cornerstone barristers

Cornerstone Housing Newsletter

February 2017

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Welcome to the Cornerstone Housing Newsletter February 2017

The Editor Speaks…

This is the first Housing Newsletter of 2017…a very belated happy new year!

Housing has remained very high on the national agenda over the last three months, not only with an increased focus and concern on the rising problem of street homelessness but also in anticipation of the long-awaited Housing White Paper and the detail of the government plans to increase affordable housing supply. Indeed, by the time you read this the Paper may well have been produced, and a formal response will be forthcoming from the Housing and Planning Teams at Cornerstone Barristers

As usual in the Newsletter, we have tried to produce a range of informative, diverse and relevant articles – the Homelessness Reduction Bill, possession of hospital beds and delayed discharge, permission to issue warrants of possession, a Briggs reform update, a Housing & Planning Act 2016 update, homelessness and the Equality Act 2010, and an update on the

Neighbourhood Planning Bill - alongside the usual case-law and housing development features.

We were delighted to hear last month that team member Matt Hutchings was appointed Queen's Counsel. A brilliant lawyer and tough opponent (I know!), this appointment is richly deserved. Well done to Paul and Tom too.

As for forthcoming events I would highlight two of these, both referred to elsewhere in the newsletter. Firstly, the 2017 Cornerstone Housing Seminar Programme has been prepared, with Jon Holbrook leading the first one on the crucial topic of fixed term and flexible tenancies on 15 March 2017. A true not to miss event.

Secondly, is the inaugural Bryan McGuire QC memorial lecture on homelessness on 5 April 2017. This is the first of an annual series of lectures on homelessness in memory of the much missed Bryan, with HHJ Luba QC as guest speaker.

Finally, I can report that two further books in the Cornerstone series are planned - Cornerstone on Social Housing Fraud and Cornerstone on mandatory, additional and selective licensing – written by myself and Dean Underwood respectively.

So enjoy the read and a big thank you to the rest of the editorial team and all contributors.

Andy Lane
Barrister

The Housing and Planning Act 2016 Update

The Government has recently made a number of announcements concerning implementation of the Housing and Planning Act 2016 ("the Act"), including the publication of the intended timetable for introduction of many of the housing-related. To date, these updates have included the abandonment of the 'pay to stay' market rent policy for higher-income tenants; delayed introduction of the voluntary right to buy scheme for housing associations and associated levy on higher-value local authority assets; and a public consultation on provisions concerning rogue landlords and secure tenancies.

Detailed background on the housing-related provisions of the Act was provided in Cornerstone Barristers' special edition housing newsletter in May 2016.[1]

'Pay to stay': market rent for higher-income tenants

On 21 November 2016 the Housing Minister Gavin Barwell announced that the Government no longer intends to implement Chapter 3, Part 4 of the Act, which provided for the introduction of mandatory rents for social housing tenants with 'higher incomes'. The Minister's statement explained the rationale for this turnaround as follows:

> "*Since the summer, the government has been reviewing this policy. We have listened carefully to the views of tenants, local authorities and others and as a result, we have decided not to proceed with a compulsory approach. Local authorities and housing associations will continue to have local discretion.*
>
> *The Government remains committed to delivering its objective of ensuring social housing is occupied by those who need it most.*

[1] https://cornerstonebarristers.com/news/cornerstone-barristers-special-edition-housing-newsletter-housing-planning-act-2016/.

> *But we need to do so in a way that supports those ordinary working class families who can struggle to get by, and in a way which delivers real savings to the taxpayer. The policy as previously envisaged did not meet those aims.*"[2]

The announcement marks a major turnaround in the Government's housing priorities, this having been one of the most hotly debated sections of the Act during its passage through the House of Lords. The Act would have mandated all local authorities in England to enforce the policy and, as rent increases were to be paid directly to the Treasury (s. 86 of the Act), was plainly motivated by a desire to generate additional revenue from the social housing sector.[3]

The Government had intended that social tenants earning over £30,000 (or over £40,000 within Greater London) would be charged market or near-market rents on their properties. The Act itself contained only skeleton provision for this policy, to be implemented by way of Regulations which, being subject to the affirmative procedure, would have required the approval of both Houses of Parliament. Regulations would have had to grapple with the complex realities of the policy, including the formulation of workable definitions of 'income' and 'high income', and the calculation of appropriate rent increases. These details had raised difficult questions regarding effective implementation, particularly in local authority districts where social and market rent levels are similar or where there were very few 'high-earning' tenants.

It appears the policy will remain available voluntarily to social landlords pursuant to DCLG policies which have been in place since 2014.[4] However, it is perhaps telling that during the passage of the Act through Parliament it emerged there was no evidence of any housing providers across the country having voluntarily taken up the policy to date.

For tenants, scrutiny of their income does not end here. As secure 'lifetime' tenancies are replaced with fixed-term 'renewable' tenancies of between two and five years' length (see below), tenants will likely be required to declare their income to their landlords when applying for a review of their tenancies. The Minister's announcement on 21 November confirmed that local authorities will be expected to take tenants' financial circumstances into account and to prioritise the grant of new tenancies for those on lower incomes. The Government "*will also consider whether other options exist to ensure that high income tenants in social housing make a greater contribution to costs.*"

Replacement of secure 'tenancies for life'

On 12 January 2017 *Inside Housing* published a timetable obtained from DCLG which sets out implementation deadlines (or perhaps to be more accurate, intended deadlines) for key sections of the Act.[5] This included the announcement that Chapter 6 of the Act, which provides for the phasing out of secure 'lifetime' tenancies, will be brought into force in Autumn 2017.

Chapter 6 will be implemented by way of Regulations which will prescribe the circumstances in which councils are entitled to offer further 'lifetime' tenancies to existing tenants who agree to move home. The timetable states that preparatory work is underway with a group of local authorities, "*to test practicalities and inform shaping of regulations and consultation planned for [2017]*". The affirmative procedure will be used so that Parliament is allowed to scrutinise the content of the Regulations.

Local authorities and housing associations were empowered to grant fixed-term 'flexible' tenancies on a discretionary basis by the Localism Act 2011, but it appears there has been very limited take-up of fixed-term and flexible tenancies by councils and housing

[2] Social housing: Written Statement – HCWS274, 21 November 2016.

[3] House of Commons Library, Social Housing: 'pay to stay' at market rents, 22 November 2016.

[4] DCLG, Guidance on Rents in Social Housing, May 2014.

[5] Inside Housing, Full implementation dates for Housing Act policies revealed, 12 January 2017.

associations. DCLG recently estimated that in 2014-2015 only 15% of social housing tenancies were let on a fixed-term basis.[6]

Section 118 of the Act will impose mandatory use of fixed term tenancies of between 2-5 years, on the expiry of which a further tenancy may be granted following review of the conduct of the tenancy (and the tenants) by the landlord. Once in force, Schedule 7 of the Act will amend the Housing Acts 1985 and 1996, Landlord and Tenant Act 1985 and Localism Act 2011, *inter alia*, so that local authorities in England will be prevented from offering lifetime tenancies in most circumstances. Housing associations will retain discretion as to their length of their tenancies.[7]

Alongside these changes, s. 120 and Schedule 8 of the Act will also substantially reduce the rights of family members to succeed to secure tenancies following the death of the tenant.[8]

Right to Buy and sale of higher-income assets

The extension of the Voluntary Right to Buy ("VRtB") scheme for housing association tenants has been delayed until at least April 2018. Correspondingly, the Government has stated that it will not demand so called 'high-value asset payments' from local housing authorities before the financial year 2018-2019.

A 'slow down' on the policy was first mentioned by Hilary Davies, DCLG's Head of Voluntary Right to Buy Implementation, while speaking at a National Housing Federation conference on 3 November 2016.[9] Following the Autumn Statement on 23 November, the Minister confirmed the new timetable looking toward 2018, although no firm deadline has yet been given.[10] The Government had previously intended to begin implementing the policy from April 2017.

Chapters 1 and 2 of Part 4 of the Act, which provide the legislative framework for these policies, came into force on 26 May 2016 once the Act received Royal Assent. However housing associations will not begin to offer VRtB in practice before DCLG Guidance is published, for which there is now no fixed timetable. Further, the recent announcement gives an assurance that the Minister will not use his powers to impose a levy on councils' "*higher value"* assets until at least April 2018. The levy will effectively require local housing authorities to sell any of their "*higher value housing"* which is likely to become vacant during the financial year (s. 69). The recently-published DCLG implementation timetable indicates this levy will be introduced by way of Regulations defining the scope of 'higher value' property and relevant exclusions, one of which will be subject to the affirmative procedure in Parliament.

A VRtB pilot scheme involving five housing associations has recently completed and published its findings. Although of an admittedly limited size and scope, the pilot was intended to assess the implications for national roll-out, assist in developing DCLG guidance and estimate future demand for take-up. The findings warn of significant additional demands on staff; possible increases in preserved right to buy applications; the utility of up-to-date information on both housing stock and tenants; the benefits of learning lessons from the expansion of the statutory RTB scheme, particularly as regards rules against sub-letting and resale of RTB properties; and the need to manage expectations around the value of applicants' properties as well as the types of housing stock which will be exempt from the scheme (between 15 and 67% of properties in the pilot associations were excluded from sale).[11]

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[6] DCLG, Lifetime tenancies: Equality impact assessment, May 2016, p. 4.

[7] House of Commons Library, Social Housing: The end of 'lifetime' tenancies in England? 27 May 2016.

[8] Tara O'Leary, Succession to Secure Tenancies, Cornerstone Barristers Housing Newsletter, November 2016.

[9] Inside Housing, DCLG: Right to Buy extension delayed by Brexit vote, 3 November 2016.

[10] Inside Housing, Right to Buy extension delayed until at least 2018, 24 November 2016.

[11] Sheffield Hallam University, Centre for Regional Economic and Social Research,

The Autumn Statement included an announcement of a larger regional pilot scheme which will now continue this work over the next five years, and which will test one-for-one replacement among other aspects of the policy. The Government has allocated £250 million to the expanded pilot to 2021 and anticipates at least 3,000 tenants buying their homes. It is highly likely that the length of the programme, together with the cost of the Exchequer, means that the higher value asset levy will be introduced prior to the end of the pilot.

Rogue landlords and housing enforcement

The Government will begin implementation Part 2 of the Act on rogue landlords and property agents in England from April 2017, with a number of further provisions to come into force in October, according to DCLG's implementation timetable.

It is intended that from 6 April 2017, rent repayment orders and civil (fixed) penalties will become available to housing authorities taking action against landlords and property agents:

- Under Part 2, Chapter 4 of the Act rent repayment orders will be available upon application to the First Tier Tribunal in relation to a range of specified housing-related offences (s. 40(3)). In practice, the Act expands the availability of rent repayment orders in a number of additional areas beyond those already provided for by the Housing Act 2004, including illegal eviction and harassment of tenants under the Protection from Harassment Act 1977.

- Under s. 126, local authorities will be able to impose a civil penalty of up to £30,000 on landlords and agents as an alternative to prosecution at the Magistrates' Court under the Housing Act 2004 for offences including failure to comply with improvement and overcrowding notices and HMO and selective licensing requirements and management regulations. Recipients of penalty notices will be entitled to appeal the service of the notice and amount of the fine to the First Tier Tribunal.

It is anticipated that October 2017 will see the launch of the national database of rogue landlords and property agents (s. 28) and the introduction of banning orders and management orders:

- The database of rogue landlords and property agents will be operated by DCLG but its content shall be managed and maintained by local authorities. Details of landlords and property agents who have been convicted of various housing-related offences will be made publicly available, some on a mandatory and others on a discretionary basis (ss. 28-37).

- Banning orders will prohibit landlords or agents from letting their own properties or from any involvement in the lettings and property-management industry or associated companies (s. 14-20). Local authorities will be able to apply to the First Tier Tribunal for the making of an order following the commission of 'banning order offences' by landlords and agents, which may then be made on a discretionary basis for a minimum period of 12 months and maximum unlimited period.

- Further, the making of a banning order will provide grounds for the making of a management order under s. 101 of the Housing Act 2004, permitting local authorities to take over the management and letting of the property in question and to keep the receipts of rent generated by lettings (s. 26).

A public consultation on banning order offences launched on 13 December 2016 and will close on 10 February 2017.[12] Banning orders are plainly draconian and should be reserved for the most serious cases,

Right to Buy for Housing Associations: An Action-Learning Approach", January 2017.

[12] DCLG, Proposed banning order offences under the Housing and Planning Act 2016: A consultation paper, December 2016.

given their effect will be to deprive landlords and agents of their income and livelihood for a potentially unlimited period of time. The Government's proposed list of offences however covers a wide range of circumstances, including not only the typical housing-related offences comprised in the 1977 and 2004 Acts but also a broad range of "*serious criminal offences"* if committed by landlords or agents at their properties. It also cites the controversial 'right to rent' offences arising from Part 3 of the Immigration Act 2014, which criminalise landlords who fail to confirm their tenants' immigration status and which have been linked to concerns about discrimination in the housing sector.[13]

Conclusion

Developments since November have made it clear that the Government remains committed to the delivery of its 2015 election manifesto commitments on housing reform, with the conspicuous exception of the abandoned 'pay to stay' policy. The reasons for that particular handbrake turn remain unclear. Although the Minister referred to concerns expressed about the policy by actors within the industry, those views had already been expressed loudly and clearly during the passage of the Act through Parliament. So what changed?

The comments made by Ms Davies on 3 November regarding delayed implementation of the VRtB are perhaps revealing. She stated that "*the Brexit vote has made us think about timing and is leading to a delay in the process. The new government is supporting Right to Buy, but you can imagine what is at the top of their to-do list currently. We have a new government as of July, and we don't really know yet where the ministers are with regard to the details."*

It remains to be seen how much Brexit will impact the implementation of the Act as a whole, but given the inevitable competition within the civil service for resources this year, it may be that DCLG's implementation timetable proves ambitious. The large number of statutory instruments required by the Act will make access to parliamentary draftsmen a particular priority. Local authorities and housing associations may wish to watch out for further public consultation and opportunities to provide input for regulations and Ministerial guidance in due course this year.

Tara O'Leary
Barrister

[13] Joint Council for the Welfare of Immigrants, No Passport Equals No Home, 3 September 2015.

Homelessness Reduction Bill Update 2016/2017

In the last edition of the Cornerstone Housing newsletter, I discussed the Homelessness Reduction Bill which is set to make the most significant reforms to homelessness law for several decades. The Bill, although introduced by Bob Blackman MP as a private member's bill, had quickly attracted government support, so it will almost certainly become law.

At the time of writing my previous article, the Bill had just passed its second reading in the House of Commons. Since then, the Bill has passed all stages of scrutiny in the Commons and has had its first reading in the House of Lords. This article looks at the progress of the Bill since last October.

A new definition of "threatened with homelessness": clause 1

Significant changes have been made to this clause since October, as a result of government amendments. The Bill introduced to Parliament inserted a new definition of "homelessness" into section 175 of the

Housing Act 1996, such that a person will be homeless if they have received a valid section 8 or section 21 notice on the day the notice expires. This measure was one of the most important reforms contained in the Bill and was intended to address the controversial practice of gatekeeping or deferring Part VII applications until the last possible moment.

In its earliest form, the Bill allowed fairly broad exceptions to this rule, where the local authority had cause to "ask" the recipient of the notice to remain in occupation, even after receipt of the notice.

However, in the version of the Bill which emerged following scrutiny in the House of Commons, the exception has been removed. Now, clause 1 the Bill inserts a new section 175(4), such that a person will be "threatened with homelessness" if they have received a section 21 notice (references to section 8 notices have also been removed) and the notice is due to expire within 56 days.

The result is that duties owed to a private sector tenant facing a “no fault” eviction will now need to take place at a much earlier stage than has been the practice in many local authorities. The content of that duty is the set out in clause 4 (the “prevention duty”).

Support for all eligible persons who are homeless - regardless of priority need or intentional homelessness: clauses 3, 4 and 5

This was another significant reform introduced by the Bill: the creation of important new duties owed to all eligible applicants, regardless of priority need or intentional homelessness.

The duty to assess and produce a housing needs plan for all eligible applicants under clause 3 (new section 189A) has survived in more or less the same form. The plan that is produced at the end of the assessment has important ramifications, because it will inform how various other duties owed to the applicant will be performed and discharged.

Similarly, the “prevention duty” under clause 4 (replacement section 195) – owed to all eligible applicants who are threatened with homelessness – survives in more or less the same form: the local authority must "*take reasonable steps to help the applicant secure that accommodation does not cease to be available for the applicant's occupation"*. The LGA has estimated that the prevention duty might result in an average increase in workload for London boroughs of 266%.

Again, the "initial duty" under clause 5 (new section 189B) – owed to all eligible homeless applicants – survives: the local authority "*take reasonable steps to help the applicant secure that suitable accommodation becomes available for the applicant's occupation"* for a period of between 6-12 months.

It will be seen that neither the prevention duty nor the initial duty oblige the local authority to *secure* that accommodation is available for the applicant; the duty is take reasonable steps to *help the applicant secure* accommodation. “Reasonable steps” are not defined and is left to the discretion of the local authority. Examples given by Bob Blackman MP included: providing a rent deposit; helping with family mediation; and entering into discussions with the landlord.

Discharge of duty for deliberate and unreasonable refusal to co-operate: clause 7

The latest version of the Bill continues to provide for two additional circumstances in which the local authority may discharge a duty to the applicant, on grounds of failure to co-operate.

Firstly, by a new section 193A, duty may be discharged where an eligible homeless applicant is owed an initial duty under section 189B and refuses a "final accommodation offer" (i.e. an assured shorthold tenancy in the private rented sector for a minimum period of 6 months) or a "final Part 6 offer" (i.e. an allocation under Part 6). In these circumstances, the main housing duty under section 193 does not arise.

Secondly, by a new sections 193B-C, the local authority may discharge either (a) an initial duty owed to an

eligible homeless applicant or (b) a section 195(2) duty owed to an eligible applicant who is threatened with homelessness where the authority is satisfied that the applicant has deliberately and unreasonably refused to to take any step agreed or recorded in their housing needs plan. Again, in these circumstances, the main housing duty under section 193 does not arise.

DCLG has stated that it intends to set out its view of what constitutes a "deliberate and unreasonable refusal to co-operate" in statutory guidance.

Further thoughts

The single most important change to the Bill, not only in terms of its passage through Parliament but also in terms of homelessness law and practice, is to set out in explicit terms that receipt of a valid section 21 notice is sufficient to trigger duties under Part VII.

DCLG announced, in a written statement to Parliament on 17 January 2017, that £48m additional funding would be provided to local authorities to manage the transition from the current legislative scheme to the new one – but only for 2 years, after which authorities are expected to have absorbed the additional workload within existing budgets.

As I reflected in my last article, the reforms brought about by the Bill ought largely to be welcomed by everyone with an interest in this area of the law, although there is room for debate about whether the Bill could have gone further. The crucial detail is whether the government is prepared to provide sufficient funding for local authorities to perform these duties properly. The government's announcement is a welcome first step, but many authorities will be legitimately concerned by the prospect of funding being cut off by 2019, as the true impacts of the Bill can only be guessed at for now.

Matt Lewin
Barrister

Neighbourhood Planning Bill 2017/2017 Pre-Commencement Conditions: A Help or a Hindrance?

"In this writer's view, such prior, "horse trading", if that nomenclature is apt, may well further the stated objective of the Bill in minimising delays after the grant of Permission. That is contingent however, upon the willingness of LPAs to trade horses. It is also based upon the assumption that those delays are attributable to pre-commencement conditions, and that where they are so attributable, they are unwarranted."

He then comments upon the debate over Clause 12 of the Bill, concerning restrictions upon the power of a LPA to impose pre-commencement planning conditions.

Introduction

1. Presented to the Commons on 7 September last year, following announcement in the Queen's speech in May: the Neighbourhood Planning Bill 2016-2017 proposes important changes to many areas and has the stated aim of providing more land for housing and greater certainty for the housing sector through the passage of measures which speed up the delivery of housing. This is no doubt, a noble end. The means, however, have proved controversial to some extent, particularly where the Bill proposes to put in place restrictions on the power of LPAs to impose pre-commencement planning conditions.

The Neighbourhood Planning Bill 2016-2017

2. The Bill is supplementary to the Housing and Planning Act 2016. In addition to the restrictions on planning conditions, the Bill seeks to make several other important changes.

   a. To strengthen neighbourhood planning; through,
      i. Increasing the relevance of Neighbourhood Plans to the decision-making process.
      ii. Making the Neighbourhood Plan a part of the development plan immediately after post-referendum approval.
      iii. Introducing a new modifications process for Neighbourhood Plans and Neighbourhood Areas.

   b. To introduce a planning register, to enable potential registration or prior approval applications and notifications of permitted development to be put on the planning register.

c. To make changes to the compulsory purchase regime.

Progress Through the Commons: Important Additions

3. The Commons committee stage was completed on 27 October 2016. During the 3rd and 4th sittings, the focus was upon the neighbourhood planning clauses. In the 5th and 6th sittings, Clause 12 was debated, about which more below. In the context of the 7th and 8th sittings, all of the Bill's Part 2 (compulsory purchase) measures were agreed to, but the Minister made noteworthy comments upon the Government's view of the interaction between CIL and Section 106 Agreements, hinting that a nationally set CIL charge may be on the cards in the Government's review of the CIL later this year.

4. Following the final sitting, further provisions were added to the Bill concerning powers of intervention in relation to Local Plans. These were as follows:

   a. The SoS will have the power to make Regulations to require LPAs to review Local Development documents, *"at prescribed times"* (Clause 10).

   b. LPA Development Plan Documents will have to identify the strategic priorities for the development and use of land in the authority's area (Clause 6 1B)).

   c. Under Clause 8 and Schedule 2, County Councils will be given default powers by invitation from the SoS to prepare DPDs.

Comment: Pre-Commencement Conditions

5. Following earlier reforms in this area the Bill, as introduced last September, sought to provide for further measures. The most important of these is that Regulations are to be made setting out certain conditions which may not be imposed in prescribed circumstances (see below). These include conditions which, *"unreasonably impact on the deliverability of a development..."* and, *"duplicate a requirement for compliance with other regulatory provisions"*. During committee stage in the Commons, the Housing and Planning Minister Gavin Barwell, was reported to have explained that he did not accept that, *"issues such as landscaping and materials must be dealt with before a single thing can be done on site, as the development begins to get underway. There is no reason why they cannot be dealt with during the process"*.

6. As it stands, under Clause 12 5) of the Bill, a (proposed) new section 100ZA) 5) TCPA 1990 will read, "*Planning permission for the development of the land may not be granted subject to a pre-commencement condition* ***without the written agreement of the applicant to the terms*** *of the condition"*. Where agreement cannot be reached, the Bill consultation paper suggests that the LPA would either change or remove the condition, or allow the developer to comply with it after

development has begun. The LPA would also have the right to refuse a planning application if it considers that the condition is necessary, but it has not been agreed by the applicant. The applicant would then be able to appeal the condition under the existing process.

7. It was noted by some that the proposed changes to pre-commencement condition had the potential to encourage *"horse-trading"* between the parties on potential conditions both ahead of, and immediately subsequent to, the issue of reports to committee prior to the final determination of the application. In this writer's view, such prior, "horse trading", if that nomenclature is apt, may well further the stated objective of the Bill in minimising delays after the grant of Permission. That is contingent however, upon the willingness of LPAs to trade horses. It is also based upon the assumption that those delays are attributable to pre-commencement conditions, and that where they are so attributable, they are unwarranted.

8. In relation to the last point, the second reading in the Lords prompted substantial debate on the validity of these assumptions. Whilst some gave Clause 12 their support, others called for more evidence that, in the context of house building, it is pre-commencement conditions that are to blame for the delays. Still others, such as the Liberal Democrat peer, Baroness Parminter, asserted that pre-commencement conditions actually speed up the process by enabling planning permission to be secured without finalising the full details.

9. If the ability to impose pre-commencement conditions does indeed work as such; this would suggest that LPAs have a facilitative attitude towards developments. That surely cannot be true in every case. In cases where a LPA is welcoming of the development, then the process of engagement between the LPA and applicant is likely to proceed smoothly and produce a positive outcome under Clause 12. However, in cases where the LPA is averse, that is unlikely to occur.

10. It is instead, those cases in which a hostile LPA misuses pre-commencement conditions in order to inhibit the progress of a development, which are germane. The new Clause 12 is a clear attempt to take powers away from such LPAs. Whether this will be successful however, will depend upon the extent to which LPAs wish to resist that loss by for example, insisting upon the condition and pushing the developer through the ordinary Appeals process.

11. Greater detail will become available on how the process will work, and thus we hope, on the question of whom is likely to have the ultimate say, after the House of Lords Committee Stage is complete, which is anticipated to be 8 February 2017.

Liam Wells
Pupil Barrister

Recent Housing Developments

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

Anti-Social Behaviour

A look into the Troubled Families Programme.

Benefits

On 30 December 2016 the Commons Library produced a note on the local housing allowance.

Council Tax

The DCLG has published its latest Local Government Finance Statistical Release (with one on social housing lettings being produced on 10 November 2016, affordable housing supply on 17 November 2016 and on right to buy sales and receipts on 8 December 2016).

Courts

A new structure for tribunals in Scotland came into effect on December 1 2016 with the launch of a Housing and Property Chamber of the First-tier Tribunal for Scotland.

A new N325A "Request for Warrant for Possession of Land following a Suspended Order for Possession" was produced In December 2016.

HM Courts and Tribunal Service have released their latest court implementation dates.

Equality

The Commons Library has produced a briefing providing an overview of Disabled Facilities Grants and other help aimed at securing essential home adaptations.

Homelessness

In December 2016 a House of Commons Briefing Paper provided background information on the increase in the number of homeless households placed in temporary accommodation by English local authorities and outlined various initiatives and issues associated with the increased use of temporary accommodation.

The Homelessness Reduction Bill 2016/17 has passed its Commons passage and is now in the House of Lords. This the form of the Bill going to the Lords.

HMOs

On 30 November 2016 DJ Pilling sitting at St Albans Magistrates' Court applied guidance for breaches of HMO Regulations with regard to fore safety.

Housing

A House of Commons Library briefing paper in November 2016 explained the current statutory overcrowding standard in England, efforts to update the standard, and Government approaches to tackling the problem.

House of Commons briefing on affordable housing published in November 2016.

In November 2016 the DCLG & DWP announced a joint consultation on funding for supported housing.

The Chancellor's 2016 Autumn Statement announced a new £2.3 billion Housing Infrastructure Fund to deliver infrastructure for up to 100,000 new homes in areas of high demand, a further £1.4 billion to deliver 40,000 additional affordable homes, a relaxation of restrictions on government grant to allow a wider range of housing-types, a large-scale regional pilot of Right to Buy for Housing Association tenants and continued support for home ownership through the Help to Buy: Equity Loan scheme and the Help to Buy ISA.

On 23 December 2016 the DCLG announced a new annual fund to help almost 150 councils tackle the problem of high levels of second homeownership in their communities.

In December 2016 the Work and Pensions Committee and the Communities and Local Government Committee launched a joint inquiry into the Government's funding reform for supported housing.

The DCLG has announced that 2017 will see the first starter homes being built on brownfield sites for first-time buyers between 23 and 40 years at a discount of at least 20% below market value.

The Commons Library has produced a briefing paper on tackling the under-supply of housing in England.

The Communities & Local Government Select Committee have launched an inquiry into whether the housing on offer in England for older people is sufficiently available and suitable for their needs.

The inquiry by the Communities & Local Government Select Committee into the capacity of the housebuilding industry to meet demand for new homes is hearing oral evidence.

Housing and Planning Act 2016

In November 2016 the Housing Minister announced that the government would fund an expanded voluntary right to buy pilot and that local authorities would not have to pay the high value asset levy in 2017/18, as well as stopping plans for mandatory pay to stay.

The DCLG announced a consultation from 13 December 2016 to 10 February 2017 on which offences should be regarded as banning order offences under the Housing and Planning Act 2016.

Research into the voluntary right to buy pilot programme has been produced.

Regulations have been made bringing further parts of the Housing and Planning Act 2016 into force.

Notices

New assured tenancy NSP from 1 December 2016 to reflect the new ground 7B, introduced by s41 of the Immigration Act 2016.

Planning

The Local Government Association produced a briefing on the Neighbourhood Planning Bill's Second Reading in the House of Lords.

Regulation

On 25 November 2016 the HCA announced a consultation on introducing a fee-charging scheme for the regulation of private registered providers of social housing.

A review into the HCA concludes that its regulatory function will be separated into a new non-departmental public body.

The HCA appointed a new chief executive in December 2016 - Nick Walkley.

The HCA has produced its list of registered providers as at 1 February 2017.

Miscellaneous

A House of Commons briefing was produced in December 2016 on the Crown Tenancies Bill.

Andy Lane
Barrister

The Briggs Report on the Civil Courts Structure

On 6 January 2017 the senior judiciary endorsed Lord Justice Briggs' Final Report ('the Report') of the Civil Courts Structure Review, and declared its support for the 62 recommendations within it. In a joint statement, the Lord Chief Justice, Lord Thomas of Cwmgiedd and The Master of the Rolls, Sir Terence Etherton noted that "the judiciary will continue to work with the Government and HMCTS to develop further the conclusions Lord Justice Briggs reached, and bring them to fruition alongside wider court modernisation."

As the Report has been welcomed in this way, it is now likely that many of its 62 recommendations will form

part of the ongoing HMCTS Reform Programme.[14] From the judicary's perspective, a team of civil judges has already been established to lead on the recommendations. It is perhaps therefore time for housing law practitioners to consider the implications, if any, that the recommendations in the Report may have on their practices.

The Online Court

The Report's primary focus is on the novel idea of an 'Online Court', or as Briggs LJ prefers to call it, an 'Online Solutions Court'. The cases before this Online Court ('OC') would progress through three stages:

i. a predominantly automated, inter-active online triage process to enable users to articulate their case and to identify documentary evidence;
ii. conciliation and case management by case officers; and
iii. resolution by judges (either on the documents, face to face or by phone or video, as deemed appropriate).

The proposed jurisdiction of the OC is money claims up to the value of £25,000, although a soft launch is envisaged with an initial ceiling of £10,000. It will ultimately be a compulsory forum for cases within its jurisdiction and will be entirely separate from the County Court. Accordingly, it will be authorised by primary legislation, and regulated by simple rules made by a new cross-jurisdictional OC rules committee, rather than by the CPR (para 6.88-91). This means that there will need to be limited amendment to the CPR in order to accommodate cases that are transferred from the OC to a higher court on grounds of complexity or public importance.

[14] Launched in March 2015, the Reform Programme focuses on three main areas: (1) using IT to improve the issue, handling, management and resolution of cases; (2) reducing reliance on buildings and rationalising the court estate; and (3) allocating aspects of the work currently done by judges to court officials under judicial supervision.

The Online Court and Housing Law

Possession Claims

The Report indicates that housing law practitioners will rarely encounter the OC. In his Interim Report ('IR') Briggs LJ had suggested that some possession claims, namely 'no fault' claims under s.21 of the Housing Act 1988 and claims where there is a mandatory ground for possession and no dispute that it applies, would be appropriate for the OC's jurisdiction.

However, following a submission by the Housing Law Practitioners Association, Briggs LJ notes at 6.95 in the Report that:

There has been virtually unanimous support for the wholesale exclusion of claims for the possession of homes, and even those few which (in IR6.43(a)) I originally thought might perhaps be safely included. I have been easily persuaded by a paper from the Housing Law Practitioners Association (HLPA) that they are no more suitable for the OC than other possession claims, and no-one has suggested otherwise. I need therefore say no more about them.

The difficulties in designing an adequate automated system to tackle the complexity of triaging possession claims is likely to have been a motivating factor in excluding such claims.[15] Despite this, Briggs LJ does appear to leave the door open to claims for possession falling under the jurisdiction of the OC in the future. Recommendation number 16 in the Report notes:

Claims for possession of homes (even if accompanied by a money claim) should at least initially be excluded from the Online Court. (emphasis added).

Disrepair

The question of disrepair claims is a little less straightforward. In the IR at IR6.49, Briggs LJ had

[15] Giles Peaker explores this in a comprehensive blogpost on this issue here: https://nearlylegal.co.uk/2016/07/online-courts-unified-enforcement/

suggested that these claims might qualify for exclusion from mandatory assignment to the OC if statistics proving the availability of an active CFA market for such claims were provided, but that they should still be admitted to the OC on a voluntary basis.

Following on from this, in the Report and in light of submissions by HLPA, Briggs LJ notes at 6.102 that:

I am persuaded that there should not be compulsory inclusion within the Online Court of damages-only sector of these claims, particularly where fixed costs recovery still supports an economic model for CFAs. But I continue to see no reason why there should not be voluntary admission of those cases, where a tenant claimant so wishes.

Of course the reality of practice is that disrepair claims often arise by way of counterclaim in possession proceedings brought by a landlord. Briggs LJ was alive to this and acknowledges that:

At the moment I cannot see how these counterclaims could easily be brought within the Online Court if the possession claim is to be excluded.

All of the above means that for housing law practitioners, at least initially, the only encounters with the OC should be those involving claimants in damages only claims below the £25,000 threshold, who have elected to use the OC. Practitioners will thus have to familiarise themselves with the software when it launches in the next few years. The current roll-out date for an online system is April 2020 although even Briggs LJ accepts that this will be a 'real challenge'.

Enforcement

The other main area of interest that the Report concerns is that of enforcement. Briggs LJ has proposed a single court as the default court for the enforcement of the judgments and orders of all the civil courts (including the OC). He suggests that this court should be the County Court (10.20).

Practitioners may have been disappointed to see that he declined to address the merits of the various means of enforcement. Instead, he took the view that the strengths and weaknesses of enforcement by High Court Enforcement Officers, Enforcement Agents and County Court bailiffs deserve a separate review. However, his recommendation that "urgent steps need to be taken to address the under-investment and consequential delays which clearly undermine the quality of the County Court bailiff service", must be seen as very welcome news for social landlords. Although it would not be surprising, given constraints on funding, if this were one of the recommendations not taken up by HMCTS.

The uniformity of enforcement via the County Court will only be tempered by what Briggs LJ refers to as a 'permeable membrane' with the High Court so that certain disputes such as cross-border enforcement, which call for judicial expertise, may be readily sent to the High Court for determination. It has been pointed out elsewhere that this is likely to mean the demise of High Court writs following county court possession orders.[16]

Conclusion

In many respects, current housing law practitioners may pay little attention to a Report that affects a comparatively small area of their practice and may not ultimately be implemented in full. However, that would be a mistake. This Report forms part of a more general trend towards the rationalisation and digitalization of HMCTS and is part of a wider conversation about court spaces and the judicial system.[17] The success of any early reforms will inevitably have an impact by way of mission creep on housing practitioners and their clients in the future.

[16] *Ibid.*

[17] A Report by JUSTICE entitled 'What is a Court?' addresses many interesting questions on this topic and can be read here.

John Fitzsimons
Pupil Barrister

Homelessness and the Equality Act 2010 post Wilson and Haque

The Equality Act 2010 adds something to the task that local authorities have to carry out when considering whether someone is homeless…. But what? In *Hotak v Southwark LBC, Kanu v Southwark LBC and Johnson v Solihull Metropolitan Borough Council* [2015] UKSC 30 we got a partial response. The public sector equality duty ("PSED") means that the decision maker should focus sharply on whether the Applicant is disabled and how that affects them. Different decision makers have taken this in different ways. Two recent cases illustrate the point.

Birmingham City Council v Wilson [2016] EWCA Civ 1137 was an appeal against a decision of the now-retired HHJ Oliver-Jones QC. The Appellant was offered accommodation in a tower block along with her two sons. One of her sons – as it turned out – had a fear of heights so acute as to amount to a disability. At the time she applied, however, she did not appreciate this and ticked the box saying that no-one in her family was disabled. She sought a review of the suitability of the accommodation offered on the basis that her sons were scared of heights, but it was not couched in terms of a disability or supported by any medical evidence. She was sent a "minded to" letter which she did not respond to. After the decision that the accommodation was suitable was upheld, the Appellant appealed and obtained medical evidence. The Judge upheld the appeal on the basis that the submissions made by Mrs Wilson raised "a real, as opposed to a fanciful, possibility of there being mental disability" and Birmingham should therefore have investigated further.

The Court of Appeal reminded itself that there is a duty on the local authority to make such inquiries as are necessary to satisfy itself as to the duty it owes to an Applicant. This is enhanced by the Equality Act.

> "*the relevant question has now become:*
>
> > *"did [the reviewer] fail to make further inquiry in relation to some such feature of the evidence presented to her as raised a real possibility that the appellant was disabled in a sense relevant [to the assessment to be made on the review]?"*
>
> …
>
> *It is agreed that the question whether the evidence presented raises a "real possibility" that any applicant for housing assistance is disabled is to be assessed by looking to see whether the review officer subjectively considers that such a "real possibility" arises or acts in a Wednesbury irrational way in concluding that it does not. In my view this is the correct approach."*

In this case, however, the reviewing officer had not failed to make those inquiries. Although the Applicant had raised the issue of a fear of heights, there was no duty to think of that fear in terms of a disability. There was an onus on the Applicant to bring forward all relevant material. This was particularly so given that she had had a minded to letter.

> *"In the absence of any indication that Ms Wilson thought that any issue of such gravity had arisen as to need her to address it by seeking any professional advice or diagnosis, [the reviewing officer] could rationally assess the position to be one where the children's fear of heights was within the normal spectrum and not indicative of*

> *any possibility that they had a disability within the meaning set out in the 2010 Act.*

In *Haque v Hackney LBC* [2017] EWCA Civ 4 the Court of Appeal took the opportunity to clarify to some extent how the PSED applies in relation to suitability decisions. There was no question but that the PSED fell to be considered in relation to suitability as much as to issues of vulnerability.

In a decision that will be welcomed by local authority decision makers (and the advocates who defend their decisions) the Court of Appeal emphasised that what matters is the substance not the form. It is a question of "stand[ing] back from the reviewing officer's decision, read as a whole, and to ask whether it is possible to discern from it that the reviewing officer has adopted the approach to section 149 required by the judgment of Lord Neuberger in *Hotak*." The Judge below, the highly respected housing specialist HHJ Luba QC, had stated that principle, but, ruled the Court of Appeal, had not applied it in this case.

Mr Haque had been placed in hostel accommodation and argued that it was not suitable for him given his disabilities, which included mental health problems. He complained, amongst other things, that the hostel's "No visitors" policy made him feel isolated and therefore exacerbated his mental problems.

The Judge held that the decision maker had failed to look at each aspect of the PSED in relation to the case. However, the Court of Appeal emphasised what Lord Neuberger had said in *Hotak* at 79:

> *I quite accept that, in many cases, a conscientious reviewing officer who was investigating and reporting on a potentially vulnerable applicant, and who was unaware of the fact that the equality duty was engaged, could, despite his ignorance, very often comply with that duty.*

The Court cautioned against applying *Hotak* as if it were a statute. *Hotak* was about vulnerability not suitability. Thus the 4 stage test adumbrated by Lord Neuberger for deciding that issue would not necessarily be appropriate in suitability cases. Briggs LJ emphasised

> *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.*

So what did the PSED require in this case? The Court identified what needed to be in the decision:

> i) A recognition that the Applicant suffered from a physical and/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 the accommodation as accommodation for him.
>
> iii) A focus upon the consequences of his impairments, ie the disadvantages which he might suffer in using that accommodation, by comparison with persons without those impairments *and*
>
> 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 the accommodation in question met those particular needs: see s. 149(3)(b) and (4).
>
> v) A recognition that the Applicant'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).

What did *not* need to be in the decision letter, on the other hand, was a bland acceptance of the Applicant's

case. The reviewing officer was entitled to bring his own judgment to bear on the accommodation and its suitability for the Applicant. And there was no need for a decision to spell out whether the Applicant was, or was not, disabled, or had any other protected characteristic. If the decision maker adopted a disciplined approach, it would no doubt put the issue beyond reasonable doubt. But where a reviewing officer considers each aspect of the Applicant's conditions and how it affects them, the PSED will normally be satisfied.

The EA s. 149 does not require the decision maker to give any reasons for a decision to which the PSED applies. It therefore adds nothing to the existing duty on local housing authorities to inform the Applicant why he has lost, and to enable him to judge whether the authority have properly fulfilled their statutory obligations including, where it is engaged, the PSED. There is no single standard for reasons.

Even though the decision maker had not decided whether or not Mr Haque was disabled, he had made it clear that he appreciated that the Applicant claimed to – and did – suffer from a disability. He had considered the impact of the disability and the reasons given for saying that the accommodation was unsuitable.

The Court recognised that those who are disabled and homeless are often in accommodation which is no more than barely suitable. Yet this is not to say that they must be moved.

> *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.*

The PSED does not alter the statutory duties owed to the homeless even when the Applicant or their family has a disability. What the PSED does do is require the local authority to make proper inquiries, being alert to the possibility that there may be a disability that the Applicant does not declare, but to the extent of making the case on their behalf, or accepting at face value what they say. These cases underline the benefits of the Regulation 8 procedure of sending out a "minded to letter" giving Applicants the chance to mention disabilities and explain their impact, and of the benefits of a structured approach to the PSED. If there is a medical condition, it is not necessary to think of it in terms of a disability. Think of it in terms of something the Applicant has to live with. How does it affect them, in a way that it does not affect other people? Does that affect the decision the local housing authority has to take? If not, why not? That's all there is to it.

Catherine Rowlands
Barrister

Housing Cases of Interest

Andy Lane has again put together the housing and related cases of interest over the last 3 months...

Anti-Social Behavior

BIRMINGHAM CITY COUNCIL V PARDOE [2016] EWHC 3119 (QB)

The court confirmed that pre-23 September 2014 anti-social behaviour could still be relevant despite s21(7) of the Anti-social Behaviour, Crime and Policing Act 2014 (though on its own it would not be sufficient to allow a s1 injunction).

Bedroom Tax

CARMICHAEL & OTHERS v SSWP [2016] UKSC 58

The bedroom tax in its current form unlawfully discriminated against two claimants who needed an additional bedroom by reason of a disability, the first claimant because she could not share a bedroom with her husband due to her disabilities, and the second claimants because they needed a regular overnight carer for their grandson who had severe disabilities. Other claimants, however, had their appeals dismissed.

Benefits

BIRMINGHAM CITY COUNCIL V ROSHNI & OTHERS [2016] EWCA CIV 1211

The Upper Tribunal had adopted a flawed approach in exercising its discretion under the Housing Benefit Regulations 2006, regulation B13(3), to determine whether the rent in a refuge for women was "unreasonably high" by considering the amount of public subsidies received by other suitable alternative accommodation. It had not made a true comparison with accommodation of a comparable type and tenure and there was no justification for reading into the market rent any artificial constraints, the comparison had to be objective, realistic, and complete. The matter was remitted for the Upper Tribunal to reconsider whether the rents were unreasonably high and, if so, the amount by which the eligible rent should be reduced

Council Tax

R (on the application of WOOLCOCK) (Claimant) v BRIDGEND MAGISTRATES' COURT (Defendant) & (1) CARDIFF MAGISTRATES' COURT (2) BRIDGEND COUNTY COUNCIL [2017] EWHC 34 (Admin)

The court quashed an order suspending the committal to prison of a council tax debtor on condition that she pay off arrears of council tax at the rate of £10 per week. The court found that magistrates had failed to conduct a proper means assessment before making this order, and the suspension period, which amounted to 11.5 years, was manifestly excessive.

LEEDS CITY COUNCIL v STEPHEN BROADLEY [2016] EWCA Civ 1213

This appeal concerned the liability for council tax and nature of tenancies. Grants of tenancies of a fixed term of 6 or 12 months and thereafter continuing on a monthly basis were valid at common law and under the Law of Property Act 1925 and not void. The tenants therefore fell within the Local Government Finance Act 1992 s6(5)(a) and were thusliable to pay council tax until the end of the tenancy even if they were no longer resident.

Development

R (on the application of ANDREW PLANT) v LAMBETH LONDON BOROUGH COUNCIL [2016] EWHC 3324 (Admin)

A challenge to a local authority's resolution to demolish and rebuild, rather than refurbish, the properties on an estate was unsuccessful. The decision contained interesting comments on consultation, and art 1 of the first protocol in so far as it concerned the secure tenants right to buy (i.e. not an absolute right to exercise the RTB and art 1 not engaged as none had as yet exercised the right).

Homelessness

HACKNEY LONDON BOROUGH COUNCIL v MOHAMMED ABDUL HAQUE [2017] EWCA Civ 4

An important and long-awaited post-Hotak case on the impact of the PSED on a local authority's assessment as to the suitability of accommodation offered. See paragraph 43 of Lord Justice Briggs' judgment in particular.

R (on the application of KENSINGTON & CHELSEA ROYAL LONDON BOROUGH COUNCIL) (Claimant) v EALING LONDON BOROUGH COUNCIL (Defendant) & S HACENE-BLIDI (Interested Party) [2017] EWHC 24 (Admin)

Where a (homelessness) housing duty had been

accepted and then discharged, there did not have to be a new incidence of homelessness for a new (homelessness) housing duty to arise. Therefore, where one local authority had accepted a housing duty and a second authority had accepted that the conditions were met to refer the housing application to it, that second authority could not avoid its duty by simply referring to the previously discharged duty, unless the first authority had acted perversely or on a mistake of fact (i.e. there had been no relevant change in circumstances at all).

LB OF CROYDON v LOPES [2017] EWHC 33 (QB)

An important costs case relating to otherwise "resolved" homelessness cases. M v Croydon LBC [2012] EWCA Civ 595 applied. The local authority here was entitled to its costs of an appeal withdrawn by a claimant where, had the appeal been heard, it would likely have been the successful party.

BIRMINGHAM CITY COUNCIL v WILSON [2016] EWCA Civ 1137

Another homelessness case – see Haque above - where the approach to the PSED was considered (in this case disability was not accepted).

Human Rights

WATTS v STEWART & OTHERS [2016] EWCA Civ 1247

The occupiers of almshouses were licensees, not tenants, and it was held that this did not give rise to a breach of art 14 (when read with art 8).

Possession Orders

ANTHONY HOLLEY & ANOR v HILLINGDON LONDON BOROUGH COUNCIL [2016] EWCA Civ 1052

This was a case of a "second succession" where the Court of Appeal held that the occupant's period of residence would not on its own be sufficient to found a proportionality defence under art 8. It could though form part of a proportionality argument, but given that Parliament had decided against second succession would be unlikely to be a strong factor.

Service Charges

THOMAS HOMES LTD v COLIN MACGREGOR [2016] UKUT 495 (LC)

The case concerned the interesting argument that in some instances it may be argued that service charges payable by a lessee were unreasonable in so far as they were said to subsidise social tenants in the same building. The Upper Tribunal overturned a decision accepting such an analysis and found that the First-tier Tribunal had failed to fulfil its actual obligation under s.27A of the Landlord & Tenant Act 1985, which was to determine the amount of service charges payable and to construe the lease by examining the words used.

Andy Lane
Barrister

Cardiff v Lee Update

Many of you will no doubt recall the stir caused at the end of last year by the Court of Appeal judgment in *Cardiff County Council v Lee (Flowers)* [2016] EWCA Civ 1034; the implications of which are that landlords must now seek the permission of the court before requesting a warrant of possession in cases where it is said that the terms of a suspended possession order have been breached. The case threw out the window that which had been previously understood by most to be the correct procedure - and certainly the usual practice – whereby, upon breach, the landlord would simply apply for a warrant using Form N235, that would be issued on the papers and thereafter if the defendant wished to challenge he/she could do so via a stay application.

For those that didn't read it at the time (or are just very keen) a copy of the judgment on baillii can be found here.

If, however, reading the judgment is a little too much effort, the case was covered by our excellent Editor,

Andy Lane, in several newsflashes (click here) and also in the November edition of our newsletter (click here). Considerable concern has inevitably been raised by housing providers and their representatives about the increased costs and delay from having an extra stage in the eviction process and one which will likely require witness evidence to be filed (when in the past that would probably only have been done if a stay application was subsequently made) and may potentially involve an additional hearing.

The Court of Appeal judgment did provide some reassurance to landlord's in that, where there has been genuine error in using the incorrect procedure (i.e. the procedure that pretty much everyone was using before) and there is no prejudice to the defendant, then the court can exercise its power under CPR 3.10 to remedy the error and thus come to the landlord's 'rescue'. That, however, is only likely to be a solution for cases where applications had already been made before the judgment, or a short time after it, as the courts will clearly expect landlords (particularly large housing providers) to be aware of the proper procedures. Indeed, the Court of Appeal made it clear that social landlord's should put in place systems and update procedures to ensure they did not get in wrong in future. So is that it then? Well no, not quite.

Update

The implications of this judgment not only have an impact on housing providers but also on the court system, which as we all know is hardly short of work. The judgment is therefore not the end of the story.

The Court of Appeal indicated in the judgment that the Civil Procedure Rule Committee ("the Rule Committee") should consider the wording on form N325. The Rule Committee has duly done so and at the end of December reported that it would be consulting in early 2017 on the current rules and the safeguards available to tenants and occupiers. It is understood that the intention is to be able to come up with a solution and issue new guidance by April 2017.

Ok great, but where does that leave things before that then?

Well, in the interim, the court service has introduced 'a work around' which takes the shape of new forms N325A and an amended N445 (reissue of warrant). Those were published in the online court form finder in early January and are have been in use since then.

Where a SPO has been granted in an arrears case (either rent or mortgage arrears) and the terms are breached, the landlord must make their request for issue of a warrant on the new Form N325A. For reissue of a warrant the amended Form N445 must be used.

In both instances a statement of the payments due and those made must be attached to the N325A or N445 and the new forms have an additional sentence certifying that, as follows:

> "*(3) a statement of the payments due and made under the judgment or order is attached to this request.†† (for rent arrears cases only).*

The intention is therefore clearly to avoid the need for a separate Part 23 application for permission on the basis that the attached rent statement ought to satisfy the evidential requirements. Thus, in effect, the new form serves both as the application for permission and the request for a warrant in one application form.

The request will be considered by a Judge on the papers and if it is determined that the warrant can be issued then an order will be drawn and the warrant issued. The Judge could call it in for hearing if there were any doubts.

It is important to note that these requests cannot be made through PCOL and therefore if a claim has been started on PCOL and gets to the stage of requesting a warrant the it will be necessary to do that on paper to the appropriate County Court hearing centre using the new forms.

For the avoidance of any doubt, the new form should only be used for cases where the order is a SPO. Requests for issue of a warrant where an outright

possession order was made will continue to be made using the standard ('old') N325.

It has been made clear that this work around interim solution only applies to arrears cases. The position in respect of suspended orders for non-arrears case (e.g. ASB cases) is not changed and therefore, at least for the time being, *Cardiff v Lee* still applies and it will be necessary to make a Par 23 application for permission to request a warrant, accompanied with appropriate witness evidence.

The outcome of the Rule Committee consultation remains to be seen so it will continue to be necessary to 'watch this space' on this one; however for now at least there is at least a little clarity.

Zoe Whittington
Barrister

Possession of Hospital Beds and Delayed Discharge

'*Bed blocking*'… '*delayed discharges*' – patients who are subject to a delayed transfer of care are increasingly seen as one of the main sources of the NHS's woes by silting up the smooth transfer of people through the system as they clog up available beds.

What do you do if you are a hospital trust and you have a patient, with capacity, who simply refuses to leave, despite offers of appropriate residence and care? The answer is that you seek a possession order of the hospital bed in the county court which will allow you to enforce an eviction.

But proceed with care – seeking possession of a hospital bed has the potential for reputational damage – as the James Paget Hospital in Norfolk discovered to their cost last week when they evicted 63 year old Adriano Guedes after two years in hospital and found themselves the subject of numerous articles in the media *(full disclosure: I advised the local housing authority involved with Mr Guedes*).

The actual possession claim is generally straightforward. The trust will have to establish it has a right to the hospital bed P occupies i.e. what its interest in the land/hospital is, that P has never been a tenant or sub tenant, that P entered as a bare licensee to facilitate medical treatment, that medical treatment (at least from this hospital) is no longer required and that the trust has revoked its consent or license for P to remain on the land and P is now a trespasser. *Barnet PCT v X* [2006] EWHC 787 (QB) and *Sussex Community NHS Foundation Trust* [2016] EWHC 3167 (QB) are two cases where trusts successfully sought possession orders.

As one will see from those cases, there is generally no real defence for P to put forward - on public law or Article 3/8 grounds – where the trust has done its preparatory work. This will likely include: a Mental Capacity Act 2005 assessment that concludes that P has capacity to make decisions on residence and care; a stepped procedure of meetings where the trust and its partner agencies (e.g. housing, social care) seek to work with P (with the assistance of a Care Act advocate where required) to gain his agreement to leave and meet any reasonable objections he may have to proposed care packages; a series of notifications that possession will be sought and signposting to sources of legal advice; final notification that consent has been withdraw/the license terminated; previous offers of accommodation and care that meet P's assessed eligible needs which have unreasonably been refused, and up-to-date evidence that P remains medically fit for discharge.

Although not vital for the possession action it may assist in gaining either an outright order for possession or quick date for the possession order if the trust can show that on eviction day the trust (or a partner agency) will: arrange for the appropriate transport (e.g. provide an ambulance/pay for a taxi); notify the police or security to attend if P is likely to exhibit challenging behavior; and work with partner agencies so P has somewhere to be transported to with care workers to provide any assistance required in the transfer.

Of course in many cases P may be ineligible for homelessness assistance and/or social care on transfer out of hospital. This need not be a bar to possession on human rights grounds – I've successfully obtained possession orders of hospital beds where the transfer plan was a taxi to the local social services offices in the hope and/or expectation that they would provide interim relief while undertaking a human rights assessment under schedule 3 of the Nationality Immigration and Asylum Act 2002.

Peggy Etiebet is giving a presentation at a workshop hosted by ADASS on '*Tackling the wicked issues underpinning Delayed Transfers of Care*' on 13 February 2017.

Peggy Etiebet
Barrister

Cornerstone Housing News

Seminar programme

The Cornerstone Housing Seminar Programme 2017 is now available on our website. Further details about each of the seminars will be announced in due course. Click here to book on to our first seminar on fixed term and flexible tenancies on 15th March 2017.

The inaugural Bryan McGuire QC memorial lecture on homelessness

On 5th April 2017 we are hosting the first of an annual series of lectures on homelessness in memory of Bryan McGuire QC. His Honour Judge Jan Luba QC will be the guest speaker. There is no charge to attend the lecture but places are limited and must be reserved in advance. Donations will be invited in aid of a homeless charity. Click here to book your place.

In other news…

For even more housing news, follow the links below to view recent e-flashes by the team:

PSPO deadline is closer than you might think…

Settling Public Law Claims: A Victory for Common Sense

Homelessness decisions and the public sector equality duty: a victory for substance over form

Kensington and Chelsea wins homelessness dispute with Ealing

Voluntary right to buy research produced

Editorial Board

Andy Lane

Clare Gilbey

Lauren Bull

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