part 4.

(2) A licence under this Part is a licence authorising occupation of the house concerned under one or more tenancies or licences within section 79(2)(b).

(3) Sections 87 to 90 deal with applications for licences, the granting or refusal of licences and the imposition of licence conditions.

(4) The local housing authority must take all reasonable steps to secure that applications for licences are made to them in respect of houses in their area which are required to be licensed under this Part but are not so licensed.

Flats in common ownership: just one licence?

- Consider sections 79 and 99
- What is the Part 3 house requiring a Part 3 licence?
  - Does Part 3 *mandate* that it comprises all non-excluded flats in common ownership,
  - or does the LHA have a *choice* to license non-excluded dwellings either individually or collectively?
- No easy answer: *Tuitt v Waltham Forest LBC* [2017] EWHC (…) Admin
- Practice varies nationwide
- Issue remains unresolved …. so, watch this space!

Designation of selective licensing areas

80 Designation of selective licensing areas

(1) A local housing authority may designate either–

(a) the area of their district, or
(b) an area in their district,

as subject to selective licensing, if the requirements of subsections (2) and (9) are met.

(2) The authority must consider that–

(a) the first or second set of general conditions mentioned in subsection (3) or (6), or
(b) any conditions specified in an order under subsection (7) as an additional set of conditions,

are satisfied in relation to the area.

Designation of selective licensing areas

First set of general conditions: areas of low housing demand

(3) The first set of general conditions are–

(a) that the area is, or is likely to become, an area of low housing demand; and

(b) that making a designation will, when combined with other measures taken in the area by the local housing authority, or by other persons together with the local housing authority, contribute to the improvement of the social or economic conditions in the area.

(4) In deciding whether an area is, or is likely to become, an area of low housing demand a local housing authority must take into account (among other matters)–

(a) the value of residential premises in the area, in comparison to the value of similar premises in other areas which the authority consider to be comparable (whether in terms of types of housing, local amenities, availability of transport or otherwise);

(b) the turnover of occupiers of residential premises;

(c) the number of residential premises which are available to buy or rent and the length of time for which they remain unoccupied.

(5) The appropriate national authority may by order amend subsection (4) by adding new matters to those for the time being mentioned in that subsection.

Designation of selective licensing areas

Second set of general conditions: anti-social behaviour

(6) The second set of general conditions are–

(a) that the area is experiencing a significant and persistent problem caused by anti-social behaviour;

(b) that some or all of the private sector landlords who have let premises in the area (whether under leases or licences) are failing to take action to combat the problem that it would be appropriate for them to take; and

(c) that making a designation will, when combined with other measures taken in the area by the local housing authority, or by other persons together with the local housing authority, lead to a reduction in, or the elimination of, the problem.

"Private sector landlord" does not include a non-profit registered provider of social housing or a registered social landlord within the meaning of Part 1 of the Housing Act 1996 (c. 52).

Designation of selective licensing areas

Additional sets of conditions and consultation

(7) The appropriate national authority may by order provide for any conditions specified in the order to apply as an additional set of conditions for the purposes of subsection (2).

(8) The conditions that may be specified include, in particular, conditions intended to permit a local housing authority to make a designation for the purpose of dealing with one or more specified problems affecting persons occupying Part 3 houses in the area.

"Specified" means specified in an order under subsection (7).

(9) Before making a designation the local housing authority must–

(a) take reasonable steps to consult persons who are likely to be affected by the designation; and

(b) consider any representations made in accordance with the consultation and not withdrawn.

(10) Section 81 applies for the purposes of this section.

Further considerations, duration etc

- By section 81, the same further considerations apply under Part 3 as under Part 2, when local authorities exercise power to designate an area for additional licensing (see Additional Licensing, Further considerations)
- For effect, the designation requires either General Approval or confirmation: section 82
- The same provisions apply in respect of the duration, review and revocation of selective licensing designations as apply to additional licensing designations: section 84
- Provisions governing the making, grant and refusal of applications for licences and related fitness and ‘suitability of management arrangements’ tests correspond broadly with those for additional licensing: sections 87 to 88

Selective Licensing of Houses (Additional Conditions) (England) Order 2015/977

3. Conditions specified for the purposes of section 80(2)(b) of the 2004 Act

(1) The following conditions are specified as additional conditions for the purposes of section 80(2)(b) of the 2004 Act, which a local housing authority must consider are satisfied in relation to the area before making a selective licensing designation under this provision—

(a) that the area contains a high proportion of properties in the private rented sector, in relation to the total number of properties in the area;

(b) that the properties referred to in sub-paragraph (a) are occupied either under assured tenancies or licences to occupy; and

(c) that one or more of the sets of conditions in articles 4 to 7 is satisfied.

(2) For the purposes of this article, a property shall not be regarded as being in the private rented sector where the landlord is a private registered provider of social housing, as defined by section 80 of the Housing and Regeneration Act 2008.

The first set of conditions: housing conditions

4. Conditions in relation to housing conditions

The first set of conditions is—

(a) that having carried out a review of housing conditions under section 3(1) of the 2004 Act, the local housing authority considers it would be appropriate for a significant number of the properties referred to in article 3(1)(a) to be inspected, with a view to determining whether any category 1 or category 2 hazards exist on the premises;

(b) that the local housing authority intends to carry out such inspections as referred to in paragraph (a), with a view to carrying out any necessary enforcement action; and

(c) that making a designation will, when combined with other measures taken in the area by the local housing authority, or by other persons together with the local housing authority, including any licence conditions imposed under section 90 of the 2004 Act, contribute to an improvement in general housing conditions in the area.

The second set of conditions: migration

5. Conditions in relation to migration

The second set of conditions is—

(a) that the area has recently experienced or is experiencing an influx of migration into it;

(b) that a significant number of the properties referred to in article 3(1)(a) are occupied by those migrants referred to in paragraph (a); and

(c) that making a designation will, when combined with other measures taken in the area by the local housing authority, or by other persons together with the local housing authority, contribute to—

(i) the preservation or improvement of the social or economic conditions in the area; and

(ii) ensuring that the properties referred to in article 3(1)(a) are properly managed, and in particular, that overcrowding is prevented.

The third set of conditions: deprivation

6. Conditions in relation to deprivation

(1) The third set of conditions is—

(a) that the area is suffering from a high level of deprivation, which affects a significant number of the occupiers of properties referred to in article 3(1)(a); and

(b) that making a designation will, when combined with other measures taken in the area by the local housing authority, or by other persons together with the local housing authority, contribute to a reduction in the level of deprivation in the area.

(2) In determining whether an area is suffering from a high level of deprivation, the local housing authority may have regard to the following factors in relation to the area—

(a) the employment status of adults;

(b) the average income of households;

(c) the health of households;

(d) the availability and ease of access to education, training and other services for households;

(e) housing conditions;

(f) the physical environment; and

(g) levels of crime.

The fourth set of conditions: crime

7. Conditions in relation to crime

The fourth set of conditions is—

(a) that the area suffers from high levels of crime;

(b) that the criminal activity affects those living in the properties referred to in article 3(1)(a), or other households and businesses in the area; and

(c) that making a designation will, when combined with other measures taken in the area by the local housing authority, other persons together with the local housing authority or by the police, contribute to a reduction in the levels of crime in the area, for the benefit of those living in the area.

Approval, confirmation and guidance

- From 1 April 2015, General Approval requires local authorities to obtain Secretary of State confirmation for any selective licensing scheme either:
  - covering more than 20% of their area or
  - affecting more than 20% of privately rented homes in their area

- New, non-statutory guidance:
  - *Selective licensing in the private rented sector – A guide for local authorities*
  - Applications for confirmation will have to set out rationale for adopting a large scale scheme
  - Local authorities will need to provide "robust evidence to support the reasons for making the decision."

Approval, confirmation and guidance

- Further …

"59. … the Secretary of State will take into account in deciding whether to confirm a scheme, the robustness of the proposed measures to ensure compliance. In particular, the Secretary of State will expect to be assured there are systems in place to monitor compliance, and enforcement measures are in place where there is non-compliance. He will also take account when considering confirmation of a new scheme whether there has been sufficient compliance with other licensing schemes operating in the local housing authority area.

60. It is important that licensing schemes that exist are robustly enforced and if a local housing authority is unable to show compliance this will cast doubt on its ability to ensure compliance with the application scheme."

Recent cases: Breach of duty is no reasonable excuse
Thanet DC v Grant [2015] EWHC … Admin

- Failure to obtain a licence for a licensable HMO
- Successful defence to prosecution under section 95(1):
  - LA's failure to comply with duty to take all reasonable steps to secure that licence applications were made in respect of houses in a licensing area (in particular, failure to adequately publicise the scheme to defendant) gave defendant a reasonable excuse under section 95(4)
- Appeal by way of case stated
- Appeal allowed:
  - Duty under section 85(4) not focused on any relevant landlord
  - It is a targeted duty; not a duty to each and every landlord in the area
  - Breach of duty might impact on assessment of whether defendant had a reasonable excuse, but would not necessarily furnish him with one
  - Court erred in finding that LA had failed to communicate with defendant

Recent cases: The relevance of planning
Waltham Forest LBC v Khan [2017] UKUT153 (LC)

Essential facts:

- Borough-wide selective licensing scheme
- K, professional landlord
- Converted 2 properties into flats
- No planning permission
- Applied for a Part 3 licence
- Licences granted for 1 year
- K expected to regularise planning position within the year
- On appeal, FTT held: planning compliance irrelevant to licensing
- Licences extended to 5 years

Held on appeal:

- FTT wrong to hold K's compliance with planning requirements irrelevant to licensing
- In light of selective licensing aims, not possible to hold otherwise
- Concerns of licensing and planning control overlapped
- Legitimate for LHA to consider planning status when considering licence application and terms
- Permissible to refuse to determine application until position regularised

Consultation

Consultation

- Remember the 4 *Sedley criteria*: *R v Brent LBC, ex parte Gunning* (1985) 84 LGR 168
  - consultation must occur at a time when proposals are still at a formative stage
  - sufficient reasons must be given, to allow intelligent consideration and response
  - adequate time must be allowed for consideration and response
  - responses must be conscientiously taken into account

- *R (Peat) v Hyndburn District Council* [2011] EWHC 1739 (Admin)
  - Local authorities must identify with sufficient precision:
    - the proposed area(s) of designation;
    - details of the proposed licence conditions;
    - details of the proposed fee structure; and
    - the reasons for the introduction of selective licensing
  - Consultations about general principles will not be sufficient

Consultation

- *R (ota Regas) v Enfield LBC* [2014] EWHC 4173 (Admin) [2015] HLR 14
  - cannot aggregate periods of ‘listening and engagement’ with periods of actual consultation
  - may need to consult outside of local authority area
- Don’t lose heart: courts tend to be slow to intervene. See:
  - *R (ota Rotherham Action Group Ltd) v Rotherham MBC* [2015] EWHC 1216 (Admin); [2015] HLR 34

Licence applications and conditions

The licence application: sections 63 and 87

- Application for a licence must:
  - be made to the local authority in accordance with its specified requirements; and
  - be accompanied by the application fee
- When fixing the fee, local authorities may take into account all costs incurred in:
  - carrying out functions under Part 2 or, as the case may be, Part 3; and
  - carrying out functions under Chapter 1 of Part 4 in relation to HMOs or, as the case may be, Part 3 houses (so far as not recoverable under Chapter 1, Part 4)
- See further:
  - Licensing and Management of HMOs (Additional Provisions) (England) Regulations 2007/1093
  - Licensing and Management of HMOs and other houses (Miscellaneous Provisions)(England) Regulations 2006/373
  - *R (ota Hemming (t/a Simply Pleasure Ltd)) v Westminster CC* [2015] UKSC 25 [2015] 2 WLR 1271

The licence fee: sections 63 and 87

Section 63

(1) An application for a licence must be made to the local housing authority.

(2) The application must be made in accordance with such requirements as the authority may specify.

(3) The authority may, in particular, require the application to be accompanied by a fee fixed by the authority.

(4) The power of the authority to specify requirements under this section is subject to any regulations made under subsection (5).

(5) The appropriate national authority may by regulations make provision about the making of applications under this section.

(6) Such regulations may, in particular– …..

> (d) specify the maximum fees which are to be charged (whether by specifying amounts or methods for calculating amounts);
>
> (e) specify cases in which no fees are to be charged or fees are to be refunded.

(7) When fixing fees under this section, the local housing authority may (subject to any regulations made under subsection (5)) take into account–

> (a) all costs incurred by the authority in carrying out their functions under this Part, and
>
> (b) all costs incurred by them in carrying out their functions under Chapter 1 of Part 4 in relation to HMOs (so far as they are not recoverable under or by virtue of any provision of that Chapter).

Section 87

In identical terms (save that the expression ‘Part 3 houses’ appears in lieu of ‘HMOs’ in sub-section (7)(b))

The licence fee: one fee or split fee?

- *R (ota Hemming (t/a Simply Pleasure Ltd)) v Westminster CC* [2015] UKSC 25
- Provision of Services Regulations 2009 give effect to Council Directive 2006/123/EC - concerns provision of services in European internal market and procedures by which authorisation to carry out services granted
- Regulations 18(2) and (4):
  - procedures and formalities of authorisation scheme must not be dissuasive or unduly complicate or delay provision of service to which they relate;
  - fee charged for authorisation must be reasonable;
  - must be a proportionate relationship between fee and cost of authorisation procedures; and
  - fee cannot exceed a proportion of the cost of the authorisation procedures
- Type B fee (one up-front fee for all applicants, inc. costs of running scheme) struck down
- Type A split fee approved … but is this permissible under Housing Act 2004; and what is the effect of a failure to pay?

Grant or refusal: sections 64 and 88

64 Grant or refusal of licence

(1) Where an application in respect of an HMO is made to the local housing authority under section 63, the authority must either–

(a) grant a licence in accordance with subsection (2), or

(b) refuse to grant a licence.

(2) If the authority are satisfied as to the matters mentioned in subsection (3), they may grant a licence either–

(a) to the applicant, or

(b) to some other person, if both he and the applicant agree.

88 Grant or refusal of licence:

subsections (1) and (2) concerning Part 3 houses are in corresponding terms

Continued …

Grant or refusal: the sub-section (3) matters

- Under Part 3, the local authority must grant a licence if:
  - the proposed licence holder is a fit and proper person to be the licence holder and the most appropriate person to be the licence holder;
  - the proposed manager of the house is either the person having control of the house, or a person who is an agent or employee of the person having control of the house; and is a fit and proper person to be the manager of the house; and
  - the proposed management arrangements for the house are otherwise satisfactory.
- Under Part 2, the local authority must grant a licence if:
  - the above conditions are satisfied; and
  - the house is reasonably suitable for occupation by not more than the maximum number of households or persons mentioned in subsection (4) or that it can be made so suitable by the imposition of conditions under section 67.
- Subsection (4)? Maximum number is that specified in the application or by the local authority

Other matters …

- Grant and refusal of licences:
  - test as to ‘suitability for multiple occupation’ under Part 2: section 65
  - tests for fitness and satisfactory management arrangements: sections 66 and 89
  - licence conditions (mandatory and discretionary): sections 67 and 90
  - general requirements and duration: sections 68 and 91
  - variation and revocation: sections 69 and 70; 92 and 93
  - appeals against licence decisions: sections 71 and 94 and Schedule 5

Required licence conditions: Schedule 4

1 Conditions to be included in licences under Part 2 or 3

(1) A licence under Part 2 or 3 must include the following conditions.

(2) Conditions requiring the licence holder, if gas is supplied to the house, to produce to the local housing authority annually for their inspection a gas safety certificate obtained in respect of the house within the last 12 months.

(3) Conditions requiring the licence holder–

- (a) to keep electrical appliances and furniture made available by him in the house in a safe condition;
- (b) to supply the authority, on demand, with a declaration by him as to the safety of such appliances and furniture.

(4) Conditions requiring the licence holder–

- (a) to ensure that smoke alarms are installed in the house and to keep them in proper working order;
- (b) to supply the authority, on demand, with a declaration by him as to the condition and positioning of such alarms.

(5) Conditions requiring the licence holder to supply to the occupiers of the house a written statement of the terms on which they occupy it.

2 Additional conditions to be attached to licences under Part 3

A licence under Part 3 must include conditions requiring the licence holder to demand references from persons who wish to occupy the house.

Licence characteristics: sections 68 and 91

91 Licences: general requirements and duration

(1) A licence may not relate to more than one Part 3 house.

(2) A licence may be granted before the time when it is required by virtue of this Part but, if so, the licence cannot come into force until that time.

(3) A licence–

(a) comes into force at the time that is specified in or determined under the licence for this purpose, and

(b) unless previously terminated by subsection (7) or revoked under section 93, continues in force for the period that is so specified or determined.

(4) That period must not end more than 5 years after–

(a) the date on which the licence was granted, or

(b) if the licence was granted as mentioned in subsection (2), the date when the licence comes into force.

Licence characteristics: sections 68 and 91

(5) Subsection (3)(b) applies even if, at any time during that period, the house concerned subsequently ceases to be a Part 3 house or becomes an HMO to which Part 2 applies (see section 55(2)).

(6) A licence may not be transferred to another person.

(7) If the holder of the licence dies while the licence is in force, the licence ceases to be in force on his death.

(8) However, during the period of 3 months beginning with the date of the licence holder's death, the house is to be treated for the purposes of this Part as if on that date a temporary exemption notice had been served in respect of the house under section 86.

(9) If, at any time during that period ("the initial period"), the personal representatives of the licence holder request the local housing authority to do so, the authority may serve on them a notice which, during the period of 3 months after the date on which the initial period ends, has the same effect as a temporary exemption notice under section 86.

(10) Subsections (6) to (8) of section 86 apply (with any necessary modifications) in relation to a decision by the authority not to serve such a notice as they apply in relation to a decision not to serve a temporary exemption notice.

Enforcement and Penalties

Enforcement and penalties

- Failure to license a property under Parts 2 and 3 is an offence: sections 72(1) and 95(1). Maximum fine was £20,000 but is now unlimited.
- A person having control of- or managing a HMO licensed under Part 2 commits an offence if he knowingly permits another to occupy the house and the house becomes occupied by more persons or households than is authorised: section 72(2).
- Failure to comply with the licence conditions is an offence: sections 72(3) and 95(2). Maximum was fine £5,000 per offence but is now unlimited.
- Defences limited: “reasonable excuse”, sections 72(5) and 95(4)
- Revocation of licence (as person may no longer be fit and proper)
- Rent repayment orders: sections 73 and 96
- Restrictions on tenancy termination: sections 75 and 98

Recent case law on selective licensing

- *R (Regas) v Enfield LBC* [2014] EWHC 4173 (Admin) [2015] HLR 14
- *R (Croydon Property Forum Ltd) v Croydon LBC* [2015] EWHC 2403 (Admin)
- *R (Rotherham Action Group Ltd) v Rotherham MBC* [2015] EWHC 1216 (Admin) [2015] LLR 575

….. and concerning licence fees:

- *R (Hemming (t/a Simply Pleasure Ltd)) v Westminster CC* [2015] UKSC 25 [2015] 2 WLR 1271

Through the crystal ball

What next in additional and selective licensing?

The crystal ball

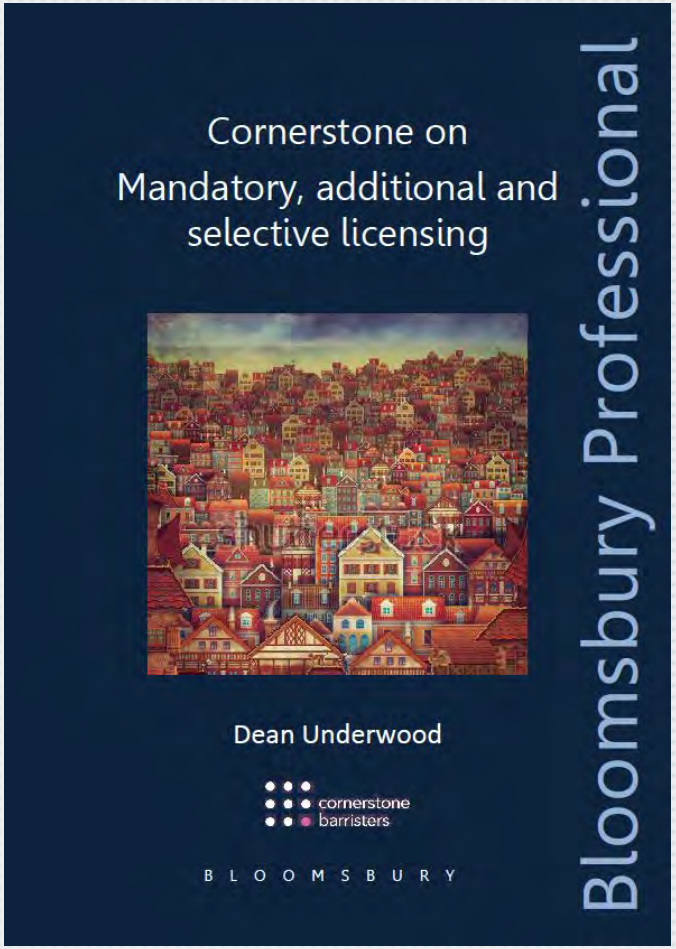
- What does the future hold?
- More additional and selective licensing schemes expected
- Easier to implement additional and selective licensing in small, targeted, geographical areas
- More difficult to implement borough-wide additional and selective licensing schemes
    - note the Guidance requirement for ‘robust’ evidence to justify any future borough-wide scheme
- Blocks in common ownership: one licence for the block, or one for each flat within?
- Disputes concerning new conditions for selective licensing; and the proportionality of fee increases, designed to cover the scheme and enforcement costs?

Useful sources of information

- Housing Act 2004 Explanatory Notes
- Review of property conditions in the private rented sector, DCLG, February 2014
- Selective licensing in the private rented sector: a guide for local authorities, DCLG, March 2015
- Selective licensing of privately rented housing, House of Commons Library, March 2015
- HMOs England and Wales, House of Commons Library, July 2017

And don’t forget …

- A new book for your shelves …
- Cornerstone on Mandatory, Additional and Selective Licensing
- Published by Bloomsbury Professional
- Part of the ‘Cornerstone on …’ series
- Expected early 2018



cornerstone barristers

Licensing the private rented sector:

Aspects of mandatory, additional and selective licensing under the Housing Act 2004

Dean Underwood

cornerstone barristers

Service Charge Update

Michael Paget

Selected Developments

- Decision-making on repairs
- Whether costs of repairs are reasonably incurred – the test clarified
- Presumption against double recovery
- Service charge issues arising from:
  - The replacement of non FD30 Front Entrance Doors
  - Retro-fitting of Sprinkler Systems

Decisions to Repair Costs Reasonably Incurred

The Landlord's covenant to repair – General Points

- The concept of repair takes as its starting point the proposition that that which is to be repaired is in a physical condition worse than that in which it was at some earlier time
- Where the deterioration is the product of an inherent defect in the design or construction of the building the carrying out of works to eradicate that defect may be works of repair
- General measures taken to avoid the recurrence of the deterioration may also be repair

The Landlord's covenant to repair (2)

- In principle, where there is a choice of methods of carrying out repair, the choice is that of the covenantor provided that the choice is a reasonable one -*Plough Investments Ltd v Manchester City Council* [1989] 1 EGLR 244

- At common law there is no bright line division between what is a repair and what is an improvement

- The use of better materials or the carrying out of additional work required by building regulations or in order to conform with good practice does not preclude works from being works of repair - *Postel Properties Ltd v Boots the Chemist* [1996] 2 EGLR 60.

- Where a defect in a building needs to be rectified, the scheme of works carried out to rectify it may be partly repair and partly improvement -*Wates v Rowland* [1952] 2 QB 12.

Costs Reasonably incurred – *Waaler (1)*

- ***Hounslow LBC v Waaler*** [2017] EWCA Civ 45

- Ivybrook Estate constructed in 1960s on a landfill site
- Subject building is originally constructed of concrete load bearing frames, floor and flat roof, with double glazed painted timber windows

- Under W's lease, H covenants to keep the structure and exterior of the building in repair

- W also covenants to pay a service charge which includes a proportion of H's costs both of carrying out repairs and also improvements

Costs Reasonably incurred – *Waaler (2)*

- H carries out works to the building, including replacing flat roofs with pitched roofs and replacing the wooden-framed windows with metal-framed units
- As a consequence of the window replacement, H also has to replace the external cladding
- W's service charge contribution is £55,195.95
- W applies to FTT under section 27A, contending that the windows should have been repaired instead of being replaced, which would also render the cladding replacement unnecessary
- FTT rejects W's case. Holds that H's decision to replace the windows is not unreasonable and that the costs of replacing them are reasonably incurred

Costs Reasonably incurred – *Waaler (3)*

- UT allows W's appeal:
  - The window replacement and cladding works are ones of improvement, not repair
  - In deciding whether costs have been reasonably incurred, H should have taken into account the length of the leases of the flats, the leaseholders' views on the works and the financial impact of the works on them
- H appeals to CoA, arguing that:
  - In considering whether costs have been reasonably incurred, the views of leaseholders are immaterial
  - FTT should focus on whether the landlord has acted reasonably in reaching the decision to carry out the works, i.e. did it act rationally

Costs Reasonably incurred – *Waaler (4)*

- CoA rejects H's appeal and holds that UT did not err in law
- The contractual dimension
  - A rationality test applies to H's decisions under the leases as to (i) choices between different methods of repair and (ii) deciding to carry out optional improvements
- The statutory requirement that costs must be reasonably incurred
  - The test is not the same
  - Whether costs have been reasonably incurred is not simply a question of process but also of outcome

Waaler on the 'margin of appreciation'

- But there is a *margin of appreciation* under section 19
  - Where a landlord is faced with a choice between different methods of dealing with a problem to the fabric of a building, there may be many outcomes each of which is reasonable
  - If a landlord chooses a course of action which leads to a reasonable outcome, the costs of pursuing that course will have been reasonably incurred even if there was another cheaper, reasonable outcome

Waaler on works of improvement

- What about works of improvement and section 19
- Although this legal test is the same for all categories of work, the legal and factual context applicable to different categories of works cannot be ignored
- there is a real difference between works of repair which a landlord is obliged to carry out and works of improvement which are optional

- The relevance of leaseholders' views and the financial impact on them depends on the nature of the improvements
  - Those which are undertaken to prevent the future failure of a part of a building caused by a defect in its original design
  - Those involving new systems which may benefit all leaseholders (e.g. CCTV or keypad locks)
  - Those which benefit only some (e.g. creation of a children's play area)
  - Those which are aesthetic only (e.g. installation of a water feature)

Waaler on works of improvement (2)

- Where a landlord is considering undertaking improvements it must take into account:
  - The extent of the interests of the leaseholders (measured by the length of the unexpired terms of their leases)
  - The views expressed by leaseholders (as expressed in response to the statutory consultation) – save that as the landlord is exercising a discretionary power to improve, the views of leaseholders should be “more influential” than in a case where the landlord is simply complying with his obligation to repair
  - The financial impact of the works (in general terms on the class of leaseholder – Knightsbridge vs Isleworth)

Waaler on section 20

- On the contents of the statutory obligation to consult:

- “38. … the landlord must conscientiously consider the lessees’ observations and give them due weight, depending on the nature and cogency of the observations. In the light of this statutory obligation to consult, it is impossible to say that the tenants’ views are ever immaterial. They will have to be considered in every case. This does not of course mean that the lessees have any kind of veto over what the landlord does; nor that they are entitled to insist upon the cheapest possible means of fulfilling the landlord’s objective. But a duty to consult and to "have regard" to the lessees’ observations entails more than simply telling them what is going to happen.”

The margin of appreciation in practice

- ***Dehavilland Studios Ltd v Peries*** [2017] UKUT 322 (LC)

- Windows in large block of 41 flats are defective
- D proposes to repair the windows at a cost of about £100,000
- P applies to FTT arguing that these costs would not be reasonably incurred because D should replace the windows instead
- Cost of replacement significantly more than cost of repair
- Experts agree that replacement is the best solution but do not rule out repair as unreasonable even though windows nearing end of life and repair would not cure all problems

The margin of appreciation in practice (2)

- FTT determines that “the replacement of the windows was the most reasonable option” and disallows cost of repairs
- On appeal to UT: appeal allowed
- Decision to repair was a reasonable even if not (in the FTT’s opinion) the best option
- FTT applied the wrong test

No double recovery

No double recovery

- ***Sheffield City Council v Oliver*** [2017] EWCA Civ 225

- S undertakes major works (insulation, re-cladding and new boilers) to various properties, including O's building
- S receives a contribution to the costs of these works from the Community Energy Savings Programme (CESP), which is calculated by reference to the number of properties which are the subject of the major works, including this building
- S does not credit O with the sum of money attributable to their flat (although it does decide not to charge for certain of the other works)

No double recovery (2)

- O unsuccessfully challenges the service charge demand in the FTT
- UT allows her appeal: holds that the authority has not "incurred" the costs which are the subject of the CESP grant
- S then appeals:
  - There was nothing unfair about the apportionment adopted
  - In any event the lease gives the decision about apportionment to the authority, whose decision should ordinarily be respected.

No double recovery (3)

- CA dismisses S's appeal:
- When interpreting the service charge provision in the lease, the starting point is that the parties would not have intended the landlord to make a profit through the service charge
- Where the landlord has received money from a third party to fund the cost of works (such as grant assistance or payments from an insurer) those sums should be taken into account so as to prevent double recovery
- Although the lease gives the decision on apportionment to the landlord, this is also within FTT's section 27A jurisdiction (and the provision does not have a contractually determinative effect: ss(6))

Front Entrance Door Replacement

Initial questions

- Is the FED demised to the leaseholder or retained by the landlord
- Who is liable to keep the FED in repair
  - Express terms of lease
  - RTB leases implied covenant that the landlord will “keep in repair the structure and exterior of the dwelling-house”: paragraph 14 to Schedule 6 Housing Act 1985)
  - ***Sheffield CC v Oliver*** [2007] (Lands Tr) - external windows are part of the structure and/or the exterior of a maisonette

Is the FED in disrepair

- Is the FED in a state of disrepair triggering the obligation to repair
- ***Quick v Taff Ely BC*** [1986] QB 809 - no breach of the repairing covenant where there is no physical deterioration
- ***Alker v Collingwood HA*** [2007] 2 EGLR 43 – FED glass panel is not safety glass but ordinary annealed glass

The St Saviours Case

- ***Southwark LBC v Various*** [2017] UKUT 10 (LC)

- St Saviours Estate built in the 1960s with FEDs being rated to FD20 standard
- Lease includes covenant to repair but no entitlement to improve
- S's surveyor conducts a visual inspection
- Notes that some leaseholders have replaced their FEDs, or installed new locks or letterboxes within the existing doors (enlarging existing apertures or drilling in)
- Takes view that any FED which has been replaced or altered is no longer FD20-compliant and therefore in disrepair
- Places no weight on its own fire safety assessments
- S undertakes programme of replacement FEDs

The St Saviours Case (2)

- V challenge their liability for service charges on the grounds that the FED replacements amount to improvements
- FTT not satisfied that all the FEDs were in disrepair
- UT dismisses S's appeal
  - Common ground that an FED door will be in disrepair if it falls below the "as-built" FD20 standard of the original doors, i.e. if it has deteriorated from that pre-existing state
  - It does not follow that because an FED has been replaced or altered, that it is no longer FD20-compliant
  - There is a need for an appropriate assessment of each FED by someone with expertise in fire safety

The proper approach

- The approach to be taken when considering FED replacement in discharge of the landlord's obligation to repair:
  - An FED is not in a state of disrepair simply because it fails to meet current standards
  - Before determining whether any FED is in a state of disrepair, so as to trigger any obligation to repair, it is necessary to identify its original (i.e. as built) fire-resistance standard
  - Each FED needs to be assessed by a fire safety expert to determine whether it has deteriorated to a condition where it no longer meets the original fire-resistance standard
  - If it has so deteriorated, then the FED will be in disrepair
  - If it has not, then the FED will not be in disrepair

The proper approach (2)

- Retro-fitting of letterboxes, key drops, or other ‘invasions’ into the door structure which have the effect of compromising its pre-existing standard (whatever that was) may be sufficient deterioration
- If an FED is found to be in disrepair, and the landlord has covenanted to repair it, its replacement will likely be a repair as a matter of law (and even though it will be an ‘improvement’ on the existing FED)
- Ordinarily, albeit depending on the particular lease, the replacement of FEDs will be service charge costs, and not ones directly levied against the individual whose FED has been replaced

Other routes to recovery?

- Where a non FD30 FED is not in disrepair, are there other covenants the landlord can rely on to justify replacement and recover a service charge
- Obligation to keep in “good condition”?
  - Credit Suisse v Beegas Nominees Ltd [1994] 1 EGLR 76 - this covenant is broken once the condition of the premises falls short of such condition as, having regard to the age, character and locality of the premises, would make them reasonably fit for the occupation of a reasonably minded tenant of the class likely to take them, even though there may have been no physical damage or deterioration in the subject matter.
- Landlord’s contractual entitlement to improve (but consider cases where the FED is demised to the leaseholder)

But please note …

- Other possible means of ensuring the replacement of FEDs?

- Other covenants in leases
- Powers to make regulations
- Insurance covenants (i.e. not doing acts etc which may have the effect of rendering insurance policies void or voidable)
- Compliance with notices served on landlord
- Regulatory Reform (Fire Safety) Order 2005
- Part I Housing Act 2004

Sprinkler Systems

Sprinkler systems

- Where a landlord wishes to install fire alarms or sprinkler systems in the common parts of blocks, (not requiring access to individual flats)
- It is doubtful that any lease would prevent it from doing so

- But a service charge would only be payable if
  - There is a contractual entitlement to improve or to add to the existing installations or services (always depending on the precise terms of the lease), and
  - The landlord has adopted a ***Waaler*** compliant approach

Sprinkler systems (2)

- Where the landlord wishes to install a sprinkler system or hardwire alarm system into each flat in a block, *very difficult* questions arise as to the landlord's entitlement to do so (and, logically, then to recover a service charge)

- Even if the lease contains an entitlement to improve, there are substantial arguments that such an entitlement does not extend to a right to improve the demised premises themselves (towards which the leaseholder is bound to contribute)

Sprinkler systems (3)

- Other options
  - Agree lease variations. (Any varied lease would need to be found reasonable by the County Court under paragraph 14(4), Schedule 6 Housing Act 1985 – but that endorsement would be bound to be given).
  - For LAs CANNOT seek a variation of the leases under section 35 Landlord and Tenant Act 1987 on the basis that the running costs of the common parts are not recoverable because this is implied into the lease by paragraph 16A(1), Schedule 6 Housing Act 1985.

Sprinkler systems (4)

- Grenfell Tower Public Inquiry
  - (14 of the flats were on long leases – 2 Housing Association owned)
  - The Regulatory Reform (Fire Safety) Order 2005 could be amended to require freeholders to fit sprinklers throughout blocks regardless of tenure.
  - Schedule 6 of the Housing Act 1985 could then be amended to include a new implied term across all right to buy leases that the lessee contributes towards the freeholder fire safety statutory obligations.

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Questions?

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