Cornerstone Housing Newsletter

August 2016

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Welcome to the Cornerstone Housing Newsletter August 2016

Bryan McGuire QC

We are very sad to announce the death of friend and colleague Bryan McGuire QC. Bryan was at the forefront of many significant developments in public law, particular in social housing, where cases such as Hotak, Kanu & Johnson, saw him achieve landmark rulings in the Supreme Court.

An obituary written by Kelvin Rutledge QC will appear shortly on chambers' website.

The Editor speaks…

The lead-up to the Housing and Planning Act 2016, and the eventual passing of this important piece of legislation on 12 May 2016, took up much of the housing spotlight over the last 12 months, and the "fall-out' continues today and will do so for some time to come. This is not least because of its dependence on regulations largely yet to be published.

We hope you enjoyed our special edition newsletter produced at the end of May 2016 to cover the Act.

This newsletter reverts to the general social housing field, and covers a range of issues hopefully of interest to those operating from within this area of law.

And so we have some "old favourites" – a wonderful analysis of the Court of Appeal's recent consideration of suspended possession orders by Catherine Rowlands for example, and an essential overview of fixed term tenancies by Emma Dring to give two examples.

Jack Parker and Zoë Whittington take a look at two recent higher courts' decisions affecting homelessness matters, whilst Kuljit Bhogal, who will be chairing the Resolve Annual Conference in November, looks at the increasingly important subject of unlawful profit orders.

Catherine even manages to make disrepair interesting by considering the Supreme Court judgment in Edwards v Kumarasamy (Ben Du Feu has also written on this in the most recent SHLA newsletter).

On a more "macro" level Kelvin Rutledge QC gives a masterly explanation of the Homelessness Reduction Bill 2016, whilst Dean Underwood bravely tackles the vexed topic of Brexit and its possible impact on social housing.

Reference to the Homelessness Reduction Bill reminds me that things are very different in parts of the United Kingdom other than England, and Clare Parry provides an impressive glimpse at the Welsh Assembly"s housing plans, with a particular focus on the scrapping of the ever controversial right to buy.

This newsletter also includes details of the 4th seminar in our Annual Housing Programme – Hoarding and Mental Capacity on 7 September 2016 - as well as the Annual Housing Day on 4 October 2016. We hope to see as many of you as possible at those events.

As chambers undergoes extensive physical refurbishment to improve facilities to clients, staff and members alike, so we hope that this newsletter fits in well with our advice and advocacy expertise, training commitments, e-flashes and social media output to ensure the best service possible is offered to our clients.

Finally, I cannot go without mentioning the untimely death of our friend and colleague, Bryan McGuire QC. This has inevitably provided the lead article of this newsletter. Bryan was a warm and generous person, and a brilliant and inspirational lawyer who will be sadly missed by all. Our commiserations go to his family.

Andy Lane

Through the looking glass, darkly: housing law in a post-Brexit UK

As the country comes to terms with the result of June's national referendum, Dean Underwood takes a look at post-EU housing law, through a dark, Brexit

looking glass.

" 'Why is a raven like a writing desk?' [said the Hatter] 'Come, we shall have some fun now!' thought Alice. 'I'm glad they've begun asking riddles…' "

Alice's Adventures in Wonderland,
Chapter 7, A Mad Tea Party

In June 2016, the UK electorate voted to leave the European Union or, to use the vernacular, to Brexit.

The result - foreword to arguably the most important chapter in the UK's recent constitutional history - heralds a significant change in the UK's relationship with the EU.

Since June, it has caused political and economic uncertainty: leadership contests; a new Cabinet; the devaluation of sterling; and a fall in the UK's credit rating.

At a more prosaic level, it has prompted questions about the potential effect of Brexit on areas of UK business and law, not least housing law.

Will rules governing the procurement of services by public bodies survive Brexit and, if so, what will they look like? What will Brexit mean for EU nationals seeking assistance under Parts VI and VII of the Housing Act 1996? What of the European Convention on Human Rights ('ECHR')? Will Brexit result in any significant change to housing law?

Trade press and social media alike have been replete with questions. Like Alice, at the start of The Mad Tea Party, commentators looked forward to the intellectual 'fun' of Brexit's many riddles … and to their answers.

Post-Brexit housing law: a Hatter's riddle?

Rarely, however, have so many questions yielded so few answers.

Commentators have been quick to point out that Brexit will not affect the application of the ECHR in the UK. Neither being a signatory to the ECHR nor the Human Rights Act 1998, which gives effect to it in domestic law, depends on the UK's membership of the EU.

Answers to other questions have, however, been atypically tentative. Why so?

In short, the effect of Brexit on housing providers and on domestic housing law will depend on the UK's future relationship with the EU. As Alice might have said to the Hatter, "The answer to your riddle, dear Hatter, rather depends on the writing desk!".

More particularly, it depends on which of four existing relationships with non-EU members it most resembles: on the one hand, those with Norway and Switzerland, which - broadly - allow free trade but require the free movement of people; or, on the other, those with Canada and the World Trade Organisation, more limited as they are in both rights and obligations.

If the former then, put simply, EU law would still apply and, broadly, the UK would be obliged to uphold the Single Market's fundamental freedoms – the free movement of people, goods, services and capital. If the latter, the Government would have far greater discretion to decide which aspects of EU law, if any, continue to bind the UK and to what extent.

It is simply too early to say, however, which of these relationship models the UK's future relationship with the EU will most resemble. Moreover, tormenting though it is, it is unlikely that the detail will become clear soon.

Brexit proper will not begin until the Government invokes Article 50 of the Treaty on the European Union.

Theresa May has indicated, however, that the Government will not invoke Article 50 before 2017; and Conservative Party Chairman, Patrick McLoughlin MP has committed only to doing so before the next

general election on 7th May 2020.

While it is likely to come under increasing pressure to begin Brexit sooner rather than later, therefore, the Government has given itself - potentially - a 3½ year window in which to begin the process.
Further, once that process has begun, the Government and EU will have two years - or such longer period as member states unanimously agree - to complete exit negotiations. In default of any earlier agreement, the UK will cease to be a member of the EU at the end of that period.

EU law as we know it will continue to apply in the UK until that time.

Quite what the scope of the Government's exit negotiations will be is presently unclear. Indeed, it is not yet known whether exit negotiations will encompass negotiation about the UK's new trade relationship with the EU, or whether that relationship will be the subject of further negotiation, after exit negotiations are complete.

With the above in mind, therefore, questions about the effect of Brexit on domestic housing law are likely to lack any certain answer for some time.

They are, however, no Hatter's riddle: unlike the latter, they at least will receive an answer at the end of this chapter in the UK's constitutional history. We, at least, will eventually know what the figurative writing desk looks like.

So, why is a raven like a writing desk?
In the meantime, naturally, speculation abounds; and it would be remiss, surely, not to indulge in a little here.

Procurement

EU directives governing the procurement of supplies, services and works by public authorities are, arguably, one of the more controversial of the EU's influences on the administration of social housing in the UK.

Domestically, they are given effect by the Public Contracts Regulations 2015.
In simple terms, the Regulations oblige public authorities wanting to procure supplies, services or works exceeding a prescribed value to follow the Regulations' procedures before awarding a contract to suppliers.

The underlying policy is to facilitate free and open competition in and between EU member states for the provision of supplies, services and works; and to increase value for the money that public authorities spend on them.

The rules have long been criticised, however, for introducing unnecessary and costly red tape into the administration of domestic social housing. In 2011, for example, the National Housing Federation estimated that compliance with EU procurement requirements cost the housing sector £30m annually - money that might otherwise be invested in the provision of social housing. That has led some to question - hopefully perhaps - whether the rules will apply in a post-Brexit UK.

While it is difficult to answer that question with certainty, knowing so little at present about the figurative writing desk, it seems unlikely that they - or a similar set of procurement rules - will not apply post-Brexit.

Public procurement rules play an important role in EU competition law, helping to uphold the free movement of people, goods and services in particular. Accepting the rules - or their effective equivalent - is likely to be important, if not pre-requisite, to gaining free access to the Single Market and to any meaningful trading relationship with the EU in the future.

Even if the Government does not agree to implement the EU's procurement directives in future, therefore, it is likely to have to formulate and implement its own;

and they are unlikely to reduce the much-lamented red procurement tape significantly.

Current procurement rules are, after all, as much about preventing corruption as they are about allowing open competition; and that is unlikely to change, it is suggested, in a post-Brexit UK.

It is possible of course that, with negotiation, some organisations - private registered providers in particular - might be excluded from the list of public authorities to whom the rules apply. In that regard, the National Housing Federation has indicated that it may discuss this issue with the Government. If it does so, the deregulation provisions of the Housing and Planning Act 2016 may yet add grist to that particular mill.

It is equally possible that the Government will succeed in reducing at least some of the existing red tape.

For the time being, however, it is far safer to assume that housing providers – local authorities and other registered providers alike - will have to comply with the red tape of procurement rules post-Brexit.

Eligibility for housing

It is far more difficult, it is suggested, to make the same assumption of a status quo in respect of EU nationals' eligibility for housing in the UK, whether under Part VI of the Housing Act 1996 or Part VII.

There are, it is estimated, approximately 3 million non-British EU nationals living in the UK and, according to the Department for Communities and Local Government, in 2014/2015, 4% of social housing lettings were made to EU national tenants.

Their eligibility for assistance under Parts VI and Part VII of the 1996 Act depends on their immigration status and, more particularly, on their reason for being in the UK.

Broadly, EEA nationals - including EU nationals - have extended leave to remain in the UK, beyond an initial three months, if they are self-employed, working, looking for work, self-sufficient or studying. Thereafter they may, in certain circumstances, acquire permanent leave to remain: for example, if they have resided and worked in the UK for a continuous period of 5 years.

At present, it is unclear whether the UK will remain a member of the EEA when it leaves the EU and, if it does not, whether it will renew its membership thereafter. It is equally unclear what the right of EEA nationals already residing in the UK will be, or what rights those coming to the UK in the future might expect.

Like so many other matters, therefore, the future eligibility of EU nationals for housing assistance will depend on the outcome of the Government's negotiations with the EU. It is conceivable that they will remain materially the same. It is equally conceivable that they will diminish.

The importance that immigration acquired in the campaign to leave the EU has, however, led some to speculate that the eligibility of EU nationals will indeed diminish. They are surely right to point out that their eligibility is no longer guaranteed.

Parts VI and VI of the 1996 Act, however, as presently enacted, help to give effect to the Single Market's fundamental freedoms, not least of which the free movement of people. That freedom, as noted above, is integral to the EU's trading agreements with other non-EU European countries – Norway, Iceland, Liechtenstein and Switzerland – and is likely to be important, if not pre-requisite, to the UK gaining favourable access to the Single Market in the future.

At present, therefore, to go further than acknowledge the precarious position of EU nationals - and that any change to their rights may affect a significant part of the housing sector - is potentially hasty.

Like Alice, therefore, we will have to continue to mull

the many possibilities without the hope of a clear answer for some time to come.

Brexit's indirect effects

In the meantime, one of Brexit's indirect effects may of course be that Parliament has insufficient time to enact or bring into force the raft of housing-related legislation recently introduced in- or passed by Parliament.

Brexit will place a heavy burden on Parliament, Government and the civil service. Disentangling the UK from the EU, politically and legally, is likely to occupy much of their time and resources for the foreseeable future. As former permanent secretary at the Foreign Office, Sir Simon Fraser, recently observed in the Financial Times, "It is the biggest administrative and legislative challenge that government has faced that I can remember, possibly since 1945. It would be a pretty all-consuming task for many Whitehall departments."

Whether, therefore, in the face of that challenge, there is time in the Parliamentary calendar to enact the Crown Tenancies Bill, the Homelessness Reduction Bill, the Housing (Tenants' Rights) Bill, the Renters' Rights Bill and other housing-related bills, many of which are at early stages of the Parliamentary process, remains to be seen. Equally, whether there is time to bring the many and diverse provisions of the Housing and Planning Act 1996 into force is unclear. What is clear, it is suggested, is that their progress is at best in jeopardy.

Conclusion

At the end of the Mad Tea Party, Alice sighs wearily and chides the Hatter, "'I think you might do something better with the time,' she said, 'than waste it in asking riddles that have no answers'."

Speculation about Brexit's implications for domestic housing law is no waste of time. Intellectually it is - depending on your predilections - 'fun'. It certainly helps to inform debate about post-Brexit UK and, potentially, the Government's position in forthcoming negotiations with the EU.

Had Alice asked a just few questions about the Hatter's infamous writing desk, she might have formed a different view about his riddle!

The answers to these questions are, however, unclear and it is doubtful that they will become clearer in the near future.

For the present, therefore, we will continue to peer through the Brexit looking glass, darkly, and hope for clarity. Whether that is forthcoming before the end of this particular constitutional chapter, or whether - like Alice - we have to endure a Mad Hatter's Tea Party beforehand - only time will tell.

Dean Underwood

Recent housing developments

Andy Lane looks at some of the issues facing the Housing Sector in the last 3 months…

Affordable Housing

- Peabody/CEBR report demonstrates the business case for affordable housing

Anti-social Behaviour

- Excellent Report by the Commons Library on the Troubled Families Programme (England)
- Protection from Harassment Act briefing from the Commons Library

- Revised Statutory Guidance has been produced on injunctions to prevent gang-related violence and gang-related drug dealing

Courts

- The Civil Procedure Rule Committee consults on proposed changes to the Court of Appeal permission test

Homelessness

- The Commons Library has produced a briefing paper on section 21 notices and homelessness applications
- The London Councils spent nearly £600 million over an 18 months period
- Rough sleeping (England) briefing paper from the Commons Library
- The DCLG produced the 1st quarter 2016 homelessness statistics and Statutory Homeless in England briefing from the Commons Library

Housing Associations

- European Investment Bank funding for social housing and shared ownership development
- Brexit and Housing Associations paper from the National Housing Federation

Housing Conditions

- Empty Housing (England) Briefing and Empty Dwelling Management Orders briefing from the Commons Library
- The Commons Library prepare a briefing on the Housing Health & Safety Rating System

Housing & Planning Act 2016

- Lifetime Tenancies: Equality Impact Assessment (May 2016) issued by the DCLG and a briefing paper by the Commons Library
- Royal assent granted on 12 May 2016 (though not published until 23 May 2016!) and the Explanatory Notes have been produced
- DCLG consultation on starter homes regulations under the Act to end on 10 June 2016
- Second set of Commencement Provisions bringing various provisions of the Act into force on 13 July 2016, 1 October 2016 and 31 October 2016

Pay to Stay

- Latest Update from the National Housing Federation on Pay to Stay for housing associations

Private Renting

- The Home Office have produced a short guide on the Right to Rent (June 2016)

Regeneration & Housebuilding

- The Chartered Institute of Housing, Poplar HARCA and Sheffield Hallam University's CRESR have produced a report on regeneration funding
- Peabody submit plans to regenerate South Thamesmead
- The Commons Library produce a briefing paper on Stimulating housing supply - Government initiatives (England)
- The DCLG have produced the 2016 first quarter new build housing starts and completions statistics
- The CIH and CIPFA release a report encouraging joined up policies to allow greater local authority housebuilding
- The Communities and Local Government Committee launches an inquiry into the capacity of the homebuilding industry
- The House of Lords Select Committee on Economic Affairs produces a report calling for the building of more homes

Regulation

- The Homes & Communities Agency revise 'Regulating the Standards', primarily to take into account the changes in the HCA's approach to the Rent Standard resulting from the Welfare Reform and Work Act 2016.

Rents

- 'Rent Standard Guidance' (April 2016) issued by the Homes & Communities Agency
- Circle Housing reports on the need for extra support to those tenants moving onto Universal Credit
- "Rent setting: social housing (England)" paper from the Commons Library
- The National Federation of ALMOs produce a survey report on the impact of universal credit on rent arrears

Right to Buy

- Provisions for the funding of voluntary RTB discounts by the Secretary of State or GLA in Part 4 of the Housing & Planning Act 2016 in force from 26 May 2016
- The Welsh Government announce its intention to abolish the Right to Buy and the Right to Acquire
- The DCLG have produced Right to Buy Sales figures for the first quarter of 2016 in England
- Voluntary Right to Buy Advice from Kelvin Rutledge QC & Ashley Bowes of Cornerstone Barristers
- The Commons Library has prepared an updated briefing note on "Extending a voluntary Right to Buy to housing association tenants (England)"

Miscellaneous

- Julian Ashby's tenure as the HCA's regulation committee chair extend to March 2018
- The HCA have produced analysis of the cost variation in the social housing sector
- The Crown Tenancies Bill (2016-17) will receive its 2nd reading on 16 December 2016

Andy Lane

New housing minister appointment

On 17 July 2016 the housing world discovered who would replace Brandon Lewis M.P. as Housing & Planning Minister, in the Department of Communities and Local Government, now headed by Sajid Javid M.P.

Gavin Barwell has been the M.P for Croydon Central since 6 May 2010 and was previously in the Whips Office. Before being elected to Parliament, he had worked for the Conservative Party as well as a consultant, and was also a Croydon Councillor from 1998 to 2010.

Mr Barwell is the 14th Housing Minister since 1997, and the 5th since 2010, and can be followed on Twitter @GavinBarwellMP.

The Homelessness Reduction Bill

The Homelessness Reduction Bill is a Private Member's Bill introduced to Parliament on 29th June 2016 by Bob Blackman, backbench Conservative MP for Harrow

East. On the same day, figures published by the Greater London Authority showed a seven per cent rise in rough sleeping in London during 2015-16. The Bill, which is based upon recommendations contained in a report commissioned by the charity Crisis, aims to amend Part 7 of the Housing Act 1996 to make further provision about measures for reducing homelessness.

Focusing on advice, information and prevention, the Bill aims to set out more clearly the types of housing advice and information local authorities must provide to people before they become homeless or are threatened with homelessness and this new duty would apply to all eligible households irrespective of priority need and intentional homelessness. The onus would be on local authorities to demonstrate that they are taking reasonable steps to prevent homelessness.

Section 175 of the 1996 Act defines "homelessness and threatened homelessness". Currently a person is threatened with homelessness if it is likely that he will become homeless within 28 days. The Bill proposes to extend that period to 56 days to enable local authorities to respond to the threat of homelessness at a much earlier point, and providing help such as mediation with landlord, payment by way of grant or loan, or debt management support. It will further provide that local authorities will have to accept a valid notice to quit or equivalent as evidence that the tenant is threatened with homelessness, overturning the rule laid down in Sacupima v Newham LBC [2001] 1 W.L.R. 563 that tenants do not become homeless until physically evicted from their properties.

The Bill further proposes to introduce a new relief duty for all eligible homeless people who have a local connection, so local authorities must take reasonable steps to secure accommodation regardless of priority need status. If the authority is unable to prevent an applicant's homelessness, they should help to secure alternative accommodation, for example, by providing a grant or loan, or advice and advocacy to help secure a tenancy in the private rented sector. This duty would last for a period of 56 days after which, if not accommodated, the applicant would be assessed to see if he is eligible for the main homelessness duty.

The Bill also proposes a new duty to provide emergency accommodation for homeless people with nowhere safe to stay, for up to 28 days so they are not forced to sleep rough. Applicants would only be able to access emergency interim accommodation under this duty for a maximum of 56 days and on no more than one occasion every six months.

In return for these new obligations, the onus would be on applicants to cooperate with local authorities' efforts to help them. Local authorities would be permitted to discharge their prevent and relief duties if an applicant unreasonably refuses to cooperate with the course of action that they have agreed to undertake.

Many of these suggested changes draw on the Welsh Government's 2014 Housing Act.

The Bill is expected to have its second reading debate on Friday 28th October 2016.

Kelvin Rutledge QC

The Court of Appeal considers suspended possession orders - City West Housing Trust V Massey

City West Housing Trust v Massey, Manchester and District Housing Association v Roberts [2016] EWCA Civ 704 is a somewhat troubling development for landlords seeking to control anti-social behaviour in their properties. When there has been criminal activity in the property, the landlord will normally seek an order for possession on the basis that it is reasonable to grant possession. This gives the Court options including imposing a suspended possession order and giving the tenant the chance to mend his ways. In what circumstances should this be done?

In Bristol City Council v Mousah (1997) 30 HLR 32, the Court of Appeal considered the case of a tenant who had schizophrenia, and who had used his Council house for the supply of Class A drugs. The Court of Appeal held that where a serious criminal offence had been committed at the premises, only in exceptional cases could it be said that it was not reasonable to make an order for possession; that should be the usual approach in such cases. However, in Stonebridge HAT v Gabbidon [2003] EWHC 2091 Lloyd J was persuaded not to make an outright possession order, and this case was sometimes cited as authority for the proposition that possessing or dealing cannabis is not so serious that a possession order must be made. However, the true ratio is that the tenant was not herself a perpetrator: her liability was limited to permitting smoking of joints on two occasions and on three occasions allowing crack to be dealt at the flat. That was the state of the law when the Court of Appeal had to consider the case of someone who had given their Council house over to the cultivation of cannabis: he considered growing cannabis to be a hobby, such as everyone should have! He had previous convictions for cannabis cultivation and yet the District Judge., who did not hear evidence from him, accepted the submission on his behalf that he had turned over a new [skunk] leaf. She made a suspended possession order. The Council successfully appealed and the Court said

The more serious the offence, the more serious the breach. Convictions of several offences will obviously be even more serious. In such circumstances, it seems to me that the court should only suspend the order if there is cogent evidence which demonstrates a sound basis for the hope that the previous conduct will cease.

Arden LJ also commented:

For my part, I do not consider that the question of whether the serious conduct would cease is the only factor, since the court has a very wide discretion, including the duty to consider the effect on those living in the locality. This was a serious and serial drug-related offence and that would, in my judgment, normally give rise to a necessity for a tenant to have to show a strong case to resist an immediate possession order. I think that the making of a stay in this type of case is likely to be exceptional.

And Gage LJ said:

I would add that the council, as a provider of social housing, have a duty to make sure (so far as it can) that its properties are properly managed and are kept free from the sort of activity with which we are concerned. This, in my judgment, is another factor which weighs the balance in favour of an outright order.

These useful dicta from *Hensley* have been cited by landlords in many cases of criminal activity in the property. For example, in Knowsley Housing Trust v Prescott [2009] EWHC 924 (QB), Blair J noted that the one of the joint tenants, who asserted that she was innocent of her husband's drug dealing, had failed to give evidence. That was not cogent evidence demonstrating a sound basis for the hope the conduct would cease. The social factors cited by Arden and

Gage LIJ added weight to the decision to make an outright order.

In *City West Housing Trust v Massey, Manchester and District Housing Association v Roberts*, the Appellant tenants sought to challenge this long-established case law. Both tenants' houses had been used for the cultivation of cannabis and in both cases, the tenants claimed that they were not responsible for it. They were made subject to suspended possession orders which required them to allow inspections by their landlords at any time. Both housing associations appealed to the County Court, one successfully, one not; both then came to the Court of Appeal with two issues: what should the Court do when a tenant has lied in evidence? Can that be considered "cogent evidence" upon which the Court can be satisfied that there is a sound basis for the hope the conduct would cease? And is it right for the Court to impose conditions of suspension which, in fact, put the onus on the landlord? That had been considered in *Hensley* but only briefly, Arden LJ being told, to her surprise, that landlords can't just go in and inspect a property at will.

On the question of lies, the District Judge had firmly rejected Ms Massey's story that she knew nothing of the cannabis being grown in her home. She had lied because she didn't want to lose her house. But she was willing to allow the landlord to inspect the property and to exclude her partner, who had grown the plants. Mr Roberts claimed that he had been coerced by a gang into letting them use his house to grow cannabis, but he had been found guilty of the offence of permitting the production of cannabis. He said that now the Police had raised his house, he thought that the criminals would move elsewhere. The District Judge accepted that. Again, he made a suspended possession order with a condition that the Housing Association could inspect the flat monthly. The Circuit Judge, on appeal, found that there was no sound basis for the hope that the conduct would cease.

The Court of Appeal (Arden LJ giving the leading judgment) said that cogent evidence had to be not just credible but also persuasive. It must persuade the Judge that there is a sound basis for the hope that the conduct will cease. That standard is pitched at a realistic level:

On the one hand, the tenant does not have to give a cast-iron guarantee. On the other hand, a social landlord does not have to accept a tenant who sets out to breach the terms of his tenancy and disables the landlord from providing accommodation in more deserving cases.

The Judge should have regard to all the evidence, such as the support that might be available to a tenant to give firmer foundation for that hope.
The fact that a tenant had lied cannot be an absolute bar to the making of a suspended possession order. If that were the case, lying on an application for housing should be a case for immediate possession, which it is not. There are many reasons why a person might lie, such as fear of the consequences. That is something to be taken into consideration, but at the same time.

Tenants should realise that if they lie in their evidence to the court they run the risk that the court will find that their evidence is not to be trusted on other matters and that the court will not accept assurances from them for the future. Giving false evidence is a very serious matter and it may have very serious consequences for the tenant.

If a Judge thinks that there is cogent evidence when a tenant has lied, she should be careful to give reasons for that.

There is nothing controversial in the Court's comments here. To say that the Court has to look at all the surrounding circumstances and make a judgment for the future is common sense and is consistent with earlier case law. That there are many reasons why a person may lie, or that a person who lies about part of her evidence may be believed on other parts, is not a

new principle. The Judge has to make an overall assessment of what will happen in future, making the best guess possible from all that has been said.

What is more controversial is that the Court considered that part of the circumstances that can be taken into consideration is the fact that the landlord can be given a right to inspect the property which, if the tenant thinks it will really happen, is something that will tend to prevent future offending. That means that the onus is on the landlord to inspect – or have some inkling that there is something to inspect. Arden LJ brushed over the resource implications and commented that sometimes landlords have to be ready to take an active role.

It will be a matter of evaluation for the district judge whether the prospect of inspection in fact, or the perception of a risk of inspection, is sufficient to support an overall assessment that there is cogent evidence which provides real hope that the terms of the tenancy agreement will be properly respected in future.

There was no discussion by the Court of Appeal of how such a condition was to be enforced. If a tenant does not allow an inspection one day, but allows it the next, the landlord may suspect that there was something hidden the previous day but be unable to prove it. If the tenant refuses to allow inspection at all, it may be many months before any application to enforce gets back before the Courts, in which time much damage may be done – to the community, to the property and to the tenant and his household. Although the Court emphasised that a condition of this nature was not a panacea in each case, the Court of Appeal in the end upheld the suspended possession orders made by the District Judges partly on the basis that the existence of that condition, and the tenant's willingness to have such a condition imposed, made it more likely that the conduct complained of would cease. It is to be expected that tenants in similar circumstances in future will ask for suspended possession orders on a similar basis, with potential resource implications for landlords. Any landlord presenting a case to Court would be well advised to bring evidence of the cost of such inspections. Another concern in cases like *Roberts* is the risk of violence to the inspector: if the gang threatened the tenant, they would probably not hesitate to do as much or more to an official interrupting them at work. Given these issues, is it reasonable to expect the landlord to undertake the role of policing their tenants? How does that sit with the comments in *Hensley* about the need to keep social housing clear of drugs and drug users?

The landlords are considering a further appeal to the Supreme Court which may give further guidance on this aspect.

Catherine Rowlands

Unlawful profit orders

There have been substantial gains recovered by social landlords through the unlawful profit orders regime introduced by the Prevention of Social Housing Fraud Act 2013. Kuljit Bhogal provides a helpful review of their place in the sub-letting work of such landlords.

Introduction

The consultation paper which led to the Prevention of Social Housing Fraud Act 2013 estimated that there were at least 50,000 social housing homes in England which were being unlawfully occupied.

The Act was the government's response to the problem: it created two new criminal offences and the ability to

seek an unlawful profit orders in the criminal or civil courts.

A number of prosecutions have been brought and unlawful profit orders have been obtained by both local authorities and housing associations. However, it remains as difficult as ever to prove the sub-letting has taken place.

The criminal offences

The offences are in respect of secure and assured tenancies (where the landlord is a private provider of social housing (in England) or a registered social landlord (in Wales)).

It is an offence to sub-let or part with possession of the whole or part of a dwelling-house without the landlord's consent (s1(1) or s2(1)). The tenant must cease to occupy the dwelling-house as his only or principal home and must know that his conduct is in breach of his tenancy. What follows is that the tenant must know that his conduct is in breach of his tenancy. This includes a situation where the tenant 'deliberately shuts his eyes' to the truth: per Lord Reid in *Warner v Metropolitan Police Commissioner [1969] 2 A. C. 256 at 279; Atwal v Massey (1972) 56 Cr, App. R. 6, DC*.

A second offence is created where there is dishonesty in addition to the above (s1(2) or s2(2)).

The offences will not be committed where sub-letting or cessation of occupation is as a result of violence or threats of violence to the tenant of his household by a person residing in, or in the locality of, the dwelling-house.

The punishment for the summary offence is a fine not exceeding level 5 on the standard scale (currently £5000). The dishonesty offence is an either way offence which carries a maximum sentence of two years imprisonment and/or a fine. An unlawful profit order may also be made upon conviction.

Local authorities have the power to prosecute the offences and proceedings must be brought within 6 months beginning with the date on which evidence sufficient to warrant the proceedings comes to the prosecutor's knowledge (s3).

Unlawful profit orders ('UPOs')

A number of UPOs have been made by the courts. They are available in both criminal and civil proceedings. They require a tenant to pay the landlord an amount representing the profit made by them as a result of the sub-letting/parting with possession of the whole of the demised premises.

In criminal proceedings a UPO can be made where a tenant is convicted of an offence under ss1 or 2. If the court chooses not to make a UPO it must give reasons for that decision when passing sentence.

Sections 4(6) and 5(6) set out how the amount payable in a UPO is to be calculated in criminal or civil proceedings. In summary the court must determine the total amount the tenant has received as a result of his conduct and deduct from that amount any amount paid as rent (including service charges) to the landlord. Where an offender has insufficient means to pay both a UPO and a fine, the UPO must take preference (s4(8)-(9)).

In civil proceedings, the court has the power to make a UPO where the tenant is in breach of an express/implied term of the tenancy by sub-letting or parting with possession of the whole/part of the dwelling-house, has ceased to occupy as only or principal home and has received money as a result of his conduct. For assured tenancies the landlord must be a private registered provider of social housing or a registered social landlord, and the tenancy cannot be a shared ownership lease.

The Prevention of Social Housing Fraud (Power to Require Information) Regulations 2014 (SI 2014/899) allow a local authority officer to require information from a list of specified persons (e.g. banks and utility companies) for the purpose of preventing, detecting or securing evidence in respect of social housing fraud.

Conclusion

Whilst some social landlords have successfully obtained UPOs they have not been sought as often as one would expect given the prevalence of social housing fraud.

It is unusual to be able to evidence the sub-letting with a tenancy agreement between the tenant of the property and his/her sub-tenants (although I have certainly had cases where the agreement has been available). Proving the underlying sub-letting or parting with possession remains as challenging as ever and evidence gathering remains an important part of bringing a successful claim. If you are considering bringing a prosecution or a civil claim we are happy to advise on gathering evidence and making the best use of evidence, including hearsay evidence.

Andy Lane wrote in the last newsletter about the question of evidence in sub-letting cases. His article can be found here.

Kuljit Bhogal

Scrapping the Right to Buy in Wales

On the 28th June 2016 First Minister Carwyn Jones announced the legislative programme for the Welsh Assembly for the next twelve months. Six pieces of legislation are proposed and the sixth is of most interest to housing practitioners. Carwyn Jones introduced the Bill in the following terms:

"Finally…., we will bring forward a Bill to abolish the right to buy and the right to acquire. We must safeguard our social housing stock in Wales and ensure it's available to people who need it and who are unable to access accommodation through home ownership or the private rented sector. We need to build more homes, and this Government is committed to delivering an extra 20,000 affordable homes during this Assembly term, but we must also tackle the pressure on our current social housing stock. This Bill will seek to protect that stock from further reductions. The analogy I've used before is that it's like trying to fill the bath up with the plug out."

The inclusion of such legislation is unlikely to have come as a surprise to most as it was a manifesto commitment of Welsh Labour, who forms the biggest party in the Assembly. It was also a manifesto commitment of Plaid Cymru, the second largest party in the Assembly who welcomed the Bill in principle subject to consideration of its detail. .

Political thinking in Wales is however not all one way of course and Andrew Davies on behalf of the Conservatives responded to the announcement saying:

I do regret the legislative part of this programme about the right to buy. I do believe that that is one of the biggest drivers of aspirational attainment over the last 30 years: the ability to own your own home. And 138,000 people have benefited here in Wales from the ability to own their own home. You say that it's like filling the bath with water without the plug in, but actually, if you have a housebuilding programme that actually meets the demands placed by people to acquire houses, then obviously you are going some way to actually meeting that need and meeting that demand. Successive Welsh Governments have not had a housebuilding programme to meet the requirements and the need across Wales, and that's evident from the numbers that have come forward. But, again, I

appreciate that's an ideological difference between us, and you will bring that legislation forward and it will be scrutinised accordingly.

Although there will be opposition to the Bill given the current make up of the Assembly there is little prospect of it being defeated. At this time nobody has seen the exact detail of the Bill that will be brought forward. Carwyn Jones has confirmed that no new legislation will be brought forward in the first one hundred days of the Assembly term, so draft legislation is not anticipated until after the summer recess.

The best place to understand Welsh Government's thinking on the need to abolish right to buy and the likely details of any legislation is the consultation paper 'The Future of the *Right to Buy* and *Right to Acquire* A White Paper for Social Housing' published by the Welsh Government in January 2015. The paper made clear the Government's view that the continued loss of social housing stock was inconsistent with the Welsh Government's ambitions to provide sufficient housing for those in need. The White Paper emphasises the Welsh Government's view that social housing forms an important part of this ambition noting "social housing with its lower rents makes a real contribution to tackling poverty, as well as providing homes".

The loss of social rented properties to right to buy is Wales is not substantial-in the five years before the white paper an average of 188 homes per year had been sold through right to buy and in the previous year 253 homes had been sold. This is set against holdings of approximately 223,000 social rented homes. Historically loss of housing stock has been much greater with a total of 137,000 social rented homes being sold between 1980 and 2007. However when the current losses are set against the demand for social housing which continues outstrip supply, and when the losses are considered in the context of the Welsh Government's ambition to provide 20,000 more affordable homes the Government is clear in the White Paper action needs to be taken.

The White Paper does make it clear that the Welsh Government intends to revoke all of the right to buy, the right to acquire and the right to buy retained by housing association tenants who have transferred to housing associations.

The Welsh Government already has the power to suspend the right to buy in an area on application by a local authority in that area, and that has occurred in Carmarthenshire but they concluded that this ad hoc approach was insufficient and had the potential to lead to unfairness.

The White Paper ultimately proposed two solutions to the perceived problem: a short term solution of reducing the maximum right to buy discount from £16,000 to £8,000 and a medium to long term solution of legislating to end the right to buy altogether. The reduction in the right to buy discount has already occurred.

The proposals in the White Paper were not universally welcomed by consultees with some tenants expressing concerns they were being robbed of the opportunity to purchase their homes. Some authorities raised concerns about the impact large estates where the loss of right to buy might mean working households leave with consequent negative effects on estate management. Many consultees suggested retaining the right to buy but reinvesting monies obtained. Despite those concerns consultee responses were generally positive to the Government's proposals and those proposals now look set to become law.

It is worth reflecting that the Welsh and Westminster Governments are heading in fundamentally different directions on housing policy, no doubt driven by ideological difference. The Welsh look set to abolish right to buy. This is set alongside the abolition of the housing revenue account provided for in the Housing (Wales) Act 2014 which will allow the building of further traditional social housing by those authorities which still own their own social housing. The Welsh are moving towards a system built around meeting housing needs through the provision of traditional social housing.

England is moving towards a very different model of housing provision. Time will tell which direction provides most effectively for the substantial need both sides of the border from those who cannot meet the market cost of housing.

Clare Parry

Disrepair in the Supreme Court - Edwards v Kumarasamy

How unusual it is to have a higher Court decision relating to section 11 of the Landlord and Tenant Act 1985 to talk about. How exciting, then, to have a Supreme Court decision on the topic! That is what we have in Edwards v Kumarasamy [2016] UKSC 40. It is a decision that will come as something of a relief to landlords who, following the decision of the Court of Appeal, had faced the prospect of extended liability over an uncertain area. How far did the definition of "the exterior" of a property extend? As well as limiting the landlord's liability, their Lordships took the opportunity to re-state some well-known principles of disrepair law.

The claim concerned Flat 10, Oakleigh Court, Boston Avenue, Runcorn. Oakleigh Court was let on a long lease to Mr Kumarasamy, who granted an assured shorthold tenancy of Flat 10 to Mr Edwards. The implied terms contained in section 11 applied to this tenancy. In particular, section 11(1A) applied as this was part of a building: so the reference in paragraph (a) of that subsection 11(1) to the dwelling-house included a reference to any part of the building in which the lessor has an estate or interest.

Oakleigh Court had three floors with four flats on each floor. It had a main entrance door leading into a front hallway and then to the lift and staircase
which serve the two upper floors. There is a car park in front of it, and, between the car park and the front door, there is a paved area, which is the only or principal means of access to the building. The paved area was also used by occupiers to get to the communal dustbins in the car park.

It was as Mr Edwards was using that path to get to the dustbins that he tripped and fell, injuring his hand and knee. He sued his landlord for damages for personal injuries. The question was whether the paving stones that made up the access path were part of the landlord's repairing obligations under the lease.
The second issue was whether, if so, the landlord was in breach of that repairing obligation: he had not had notice of the unevenness of the paving stones.

The Lords considered that "exterior" of the property had to be given its ordinary meaning – if there is such a thing. It was not right to speak of a path as part of the exterior of the entrance hall; it was merely adjacent. They did not think that too wide a meaning should be given to a landlord's contractual obligations. In Brown v Liverpool Corpn [1969] 3 All ER 1345 the Court of Appeal had held that the front steps to a property were part of the exterior; that case was expressly overruled. The exterior of the house or building stops at its outside walls. It does not extend to rights of way, easements, attaching to the property.

This practical, easily understood approach, is good news for landlords – bad news for tenants – although it should be recalled that this is an interpretation of the implied terms of section 11; express terms of many tenancy agreements place the responsibility for maintaining the path on the landlord in any event.
That being so, the other issues considered by the Supreme Court may be of relevance. Is a landlord obliged to repair the common parts that are within his control even if he is not on notice of the disrepair?

The Lords confirmed the general rule that notice is required: "a landlord is not liable under a covenant with his tenant to repair premises which are in the possession of the tenant and not of the landlord, unless and until the landlord has notice of the disrepair" – although, again, the express terms may alter this.

The Supreme Court, rather surprisingly, held that the landlord's repairing obligations (if there had been any) in relation to the path were subject to being on notice of the disrepair. The landlord had an interest in Flat 10 which he had wholly sublet to the tenant. He had a right of way over the path – those interested in easements may spend a happy few minutes reading about the discussion of the landlord's interest in the property. However, under the subtenancy, the right to walk up and down the path became Mr Edwards' right, not Mr Kumarasamy's. "The landlord has effectively lost the right to use the common parts and the tenant has acquired the right to use them, for the duration of the Subtenancy." The tenant was in the best position to spot any disrepair, and the landlord had no such opportunity – even though he had the right to inspect and access the flat for repairs.

This will no doubt extend to other aspects of the common parts; their Lordships had a brief moment of considering voids between flats, for example, but staircases and lighting are a far more common issue. A sensible landlord will still ensure that common parts are inspected and properly maintained – not least for the landlord's own sake. The Defective Premises Act may provide a remedy for tenants or other visitors to the property even if section 11 doesn't.

Catherine Rowlands

Fixed term tenancies – making them work

Background

1. Under the Housing Act 1985 it has always been theoretically possible for local authorities to grant fixed term secure tenancies: see s. 82(1)(b) and (3). However, in practice this power has rarely if ever been used. The hallmark of the secure tenancy has been that it rolls on from one period to the next, and can only be brought to an end by the landlord proving discretionary grounds for possession.

2. This position began to change in 2012, with powers under the Localism Act 2011 for local housing authorities to grant 'flexible tenancies'. These were fixed term tenancies of at least 2 years' duration. The take-up of these powers was far from universal, however; possibly because of the perceived technicalities associated with terminating such tenancies. It is also fair to say that the idea of a two year fixed term tenancy was seen by many as being anathema to the concept of security of tenure.

3. The logical end point of the 2012 changes has now been reached in schedule 7 of the Housing and Planning Act 2016, which (when it comes into force) will have the radical effect of doing away with the periodic secure tenancy, which will henceforth be known as an 'old-style secure tenancy'. All new secure tenancies will have to be fixed term tenancies of between 2 and 10 years in duration.[1] The only exception on the statute book is where the new tenancy is offered as a replacement for an 'old-style' secure tenancy, although the Act contemplates that other exceptions might be specified.

4. In this article, I explain the key elements of the new regime and how to avoid some of the pitfalls.

[1] There is specific provision for cases where a child under 9 will live in the dwelling. Then, the fixed term may end on child's 19th birthday.

Deciding on the length of the tenancy term

5. The first decision a local authority will need to make will be to decide how long the fixed term should last in the case of the prospective tenant (between 2 and 10 years). The Act envisages that government guidance will be produced to assist with this task.

6. Local authorities will also want to consider drafting their own policies to improve consistency and transparency. Indeed, although the Act does not expressly require the adoption of such policies, it plainly assumes that they will be in place. The prospective tenant will have 21 days to request a review of the decision on the length of the term, and the sole purpose of the review will be to consider whether length of term which has been offered complies with "any policy that the prospective landlord has about the length of secure tenancies it grants": s. 81D(2) of the 1985 Act. In the absence of a written policy, therefore, there would seem to be no scope for a review.

7. Regulations will be made in due course about the procedure to be followed on the review, and the Act specifically provides that the regulations may "require the review to be carried out by a person of appropriate seniority who was not involved in the original decision" and may provide for a right to an oral hearing. It is therefore likely that the regulations will follow the model for reviews under Parts VI (allocations) and VII (homelessness) of the Housing Act 1996.

8. **Tip:** Local authorities may want to consider keeping the decision on length of term distinct and separate to the decision to offer a particular property, breaking the decision down into two stages. If the two decisions are bound together, any review may result in a delay in the identified property being occupied, with budgetary and stock management implications.

Terminating fixed term tenancies:

(i) Tenant's right to terminate

9. By new section 86F of the 1985 Act, it will be an implied term of every new fixed term secure tenancy that tenant can terminate if:

a. 4 week's written notice is given (although the local authority can dispense with this), and

b. On the termination date there are no rent arrears and no other material breach of the tenancy terms.

10. There are at least two problems or pitfalls with these provisions.

11. First, if the tenant is in rent arrears or has otherwise materially breached the tenancy, the local authority may be quite happy for the tenancy to come to an end. However in these circumstances the conditions for the exercise of the implied term are not met. There is no scope within the statutory provision for waiving them. This may be considered somewhat counterintuitive.

12. Second, if the tenancy ceases to be secure (due to non-occupation or subletting of the whole) the implied term will not be available because it is a term "of every secure tenancy". Its availability depends on security being maintained.

13. **Tip:** local authorities should consider whether to include an express contractual break clause for tenants within the terms of their fixed term tenancy agreements. This could be drafted in a less restrictive manner, to avoid the problems just mentioned with the implied term. This would not be objectionable because it would not cut down the tenant's statutory right; in fact it would amount to an enlargement of that right.

(ii) Termination by the landlord at the end of the fixed term

14. Under new s. 86A of the 1985 Act, the local authority will be required to carry out a review when the fixed term has between 6 and 9 months left to run. The purpose of the review is to decide what should happen at the end of the term.

15. The options open to the local authority are: (i) to grant a new fixed term tenancy of the same property; (ii) to seek possession, but to offer a fixed term tenancy of another property instead; or (iii) to seek possession without offering any further tenancy. This provides flexibility for the local authority to respond to the changing circumstances of the tenant, in particular changing household size, and should go a long way towards alleviating problems with under-occupancy which can occur with long term periodic secure tenancies.

16. The outcome of the review will have to be notified to the tenant in writing no later than 6 months before the end of term: new s. 86B(2). The tenant will then have a right to request a reconsideration of the decision, in the event that the local authority decides on an option which involves seeking possession: new s. 86C. When carrying out the reconsideration, the local authority will have to consider "in particular" whether the review decision is in accordance with any policy it has adopted, but the scope of the reconsideration is not limited to that issue (in contrast with the review of the tenancy term) and all relevant issues are at large.

17. Again, regulations will be enacted to deal with the reconsideration procedure; and again, it is likely that the regulations will be modelled on the Part VI and VII Housing Act 1996 review procedures.

18. After the fixed term has ended, a statutory fixed-term tenancy arises automatically (unless a new fixed term secure tenancy of the same property has been granted and begins immediately on expiry). The purpose of this is to avoid any possible 'tolerated trespasser' issues, and to ensure that the rights and obligations of the tenancy continue to bind both parties until such time as the tenant's right to occupy can be formally brought to an end by the Court. The fixed term tenancy that arises is (i) the length offered by the local authority following the s. 86A review, if the tenant fails to accept the offer in time, or (ii) in any other case, 5 years.

19. If the local authority has carried out a s. 86A review and decided to seek possession, and has maintained that decision on any s. 86C reconsideration, it may then initiate possession proceedings under new s. 86E. The Court must make a possession order in such a case, provided the Court is satisfied that:

a. The local authority has complied with all of the statutory requirements relating to reviews and reconsiderations towards the end of the fixed term;

b. The fixed term tenancy has ended;

c. The proceedings were commenced within three months of the end of the fixed term;

d. The only tenancy in existence is the statutory fixed term tenancy which arises immediately on expiry of the original fixed term.

20. If a possession order is made, the automatic statutory fixed term tenancy comes to an end on the execution of the order and the tenant then has no legal right to remain in the property and can be evicted.

21. In the event that the statutory requirements have not been fully or properly complied with, the local authority will be in a difficult position. As set out above, the requirements involve decisions being made and notified prior to the end of the fixed term. The 6-9 month window will only come around once. If the original fixed term has ended, it will not be possible to go back in time and re-do the review and reconsideration procedures again. It therefore appears that a local authority will only have one chance to rely on the mandatory basis for possession in s. 86E.

22. The local authority would of course be able to rely on the normal discretionary grounds for possession in this scenario; however it must also be borne in mind that after the original fixed term has ended, the tenancy then in existence will be the automatic statutory fixed term. There are likely to be difficulties in relying on breaches of the original fixed term tenancy as a basis for seeking possession of the automatic statutory fixed

term; as this is a completely new tenancy as a matter of law.

23. **Tip:** It is obvious that compliance with the statutory review and reconsiderations procedures will be fundamental to the local authority's ability to seek possession at the end of the term, particularly given that the local authority seemingly only get one chance to get it right. It will also be noted that the timescales for carrying out the review are reasonably tight (bearing in mind that this requirement will eventually apply to all secure tenancies in the local authority's area). It will be very important for local authorities to schedule in these processes well in advance and to ensure that good records are kept of all stages of the process.

24. **Tip:** Although new s. 86E will provide a mandatory basis for making a possession order, it is worth remembering that a tenant can still mount a defence based on Article 8 ECHR, the Equality Act 2010 or public law errors even if the local authority has carried out all statutory procedures correctly. The review and reconsideration processes can be viewed as a useful way of flushing out any relevant issues or changes in circumstances and demonstrably having regard to them; potentially reducing the scope for successful challenges further down the line.

(iii) Termination by the landlord during the term of the tenancy

25. Provided the tenancy remains secure, it is open to the landlord to commence possession proceedings in the normal manner, by serving a notice seeking possession and issuing a possession claim relying on one or more of the statutory grounds. Even though the tenancy will be a fixed term tenancy, which would normally be brought to an end through forfeiture proceedings or a contractual break clause, new s. 82(A1) and (A2) provide that even in the absence of a break clause:

"a fixed-term secure tenancy of a dwelling-house in England that is granted on or after the day on which paragraph 4 of Schedule 7 to the Housing and Planning Act 2016 comes fully into force cannot be brought to an end by the landlord except by

(a) obtaining –

(i) an order of the court for the possession of the dwelling-house, and

(ii) the execution of the order…"

26. So far, so straightforward.

27. However, the situation is potentially much more complex in the event the tenancy ceases to be secure during the fixed term (for example, if the tenant has sublet the whole of the property). Landlords will be used to serving notices to quit in these situations to bring the tenancy to an end; because the requirement to prove grounds for possession only applies to 'secure' tenancies (s. 84(1) of the 1985 Act). However, service of a NTQ is not an option which is available in the case of a fixed term tenancy, because NTQs cannot be served during a fixed term (rather, they bring a periodic tenancy to an end at the end of a period of the tenancy).

28. In addition, s. 82(A1), which prevents local authorities from having to rely on break clauses and forfeiture proceedings during the fixed term, only applies to "a fixed term *secure* tenancy".

29. The consensus view is that, in these circumstances, a landlord will need to proceed to terminate the fixed term by exercising rights of forfeiture. The laws of forfeiture are complex and could themselves provide the material for many articles, and so I do not attempt to explain that procedure here. Suffice to say that great care needs to be taken to avoid the possibility of waiving the right to forfeit a tenancy, and the possibility of the Court granting relief from forfeiture also exists.

30. There are also difficult questions around the precise mechanism for ending a fixed term tenancy which has ceased to be secure, including issues around whether a statutory fixed term arises even after forfeiture proceedings, and how that is to be terminated. Such issues are beyond the scope of this article.

31. **Tip:** Local authorities should seek legal advice before attempting to terminate and seek possession in cases where it is believed that security of tenure has been lost.

Succession

32. Succession rights under s. 89 of the 1985 Act only apply to periodic tenancies, and therefore there will be no right whatsoever to succeed to a new fixed term secure tenancy.

33. In addition to this, the Housing and Planning Act 2016 contains provisions which amend s. 86A of the 1985 Act (persons qualifying to succeed) to make the Localism Act changes – which restricted succession rights to spouses and civil partners only – retrospective.

34. Finally, even where succession rights do still exist in the case of 'old-style secure tenancies', all successors will now acquire a new five year fixed term tenancy which is on the same terms as the previous periodic tenancy (as far as it is compatible with a fixed term agreement) and which is subject to any existing court orders (e.g. suspended possession orders).

35. **Tip:** Local authorities will need to take care when drafting new tenancy terms to take the above changes into account, and to ensure that staff are correctly trained on the retrospective changes.

Conclusion

36. It will be clear from the discussion in this article that the 2016 Act will introduce fundamental changes to the way local authorities grant and terminate tenancies. The new provisions include review and reconsideration procedures which will impose additional administrative burdens on local authorities, and will require careful training and overhauling of existing processes. There are various pitfalls in the possession procedure, notably in the requirement to get the statutory requirements right first time and in the very technical issues which arise where tenancies cease to be secure. The latter issue is almost certain to entertain the higher courts quite soon after the relevant parts of the Act come into force.

Emma Dring

Settling down in temporary accommodation for two years (by mistake)

Can accommodation provided to an intentionally homeless person under s. 190(2) HA 1996 (i.e. for such period as the local authority considers will give him a reasonable opportunity of securing other accommodation) ever become "settled accommodation"?

In Huda v Redbridge LB [2016] EWCA Civ 709, the Appellant had, by reason of an administrative error on the part of the local authority, never been evicted from the temporary accommodation provided under s. 190(2) HA 1996 and remained there for two years. Having accrued rent arrears, he became threatened with eviction and made a further application for assistance. His application was rejected on the basis that his accommodation had not been "settled" so as to break the chain of causation with the previous finding of intentional homelessness.

In a decision which will provide comfort to any local authority which finds itself in a similar position, the Court of Appeal upheld the reviewing officer's decision and found that it was open to the officer to conclude "as a matter of fact and degree" in accordance with Din v Wandsworth [1983] 1 AC 657 that the accommodation was "precarious (and therefore not settled) because:

- A had remained in the accommodation because of an administrative error. Failure to evict A was not indicative of a decision to allow him to remain;
- Although A had lived in the accommodation for two years, this was not determinative;
- A, having been provided with accommodation under s. 190(2), was a licensee not a tenant, did not enjoy exclusive possession and the Protection from Eviction Act 1977 did not apply (Desnousse v Newham LBC [2006] QB 831). Although the s.190(2) power may have come to an end, this did not mean that the nature of the Appellant's occupation had changed from licensee to attract a greater degree of security of tenure and there was nothing on the facts to suggest that this had happened. The Appellant could have been evicted by the local authority at any time;

The reviewing officer went onto find that, even if the Appellant had become an assured shorthold tenant by reason of the effluxion of time, the nature of the Appellant's occupation taken as a whole was precarious because the administrative error which led to the Appellant continuing to occupy the accommodation could have been discovered at any time. The Court of Appeal, having found that it was open to the reviewing officer to conclude that the Appellant was a licensee, declined to express a view on this aspect of the decision letter. It would perhaps be unusual, in light of the suggestion in Knight v Vale RBC [2004] HLR 106 that the grant of a 6-month AST would usually lead to accommodation being settled, that an AST did not give rise to settled accommodation but as the Court of Appeal noted, everything depend on the particular circumstances.

Jack Parker

Fresh facts or "more of the same"? Repeat homelessness applications

Zoë Whittington considers the recent High Court decision of R (on the application of Hoyte) v London Borough of Southwark [2016] EWHC 1665 (Admin) and the impact for authorities considering repeat homelessness applications which are similar to earlier applications.

In a judgment handed down on 8 July 2016, the High Court found that the decision of a local housing authority (LHA) not to accept a woman's third homelessness application within the space of a year was irrational.

In R (on the application of Hoyte) v London Borough of Southwark [2016] EWHC 1665 Admin the authority's refusal to consider Ms Hoyte's further homelessness application had been on the basis that, in the authority's view, the facts of her case had not changed since its earlier decision that she was not in priority need and the application was essentially "more of the same". The Court disagreed and found that the authority's conclusion that the application was based on the same facts was irrational in the Wednesbury sense. The evidence from Ms Hoyte's GP had been relied on heavily by the local authority in its earlier decision to make a finding (contrary to the evidence of a clinical psychologist instructed on Ms Hoyte's behalf) that she had, at that time, no active suicide plan or risk. By the time of the third application, however, the opinion of the GP had clearly changed. That being so, the new application could not be considered by any reasonable authority to be based on "exactly the same" facts, as was required following R v Harrow LBC Ex p. Fahia [1998] 1 WLR. Crucially, the local authority could not rely on facts which, although raised by the applicant in her previous application, had been rejected by the authority to now argue that 'the facts' on the new application were the same. That was irrational. The decision not to consider the application was therefore quashed, with the consequence that the authority would

be required to consider the application as a fresh application in the usual manner.

Facts

Ms Hoyte, a 58 year old woman, had a history of mental health problems and diagnosis of depression. She was homeless and had been temporarily 'sofa surfing' between the homes of her two daughters. In June 2015 she made a homelessness application to the London Borough of Southwark and, following inquiries, she was found not to be in priority need as she was not significantly more vulnerable than someone ordinarily vulnerable as a result of being homeless (applying Hotak v Southwark LBC, Kanu v Southwark LBC and Johnson v Solihull MBC [2015] UKSC 30). The decision was upheld on review. At that stage there were references to depression and self-neglect but nothing regarding suicidal ideation.

Ms Hoyte subsequently obtained a report from a clinical psychologist who diagnosed Ms Hoyte as having a major depressive illness that was quite severe and provided the opinion that Ms Hoyte was "quite a high suicide risk". This was used to support a second homelessness application by her in October 2015. The local authority obtained a report from its own medical adviser who disagreed with the psychologist's opinion and the local authority preferred their adviser's opinion and found again that Ms Hoyte was not in priority need. On review, further records were obtained from the GP covering the period both before and after the psychologist's report. In upholding the decision on review, the local authority placed reliance on the fact that the GP had noted that Ms Hoyte had no thoughts or plans to self-harm and the reviewing officer preferred this view of the GP and the authority's own medical adviser to that of the psychologist. The authority's conclusion was that there was no active suicidal ideation or planning and Ms Hoyte was not in priority need.

Following that decision, on 23 February 2016 Ms Hoyte received advice that she could not appeal the review decision and on 24 February 2016 she made plans to commit suicide. Those plans were intercepted and she instead saw her GP who concluded that she had "clear suicidal ideation" and made an urgent referral to mental health services. The mental health nurse who saw Ms Hoyte on 25 February found that she had "active suicidal thoughts with plausible evidence of plan and intent". A third homeless application was made by Ms Hoyte relying on the evidence of the GP and the mental health nurse. The local authority refused to accept the further application on the basis that it said there had been no material change in the facts which had led to the earlier decision because it had already been known to the authority when it made that decision that Ms Hoyte had depression and a history of suicidal ideation.

Ms Hoyte applied for judicial review of that decision, arguing that it was irrational to describe her application as factually identical to the earlier one because there was now active suicidal ideation as demonstrated by the new GP and mental health nurse evidence.

The Court's decision

The Court found that the local authority's decision – which was in essence a decision that the applications were factually identical - was irrational. In making that finding, the Judge found that the authority could not argue, as it tried to, that because the applicant had previously provided assertions of suicide risk that meant that the facts of the applications were the same. That was because the local authority had previously expressly rejected that those assertions by Ms Hoyte and not accepted that she was a suicide risk. On the contrary, it had specifically concluded that there was no significant suicide risk based on the GP's views at that time combined with its own medical adviser's opinion. That had been a decision which the authority was entitled to make but it could not then go back and refer to facts which Ms Hoyte had asserted as part of her application but had been rejected in the authority's decision. The Judge said that a person who has been presented with evidence but rejected it cannot reasonably then say that they had been aware of the facts which that evidence related to when they are

presented with new evidence of the fact that was alleged. It was held, following Begum (Rikha) v Tower Hamlets LBC [2005] EWCA Civ 340, that the facts behind an application had to refer to the facts that were in the decision maker's mind at the time of the decision and not merely the facts that were asserted but were not accepted by the decision maker.

The events of 24 February 2016 together with the new medical evidence resulting of those events were not simply new evidence of an existing situation but new facts and required fresh consideration. Further, since the local authority had previously placed significant reliance on the GP's views, it was irrational of the local authority to say that the facts were exactly the same when the GP's views had clearly changed.

Comment

Anecdotally it seems that repeat homelessness applications are becoming an increasing problem for LHAs. The impact of them on the already strained resources of all authorities, and especially those in the London area (as in this case), cannot be underestimated. Each separate application requires considerable resources in order to complete the necessary interviews and inquiries on the application, as well as to deal with the reviews if a negative decision is given and the individual exercises his or her right to seek a review. This pressure of authorities formed part of the respondent authority's submissions, however it is clear from the judgment that local housing authority's must be very careful to ensure that any decision not to consider a further application is properly one where the facts are genuinely not new. Applications may seem very similar to earlier ones but the test of being factually identical would appear to be quite a high one and authority's need to be mindful of any changes at all. Crucially, this decision makes it clear (and perhaps clarifies a point which was not clear from the previous case) that what matters when it comes to making this decision is how the authority treated the asserted facts in its previous decision and not merely the fact that the applicant asserted them previously. If, as here, the authority has rejected in an earlier decision some fact asserted by the applicant, the authority will not be able to rely on that asserted 'fact' as the basis of saying that the application is based on the same facts as previously.

Zoë Whittington

Housing cases of interest

Andrew Lane has put together the recent Housing cases of interest over the last 3 months.

Allocations

R (on the application of GEORGIA WOOLFE) v ISLINGTON LONDON BOROUGH COUNCIL QBD (Admin) (Holman J) 15/07/2016

A local authority's operation of a points based threshold for bidding for social housing had not been unlawful and did not breach the Housing Act 1996 s.166A or the Children Act 2004 s.11. However, it had misapplied its policy when awarding points under its "New Generation" policy.

Children Act

R (on the application of N) v GREENWICH LONDON BOROUGH COUNCIL QBD (Admin) (Andrew Thomas QC) 25/05/2016

A local authority was ordered to provide interim accommodation to a seven-year-old child and his mother pending the hearing of his judicial review application of the decision that he was not a child in need under the Children Act 1989 s.17. He and his mother would be unable to obtain appropriate accommodation in the interim.

R (on the application of (1) C (2) T (3) M (4) U) (Appellant) v SOUTHWARK LONDON BOROUGH

COUNCIL (Respondent) & CORAM CHILDREN'S LEGAL CENTRE (Intervener) [2016] EWCA Civ 707

A local authority had not followed a flawed policy or practice thereby fettering its discretion in its provision of accommodation and financial support to a family seeking assistance under the Children Act 1989 s.17.

Civil Procedure

(1) IAN HANDLEY (2) SHEILA EVANS v LAKE JACKSON SOLICITORS (A FIRM) : VANDA LOPES v LONDON BOROUGH OF CROYDON : CHRISTIE OWEN & DAVIES LTD v (1) ISABELLE MICHELLE AWAN (2) SAFARAZ AWAN [2016] EWCA Civ 465

The court determined the correct destination for appeals where there had been an appeal to the county court which had made a determination as to costs and the parties wished to appeal the costs order.

Disrepair

EDWARDS v KUMARASAMY [2016] UKSC 40

The repairing covenant implied into a subtenancy of a flat by the Landlord and Tenant Act 1985 s.11 did not impose, under s.11(1A), a liability on the headlessee to keep a paved area outside the building in repair, as it was not part of the exterior of the common parts of the building in which the headlessee had an interest.

Homelessness

R (on the application of S (ALBANIA)) v WALTHAM FOREST LONDON BOROUGH COUNCIL [2016] EWHC 1245 (Admin)

A local housing authority's failure to perform a "housing needs" assessment, as required by the Housing Act 1996 s.192(4), before deciding not to exercise its discretion to house an applicant who was not in priority need amounted to a failure to discharge its duties under s.192(2) and s.192(3). Judicial review was the appropriate form of challenge, rather than s.202 of the Act. There was no need to wait until the statutory review process or appeal procedure was completed.

R (ON THE APPLICATION OF ROGER PLANT) V (1) SOMERSET COUNTY COUNCIL (2) TAUNTON DEANE BOROUGH COUNCIL [2016] EWHC 1245 (Admin)

The court declined to set aside a default order requiring a local housing authority to discharge its housing duty to a homeless person. The housing authority could satisfy neither the requirements of CPR r.39.3 nor the three-stage test in Denton v TH White Ltd [2014] EWCA Civ 906, [2014] 1 W.L.R. 3926 and in any event had satisfied the order by making an offer of accommodation which it deemed suitable.

LOUNIS v NEWHAM LONDON BOROUGH COUNCIL QBD (Eady J) 22/06/2016

A judge had been entitled to refuse to extend time for a s204 appeal against a local authority's review of a housing decision where the appellant had not presented evidence of a good reason for his delay in lodging the appeal.

R (on the application of JENNIFER HOYTE) v SOUTHWARK LONDON BOROUGH COUNCIL [2016] EWHC 1665 (Admin)

The court quashed a local authority's refusal to consider a homeless woman's further application for priority housing where it had concluded that the facts of her case had not changed since its decision that she did not have a priority need. Given that the local authority in making its decision had placed significant weight on the views of the woman's GP concerning her mental health, and those views had since clearly changed, its conclusion that the new application was based on the same facts was irrational.

HUDA v REDBRIDGE LONDON BOROUGH COUNCIL [2016] EWCA Civ 709

In determining whether accommodation provided under the Housing Act 1996 s.190 could be regarded as "settled", all relevant facts had to be considered. No distinction could be drawn between those factors evident from the occupation agreement and factors that arose from outside the agreement.

Nuisance

EALING LONDON BOROUGH COUNCIL v CONNORS & ORS [2016] EWHC 1387 (QB)

An interim injunction prohibiting a family of travellers from setting up encampments on public land and highways within the applicant local authority's borough was granted where there was evidence that they had created a public nuisance.

Planning

ST MODWEN DEVELOPMENTS LTD (Claimant) v (1) SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT (2) EAST RIDING OF YORKSHIRE COUNCIL (Defendants) & SAVE OUR FERRIBY ACTION GROUP (Interested Party) [2016] EWHC 968 (Admin)

National Planning Policy Framework para.47 required that sites for housing supply should be available, in a suitable location, achievable and have a realistic prospect of being developed, but there was no requirement for a site to have existing planning permission. The NPPF did not require housing need to be assessed always and only by reference to the area of the development control authority: an authority was entitled to assess housing need on the basis of its and a neighbouring authority's combined areas.

R (on the application of OXTED RESIDENTIAL LTD) v TANDRIDGE DC [2016] EWCA Civ 414

It was lawful for a local planning authority to adopt a development plan document and a community infrastructure levy charging schedule to support a core strategy prepared under a national planning policy for housing land supply that had been superseded by the National Planning Policy Framework on its publication in March 2012.

SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT v (1) WEST BERKSHIRE DISTRICT COUNCIL (2) READING BOROUGH COUNCIL [2016] EWCA Civ 441

The Court of Appeal determined that the decision of the Department of Communities and Local Government, by way of written ministerial statement, to alter national policy in respect of planning obligations for affordable housing by introducing exemptions from the requirement to provide affordable housing for small sites, was lawful.

OLD HUNSTANTON PARISH COUNCIL v (1) SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT (2) HASTOE HOUSING ASSOCIATION LTD (3) KINGS LYNN & WEST NORFOLK BOROUGH COUNCIL CA (Civ Div) (Laws LJ, Tomlinson LJ, Lewison LJ) 07/07/2016

The planning policy in a sparsely populated rural area was that local need for affordable housing could be met by the development of small rural exception sites that would not otherwise be available for residential development. "Local need" was not defined in the policy documents, but meant the needs of the rural settlement itself and those of any other small local rural communities, but not those of an adjacent larger town. To alleviate the housing need in the town by building in a rural area would be at odds with rural policy.

SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT v BDW TRADING LTD (T/A DAVID WILSON HOMES (CENTRAL, MERCIA & WEST MIDLANDS)) [2016] EWCA Civ 493

When upholding the refusal of planning permission for a housing development, the planning inspector had adhered to her duty under the Planning and Compulsory Purchase Act 2004 s.38(6) to make the decision in accordance with the development plan unless material considerations indicated otherwise.

Possession

CITY WEST HOUSING TRUST v LINDSEY MASSEY : MANCHESTER & DISTRICT HOUSING ASSOCIATION v VINCENT ROBERTS [2016] EWCA Civ 704

The court provided guidance on the approach to be taken to the exercise of discretion by district judges when considering whether to make a suspended possession order.

Private Rented Sector

McDONALD (BY HER LITIGATION FRIEND DUNCAN

J McDONALD) v McDONALD & ORS [2016] UKSC 28

When hearing a claim for possession by a private sector landlord against a residential occupier, the court was not entitled to consider the proportionality of eviction in the light of the Human Rights Act 1998 s.6(1) and the ECHR art.8(2).

Andy Lane

Cornerstone housing news

Upcoming events

The programme for the annual Cornerstone Housing Conference taking place on 4th October is now available. Visit our website for further details and to book a place.

The next event in our annual seminar programme is the Hoarding and Capacity Seminar on 7th September with Ryan Kohli and Zoë Whittington. Tickets are available on our website.

Kuljit Bhogal is chairing this year's Resolve ASB Conference on 8th -9th November. Visit the Resolve ASB website for further details.

Kuljit Bhogal commended at Asian Women of Achievement Awards 2016

Kuljit Bhogal received a special commendation in the Professions category at the Asian Women of Achievement Awards 2016 in May. Kuljit was selected by the panel of judges from a shortlist of five leading female practitioners from the fields of law, architecture and medicine.

The annual awards celebrate Asian women who have achieved success in a diverse range of fields, from culture and public service through to business and entrepreneurship; recognising those that not only demonstrate excellence in their field but also benefit wider society through their work.

Sam Collins joins the clerking team

Sam Collins is joining the Cornerstone clerking team on 22nd August as Team Leader. Sam is currently the senior regulatory clerk at St Phillips Chambers.

Recent news

For even more housing news, follow the links below to view receive e-flashes by the Housing Team:

The Court of Appeal considers suspended possession orders

Dean Underwood and Clarke Willmott consider future housing law and policy at House of Lords

Cornerstone barristers advise on voluntary right to buy scheme

No Proportionality Assessment in Private Sector Possession Claims

Court of Appeal gives guidance on destination of County Court "costs only" appeals

Editorial Board

Andy Lane

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