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Cornerstone Housing Newsletter

October 2015

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Cornerstone Housing Day at Gray's Inn

Welcome to the Cornerstone Housing Newsletter

This bumper edition of the Newsletter follows on from Cornerstone's hugely successful Housing Day held at various prestigious venues across Gray's Inn earlier in the month. The breadth of topics covered in this edition demonstrates once again the diverse interests and specialist expertise within the Housing Team. If your interest is tenancy management, homelessness or housing policy there's something here for you. The inclusion of an article on the Court of Protection is testament to the Team's ability to recognise new fields of importance to the busy housing practitioner and, as with everything else presented in the Newsletter, to offer relevant, practical and up-to-date commentary. I very much hope you enjoy reading it.

Kelvin Rutledge QC
Joint head of Housing Team

The Cornerstone Annual Housing Conference 2015

The last 12 months have brought considerable success for the housing team at Cornerstone Barristers, with: • no fewer than 11 of the team's silks and juniors appearing before the Supreme Court and Court of Appeal, addressing issues as diverse as Pereira vulnerability, protection from eviction, the termination of joint tenancies and human rights; • the publication of Kuljit Bhogal's 'Cornerstone on Anti-social Behaviour: the new law'; • a popular team newsletter edited by Cornerstone roommate Andrew Lane; • a busy seminar programme in London, Birmingham and Manchester; and • the launch of Cornerstone Housing's Twitter feed @CstoneHousing.

On 6th October 2015, we were delighted to be able to share and celebrate some of that success with key clients, when more than 100 delegates attended (or returned to) Grays Inn for the Annual Cornerstone Housing Conference 2015 – or, as the Twitterati would have it, #CSHousing2015.

In the chair this year, Ranjit Bhose QC led the first of the day's plenary sessions addressing Key Developments in 2015. The session - which covered a range of topical issues, from housing allocation to the newly-extended right to buy - was a fitting prelude to a day of sheer variety and choice.

Ranjit Bhose QC discussing key housing developments in 2015

During a 6 hour programme, delegates were able to attend a further four plenary sessions, considering issues of perennial interest, from anti-social behaviour and repossessions to homelessness and welfare reform; and three of 8 different breakout sessions, addressing bespoke subjects, such as additional and selective licensing, service charges and out-of-borough placements. The full conference programme is available here.

This year, delegates were provided with a complementary memory stick loaded with soft copies of the speakers' PowerPoint presentations and accompanying material packs. The move, aimed at limiting the conference's environmental footprint, encouraged lively interaction between delegates and the fourteen juniors and silks taking part in both plenary and breakout sessions.

Like its predecessor, the 2015 Conference prompted a flurry of social media activity by speakers and delegates alike, with delegates posting generously about the day's content and organisation.

It is fitting that the first of these messages is directed at Chambers' marketing and administrative staff, who did a sterling job organising the event and ensuring its smooth running on the day. Our thanks go to them.

It is equally fitting that the last message, now, goes to you - our clients - for making the day itself and the last 12 months at Cornerstone Barristers such a resounding success.

- Well done @ellahewittcs & @claregilbey on organising a brilliant @cornerstonebarr annual housing conference #CSHousing2015 very informative.
- #CSHousing2015 Kelvin Rutledge & vulnerability. Knowledge, experience & ability to convey it. Doesn't get better than that @cornerstonebarr.
- Great Equality Act talk by @RyanSKohli with useful tips for defences #cshousing2015
- #CSHousing2015 @cornerstonebarr Capacity with Peggy Etiebet ... What an excellent and knowledgeable speaker. Increasing area of law.
- ASB masterclass from @KuljitBhogal @CstoneHousing #CSHousing2015.
- Very interesting talk by Jon Holbrook. Always holds the room. #CSHousing2015
- Excellent and interesting talk by @DeanUnderwood01 at #CSHousing2015

Preparation for next year's Annual Cornerstone Housing Conference will begin shortly, so watch out for the 'save the date' email – we look forward to welcoming you (back) to #CSHousing2016.

In the meantime, if you have any further feedback about this year's housing conference or would like to contribute ideas about the organisation and content of next year's event, please email me at deanu@cornerstonebarristers.com. We would be delighted to hear from you.

Dean Underwood

Recent Housing Developments

Andy Lane provides a whirlwind tour around some of the issues facing the Housing sector in the last 3 months…

Anti-social Behaviour

The Police get new national guidance on handling domestic abuse

A Briefing paper on "Harassment: 'Police Information Notices'" has been produced

The National Housing Federation has produced a paper "Hoarding: Key considerations and examples of best practice"

Data Protection

Updated guidance from the Information Commissioner's Office on data protection and the crime and taxation exemptions

Homelessness

Statutory Homelessness in England - the figures, policy and law

The 2015 2nd Quarter homelessness statistics have been produced by the Department for Communities & Local Government

HCA & Housing Associations

The HCA statistical data return 2014-2015 has now been published

The Homes & Communities Agency publishes its Consumer Regulation Review (2014/15)

Rent setting for social housing in England...the history & the future for housing associations

Housing and Planning Bill

The House of Commons Library has produced a Briefing paper on the Housing and Planning Bill 2015-2016. Follow the Bill's progress here…

Pay to Stay

The Department for Communities & Local Government's "Pay to Stay: Fairer Rents in Social Housing" consultation ends on 20th November 2015

This is what it is all about…

Private Sector

The Department for Communities & Local Government has produced a guidance note on the retaliatory eviction provisions in the Deregulation Act 2015

Private rented sector landlords' obligations to carry out immigration checks on tenants brought in by the Immigration Act 2014 explained in this briefing paper

The Local Government Association respond to the DCLG's technical discussion paper "Tackling Rogue landlords and improving the private rental sector"

The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) (Amendment) Regulations 2015 amends regulations brought in earlier the same month. Prescribed section 21 notices for post-1 October 2015 tenancies are needed along with other prescribed legal requirements and information. Further information can be found here and here.

Right to Buy

The House of Commons Library produced a Briefing Paper on the proposals to extend the right to buy in England

The Centre for Regional Economic and Social Research at Sheffield Hallam University has produced its headline findings from the evidence review into the impact of the existing right to buy and the implications for the proposed extension to Housing Associations

The Prime Minister announces an agreement with housing associations through the National Housing Federation on extending the right to buy to 1.3 million more families

To which David Orr, Chief Executive of the National Housing Federation responded

The Chartered Institute of Public Finance and Accountancy however warns of the impact on local authorities

And the Local Government Association expresses concern too…

Miscellaneous

Housing Ombudsman Annual Report and Financial Statements 2014 to 2015

Updated Discretionary Housing Payments guidance from the Department for Work and Pensions

What is the Crown Tenancies Bill [2015-16]?

Andrew Lane

Out of borough placements: a time for policy review?

Kelvin Rutledge QC

In Nzolameso v Westminster City Council [2015] UKSC 22 Lady Hale remarked “There is no doubt that, for a variety of reasons … ‘out of borough’ placements have become increasingly common in recent years”. This is undoubtedly true as the Government statistics published in August 2015 show: as at 31st March 2015 26% of statutorily homeless families in England had been placed in the area of a different local authority, a rise of 30% on the previous year’s figure. The reasons are manifold and include dwindling council-owned stock, welfare cuts and rising rents in the private sector. Even the London Olympics is said to have had an impact on neighbouring boroughs.

In homelessness cases it is not per se unlawful for a local authority to secure accommodation for an applicant outside its area. Section 208(1) of the Housing Act 1996 states that accommodation should be secured in-borough so far as is “reasonably practicable”. It follows that where it is not so practicable the local authority must search further afield in order to discharge its duty. Where it does regulations set out the factors to which the local authority must have regard. Key amongst these are distance, disruption and accessibility of support services: see the Homelessness (Suitability of Accommodation) (England) Order 2012 (SI 2012/2601), Article 2.

Out of borough placements potentially affect local authorities in at least three ways. Firstly, those who make them face the possibility of legal challenge from the individual and/or (at least theoretically) the other authority. In the Nzolameso case, for example, the appellant, a single mother of five who had established links and a support network in Westminster, successfully challenged the authority’s decision to discharge the duty it owed her under section 193(2) of the Housing Act 1996 by the offer of accommodation in Milton Keynes, a distance of approximately 40 miles from the borough.

Secondly, the host authority may unwittingly incur statutory duties to the individual or family placed in its borough. For example, it may have to afford them a “reasonable preference” under its allocation scheme as persons owed a homeless duty by “any” local housing authority (see section 166A(3)(b) of the 1996 Act). Additionally, a family’s physical presence alone may require the authority to provide services under Part III of the Children Act 1989 if any child is assessed as being “in need”: see R(AM) v LB Havering and LB Tower Hamlets [2015] EWHC (Admin) 1004.

Thirdly, price wars and gazumping practices may occur between neighbouring boroughs forced to compete for accommodation in the private rented sector, a situation which in London lead sensibly to an inter-borough co-operation agreement.

Relevant statutory guidance on out of borough placements is to be found in paragraphs 16.7 and 17.41 of the 2006 Code of Guidance and paragraph 48 of the Supplementary Guidance published following the changes implemented by the Localism Act 2011. The latter contains in paragraph 48 this advice to local authorities:

> “Where accommodation which is otherwise suitable and affordable is available nearer to the authority’s district than the accommodation which it has secured, the accommodation which it has secured is not likely to be suitable unless the authority has a justifiable reason or the applicant has specified a preference.”

This concentric circle requirement of placement policy suggests strongly that local authorities should either familiarise themselves fully with the lettings markets in surrounding areas or have a proper evidence base for justifying any placements they make further afield. The establishment and

maintenance of support services in a particular area – reminiscent of the procedures some of the London Boroughs applied when placing families in coastal hotels in the days of local authority asylum support – may well suffice for this purpose.

In Nzolameso Lady Hale urged local authorities to review their policies on out of borough placements:

> "Ideally each local authority should have an up to date publically available policy for securing sufficient units of temporary accommodation to meet the anticipated demand for the coming year, reflecting its obligations under the 1996 Act and the Children Act 2004."

Such a procurement policy, with a supporting evidence base, is necessary to enable the local authority to meet its obligations under section 208(1) and, in particular, to demonstrate that it is not "reasonably practicable" to place all its applicants in-borough.

Lady Hale continued:

> "It should also have a policy for the allocation of those units to individual homeless households, to which reference would be made in explaining any decisions to accommodate a household out of the area."

It is by reference to such a policy that the local authority will seek to comply with their obligations under both the 2012 regulations and the statutory guidance to secure "suitable" accommodation.

Local authorities who do not have these policies in place run the risk of legal challenge. Since out of borough placements may have a discriminatory effect in some cases, authorities should when reviewing their polices have due regard to their public sector equality duties as well as to their broader strategic obligations to children under section 11(2) of the Children Act 2004.

Kelvin Rutledge QC

All change in the Court of Protection

Jon Holbrook

Jon Holbrook considers a landmark judgment that should restore common sense to the way the Court of Protection deals with welfare applications.

1. Consider this scenario: P, a mentally incapacitated person, is being deprived of his liberty by being (or is about to be) accommodated in a care home or residential placement. Nobody disputes that the placement is working (or would work) well and that it is in P's best interests. The local authority applies to the Court of Protection for an order authorising the deprivation of liberty. Common sense would suggest that nearly all such applications ought to be straightforward, take a matter of weeks, be concluded on the papers and involve perhaps one lawyer for the local authority.

2. Yet, as practitioners in the Court of Protection are well aware, such applications have hitherto been anything but straightforward. They've often taken months, involved numerous hearings, required the instruction of several experts and engaged several lawyers. Well, as a result of Mr Justice Charles's judgment in NRA & others [2015] EWCOP 59 this unnecessary deployment of lawyer-led resources ought to become a problem of the past. From now on welfare applications of this non-contentious nature should have these features:

- **P as a party?** P does not normally need to be made a party (§§176-178, 269(1)). In an appropriate case P should now be discharged as a party (§236). If P is not a party then the need for a litigation friend will disappear. But for good measure Charles J made these two points about litigation friends:
- **The Official Solicitor as a litigation friend?** There should rarely be a need for the Official Solicitor to act as P's litigation friend (§236). 'In a non-contentious case [the Official Solicitor's] input through those he instructs (usually solicitors) may well add nothing of value' (§50). Hitherto, in an application which became contested, often because of the Official Solicitor's involvement, his costs might have been in excess of £50,000 (§77).
- **Family or friends as a litigation friend?** Where there is evidence of a suitable family member or friend who has been involved in P's care the appointment of any sort of litigation friend would normally add little as other ways should be found for those people to present their views (§§45-46). However, in an appropriate case a family member or friend can be a litigation friend (§§162, 167, 173).
- **What's required?** P's best interests are best served with input from a person who can perform three roles: (i) eliciting P's wishes and feelings without causing P any unnecessary distress; (ii) critically examining P's care package; (iii) keeping that care package under review (§164).
- **Achieving that objective?** The Court of Protection rules (particularly new rule 3A) should be applied flexibly to ensure that P's minimum procedural safeguards are met (§§195, 239) and this may mean:
  – If P is made a party then a family member or friend will typically be able to act as P's litigation friend (§§162, 167, 173). Such a person can often provide a degree of independence (§§217-219).
  – A family member or friend can be appointed as a Rule 3A representative (§233). This is often the best way of safeguarding P's interests because such a person will be dedicated to P's care (§269(2)).
  – A judge can play a greater role (§254) and where he considers that more information is required he can make orders for s49 reports and issue witness summonses (§§244, 261, 269(4)).
- **Court hearings?** There will often be no need for a court hearing (§104).
- **Streamlined paper disposals?** It would be helpful if applicants prepared reasonably short care plans (§223) that addressed specific issues (§§225-226).

3. Legal aid? Charles J considered the availability of legal aid for deprivation of liberty cases and he noted how it will normally only be available for P if there is likely to be a hearing (§§89, 94, 96). Thus 'legal aid will not be an available source of funding unless the case turns out to be contentious and so requires a hearing' (§108). But he warned that any attempt to claim that a case was contentious so as to facilitate an award of legal aid may cause the court to consider 'whether the course taken was a contrivance' (§105).

4. Policy driven? It is likely that some lawyers will criticise the NRA judgment for being driven by policy rather than law. In fact Charles J grounds his judgment on a consideration of what the European Convention on Human Rights and domestic law required (§§179-196). But more to the point: why shouldn't the way vulnerable people are protected be a matter of policy? The following comments from Charles J are about policy but nobody could seriously claim they have no place in a judgment of this nature:

- 'But the well-known difficulties in identifying and appointing the Official Solicitor as a litigation

friend and the costs and delays of so doing mean that it did and does not take a crystal ball to see that the joinder of P as a party in all such cases will create burdens in terms of both delay and emotional and financial cost.’ (§21)

- ‘The people that know P best and have often spent a long time negotiating with public authorities and getting the best care package available for P are members of P’s family. And so it seems to me that to promote P’s best interests their autonomy, dignity, status, and their past and continuing care and support of P needs to be recognised and promoted.’ (§11)

5. If the devising of a streamlined system that promotes P’s best interests, their autonomy, dignity and care needs requires a judge to consider issues of policy then that is something to be welcomed, not criticised. Some lawyers have a tendency to elevate abstract legal principles over the interests of the people that laws are intended to protect. This judgment from Charles J is an antidote to that problem.

Jon Holbrook

Intentional homelessness, queue jumping and the “I would have been homeless anyway” argument

Matt Hutchings

Haile v Waltham Forest LBC [2015] UKSC 34

The main housing duty under section 193 of the Housing Act 1996 is owed by local authorities to applicants who are eligible, homeless, in priority need and who did not become homeless intentionally. Intentional homelessness thus acts as a control mechanism on the extent of the duty owed by authorities: a person who is eligible and has a priority need cannot hand back the keys to his accommodation and thereafter simply expect to be housed by a local authority.

The homelessness legislation was originally enacted in the Housing (Homeless Persons) Act 1977. Then, as now, the core definition of intentional homelessness was:

> “A person becomes homeless intentionally if he deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy.”

This has to be read together with the criteria for the main housing duty being imposed on the authority:

> “…where the local housing authority are satisfied that an applicant is homeless, eligible for assistance and has a priority need, and are not satisfied that he became homeless intentionally.”

Over 3 decades ago, Stephen Sedley (as he then was) failed to convince the House of Lords in Din v Wandsworth LBC [1983] AC 567 that his clients, the Dins, were not homeless intentionally on the basis of an argument that “they would have been homeless anyway”. In dire financial straits, the Dins left their flat at 56 Trinity Road and handed in their keys. Mr Sedley’s point was that they would have been evicted for rent arrears in short order in any event. So, he argued, they were not homeless intentionally. By a bare majority, the House of Lords rejected this argument, on the basis that the relevant question was why they became homeless at the time they left 56 Trinity Road. This was due to their deliberate

acts. Hypothetical events which had not in fact happened (the landlord bringing possession proceedings) could not affect the answer to this question.

Fast forward to 20 May 2015, when the Supreme Court by a majority of 4-1 allowed Ms Haile's appeal against Waltham Forest's decision that she became homeless intentionally: Haile v Waltham Forest LBC [2015] UKSC 34; [2015] 2 WLR 1441. Ms Haile obtained a tenancy in a hostel for single people in Leyton. Unhappy about smells in the hostel, she handed in her keys. She applied as homeless to Waltham Forest. However, and before they reached a decision on her case, she had a baby. Since children were not allowed in the hostel, by that time she would have become homeless anyway.

Pausing there, it should be noted that the birth of Ms Haile's baby was an event that had really happened, unlike the hypothetical possession proceedings that had never been brought against the Dins. However, the causal effect of the birth – having to leave the hostel – was equally hypothetical. The acceptance by Waltham Forest that, on the facts of this particular case, the birth of the child would have had the effect of rendering Ms Haile homeless tended to obscure the difficulty that local authorities may have inquiring into the hypothetical effects of known events on an applicant's previous accommodation.

Waltham Forest decided that the relevant question was why she left the hostel in Leyton. The fact that she had had a baby since was irrelevant. The county court and the Court of Appeal agreed, holding that they were bound by Din. The Supreme Court disagreed.

The leading judgment in the Supreme Court was given by Lord Reed. It contains a classic judicial thought experiment revolving around an elderly homeless man who, while a student, had been evicted from his digs for holding rowdy parties. On a literal application of the definition of intentional homelessness ("deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation"), the man would remain "intentionally homeless" for the rest of his life, since he had once become homeless intentionally from the student digs. This would be absurd. Hence, reasoned Lord Reed, it was necessary to read into the legislation a second question, namely whether Ms Haile's current homelessness was caused by her deliberate act. There were two causal questions: did she cease to occupy accommodation due to a deliberate act in the first place, and if so, was that act still the cause of her homelessness as at the date of the decision?

What is surprising about the majority decision is that little detailed attention was given to the reasoning of the majority in Din. It should be pointed out that it is very unlikely that the outcome in Din would be the same today. Given that their accommodation was unaffordable when they left it, it was not reasonable for them to continue to occupy, save on a very short-term basis, which on a current understanding of the Act would mean that the Dins were already homeless. However, the reasoning of the majority as to the nature of the inquiry into intentional homelessness is not affected by this point and it had stood for more than 30 years, including two re-enactments of the legislation.

There were two main reasons why the Dins' case failed. The first was that it was inconsistent with the wording of the Act, which clearly focuses on the question of what caused the applicant to become homeless at the time that he did ("became homeless intentionally"). The second was that it would add to the administrative difficulties of local authorities if they had to inquire into hypotheses. These reflect Lord Wilberforce's points 1 and 3 on p.667 of the report and are also referred to in the other majority speeches.

In Din, the majority accepted that an applicant's homelessness would no longer be intentional if he subsequently acquired "settled accommodation" from which he was then evicted for reasons that

were not of his making. They would have accepted the point made by Lord Reed at para 23 in Haile, that "became homeless intentionally" must refer to the applicant's current state of homelessness. But they would have said that the relevant question was: what was the cause of the applicant's current state of homelessness, when it began? In other words, in order to render the Act workable, the only implication that it is necessary to make into the main housing duty is: "became homeless intentionally this time", rather than Lord Reed's alternative: "became is homeless intentionally".

Read in this way, the Din interpretation answers Lord Reed's example of the former rowdy student. His chequered history as a student is of no relevance to why he recently became homeless. It is also difficult to disagree with the reasoning of the majority in Din that Dyson v Kerrier is not on point. The principle established in that case was that a local authority is entitled to look beyond the proximate cause of the loss of temporary accommodation (a winter let that came to an end) to see if the applicant's current homelessness was caused by an intentional loss of earlier accommodation (the surrender of a council flat). In short, the proximate cause is not necessarily the only effective cause of homelessness.

Lord Reed cited a number of other cases in support of his reinterpretation of the Act. In ex p. Bassett the point accepted by Taylor J was that the applicant's becoming homeless from her husband's sister's accommodation was due to her marriage breakdown and had nothing to do with the surrender of earlier secure accommodation. In ex p. Fahia the applicant left the guest house because her housing benefit was cut, again nothing to do with her deliberate eviction from earlier accommodation in Harrow. In ex p. Aranda the applicant became homeless from accommodation in Columbia because her husband deserted her; the earlier surrender of their house in Camden was not the cause. In ex p. Ajayi it was held that the authority was entitled to decide that the applicant's leaving settled accommodation in Nigeria was a cause of her subsequent homelessness when having to leave temporary accommodation in the UK after she became pregnant, because the temporary accommodation was inherently precarious. The argument in Stewart was that, if the applicant had effectively installed a caretaker while he was in prison, who had later failed to pay the rent, his earlier imprisonment may have ceased to be relevant. However, on analysis, all of these cases are consistent with Din, properly understood. They are all concerned with what caused the applicant's current state of homelessness, when it began. Lord Reed recognised the force of this at para 55. His apparent answer to it was that it would be arbitrary to use the date when the applicant became homeless as a cut off date beyond which issues of causation ceased to be applicable. But is this not, in reality, a wholesale rejection of the reasoning of the majority in Din, in favour of that of the minority, notwithstanding that it had stood the test of time? As Lord Neuberger made clear at para 79, Din was not formally overruled, but distinguished. Thus, it remains good law that an applicant cannot rely on hypothetical events to break the chain of causation of his current homelessness. However, he can now rely on the hypothetical effect of known events by arguing that they would have caused him to become homeless, in any event.

At para 56 Lord Reed went on to reason that a purposive interpretation was required, fastening on the putative policy of preventing "queue jumping", suggested by Lord Lowry at p.679 in Din. However, that is not quite what Lord Lowry said:

"Clearly Parliament did not intend to punish persons for becoming homeless intentionally: the object was to lay down conditions for retaining priority and thereby to discourage persons from so acting as to increase the already heavy burden on housing authorities. The method was to postpone the claims of those who so acted and to give their places in the queue to those who did not." (Original emphasis)

On one view, Ms Haile acted in such a way as to increase the burden on the local authority. Certainly, her actions in surrendering her hostel accommodation, at the time they were done, were likely to have that effect. The Act's disincentive effect in relation to surrendering accommodation that is reasonable to occupy at the time has been weakened.

In his dissenting judgment, at para 89, Lord Carnwath noted that the majority's re-analysis of Din had not been suggested to the Court by either party. The arguments advanced on behalf of Ms Haile were summarised at para 90 and, it might be thought, convincingly answered in the paragraphs that follow. A reader of the majority judgments may therefore be left with the unsatisfied feeling that Din has in substance been overruled (preserved only to the extent of precluding reliance on hypothetical events), but without the full force of its reasoning having been grappled with. One thing is certain however: that in consequence of the decision in Haile, if they have not done so already, local authorities will need urgently to review their decision making on intentional homelessness.

Matt Hutchings

First reported decision on the Anti-Social Behaviour, Crime and Policing Act 2014

Kuljit Bhogal

On 30 June 2015 the High Court gave judgment on applications for interim injunctions made under Part 1 of the ASBCPA 2014. The case is first reported decision on the not-so-new Act.

Kuljit Bhogal, author of 'Cornerstone on Anti-Social Behaviour: The New Law' explains why the applications were made and the High Court's decision in relation to them.

The applications were made by the Chief Constable of Bedfordshire Police and sought to place restrictions on the activities of 'Britain First' a registered political party which holds anti-Muslim views.

Without notice injunctions were refused and the applications were then renewed on an on-notice basis. The Chief Constable sought to place restrictions on a public procession organised by Britain First and due to take place in Luton on 27 June (the 'March').

The injunctions granted by Mr Justice Knowles included the following terms:

> "(b) Entering any Mosque or Islamic Cultural Centre or its private grounds within England and Wales without prior written invitation.
>
> (c) Publishing, distributing or displaying, or causing to be published, distributed or displayed, any words or images, whether electronically or otherwise, which having regard to all the circumstances are likely to stir up religious and/or racial hatred.
>
> (d) Using threatening, abusive or insulting words or behaviour thereby causing harassment, alarm or distress to any person.
>
> (e) Carrying or displaying in Luton on Saturday 27 June 2015 at or in connection with the march by "Britain First" any banner or sign with the words "No More Mosques" or similar words or words to like effect."

Mr Justice Knowles refused to grant a term which would have prevented the Respondents from entering the town of Luton and its surrounding area. His reasons were (a) that the March was already regulated by conditions imposed under the Public Order Act 1986 (in terms of requiring a moving procession, taking a prescribed route and being held within stated hours), (b) that there had been no evidence or submissions presented to the court which had evaluated the potential impact of the named Respondents being excluded from the March, (c) to ban the leaders of a registered political party from a town was a 'very considerable thing' and the submission that the named Respondents had 'no link' to Luton and had 'no need' to be there did not find favour with the court (para. 13), and finally (d) that no additional restrictions (to those imposed under the 1986 Act) had been thought necessary until the events of 3 June 2015 when the Respondents had used provocative, threatening and offensive remarks or gestures towards members of the public.

Readers will note that terms (c) and (d) are matters which are already regulated by the criminal law. Those familiar with ASBO case law will know that such terms can be permitted in certain circumstances. In R v Dean Boness, the court held that the there was no bar to the inclusion of a term which was also a criminal offence, the key consideration was whether the term sought was necessary. It will be interesting to see whether this point is more fully argued at the final hearing of the applications.

Kuljit Bhogal is a barrister, Joint-Head of the Housing Team and author of 'Cornerstone on Anti-Social Behaviour: The New Law' published in February 2015.

Kuljit Bhogal

Joint head of Housing Team

Homelessness roundup

Catherine Rowlands

2015 has seen a bumper crop of homelessness cases, but what with Hotak, Johnson and Kanu, Nzolameso and Haile in the Supreme Court, you may have overlooked some less dramatic but no less interesting cases in the Court of Appeal. They resolve some questions of statutory interpretation about the interrelationship of other duties that local authorities owe to those in, seeking, or losing social housing. One of the features of these decisions is the recognition by the Court of the strains that the current atmosphere of austerity is placing on those at the bottom of the housing scale, and those attempting to assist them.

Firoozmand v Lambeth LBC [2015] EWCA Civ 952

An interesting appeal against the suitability of accommodation offered to a homeless applicant, which concerned an Iranian who had been granted asylum and who had mental health problems which made him less tolerant to noise from neighbours. He specifically said that he did not want to be accommodated in a hostel, but, being a single man, and not in priority need, this was what was offered to him. He alleged that dampness in the flat aggravated his mental health problems and relied on the Housing Health and Safety Rating System. He appealed on the basis that the Council should have carried out an assessment under the HHSRS before offering him the hostel accommodation. the Court of Appeal rejected the suggestion that there was a

general duty to carry out assessments before any offer of accommodation, or even when there was a complaint about the standard of accommodation already offered, whilst accepting that the HHSRS could be relevant in certain individual cases, if the local authority did not think that it had sufficient information about the condition of the property. It would be only if the local authority irrationally found that it had sufficient information when any reasonable local authority would have carried out such an assessment that this would be a ground for challenge. The attempt to broaden out the application of the HHSRS failed.

Lambeth were represented by Wayne Beglan of Cornerstone Barristers.

Mohamoud v Kensington and Chelsea RLBC [2015] EWCA Civ 780

This case concerned the interplay of the Housing Act 1996 and the Children Act 2004 section 11. Where an applicant with dependent children has been found to be intentionally homeless, what is the impact of section 11 of the Children Act 2004? On the Appellants' side, it was contended that local authorities are required to have proper arrangements in place to ensure that their officers treat the best interests of children as a primary consideration whenever they discharge their local authority functions, and must conduct a Children Act assessment of any children effected before deciding to evict their parents from temporary accommodation, once the Council had decided that it did not owe the main housing duty. The Respondent local authorities successfully argued that the Children Act duty was "simply an overarching strategic obligation, giving rise to no individually enforceable rights". Lady Justice Sharp showed an admirable grasp of the reality of the burdens on those assisting the homeless when she said at paragraph 68:

> 68 Standing back for a moment, if the respondents were required to engage in an assessment of children in homelessness cases …, this would be extraordinarily burdensome in terms of cost and resources and – in the overwhelming number of cases — simply futile. As outlined above, the law already caters for the position of children, it allows for the assessment of proportionality at various stages, it has built into it various periods when any particular facts can be raised which might (in the most exceptional case) bear on the proportionality of an eviction, and mandate a temporary halt of the process, and the legislation, together with the procedural protections available to protect the article 8 rights engaged, provide for such matters to be independently assessed by a court. Hard pressed social workers would be diverted from their vital child protection work in relation to children in need as defined by the legislation, to conduct thousands of child assessments on the off chance that there were exceptional facts, of which the local authority which had already conducted a detailed review of the parent's circumstances was, as yet, unaware, and the parent did not think to raise with the local authority him or herself. If the appellants' argument are correct, then one child might be the subject of any number of such assessments (presumably these would then be required further back into the process). There is moreover an existing duty on the part of local authorities to conduct a Children Act assessment in respect of any child in need, whose parent is likely to lose their accommodation; and local housing authorities and children's services/departments are under a duty to co-operate in any event: see section 10 of the 2004 Act and section 27 of the 1989 Act.

Johnston v City of Westminster [2015] EWCA Civ 554

Mr Johnston – that's Johnston with a t, just to differentiate him from the Johnson in the vulnerability appeal – was found not to be homeless by Westminster. He had applied as homeless to

Westminster in 2011; they had found that he had a local connection with Eastbourne, who had accepted a duty to him. He appealed, and Westminster agreed to take a fresh application from him. This time, they held that given that Eastbourne were willing to accommodate him, he was not homeless. Mr Johnston objected to this on the grounds that any accommodation that Eastbourne might be willing to offer was speculative and hypothetical. This aspect of his appeal was upheld. The mere fact that another local authority might offer accommodation does not mean that the applicant is not homeless; he does not in fact have accommodation. However, Mr Johnston's appeal failed on the basis that once Eastbourne had accepted its duty to him, Westminster's duty had come to an end.

Catherine Rowlands

Case Law Update

Andrew Lane

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

Allocations

R (on the application of HA) v EALING LONDON BOROUGH COUNCIL [2015] EWHC 2375 (Admin)

A local authority's housing allocations policy was unlawful where its requirement that a person had to have lived in the local area for the previous five years to be eligible for social housing excluded people who, under the Housing Act 1996 s.166A(3), had to be given "reasonable preference" when allocating housing.

Homelessness

See Catherine Rowlands' "Homelessness Round-up" for an analysis of 3 recent homelessness cases.

R (on the application of ANGELA BROOKS) v ISLINGTON LONDON BOROUGH COUNCIL [2015] EWHC 2657 (Admin)

The court construed the Housing Act 1996 s.188 to determine whether a local authority's temporary duty to secure the provision of accommodation ended where it was satisfied that the claimant had refused an offer of suitable accommodation. The local authority had performed its s.188 duty where accommodation had been offered, subject to a material change of circumstances, but the duty continued pending notification of the final decision of whether a duty existed under another provision of the Act.

JAVID FIROOZMAND v LAMBETH LONDON BOROUGH COUNCIL [2015] EWCA Civ 952

A local authority did not have a duty under the Housing Act 1996 s.210 to conduct a full inspection and hazard assessment of accommodation whenever a Part 7 applicant complained about the its condition. Local authorities operated on tight budgets and had to exercise judgment when deciding whether to conduct a full-scale inspection and assessment.

R (on the application of BARRETT) v WESTMINSTER CITY COUNCIL [2015] EWHC 2515 (Admin)

A local housing authority had acted unlawfully by failing to consider conscientiously matters raised by a homeless woman when refusing to accommodate her pending the outcome of a review of her unsuccessful application for housing assistance.

FAZIA ALI v THE UNITED KINGDOM (ECHR – 20 OCTOBER 2015) 40378/10

The Court disagreed with the Supreme Court and held that the Council's determination that its duty to secure accommodation for the applicant had ceased was a determination of her civil rights within the meaning of Article 6. However, it also considered that the section 204 appeal afforded adequate protection as regards the judicial "determination" of that "civil right". The decision by the Council that it had discharged its duty to the applicant under Part VII of the 1996 Act was subject to judicial scrutiny of sufficient scope to satisfy the requirements of Article 6 of the Convention.

Leases & Service Charge

FREIFELD & ANOR v WEST KENSINGTON COURT LTD [2015] EWCA Civ 806

The court considered the correct approach to granting relief from forfeiture where a lessee had wilfully breached a term of the lease.

GERTRUDE COWLING v WORCESTER COMMUNITY HOUSING LTD [2015] UKUT 496 (LC)

The First-tier Tribunal had no jurisdiction to determine the reasonableness of a service charge when a money judgment for the full amount of the charge had already been entered by the county court on the basis that the charge was fixed rather than variable. The tribunal's jurisdiction was excluded by the Landlord and Tenant Act 1985 s.27A(1) and s.27A(4)(c).

CHAPLAIR LTD v KUMARI [2015] EWCA Civ 798

A county court judge had power to make an award of costs in favour of a landlord in proceedings for rent arrears brought under the small claims track where the terms of the lease allowed for recovery of the costs of legal proceedings against the tenant.

Licensing

HYNDBURN BOROUGH COUNCIL v (1) PAUL BROWN (2) JOHN BARRON sub nom RE 112 DOWRY STREET, ACCRINGTON, LANCASHIRE BB5 1AW: RE 144 AVENUE PARADE, ACCRINGTON, LANCASHIRE BB5 6QB [2015] UKUT 489 (LC)

The local authority successfully appealed against two decisions of the First-tier Tribunal Property Chamber (Residential Property) in relation to the amendment and removal of two conditions imposed in licences granted by the appellant on 13 January 2014 under Part 3 of the Housing Act 2004 under a selective licence scheme which had been established under that Part of that Act. It was within the power of the appellant local housing authority to impose conditions requiring the provision of a carbon monoxide detector and an EICR in the terms of conditions 6 and 8.

R (on the application of CROYDON PROPERTY FORUM LTD) v CROYDON LONDON BOROUGH COUNCIL [2015] EWHC 2403 (Admin)

A local authority had complied with its duty to take reasonable steps to consult persons likely to be affected by its decision to designate the entire borough for selective licensing of privately rented sector properties. Comprehensive publicity had been given to the consultation exercise which had lasted six months, and it could reasonably be expected that anyone with a connection to, or interest in, the area would have had the local authority's proposals drawn to their attention.

Planning

(1) WEST BERKSHIRE DISTRICT COUNCIL (2) READING BOROUGH COUNCIL v DEPARTMENT FOR COMMUNITIES & LOCAL GOVERNMENT [2015] EWHC 2222 (Admin)

The decision of the Department of Communities and Local Government, by way of ministerial statement, to alter national policy in respect of planning

obligations for affordable housing by introducing exemptions for the requirement to provide affordable housing for small sites, was unlawful. The new policy was inconsistent with the statutory scheme and its purposes, the consultation process undertaken before the change had been unfair, material considerations had not been taken into account in making the decision, and it had been adopted without complying with the public sector equality duty.

Possession

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

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

Tenancies

WANDSWORTH LONDON BOROUGH COUNCIL (Claimant/Respondent) v JOANNE TOMPKINS (Defendant/Appellant) & WARREN TOMPKINS (Defendant) [2015] EWCA Civ 846

The notification requirement for creating a secure tenancy under the Housing Act 1985 Sch.1 para.4 required a landlord to notify tenants that the tenancy was to be regarded as secure at the date of grant, and not merely at some unspecified date in the future. The signing by tenants of an introductory tenancy could not amount to notification by a local authority of a secure tenancy under para.4.

SPIELPLATZ LTD v (1) JOHN PEARSON (2) MAUREEN PEARSON [2015] EWCA Civ 804

A chalet which tenants had constructed on a plot which they leased on a naturist resort had become part of the land. The tenants occupied the chalet as their home and it could not be moved without being dismantled. It was irrelevant that both the freeholder and the tenants believed that the building belonged to the tenants. The tenants therefore had an assured tenancy of the plot.

Miscellaneous

R (on the application of SG) (Claimant) v HARINGEY LONDON BOROUGH COUNCIL (Defendant) & SECRETARY OF STATE FOR THE HOME DEPARTMENT (Interested Party) [2015] EWHC 2579 (Admin)

A local authority's decision to refuse accommodation to an asylum-seeker in need of support with daily tasks was quashed, as it had failed to ask itself whether the services she was already receiving would have been rendered useless if she were made homeless. The court found that several propositions established in R. (on the application of M) v Slough BC [2008] UKHL 52, [2008] 1 W.L.R. 1808 and R. (on the application of SL) v Westminster City Council [2013] UKSC 27, [2013] 1 W.L.R. 1445 applied to the accommodation provisions of the Care Act 2014.

MIKE v MERTON LBC (2015) QBD (Judge Graham Wood QC) 07/10/2015

Completely unmeritorious claims by a tenant against a local authority were struck out as disclosing no cause of action. The court was not to be used for the ventilating a broad basis of complaint, regardless of how strongly a claimant felt about it.

Andrew Lane

Tier 1 Leading Set in Social Housing

Legal 500 2015

Cornerstone Housing News

Legal 500 rankings

The Cornerstone Housing team has been recognised as a Tier 1 Leading Set for Social housing for a second consecutive year, owing to a "strong team" which "includes member with allied strengths in planning and property law." 9 members of the team were named as leading individuals. Full details on the rankings can be found here.

New team members

We are very pleased to welcome Tara O'Leary and Ben De Feu to the Cornerstone Housing Team. Tara and Ben joined Cornerstone Barristers as pupils last year and were awarded tenancy in September.

Forthcoming events

The Cornerstone Housing team is hosting a seminar on The Anti-Social Behaviour Crime and Policing Act 2014 on 24th November in London, followed by a re-run of this seminar at our Birmingham office on 8th December.

To book a place on this seminar or for further details about other Cornerstone Housing events, please visit our website events page.

Editorial Board

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