cornerstone barristers

Cornerstone Housing Newsletter

May 2016

Contents

Welcome to the second housing newsletter of 2016

It has been a busy quarter in chambers with the refurbishment works in full swing. Soon we will have a state of the art seminar space to host team events and fully equipped conference rooms for our valued clients.

In the meantime do bear with us during the works. We are doing our best to ensure seminars take place on site or close by and we are still able to host client meetings and conferences.

In this edition of the newsletter you will find a wealth of articles on the latest developments in housing and a piece on our attendance at the CIH South East Conference in Brighton.

Newsletter highlights include a summary of the arguments in McDonald v McDonald where the court has been asked to decide whether an Article 8 defence can be used against a private landlord. Judgment is awaited from the Supreme Court. Matt Hutchings and Jenny Oscroft acted for Shelter.

There is an interesting article by Matt Lewin on Cocking and Cocking v Eacott and Waring where the Court of Appeal decided that a licensor could be held liable for a nuisance caused by a licensee.

There are also articles on the law and best evidence in subletting cases (Andy Lane), making out of borough placements after Nzolameso (Peggy Etiebet), renewal of designations for additional/selective licensing (Dean Underwood), as well as our usual round up of housing cases of interest over the last three months (Andy Lane).

Cases to watch out for

In May Ranjit Bhose QC will be leading Dean in the Court of Appeal on the question of whether a county court can refuse relief to a starter tenant who says the private registered provider's decision to issue him with a section 21 notice requiring possession was flawed in public law. We hope to have an update on the arguments in the next edition of the newsletter.

Dates for your diaries

Andy Lane and Emma Dring will be presenting the team's next seminar, a Housing Law Update, The Last 12 Months on 8 June 2016. There is still time to book a place here.

Please also note that our hugely popular annual conference will take place on Tuesday 4 October. Don't miss out on the early bird rate, tickets are available here. The team's seminar programme for the rest of 2016 can be accessed here.

As ever we will endeavor to keep you up to date with all the latest developments in social housing.

Joint Heads of the Housing Team:

Kuljit Bhogal

Kelvin Rutledge QC

Hotak, Johnson & Kanu one year on

A report[1] recently published by *Crisis*, the charity for single homeless people, says this in relation to the May 2015 ruling of the Supreme Court in the conjoined appeals of *Hotak v Southwark LBC*; *Johnson v Solihull MBC* & *Kanu v Southwark LBC* [2015] 2 W.L.R. 1341

> "*This ruling should have marked an important development in terms of defining vulnerability, but its impact appears to be limited. The last release of statutory homelessness statistics showed that the proportion of applicants accepted as homeless and deemed vulnerable remained fairly steady at 26 per cent. As part of the latest Homelessness Monitor England 2016 report, local authorities were asked about the implications of the ruling, and whether it is likely to mean that a higher proportion of their single homeless applicants will be accepted as being in priority need as a result. Just over half of councils anticipated that the ruling would have little impact on their practice (51%), while about one third (34%) felt that it would make some slight impact.*"

This is unsurprising. The *ratio decidendi* of the Supreme Court's decision on the correct approach to identifying vulnerability appears at paragraphs 53 and 58 of the judgment of Lord Neuberger PSC:

> "[*53] … I consider that the approach consistently adopted by the Court of Appeal that 'vulnerable' in section 189(1)(c) connotes 'significantly more vulnerable than ordinarily vulnerable' as a result of being rendered homeless, is correct …*

[1] The homelessness legislation: an independent review of the legal duties owed to homeless people http://www.crisis.org.uk/data/files/publications/The%20homelessness%20legislation,%20an%20independent%20review%20of%20the%20legal%20duties%20owed%20to%20homeless%20people.pdf

> *[58] … I consider that, in order to decide whether an applicant falls within section 189(1)(c), an authority or reviewing officer should compare him with an ordinary person, but an ordinary person if made homeless, not an ordinary actual homeless person.*"

The Supreme Court thus approved the comparative approach to assessing vulnerability, though with some modification to the comparator to be applied. Moreover, by refraining from further defining the test, or giving any colour to the adverb "significantly", the Court clearly intended this to remain what Lord Walker of Gestingthorpe had described in *Runa Begum v Tower Hamlets LBC* [2003] 2 A.C. 430 as "*an exercise, and sometimes … a very difficult exercise, of evaluative judgment*" for local authorities.

Consequently, local authorities now have to decide, by reference to a person who becomes homeless, whether the applicant's vulnerability is significantly greater or not. In substance that is not so far removed from a test which requires the authority to compare the applicant with a person who is "less vulnerable".

Kelvin Rutledge QC

Housing Cases of Interest

Andy Lane has put together the recent Housing cases of interest over the last 3 months…

Allocation

R (on the application of H & ORS) v EALING LONDON BOROUGH COUNCIL [2016] EWHC 841 (Admin)

The local authority's amendments to its allocation policy to reserve 20% of available lettings for "working households" and "model tenants" fell foul of ss19 and 149 of the Equality Act 2010, and was in breach of art.14 and s11 of the Children Act 2004

Council Tax

ZAFAR v REDBRIDGE LONDON BOROUGH COUNCIL QBD (Admin) (Dove J) 03/02/2016

The court dismissed a homeowner's appeal against a decision that she was liable for outstanding council tax, on the basis that the appeal was out of time and totally without merit.

Disrepair

MEGAN LOUISE DODD (WIDOW & EXECUTRIX OF THE ESTATE OF PAUL JAMES DODD, DECEASED) v RAEBARN ESTATES LTD & 5 ORS [2016] EWHC 262 (QB)

A freeholder was not liable in negligence where a man had died after falling down a staircase in one of its buildings. Although the stairs were potentially dangerous as they were steep and had no handrail, that was not the test for a relevant defect that a landlord had a duty to repair under the Defective Premises Act 1972 s.4. An object had to be out of repair for that duty to arise, and the staircase itself was well constructed.

ROBINA LAFFERTY v NEWARK & SHERWOOD DISTRICT COUNCIL [2016] EWHC 320 (QB)

The Defective Premises Act 1972 s.4(4) did not create a form of strict liability. It extended the application of s.4(1) to relevant defects which were outwith its scope, and was subject to the requirement of s.4(2) that a

landlord knew or should have known of the defect.

NILI STERNBAUM v BAL BINDER DHESI [2016] EWCA Civ 155

In the context of a claim under the Defective Premises Act 1972 s.4, although a very steep stairway with no railings was certainly a hazard, the demised premises were not in disrepair. The landlord's obligation did not extend to improving the premises or putting them into a safe condition.

Homelessness

R (on the application of (1) RACHEL EDWARDS (2) VERNICA COLE (3) YASMIN SAEED (4) MARIAN NOWOROL) v BIRMINGHAM CITY COUNCIL [2016] EWHC 173 (Admin)

A local authority had not breached its duties under the Housing Act 1996 Pt VII in processing the homeless applications of four applicants, nor was there evidence of systemic failure in its homelessness procedures.

ROLLE v LONDON BOROUGH OF TOWER HAMLETS [2016] EWCA Civ 229

Permission to appeal for a second time, against a local authority's finding that it did not owe a mother and two children a full housing duty where they had become intentionally homeless as a result of her refusal of an offer of accommodation, was refused where no important point of principle or practice had been raised in respect of the correct test for determining her mental capacity to refuse the offer.

NIEMA ABDUSEMED v LAMBETH LONDON BOROUGH COUNCIL QBD (Admin) (Ouseley J) 19/02/2016

A local authority's refusal to provide an Eritrean national with accommodation pending review of her homelessness application was not irrational and unlawful. Even though she had been diagnosed with moderately severe to severe Post Traumatic Stress Disorder and had been sleeping in a Mosque at night and wandering the streets by day she was not street homeless.

ERSUS v LONDON BOROUGH OF REDBRIDGE QBD (Supperstone J) 23/03/2016

A judge had been entitled to make an order of no order for costs where an appeal under the Housing Act 1996 s.204 had become academic and been discontinued as it could not be said with certainty that there had been a causal connection between the bringing of the housing appeal and the local authority's subsequent offer of suitable accommodation.

Leasehold

(1) JONATHAN PAUL STEVENS (2) AUDREY STEVENS v ALEX IBRAHIM ISMAIL [2016] UKUT 43 (LC)

The Upper Tribunal (Lands Chamber) had jurisdiction under the Law of Property Act 1925 s.84(12) to modify covenants contained in the 999-year leases of two flats. More than 25 years of the term had elapsed when the application to modify was made, and a deed of variation made 18 years after the original lease did not necessitate the surrender and re-grant of that original lease.

JOHN PATRICK MURPHY v LAMBETH LONDON BOROUGH COUNCIL Ch D (Murray Rosen QC) 19/02/2016

A long lease, on its proper construction, demised only the ground floor of a flat and not the basement. The land register was rectified to reflect that, where the registered proprietor had not been in possession of the basement, and there were no exceptional circumstances justifying a refusal to amend the register.

SIDEWALK PROPERTIES LTD v CHRISTOPHER MARK TWINN & ORS [2015] UKUT 122 (LC)

The First-tier Tribunal had erred in holding that the costs recoverable by a landlord in granting new leases under the Leasehold Reform, Housing and Urban Development Act 1993 s.60 should be based on the tribunal's own assessment of an appropriate rate charged by an in-house solicitor. It should have held that in-house costs were to be determined on the same basis as those of an independent practitioner and should not have directed the filing of evidence as to

overheads, which was both irrelevant to the task it was required to undertake and disproportionate to the costs it was required to assess.

Licensing

NOTTINGHAM CITY COUNCIL v (1) DOMINIC PARR (2) TREVOR PARR ASSOCIATES LTD [2016] UKUT 71 (LC)

It was lawful for the licence of a house in multiple occupation to restrict the use of a bedroom to a particular category of occupier, such as students.

Mobile Homes

BRITANIACREST LTD v (1) EDWARD W BAMBOROUGH (2) M A BAMBOROUGH [2016] UKUT 144 (LC)

When determining a mobile home pitch fee pursuant to the Mobile Homes Act 1983 s.4, the tribunal had a wide discretion to vary the fee to a reasonable level. The presumption in Sch.1 Pt I para.20 that the fee should not be increased by more than the increase in the retail prices index the previous year was rebuttable and a number of factors could justify a greater variation if the fee would otherwise not be reasonable.

Planning

SMECH PROPERTIES LTD v (1) RUNNYMEDE BC (2) CREST NICHOLSON OPERATIONS LTD (3) CGNU LIFE ASSURANCE LTD (Respondents) [2016] EWCA Civ 42

The court upheld a grant of planning permission for a mixed use development within the green belt. The planning committee had been incorrectly advised in relation to housing need, but the judge would have reached the same decision if she had been properly advised. There was great pressure of need for new housing and very limited options for meeting that need and the judge had been correct to conclude that there were very special circumstances which justified permission for development in the green belt.

IN THE MATTER OF AN APPLICATION BY TONY O'HARE & PATRICK O'HARE (AS PERSONAL REPRESENTATIVES OF THE ESTATE OF TERENCE O'HARE (DECEASED)) FOR JUDICIAL REVIEW [2016] NIQB 20

A planning authority's decision to grant planning permission for partial development of a social housing site was quashed where proper consideration had not been given to a planning policy that aimed to avoid fragmenting new communities. The importance of social housing and the fact that the policy should have been a material consideration outweighed any prejudice to the developer.

WEST BERKSHIRE DISTRICT COUNCIL v (1) SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT (2) HDD BURGHFIELD COMMON LTD [2016] EWHC 267 (Admin)

In allowing an appeal against the refusal of planning permission for a residential development, the planning inspector had rightly treated the core strategy's housing policies as out-of-date and incapable of providing an appropriate basis for calculating the required five-year housing supply, identified the housing need figure for himself, dealt with all matters required by the National Planning Policy Framework, and given proper reasons for his decision.

SUFFOLK COASTAL DISTRICT COUNCIL (Appellant) v HOPKINS HOMES LTD (Respondent) & SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT (Interested Party): RICHBOROUGH ESTATES PARTNERSHIPS LLP v (1) CHESHIRE EAST BOROUGH COUNCIL (2) SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT [2016] EWCA Civ 168

The meaning of "relevant policies for the supply of housing" in the National Planning Policy Framework para.49 should be given a wide interpretation. It was not confined to policies that provided positively for the delivery of new housing in terms of numbers and distribution or the allocation of sites. The concept extended to plan policies whose effect was to influence the supply of housing land by restricting the

locations where new housing might be developed.

Public Function

R (on the application of MACLEOD) v PEABODY TRUST GOVERNORS [2016] EWHC 737 (Admin)

A charitable housing association's refusal to allow a mutual exchange of a tenant's assured tenancy was not amenable to judicial review; the association had not been exercising a public function in refusing the transfer as it had purchased the relevant housing stock with private funds, the stock offered intermediate rent levels and was thus not pure social housing, and intermediate rents were not subject to the same level of statutory regulation as social housing in general.

R (on the application of ASLAMIE) v LONDON & QUADRANT HOUSING TRUST QBD (Admin) (Judge Curran QC) 19/04/2016

An application for permission to apply for judicial review of a housing trust's refusal to consent to the exchange of tenancies between the claimant and another tenant could not be determined in circumstances where it had been suggested that the housing trust had placed undue pressure on the tenant, who decided to exchange with someone else as a result, and the tenant had brought to the court's attention that the housing trust had made a mistake in a witness statement. There was insufficient evidence on the issue of undue pressure and so the matter was adjourned so that further evidence could be obtained.

Social Care

(1) M (2) A v ISLINGTON LONDON BOROUGH COUNCIL [2016] EWHC 332 (Admin)

The Children Act 1989 s.27, which imposed a duty for local authorities to co-operate in relation to the provision of services for children in need, was aimed at co-operation between different authorities rather than different departments within a unitary authority. However, government guidance required the same degree of co-operation between departments in a unitary authority, meaning that the requirements of s.27 applied indirectly.

R (on the application of ANTWA) v LAMBETH CHILDREN'S SOCIAL SERVICES QBD (Admin) (Holman J) 10/03/2016

The court did not extend an interim mandatory injunction requiring a local authority to provide accommodation to a mother and three children pending her judicial review claim. A needs assessment had concluded that the children's father was trying to manipulate the local authority into providing publicly-funded accommodation by falsely claiming that he would not support his family. The court could not conclude at an interim stage that that assessment was wrong.

Utilities

KIM JONES v SOUTHWARK LONDON BOROUGH COUNCIL [2016] EWHC 457 (Ch)

The Water Resale Order 2006, made pursuant to the Water Industry Act 1991, applied to an arrangement whereby a local authority had charged its tenants for water and sewerage supplied by a water utilities company to unmetered properties occupied by local authority tenants. As the Order limited the amounts tenants could be charged, the amounts that the local authority had charged for the supply exceeded the maximum charge permissible under the Order.

Andy Lane

Nzolameso fall-out

It will be no news at all to readers that London authorities are experiencing a huge increase in

demand for temporary accommodation and considerable difficulties in securing that accommodation in or even near borough.

The London Councils' evidence to the Communities and Local Government Committee's (CLGC) ongoing inquiry into homelessness states that the rate of homeless acceptances has increased by 80% in the four years since to 2013/14. In September 2015 the number of households living in temporary accommodation (TA) exceeded 50,000 for the first time since 2008. This figure represents a 10% increase from the same period in 2014.

The causes are not difficult to find and have all been placed before the CLGC: the major cause of homelessness is currently the ending of an assured short hold tenancy (AST) due to unaffordability; in the current housing market landlords can obtain higher rents privately; there is a large discrepancy between Local Housing Allowance (LHA) and rents in the PRS rendering many properties unaffordable; landlords are increasingly prone to evict tenants on housing benefit (HB); landlords are less likely to work with local authorities to house homeless households due to fears of the cessation of direct payments to landlords under universal credit; the benefit cap reduction to £23,000 in London will severely affect the ability to find affordable housing, particularly when taken alongside the four-year freeze on local housing allowance; and there is competition from other boroughs for scarce placements.

What to do?

A number of authorities have asked the CLGC to consider legislative or policy changes to make it easier for authorities to place homeless applicants in affordable out of borough accommodation. For example Kingston stated, '*It would help if Government review the Suitability of Accommodation Order and guidance, in order to reduce the burden on Kingston and other expensive areas in London & the South East. Many parts of London are already unaffordable and more parts of the country will become unaffordable under the lowered benefit caps and we need Government to enable us to place affected households in the few remaining affordable areas. The basis of suitability should be that accommodation is affordable for the household from their usual income and/or benefits (without the Council having to top up the rent). Location should be a secondary consideration*.'

Similarly Westminster informed the CLGC, '*we aim to place homeless households in private rented accommodation which they can afford. However the law requires local authorities to offer housing 'in borough' where it is 'reasonably practicable'. While every effort is made to do this, we simply cannot procure enough affordable TA or PRS accommodation in-borough (or even very close to the borough)...Many of our out of borough placements are challenged. While we acknowledge that some households need to be able to remain in Westminster – we suggest that the law or code of guidance should be changed so that affordability is a key issue when making placements and offers, so that people can live in good quality private rented homes which they can afford in areas where they can set down roots.'*

Councilor Astaire, Westminster's Cabinet Minister for Housing, Regeneration, Business and Economic Development told the CLGC in oral evidence, on 18 April requested, '*allow us greater flexibility to include sustainability, ie affordability of ongoing rent, as one of the key criteria in providing someone with accommodation and discharging our duty*.'

The answer?

Homelessness Minister Marcus Jones, at a conference in London on 21 April 2016 run by charity Crisis, said: "*We still want local authorities to place people in accommodation within their own borough where that is achievable…What we don't want is people forced to move a significant way away from their home from where the children go to go to school against their will.*" Mr Jones added that the government was not looking at changing legislation that would increase councils' powers to house homeless people in cheaper

boroughs.

What to do now?

Lady Hale in *Nzolameso v City of Westminster* [2015] UKSC 22, the leading case on out of borough placements, gave guidance that each local authority should have and keep up to date policies for procuring and allocating temporary accommodation.

A number of local authorities have TA allocation polices that prioritise affordability. For example Lambeth's policy states that homeless '*households who would otherwise be in Group A [i.e. prioritized for accommodation in the local area due to factors such as education, social care needs, SEN needs, and caring obligations] but who are unable to afford accommodation in Lambeth or the Local Area, for instance due to benefit restrictions*' will be offered accommodation wherever the borough is able to procure it including outside in London.

Similarly Waltham Forest's policy states, '*Households in receipt of welfare benefits may be subject to restrictions on the amount of benefit they can receive, which may affect their ability to pay rent. Placement in Waltham Forest or nearby boroughs is subject to suitable accommodation being available and the applicant being able to afford accommodation in these areas.*'

Affordability is, as we all know, an element of suitability; a local authority needs to provide suitable accommodation to homeless applicants. Accommodation will not be suitable unless it is affordable. If a local authority has a robust and detailed evidence based procurement policy that concludes that it is not reasonably practicable to secure all its TA in or close to borough then it can look to robustly defend a TA allocation policy that provides for affordability as a material factor.

The key is in Mr Jones' phrase '*where that is achievable'* but to show that it is not achievable (for all TA) local authorities will require a robust and up-to-date evidential base to underpin their policies.

Take heart from the oral evidence given by Kate Webb, Head of Homelessness Policy, Shelter, and Giles Peaker, Chair, Housing Law Practitioners Association on 14 March 2016 to the CLGC. Both accepted that as long as local authorities have followed the process correctly, and if there is simply no accommodation and the local authority has tried to procure accommodation within its area, have looked at the support needs of that family, and there is no alternative, then, regrettably, yes, it may be appropriate to move them out of area.

Peggy Etiebet

The PSED and Homelessness

The Equality Act 2010

The Equality Act 2010 combined, for the first time, equality legislation formerly split into various statutory codes covering different protected groups. It also significantly strengthened their legal rights. One of the key elements of the 2010 Act is the PSED.

The relevant protected characteristics for the purposes of the PSED are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Hereafter the groups of people sharing these protected characteristics will be referred to as "the Protected Groups". Schedule 18 provides for exceptions.

It is well-established that Parliament's intention was that equality of opportunity for the Protected Groups

should be placed at the centre of policy formulation by public authorities. The legislative technique used was to require public authorities to have "due regard" to the three equality needs or aims set out in section 149(1) when exercising their functions.

The PSED

The PSED is "only" a process duty. In other words, all that it requires is that "due regard" is given to the three equality needs in section 149(1). It does not dictate any particular outcome, but requires public authorities to think hard about the equality implications of their decisions. "The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker": *R(Hurley & Moore) v SSBIS* [2012] HRLR 13, at para 78.

Nevertheless, it has been said that the PSED imposes a heavy burden on public authorities, both in terms of discharging this procedural duty and in ensuring that there is sufficient evidence available when challenged to prove that the duty has been discharged: see *R(Bracking) v SSWP* [2013] EWCA Civ 1345; [2014] EqLR 60, at para 59.

The detailed requirements of the PSED have been exhaustively discussed in the case law (see e.g. *Bracking* at para 27). A sufficient summary for present purposes is that the decision-maker must: (i) have adequate, relevant information, (ii) focus on the statutory equality aims, (iii) face up to the realities of any adverse impacts on members of the Protected Groups and (iv) consider possible mitigating measures.

Policy decisions and individual cases

The above all makes sense in the context of legislation designed to push equality of opportunity up the policy agenda for central and local government. Undoubtedly, the PSED will apply to policy decisions affecting the homeless, such as locational placement policies, criteria for use of PRSOs and housing allocations policies.

Less clear, perhaps, is how the PSED impacts on decision-making in individual cases, in particular decisions made under Part 7 of the Housing Act 1996,. The homelessness legislation is itself designed to assist vulnerable sections of society and contains its own set of procedural and substantive rules. Does the PSED trump the specific legislation? Or, to put the contrary position, does it add nothing?

It is clear from authorities under predecessor equality legislation that the PSED is capable of applying to decisions, not only at the policy level, but also in individual cases. See, for example *R(Harris) v Haringey LBC* [2011] PTSR 931, in which the Court of Appeal quashed a planning permission for the redevelopment of the Wards Corner market in Tottenham that would have been likely to lead to the loss of Latino traders serving the local community. It was held that section 71(1)(b) of the Race Relations Act 1976 required the decision maker to apply the statutory criteria to the specific facts of the case.

The duty of inquiry

It is also clear that the mere fact that an individual decision is made under legislation which has its own particular rules does not oust the operation of the PSED. Thus, in *Pieretti v Enfield LBC* [2011] PTSR 565 - a homelessness case - it was held that section 49A(1) of the Disability Discrimination Act 1995 fortified the duty of inquiry into a homelessness application, in a case where the applicant's disability or claimed disability was relevant. The decision that the applicant became homeless intentionally was quashed because the local authority had not taken "due steps to take account of" the applicant's mental disability.

At para 28 of the judgment in *Pieretti* Wilson LJ stated that the duty "to take steps to take account of" disability complements the duty in section 184(1) of the 1996 Act to make necessary inquiries into a homelessness application. The potentially narrow point of difference

between the two duties of inquiry was held to be that, whereas the court could only intervene in relation to section 184(1) if the local authority had failed to make an obvious inquiry, under what is now section 149(4) of the Equality Act 2010 the court could intervene if it had failed to make all appropriate inquiries: see at paras 31-35.

The duty to give reasons

Beyond fortifying the duty of inquiry in cases involving disability, does the PSED make any other difference to homelessness cases in practice?

In *R(McDonald) v Kensington & Chelsea RLBC* [2011] PTSR 1266, the local authority had conducted a very thorough assessment under community care legislation into the applicant's community care needs. The argument that the assessment had failed to give due regard to the equality aims in relation to disabled people was given short shrift by Lord Scott at para 24, as follows:

> *"Where, as here, the person concerned is ex-hypothesi disabled and the public authority is discharging its functions under statutes which expressly direct their attention to the needs of disabled persons, it may be entirely superfluous to make express reference to section 49A and absurd to infer from an omission to do so a failure on the authority's part to have regard to their general duty under the section."*

A similar argument could be advanced in relation to homelessness decisions about priority need, intentionality and suitability: provided that the assessment leading to the decision is thorough, the Equality Act adds nothing of substance ("the McDonald argument").

The leading case on the interaction of the two statutory schemes is currently *Hotak v Southwark LBC* [2015] 2 WLR 1341. In *Hotak* the Equality Act was relied on to challenge the substance of vulnerability decisions in relation to applicants who were disabled. At para 78 Lord Neuberger PSC described the PSED as complementary to the duties under the 1996 Act. Helpfully, he went on to explain what this meant in practice, namely that it:

> *"require[s] the reviewing officer to focus very sharply on (i) whether the applicant is under a disability (or has another relevant protected characteristic), (ii) the extent of such disability, (iii) the likely effect of the disability, when taken together with any other features, on the applicant if and when homeless, and (iv) whether the applicant is as a result 'vulnerable'."*

In relation to the McDonald argument, he said this at para 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."*

So, what difference does the PSED actually make? Lord Neuberger went on to state:

> *"In the Holmes-Moorhouse case [2009] 1 WLR 413 , paras 47–52, I said that a 'benevolent' and 'not too technical' approach to section 202 review letters was appropriate, that one should not 'search for inconsistencies', and that immaterial errors should not have an invalidating effect. I strongly maintain those views, but they now have to be read in the light of the contents of para 78 above in a case where the equality duty is engaged."*

In summary, therefore, when a homeless applicant or a member of his household belongs to a Protected Group, and this is relevant to the question that the local authority has to decide, the court will expect a higher standard of reasoning to justify an adverse decision. Such reasoning will have to show a "sharp

focus" on the relevant protected characteristic and its potential impact on the decision in question.

Watch this space: Poshteh

The potential impact of an applicant's mental health on the suitability of accommodation came to prominence in *R v Brent LBC, ex p. Omar* (1991) 23 HLR 446, the well known case in which the accommodation offered reminded the applicant of his former prison cell and caused him to have a panic attack at the viewing.

In a case highly reminiscent of *Omar*, *Poshteh v Kensington & Chelsea RLBC* [2015] HLR 36, the Court of Appeal rejected the applicant's challenge to the suitability of accommodation offered to her, based on its "cell windows". By a majority the Court of Appeal held that the PSED had been properly discharged. McCombe LJ stated at para 41:

> *"…the reviewing officer clearly recognised Ms Poshteh's disability. He conscientiously recognised the public sector equality duty in that respect and was at pains to acquire all information that appeared to him to be necessary for that purpose. In particular, he considered the important question of the likely effect of Ms Poshteh's particular disability on whether it was reasonable for her to accept this offer of accommodation that had been made."*

However, the Supreme Court has granted permission to appeal. It is likely that its judgment will have more to say about the degree of scrutiny which the courts should apply to homelessness decision making, and in particular in the context of the Equality Act 2010.

Matt Hutchings

Update on the Housing and Planning Bill – Scrutiny

The Housing and Planning Bill is continuing its journey through Parliament, following its introduction to the House of Lords in February 2016.

A detailed analysis of the Bill by Ranjit Bhose QC, *The death of the social rented sector? Selective thoughts on the Housing and Planning Bill*, was published in our February 2016 Housing Newsletter. This article provides a brief update on some of the developments which have taken place in the Lords since then. As a reminder, it will suffice to say that the main provisions in the Bill concerning social housing were originally as follows:

- The phasing out of secure tenancies 'for life', and the introduction of a requirement that all new secure tenancies be for fixed terms of between 2 and 5 years only.

- The mandatory introduction of market rents for higher-income social housing tenants, known colloquially as 'pay to stay'. As currently proposed, the rule would apply to any household which has an annual income above £40,000 p.a. in London or £30,000 p.a., in the rest of England.

- The extension of the right to buy to housing association tenants, based on an agreement reached with the National Housing Federation (NHF) in October 2015. This which would provide for voluntary sales by housing associations with similar discounts offered as under the statutory right to buy.

- The introduction of new duties for local authorities:
  - To consider selling their interests in 'high value housing'; and

  - To make payments to the Secretary of State assessed in accordance with the value of their interest in 'high value housing' which is likely to become vacant in any one year. It is understood that these payments are intended to fund, in whole or part, reimbursements to housing associations whose properties have been sold at a discount under the voluntary right to buy provisions.

- A package of measures intended to reduce social housing regulation and allow housing associations to move back into the private sector.

The Bill underwent line by line examination during the Committee stage in March 2016 and entered the Report stage on 11 April. The fifth and final day of the Report stage is scheduled for 25 April. At the time this article was written, therefore, Report stage debates had not concluded. However it was already clear that the Lords had taken a robust approach to some of the criticisms and concerns raised about the Bill, and the Government had suffered at least eight defeats related to some of the key provisions.

On the end of secure tenancies, the Government made a key concession by agreeing to introduce local authority powers' to grant fixed term tenancies of up to ten years "*in certain circumstances".* This is a significant extension as fixed-term tenancies would otherwise be limited to between two and five years. The exception will apply to persons with disabilities, but additional circumstances will also be discussed in further readings. One possibility is to grant longer tenancies to cover the period when dependent children will be attending school; another may consider those moving homes to escape violence.

Regarding right to buy, the Peers focused their attention on the proposed sale of 'high value' local authority properties. Developments here included:

- The redefinition of 'high value' properties as '*higher-value'* in the bill. This is intended to ensure that, for the purposes of defining homes to be sold, properties can be compared to the council's own stock, as opposed to the wider regional housing market overall;

- Further rules setting the precise value and definition of 'higher value' will not be made by ministers but through regulations, which will be subject to parliamentary approval;

- Baroness Susan Williams gave undertakings on behalf of the Government to consider allowing councils to ensure 'one-for-one' and 'like-for-like' replacements of properties sold under right to buy, in some circumstances. Her speech in the Lords suggested, however, that this policy may only apply to local authorities outside of London. A proposed amendment which would have required councils to ensure one-to-one replacement was withdrawn on foot of these undertakings.

- Undertakings included a commitment to reconsider forced sale of local authority homes in national parks and areas of national beauty.

On 'Pay to stay', the Peers adopted amendments as follows:

- Local authorities to have discretion over whether to implement the policy within their areas;

- The threshold for tenants considered to be 'high income' would be raised to £50,000 in London and £40,000 in the rest of England, up from £40,000 and £30,000 respectively;

- For tenants who are caught by the policy, the increased rent which they would have to pay would be limited, in that rent should not equate to more than 10p for each pound of a tenant's income above the minimum threshold. The market rent previously proposed was for an equivalent rent of 20p per pound.

If enacted in the final legislation, these amendments would significantly water down the mandatory 'pay to stay' scheme envisaged by the Government. The existing voluntary 'pay to stay' policy, which came into effect on 1 April 2015, has had limited take up in areas with low numbers of 'high earning' tenants, where local authorities feared that the administrative costs of setting up and enforcing the scheme would outweigh any additional revenue generated.

In terms of housing association regulation, the Government increased its efforts to remove housing associations from the public sector by putting forward an amendment which would, if enacted, give the minister power to create regulations which would limit or remove local authorities' ability to "*exert influence*" over registered providers of social housing. This amendment is in addition to the existing proposals which would give housing associations unfettered discretion as to how to use the funds from sale of their properties. The amendment had not been considered by the Lords at the time of writing this article. The type of measures envisaged by the ministerial powers include:

- Removing local authorities' ability to appoint or remove officers to housing associations, such as those appointed to act as board members, or limiting the number of officers which can be appointed;

- Giving housing associations power to remove officers previously appointed by local authorities;

- Removing local authorities' right to vote on the boards of housing associations;

The Bill is scheduled to begin its Third Reading on 27 April, following the conclusion of the Report stage with a final day of debate on 25 April. This is the final stage of the legislative process in the House of Lords before the Bill is returned with the Lords' amendments for the consideration of the Commons. That process is currently diarised to begin on 3 May.

As soon as the legislation is enacted Cornerstone Barristers plans to produce a special edition of our Housing Newsletter with in-depth analysis and discussion. Details will be announced in due course.

Tara O'Leary

"The dog that barked": Court of Appeal holds that licensor is liable for nuisance caused by her licensee

The Court of Appeal has held that a licensor was liable for the acts of nuisance of her licensee in Cocking and Cocking v Eacott and Waring [2016] Civ 140.

Mr and Mrs Cocking, the Claimants, lived next door to Ms Eacott. Ms Eacott's home was owned by her mother, Mrs Waring. Mrs Waring did not live at the property, but had granted a bare licence to Ms Eacott to occupy the property. Ms Eacott caused nuisance to Mr and Mrs Cocking because her dog, Scally, barked excessively "*between 5 and 10 months from August 2008 onwards*".

The issue in the appeal was whether the first instance judge had been correct as a matter of law to hold that Mrs Waring was liable for the barking nuisance.

Mrs Waring argued that her position as licensor should be equated with that of a landlord for these purposes. As is well known, a landlord is only liable for the nuisance of her tenant where the landlord has either

participated directly in the commission of the nuisance by herself or by her agent, or must be taken to have authorised the nuisance by letting the property; the fact that a landlord does nothing to stop a tenant from causing the nuisance cannot amount to participating in it: *Lawrence v Fen Tigers Ltd (No.2)* [2014] UKSC 46. The landlord's limited liability in nuisance reflects the principle of law that a landlord has neither control over nor possession of the property from which the nuisance emanates.

Mr and Mrs Cocking argued that a licensor is not in the same position as a landlord. It was argued that Mrs Waring, as the licensor, was the *occupier* of the property, notwithstanding that she did not physically occupy it. An occupier of a property may be sued for nuisance emanating from that property. This is because, as a matter of law, the occupier has possession and control of the property: *Sedleigh-Denfield v O'Callaghan* [1940] AC 880.

The Court of Appeal held that an occupier becomes liable for the nuisance if she continues or adopts the nuisance by failing to abate it without undue delay after she became aware of it, or with reasonable care should have become aware of it.

Having set out the principle of law, the Court then needed to resolve the question of fact: was Mrs Waring, the licensor, correctly regarded as an occupier of the property? On the facts of this case, she was an occupier of the property: she had allowed Ms Eacott to live at the property under a bare licence.

However, the Court observed that each case will turn on its own facts; in each case it will be necessary to determine whether, as a matter of fact, the licensor is in possession and control of the property: "*It would, perhaps, be possible to imagine cases where an arrangement called a licence was either held to be a tenancy, or found to be so much akin to a tenancy that the licensor could not properly be regarded as an occupier in the relevant sense. This was certainly not such a case. Accordingly, further examination of the position in such a situation can await a case in which such facts arise.*

Matt Lewin

Peabody—a public body?

This article was first published on Lexis®PSL Local Government analysis on 13 April 2016.

Jon Holbrook explains why the court decided in the case of R (on the application of Macleod) v Governors of the Peabody Trust that a housing association was not exercising a public function when it declined to approve a mutual exchange of tenancies.

Original news

R (on the application of Macleod) v Governors of the Peabody Trust [2016] EWHC 737 (Admin), [2016] All ER (D) 37 (Apr)

The Administrative Court dismissed the claimant's application for judicial review of the decision of the defendant housing association with charitable status to decline to approve the exchange of his assured tenancy. On the facts of the case, the defendant had not been exercising a public function in relation to the claimant's tenancy.

Briefly, what was the background to this case?

The claimant's flat was one of a number transferred from the Crown Estate Commissioners (CEC) to the defendant housing association, the Peabody Trust. The claimant was subject to a non-assignment clause in his tenancy agreement. The claimant wished to exchange his tenancy with that of a tenant of a flat in

Edinburgh by arguing that Peabody had a public law discretion to allow it. Peabody declined to approve the transfer and the claimant sought judicial review. Peabody argued that its decision to decline to approve the transfer was a matter of contract and a private law obligation and hence that it was not exercising a public function.

What did the court have to decide?

The principal issue was whether Peabody was exercising a public function when it decided not to allow the claimant to mutually exchange his flat with another tenant in Scotland.

What factors did the court take into account in deciding that Peabody, in making the decision they did, were not acting as a public body and were therefore not subject to judicial review?

There were four key factors in Peabody's favour:

- **Open market**
  Peabody purchased the properties from CEC using funds raised on the open market, not via any public subsidy or grant.

- **Not pure social housing**
  Although the properties were not let at full market rent, it is not clear that they were pure social housing. The key workers for whom the property was reserved included those with a family income of up to £60,000 per annum. The commercial housing market in London adequately serves the needs of those workers. Very many workers in occupations not covered by the nomination agreement relating to the CEC properties are served by the open market. The provision of below market rent properties for such workers does not fall within the definition of social housing in section 69 of the Housing and Regeneration Act 2008.

- **No allocation relationship**
  Unlike the housing association in R (on the application of Weaver) v London and Quadrant Housing Trust (Equality and Human Rights Commission intervening) [2009] EWCA Civ 587, [2009] 4 All ER 865, Peabody had no allocation relationship with any local authority. It was not acting in close harmony with a local authority to assist the local authority to fulfil its statutory duty.

- **Treatment of rents**
  Rents for the properties transferred from CEC (mostly intermediate rents with some market rents) are not subject to the same level of statutory regulation as social housing in general.

- **Does this case depart from guidance given in R (Weaver) v London and Quadrant Housing Trust?**
  No, the case applied Weaver but it is a welcome reminder that Weaver did not establish that housing associations would always be exercising public law functions.

- **What did the judge say in relation to the other elements of the claimant's case?**
  The judge found that even if Peabody had been exercising a public function:

  - it had been entitled to depart from its own mutual exchange policy having regard to its tenancy agreement that did not permit a mutual exchange (paras [23], [24])

  - relief under the public sector equality duty of section 149 of the Equality Act 2010 would be refused having regard to the claimant's evidence that consisted largely of assertions about his mental health unsupported by medical or other evidence (para [25])

  - it made a decision that it was open to a reasonable decision-maker to make (para [26])

- **Is this likely to be the end of the matter?**
  The judge refused the claimant's application for permission to appeal.

- **Any other points of interest?**
  There do not appear to be any other reported cases of a judge finding that a housing association was not exercising a public function.

Jon Holbrook

Consult in haste, repent at leisure

As local housing authorities nationwide consider introducing or renewing additional and selective licensing schemes, Dean Underwood, current Chair of the Social Housing Law Association, considers the requirements of a key pre-condition to designation and provides local housing authorities with tips about lawful consultation.

The statutory duty to consult

1. Parts 2 and 3 of the Housing Act 2004 ('the 2004 Act') which, respectively, provide the statutory framework for additional and selective licensing schemes require local housing authorities ('LHAs') proposing to designate their area - or part of their area - for additional or selective licensing to:
   1.1. take reasonable steps to consult persons, who are likely to be affected by the designation; and
   1.2. consider any representations made in accordance with the consultation and not withdrawn[2].

2. The statutory obligation is an important one, intended to ensure that those likely to be affected by a licensing designation – which may put them to significant cost and administrative inconvenience – have an opportunity to consider, comment upon and potentially shape the LHA's final proposal.

3. As the cost of unlawful consultation and an ineffective designation is invariably significant, in terms of time, money and reputational damage, it is critical that LHAs consult correctly.

4. So, what exactly does the statutory obligation involve; is there a yardstick by which the lawfulness of a consultation can be measured; and how can LHAs assess whether they have taken the 'reasonable steps' required by the 2004 Act?

The bare essentials: procedural fairness and the *Sedley* criteria

5. The overriding consideration and, ultimately, measure of lawful consultation - whatever the source of the legal obligation - is procedural fairness[3]; and the *Sedley* criteria[4] long-

[2] Section 56(3) of the 2004 Act for additional licensing; and section 80(9) for selective licensing.
[3] *R (Moseley) v Haringey LBC* [2014] UKSC 56 [2014] 1 WLR 3947 per Wilson JSC at [24]
[4] Formulated by Stephen Sedley QC (as he then was) in *R v Brent LBC, ex parte Gunning* (1985) 84 LGR 168 and accepted by Hodgson J at 189. Endorsed by the Court of Appeal in *R v Devon CC, ex parte Baker* [1995] 1 All ER 73, *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 and *R (Royal Brompton & Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 [2012] 126 BMLR 134, in which the Court described the criteria at [9] as a "prescription for fairness". Endorsed by the Supreme Court in *R (Moseley) v Haringey LBC* (above) per Wilson JSC at [25].

recognised as a four-stage guide to its achievement.

6. Endorsed by the Supreme Court in 2014, the *Sedley* criteria prescribe that LHAs:

6.1. consult at a time when their proposals are still at a formative stage;

6.2. give sufficient reasons for their proposals, to enable intelligent consideration and response;

6.3. allow adequate time for consideration and response; and

6.4. take responses into account conscientiously when finalising their proposals.

The devil is in the detail, even at a formative stage

7. The rationale for consulting at a proposal's formative stage needs little explanation: one purpose of consultation is to provide those likely to be affected by a proposal with a chance to influence its final form – a chance that becomes more illusory the later that consultation takes place.

8. The need to consult at a relatively early stage does not, however, absolve LHAs of their obligation to flesh out the bones of their proposed designation. Guidance issued by the Department of Communities and Local Government ('DCLG') stresses the need for consultation about detailed proposals. Its now-archived guidance of 2010 – *Approval steps for additional and selective licensing designation in England* - provided that:

> *"During consultation, LHAs must give a detailed explanation of the proposed designation, explaining the reasons for the designation, how it will tackle specific problems, the potential benefits etc. For example, in the case of selective licensing, LHAs must be able to demonstrate what the local factors are that mean an area is suffering from low demand and/or anti-social behaviour, how those factors are currently being tackled and how the selective licensing designation will improve matters."*[5]

9. Its recent guidance – *Selective licensing in the private rented sector – a guide for local authorities* (March 2015) – takes up the refrain[6]; and, if further emphasis were required, the experience of Hyndburn Borough Council before the High Court provides it. In 2011, a lack of detail about the LHA's proposed designation led to the failure of its selective licensing scheme[7]. In a salutary lesson, McCombe J observed that consultation:

> "… does require some precision in the identification of what is to be designated and its consequences, so that the extent of the effect on those persons can be appreciated. In addition, it is hard to see how adequate steps can be taken to consult with persons affected unless one knows the likely licence conditions that will be imposed. Consultations as to general principles [are], in my judgment, insufficient. … In order to comply with the [*Sedley* criteria], the consultees must be given sufficient information to enable them to reach an informed decision upon that which they are being consulted. Without some fleshing out of

[5] *Approval steps for additional and selective licensing designation in England*, page 13.
[6] Selective licensing in the private rented sector – a guide for local authorities at [48-49]
[7] *R (Peat) v Hyndburn BC* [2011] EWHC 1739 (Admin)

the reasons for the proposals, the nature of the proposals as regards the licence conditions and as to a fee structure, it seems to me that an informed response [is] really impossible."[8]

10. Consultation about general principles will not, therefore, discharge a LHA's statutory obligation and, even at a proposal's formative stage, LHAs will be expected to provide consultees with detailed information about:

- the area or areas affected;
- the need for the proposed designation in each area;
- the alternatives to designation and the reason for their inadequacy;
- the alternative schemes available, their respective merits and demerits, the LHA's preferred choice and the reasons for its preference;
- those likely to be affected by the designation;
- the likely effect of designation - and the LHA's preferred scheme in particular - on those affected;
- the process by which those affected may apply for and obtain a licence;
- likely licence conditions; and
- the proposed licence fee and fee structure.

11. Evidently, LHAs will be unable to provide the necessary detail without first researching and gathering evidence about their proposed designation and the possible alternatives. To that end, a period of informal consultation, or 'listening and engagement', such as that undertaken recently by the London Borough of Croydon (below), is often fruitful and may assist LHAs to demonstrate, in the event of later challenge, that they have complied with their obligation to 'take all reasonable steps' to consult.

12. However they go about the process, LHA's would be well-advised to heed the lessons learned by Hyndburn Borough Council (above) and the London Borough of Enfield (below) and not rush the process of consultation.

Wisely and slow. They stumble that run fast.

13. In fact, in the context of additional and selective licensing, the need for LHAs to allow adequate time for consultation – a requirement echoed in the DCLG's archived and recent guidance - rarely causes difficulty.

14. If LHAs want to obtain the Secretary of State's General Approval[9] for a licensing scheme and avoid the need for ministerial confirmation, they must consult formally for a period of at least 10 weeks[10], a period that, in practice, often proves adequate to ensure compliance with the statutory obligation.

15. Indeed, even in cases in which General Approval is not available, the DCLG recommends,

"that if the scheme requires confirmation the local housing authority should aim to consult

[8] *R (Peat) v Hyndburn BC* (above) at [50-52]

[9] As to which, see section 58(1) and (6) of the 2004 Act for additional licensing, section 82(1) and (6) for selective licensing and the Housing Act 2004: licensing of houses in multiple occupation and selective licensing of other residential accommodation (England) General Approval 2015

[10] Note that General Approval is no longer available for selective licensing schemes that, themselves or in combination with other designations, cover more than 20% of the LHA's geographical area or affect more than 20% of the privately rented homes in the area, based on figures taken from census data.

for at least 10 weeks unless there are special reasons for not doing so."[11]

16. Whether the *Sedley* criteria require any longer period of consultation, of course, will depend in any given case on a range of factors, not least the nature and extent of the scheme and the number and geographical spread of those likely to fall within its purview.

17. What is now clear, however, is that periods of listening and engagement, during which a LHA is gathering evidence before consulting formally, are very unlikely to count as consultation, not least because they will usually fall foul of the second *Sedley* criterion. They will not, therefore, bring a scheme about which a LHA has consulted for less than 10 weeks within the scope of the Secretary of State's General Approval.

18. In *R (Regas) v Enfield LBC*[12], the High Court quashed a decision to introduce borough-wide additional and selective licensing schemes in the London Borough of Enfield. The local authority had engaged in a period of 'listening and engagement' before consulting formally about its proposed schemes for a period of eight weeks. The Court rejected the local authority's submission that it was appropriate to aggregate the two periods in order to bring the scheme within the scope of the General Approval. Applying McCombe J's approach in *Peat,* McKenna HHJ held that:

"Superficially attractive though Enfield's argument is, in my judgement it is flawed. As McCombe J, as he then was, put it in Peat *at [50] the statutory consultation requirement cannot be satisfied by a general engagement and listening exercise but requires a draft proposal which would require some precision in the identification of what is to be designated and its consequences so that the extent of the effect on the people can be appreciated. In addition, it is hard to see how adequate steps could be taken to consult with the persons affected unless they knew the likely licence conditions that would be imposed. That level of detail was conspicuously lacking in the first phase undertaken by Enfield and, in the circumstances, Enfield's argument cannot prevail, falling foul as it does, of the second of the Sedley principles."* [13]

Consideration never hurt anyone

19. As for the fourth *Sedley* criterion, it is plainly critical that LHAs consider each response to their consultation with care. It is just as important that they record, statistically and otherwise, how that response has affected their final proposal, if at all.

20. LHAs are unlikely to need, it is suggested, to reply in detail to each response received though, for obvious reasons, they should at least acknowledge each response; and some will call for a more substantive reply.

21. When consultation has closed, however, LHAs are required to compile and publish a report summarising the responses they have received

[11] Selective licensing in the private rented sector – a guide for local authorities at [47]
[12] *R (Regas) v Enfield LBC* [2014] EWHC 4173 (Admin) [2015] HLR 14
[13] *R (Regas) v Enfield LBC* (above) at [47]

and explaining whether or not they have influenced their final proposal.

22. In that regard, DCLG's 2015 guidance is as applicable to additional licensing as it is to selective. It recommends that:

> *"Consultees should be invited to give their views, and these should be considered and responded to. Once the consultation has been completed the results should then be published and made available to the local community. This should be in the form of a summary of the responses received and should demonstrate how these have either been acted on or not, giving reasons."*[14]

Reasonable steps require a tailored approach

23. The Housing Act 2004 applies a statutory gloss to the duty to consult, obliging LHAs to take 'reasonable steps' to consult those likely to be affected by their proposed designation.

24. The Act does not describe what constitutes or is likely to constitute reasonable steps. Like the proverbial cloth cutter, LHAs will need to tailor the steps that they take to suit the circumstances of their proposed designation and consultation. As McKenna HHJ observed in *Regas*, concerning the pool of potential consultees,

> *"The breadth of the specified group will depend on the nature and extent of the proposed designation in any given case."*[15]

25. The duty is, however, limited in scope. As Sir Stephen Silber observed in *R (Croydon Property Forum Ltd) v Croydon LBC*[16], the obligation is only to take 'reasonable steps' to consult those likely to be affected and does not extend to taking every step, all steps or even all reasonable steps.

26. In that regard, LHAs will find some assistance with the scope of their duty in DCLG guidance. Like its 2010 guidance on both additional and selective licensing, the DCLG's 2015 guidance recommends that LHAs consult:

> *"… local residents, including tenants, landlords and where appropriate their managing agents and other members of the community who live or operate businesses or provide services within the proposed designation. It should also include local residents and those who operate businesses or provide services in the surrounding area outside of the proposed designation that will be affected. Local housing authorities should ensure that the consultation is widely publicised using various channels of communication."*[17]

27. The importance of consulting out-of-borough and publicising the consultation widely should not be overlooked. The Act requires LHAs to take reasonable steps to consult 'persons likely to be affected' by the proposed designation. As the local authority learned to its cost in *Regas*, the group affected by a designation is likely to include persons running businesses and providing services in areas outside the proposed area of designation. With that in mind, the wider

[14] Selective licensing in the private rented sector – a guide for local authorities at [48-49]
[15] *R (Regas) v Enfield LBC* (above) at [37]

[16] *R (Croydon Property Forum Ltd) v Croydon LBC* [2015] EWHC 2403 (Admin) [2015] LLR 812 at [45].
[17] Selective licensing in the private rented sector – a guide for local authorities at [46]

the consultation is publicised - in both designated and surrounding areas - the better the prospect of demonstrating compliance with LHAs' statutory duty.

28. Like the requirements of many obligations, the demands of the 2004 Act's duty to consult are illustrated acutely by the misfortunes of others. Case law provides many salutary lessons, of which *Peat* and *Regas* are but two. Just as salutary, however, are the lessons learned from lawful consultations that have survived judicial scrutiny. The consultation challenged in *R (Croydon Property Forum Ltd) v Croydon LBC* is a prime example.

29. In 2014, the LHA began a lengthy consultation about a proposed, borough-wide selective licensing scheme. The exercise lasted from 1st September 2014 to 2nd March 2015 and had three stages:

29.1. a general, non-statutory consultation, which lasted for 2 months, from 1st September 2014 to 31st October 2014, in which the LHA engaged with private sector landlords, managing agents and associations that either supported private landlords or had an interest in private landlord affairs, to determine the level of support for the LHA's proposals. To that end, it made information about the proposed designation and its cost available on its website, undertook a postal survey and hosted a workshop with landlords and their agents to obtain feedback on the proposals.

29.2. The LHA then undertook a four-week period of formal consultation, in which it identified four scheme options and explained its preference for a borough-wide scheme. It publicised the consultation widely and in a variety of ways including: on its website, by email and social media, by distributing posters and flyers in public places, by placing advertisements in newspapers and by press release. It also hosted a further workshop to discuss the proposals publicly and undertook a face-to-face survey of more than 1000 households.

29.3. Following the decision in *Regas*, the LHA then engaged in a further ten week period of formal consultation about its four proposed options, targeting those in neighbouring boroughs and, generally, those with connections to the borough. It publicised the consultation in many of the ways used at stage 2 and facilitated an online survey for those in neighbouring boroughs, as well as placing an advertisement in the newspapers of its neighbouring boroughs.

30. The exercise undertaken by Croydon is, it is suggested, an excellent example of lawful consultation; and LHAs proposing to introduce or renew a scheme of additional or selective licensing could do far worse than to follow it.

31. Whatever steps they propose to take to comply with their statutory obligation, however, the bare minimum for which LHAs should aim is compliance with DCLG guidance. As McCombe J held in *Peat*,

"While I agree … that the guidance issued in the present case has a lesser status than that in issue in the Munjaz case, it does provide a helpful, objective yardstick as to the steps that might well be considered reasonable in the consultation process and the absence of which might well be considered to demonstrate a failure to take reasonable steps."[18]

Pointers in the right direction

32. So, how can LHAs improve the prospect of complying with their statutory duty and mitigate the risk of subsequent challenge? A few brief pointers may assist.

32.1. Follow the DCLG's guidance. It is, as McCombe J held, a helpful measure of the steps likely to be considered reasonable in the consultation process.

32.2. Do not rush into consultation. Formal consultation requires a detailed, evidence-based proposal. Time and resources permitting, LHAs should first undertake a listening and engagement exercise, as a pre-cursor to formal consultation. The exercise is very unlikely to qualify as consultation[19], but will assist LHAs to research and gather evidence to support their proposal. It will also forewarn interested parties of the LHA's intention to designate an area for additional or selective licensing and assist LHAs to demonstrate, subsequently, that they have complied with their consultation obligation. In particular, it will assist them to rebut claims – such as those made successfully in *Regas* - that interested parties would only have become aware of the consultation by pure happenstance[20].

32.3. Publicise the consultation using a wide range of communication – indeed as wide a range as possible:

- LHA publications
- press releases
- email and postal correspondence targeted at known private landlords, private landlords' associations - e.g. the Residential Landlords Association and National Landlords Association - and managing agents
- online, postal, telephone and face-to-face surveys
- public meetings and workshops
- advertisements in local newspapers and those of neighbouring boroughs
- publicity in social media, such as Twitter, Linkedin and Facebook
- posters and flyers distributed in public places – libraries, shopping centres, town centres etc - in both the local authority's area and those of neighbouring boroughs
- information in the footer to all the local authority emails

[18] *R (Peat) v Hyndburn BC* (above) at [53]
[19] *R (Regas) v Enfield LBC* (above) at [47-48]

[20] *R (Regas) v Enfield LBC* (above) at [39]: "…anyone outside the borough who might have had their attention drawn to the proposals had that attention drawn entirely by chance if they happened to have seen a reference to the proposals in media circulating outside the borough (with the possible exception of the national landlord's association) or happened to drive through the borough and saw one of the posters or the like. As counsel for the claimant characterised it, there was no strategy for the consultation of anyone outside the borough and it was a matter of pure happenstance if they became aware of the proposals."

- information on plasma display schemes in public areas

32.4. Time and resources permitting, consult formally for longer than the 10-week period required for General Approval, or recommended for ministerial confirmation. The longer the consultation, the longer its likely shelf life – a factor that may be important if there is a delay between the close of consultation and subsequent designation. As McCombe J observed in *Peat*[21], "…if the council's consultation is a shallow one, as in my view this one was, its usefulness is likely to have a much shorter sell-by date."

32.5. Provide detailed reasons for either accepting or rejecting the representations of consultees. Time spent explaining the rationale for the LHA's final proposal after the close of consultation is likely to save time later, responding to letters before action and claims for a judicial review.

Solace in a high threshold?

33. There is little doubt that the job of ensuring a lawful consultation is time-consuming and demanding, requiring LHAs to research and gather evidence for a detailed proposal and ensure compliance with the *Sedley* criteria at all stages of the exercise.

34. LHAs may find solace in the knowledge that the threshold above which courts will consider a consultation exercise unlawful is a high one. LHAs have a wide discretion about the way in which they consult and an exercise which is flawed in one or even a number of respects will not necessarily be so unfair as to be unlawful. That it might have been better is emphatically not the test: it will not be considered unlawful unless something goes clearly and radically wrong[22]. Indeed, "in order to be unlawful, the nature and extent of the process must be so narrow that no reasonable council, complying with the principles set out above, would have adopted it"[23].

35. Nevertheless, LHAs will want to take time to ensure that they consult lawfully and thoroughly. The cost of rushing the process is likely to be significant and, as history demonstrates, those who hasten to consult tend to repent at their leisure.

Dean Underwood

Barrister and Chair of the Social Housing Law Association

[21] *R (Peat) v Hyndburn BC* (above) at [56].

[22] *R (Wainwright) v Richmond upon Thames LBC* [2001] EWCA Civ 2062 [2001] All ER (D) 422 (Dec) per Clarke LJ; *R Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) [2007] Env LR 623, per Sullivan J at [62-63]; *R (Peat) v Hyndburn BC* [2011] EWHC 1739 (Admin) [2011] All ER (D) 86 (Jul) per McCombe J; *R (Croydon Property Forum Ltd) v Croydon LBC*, per Sir Stephen Silber at [59]

[23] *R (Wainwright) v Richmond upon Thames LBC* (above), per Clarke LJ at [11].

Sub-letting: have you got the best evidence?

As first appeared in the SHLA newsletter (April 2016)

Andy Lane considers some of the issues arising, and the court procedures available to, social landlords taking possession action because the tenant is believed to have sub-let or parted with possession of the demised premises

Introduction

It is trite law that:

1. If a tenant does not reside in their demised premises as their only or principal home then security of tenure comes to an end[24] .

2. If they have in fact sub-let or otherwise parted with possession of the whole of the demised premises then that security of tenure is not only lost but it cannot be regained (save by the grant of a fresh tenancy)[25] .

3. The remaining common law tenancy can thereafter be determined by means of the service of a notice to quit[26].

Sub-letting is a reasonably straightforward concept[27], but 'parting with possession' is not always so easy to explain or demonstrate.

In the Privy Council case of Lam Kee Ying v Lam Shes Tong [1975] A.C. 247 Sir Harry Gibbs said at [256C].

"A covenant which forbids a parting with possession is not broken by a lessee who in law retains the possession even though he allows another to use and occupy the premises. It may be that the covenant, on this construction, will be of little value to a lessor in many cases and will admit of easy evasion by a lessee who is competently advised, but the words of the covenant must be strictly construed, since if the covenant is broken a forfeiture may result."

The potential difficulties with this concept were starkly to the fore in Hussey v Camden LBC (1995) 27 HLR 5 at [10] where the tenant succeeded in his appeal despite the evidence available to the local authority:

"As summarised by Mr Bhose, there was proof before the judge that there were periods when Mr Hussey was not living at his flat but, on the contrary, was living elsewhere; that during such periods someone else was living at the flat…"

As for the only or principal home context, in Crawley BC v Sawyer (1988) 20 HLR 98 the tenant left his flat to go and live with his girlfriend, told his landlord that he was living there and that they intended to purchase her home, and had his electricity cut off at his flat. A notice to quit was served and he returned to live at the flat, following a relationship breakdown, some 10 days after the notice to quit had expired.

The Court of Appeal confirmed that the trial judge was entitled to find despite all this that the tenant was still living at the flat as his only or principal home, his occupation of his girlfriend's premises being of a temporary nature[28] :

"In the present case the learned judge was, on the evidence, in my view well entitled to hold that throughout the period the premises the subject of the action were occupied by the defendant as a home. The only question which really arose is whether it was occupied as a principal home. The learned judge considered the question. He came to the conclusion which he did on the basis that the defendant had left

[24] Sections 79 and 81 Housing Act 1985 (secure tenancies)/Section 1(1)(b) Housing Act 1988 (assured tenancies): only one of a joint tenant needs to so reside and there can be occupation by a tenant's spouse/civil partner
[25] Section 93(2) Housing Act 1985/Section 15A Housing Act 1988
[26] The tenancy being determined at the expiry of the notice to quit: *Hussey v Camden LBC* (1995) 27 HLR 5, CA
[27] It is an objective test and largely a question of fact for the judge - *Brent LBC v Cronin* (1998) 30 HLR 43 at [46-7]
[28] Parker LJ at [102]

to live with his girlfriend but with no intention of giving up permanent residence of Cobnor Close.

Some criticism is made of that wording, but we are not analysing a judgment which was carefully prepared and delivered after reservation. It is in my view unjustified to latch on to sentences in a short extempore judgment and try to find on them an argument that the learned judge misdirected himself in law. The situation, which the judge was entitled to take into account, was that he had before him the evidence of the defendant, who asserted throughout that he had every intention of returning and not merely that he had not abandoned the flat. He said in his evidence-in-chief: "I accept I was not there but I had every intention to return." He again said he had every intention to return somewhat later on and that he did not intend to give up the flat. He was staying with his girlfriend helping her to buy a house. I fail myself to understand how he could have been a tenant in common, and the matter was not investigated. The learned judge was entitled to take the view that he was there on a temporary basis and that his principal home throughout remained the premises the subject of the action."

The need to ensure that the best evidence is before the court is therefore, unsurprisingly, of critical significance.

2013 Legislation

Unlawful sub-letting has been a real issue for social landlords for many years[29], as well as other example of social housing fraud[30]. It was felt to be such a problem that the Coalition Government took over a Private Member's Bill in 2012[31] and enacted the Prevention of Social Housing Fraud Act 2013 ("the Act")[32].

Some cases are very straightforward, albeit contested. For example, I represented a housing association in their possession claim against a tenant of a one-bedroom flat. Aside from evidence of his use of other premises (including ownership of one), even more tellingly the association had obtained documentary evidence of tenancy agreements the tenant had provided to two persons in respect of the demised premises. He admitted one (she slept in the bedroom, he in the lounge he said) but denied the other. Unfortunately for him, when his bank accounts were obtained these showed regular monthly payments being received from both individuals.

At trial he did not attend but sent a friend with a bottle of pills and a note to explain he had a "sports injury" and could not sit for long periods. He wanted an adjournment, which was unsurprisingly declined by the judge, and a possession order was ultimately (and inevitably) obtained.

Not every case is as clear or obvious, but even those that are, are often only so because of the hard work of the landlord, their lawyers and any investigators in obtaining the necessary evidence.

This article highlights the question of that evidence collation, particularly through the courts, but before considering that issue will briefly build on the overview of the relevant legislation referred to above.

Pre-Act

Possession action, following proper service of a valid notice to quit, was the main remedy employed by social landlords prior to 15 October 2013 in sub-letting/parting with possession cases (and, in reality, still is).

There were claims for unjust enrichment or in

[29] Estimates at the time the Prevention of Social Housing Fraud Act 2013 received royal assent on 31 January 2013 put the number of unlawfully sub-let social housing dwellings at around 98,000

[30] Such as obtaining a tenancy (allocation or homelessness) by fraud, false succession claims, fraudulent right to buys, mutual exchanges with consent obtained by fraud, assignment without consent (or where consent obtained by fraud) and benefit fraud (such as in relation to housing benefit & council tax support)

[31] Presented by Richard Harrington MP on 20 June 2012

[32] The Act extends to England and Wales and was brought fully into force in England on 15 October 2013: Commencement Order

fraudulent misrepresentation, criminal prosecutions under the Fraud Act 2006 and sections 171 (allocations) and 214 (homelessness) of the Housing Act 1996, and recovery provisions under the Proceeds of Crime Act 2002, but these were comparatively few and far between.

The 'landscape' in respect of sub-letting and parting with possession cases has however been simplified and clarified by reason of the Act's introduction.

Post-Act Picture

Sections 1 and 2 of the Act create two new criminal offences in respect of secure and assured tenancies[33] respectively, though this is outside the purview of this article.

In civil proceedings, by application or as part of possession or other proceedings, section 5 enables landlords to seek an unlawful profit order against tenants who have sublet their homes in breach of their tenancy agreements in return for payment. Landlords can in effect recover the 'profit element'[34].

Crucially, section 6 also provides (by the insertion of section 15A into the Housing Act 1988) that an assured tenant who sub-lets or parts with the whole of their dwelling will no longer be able to regain their security of tenure by moving back into the property (prior to the expiry of any notice to quit served). This has brought assured tenants in line with the position long applicable to secure tenants of local authorities.

The ever-impressive House of Commons Library produced an excellent briefing note on the Act in 2014.

Investigation Powers

The Prevention of Social Housing Fraud (Power to Require Information) (England) Regulations 2014[35] ("the Regulations") came into force on 6 April 2014.

It makes express provision for powers to require information to be produced for housing fraud investigation purposes.

Prior to this social landlords used the comparatively limited data sharing powers and ability to request information under the Data Protection Act 1998[36], and the surveillance powers to be found under legislation such as the Regulation of Investigatory Powers Act 2000.

The Regulations enable an authorised officer (usually employed by a local authority) to require banks, building societies, other providers of credit, telecommunications providers and utilities companies to provide information that is reasonably required for the purpose of preventing or detecting fraud under the Act[37].

The operation of this power is unsurprisingly not without its caveats and "hurdles". Paragraph 4 of the Regulations says for example (with my emphasis in underlining):

"(5) An authorised officer shall not, in exercise of those powers, require any information from any person by virtue of that person falling within paragraph (3) unless it appears to that officer that there are reasonable grounds for believing that the person to whom it relates is—

(a) a person who has committed, is committing or intends to commit an offence listed in section 7(7)[38]

[33] This does not apply to shared ownership tenancies
[34] The maximum amount recoverable defined at section 5(6)
[35] SI No. 2014/899 - made under sections 7, 8 and 9(2)(b) and (c) of the Act

[36] Sections 29 and 35, and Schedule 2 (paragraph 6) – see Tenancy Fraud & Data Sharing" by the CIH (February 2012)
[37] Paragraph 4
[38] *(7) In this section "housing fraud investigation purposes" means purposes relating to the prevention, detection or securing of evidence for a conviction of—*
(a) an offence under this Act;
(b) an offence under the Fraud Act 2006 relating to the unlawful sub-letting or parting with possession of the whole or part of a dwelling-house let by a local authority, a private registered provider of social housing or a registered social landlord,
(c) an offence under the Fraud Act 2006 relating to an application for an allocation of housing accommodation under Part 6 of the Housing Act 1996,
(d) an offence under the Fraud Act 2006 relating to an application for accommodation, or for assistance in obtaining accommodation, under Part 7 of the Housing Act 1996 [or under Part 2 of the Housing (Wales) Act 2014],

of the Prevention of Social Housing Fraud Act 2013; or

(b) a person who is a member of the family of a person falling within sub-paragraph (a)."

It is an offence under paragraph 5 of the Regulations to not provide, intentionally delay, etc. the information requested. However, the application of the Regulations runs, in my experience, relatively smoothly and is especially useful with regard to bank statements and details.

It does not though assist in obtaining information from third parties, such as a "reluctant" sub-tenant, who are unrelated to the tenant.

Court Processes

That is where effective use of court procedures may assist "fill in the gaps" and strengthen the evidence to its optimum effect.

Pre-Action: most of the realistic actions available through the civil courts relate to the post-issue period, though pre-action disclosure is available pursuant to CPR 31.16.

Any application for pre-action disclosure:

(a) can only be made against a would-be (likely) party,
(b) must identify the documents or class of documents to be disclosed (which would have been disclosable under standard disclosure if proceedings had been issued), and
(c) will only be considered if it is desirable to:

i. dispose fairly of the anticipated proceedings;
ii. assist the dispute to be resolved without proceedings; or
iii. save costs.

This option is however unlikely to be taken up in most sub-letting cases, not only because of the powers already available to a social landlord to obtain information (see above – this would often include a transcript of an under caution interview with the would-be defendant), but also because it is unlikely that the required evidence could be identified with sufficient clarity or satisfy (c) above.

Post-issue: the landlord in any event has often determined to issue proceedings (in some instance after offering the defendant an 'amnesty' against prosecution, etc. if she/he would simply give back the keys and surrender the demised premises with vacant possession) and has three primary options available to them, which are generally under-used, to improve further their case.

Firstly, there is the Part 18 Request for Further Information procedure. Its purpose is to clarify a party's case and the relevant matters in dispute.

For example, I have one case where the defence is in essence a bare denial of sub-letting, but does not respond at all to the matters used to support the landlord's case. It is therefore not known, to give three instances:

- What the defendant says about monthly payments going into her account.
- How long she spends (and what she does) in another country, where her husband and business are.
- What she lived on for a 3-year period when she was not working and was not in receipt of social security benefits.

The solicitors for the local authority submitted a Request for Further Information to the defendant's

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(e) an offence under the Fraud Act 2006 relating to—
(i) a claim to exercise the right to buy under Part 5 of the Housing Act 1985,
(ii) a claim to exercise the right to acquire under section 16 of the Housing Act 1996, or
(iii) a claim to exercise the right to acquire under section 180 of the Housing and Regeneration Act 2008, or
(f) an associated offence in relation to an offence mentioned in any of paragraphs (a) to (e).

solicitors, but they declined to answer it. An application for an order requiring a response to the Request was therefore made to the court and granted.

It is important to note:

i. A preliminary written request should always be made first, providing a date when a response is expected and confirming that the Request is made under Part 18.

ii. The Request should be proportionate and with a genuine view of knowing the case the first party has to meet.

iii. Such a Request should comply in full with the Practice Direction to Part 18.

iv. Any Response should be verified by a statement of truth.

v. If the second party objects to complying with the Request (including on the basis that it would be disproportionately expensive), or any part of it, then they should inform the first party promptly.

vi. If no response at all is made, and at least 14 days was given to respond, then the first party can seek an order without a hearing, and without serving the application on the second party.

vii. A court granting an order under Part 18 can make it subject to conditions, and with the application of a sanction for failure to comply.

viii. The court can make a Part 18 order of its own initiative.

ix. A Request is necessarily made post-statement of case, but may be made prior to statements being served and more than once.

x. The Part 18 procedure is only available against a party, but that does not prevent any landlord writing to a witness or would-be witness, such as an alleged sub-tenant, seeking answers to specified questions. Those answers may be helpful in cross examination of that individual, and a failure to respond may be argued as showing, for example, a degree of collusion or complicity with the defendant.

In many instances allied to the Part 18 process is the availability of the two other options alluded to above.

That is, the power under CPR Part 31 for a court to order specific disclosure of identified documents or classes of documents (31.12), or disclosure against a person who is not a party (31.17).

The former is somewhat self-explanatory and enables the landlord to seek disclosure of documents not identified during the standard disclosure process (though an application can be made prior to the time for standard disclosure).

It has been my experience that whilst separate applications pursuant to CPR 31.12 are not common in subletting/parting with possession cases the power is sometimes exercised 'by the back door' by identifying requested documents in the usual direction for standard disclosure.

The latter application under CPR 31.17 is available to a party where the documents sought are likely to support the case of the applicant or adversely affect the case of another party, and disclosure is *"necessary in order to dispose fairly of the claim or to save costs".*[39]

Unlike the Part 18 or 31.12 procedures, an application under 31.17 is expressly aimed at non-parties.

[39] There is a strong public interest in the court having before it all the relevant evidence and documents: Mitchell v News Group Newspapers Ltd [2014] EWHC 1885 (QB) ¶ 14-15

For example, it may seek the bank accounts of the alleged sub-tenant, or details in relation to where they claim to have lived at the relevant time (such as household bills).

As always, it is sensible to first seek the required information without recourse to the courts, any application being very much a last resort.

Finally, it is worth reminding the reader of a fourth option – the ability to witness summons an individual to attend court to give evidence or produce documents in court (CPR 34.2), or call the other party's (identified) witness where they were not otherwise going to be called (CPR 33.4).

One has to be careful in the use of these powers of course because it can backfire and end up strengthening the case of the defendant.

For example, in a recent succession possession claim the defendant had not called any evidence from his siblings, adult children, partner or ex-wife to support his claim to have lived with his mother, the tenant, for at least 12 months prior to her death.

The local authority in that case did not seek to witness summons these persons but rather were able to successfully raise their non-attendance or involvement with the defendant in cross examination.

It is perhaps a power most frequently considered in the case of "neighbours", otherwise reluctant to come forward and confirm the information they have previously given to the landlord.

However, it also has obvious application for professional persons, such as housing benefit officers.[40]

Conclusion

This article is not intended to be a definitive guide to everything a social landlord can do to determine the strength of its case in a sub-letting/parting with possession scenario[41], but does seek to address some options available to them to bolster their case (or even determine that the merits do not justify action)[42].

Andy Lane

Article 8 defences against private landlords? Supreme Court to decide

Last month the Supreme Court heard arguments on the scope for human rights defences in possession proceedings brought by private landlords. It is now settled law that the courts, when considering possession claims brought by public authorities and, in some cases, housing associations, have the power to consider whether an order would be a proportionate interference with the tenant's right to respect for their home, protected by Article 8(1) of the European Convention on Human Rights. Hitherto, however, that power – set out in the Pinnock and Powell line of cases – had been assumed to apply only in cases involving social housing.

McDonald v McDonald

In the case of *McDonald v McDonald* – in which Matt Hutchings and Jennifer Oscroft of Cornerstone Barristers acted on behalf of intervening party Shelter – the Supreme Court was invited to extend this power to possession proceedings in the *private* rented sector. The appellant in the case suffers from a mental disorder which makes her particularly distressed by changes in her environment. She held an assured

[40] A process frequently used at the old Shoreditch County Court in possession claims based on rent arrears, where it was generally accepted the real issue was delayed housing benefit claims

[41] For example, there is the availability of a Notice to Admit Facts under CPR 32.18 (see CPR Part 32)

[42] Information on the amount of Local Authorities' fraud work can be obtained under Local Government Transparency Code 2015 and the Local Government Counter Fraud and Corruption Strategy 2016-19 has recently been produced

shorthold tenancy of a property owned by her parents. When the parents defaulted on the mortgage payments, receivers served a section 21 notice seeking possession of the house. The appellant opposed the making of a possession order on the ground – alongside others which were not pursued in the Supreme Court – that the order would be incompatible with her Article 8 rights.

In respect of Article 8, the Court of Appeal dismissed her appeal on the basis that no "clear and constant" jurisprudence of the Strasbourg court indicated that a proportionality analysis applies to private landlords under Article 8(2) ("There shall be no interference by a *public* authority…"). Moreover, the Court was bound by *Poplar Housing v Donoghue* to hold that section 21 of the Housing Act 1988 is compatible with the Convention. The Court found that it was prevented by *Donoghue* from finding that the proportionality test applied, and therefore the question of "reading down" section 21 to achieve compatibility with Article 8 did not arise.[43]

The issues before the Supreme Court

The Court was invited to find that the power to consider the proportionality of making a possession order extends to orders sought by private landlords. First, the wording of Article 8(1) itself: "*Everyone* has the right to respect for…his…home" seems to suggest that no distinction between public and private tenants was contemplated by the signatories to the ECHR. Second, a court is a public authority, as an emanation of the legal branch of the state and for the purposes of the Human Rights Act 1998,[44] and therefore falls within the "no interference by a public authority except…" prohibition set out in Article 8(2). Rather than announcing a new departure in the law, the Supreme Court was simply invited to recognise the logic of both Convention and domestic law. A court in making a possession order is, it was argued, interfering with the defendant's right to respect for his home. Accordingly, it should only be able to do so to the extent "necessary in a democratic society" (the proportionality test).

What next?

Readers will be aware that – other than in very limited circumstances – a court has no power *not* to grant possession based on a section 21 notice, which is essentially a 'no-fault' mechanism for securing possession. Depending on the outcome of *McDonald v McDonald*, however, that could be set to change, meaning that private landlords – and those representing them – will need to be aware of the law surrounding Article 8 defences in possession claims. As pointed out by the Residential Landlords Association, who also intervened in the case, this would affect a substantial proportion of the housing market. As of 2014-2015, the private rented sector accounted for 19% of all households (or 4.3 million households) in England,[45] with the Association raising concerns that it would adversely affect the vitality of the market.

In our view, should the Court favour the appellant, there will be no cause for undue celebration on the part of tenants, nor for undue concern on the part of landlords. As Shelter noted in its witness statement to the Court, its solicitors could find no example of a case in which an Article 8 defence alone had been successful. In social housing cases the vast majority of such defences are dealt with – and rejected – summarily. There is only one reported case of an Article 8 defence being deployed successfully.[46] Given the additional factor weighing in the favour of private landlords – the right to peaceful enjoyment of one's possessions under Article 1 Protocol 1 ECHR – there is no reason to think that Article 8 defences will enjoy greater success than they do in the social housing sector. [47]

[43] Pursuant to the court's interpretive obligation under section 3 of the Human Rights Act 1998.
[44] Section 6(3)(a).

[45] By comparison, the social rented sector comprises 17% of households while 64% are owner-occupiers; see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/501065/EHS_Headline_report_2014-15.pdf.
[46] *Southend-on-Sea Borough Council v Armour* [2014] EWCA Civ 231.
[47] Although there is no statutory requirement for a private landlord to manage their housing stock, as is the case with social landlords.

Nevertheless, should the Court find in favour of the appellant in *McDonald v McDonald*, there may be exceptional cases in which an Article 8 defence will arise in respect of a possession order under section 21. There will be a consequent need for private landlords and their lawyers to verse themselves in Article 8 and proportionality. Watch this space.

Gary Dolan and Ruchi Parekh
Pupils at Cornerstone Barristers

Recent Housing Developments

Andy Lane has delved into his twitter account to remind himself (and you) of some of the issues facing the Housing Sector in the last 3 months…

Allocation

A House of Commons Library Briefing Paper has been produced on 'EEA migrants: access to social housing (England)'

Anti-social Behaviour

Salford City Council are to respond to Liberty privately about concerns on the PSPO introduced to stop foul and abusive language.

Effective use of community protection notices was demonstrated in Leeds in early April in relation to a garden

Council Tax

The New Policy Institute report on 'Key Changes to Council Tax Support in 2016/17', commissioned by the Joseph Rowntree Foundation, was published on 5 April 2016

Courts

The Ministry of Justice has reached its decision on court closures.

The Judicial Executive Board is consulting on 'Reforming the courts' approach to McKenzie Friends'.

On 21 March 2016 there were fee increases for possession claims, applications made by consent and general applications (with or without notice).

Fee increases have been introduced in respect of the Court of Appeal and Upper Tribunal (Lands Chamber).

Homelessness

The Supreme Court has granted permission to appeal in Poshteh v Kensington & Chelsea RLB.

The DCLG has produced its 2015 (final quarter) homelessness statistical release.

The House of Commons Library have produced a 'Households in temporary accommodation (England)' briefing paper.

An expert panel of council members, lawyers and housing experts – convened by Crisis - has published its final proposals for a new English law aimed at making sure all homeless people can get the help they need

Housing & Planning Bill 2015-16

As this nears the end of its Parliamentary run progress can be followed at this Parliamentary website.

Licensing

There was a good example of selective licensing's primary purpose in Gateshead in March 2016.

Interesting use of a criminal behaviour order against a private landlord poorly managing his properties.

Notices

New s8 (notice seeking possession) and s13 (rent increase) notices in force in England from 6 April 2016

Pay to Stay

The Government has responded to the 'Pay to stay' consultation.

Possession

The Minsitry of Justice produces its 'Mortgage and Landlord Possession Statistics Quarterly, England and

Wales' for the October to December 2015 period.
Senior Master Practice Note on applications for transfers to the High Court for the enforcement of possession orders.

Private Rented Sector

The DCLG have produced a model PRS assured shorthold tenancy agreement and guidance.
The House of Commons Library have produced a briefing paper on 'Dealing with infestations in privately rented property in England'.
The Home Office has published an updated Code of Practice on the right to rent.
The Home Office have issued revised guidance on right to rent checks.

Rent

The DWP have issued updated guidance for local authorities administering discretionary housing payments.
The Economic & Social Research Council has produced an evidence briefing on 'Rents in social housing: the trade
offs'.
1% social rent reduction regulations in force on 1 April 2016.
The National Housing Federation have produced a revised briefing on housing associations implementing the 1% rent cut introduced by the Welfare Reform and Work Act 2016 with effect from 2016/17.

Right to Buy

The Communities and Local Government Select Committee produced a report in February 2016 on 'Housing Associations and the Right to Buy'.

Shared Ownership

The Homes & Communities Agency has issued its Shared Ownership and Affordable Homes Programme 2016 to 2021.

Social Housing Fraud

On 23 March 2016 the DCLG produced 'The local government counter fraud and corruption strategy 2016-2019'.
Social housing fraud was successfully prosecuted at Inner London Crown Court.

Succession

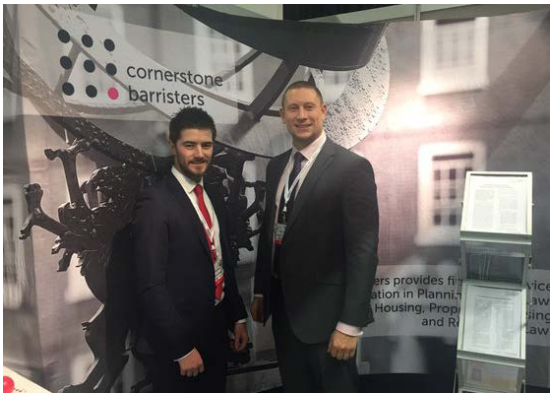
A briefing paper was produced by the Housing of Commons Library on 17 March 2016 on 'Succession rights and social housing (England)'

Miscellaneous

The DCLG produces its Headline Report on the English Housing Survey.
The Law Commission has launched a consultation on updating the Land Registration Act 2002.
London & Quadrant Housing Trust, The Hyde Group and East Thames have entered into merger talks .
The London Borough of Camden set up "Camden Living" to provide 'intermediate' rental housing for residents who cannot afford private rents but do not qualify for the housing register.
The Private Housing (Tenancies)(Scotland) Bill 2015 received royal assessment on 22 April 2016.
A briefing note from the House of Commons Library was issued on 26 April 2016 on new forms of service delivery being implemented by local authorities.

Andy Lane

Cornerstone in Brighton: The CIH South East Conference



Justin Callaghan and Elliot Langdorf, Clerks at Cornerstone Barristers

In March, Cornerstone Barristers exhibited at the CIH South East Conference in Brighton. For each day of the three day event, our barristers, and members of our clerking and events teams were on hand to meet with some of the 1200 delegates the conference attracts each year. It was an excellent opportunity to make new contacts and catch up with so many of our existing and valued clients. Thank you to everyone who visited our stand.

Dean Underwood

As well as manning the stand in the exhibition hall, Dean Underwood gave a Housing Law Update to the conference. Dean spoke alongside Mike Owen from Capsticks and Amy Cheswick (CIH Board Member). The session provided a legal update on the main issues facing the sector, including welfare reform, ASB and tackling tenancy fraud.

Ben Du Feu

Cornerstone Housing News

Upcoming events

The next event in the Cornerstone Housing Seminar Series is the Housing Update on 8th June, at which Andy Lane and Emma Dring will look at some of the primary issues which have faced social landlords over the last 12 months, and briefly look ahead to changes to come. Click here to book a place. During the seminar, Andy and Emma will be announcing the results of a short housing survey which you can contribute to here.

Other dates for your diaries include a Hoarding and Capacity Seminar on 7th September and the Annual Housing Day on 4th October. Visit our website for further details.

Recent News

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

You Can't Judicially Review All Housing Association Decisions

Matt And Jenny Aim For Supreme Three In A Row

Be Wary Of Claimants Who Try To Manipulate The High Court

Decision Reached On Court Closures

Editorial Board

Andy Lane

Clare Gilbey

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