cornerstone barristers

Cornerstone Housing Newsletter

May 2017

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Welcome to the Cornerstone Housing Newsletter May 2017

The Editor Speaks…

This newsletter has been produced in very eventful times (thanks Donald), and with a number of local, regional and national elections coming up in the UK. As I write this editorial, Europe is inevitably still high on the agenda…I still think we have a good chance of beating Celta Vigo and getting through to the final but tiredness is an issue.

On a more serious note, the general election allows the political parties to set out their stall on a whole host of issues, not least of course the perennial problem of housing – increasing numbers of people sleeping on the streets, not enough housing being built, continuing issues surrounding the local housing allowance and real issues of affordability across all sectors to highlight just four issues.

Since the last issue of the newsletter we have also seen the Housing White Paper published on 7 February 2017 through to the critical report of the House of Commons

Committee of Public Accounts, "Housing State of the Nation", produced on 28 April 2017.

On the home front, we saw the first Bryan McGuire QC memorial lecture on homelessness in April. This is highlighted later in the newsletter and suffice to say here that the wonderful attendance was a tremendous tribute to the respect and affection in which Bryan was held by so many people in the housing world and beyond. HHJ Luba QC must also be thanked once again for providing an impressive and engaging contribution.

Our seminar programme kicked off with Jon Holbrook, Emma Dring and Matt Lewin presenting a well-received seminar on fixed term/flexible tenancies in March, and Peggy Etiebet and Ruchi Parekh presenting an excellent session on tackling tenancy fraud last month. Ruchi has got a real taste for this training lark and joins Tara O'Leary and myself in June to present a half-day session on public law and Equality Act defences.

Special mention should also go to Kelvin Rutledge QC, Matt Hutchings QC and Matt Lewin for organising and delivering a timely and superb session on the Homelessness Reduction Bill (now Act) on 20 April 2017. This has not been the only seminar we have delivered on the topic, and it won't be the last.

So enjoy the read as always. There are some impressive articles and I have for once also stopped watching "Big Bang Theory" and "Judge Judy" and put fingers to keyboard. But special thanks go to Peggy, Liam, Matt and John for their contributions, and most of all to the rest of the editorial board who, as you always suspected, do the real hard work and put my ramblings into some sort of coherent order. Thank you.

Andy Lane
Barrister

The Homelessness Reduction Act 2017: Opportunities, Challenges

Readers will be familiar with the Homelessness Reduction Bill, which started life as a private member's bill, introduced by Bob Blackman MP, but which quickly attracted government support. Readers also familiar with this newsletter will know that I have been keeping tabs on the progress of the Bill through Parliament on its way to becoming law (here and here). More recently, I looked at the final version of the Bill in the March newsletter of the Social Housing Lawyers' Association (here). For detailed comment on the Act, I recommend those earlier three articles.

On 27 April 2017, the Bill received Royal Assent and becomes the Homelessness Reduction Act 2017. Secondary legislation will bring the Act into force in due course, with transitional provisions which will presumably explain how the new duties will apply to applications already being processed when the reforms come into force. The Act also provides for a new Code of Practice, although DCLG have said nothing further about this in public, as far as I can tell.

Opportunities, challenges

As I have commented before, there is much in the reforms to be welcomed. In particular, the new section 175(5) – which provides that a private sector tenant who has received a valid Section 21 notice is threatened with homelessness – should bring about greater certainty for all involved and reduce the burden on the courts of unnecessary, wasteful possession claims.

For local authorities in particular there are many opportunities to benefit from the reforms. The Act finally puts the valuable homelessness prevention work of housing options teams on a statutory basis. For applicants who are threatened with homelessness (especially Section 21 notice cases, which are the single largest cause of Part VII applications), local authorities will have a much longer lead time in which to carry out prevention work (56 days). If prevention work

is successful, and homelessness is avoided, then no final duties will arise. Therefore for local authorities carrying out effective prevention work there are significant opportunities to reduce caseloads where final duties are owed.

For applicants who are already homeless, or who become homeless at the end of the 56 day prevention period, the new initial duty gives a local authority a further 56 day window in order to resolve the applicant's homelessness. The initial duty can be discharged by securing suitable private sector accommodation for a minimum period of 6 months. Again, for local authorities with effective procurement strategies, this represents a significant opportunity to reduce caseloads where final duties are owed.

Of course the benefit is mutual: where a local authority's prevention work successfully prevents a final duty being owed, it will be because the applicant's homelessness has been resolved.

The Act also imposes express duties on the applicant to co-operate with the authority in the processing of their application. This welcome reform means that, in an ideal world, the authority and the applicant should be in dialogue. If this works in practice, this ought to make it more likely that the applicant's homelessness can be resolved at a much earlier stage. A failure to co-operate means that duties can be discharged.

Perhaps the most fertile new area for legal challenge will be the new section 213B, which imposes an express duty on other public authorities to refer potentially homeless applicants to the local housing authority. The list of public authorities will be set out in regulations, but it will almost certainly include social services departments and local education authorities. In other words: colleagues working in other teams within the unitary authority or over at County Hall. Therefore local authorities would be well advised to update their joint working arrangements with these other departments at an early stage and to ensure that there is an effective information sharing agreement in place.

The Act also creates a large number of new rights of review to reflect the new duties. It is now conceivable that local authorities may have to deal with simultaneous requests for reviews. *Ravichandran v Lewisham LBC* [2010] EWCA Civ 755 held that it is lawful to carry out reviews of two separate issues in the same decision. I see no reason why that principle should not continue to apply following the Act's reforms. Provided the authority states clearly that it proposes to roll up multiple requests for a review into a single decision, it would make good administrative sense to reduce the amount of paperwork involved. As officers will soon see, more paperwork is one of the major themes of the Act.

Matt Lewin
Barrister

Contracting Out Homelessness Decisions

It is just over 10 years since the Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 SI No. 3205 came into force but local authorities are still facing challenges, in section 204 Housing Act 1996 appeals, on whether they have validly contracted out their homelessness functions pursuant to article 3 of the 1996 Order.

It is of course clear, as Mr Justice Jay in *Tachie v Welwyn Hatfield Borough Council* [2013] EWHC 3972 (QB) stated, that any ultra vires issue is capable of being the subject of a section 204 appeal. However, to the frustration of many a local authority, in a significant

number of appeals there is a stark focus on what is perceived to be arid and technical points which demonstrate no prospect of a different decision on the public law merits of the review decision itself.

If this is the case, it is always worth stating so upfront – you may attract the sympathy of the court. For example, Recorder Geraint Jones QC in *Kryczka v Westminster* unreported 23 December 2016 was fairly scathing, '*It is beyond doubt that arguments of this kind are now current in cases where it is perceived that the more usual grounds of challenge to a part VII decision will not or may not avail an appellant. In my judgment this approach is to be deprecated. The practice of trawling through any given Council's Constitution and Standing Orders in the hope that some internal provision might have been offended or not complied with to the letter, is utterly wasteful of public funds (most appellants in this kind of appeal being legally aided) and often indicative of a want of other properly arguable grounds of appeal.'*

It is also worth pointing out that there is likely to be no point to many of these types of challenges. Section 135(4) of the Local Government Act 1972 provides, '*A person entering into a contract with a local authority shall not be bound to enquire whether the standing orders of the council which apply to the contract have been complied with and non-compliance with such orders shall not invalidate any contract entered into by or on behalf of the authority'*. As such, notwithstanding say a failure to tender the contract (should the value of the contract require it), or to complete the written agreement as set out in the standing orders, the contract remains valid and thus the review has been validly authorised to make the homelessness decision.

Often it is asserted that a breach in the contract renders the review decision ultra vires. But on the contrary, this is a contractual matter between the local authority and the contractor. If there has been a breach it is for the wronged party to decide if it wishes to rely on any breach, a breach of contract does not automatically vitiate the agreement unless and until recession is sought from the court and granted or the parties terminate the contract. As such a breach of contract is unlikely to render a decision taken pursuant to that contract unlawful in public law terms.

It will however, likely be necessary for the local authority to prepare a witness statement to evidence that there has been a proper and lawful contracting out. Unless the directions specifically allow it do make an application using form N244 for permission to rely on the witness statement. Where all the local authority is doing is elucidating the factual situation in relation to the claim a court is very likely to allow the authority to rely on it applying *R. v Westminster City Council Ex p. Ermakov* (1996) 28 H.L.R. 819.

A witness statement may be particularly useful where it is alleged is that the local authority has not complied with its public sector equality duty (PSED) as that is non-delegable and cannot be contracted out.

While we wait for the Court of Appeal to hear and decide the issue in *Smith v London Borough of Haringey* B5/2016/3856 on 10 or 11 May 2017, one way in which local authorities are winning on this point is to rely on paragraph 94 of *R(Brown) v SSWP* [2008] EWHC 3158 (Admin) where Lord Justice Aikens states, *'Fourthly, the duty imposed on public authorities that are subject to the section 49A(1) duty is a non-delegable duty. The duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the section 49A(1) duty. In those circumstances the duty to have "due regard" to the needs identified will only be fulfilled by the relevant public authority if (i) it appoints a third party that is capable of fulfilling the "due regard" duty and is willing to do so; and (ii) the public authority maintains a proper supervision over the third party to ensure it carries out its "due regard" duty…'.*

The witness statement should address how the local authority has due regard to the PSED by evidencing the willingness and capability of the contractor to fulfil the due regard duty and that it maintains a proper supervision over the contractor.

Further or alternatively, the local authorities have also been successfully relying on section 149(2) Equality Act 2010 to defeat this claim. Section 149(2) provides, '*A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).*' The contractor is not a public authority but is exercising a public function and so itself can have due regard to the PSED. There is no need to delegate as the Act has done it already: section 149(2) postdates *Brown* and provides for a further body '*charged with*' the duty in *Brown* terms.

It may be ten years since local authorities were able to contract out but these issues continue to rumble on – please do proactively check that your authority has lawfully contracted out its homelessness functions. It is extraordinarily annoying when a lot of time and effort has gone into making a lawful section 202 review decision that is not itself challenged (or credibly challenged) on its merits to have to withdraw that decision (perhaps with costs) because of a flaw in the contracting out process.

For example, some local authorities were caught out because the contractor itself had then gone on to subcontract the actual decision making. This is impermissible – article 3 of the 1996 Order requires that the decision is exercised by, or by employees of, the authorised contractor.

However, all may not be lost if you face a contracting out claim and there is a flaw in your process – in an appropriate case local authorities can always consider a subsequent ratification of the position that is, depending, on the facts, likely to defeat the claim (aka *Tachie*).

Peggy Etiebet
Barrister

Funding for Supported Housing: Lost Between the Gaps?

With a joint inquiry under way in to the funding of supported housing, Liam Wells considers the changes to funding which are due to be implemented in 2019, and reviews the outcome of the recent consultation which has taken place on the matter, in which responses were received from: housing associations, local councils, charities and tenants.

It is widely acknowledged that adult social care is underfunded. As the U.K. population ages, and as certain health conditions become more prevalent; that underfunding is becoming chronic. Supported housing provides vulnerable individuals with safe and secure homes which enable them to live independently. However, given that supported housing provides those individuals with much more than just a roof over their heads, is it right that supported housing should be funded on a basis calculated by reference to the Local Housing Allowance (LHA)?

As of this time, there is a shortfall of 17,000 supported housing places for working age people, with that shortfall predicted to rise to 35,000 by 2020-2021. Government research from 2015 indicates that the annual cost of supported housing is almost £6.2bn (with only £4.12bn of that sum covered by Housing Benefit.) As any professional working in the supported housing sector will tell you, supported housing cannot be properly funded by reference to housing costs alone. Service charges, in particular, are much higher for supported housing than the level allowed for by the LHA cap.

These concerns, amongst others, are currently the subject of the joint inquiry in to the future funding of supported housing by the Communities and Local Government and Work and Pensions Select Committees. The inquiry examines the planned changes for 2019–20, when core rent and service charges for supported housing will be funded through using Benefit or Universal Credit up to the LHA rate (for

costs above this, funding will go to local authorities for local distribution). The inquiry has sought opinion on whether the new system will mean that the varied rate of the LHA cap will lead to regional inequality in the provision of supported housing; on how the funding should be ringfenced; and, on how best to distribute top-up funding locally. The consultation has also sought views on ways to match funding to local demand for supported housing; and on the possibility of new statutory duties.

A large number of responses were received. Whilst many welcomed the ringfencing of funding, two related issues stand out from the responses. The first concerns the effect upon regional equality of application of the LHA cap to rent and service charges for supported housing; the second concerns the routes through which funding, generally, is distributed for the benefit of residents of supported housing. Whether that funding is wholly distributed by central government, or (as is planned) top-up funding is devolved to local authorities; it seems there is a fear that the ring fenced funding for supported housing will merely be lost 'between the gaps'.

The Local Housing Allowance Cap

Broadly speaking, the LHA is calculated based upon the average cost of housing the 'average' individual in the relevant area. The problem that this poses for supported housing arises from the fact that supported housing generally provides more than just housing and that users of supported housing have greater than average needs, which are costly to meet. Many (although not all) will have come to supported housing as a consequence of being considered 'un-houseable' in traditional social housing. That may be, for example, because they require regular care due to old age, or because they require regular support as a result of mental health issues. Ultimately, this makes the LHA cap an unsuitable basis upon which to set funding levels.

Subsequently, the inquiry consultation responses strongly urge the government to dis-apply the LHA cap in relation to supported housing. Many responses, including that of the National Housing Federation, point to the disparities that arise between the regions of the U.K as a result of its application. The LHA cap differs from region to region in line with differences in average housing value. In low-value housing areas the cap is simply too low in absolute terms to accommodate the cost of supported housing. This is important to note because the burden is then necessarily placed upon the top-up funding provision; for which, it has been indicated, responsibility will soon be devolved to local authorities. What is clear from the responses is that consultees feel it makes little sense to propose changes to who controls the funding, without changing the basis upon which it is held.

Lost Between the Gaps?

Is the effective provision of social care to vulnerable individuals an objective which is lost between the gaps that exist between the various agencies which deliver it? In its response to the consultation, Support Solutions U.K. remarks that *"funding for prevention should accommodate the totality of a person's need…. It should not be necessary for a provider to have to go to different commissioners to meet the multiple needs of a single person".* They go on to call for integration between the areas of health and social care; and looks towards a system which draws no distinctions between: *"the NHS; social care; supporting people; criminal justice and public health"*. Specifically, in terms of funding, they wish to see a single pooled fund disbursed by a regionally organised, unified commissioning structure in England.

Notwithstanding this, the responses seem to show that the devolution of top-up funding to the local level is generally welcomed. It seems, therefore, that what is called for in terms of funding is less centralisation in terms of who holds the funding, but more 'togetherness' in terms of delivery. Will these dual aims be achievable? More will be known once the Green Paper is published this spring.

Liam Wells
Pupil Barrister

Housing & Planning Act: Commencement Update

The Housing and Planning Act 2016 ("the Act") received Royal assent almost a year ago on 12 May 2016. At the time, it sought to legislate for a variety of changes to housing law covering areas as diverse as private rented sector banning orders and rent repayment orders, a rogue landlords and property agents database, recovery of abandoned premises, extended ('voluntary') right to buy and sale of higher value local authority properties, pay to stay, reducing social housing regulation, succession rights for secure tenants and the phasing out of 'tenancies for life'.

Cornerstone Barristers produced a detailed special edition housing newsletter on the Act which can still be read here. Since then, there have been various updates in respect of the implementation of the Act. In particular, these updates have included the abandonment of the 'pay to stay' market rent policy for higher-income tenants; delayed introduction of the voluntary right to buy scheme for housing associations and associated levy on higher-value local authority assets; and a public consultation on provisions concerning rogue landlords and secure tenancies. Tara O'Leary explored those updates in our February 2017 newsletter here as well as in our November 2016 newsletter here.

The Housing and Planning Act 2016 (Commencement No. 5, Transitional Provisions and Savings) Regulations 2017 provided for various provisions of the Act to come into force on 10 March and 6 April 2017. The headline for LHAs is that rent repayment orders, civil (fixed) penalties and information seeking powers are now available in order to take action against landlords and property agents. For completeness, the following sections are now in force:

- Rent Repayment Orders, including a duty to consider them (ss.40 - 52);
- Appeals from the first-tier tribunal and interpretation of Part 2 (ss.53 - 56);
- Financial penalties as an alternative to prosecution under the Housing Act 2004 (s.126 and schedule 9);
- Housing information in England (ss.128 - 129);
- Limitation of administration changes and costs of proceedings (s.131);
- Development consent for projects that involve housing (s.160);
- Notice of general vesting declaration procedure (s.183 and paragraphs 1 to 7 of Schedule 15); and
- Interest on advance payments of compensation paid late (s.196(3)).

Rent repayment orders, financial penalties as an alternative to prosecution under the Housing Act 2004 and housing information are each dealt with below.

Rent Repayment Orders

Part 2, Chapter 4 of the Act allows the First-tier Tribunal ("FTT") to make a rent repayment order against a landlord after an offence has been committed by a landlord. A tenant or a LHA may make applications for an order. An order may be sought even where a landlord has not been convicted of the offence in question, but the FTT will need to be satisfied beyond reasonable doubt that the landlord has committed the offence. The offences are not retrospective and it will thus not be possible to seek rent repayment orders in relation to offences committed before 6 April 2017. The offences in question are:

1. Using violence to secure entry contrary to s.6 of

the Criminal Law Act 1977;

2. Illegal eviction or harassment of occupiers contrary to s.1 of the Protection from Eviction Act 1977;
3. Failure to comply with an improvement notice served by a local authority under the Housing Health and Safety Rating System ("HHSRS") as governed by s.30 of the Housing Act 2004;
4. Failure to comply with a prohibition order under the HHSRS as governed by s.32 of the Housing Act 2004;[1]
5. Breach of a Banning Order made under section 21 of the Act (although this offence has not yet taken effect and is only scheduled to do so from 1 October 2017); and
6. Operating a HMO or property without a licence (if the property requires a licence).

When applying for a rent repayment order, LHAs must have regard to the April 2017 guidance published by DCLG on rent repayment orders. This guidance details how LHAs can apply for rent repayment orders and notes that LHAs are expected to develop and document their own policy on when to prosecute and when to apply for rent repayment orders. It also outlines how if a landlord has been convicted of the offence to which the rent repayment order relates, the FTT must order that the maximum amount of rent is repaid (capped at a maximum of 12 months).

However, where a landlord has not been convicted of the relevant offence, a number of factors should be taken into account when considering how much rent a LHA should seek to recover. These factors are punishment of the offender, the need to deter the offender from repeating the offence, the need to dissuade others from committing similar offences, and the removal of any financial benefit the offender may have obtained as a result of committing the offence.

[1] Under section 40(4) of the Act, both of the offences pursuant to the HHSRS (failure to comply with an improvement notice and failure to comply with a prohibition order) must be in relation to a hazard on the premises let by the landlord rather than in common parts.

The process by which a LHA may apply for a rent repayment order is also outlined in the guidance. It notes that a LHA may only apply for a rent repayment order if the offence relates to housing in the LHA's area and that a LHA must comply with the following procedure:

- Before applying for a rent repayment order, it must give the landlord notice of intended proceedings, served within 12 months of the date on which the landlord committed the offence to which it relates;
- The notice must inform the landlord that the LHA is proposing to apply for a rent repayment order and explain why; state the amount that the LHA is seeking to recover; and invite the landlord to make representations within a period specified in the notice which must be at least 28 days;
- The LHA must consider any representations made within the notice period and must not apply to the FTT until the specified period in the notice expires.

Civil Penalties

Also in April 2017, DCLG published guidance for LHAs on civil penalties under the Act. As the guidance is issued pursuant to Schedule 9 of the Act, LHAs must now have regard to it in the exercise of their functions in respect of civil penalties. The penalties in question arise in the context of the following housing offences in the Housing Act 2004:

- Failure to comply with an Improvement Notice (s.30);
- Offences in relation to licensing of HMOs (s.72);
- Offences in relation to licensing of houses under Part 3 (s.95);
- Offences of contravention of an overcrowding notice (s.139); and
- Failure to comply with management regulations in respect of HMOs (s.234)

Before it offers a penalty (which must not exceed £30,000) as an alternative to prosecution, the LHA must be satisfied beyond reasonable doubt that the offence

has been committed. In a context in which the offences listed can carry unlimited fines, a £30,000 maximum penalty is likely to attract many landlords.

As is the case with rent repayment orders, a notice of intent must first be served by the LHA setting out the amount of the proposed financial penalty, the reasons for proposing to impose the penalty and information about the right of the landlord to make representations within 28 days from when the notice was given. Following this period for representations, a final notice must be served setting out the amount of the penalty, the reasons for imposing it, information about how to pay it and the period for payment (28 days), information about rights of appeal to the FTT and the consequences of failure to comply with the notice.

A LHA is also entitled to impose a civil penalty *and* seek a rent repayment order for certain offences. Both sanctions are available for the following offences under the Housing Act 2004:

- Failure to comply with an improvement notice (s.30);
- Offences in relation to licensing of HMOs (s.72(1)); and
- Offences in relation to licensing of houses under Part 3 (s.95(1))

Housing Information

The commencement of section 128 of the Act has led to the amendment of the Housing Act 2004 via the insertion of a new section 212A. This provides that all approved tenancy deposit scheme providers will be required to provide a LHA in England with any information that relates to a tenancy of a premises in the LHA's area if the LHA requests it. An explanatory booklet for LHAs on 'Obtaining and Using Tenancy Deposit Information' was published in April 2017. Helpfully, it includes a step-by-step guide as to how to request tenancy deposit information as well as a sample request letter for LHAs to send.

Under s212A(5), information obtained by a LHA pursuant to this section, may only be used for a purpose connected with the exercise of the authority's functions under any of Parts 1 to 4 of the Act in relation to any premises, or for the purpose of investigating whether an offence has been committed under any of those parts in relation to any premises.

Conclusion

Announcing the measures, Housing Minister Gavin Barwell noted that the powers commenced in April 2017 will give LHAs the tools to crack down on the small minority of rogue landlords who shirk their responsibilities. While LHAs will welcome these tools, the procedures to engage them must be carefully complied with and a prudent LHA would be well advised to ensure that its officers are fully briefed on the various guidance documents highlighted above.

The next anticipated commencement under the Act is expected to be October 2017 when some of the more controversial measures such as banning orders, as well as a database of rogue landlords and property agents and management orders are due to come into force. However, with an election set to take place in June this year, a change of government may well lead to a different approach. For now though, the introduction of the April measures should provide more than enough material to which LHAs must adapt over the coming months.

John Fitzsimons
Pupil Barrister

Succession to Social Tenancies

The recent Court of Appeal judgment in Turley v (1) Wandsworth LBC (2) Secretary of State for Communities and Local Government [2017] EWCA Civ 189 highlighted the restrictive nature of succession rights to social tenancies. Andy Lane considers the case, the current position as it applies to such tenancies in England[2], and changes to come.

Introduction

It used to be the case that secure tenancies allowed much wider rights of statutory succession upon the death of the tenant than the more restrictive arrangements in place for assured tenancies.

Housing associations and other private registered providers, however, frequently made provision for family members beyond spouses and civil partners to "succeed" within the terms of their tenancy agreement, but these were not statutory successions and enforcement of such arrangements was not always enforced[3].

At the time of the Coalition Government in 2010, the government did not consider 'automatic' succession to family members other than spouses and civil partners to be inappropriate for much needed social tenancies (unless expressly provided for by the landlord[4]).

The Localism Act 2011 therefore introduced important succession changes from 1 April 2012, a process which is to be continued by further reforms to be found in the Housing & Planning Act 2016.

The Current Position

Today therefore the position is more nuanced, albeit straightforward in the general approach to succession.

Periodic Tenancies[5]

Both secure and assured tenancy succession rights are restricted to spouses and civil partners (and those living together as if in one of these arrangements[6]) who were occupying the relevant premises as their only or principal home immediately before the tenant's death: s86A(1) Housing Act 1985/s17(1) Housing Act 1988.

That is subject to a number of caveats:

(a) It being a sole tenancy. If a joint tenancy, the surviving tenant becomes the sole tenant under the common law doctrine of survivorship[7].

(b) For tenancies granted on or after 1 April 2012[8], if there is no spouse, etc. entitled to succeed then if a term of the tenancy agreement allows for some other person to succeed (e.g. carer, wider family members, etc.) then that provision applies and the tenancy will vest in the qualifying person at the time of death: s86A(2) Housing Act 1985/s17(2) Housing Act 1988

(c) There are no statutory succession rights available if the deceased tenant was himself or herself a successor[9] (which includes by way of the doctrine of survivorship referred to at (a) above) unless the tenancy agreement makes express provision to the contrary: s86A(3)(4) Housing Act 1985/s17(1D)(1E) Housing Act 1988.

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[2] Succession rights in Wales are provided for at s87 Housing Act 1985

[3] If they were in any contentious situation, it would normally be by way of the Contracts (Rights of Third Parties) Act 1999 if disputed

[4] See 'Local Decisions: A fairer future for social housing' consultation (November 2010)

[5] Flexible tenancies are secure tenancies, and so the succession provisions of s86A apply

[6] S86A(5) Housing Act 1985/S17(4) Housing Act 1988

[7] *Solihull MBC v Hickin* [2012] UKSC 39; [2012] 1 WLR 2295; [2012] HLR 40

[8] Localism Act 2011, ss160(6)(a), 161(7)(a)

[9] As defined at s88 Housing Act 1985/s17(2)(3) Housing Act 1988

(d) The exclusion of wider family members from 'automatic' succession to secure tenancies ('family members' including those living together as husband and wife, or as if they were civil partners[10]), unless provided for in the tenancy agreement, does not apply to those tenancies granted before 1 April 2012: S160(6)(a) Localism Act 2011.

(e) It follows, common law spouses and those living together as if civil partners, where the secure tenancy began before 1 April 2012, must have lived with the deceased tenant for the 12 months prior to the death: s87(b) Housing Act 1985.

In broad terms therefore, secure tenancy succession requirements have been brought in line with those in place already for assured tenancies, common law arrangements for secure tenancies are equated to legal relationships (as they already were for assured tenancies), and tenancy provisions extending statutory rights are given statutory force and constitute a statutory succession.

Fixed term assured tenancies

If there is an assured fixed term tenancy of not less than two years, and the (deceased) had a sole tenancy then the position for periodic tenancies and as described in paragraphs (a)-(c) applies: s17(1B) Housing Act 1988.

Turley facts

Turning therefore to the facts before the Court of Appeal earlier this year, Susan Turley was the long-term partner of Roger Doyle. They had four children and in 1995 they moved into a four-bedroom house. Mr Doyle was the sole (secure) tenant.

The landlord was the London Borough of Wandsworth. Susan and Roger's relationship broke down 2010 and in December of that year he moved out (though without giving up the tenancy), leaving her living in the flat with the younger children, then aged 17 and 15.

[10] Housing Act 1985 s113(1)(a)

He came back in January 2012, but he was by then seriously ill and died on 17 March 2012.

The succession argument

Ms Turley was not entitled to succeed to Mr Doyle's tenancy on the simple reading of the legislation. It was a pre-1 April 2012 tenancy and at the time of his death, they had not been living together as husband and wife for the required 12-month period.

It was argued on her behalf that this difference in treatment between a spouse and common law spouse was discriminatory and without justification.

To avoid a breach of her Convention rights (art.8[11] and art.14[12]), it was said that the succession provisions of the Housing Act 1985 had to be construed, in accordance with section 3 of the Human Rights Act 1998:

"(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

so as to accord her a right to succeed to the tenancy (or that Wandsworth was in any event obliged by section 6 of the 1998 Act[13] to grant her a fresh secure tenancy of

[11] *Right to respect for private and family life*

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[12] *Prohibition of discrimination*

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[13] *(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*

the flat).

The Decision

As with the court below, this argument was not accepted.

Lord Justice Underhill delivered the main judgment of the court and began by assuming the 12 months' distinction was prima facie discriminatory and so turned to consider whether the provision was a proportionate means of achieving a legitimate aim.

Dealing with these issues in logical order, he confirmed that the distinction between spouses and common law relationships had a legitimate aim:

"19…it is plainly legitimate to seek to limit rights of succession to family members whose relevant relationship is of a permanent character. And it is also plainly legitimate (subject to the issue of proportionality) to treat that requirement as sufficiently satisfied in the case of legal spouses, whose relationship is inherently permanent in character, but not by other relationships which do not involve the same formal commitment."

Moving to the question of the proportionality of the 12-month qualification period for a common law spouse, and whether that was manifestly without reasonable foundation:

(a) Regard was had to an earlier succession case, *Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271; [2003] 1 WLR 617, and the comments of Brooke LJ at [631A]:

"It appears to me that this is pre-eminently a field in which the courts should defer to the decisions taken by a democratically elected Parliament, which has determined the manner in which public resources should be allocated for local authority housing on preferential terms."

(b) A relatively wide margin of appreciation was appropriate.

(c) The changes brought in by the Localism Act 2011, and ultimately the Housing & Planning Act 2016, did not undermine the legitimacy of the pre-1 April 2012 regime. Lord Justice Underhill concluded:

"31. …Ms Walker's evidence was that the Government took the straightforward view that the entire package of changes to succession rights introduced in 2012, of which the removal of the twelve-month condition was only part (and not the most significant part), should apply prospectively only, so as to avoid unsettling existing legal rights and expectations. Mr Lask summarised the effect of the evidence in his skeleton argument as follows:

"It was … reasonable to maintain a bright line between existing and new tenancies. Had Parliament sought to introduce exceptions to the rule (e.g. for unmarried partners), this would have created further difficulties. It would have undermined legal certainty for both landlords and tenants, and could have impacted adversely on the rights of other family members under the preferential succession rules in [the 1985 Act]. Maintaining that bright line does not preclude landlords from granting new tenancies to persons left in occupation where they consider it appropriate to do so."

I cannot regard such an approach as manifestly without reasonable foundation."

It was therefore decided that even if the position of spouses and common law spouses was analogous for art.14 purposes, which was not formally determined, the difference in treatment was justified and proportionate[14].

To come…

[14] See *Swift v Secretary of State for Justice* [2013] EWCA Civ 193; [2014] QB 373 ¶33-40

The Housing & Planning Act 2016 (s120 and Schedule 8) makes further changes to succession rights for secure, introductory and demoted tenancies.

They will, when brought into force, amend the Housing Act 1985 further so as to bring the succession provisions for pre-1 April 2012 secure tenancies in line with those for tenancies granted since that date.

The Act's explanatory notes explain the purpose of the changes in this way:

"The statutory rights of other family members to succeed to a secure tenancy granted before 1 April 2012 are changed. The changes made by this Schedule mean that family members will not have an automatic right to succeed to a lifetime tenancy if they lived with a lifetime tenant for 12 months or more. Instead, under this section, local authorities will have discretion to grant them succession rights. Where the deceased tenant had a lifetime tenancy, persons other than spouses and partners who qualify to succeed cannot be given a lifetime tenancy and must be given a five year fixed term tenancy. The terms and conditions of the new tenancy will be the same and any outstanding possession order will continue to apply."

[Changes will also be made to the legislation in Wales, though by a different statutory route]

Housing Cases of Interest

Andy Lane considers housing and related cases of interest over the last 3 months...

Allocation

R (on the application of FARTUN OSMAN) v HARROW LONDON BOROUGH COUNCIL [2017] EWHC 274 (Admin)

An amendment to a local authority housing allocation scheme which reduced the priority of those suffering overcrowding in privately rented accommodation, by comparison with those who were overcrowded and secure tenants, was proportionate and justified and pursued a legitimate aim.

R (on the application of XC) v SOUTHWARK LONDON BOROUGH COUNCIL [2017] EWHC 736 (Admin)

Although a local authority's priority housing allocation scheme indirectly discriminated against disabled persons and women, the scheme had a legitimate aim, namely the creation of sustainable and balanced communities, and was the least intrusive measure which could be used to achieve that aim.

Benefits

R (ON THE APPLICATION OF HALVAI) v HAMMERSMITH AND FULHAM LONDON BOROUGH COUNCIL QBD (Admin) (Sara Cockerill QC) 09/03/2017

A local authority had acted unlawfully in refusing discretionary housing payment to a disabled woman who lived in specially adapted accommodation. It had failed to apply its own policy in not understanding that discretionary housing payment could be a long-term solution, had failed to consider all the relevant factors, had not considered the individual's particular circumstances and had failed to consider the exercise of its residual discretion.

Licensing

NOTTINGHAM CITY COUNCIL v (1) DOMINIC PARR (2) TREVOR PARR ASSOCIATES LTD [2017] EWCA Civ 188

It was not unlawful to impose a licence condition restricting the occupation of a house in multiple occupation to full-time students. Although the licensing regime concerned the physical characteristics of the relevant property, the personal characteristics and activities of potential occupiers would often be relevant and require investigation.

WALTHAM FOREST LONDON BOROUGH COUNCIL v MOHAMMAD AFZAL KHAN [2017] UKUT 153 (LC)

It was legitimate for a local housing authority to have

regard to the planning status of a house when deciding whether or not to grant a licence under the Housing Act 2004 Part 3 and when considering the terms of that licence.

Ashley Underwood QC acted for the successful authority – his e-flash is here

Notices

ISLINGTON LONDON BOROUGH COUNCIL v RAYMOND DYER [2017] EWCA Civ 150

A notice served by a landlord on a tenant for the purposes of the Housing Act 1996 s128 could be comprised in more than one document. There was no reason why an accompanying information leaflet should not be treated as part of the notice if the reasonable recipient would have understood that the documents were intended to be read together.

Only or Principal Home

1) EVELYN DOVE (2) ELAINE DOVE v LONDON BOROUGH OF HAVERING [2017] EWCA Civ 156

A judge had been entitled to find on the evidence of alternative accommodation that neither of joint tenants was occupying a local authority flat as her principal home when notice to quit was served. Neither, therefore, was a secure tenant and it followed that the local authority was entitled to possession without the need to prove a statutory ground.

Succession

SUSAN TURLEY v (1) WANDSWORTH LONDON BOROUGH COUNCIL (2) SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT [2017] EWCA Civ 189

A condition in the Housing Act 1985 s87(b) which required, up until 1 April 2012, that the long-term partner of a secure tenant had to have resided with the secure tenant throughout the 12-month period prior to the secure tenant's death in order to succeed them, was not manifestly without reasonable foundation. Even if the situations of common law spouses and married or civil partnership spouses were analogous for the purpose of ECHR art.14, the difference in treatment between them was justified and proportionate.

Wayne Beglan acted for the successful respondent authority.

Cornerstone Housing News

The inaugural Bryan McGuire QC memorial lecture on homelessness

Over 200 guests joined Cornerstone Barristers for the first in the annual series of lectures in memory of Bryan McGuire QC, held at the Church of St Alban the Martyr on 5th April. The event, in dedication to the life and career of former Cornerstone member Bryan McGuire QC, raised funds for the homelessness-related charities Z2K, St Mungo's The Lodge at St Ursula's and the Church Housing Trust. For the text of Judge Luba's lecture please click here.

HHJ Luba QC and Kelvin Rutledge QC

The Cornerstone Housing team has also presented seminars recently on fixed term and flexible tenancies, the Homelessness Reduction Bill and tackling tenancy fraud.

Kelvin Rutledge QC introduces the Homelessness Reduction Bill seminar.

Peggy Etiebet presents a seminar on tackling tenancy fraud

Andy Lane speaks at the Housing Associations' Legal Alliance Annual Conference held in Chambers.

Cornerstone Barristers shortlisted for Chambers of the Year

Cornerstone Barristers has been shortlisted for Chambers of the Year at the Solicitors Journal Awards 2017. The awards recognise solicitors, law firms, barristers, and other legal professionals who are making significant contributions to the legal services sector.

Upcoming events

The next Cornerstone Housing seminar is on 7th June and will consider Public law/Equality Act 2010 defences. Please click here for more information and to book a place.

Save the date for the Cornerstone Annual Housing Day on 4th October. Further details to be announced shortly.

In other news…

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

Is there always a public law defence to a possession claim brought by a public authority?

London Borough of Waltham Forest successfully upholds its selective licensing practice

Editorial Board

Andy Lane

Clare Gilbey

Lauren Bull

Ben Connor

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