cornerstone barristers

Cornerstone Housing Newsletter

November 2016

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Welcome to the Cornerstone Housing Newsletter November 2016

The Editor speaks…

Since our last newsletter in August the two matters that "stick out" for me in the Housing world – aside from the wonderful Cornerstone Housing Conference held on 4 October 2016 - are the progress of the Homelessness Reduction Bill 2016/17 and the recent Court of Appeal judgment in Cardiff County Council v Lee (Flowers) [2016] EWCA Civ 1034. The latter was the subject of no less than 3 e-flashes from myself, starting with my pre-hearing consideration of the case and its potential impact.

The Lee judgment attracted a lot of publicity and comment as the Court of Appeal held that since 2014 landlords should have been seeking the permission of the court before requesting a warrant of possession in cases where it was said that the terms of a suspended possession order had been breached. Whatever the arguments as to costs and delay such an additional process will bring, or the correctness of the decision or of the concessions made, no-one can say they haven't now been warned, not least by Lady Justice Arden at paragraph 31 of the Judgment:

"…I reiterate that CPR 83.2 constitutes an important

protection for tenants. It is not to be taken lightly. Social landlords must ensure that from now on their systems are such that the same mistake will not be made in future. I also hope that the Civil Procedure Rule committee will consider whether any amendment can be made to form N325 to make it clear that there are cases in which permission must be sought first. Hopefully also county court offices will be able to identify cases which are not within CPR 83.26 and this will assist the bailiffs who have to carry out warrants."

On the legislative front, whilst we await the regulations in respect to significant housing reforms to come (in 2017) such as pay to stay and the voluntary right to buy, the House of Commons gave the Homelessness Reduction Bill its Second reading on 28 October 2016, it is now moving to the Committee Stage. This private member's bill has attracted cross-party and government support, and is one of the subjects dealt with in this newsletter by Matt Lewin. It seeks to refocus English local authorities on efforts to prevent homelessness arising in the first place, and the government has pledged to meet the "reasonable" additional costs to local authorities of the reforms.

We will obviously follow the Bill's progress through the Houses of Parliament, as we will the Housing White Paper Sajid Javid, Secretary of State for Communities and Local Government, announced, on 3 October 2016, would be published later in the year.

Finally, on a chambers front we are delighted that Ruchi Parekh accepted tenancy after the successful completion of her pupillage here at Cornerstone. She is an important addition to the Housing Team, and will ensure that the quality recognised recently by Legal 500, when chambers was shortlisted for set of the year in both the Public Law and Real Estate, Environment and Planning categories, is maintained and enhanced.

So as always, enjoy the read and feedback is always welcome!

Andy Lane
Editor

When is an applicant "significantly" more vulnerable than ordinarily vulnerable?

Introduction

In this article I consider a legal argument which is currently being raised in s. 204 Housing Act 1996 appeals where the issue is whether or not the applicant is in priority need due to vulnerability.

The argument is part of the post-*Hotak* fallout, and demonstrates once again that no matter how many judgements are handed down on the meaning of Part 7 of the 1996 Act, there is seemingly always scope for a new argument to be raised.

Although the issue has only been considered at County Court level for now, the Court of Appeal will undoubtedly have to grapple with it in due course.

The issue

In order to be owed the main housing duty under s. 193 of the Housing Act 1996, an applicant needs to have a priority need for housing. There are a number of categories of priority need set out in s. 189, but the most contentious concerns persons who are "vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason" (s. 189(1)(c)).

Readers will be well aware that in *Hotak v LB Southwark* [2015] UKSC 30, [2015] 2 WLR 1341 the Supreme Court departed from the previously-applied test, derived from *R v LB Camden ex p. Pereira* (1999) 31 HLR 317, CA, to hold that an applicant was

'vulnerable' for the purposes of s. 189(1)(c) if he was "significantly more vulnerable" than an ordinary person if made homeless.

As with the *Pereira* test before, this involves a comparative exercise. It is necessary to compare the position of the applicant if made homeless with the position of an ordinary person if made homeless.

So far, so good. However, in a number of recent cases in the County Court applicants have sought to challenge s. 202 review decisions on the basis that the reviewing officer has fallen into error by failing to define what he or she understands the concept of being "significantly more vulnerable" to mean.

Unfortunately the judgements of the Supreme Court in *Hotak* do not contain any further explanation as to what is meant by "significantly" for these purposes. Hence the issue is up for grabs.

The arguments

Appellants

The argument on behalf of appellants is that it is necessary for the reviewing officer to explain how great the "gap" must be between the harm that would be suffered by an ordinary person if rendered homeless, and the harm that would be suffered by the applicant if rendered homeless, before it can be said that the applicant is "significantly" more vulnerable that the ordinary person.

In using the word "significantly", does the reviewing officer mean "to a greater extent than simply insignificant or peripheral", or does he mean "something really serious"?

It is said that, unless this is explained, the applicant is not in a position to understand the basis upon which an adverse decision has been reached. Viewed in that way, the argument is essentially a reasons challenge.

Appellants argue that in order to be considered "significantly" more vulnerable, it is only necessary for the local authority that to find that the applicant would suffer harm which was more than minimally worse than the harm that would be suffered by an ordinary person. In other words, the "significantly more vulnerable" test only excludes cases where the degree of 'additional' harm the applicant would suffer is *de minimis*.

Local authorities

The first argument on behalf of local authorities is that it is not appropriate to attempt any further definition of the word "significantly".

The concept of being "significantly" more vulnerable is not one which is found in the statute but is a judge-made concept, which has itself been developed to guide interpretation of the word "vulnerable". To attempt further definition of the phrase is inappropriate because:

a. The word 'significantly' is an ordinary English word which local authorities are capable of understanding and applying when reaching a judgment, no further elaboration is needed;
b. It is not a statutory phrase (or a phrase used in statutory guidance) which requires judicial interpretation;
c. It is generally undesirable to seek to add additional glosses or definitions to judicial dicta;
d. If the Supreme Court had intended to provide further elaboration on the meaning of 'significantly', no doubt it would have done so.

The question of whether an applicant is "significantly more vulnerable than an ordinary person" involves a classic exercise of judgement and requires the weighing up of a variety of factors, which will differ from case to case. The exercise is not susceptible to the application of a bright line threshold.

It is also argued that the same definitional issues which are raised in respect of the word "significantly" also arise with other potential formulations; for example what does "greater than a minor or trivial gap" mean? It is not possible to accurately quantify or define in words "how great the gap between an ordinary person if rendered homeless, and an applicant" must be.

Finally it is argued that the mere exclusion of trivial or minor cases is no more than an application of the general principle that the law is not concerned with trivial things (*de minismis non curat lex*), and therefore the Supreme Court must have intended to imply a higher threshold than this. The word 'significant' is defined in the shorter OED (in its adjectival form) as meaning "full of meaning or import; important, notable", which implies a higher threshold than suggested by the Appellant.

Alternatively it is argued that if the reviewing officer does define what he or she understands "significantly" to mean, the actual decision as to which definition is chosen is a matter of judgement for him/her.

The judgments so far

With thanks to the Nearly Legal blog for all but the last of the case notes below.

***HB v LB Haringey*. Mayors & City of London Court, 17 September 2015**

In this case HHJ Lamb, allowing the appeal and quashing the review decision, concluded that it was impossible to discern from the reviewing officer's decision:

a. How he defined vulnerability
b. What, if any attributes of vulnerability he had ascribed to the ordinary person comparator.
c. How he defined the word 'significantly' – where on a spectrum of meaning between 'noticeable' and 'substantial' he had placed 'significantly'.
d. Whether he considered the applicant to be more or less vulnerable than the ordinary comparator.
e. Whether he considered the applicant to be invulnerable or without vulnerability, and
f. If he considered the applicant to be more vulnerable than the ordinary comparator, whether and to what extent and why the difference was insignificant.

It appears that the judge did not reach a conclusion himself as to what "significantly" means in this context, but did agree that the reviewing officer needs to pin his or her colours to the mast on the issue and provide an explanation of "how big the gap needs to be" between the applicant and the ordinary person before he will consider the applicant vulnerable.

Mohammed v Southwark LBC. County Court at Central London, 18 December 2015

In this case Recorder Hochauser QC was prepared to reach a view as to the meaning of "significantly", finding that it should be construed by analogy with the word 'substantial' in the Equality Act 2010, as meaning 'more than minor or trivial'. Therefore provided the applicant was likely to suffer more harm by the exacerbation of (in that case) his mental illness by reason of becoming homeless than an ordinary person would, then he should be regarded as vulnerable for the purpose of s.189(1)(c) Housing Act 1996.

***Ward v LB Haringey*. County Court at Central London. 22 Feb 2016**

The Judge in this case was not prepared to reach any further definition of the word "significant", but concluded that on any definition, the applicant's vulnerability was with the meaning of the word. The appeal was allowed and the decision was quashed.

***Butt v London Borough of Hackney*. County Court at Central London. 22 February 2016**

Although the local authority argued that the word "significantly" was "an ordinary English word and it falls to be given its ordinary meaning", HHJ Luba QC observed that the word had "at least two potential meanings or shades of meaning. It could mean, as I have indicated, 'something more than trifling' or 'more than insignificant', or it could mean 'something of real importance' or 'of real and significant extent'".

Although it was not obvious which meaning had been applied by the reviewing officer, "certain of the language used … does suggest that he is applying an approach which requires a substantial or extensive difference between the Applicant and that of others".

HHJ Luba held that the obligations on the reviewing officer to give reasons and to direct himself in accordance with *Hotak* meant that he was required "to identify the sense in which he is using the term 'significantly'". There had been a failure to do that sufficiently, and therefore insufficient reasons had been given.

***DT v LB Lambeth*. County Court at Central London, 31 August 2016**

full disclosure: I acted for the local authority in this case

In this case HHJ Gerald QC allowed the appeal on other grounds and expressly declined to determine the issue one way or the other, but said that if he had needed to decide the point he would have concluded that the multi-faceted nature of the comparative exercise being undertaken takes in any number of often conflicting matters which may interrelate on each other in ways different on one case compared with another; and that it was simply not possible for any further clarity to be given to the comparative exercise.

It was not possible to define in clear percentage or quantitative ways what the outcome of vulnerability comparison exercise would be. It was a statement of the obvious that, when carrying out the comparative exercise, insignificant or trivial matters are to be ignored. Those which are of materiality to making the applicant vulnerable as compared to the ordinary person are to be taken into account.

Conclusion

As can be seen from the summaries above, the County Court has to date not adopted a consistent line on the issue. In some cases judges are declining to determine the point, or concluding that the word "significantly" cannot be defined with further clarity. In other cases judges are agreeing that the reviewing officer needs to say what they understand the word to mean, but not venturing to say which definition is correct. In yet further cases judges are holding that "significantly" simply means "more than trivial".

There does appear to be a trend towards the conclusion that, at the very least, decision makers need to say what definition they are applying. Of course, if that is done then there is an inevitable risk that the definition which is selected will in due course be held by the Court of Appeal to have been wrong.

Needless to say, this is a critical issue. Vulnerability decisions are among the most commonly litigated. The "more than de minimis" definition of "significantly" sets the threshold for vulnerability very low. If that is ultimately the definition which is favoured it is likely to mean that many more applicants ought to be accepted as being vulnerable by local authorities than is currently the case.

Unfortunately, both applicants and local authorities will have to wait (and may have to wait for a considerable time, based on current Court of Appeal listings) for a definitive answer.

Emma Dring

Recent housing developments

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

Anti-Social Behaviour

- Troubled Families Programme briefing paper by the Commons Library…still supported by Government despite criticisms (15 October 2016)
- The House of Lords debated PSPOs on 8 September 2016
- Report on the Community Trigger by ASB Help (September 2016)

- Police Information Notices briefing (11 October 2016)

Benefits

- The Commons Library produce briefing papers on council tax, council tax reduction schemes and housing benefit
- The DWP publishes the "Social Landlord Support Pack" as the universal credit roll-out continues

Courts

- Changes to the permission to appeal (CA) process and to routes of appeal introduced from 3 October 2016
- Court closure updates (13 October 2016)
- Consultation on proposed closure of Camberwell Green and Hammersmith Magistrates' Courts ended on 27 October 2016

Equality

- "No Place Like An Accessible Home" report produced by the LSE and the Centre for Analysis of Social Exclusion (July 2016)

Homelessness

- The Community and Local Government Select Committee reports on homelessness (18 August 2016)
- "Rough sleepers: access to services and support (England)" briefing paper (7 September 2016) and "Households in Temporary Accommodation (England)" briefing paper (6 October 2016)
- More housing help for women prisoners needed upon their release (September 2016)
- April to June 2016 figures on statutory homeless produced by the DCLG (28 September 2016)
- Amended allocation and homelessness eligibility regulations in force from 30 October 2016
- The Homelessness Reduction Bill 2016/17 is now supported by government and the CLG Select Committee (October 2016)

Home Ownership

- Problems arise with the Government's Help to Buy ISA programme (August 2016)
- Right to Buy sales figures for April to June 2016 produced by the DCLG (22 September 2016) and on 20 October 2016

Housing Associations

- The Executive Team designate and Shadow Board announced for AmicusHorizon/Viridian partnership (15 August 2016)
- The National Housing Federation reports on forthcoming deregulatory measures to ensure housing associations are classified as private bodies (18 August 2016)
- The HCA publishes its Consumer Regulation Review (2015/16)
- Sector remains in a strong financial position according to the HCA (24 August 2016)
- On 21 September 2016 the HCA published its social housing sector risk profile 2016
- Sales of housing association properties under the right to buy have begun
- Registered Providers of social housing in Scotland, Wales and Northern Ireland classified as public bodies by the ONS (September 2016)

Legislation

- The LGA produce a briefing overview of the Housing and Planning Act 2016 (July 2016)

Local Authorities

- 2015/16 Local Authorities' spend explained by the DCLG (25 August 2016)
- Pay to Stay regulations made on 27 September 2016

Possession

- The Ministry of Justice produces its April to June 2016 possession statistics

Private Rented Sector

- The DCLG's review of the Client Money Protection

scheme ends
- The ONS considers the affordability of the private rented sector (7 October 2016)
- Consultation from 18 October 2016 on extension of HMO mandatory licensing

Miscellaneous

- Supporting Housing briefing paper from the Commons Library (28 September 2016
- Affordable rent report by Shelter (October 2016)
- The House of Lords debate on 3 November 2016 on the shortage of housing for young people has a report prepared for it in advance

Andy Lane

The current state of play in the Mayor of London's housing plans

Introduction

On 24 October 2016 the Mayor of London published a new document "A City for all Londoners" described as a statement of his ambitions as Mayor. It is the first step towards the creation of a new 'London Plan' – the spatial development strategy for the capital.

This new publication builds on many of the manifesto promises made by the Mayor who described his recent election as a "referendum on housing". His manifesto set out that tackling the housing crisis is his "first priority" as it presents "the single biggest barrier to prosperity, growth and fairness facing Londoners today".

The Mayor's manifesto identified a need for "50,000 new homes a year" and set "a target of half of all the new homes that are built across London being genuinely affordable to rent or buy." This is repeated in the new document with a plan to "work towards a strategic, London-wide target for 50% of new homes in London to be affordable."

The Mayor's manifesto promised "a step change in new housing supply, to rent and to buy, with first dibs for Londoners, and exploring incentives for businesses to provide investment in new homes which could benefit their workforce." However, the Mayor has also acknowledged that the system is not going to be fixed overnight.

A City for all Londoners

The new publication summarises the Mayor's plans in respect of accommodating growth, housing, economy, environment, transport and public space. The document describes efforts to address London's housing problems as "a marathon not a sprint" as these problems are "far reaching and deep-seated".

Homes for Londoners

The Mayor's vision is in part to be achieved by the creation of a new team at the heart of City Hall - Homes for Londoners ("HFL"). HFL have been tasked with bringing together "all the Mayor's housing, planning, funding, and land powers alongside new experts to raise investment, assemble land, make sure Londoners get a fair deal from developers, and commission and construct new homes."

James Murray has been appointed the new Deputy Mayor for Housing and Residential Development. A key ambition of HFL is to drive up homebuilding by:

- making sure the right policies and funding streams are in place to support all developers, investors, housing associations, councils and others in building the homes Londoners need;
- using all relevant land and planning powers to support public and private development, unlocking development sites and bringing forward surplus public land;
- driving forward development in key areas across the capital and making sure opportunities for more affordable homes aren't missed; and

- exploring and promoting innovative construction methods, and working with the wider construction sector to develop the skilled workforce required to build thousands of new homes for Londoners.

Affordability and the Planning Process

The "A City for all Londoners" document confirms that the Mayor intends to publish supplementary planning guidance ("SPG") on maximising affordable housing provision later in 2016. This new SPG is likely to include a new definition of "*genuinely* affordable housing" beyond that contained in the National Planning Policy Framework. The Mayor has expressed concern that "no more than 80% of the local market rent", the definition provided by the NPPF, does not translate as affordable in London. The new definition is likely to refer to the London Living Rent, shared ownership schemes and social rents.

The new planning guidance is also likely to include a methodology for viability assessments in the planning process and an optional affordable housing tariff. City Hall are consulting with developers on the option of a flat 35% rate of affordable housing tariff – part of the aim of such a scheme being to speed up planning permission.

There are plans to concentrate housing development at higher densities around transport infrastructure to make the best use of space and connections. Investment in transport infrastructure is seen as a key to unlocking the development of many new homes across the capital.

London Living Rent

In September, the Mayor announced plans to introduce the London Living Rent. This is proposed to take the form of a new type of tenancy for newly-built affordable homes. The aim is to help average earners in London save for a deposit by offering them a below-market rent.

London Living Rent homes will have rents based on a third of average (median) local gross household incomes in each borough. New homes will be offered to low and middle-income households, typically earning between £35,000 and £45,000, who are currently renting privately. The Mayor has announced that across London, this would see the rent for a two-bed flat drop below £1,000 – compared to average private rents of £1,450.

The London Borough of Hackney are the first borough to commit to getting 500 homes built at the London Living Rent.

Estate Regeneration

On estate regeneration, the Mayor's Manifesto states that he plans to require that "estate regeneration only takes place where there is resident support, based on full and transparent consultation, and that demolition is only permitted where it does not result in a loss of social housing, or where all other options have been exhausted, with full rights to return for displaced tenants and a fair deal for leaseholders." It is not clear how he proposes to achieve those aims.

Home ownership and renting

The Mayor's manifesto also addressed issues concerning home ownership and renting – highlighting concerns in respect of high agency fees and low property standards. The manifesto emphasised that for young families and individuals on average incomes, housing is increasingly unaffordable – with home ownership a distant dream.

The Mayor's plans include working alongside boroughs to promote landlord licensing schemes to drive up standards, and make the case to government for London-wide landlord licensing. He plans to name and shame "rogue" landlords. As well as a modernised private rented sector, the Mayor emphasised that London needs to "protect its social housing as a vital asset."

Homelessness and Rough Sleeping

On rough sleeping and homelessness, the Mayor aims to reverse the trend that has seen the number of people sleeping rough in the capital more than double in the

past eight years. Part of these plans include the intention to coordinate councils' efforts to find stable private rented housing for those in need who are not able to move into social housing, instead of desperate boroughs being forced to outbid each other for homes from landlords.

In October, the Mayor announced a new taskforce dedicated to helping tackle the rise in the number of people sleeping rough on London's streets. The new 'No Nights Sleeping Rough Taskforce' will be chaired by the Deputy Mayor for Housing and Residential Development. The taskforce plans to identify what new interventions may be needed to tackle specific problems, and lobby government for support where necessary.

The five Boroughs with the highest number of rough sleepers will work together with the voluntary sector and other public sector organisations with the aim to help people who are sleeping rough and to prevent people ending up on the street in the first place. Funding for supported housing and mental health provision for rough sleepers are high up on the agenda. This recognises that housing supply is not the only problem and a complex mix of social issues and changes to welfare also contribute to the levels of homelessness.

The document also recognises that homelessness affects far more people than those who are sleeping rough. It explains that local authorities are responsible for finding homes for these people, but their task is extremely challenging under the current circumstances - homes of all kinds are scarce, housing costs are rising, welfare reforms are making it harder to sustain tenancies and local-government budgets are limited.

The Mayor does not have direct powers in this area, but wants to take a leadership role. The document explains that the Mayor is working with London boroughs to identify ways in which a pan-London approach might be more effective – for example by coordinating rates for temporary accommodation, which could result in better deals and more places for homeless people to live.

Conclusion

The Mayor has a clear vision for Housing in London. At the centre of that vision is an ambition to build more of the right kinds of housing for Londoners. Getting the right mix of affordable housing in new developments will be a key factor in the success of his plans. This focus is understandable as it is probably the area over which he has the greatest potential influence.

However, he also envisages a more proactive role in areas such as rough sleeping, homelessness prevention and the improvement of the private rented sector. These are pressing concerns and coherent thinking and leadership on these issues is welcomed. Whether he can influence the government act on some of these issues is another question all together. If not, the impact of his plans may be more limited than he would wish.

The Mayor recognises that many of his plans "can only be achieved in partnership with local authorities and developers" and the success or failure of those plans will largely depend on efforts to foster those working relationships. The outcome of those efforts remains to be seen.

Ben Du Feu

Housing cases of interest

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

Allocation

YA v HAMMERSMITH & FULHAM LONDON BOROUGH COUNCIL [2016] EWHC 1850 (Admin)

A local authority's refusal to enter a care leaver on its housing register was unlawful, as it had based its decision on the leaver's spent criminal convictions contrary to the Rehabilitation of Offenders Act 1974 s.4(1).

Children Act

R (on the application of HASSAN JALAL) v GREENWICH ROYAL LONDON BOROUGH COUNCIL [2016] EWHC 1848 (Admin)

The Children Act 1989 s7 conferred a power, not a duty, to assist a child in need. A local authority had therefore been entitled to refuse a family accommodation under s.17 where the parents had the resources to find a family home, but had failed to do so by the time their temporar

y accommodation ended. The local authority's proposal to accommodate the children without the parents, should the latter fail to find accommodation, was reasonable and was not a breach of ECHR art.8.

Homelessness

R (on the application of HINDIS ABDULRAHMAN) V THE LONDON BOROUGH OF HILLINGDON [2016] EWHC 2647 (Admin)

This was an application for judicial review of a decision by the local authority to decline an application made by the Claimant pursuant to s183 of the Housing Act 1996 on the grounds that there had been no change of circumstances since an earlier determination in 2013. The court rejected the first ground of challenge – that the authority had applied the wrong test (which was whether the application was based on exactly the same facts as previously) – but found for the Claimant on the irrationality challenge. It was no longer a joint application, and the number of people seeking assistance had changed

Possession

CARDIFF COUNTY COUNCIL v LEE [2016] EWCA Civ 1034

A landlord's failure to apply to the court for permission before seeking a warrant of possession, as required by CPR r.83.2, was a procedural defect which the court was empowered to cure under CPR r.3.10 by dispensing with the need for a prior permission application and proceeding to validate the warrant where the circumstances justified that course. Rule 83.2 did not exclude the exercise of the r.3.10 power.

LILLIAN IRIS FORKNER v ZAS VENTURES LTD [2016] EWCA Civ 1062

The right to occupy a property was terminated where the occupier failed to comply with an obligation to insure the property and keep it in good repair. Previous owners had waived her breaches, but that waiver came to an end when the current owner asserted that she would be held responsible for carrying out past and future repairs.

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

In considering a possession order made because the Housing Act 1985 s.87 did not permit a second succession to a secure tenancy, the occupant's period of residence would not on its own be sufficient to found a proportionality defence under ECHR art.8. Length of residence might form part of an overall proportionality assessment, but it was unlikely to be a weighty factor because Parliament had lawfully excluded second succession to members of a deceased secure tenant's family.

Rent

(1) PRAVIN CHOUHAN (2) ANGELA THOMAS v EARLS HIGH SCHOOL [2016] UKUT 405 (LC)

A clause in a tenancy agreement constituted a contractual provision for the variation of rent under the Housing Act 1988 s13(1)(b) such that the First-tier Tribunal did not have jurisdiction under s14 to consider a proposed increase in rent. The Upper Tribunal suggested that the parties might consider deleting the provision, given that the agreement had become an

assured tenancy to which the Act applied.

Service Charges

LEASEHOLDERS OF FOUNDLING COURT & O'DONNELL COURT v (1) CAMDEN LONDON BOROUGH COUNCIL (2) ALLIED LONDON (BRUNSWICK) LTD (3) BRUNSWICK GP LTD (4) BRUNSWICK NOMINEE LTD (5) BIS (POSTAL SERVICES ACT 2011 COMPANY) LTD [2016] UKUT 366 (LC)

Where a superior landlord proposed carrying out works to which the consultation requirements under the Landlord and Tenant Act 1985 s20 applied, the obligation to consult was on the superior landlord, not the intermediate landlord; the obligation was on the landlord intending to carry out the works. It required the superior landlord to consult the individual leaseholders, not just the intermediate landlord.

(1) PATRICK CANNON (2) TAMARA CANNON v 38 LAMBS CONDUIT LLP [2016] UKUT 371 (LC)

A landlord's failure to serve a notice which complied with the Landlord and Tenant Act 1987 s47 did not deprive the First-tier Tribunal of jurisdiction to determine a service charge dispute under the Landlord and Tenant Act 1985 s27A. A service charge was not due until a landlord complied with s.47, but a landlord could give a valid notice at any time and it did not follow that the tribunal could not be asked to consider an application under s.27A until a valid notice had been served.

Succession

JACK JONES V LUTON BOROUGH COUNCIL [2016] EWHC 2036 (Admin)

The Claimant challenged a decision of the Defendant's Housing Needs Review Panel not to offer him a tenancy of his home following the death of his tenant father (himself a successor). There was no statutory right to succession and a notice to quit was issued by the authority, though they offered the Claimant and his partner alternative one-bedroom accommodation. They argued that they should be entitled to stay in the two-bedroom property because the partner's brother lived with them and had medical issues. The authority decided that the brother was not part of their permanent household and so upheld their decision to offer alternative one-bedroom accommodation. The court decided that this was a decision the authority was entitled to make.

Sub-letting

IVETA NEMCOVA v FAIRFIELD RENTS LTD [2016] UKUT 303 (LC)

A lessee had breached a covenant in her lease not to use her flat other than as a private residence by granting a series of short-term lettings of the property. The fact that the lessee had granted the lettings meant that her occupation of the flat was so transient and not sufficiently permanent that she would not consider the property her private residence.

Miscellaneous

MAHMUT & ANOR v JONES & ORS Ch D (Asplin J) 31/10/2016

A judge had erred in refusing to vary a court order under the slip rule to include the grant of permission to appeal. It was clear from notes on the court file that the intention had been for the order to include the grant of permission to appeal, and a failure to amend would result in prejudice as it would deny the appellants a right to appeal to the Court of Appeal.

R (on the application of GS) (BY HER LITIGATION FRIEND THE OFFICIAL SOLICITOR) v CAMDEN LONDON BOROUGH COUNCIL [2016] EWHC 1762 (Admin)

A local authority was not obliged under the Care Act 2014 to provide a homeless Swiss national who was wheelchair dependent with accommodation where that was her sole requirement; a need for accommodation did not amount to a "need for care and support". However, it had a duty to provide her with accommodation by exercising its power under the Localism Act 2011 s.1, as the seriousness of her physical disabilities and mental disorder were such that

homelessness would breach her rights under ECHR art.3.

Andy Lane

Homelessness Reduction Bill will introduce major changes to homelessness law – and now has government support

The Department for Communities and Local Government has announced that it will support the Homelessness Reduction Bill – introduced in Parliament as a private member's Bill – meaning that it is highly likely to become law. It will make significant changes to Part VII of the Housing Act 1996.

The Bill was presented to Parliament in June 2016 and was due to receive its second reading on 28 October 2016. If given a second reading, the Bill will then proceed to committee stage for more detailed scrutiny.

The headline reforms proposed by the version of the Bill which was presented at its first reading are:

- a person will be homeless where they have received a section 8 or section 21 notice (subject to exceptions);
- a person will be threatened with homeless where it is likely that she will become homeless within 56 (rather than the current 28) days;
- a new freestanding duty to carry out homelessness assessments of, and produce personalised plans for, all of their Part VII applicants;
- an expanded duty (under section 195) owed to any applicant (regardless of priority need or intentional homelessness) who is threatened with homelessness to take reasonable steps to help the applicant secure that accommodation does not cease to be available for their occupation;
- a new "initial duty" owed to all eligible persons (again regardless of priority need or intentional homelessness) who are homeless to take reasonable steps to help the applicant to secure that suitable accommodation becomes available for their occupation; and
- new rights to request reviews of a decision to discharge the new duties.

The objects of the Bill will be apparent from these headlines: to enable and encourage local authorities to intervene at a much earlier stage to prevent homelessness; and to improve the provision of support to anyone who is eligible and homeless, regardless of priority need or intentional homelessness.

A new definition of homelessness: proposed section 175(3A)-(3C)

Clause 1 provides that where a person has received a valid section 8 or section 21 notice, they will be homeless on the day after the possession proceedings can be brought (section 8) or the notice expires (section 21). This measure is intended to address the controversial practice adopted by many local authorities of deferring the point at which a Part VII application is accepted until a possession order has been made (an inevitability in most cases where the claim is brought on mandatory grounds) or even until the bailiffs are coming through the front door.

However, it has been considerably watered down compared to the version that was presented to, and scrutinised by, the Communities and Local Government Select Committee over the summer. The version of the Bill presented to Parliament has introduced some very significant exceptions which will allow the local authority

to require the recipient of a notice to remain in occupation even after the notice has expired. These were not included in the draft Bill.

Clause 1 will permit the local authority to "ask" the recipient of a notice to remain in occupation; the effect of "asking" is to disapply the deemed homelessness provision that a person is homeless once the notice has expired. A local authority may ask a recipient where:

(a) it considers that the applicant can reasonably be expected to occupy the accommodation; and
(b) (in the case of a section 8 notice) it considers that there is a reasonable prospect that the landlord will withdraw the claim or the claim will be successfully defended or (in the case of a section 21 notice) it has taken reasonable steps to persuade the landlord to withdraw the notice or delay applying for a possession order.

There is no statutory right of review against a decision of the local authority to "ask" a recipient to remain, so challenges to these decisions will need to proceed by way of judicial review.

Support for all eligible persons who are homeless – regardless of priority need or intentional homelessness

The draft version of the Bill proposed a duty on local authorities to help to secure that accommodation would be available for *all* eligible applicants for a period of 56 days after their application. This proved to be very controversial among contributors to the Select Committee's inquiry and has been removed from the Bill which was presented to Parliament.

Instead, by clause 5, the Bill now imposes a new "initial duty" which is, again, owed to all eligible persons who are homeless. The wording is important: it is a duty to "take reasonable steps to *help the applicant to secure* that suitable accommodation becomes available for [their] occupation". The duty is owed for a minimum of 56 days or until another prescribed event occurs (whichever is the earliest).

By clause 3, local authorities will be required to assess the circumstances in which the applicant became homeless, their housing needs and what support the applicant would need to be able to have and retain suitable accommodation. The results of that assessment must be produced in a personalised plan and regard must be had to the plan in discharging the new duties owed to all eligible homeless applicants.

By clause 4, the duty owed to applicants who are threatened with homelessness is now no longer limited to applicants who are in priority need and not intentionally homeless. As with clause 5, the duty is slightly modified from the existing requirement in section 195 to take reasonable steps "*to secure* that accommodation does not cease to be available for [their] occupation"; the new duty is a requirement to "take reasonable steps to *help the applicant to secure ...".*

Thoughts

Much of the reforms proposed in this Bill are to be welcomed: any measure which prevents a person from losing the roof over their head can only be an unequivocal good. However, the crucial detail is not a legal question at all, but rather a practical one: will the government fund the considerably enhanced workloads that local authorities will face if these reforms become law?

This article was written before the Second Reading which took place on 28 October 2016.

Matt Lewin

Succession to secure tenancies: a 'tenancy for life after life'

The Housing and Planning Act 2016 will introduce significant amendments to the rules concerning succession to secure tenancies under the Housing Act 1985. These changes will deepen and lengthen the impact of the 'phasing out' of secure tenancies for life under the 2016 Act, and will replace the succession regime introduced by the Localism Act 2011. The impact of these changes means that, whereas 'tenancies for life' often transpired in practice to be 'tenancies for life after life' over successive generations, the end of that era is now dawning.

The Housing and Planning Act 2016

When they are brought into force, s. 120 and Schedule 8 to the Housing and Planning Act 2016 will provide that any new succession after the commencement of the reforms will be for a fixed term of 5 years only. Whereas at present the tenancy is deemed to vest in the successor upon the death of the tenant (i.e. the old tenancy continuing to exist in the name of the successor), under the new rules the old tenancy will come to an end on the death of the tenant and a new tenancy will be created. The new tenancy will have the same terms as before, "except that the terms are confined to those which are compatible with a tenancy for a fixed term of 5 years": s. 89(2A) and (2B) of the 1985 Act as amended.

Perhaps more significantly, the reforms will apply to all existing secure tenancies regardless of when the tenancy itself was created. That is because the 2016 Act will remove the distinction introduced by the Localism Act 2011 between tenancies entered into before and after 1 April 2012: s. 86G(8) of the 1985 Act as amended. Local authorities will however still be permitted to extend succession rights in the tenancy agreement. The effect will be that when any secure tenant dies after the 2016 Act has come into force, there will be no succession to anybody other than a spouse, civil partner or person living with the tenant as a partner – unless (i) there is no spouse/civil partner qualified to succeed and (ii) the council has contractually provided for succession by other family members through the inclusion of an express term in the tenancy agreement.

The fact that this may cause particular and unexpected hardship for the relatives of tenants who hold pre-April 2012 secure tenancies was dismissed by the then-Housing Minister Brandon Lewis when introducing the provisions into the draft Housing and Planning Bill in March 2016:

> "We therefore propose that the succession rights for secure tenancies granted before April 2012 be aligned with those granted after that date. The amendments will deliver a consistent approach across all secure tenancies and ensure that common-law partners are put on an equal footing with married couples and civil partners. Other family members who may have had an expectation of succeeding to a secure tenancy granted before April 2012, having lived with the tenant for at least 12 months, will lose their statutory right to succeed. We do not think that it is right that those who may not need social housing, because, for example, they can rent or buy privately, should have the automatic right to succeed to a social home when nearly 1.4 million households are on council waiting lists."1

The former criteria for pre-April 2012 tenancies will continue to apply only in Wales, where s. 87 of the 1985 will continue in force in its current form.

Dealing with practicalities

As yet there has been no word from the Government on the intended timeframe for implementation of these provisions. Further, it is unclear whether or how much advance notice will be given ahead of the introduction of the commencement order, there being no minimum

[1] See Housing of Commons Library Briefing Paper, Succession Rights and Social Housing (England), Number 01998, 17 March 2016, p. 10.

period required: s. 216(3) of the 2016 Act.

The 2016 Act is not entirely clear as to the mechanisms which will apply to the 5-year fixed term tenancies which will arise upon the death of the tenant. In particular, the Act is silent as to whether successors will be entitled to a review and re-grant of further secure tenancies once the initial 5-year term has expired. Section 89(2B) will provide only that the "the parties and terms of [the new tenancy] are the same as those of the tenancy that it replaces, except that the terms are confined to those which are compatible with a tenancy for a fixed term of 5 years."

Read literally, this could mean that there is no entitlement to a review upon expiry because, of course, 'old style' secure tenancies (i.e. 'tenancies for life') did not provide for review as a term of the tenancy. However, under the 1985 Act as amended the general duty to conduct a review before the end of the term of fixed term secure tenancies is expressed to apply to "the landlord under a fixed term secure tenancy of a dwelling-house in England": s. 86A. If "a fixed term tenancy" is understood as encompassing 'any' fixed term tenancy granted under the Act, then this will surely be taken to include the 'new' tenancy granted upon succession pursuant to s. 89(2A). This reading of the Act is supported with reference to a number of other provisions which provide for the automatic grant or creation of 5-year fixed term tenancies in various circumstances (ss. 81A(4) and 86D(5)). This suggests that the Act's general 'default option' will be for the grant of a 5-year fixed term tenancy, providing parity among all tenants as regards review and potential grant of a further tenancy if they are deemed to meet whatever qualifying criteria will apply to the review process.

When local authorities exercise their discretion to grant a secure tenancy under the 1985 Act as amended, they will be able to choose between tenancies of 2 and 10 years' fixed term: ss. 81A(1) and (2) and s. 86A(5).[2] This would mean that, whereas a successor is only entitled to a 5-year fixed term tenancy upon the death of the tenant, he may be given a longer or a shorter tenancy upon review. In deciding on the length of a further tenancy following review, local authority landlords will be required to consider any available Ministerial Guidance (s. 81A(5)). However they will also be entitled to adopt their own policies, which could make specific provision as regards successor tenants.

Like the old rules, when a 'new' tenancy arises following succession pursuant to s. 89(2A), the new tenant is himself defined as a successor. In other words, if he dies before the expiry of the 5-year term his spouse or civil partner (or any other relative who would otherwise qualify under the terms of the tenancy agreement) will not be entitled to succeed regardless of whether or not they fulfil the residence criteria: s. 88(ba) as amended. However it is unclear what will happen if, at the end of his 5-year term, the successor is still alive and is granted a further tenancy upon review. Will s. 88(ba) continue to apply so that the 'new' tenant is still defined as a successor? Or is the slate wiped clean by the grant of a new tenancy, such that the rights of succession apply afresh as if there had never been a succession?

S. 88(ba) is expressed to apply where "the tenancy arose by virtue of s. 89(2A) (fixed term tenancy arising in certain cases following succession to periodic tenancy)". But upon review, the local authority may "offer to grant a new secure tenancy of the dwelling-house at the end of the current tenancy": s. 86A(5). On a plain reading of the Act, it would appear that following the grant of a "new" tenancy under s. 86A(5), "the tenancy" held by the tenant for the purposes of s. 88 is not the same one which "arose by virtue of s. 89(2A)" and therefore a new right to succession would apply.

[2] The review process introduced by the 2016 Act is discussed in detail in Richard Hanstock, "Phasing out tenancies for life" in Cornerstone Barristers' Special Edition Housing Newsletter on the Housing and Planning Act 2016, May 2016.

It will certainly be open to local authorities to adopt a generous approach in setting their own policy, i.e. to decide that if a successor tenant is granted a new tenancy upon review, they will as a matter of policy grant the new tenancy free of any restriction on the right to succeed. It is less clear whether it would be permissible to decide this question the other way however. This appears to be an area where guidance from the Secretary of State and/or courts may be required notwithstanding that it is likely to be some years after the introduction of the new rules before a would-be successor find himself in a position to raise this argument.

Succession and social need

The 2016 Act did not introduce any equivalent provisions into the Housing Act 1988, so that succession rules for tenants of housing associations and other registered providers of social housing will remain unchanged. Those rules are (s. 17 Housing Act 1988) that a spouse, civil partner or person living with the tenant as a partner may succeed, with the possibility to extend succession rights to other relatives under the terms of the tenancy agreement. Those who do succeed to an assured tenancy will not necessarily be subject to fixed terms or future review of their tenancies, and may therefore enjoy a significant advantage over council tenants in the same situation.

The 2016 Act therefore takes its place among the growing range of provisions which distinguish the rights and entitlements of local authority tenants from those of housing associations. Many will consider this unfortunate. For example in 2006 the Law Commission recommended elimination of the disparity in succession rules between secure council and assured housing association tenancies. The Commission recommended the creation of single social housing tenancy, and took the view that allowing only one statutory succession to a tenancy was "too restricted". Under their proposals, a further succession would be allowed to a "reserve successor", following the death of a "priority successor".3 Those proposals accepted the statute's preference for protecting the surviving spouse or civil partner (the "priority successor"), while recognising the need for some flexibility to account for carers, adult children or other relatives (the "reserve successor") who had made their home with the tenant in certain circumstances.

Given where we are now in 2016, those proposals appear almost as the relics of a lost age. But perhaps the same can be said of the original succession rules for pre-April 2012 tenancies, given the generosity they demonstrated towards a large and broadly-defined group of "family members" including step-children, relatives of the "half-blood" and relations by marriage: s. 113 of the 1985 Act. Back in 1985, it may have been thought that only small numbers of relatives would co-habit with tenants and meet the qualifying criteria. In contrast, the Minister's remarks quoted above seemed to suggest that the current Government viewed the rules as a form of loophole allowing 'undeserving' relatives to retain occupation of council properties over the generations. Predictably, over the years certain newspapers have shared this view.4

No doubt the rules on succession are perceived as unfair by those waiting on housing allocation lists as much as by 'failed successors' facing eviction from their family homes. However there appears to have been no recognition by the Government of 'increased' (although there are no known available figures to support this) or 'excessive' numbers of successions as a symptom of housing shortage rather than its cause. The Minister suggested that relatives succeeding to pre-April 2012 tenancies are amongst those who do "not need social housing", but plainly this begs the question as to why so many working-age adults are living in their parents' spare bedrooms rather than buying or renting their own

[3] Summarised in the Housing of Commons Library Briefing Paper, Succession Rights and Social Housing (England), Number 01998, 17 March 2016, p. 15.

[4] The Daily Mail, "£9 billion worth of council homes are inherited by 90,000 people who don't need government help", 19 October 2010.

properties as the Government seems to believe they should.

In Thurrock BC v West [2013] HLR 5 the Court of Appeal held that the position of 'failed successors' in precisely this situation was so unexceptional that it could not amount to an arguable defence to a claim for possession. Mr West would have fulfilled the qualifying criteria to succeed but for the fact that the late tenant had herself been a successor. It is clear from the facts as described in the judgment that a significant (albeit not the only) reason for Mr West having taken up residence with his family in his elderly grandparents' council property was for lack of affordable housing elsewhere [para. 16]:

> "…He described his work and that of his partner, which in both cases was part-time. He said that they were both of limited means and, if the Property was taken away from them, not only would it cause great disruption but it would also mean that they would be homeless and the three of them would need to be re-housed by the Council. He said they would not have the means to rent on the private market, and that taking away his tenancy would cause him detriment…"

In other words, lack of alternative accommodation was a key reason that Mr West – a healthy young adult in a two-income household – found himself in the position to satisfy the residence criteria necessary for succession. The Court held these facts did not reach the threshold of even a seriously arguable Article 8 defence [paras. 21-36]. Rather, it was precisely the ordinariness of these circumstances which weighed against Mr West and his family:

> "There is, however, nothing exceptional in this context about the housing needs of a couple who have limited financial means and are the parents of a young child. Indeed, such a family unit is entirely typical of those with a need for social housing. They are no less typical because […] they have not defaulted on any financial obligations or committed any nuisance or other wrongdoing as occupiers and they have had a long association with the locality. The fact that they have occupied the Property for some time is in itself irrelevant since Parliament has limited the number of successions to a secure tenancy however long a person's association with, and emotional ties to, a property, and that legislative policy does not infringe Art.8 ."

This reasoning was recently upheld in strong terms by the Court of Appeal in Holley v LB Hillingdon [2016] EWCA Civ 1052, in a judgment handed down on 1 November 2016.[5] The case also concerned a 'failed successor', who would have met the qualifying criteria but for the rule against second succession. He had raised a proportionality defence to a claim for possession, relying upon the length of his residence in his late grandmother's flat (some 37 years) and a history of depression and anxiety. The Court affirmed the decision of the court below that those circumstances were neither exceptional nor of "anything like sufficient weight" to render a decision to seek possession unreasonable [19]. Hillingdon had filed evidence regarding the shortage of social housing in its area, and it would have "undermined one of the fundamental principles of the respondent's allocation scheme, namely the prioritising of those in greatest need" to have preferred the Appellant over the other 1,161 households waiting for a three-bedroom property.

What's next?

It is without question that the impact of the 2016 Act will be to move, overnight, thousands of occupants of council properties across the country into Mr West's position by removing their entitlement to succession at a stroke. But as there is nothing unlawful about Parliament's decision to limit the persons and occasions for automatic succession to secure tenancies (Wandsworth LBC v Michalak [2002] EWCA Civ 271, para. 41), 'failed successors' will be likely to try to

[5] Ranjit Bhose QC and Emma Dring of Cornerstone Barristers acted for LB Hillingdon in this case. A summary of the judgment is available on Cornerstone Barristers' website.

oppose claims for possession of their homes by challenging the exercise of councils' discretion to evict them.

Although the ruling in Holley is authoritative as to the limits of Article 8 / proportionality defences, highlighting the attractiveness of Equality Act defences for defendants to possession claims, there is in my view fertile ground for challenges which may occupy the courts in the coming years.

Consider for example the situation of a pre-April 2012 secure tenant with a long-term terminal illness, who has the misfortune to die the week after the commencement of the Act rather than a week beforehand. There will be no legal obligation for the local authority to grant a new tenancy to a "family member" who would have succeeded – and who has always had a legitimate expectation of succeeding – but for the date of the tenant's death. However it seems almost inevitable that the 'failed successor' in those circumstances will raise an Article 8 defence to the claim or plead a public law challenge to the lawfulness of the council's application of its policy.

Local authorities will therefore need to carefully consider the application of their existing 'discretionary succession' or housing allocation policies in such cases, preferably in advance of the issuing of the claim so that the its decision-making process and the evidence which underpins it will be apparent to the court. The landlord should explain both why any defined exceptions contained within the policies do not apply to the family in question and why a general exception to the policy should not be made in such unusual circumstances, especially when the occupants also have known vulnerabilities, disabilities or other reasons why eviction would cause particular hardship.

Local authorities would generally be well-advised to adopt or review policies to address the situation of 'second successors'. In the past these policies were often referred to misleadingly as 'second succession' policies. However it is important to remember that there is of course no such thing as a 'second succession', only the grant of a new tenancy on a discretionary basis. In consequence there can be no agreement with the 'second successor' to exclude or reserve their usual statutory rights of succession.

That said, it should be remembered that from now on, where 'discretionary succession' is permitted, only the spouse or civil partner of the new tenant would be entitled to succeed unless the local authority has chosen to extend rights of succession to other relatives under the terms of the tenancy agreement. Further, all 'secure tenancies' will be fixed term tenancies, so that a local authority granting a new tenancy to a 'failed successor' on a discretionary basis will be able to choose the length of the fixed term (or introductory) tenancy provided (s. 81A).

Conclusion

Although it is yet unknown when they will come into force, the undeniable impact of the new succession rules will be a sharp and sudden jump in the number of persons who are no longer entitled to remain in occupation of council properties following the death of their loved ones. As each of those occupants searches for a way to retain access to social housing, it is highly likely that the county courts hearing claims for possession concerning 'failed successors' will be required to consider ever-greater numbers of challenges concerning the lawfulness of local authorities' housing allocation schemes and the exercise of their discretion to seek possession. Whether the county courts are the appropriate forum, with the appropriate level of expertise, time and resources to deal with these challenges, may be a discussion for another day.

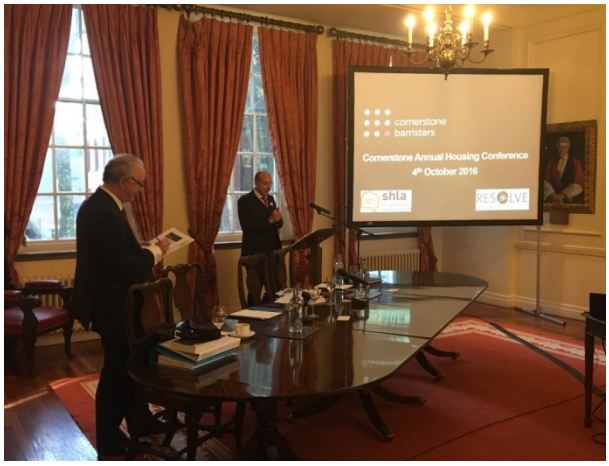
Tara O'Leary

Cornerstone housing news

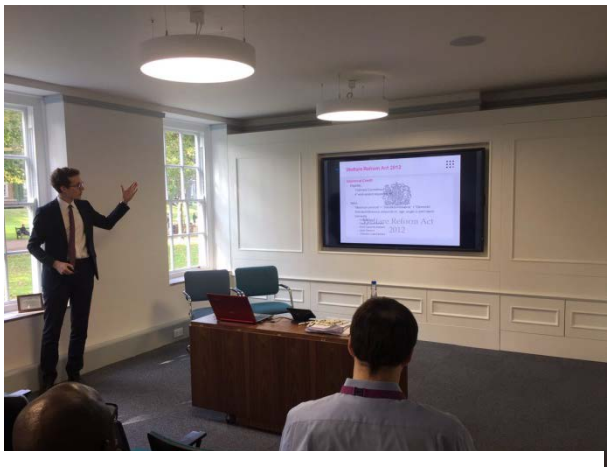
The Cornerstone Housing Conference 2016

The Cornerstone Housing Conference took place on 4th October and was attended by over 100 housing practitioners. Covering a broad range of topics from service charges to welfare reform, the conference provided an opportunity to discuss some of the significant changes affecting the sector in recent months.

Kuljit Bhogal is hosting the next seminar on ASB which is taking place in Chambers on 23rd November. Contact laurenb@cornerstonebarristers.com if you would like to register for this event.

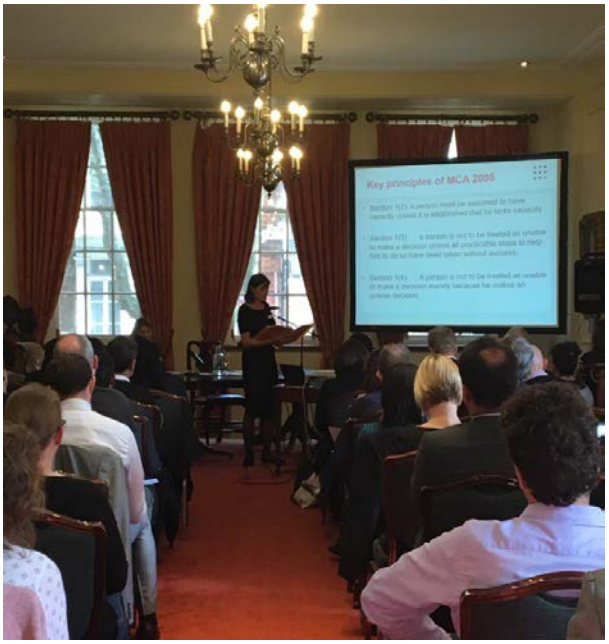


Andy Lane and Ranjit Bhose QC open the conference



Matt Lewin explores welfare reform issues

Shomik Datta and Michael Paget discuss service charges



Jenny Oscroft speaking on Court of Protection

Cornerstone Barristers shortlisted for The Legal 500 UK 2017 awards

We are delighted to have been shortlisted for set of the year in the Public Law and Real Estate, Environment and Planning categories in the Legal 500 Awards 2017. Based on extensive research including over 70,000 interviews with in-house counsel, law firms and sets in the UK, the awards recognise the most capable, expert practitioners and firms operating across a number of different business sectors. The list of winners can be found on the Legal 500 website.

Cornerstone Housing Team retains top banding in Chambers & Partners 2017

The Cornerstone Housing Team has yet again been ranked Band 1 in this year's Chambers & Partners directory. 13 members of the team are ranked as leading individuals and the directory goes on to note that "Cornerstone Barristers is a standout social housing chambers with a formidable reputation for its work on behalf of public authorities, housing associations and registered landlords." Visit the Chambers & Partners website for further details.

Kuljit Bhogal chairs ResolveASB Conference 2016

Kuljit Bhogal is chairing this year's ResolveASB Conference taking place in Birmingham on 8-9th November 2016. The annual conference is the key event in the community safety calendar, bringing together over 300 delegates from the housing sector, local authorities, police and voluntary organisations.

In other news…

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

Long residence "of little consequence" - the final nail in the coffin for article 8 defences?

Does a landlord need court permission to issue a warrant for possession?

Fast, Furious and Fatal

PSPOs: Bans on hats, lying down in public, car cruisers and skateboarders...what next?

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For queries regarding counsel and cases please contact our clerking team on 020 7242 4986 or email clerks@cornerstonebarristers.com. You can also follow us on twitter or join us on LinkedIn.