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Cornerstone Barristers Housing Newsletter

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Message from the Heads of the Cornerstone Housing Team

This is the last newsletter before the Cornerstone Annual Housing Conference to be held in Gray's Inn on Tuesday 6th October 2015. Building on the success of last year's sell-out production, this year's conference promises to provide a stimulating and informative day reflecting what has been an extraordinary twelve months for the housing practitioner.

The majority of Cornerstone's housing specialists will be speaking at the conference, either in the plenary sessions or break-out groups.

For the housing strategists there will be consideration of the implications for social providers of the government's controversial legislative plans, announced in the Queen's Speech, to extend the right to buy to housing association tenants; of the on-going impact of welfare reform and benefit-capping and how this is forcing many local authorities to devise imaginative new policies for meeting housing demand, and of the increasing importance of providing integrated housing services with those involving health and social care following the implementation this April of the Care Act 2014.

For the frontline practitioner there will be up-dates and practical tips on the Anti-Social Behaviour, Crime and Policing Act 2014, housing fraud, and human rights and Equality Act defences to possession claims.

An innovation this year will be the inclusion of a session on mental capacity and the role of the Court of Protection. On the public law side, there will be analysis and practical advice given on the latest decisions including homelessness vulnerability post-Hotak, Johnson & Kanu; intentionality post-Haile; housing allocation following Jakimaviciute, and out of borough placements in the light of Nzolameso v Westminster CC and R(AM) v Waltham Forest LBC.

In many instances the speakers will have personal knowledge of the cases having appeared as Counsel in them.

All this and lunch to boot will hopefully make this a red-letter day in the Cornerstone housing calendar.

Kelvin Rutledge QC

Kuljit Bhogal

Grant Money does not have to reduce leaseholder bills

Jon Holbrook

The Upper Tribunal ('UT') has given two recent judgments on whether a local authority has incurred costs, which it can pass onto a leaseholder, even though it has received grants in respect of those costs. In May the UT answered this question in favour of the leaseholder (Sheffield case) but in June it answered it in favour of the local authority (Barnet case). Jon Holbrook explains.

The general position – leaseholder can be charged

The general position, as set out in the Barnet case, is that 'the receipt by a local authority lessor of a grant in respect of works to a building is not regarded as affecting what the owner of a leasehold flat can properly be charged through the service charge' (§68). This is because of the meaning of the word 'incurred' as it appears in most service charge provisions and in the Landlord and Tenant Act 1985, s19.

The UT held that a cost is incurred when the landlord enters into a contract with a contractor (§62-63, 66). The fact that grants have been paid to cover the work does not ordinarily affect whether those sums have been incurred, they merely address the different issue of how the landlord subsequently defrays those costs.

In the Barnet case the authority received a grant of £7.1m from the London Development Agency in respect of repair and improvement work to three tower blocks that cost of £9.4m. The UT concluded that Barnet did not have to use that grant to reduce any leaseholder costs so long as the grant money was spent on refurbishing the three tower blocks. In other words Barnet's tenants and its Housing Revenue Account were the main beneficiaries of the grant, rather than its leaseholders.

In fact Barnet had used some of that grant to reduce each leaseholder's costs from about £45,000 to £24,000 but if the full amount of grant had been apportioned equally between all residents, as the appellant argued, then each leasehold bill would have fallen to about £14,000.

The Sheffield position - leaseholder cannot be charged

The judge in the Barnet case found the facts in the Sheffield case were distinguishable. In the Sheffield case the authority received grant funds 'specifically intended to meet the cost of works referable to the lessee's flat'. In particular grant was available 'for specific items of work on individual buildings and once such work had been completed the qualifying work to each building was inspected and approved by an independent chartered surveyor' (§54). It was in these circumstances that the UT had concluded that Sheffield 'had not "incurred", within the terms of the lease, the costs of the works which had been funded in this manner'.

Conclusion

Much turns on the basis upon which grants are paid. In the Barnet case the UT concluded that Barnet had a wide discretion as to how to spend the money. The application for and award of grant merely required Barnet to ensure that the money was used to improve the 179 homes in the three tower blocks whereas Sheffield had been given far less discretion to decide how the grant was spent (§54). Jon Holbrook acted for Barnet and was instructed by Mark Oakley of Judge & Priestley Solicitors.

Jon Holbrook

Golden rules for housing notices

Richard Hanstock of Cornerstone Barristers, with Ailsa Anderson and Mark Oakley of Judge and Priestley Solicitors

Local housing authorities have at their disposal a sizable armoury of powers of compulsion, designed to mitigate hazards and raise standards within their areas. These include improvement notices under the Housing Act 2004, notices and demands under the Environmental Protection Act 1990, as well as more obscure powers such as those under the Prevention of Damage by Pests Act 1949.

Common to all these notices is a clear message: unless the target of the notice does (or refrains from doing) some act – carry out these works, stop this activity, take the following steps – they face a criminal record and a hefty fine. Breaches are often made out under strict liability and prosecutions can be very difficult to defend.

Strict procedural requirements apply to these notices, set out in the relevant statutes and case law. However, a recent string of first instance cases have raised questions as to whether best practice is being observed. Local authorities considering serving such a notice should be sure to consider the following 'golden rules' to avoid a subsequent prosecution being thrown out of court – and recipients of these notices would be wise to identify these errors.

1. Be specific

Careful drafting is essential. The consequences of default of a notice are serious: fairness demands that the recipient is left in no doubt whatsoever as to what is required of them. As a rule of thumb, it should be possible for a layperson to ascertain by reference to the notice alone what actions or defaults will expose the recipient to criminal liability and when that liability will arise.

In *Perry v Garner* [1953] 1 QB 335, a Pests Act notice required the owner of rat-infested land to treat the land with poison, alternatively to carry out "*other work of a not less effectual nature*". Goddard CJ found that "[t]*he notice at once becomes unspecific because it directs the doing of a particular thing or something else, and the something else is left completely at large*": in other words, the notice was so vague as to be invalid from the outset and incapable of sustaining a criminal conviction.

Whilst this is an extreme example, any notice that imposes an open-ended requirement could well be struck down for uncertainty. Works should be specified in an exhaustive list, avoiding phrases such as "*all necessary works*", "*any structural repairs*" and "*works should include*". Although the notice will usually be part of a stepped approach to enforcement that has centred upon the provision of advice to a landlord, the time for friendly advice has passed: minimum standards now need to be set out with certainty and clarity.

2. Notice periods

Periods for compliance should be driven by principles of reasonableness. Any minimum period specified in the statute need not dictate the period given in the notice. A bespoke and realistic period should be set for each case, following a balancing exercise weighing the onerousness of the requirements against the public interest in prompt compliance, taking into account any personal circumstances or other material factors (*e.g.* enforcement policy).

This means that a blanket, uniform approach to periods for compliance should be avoided. Officers deciding on periods for compliance should be able to defend their reasoning in evidence: this will also help to show the degree of culpability that flows from a period of default. Including this balancing exercise in a witness statement or covering letter could head off a preliminary challenge.

Note as well that if a notice is served by any method other than personal service, the time for compliance should build in extra time for the notice to be received. Part 4 of the Criminal Procedure Rules creates a presumption that a document served by first class post is served "*on the second business day after the day on which it was posted*" (CrimPR r 4.10(2)(b)). Council officers should be aware of rules on service and put themselves in a position to prove from the outset the date and method of service, including postal class, ideally by way of a contemporaneous record.

3. The right to appeal

"*It is most important that persons served with any notice or order under the Act should know their rights.*"
—Neville J, *Rayner v Stepney Corp* [1911] 2 Ch 312

Knowing one's rights is an ancient principle. It ensures that nobody can be prosecuted for a default of an order that they didn't know they could challenge in the first place. Equally ancient is the principle that ignorance of the law is no defence; however, the courts have indicated that fairness in the criminal context means that where criminal liability arises from default of a notice directed at an individual, that individual should be informed how to challenge the notice should they wish to do so. This obligation is codified in statute in *e.g.* section 13(4) Housing Act 2004.

Rayner concerned a closing order given under the Housing, Town Planning &c Act 1909 in respect of a

property that was not (in the opinion of the local authority) fit for human habitation. The Act gave a statutory form of notice which included a footnote referring to the right of appeal. This footnote was omitted from the order served by the local authority, and this omission was held to be so material as to invalidate the notice, stopping the prosecution in its tracks. Had the authority included in its order the statutory note setting out the right of appeal, the prosecution may well have been successful.

Routes of appeal are not always clear. For example, the Pests Act 1949 imports the appeal provisions of the Public Health Act 1936, which has itself been extensively amended – but seemingly only to a subset of notices requiring 'structural works'. Others are silent altogether, suggesting that only judicial review would be appropriate. In cases in which no statutory appeals route applies, Councils may wish to consider instituting their own appeals procedure to avoid unnecessary litigation.

The tactical value of appeals

Where there is any question as to the validity, reasonableness or propriety of a notice, the recipient should give careful thought to the possibility of bringing an appeal during the notice period, before any question of a prosecution in default can arise. This will usually have the effect of suspending the notice pending determination of the appeal, which is likely to extend the time for compliance even if the notice is upheld. Landlords in receipt of notices are encouraged to seek prompt legal advice in order to identify whether there any arguable route of appeal arises.

In the planning context, the TCPA 1990 provides at section 285(1) that the validity of an enforcement notice cannot be challenged in the magistrates' court if the statutory right of appeal is not pursued. This is because the criminal courts are not well-equipped to decide public law points about reasonableness of an otherwise valid notice, but the validity of the notice is a crucial part of the prosecution case. The line between the two types of appeal is less than clear: see *Canterbury CC v Bern* (1982) 44 P&CR 178 and *Southend-on-Sea BC v Odeniran* [2013] EWHC 3888 (Admin). The message is clear: if there is an arguable route of appeal on public law grounds, landlords should raise it at the earliest opportunity, and not wait until criminal proceedings are brought, as by then it could be too late.

Conclusion

Failure to observe any of the 'golden rules' above will not necessarily compromise the validity of a notice and any prosecution flowing from default. However, an accumulation of failures could well have that effect, or could at least damage the prosecution case by providing mitigation or serving to reduce the costs awarded against a convicted defendant. They may also affect the public interest in bringing a prosecution at all.

Other potential errors include service on the wrong person or at the wrong address, specifying the wrong power, failing to specify hazards, specifying a shorter period for completion than the statutory minimum, and failing to observe consultation requirements (*e.g.* s 10 Housing Act 2004). Officers should also be able to explain the powers under which they have entered land to gather evidence to avoid an argument that the evidence should be excluded under section 78 of the Police and Criminal Evidence Act 1984.

These are not new principles, nor are they especially onerous. Early legal advice can avoid the expense and negative publicity associated with a failed prosecution – or could result in a landlord avoiding prosecution where the Council has failed to act in a fair way.

In light of the array of potential challenges, local authorities are encouraged to seek legal support before serving a notice, and recipients of notices are also encouraged to seek advice as soon as a notice is received. Both Judge & Priestley Solicitors and members of the Cornerstone Barristers Housing Group are well-placed to advise or provide training on notices and associated prosecutions, whether on a case-by-case basis or on strategic matters of policy and procedure.

Richard Hanstock

Mark Oakley

Ailsa Anderson

The Supreme Court's interpretation of vulnerability in Hotak, Kanu and Johnson

Matt Hutchings

On 13 May, in three appeals about priority need for the homeless (Hotak, Kanu, and Johnson [2015] UKSC 30; [2015] 2 WLR 1341), the Supreme Court overturned the test laid down 16 years previously, used by local authorities to decide whether a homeless person is "vulnerable" and so in priority need of accommodation.

The court ruled that the correct comparison is with an "ordinary person" so that the correct test is: significantly more vulnerable than an ordinary person, if homeless.

Legal Context

Part 7 of the Housing Act 1996 contains the homelessness legislation. Section 189(1)(c) provides that:

"(1) The following have a priority need for accommodation… (c) a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside."

Having a priority need is a necessary condition for being owed a number of housing duties, including the main housing duty in section 193(2).

In R v Camden LBC, ex p. Pereira (1998) 31 HLR 317, at p.330 Hobhouse LJ gave guidance as to the application of the vulnerability test, as follows: "when homeless, less able to fend for himself than an ordinary homeless person so that injury or detriment to him will result when a less vulnerable man would be able to cope without harmful effects."

The history of the post-Pereira case law leading up to the Supreme Court decision may be viewed as a cautionary tale about the dangers of judicial glossing of statutory wording. It is doubtful Hobhouse LJ intended the above to be any more than practical guidance. However, in numerous subsequent cases his judgment was construed as if it was a statute and (despite judicial protestations to the contrary) elevated into the substitute "Pereira test".

The comparator issue

The main difficulty lay in the use of the comparator, the "ordinary homeless person". As verified by statistics produced by charities assisting the homeless, homeless people were likely to suffer from mental and physical ill health. A comparison with an ordinary homeless person therefore produced a "super-vulnerability test": more vulnerable than the vulnerable.

Over the intervening period since Pereira, a number of factors combined to put pressure on local authorities, particularly those in London, to refuse the main housing duty where they could: the scarcity of social housing, benefit cuts and cuts in grant funding. Thus, there was an upwards pressure on the threshold that had to be crossed in order to be considered "vulnerable".

At the Supreme Court hearing, counsel for the interveners, Shelter and Crisis, showed the court examples of decisions in which homeless applicants with depression and suicidal tendencies, or those who had suffered from serious abuse when homeless, were denied priority need status on the basis that they were no worse off than many actual homeless people.

At paragraph 56, Lord Neuberger stated: "if the comparison is with the ordinary actual homeless person, then … as Justice Sedley pointed out in R v Hammersmith & Fulham London Borough Council, Ex p Fleck (1997) 30 HLR 679, 681, there would be a real risk that 'a sick and vulnerable individual (and I do not use the word "vulnerable" in its statutory sense) is going to be put out on the streets', which he described as a 'reproach to a society that considers itself to be civilised'".

At paragraph 60, Lord Neuberger gave short shrift to the argument that Parliament had implicitly approved the previous case law by not legislating to reverse it.

As Baroness Hale stated at paragraph 91 (agreeing with the majority on this issue):

"we had reached the point where decision-makers were saying, of people who clearly had serious mental or physical disabilities, that 'you are not vulnerable, because you are no more vulnerable than the usual run of street homeless people in our locality.'"

The family support issue

The other main issue, raised in the Hotak and Kanu cases, was whether support and care provided by a third party, such as a family member, was relevant to whether the applicant was "vulnerable".

The main argument advanced against taking such support into account was what might be described as the "bad brother" anomaly. In short, the "good brother" offering to support his ill sibling, so that he was protected from harm when homeless, would thereby deny both of them priority need; whereas the "bad brother" unwilling to support his ill sibling would thereby be rewarded by both of them qualifying for priority need status.

However, there was a more powerful argument for taking such support into account. This might be described as the "magic pill" argument. If an applicant's illness can be satisfactorily treated by medication, it seems counter-intuitive to treat him as vulnerable. The problem then becomes one of drawing a principled line. Lord Neuberger stated for the majority at paragraph 64:

"Once one accepts that point, it is very hard to see any logical reason for ignoring any support or assistance which an applicant would receive when homeless."

The Supreme Court's answers

The court decided unanimously that the Pereira test was wrong. The correct test is "significantly more vulnerable than ordinarily vulnerable" and the correct comparator is an ordinary person: see paragraphs 53, 57-59. Baroness Hale summarised this at paragraph 93:

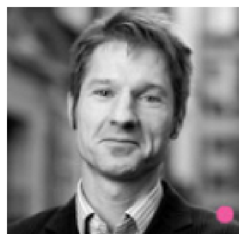
"more at risk of harm from being without accommodation than an ordinary person would be."

The court, by a majority, decided that third party support could be taken into account, but subject to the caveats that: (i) the local authority must be satisfied that, as a matter of fact, the third party will provide such support on a consistent and predictable basis (paragraph 65), (ii) the mere fact that such support will be available may not remove the applicant's vulnerability (paragraph 69) and (iii) there is no presumption that a family member will do what it is reasonable to expect him to do (paragraph 70). Baroness Hale dissented, reasoning that the appropriate dividing line was between support provided pursuant to a statutory obligation and other support (paragraph 94 onwards).

Future issues

It remains to be seen what local authorities' policy response to this judgment will be. A substantial change in the practice of vulnerability decision making will be required, and this is likely to be accompanied by other homelessness prevention and housing related support initiatives.

What is unlikely to be a viable option is to seek to erect a new comparator by putting too much weight on the word "significantly" more vulnerable within Lord Neuberger's judgment. This would amount to another gloss and tend to reintroduce the Pereira comparator through the back door.



Matt Hutchings

The proposed extension of the Right to Buy

Matt Lewin

Last month the Social Housing Lawyers Association held a seminar to discuss the vexed subject of the government's proposals to "extend" the statutory Right to Buy to housing association tenants. An interesting debate ensued, from which emerged something of a consensus: it's a terrible idea but it's going to happen. No details have been published so far

Any discussion of the proposals at this moment in time must inevitably be speculative. The government has not so far given any indication of the finer details of their intended scheme. This uncertainty has encouraged further conjecture as to whether the government intends to introduce a new statutory right to buy for tenants of private registered providers of social housing ("PRPs") or simply amplify the discounts already available to some of those tenants under the Right to Acquire scheme (s.180 Housing and Regeneration Act 2008 which, inter alia, applies only in respect of dwellings which were "publicly funded").

On the one hand, a letter from the Minister of Housing sent to Tessa Munt MP as recently as October 2013, which has entered public circulation, indicated the then-government's apparent recognition that "Housing association properties which ... have largely been provided with private money and not funding from the public purse ... the Government does not consider that it would be reasonable to require housing associations to sell these properties at a discount." Having said that, it seems doubtful that that letter can be given much weight today: not only has a new government been elected, but the letter apparently rejects the notion of extending the right to buy to tenants of housing associations altogether, which is clearly not the government's position at present. This perhaps explains the contrary view of the National Housing Federation, as expressed at the SHLA seminar, which is that an extension of the Right to Acquire scheme is unlikely and that the government is "committed" to achieving "parity" as between tenants of PRPs and local authorities.

Achieving "parity"

The government's policy objective of achieving "parity" as between secure and assured tenants is illustrated not only by the proposal to extend the Right to Buy but also by the surprise announcement in the Summer Budget on 8 July that it will impose 1% annual rent reductions across the social rented sector – i.e. for both local authority and PRP landlords – for four years from April 2016. The justification advanced by the government for this latter proposal was the supposed imperative to reduce the housing benefit bill.

Both measures demonstrate a perhaps surprising willingness for a Conservative government to yoke the private sector to its political agenda even where that would undermine the autonomy of those independent organisations. The National Housing Federation has said that "forcing housing associations to sell off their properties under the Right to Buy sets an extremely dangerous precedent of government interference in independent businesses." Interestingly, the Office for Budget Responsibility has warned that these two policies create a "risk" that the Office for National Statistics may be prompted to reclassify the income, spending and debt of private registered providers from the private into the public sector, with the result that approximately £60bn of debt would be added to the government's accounts. Perhaps that unwelcome prospect might encourage the government to pause for thought?

Historical perspective

The Bishop of Manchester's criticism of the proposed extension of the right to buy takes a long view: "The last time the state intervened to purloin charitable assets on this scale was the dissolution of the monasteries." As sympathetic as I might be to the sentiment, I am not sure that this characterisation of the proposal accurately captures the nuanced relationship of inter-dependence between PRPs and the state, the uncertain boundaries between the two and the implications of both of these factors for the proposal to extend the Right to Buy.

In one sense, the Bishop is correct to reflect on history: the inter-dependency of PRPs and the state has a long history. The mid-nineteenth century ancestors of today's PRPs were the beneficiaries of a series of statutes promoting what might now be described as "corporate welfare": the repeal of window, glass, bricks and timber taxes between 1850 and 1866 which lowered construction costs; reform of company law to introduce limited liability (Limited Liability Act 1855) which encouraged incorporation and investment; and the enactment of the Labouring Classes Dwelling Houses Act 1866 which enabled the private sector to borrow from the public sector – at a lower cost compared to the open market – for the purpose of building working class homes.

In more recent years, PRPs have again been enlisted by the government in pursuit of its housing policy. When assured tenancies were created by Part I of the Housing Act 1988, tenants occupying under assured tenancy agreements enjoyed similar security of tenure to local authority secure tenants and rights of mutual exchange. Some other examples of this phenomenon were highlighted, in passing, by the Court of Appeal in R (Weaver) v London and Quadrant Housing Trust [2009] EWCA Civ 587: their enjoyment of statutory powers identical with those of local authorities, such as anti-social behaviour powers and parenting orders. [16]

Redressing the balance between public and private became an explicit policy goal for the Conservative government which enacted the Housing Act 1988. The 1988 Act – which saw the lifting of rent controls under Part I of the Act and encouraging housing associations to undertake more commercial activities ancillary to their main housing activities under Part II of the Act – sought to make housing associations less reliant on public subsidy by seeking private finance.

However, the effectiveness of that policy is now one of the principal arguments deployed against the proposals to extend the Right to Buy: private registered providers are far less reliant on public subsidy; and the gradual uncontrollable erosion of their asset bases and the loss of rental income may jeopardise their current and prospective borrowing arrangements.

Blurred distinction between public and private

Even this rough sketch of the history of PRPs indicates that, for much of their existence, the distinction between public service and private enterprise has been blurred. In 1866, public funding took the form of a subsidised loan; today it takes the form of financial assistance administered by the Homes and Communities Agency. The courts now recognise that the provision of social housing by PRPs is capable of amounting to the exercise of a public function within the meaning of section 6(3)(b) of the Human Rights Act 1998 and therefore PRPs can be "hybrid" public authorities for the purposes of the 1998 Act: R (Weaver) v London and Quadrant Housing Trust [2009] EWCA Civ 587.

The Court of Appeal in Weaver drew on the formulation adopted by Lord Nicholls in Aston Cantlow and Wilmcote with Billesley Parochial Church v Wallbank [2003] UKHL 37: the factors to be taken into account in determining whether a body is a public authority under section 6 of the 1998 Act "include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service." [16]

In Weaver, the Court of Appeal analysed the position of London and Quadrant Housing Trust, in the light of Lord Nicholls' formulation, and decided that the Trust's provision of social housing was the exercise of a public function within the meaning of section 6(3)(b). Material to that conclusion were: (a) the Trust's reliance on a "substantial public subsidy which enables [it] to achieve its objectives"; (b) the Trust's operation "in very close harmony" with local authorities' housing duties and objectives; (c) the Trust's provision of subsidised housing is a typically governmental function and therefore provides a public service; (d) the Trust's activities were outside of (or not limited to) purely private commercial enterprise; (e) the "intrusive regulation" to which the Trust was subject. [68]-[72] That analysis will apply with equal force to many PRPs, although Elias LJ expressly reserved the possibility that a PRP that had never received any public subsidy at all might not be exercising a public function for these purposes. [84]

Challenge to basic principle unlikely to succeed

In the event of any challenge to the extended Right to Buy scheme, based on Article 1, Protocol 1 of the European Convention on Human Rights ("Protection of Property"), the Bishop of Manchester's view of the policy is unlikely to be shared by the courts. The case of James v United Kingdom (1986) 8 EHRR 123 will cover most of this territory: taking property in pursuance of legitimate social, economic or other policies can, in principle, be in the public interest; national legislatures enjoy a very wide margin of appreciation in determining what is in the public interest and the court will respect that judgment unless it is manifestly without reasonable foundation (therefore allowing for a considerable difference of opinion about the rights and wrongs of a policy such as Right to Buy); payment of compensation in an amount reasonably related to the value of the property taken normally ensures that the interference with the right under Article 1, Protocol 1 is not disproportionate.

The future

The difference between this recent history of inter-dependence between the state and PRPs and the government's proposal to extend the Right to Buy may be that the latter is now widely perceived to work against the interests of the private registered provider. The National Housing Federation has summarised it in this way: "One thing should be clear – housing associations want to help people meet their housing aspirations. Whether that is through low cost home ownership, great homes for rent, or homes for sale on the open market, we want to do more. But to build, we need to borrow, And to borrow, we need assets we are in control of and a secure income we can rely on. Right to Buy, regardless of how it is implemented and what the rules are, could make this much more difficult."

I hope I am fairly representing the sentiment at the SHLA seminar when I say that there was broad sympathy with this position. Housing lawyers must now await publication of the finer detail of this scheme. Even at this stage, however, it seems unlikely that a legal challenge to the basic principle of the scheme has great prospects of success. Those in the know at the seminar passed on the message that the government has invested considerable political capital in the scheme and is determined to see it enacted. In the meantime, however, there seems to be room for negotiation on the practical details, and perhaps the only glimmer of hope lies in the government's reticence in publishing any concrete proposals which an optimist might interpret as an indication of their willingness to listen to the concerns of private registered providers and their lawyers.

Postscript: the House of Lords on 20 July 2015 supported by a majority of 257 to 174 an amendment to the charities bill to the effect that charities are "not compelled to use or dispose of their assets in a way which is inconsistent with their charitable purposes". This would have the effect of blocking any attempt of forcing those housing associations which have charitable status to sell their stock under any extension of the right to buy. The matter will now be considered by the House of Commons.

Matt Lewin

Social rents to fall

Andrew Lane

The recent emergency budget announced by the Chancellor had a number of controversial measures impacting upon social housing, such as the 'pay to stay' reforms, and in this article Andy Lane considers the rent reductions planned to continue through to 2020.

The Welfare Reform and Work Bill 2015, which received its Second Reading on 20 July 2015, includes within its proposals measures (clauses 19 to 22) which will see in England:

- Social housing rents reduced by 1% each year up to 2020
- A 12% reduction in average rent levels by 2020-12 compared with current forecasts
- A reduction in social landlords' rental income by £2.5bn in today's prices
- Fewer affordable homes being built over the period (The Office for Budget Responsibility predicts 14,000 fewer affordable homes)

It marks a move away from the rent alignment policy (involving local authority and housing association rents) introduced by the Labour Government in 2002, and continued by the previous Coalition Government.

However, from July 2013 moves were afoot to change this approach and in May 2014 Guidance was produced by the Coalition Government. This confirmed that rent convergence, allowing housing associations to increase rents by an additional £2 per week in addition to the RPI + 0.5% arrangement then in force, would end in April 2015 and there would in its stead be a rent increase formula of CPI plus 1% for the next 10 years (until 2026). Whilst appreciating the certainty provided by such a system some were concerned by a drop in income. Gavin Smart, director of policy and practice at the Chartered Institute of Housing, said:

'Landlords needed certainty and viability on rent. We got certainty, but we are concerned that it doesn't deliver viability. The formula of CPI plus 1 per cent looks like a reduction in income available to landlords, which will limit their ability to build homes.'

Then the Chancellor announced in the emergency budget on 8 July 2015 that rents in social housing - i.e. local housing authorities and private registered providers - would now be reduced by 1% a year. He was clearly concerned by the increasing welfare budget and the impact of increasing rents - 20% up over the 3 years from 2010/11 - on the housing benefit bill (2.7 million social tenants being in receipt of housing benefit). It is worth pointing out:

1. Rents will be reduced by 1% each year between 2016 and 2019, using the rent payable on 8 July 2015 as the baseline.

2. Despite the policy, void units will be able to be converted to affordable rent units.

3. There will be exceptions to the reductions such as shared ownership units.

4. The Homes & Communities Agency will be able to exempt a private registered provider from the reductions if it would jeopardise their financial viability (and the Secretary of State can issue a direction to like effect in respect of local housing authorities).

The biggest concern for housing associations is in respect of development and financial plans previously put in place and based on a very different policy as outlined above, as well as the likely impact on future investment. Is George Osborne unrealistic in expecting the shortfall to be met by 'efficiency savings'?

The National Housing Federation said in its 'Summer 2015 Budget Briefing' on 10 July 2015:
Our own estimates suggest that the reduction will result in a loss of almost £3.85bn in rental income over the four years. Simply dividing this by the average build cost in the 2011-15 programme of £141,000, suggests that at least 27,000 new affordable homes won't be built as a result of the change. This of course assumes the lost income wouldn't be matched by any government grant or used to leverage in private finance, so the actual total could be higher.

Chief executive of the Chartered Institute of Housing, Terrie Alafat, commented:

"We understand the government's desire to manage the cost of the housing benefit bill – but undermining their income by cutting social housing rents by one per cent a year over the next four years is going to make it much tougher to build new homes, at a time when we desperately need to do so."

Difficult times are ahead therefore for social landlords effected by the planned changes.

Finally, along with the extension of the right to buy proposals to housing associations (anticipated in the forthcoming Housing Bill), there is a view that these reforms could lead to the official classification of housing associations as public sector bodies. This would in particular impact upon the treatment of their debt and ironically lead to a reduction in public sector income outweighing any housing benefit savings.

See page 20 for Bibliography.

Andrew Lane

Making sense of the "Pre-Action Protocol for Possession Claims by Social Landlords"

Zoe Whittington and Matt Lewin

1. The Pre-Action Protocol for Possession Claims by Social Landlords ("the Protocol") came into force on 6 April 2015.[1]

2. The Protocol applies to claims for possession of residential premises brought by social landlords. It replaces the previous protocol for rent arrears possession claims and now also covers possession claims based on mandatory grounds of different types (although the precise scope of the latter is subject to some debate due to the drafting of the Protocol, as discussed in further detail below).

3. The Protocol comprises three parts: Part 1 setting out the aims and scope of the Protocol and Parts 2 and 3 stipulating the substantive actions which must be taken by social landlords at the pre-action stage.

Part 1: "Aims and scope of the protocol"

4. The primary aim of the Protocol is to encourage more pre-action contact and exchange of information between parties so as to avoid litigation or at least enable effective use of court time if proceedings are necessary (paragraph 1.5).

5. Of particular relevance to this article is the aims or purpose of Part 3, which is described in paragraph 1.4:

"Part 3 seeks to ensure that in cases where Article 8 of the European Convention on Human Rights is raised the necessary information is before the Court at the first hearing so that issues of proportionality may be dealt with summarily, if appropriate, or that appropriate directions for trial may be given."

6. Evidently, paragraph 1.4 intends that there should be pre-action contact and exchange of information in cases where Article 8 defences might be raised. This would include contact with unlawful occupiers (e.g. trespassers, persons with no right to succeed etc.).

7. Part 1 also stipulates the requirements that social landlords must follow where they are aware that the tenant has a difficulty in reading or understanding information or is under 18 or has a particular vulnerability.

Part 2: "Possession claims based on rent arrears"

8. Part 2 concerns possession claims which are brought solely on grounds of rent arrears. It is in largely the same terms as the former Pre-Action Protocol for Possession Claims based on Rent Arrears[2] and therefore lawyers and officers working in the area should already be familiar with most of the action required. Regard should, however, be had to the new requirement – in paragraph 2.8 – to send a copy of the Protocol to the tenant after service of the statutory notice but before the issue of proceedings.

Part 3: "Mandatory grounds for possession"

9. It is Part 3 which contains the major change from the previous pre-action protocol. Social landlords are now required to take certain pre-action measures in mandatory possession cases (i.e. cases where the court has no discretion but to make a possession order). Precisely which types of claim Part 3 actually applies to, however, remains unclear due to the wording of the Protocol. This latter point has caused considerable uncertainty among housing lawyers and it is widely considered that there has been an error in the drafting.

When does Part 3 of the Protocol actually apply?

10. The difficulty caused by the current drafting of the Protocol is that it is simply impossible to identify when Part 3 does and does not apply.

11. The first cause of uncertainty appears in paragraph 1.1, which provides:

"Part 3 relates to claims where the Court's discretion to postpone possession is limited by s89(1) Housing Act 1980. The protocol <u>does not apply</u> to claims in respect

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Footnotes

[1]The Protocol was not published immediately on the MOJ website – an inauspicious beginning – which must give rise to some doubt about whether social landlords can fairly be sanctioned for non-compliance in the interim period between the Protocol coming into force and its publication.

[2] The Pre-Action Protocol for possession claims based on rent arrears still appears on the MoJ website: http://www.justice.gov.uk/courts/procedure-rules/civil/protocol. It is not clear from the "PAP Making Document" whether or not it has been revoked: http://www.justice.gov.uk/courts/procedure-rules/civil/pdf/preview/pre-action-protocol-amendments-6-april.pdf

of long leases or to claims for possession where there is no security of tenure." (emphasis added)

12. There seems to be no immediately obvious reason why "*claims for possession where there is no security of tenure*" would be excluded from Part 3 of the Protocol, particularly when paragraph 1.4 – the paragraph setting out the purpose of Part 3 – is borne in mind.

13. Indeed, the Supreme Court noted in *Manchester CC v Pinnock* [2011] 2 AC 104 at [56] that – in the context of a possession claim against an occupier *with* security of tenure – the concepts of "reasonableness" and "proportionality" are, for all practical purposes, the same. It follows that it is precisely occupiers who *lack* security of tenure – in circumstances where the landlord enjoys an unqualified right to possession – who will seek to rely on Article 8 rights as a defence to the possession claim. It is hardly surprising, therefore, that possession claims brought against occupiers who lack security of tenure have given rise to the leading authorities on Article 8 defences: *Pinnock* (demoted tenancy); *Powell* (non-secure tenancy); *Leeds CC v Hall* (introductory tenancy); *Thurrock BC v West* [2013] HLR 5 (unsuccessful succession).

14. This suggests to us that the reference to lack of security of tenure in paragraph 1.1 is highly likely to have been a drafting error and we would anticipate that it may be removed if and when the Rules Committee come to reconsider the wording of the Protocol. We understand that there may have been approaches to the Rules Committee in this regard but as yet there has been no indication as to whether there will be any amendment.

15. The next area of confusion is caused by the direct contradiction between paragraph 1.2, which provides:

"Part 3 of the protocol does not apply to cases brought by social landlords solely on grounds where if the case is proved, there is a restriction on the Court's discretion on making an order for possession and/or to which s89 of the Housing Act 1980 applies." (emphasis added)

and paragraph 3.1, which provides:

"This part [Part 3] applies in cases where if a social landlord proves its case, there is a restriction on the Court's discretion on making an order for possession and/or to which s.89 Housing Act 1980 applies (e.g. non-secure tenancies, unlawful occupiers, succession claims, and severing of joint tenancies)." (emphasis added)

16. It seems that one paragraph must be wrong: either Part 3 does or does not apply to cases where "*there is a restriction on the Court's discretion on making an order for possession ...*". Again, bearing in mind paragraph 1.4, it would seem that the contradiction can only be resolved by regarding paragraph 1.2 as a drafting error. We anticipate that the entire paragraph will need to be deleted in order to make sense of the Protocol.

What pre-action steps does Part 3 require?

17. In cases to which it applies (for our answer, see below), Part 3 requires social landlords to take some modest preliminary steps before issuing possession proceedings:

"3.2 ... before issuing any possession claim

social landlords –

a. *should write to [the] occupants explaining why they currently intend to seek possession and requiring the occupants within a specified time to notify the landlord in writing of any personal circumstances or other matters which they wish to take into account. In many cases such a letter could accompany any notice to quit and so would not necessarily delay the issue of proceedings; and*

b. *should consider any representations received, and if they decide to proceed with a claim for possession give brief written reasons for doing so."*

18. The Protocol does not expressly exclude the possibility that an occupier with a potential Article 8 defence to the possession claim may remain silent in response to a pre-action request for information about her circumstances but nevertheless attend the first hearing and seek to rely on her personal circumstances by way an Article 8 defence. It is not clear that the social landlord could rely on paragraph 1.6 of the Protocol – "*Courts should take into account whether this protocol has been followed when considering what orders to make*" – to have the defence struck out or dismissed. After all, the occupier's procedural right under Article 8 is the right to raise the question whether the decision to evict her is proportionate and to have that determined by an independent tribunal with jurisdiction, in the appropriate case, to assess the facts for itself: *Pinnock* [45]. Admittedly, given the high threshold below which the defence will be summarily dismissed (the defence must be 'seriously arguable' to merit further consideration by the court) this may, in most cases, prove to be an academic question.

19. Paragraph 3.3 of the Protocol requires social landlords to include evidence in the form of a schedule – whether in the Particulars of Claim or in a witness statement – of:

- their compliance with paragraph 3.2;
- their brief reason(s) for nonetheless bringing the proceedings; and
- copies of any documents relevant to the issue of whether bringing possession proceedings is a proportionate means of achieving a legitimate aim.

20. As regards the need to give reasons in paragraphs 3.2 and 3.3, we know from the case law that in bringing the possession claim it should be taken as a given that the social landlord is pursuing the "twin aims" of vindicating its ownership rights and enabling it to comply with its public duties in relation to the allocation and management of its housing stock: *Pinnock* [54]; *LB Hounslow v Powell* [2011] 2 AC 186, [37]. Therefore, in almost all cases, it ought not to be necessary for the social landlord to explain and justify its reasons for its decision to issue the possession claim; it ought to be sufficient, for the purposes of paragraphs 3.2 and 3.3 of the Protocol, to simply refer to the "twin aims". Of course, there may be cogent, additional reasons depending on the facts of a given case, and there is nothing to prevent the social landlord from relying on them where they exist.

How should social landlords approach compliance with the Protocol in light of the drafting uncertainties?

21. By disregarding the reference to lack of security of tenure in paragraph 1.1 and paragraph 1.2 in its entirety, the Protocol begins to make more sense. In summary, where a social landlord is contemplating bringing a possession claim on mandatory grounds – i.e. where the court will have no discretion but to make a possession order if the landlord proves its case – Part 3 of the Protocol applies and the landlord will be required to carry out the preliminary steps referred to in paragraphs 3.2 and 3.3.

22. In the meantime, however, social landlords must work with – or around – the current draft of the Protocol.

23. It seems to us that social landlords should give effect to the Protocol in the manner described above, even though strictly speaking that is not what the Protocol in its current form requires[3]. Doing so would be fairer to the occupiers of the property and would assist in the conduct of the litigation.

24. Having said that, unless and until the Protocol is amended, it would appear that the power of the court to enforce compliance with the Protocol – paragraph 1.6: "*Courts should take into account whether this protocol has been followed when considering what orders to make.*" – may be effectively meaningless. Where, on the face of the Protocol, there is a profound ambiguity about when Part 3 does or does not apply, it would seem potentially unfair to sanction a landlord for a failure to comply. In these circumstances, we would hope that the Rules Committee give urgent consideration to amending the Protocol, in order to settle the uncertainty once and for all.

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Committal in absentia warrants cautious approach from the Bench

Dean Underwood

Key words:

- contempt of court;
- committal;
- absence;
- adjournment;
- legal aid;
- county court bench warrant;
- toolkit

Footnote

[3] In this regard, the reference in paragraph 1.2 to a claim which is brought "*solely*" on mandatory grounds may be significant. In a claim brought (on a without prejudice basis) on both discretionary and mandatory grounds (e.g. abandonment leading to service of a NTQ for loss of security of tenure and a NOSP for breach of tenancy), on a literal reading of the current draft of paragraph 1.2, Part 3 of the Protocol applies.

On 14th May 2015, the Court of Appeal's judgment in *Brown v Haringey LBC* [2015] EWCA Civ 483 passed from the Bench to legal search engines with little comment or media fanfare. Its facts are prosaic and its findings unsurprising. Yet the decision raises issues of practical significance for parties and practitioners alike; and is reportedly causing something of a stir in County Courts nationwide.

The facts

The essential facts of the case are that, in May and June 2014, the court granted the local authority an injunction, carrying a power of arrest, prohibiting Mr Brown, 80, from engaging in anti-social behaviour.

In October 2014, following reports of further anti-social behaviour on his part, the local authority applied to commit him to prison for contempt of court. He was later arrested for a further breach of the injunction; and the committal proceedings listed for hearing over two days in November 2014.

Mr Brown tried to obtain legal aid to pay for representation at the committal hearing. The Legal Aid Agency ('LAA') took the view that his case was a criminal case and his application one for criminal legal aid. The local magistrates' court, to which Mr Brown duly applied for criminal legal aid, considered it a civil case; and his application wrongly made. By the time of the hearing, therefore, Mr Brown had neither legal aid nor information about when it would be granted.

His solicitors wrote to the local authority and the court to explain that they had applied for legal aid but were not in funds. The local authority declined a request to agree an adjournment; and Mr Brown represented himself on the first day of the committal hearing.

Save for a very brief exchange with the judge, in which he confirmed that he did not have representation, Mr Brown was not asked about the legal aid position, nor whether he wanted representation or assistance at the hearing. He did not ask for an adjournment; the hearing continued; and the local authority adduced its evidence.

Mr Brown was then absent from court on the second day of the hearing. The court office received a message stating that he was in hospital with heart pains. Mindful of Mr Brown's past absences from court for similar reasons, the court decided to continue with the hearing nonetheless. It found that Mr Brown had breached the injunction on numerous occasions and committed him to prison for a total of 18 months.

The appeal

Mr Brown appealed: the fact that he was entitled to- but did not have legal representation at the committal hearing constituted a serious procedural irregularity, he submitted, depriving him of the fair trial to which he was entitled at common law and under Article 6 of the European Convention on Human Rights ('ECHR'). In the circumstances, he submitted, the court ought to have adjourned.

The judgment

Applying *King's Lynn and West Norfolk Council v Bunning and another* [2013] EWHC 3390 (QB); [2015] 1 WLR 531 and what he described as 'disgracefully complex', legal aid legislation [3], McCombe LJ clarified the nature of committal proceedings for the purposes of securing legally aided representation:

- the proceedings qualified as 'criminal proceedings' within the meaning of section 14 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO');
- an alleged contemnor qualified for representation in the proceedings, as a 'specified individual' within the meaning of section 16 of LASPO;
- by section 19 of LASPO and regulations made under it, the Crown Court, High Court, and Court of Appeal were authorised to determine whether a person qualified for representation for the purpose of criminal proceedings before them;
- the County Court, by contrast, had no such authorisation: the power conferred previously by section 29 of the Legal Aid Act 1988 had been repealed and had not been replaced; and
- by section 18 of LASPO, only the Director of the LAA was authorised to determine whether a respondent qualified for representation in proceedings before the County Court.

In Mr Brown's case, the Director would have done so, had the magistrates' court not mistaken the nature of his application.

In the circumstances, the Court of Appeal held, the County Court judge ought to have adjourned on the first day of the committal hearing pending enquiry about the legal aid position and Mr Brown's right to representation.

Expressing sympathy for the judge, who had been "confronted with a litigant who, in the earlier parts of the proceedings before him, had not behaved well and who had … displayed a tendency to extreme truculence", McCombe LJ nevertheless stressed the need for a more cautious approach to committal proceedings:

"…when it came to the committal application, the proceedings had moved to *an entirely different phase*.

They were no longer civil proceedings, but had obtained a quasi-criminal character; the appellant's liberty was at risk. *It was necessary to isolate the quasi-criminal application before the court from what had passed before* and *to make full enquiry* (a) as to whether the appellant wanted legal representation and (b) whether he had applied for the necessary funding to do so and with what results. For my part, I do not think that the judge's short enquiry about representation … went nearly far enough in this respect." [41] (emphasis added)

The failure to adjourn on the first day was, the Court of Appeal held, compounded on the second when the judge omitted to consider whether to adjourn to enable enquiry about Mr Brown's hospitalisation; and then again to enable Mr Brown's presence at court for sentencing:

"…it seems to me that before passing a sentence … the judge should have considered whether to adjourn the case to secure the appellant's attendance and to make further enquiries about the availability of representation at the adjourned hearing." [44]

Accordingly, the Court allowed Mr Brown's appeal. It quashed both the committal order and the findings on which it was based and decided not to remit his case to the County Court: Mr Brown had already served 5 months in custody; and, in the circumstances, the local authority was disinclined to pursue his committal further. Mr Brown was, therefore, released from custody.

In a postscript, McCombe LJ lamented the obscurity of the legal aid scheme and made a direct plea for assistance:

"…it seems to me that it is important that all involved in committal proceedings in the County Courts should be aware of the route to be taken in applying for legal aid in such proceedings. For my part, I would encourage the LAA, the Courts Service, the judiciary, the professions and the voluntary organisations (that assist litigants) to co-operate in ensuring at an early stage in committal proceedings that all concerned are aware of the authority to which legal aid applications in such cases are to be made and what the entitlements are. It may be that, as Mr Bridge submitted here, consideration should be given to the promulgation of standard directions on the subject, either on the application notice itself and/or in any preliminary order regulating the procedure in an individual case."

Comment

Given the facts of Mr Brown's case, his right to a fair hearing and the fundamental importance of open justice – the focus of Lord Thomas LCJ's recent Practice Direction and Practice Guidance - the outcome of this appeal is neither surprising nor remarkable: respectfully, Mr Brown's right to a fair hearing was clearly infringed by the court's failure to appreciate- and to adjourn pending enquiry about his entitlement to legally aided representation.

The judgment is however noteworthy, raising questions of practical significance for legal professionals and other court users. For present purposes: how do landlords' representatives accommodate the Court of Appeal's plea for assistance? And if it adjourns proceedings to enable sentencing in a respondent's presence, how can the County Court ensure his or her attendance at the next hearing?

Given the administrative and financial pressures under which the LAA and Court Service operate, it is unlikely that either will provide an answer to the first question any time soon. It is suggested that the question is probably best answered by the Civil Procedure Rules Committee in any event. Paragraph 13.1 and 13.2 of the Practice Direction to Part 81 of the Civil Procedure Rules ('CPR') prescribe the formal requirements of a committal application notice, including the need for a prominent notice advising the respondent about the possible consequences of a committal order and failure to attend court. An addendum to the recommended form of notice, which appears at Annex 3 to the Practice Direction, would ensure consistency of approach and meet at least some of McCombe LJ's concerns.

Example addendum

"Depending on your circumstances, you may qualify for legal aid to pay for a solicitor or barrister to represent you at court. If your hearing is in the County Court, you will have to apply to the Director of the Legal Aid Agency to determine whether you qualify for representation. If it is in the High Court or the Court of Appeal, you will have to apply to the court itself. In both cases, these proceedings will qualify as criminal proceedings for the purposes of the Legal Aid, Sentencing and Punishment of Offenders Act 2012."

In the meantime, landlords' representatives would be well-advised to raise the question at their next Court User Group meeting; and to include the above or a similar form of wording – as well as a reference to *Brown* itself and the British and Irish Legal Information Institute website - in both their application notices and letters to the respondent.

They will also need to ensure that, at the first possible opportunity, the court makes full enquiry about the respondent's desire for representation and legal aid; and – to mitigate the prospect of avoidable legal aid

delays - adds a preamble summarising *Brown* to its directions.

The answer to the second question is arguably more esoteric: neither the Contempt of Court Act 1981, the Housing Act 1996 ('the 1996 Act') nor the Anti-social Behaviour, Crime and Policing Act 2014 ('the 2014 Act') provides an appropriate power; the court's power to issue a warrant under CPR 81.30 does not crystalise until it has ordered the respondent's committal; unlike the High Court and Court of Appeal, the County Court has no inherent jurisdiction to issue a bench warrant requiring the respondent's arrest and production at court; and there is no County Court form for a bench warrant in any event. In *Brown*, nonetheless, McCombe LJ found force in the submission that Mr Brown's attendance for sentencing "could be secured (if necessary by bench warrant)" [40-41].

Arguably, the answer lies in subsection 38(1) of the County Courts Act 1984:

"Subject to what follows, in any proceedings in a county court the court may make any order which could be made by the High Court if the proceedings were in the High Court."

So found His Honour Judge Birss QC, sitting in the Patents County Court in *Westwood v Knight* [2012] EWPCC 14:

"Since the county court has power to issue a committal order, i.e. a warrant of committal to prison, in a case of breach of an order, then it might be said to be unlikely if the court did not have the power to make what is a lesser order in some respects, to compel attendance at court. However that does not answer the question. It seems to me the answer is provided by section 38(1) of the County Courts Act 1984. … Section 38 does not confer on the county court a jurisdiction to hear a case it has no jurisdiction to hear. It is concerned with remedies and orders the court can make in proceedings properly before it. This committal application is properly before me, a circuit judge sitting in the county court. If this committal application was proceeding in the High Court then the High Court could make an order issuing a bench warrant to secure Mr Knight's attendance at court. Accordingly, by section 38 of the 1984 Act, an order to issue a bench warrant can be made by a county court. I may make such an order here in a proper case." [144-145] [147]

This finding has not been tested on appeal; and it is at least arguable, respectfully, that it is inconsistent with the intended purpose of section 38. It has, however, found favour in the County Court at Central London; and in the circumstances, practitioners would be well-advised to add the decision to their essential, committal toolkit. Given the caution with which the County Court bench will proceed, in light of *Brown*, it may yet prove invaluable in dealing with committal proceedings promptly.

Committal for breach of an injunction
Essential toolkit

Legislation

- Anti-social Behaviour, Crime and Policing Act 2014, Part I
- Housing Act 1996
- Civil Procedure Rules 1998, Parts 65 and 81

Case law

- Amicus Horizon v Thorley [2012] EWCA Civ 817; [2012] HLR 43
- Sanchez v Oboz [2015] EWHC 235 (Fam); [2015] Fam Law 380
- Westwood v Knight [2012] EWPCC 14

Guidance

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

Dean Underwood

The 'Pay to Stay' policy – a great leap forward?

Tara O'Leary

The recent emergency budget announced by the Chancellor had a number of controversial measures impacting upon social housing, including an extension of the 'pay to stay' policy.

On 8 July 2015 the Chancellor announced the Government's intention that social housing tenants on higher incomes - over £40,000 in London and over £30,000 outside London – will be required to pay market rate, or near market rate, rents in order to stay in their homes.

The Budget provided little other detail about the proposed policy beyond these earnings thresholds. As yet there is no indication how it will be enforced, although it is said that consultation and further details will follow in due course.

However on 17 July 2015 *Inside Housing* reported that officials from the Department for Communities and Local Government (DCLG) have said further details will be set out in a forthcoming Housing Bill, which is likely to introduce powers to force tenants to disclose their income. Although it remains unclear how this will be achieved, it is thought that tenants earning above the income thresholds will be required to declare their incomes. Legislation will also presumably detail sanctions for tenants found to have failed to declare.
Although local authorities will be required to repay rent subsidies recovered from 'high earner' tenants to the Exchequer, contributing to deficit reduction, housing associations will be able to use recovered rent subsidy to reinvest in new housing.

The announcement marks a considerable extension of the existing 'pay to stay' policy, which came into force from 1 April 2015 on foot of DCLG guidelines published in May 2014, *Guidance on rents for social housing*. This policy grants local authorities discretion to implement to exempt social tenants with incomes of at least £60,000 per year from the Government's Social Rent Policy, charging up to full market rent. Under current guidelines local authorities should consider the combined, taxable income of tenants and their spouse, civil partner or a co-habiting partner.
Introduction of legislative provisions to 'force' tenants to disclose their income levels are likely to be welcomed: housing providers as well as the Government itself have long recognised that 'pay to stay' policies were realistically unworkable without a legislative enforcement mechanism. Launching the policy in 2012, the Government stated:

"*Our present view is that primary legislation will be required to enable landlords to access tenant income data if this policy is to be fully effective. We intend to explore what such legislation might look like, with the aim of introducing it at a suitable opportunity".*

The key question which remains unanswered is whether the 'pay to stay' policy will now become compulsory, or whether individual housing providers will continue to enjoy some flexibility as to whether to adopt the scheme and what level of rent subsidies to recover.

The 2012 Public Consultation and 2013 Summary of Responses made clear that housing providers across England had a number of concerns regarding the policies - particularly providers in areas with low numbers of 'high earner' tenants who feared that the administration costs of any scheme would outweigh the revenues generated. Implementing the policy over existing secure and assured tenancies may potentially require renegotiation of tenancy agreements or service of appropriate notice periods.

All that is currently clear is that the legislative development of 'pay to stay' will need careful thought and consideration, and housing providers should be alert to the potential for further consultation in the coming months.

Tara O'Leary

Case Law Update

Andrew Lane

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

Homelessness & Allocation

VIDA POSHTEH v KENSINGTON & CHELSEA ROYAL LONDON BOROUGH COUNCIL [2015] EWCA Civ 711

A local authority had been entitled to consider that a homeless person's rejection of an offer of permanent accommodation brought its duty under the Housing Act 1996 s.193 to an end. The accommodation was objectively suitable, and the local authority had been entitled to conclude that accepting it would not have an adverse effect on the applicant's mental health such that it would be reasonable for her to refuse it.

R (on the application of HAKIMA ALEMI) v WESTMINSTER CITY COUNCIL [2015] EWHC 1765 (Admin)

A local authority's housing policy preventing those who were unintentionally homeless and in priority need from bidding for social housing for 12 months was unlawful. The policy breached the duty imposed on local housing authorities under the Housing Act 1996 s.166A(3).

R (on the application of FAIZI) v BRENT LONDON BOROUGH COUNCIL (2015) QBD (Admin) (Haddon-Cave J) 17/06/2015

The Housing Act 1996 s.193 made clear that from the moment that a person refused an offer of suitable accommodation, the duty on the local housing authority to provide accommodation ceased. There was a power, but not a duty, to provide accommodation pending a review or appeal against that decision.

JOHNSTON v CITY OF WESTMINSTER [2015] EWCA Civ 554

A housing authority could not decide that an applicant for housing was not homeless under the Housing Act 1996 s.175(1) on the basis that he might be offered accommodation by another authority which had accepted that it had a duty to house him.

R (on the application of SARBPREET DAUDHAR) v OXFORD CITY COUNCIL [2015] EWHC 1871 (Admin)

The local authority refused to accept an application for housing assistance from a 16-year old boy, after his parents had both previously submitted their own homelessness applications and been found homeless. Mr Justice Ouseley refused permission to apply for judicial review and discharged the accommodation interim relief. It was clear that Parliament did not intend a 16 or 17 year old residing with her/his parents to be able to circumvent intentionality findings against them.

SABA HAILE v WALTHAM FOREST LONDON BOROUGH COUNCIL [2015] UKSC 34

An applicant who had applied for accommodation as a homeless person under the Housing Act 1996 had not become homeless intentionally where the cause of her current state of homelessness was not her surrender of her original accommodation but a later event which would have caused her to become homeless in any event. While the decision in Din (Taj) v Wandsworth LBC [1983] 1 A.C. 657 remained good law, it was distinguished on the basis that whether homelessness was intentional had to be judged as at the date of the local authority's inquiry, not the date when the applicant quit her accommodation.

HOTAK v SOUTHWARK LONDON BOROUGH COUNCIL : KANU v SOUTHWARK LONDON BOROUGH COUNCIL : JOHNSON v SOLIHULL METROPOLITAN BOROUGH COUNCIL [2015] UKSC 30

The assessment of whether a homeless applicant was "vulnerable" for the purposes of the Housing Act 1996 s.189(1)(c) involved asking whether he would be more vulnerable than others in the same position. Any support that would be offered to him by family members while he was homeless had to be taken into account.

MARYAM MOHAMOUD v KENSINGTON & CHELSEA ROYAL LONDON BOROUGH COUNCIL : BUSHRA SALEEM v WANDSWORTH LONDON BOROUGH COUNCIL [2015] EWCA Civ 780

The Children Act 2004 s.11(2) did not oblige local authorities to carry out an assessment of the interests of any relevant children in all cases in which they sought possession of temporary accommodation granted pursuant to their powers under the Housing Act 1996 Pt VII.

Possession

SAFIN (FURSECROFT) LTD v THE ESTATE OF DR SAID AHMED SAID BADRIG (DECEASED) [2015] EWCA Civ 739

The court examined its powers to grant an extension of time for compliance with conditions in a consent order which gave a residential tenant relief from forfeiture.

SOUTHWARD HOUSING CO-OPERATIVE LTD (Claimant) v (1) VICKY WALKER (2) DAVID HAY (Defendants) & SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT (Interested Party) [2015] EWHC 1615 (Ch)

A tenancy granted by a fully mutual housing association had been caught by the rule against uncertain terms. Since treating the tenancy as a 90-year tenancy under the Law of Property Act 1925 s.149(6) confounded the parties' intentions and fundamental aspects of the agreement, it was to be treated as a contractual licence. The provisions in the Housing Act 1985 and the Housing Act 1988 excluding fully mutual housing co-operatives' tenancies from security of tenure did not have to be read down so as to comply with ECHR art.8 and art.14.

Tenancies

GORMAN v NEWARK & SHERWOOD HOMES [2015] EWCA Civ 764
On the proper construction of a housing director's report and the minutes of a housing committee meeting, a local housing authority had elected to operate an introductory tenancy regime under the Housing Act 1996 s.124(1) in September 1997. The regime was not intended to be, and had not been, limited to a one-year period, and a tenancy for a local authority property starting in August 2011 was an introductory tenancy.

GUERROUDJ v RYMARCZYK [2015] EWCA Civ 743
A judge had not erred in law when ordering a tenancy to be transferred from the appellant to the respondent, his former partner, having regard to material which indicated that the local authority would have a duty to rehouse the appellant as a person in priority need.

Miscellaneous

IRWELL VALLEY HOUSING ASSOCIATION v LEE O'GRADY [2015] UKUT 0310 (LC)
The Upper Tribunal allowed the appeal of the Association against the procedure adopted by the First-tier Tribunal in respect of a referral by Mr O'Grady of a notice of increase to them in accordance with s.13(4)(a) of the Housing Act 1988.In particular it held that the FTT should not have made use of a specific piece of evidence (a comparable) without affording the parties an opportunity to comment on it.

KATHRINE EMMA O'KANE v CHARLES SIMPSON ORGANISATION LTD [2015] UKUT 355 (LC)
The court construed the Mobile Homes (Site Rules) (England) Regulations 2014 reg.10 regarding the right of a mobile home occupier to appeal against the introduction of new rules by a caravan site owner. It explained how the 21-day period in reg.10(1) and reg.10(3) should be computed and interpreted the phrase "within 21 days of receipt of the consultation response document".

SULTANA ANSARI v SOUTHWARK LONDON BOROUGH COUNCIL [2015] UKUT 204 (LC)
A property owner could not rely on a representation that a local housing authority would support an out-of-time application for permission to appeal against prohibition orders as the representation had later been qualified and her conduct indicated that she had not continued to rely on the representation. It was not possible for the parties to waive the statutory provisions about when out-of-time applications could be made.

Andrew Lane

Cornerstone Housing News

Richard Hanstock joins Cornerstone Housing

We are very pleased to welcome Richard Hanstock to the Cornerstone Housing Team. Richard recently accepted tenancy at Cornerstone having joined as a third six pupil in October 2014. Richard has experience of working for both tenants and local authorities across a wide range of housing law issues, including social housing fraud, anti-social behaviour and closing orders, unlawful evictions, injunctions, committal applications, and improvement notices.

Having spent time seconded to social landlords, Richard has a front-line insight into the pressures faced by public authorities in this area. He has also advised on a number of cases involving vulnerable people in social housing.

Cornerstone Barristers Annual Housing Day 2015

There is still time to book your space for the annual Cornerstone Housing Conference, taking place on Tuesday 6th October 2015 at Gray's Inn.

The annual conference is designed to provide local authorities, housing associations and social housing consultants with a thorough analysis of housing policy and strategy developments, including practical advice on a wide range of housing law issues. It is a must-do event for anyone involved in social housing.
The day will be hosted by Cornerstone Barristers' team of housing experts, with an introduction from a keynote speaker. Topics covered on the day will include:

- Homelessness
- The Anti-Social Behaviour, Crime and Policing Act
- Court of Protection, mental capacity and social housing
- The Human Rights Act and Equality Act
- Out of borough placements and the overlap with the Children Act and the Care Act

Click here for booking information and to view the full programme. Footage from the sold out 2014 event can be viewed on our website.

Cornerstone Housing Events and Seminars

The Cornerstone Housing team has hosted a number of training events and seminars in London and Birmingham since our last newsletter including:

- The New ASB Injunctions – Proving Your Case
- The Year That Was: Cornerstone look back at housing in the Appeal Courts in 2014
- Trial Without Error: how to make the most of your evidence in housing litigation

Forthcoming events include:

- Cornerstone Barristers' Annual Housing Conference 2015 (6th October 2015)
- The Anti-Social Behaviour Crime and Policing Act 2014 (24th November 2015)

For further information on Cornerstone Housing events, please visit our website events page.

Housing Quiz Winner

Louise Misselbrook is the lucky winner of our housing quiz, winning herself a copy of "Cornerstone on Anti-Social Behaviour: The New Law".

Louise says:
"I was thrilled to win the Cornerstone Anti-Social Behaviour: The new Law book after completing the quiz. The book is fantastic and I know it will be the go to textbook for this area in the legal team. The layout of the book is clear and concise and I particularly like the snapshot sections which set out what is out, what's in and Key points together which the examples provided. I would highly recommend to all!"

New Cornerstone appointments

We are very pleased to welcome our new CEO Elizabeth Woodman. Elizabeth joined Cornerstone in June from Thomson Reuters Legal UK and Ireland, where she was Vice President and Head of Strategy. As CEO Elizabeth has overall responsibility for the management, strategy and development of Chambers, with a particular focus on ensuring high quality service and client care.

Elizabeth's appointment follows the arrival of our new Communications Manager Clare Gilbey in May. Clare is responsible for all communications and marketing activities at Cornerstone Barristers.

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"Rent setting for social housing tenancies (England)" (Commons Library - January 2015)
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The Cornerstone Barristers Housing Newsletter is edited by Andrew Lane.

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