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Housing litigation post lockdown: everything you need to know

Kelvin Rutledge QC, Matthew Feldman, Dean Underwood and Tara O'Leary

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Housing litigation post lockdown: everything you need to know

A recording of this webinar and a downloadable copy of the slides will be available on our website shortly

Today's webinar

1. Welcome and introduction – *Kelvin Rutledge QC*
2. Remotely important: An overview of post-pandemic practice and trends – *Dean Underwood*
3. Housing Act 2004: Key developments in rogue landlord regulation – *Dean Underwood*
4. Repossessions, practice and procedure – *Matthew Feldman*
5. Homelessness – *Tara O'Leary*
6. Questions

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Remotely important: An overview of post-pandemic practice and trends

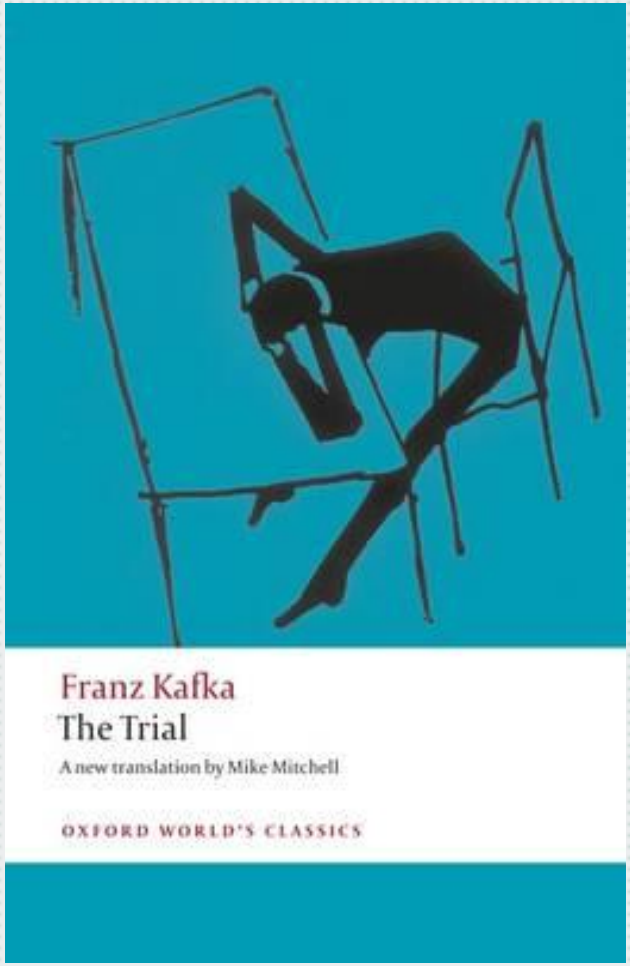
Dean Underwood, Barrister

Post-pandemic court practice – remotely familiar?

- A future for remote and hybrid hearings?
  - Current and future court practice
  - A glimpse behind the Bench: What are judges being asked to do?
  - The HMCTS view: the advantages of remote and hybrid hearings
  - Consider HMCTS's recent blog post on the Video Hearing Service, available here
- Too remote to be effective: When *are* in-person hearings necessary, or desirable?
  - Ultimate test: What is in the interests of justice?
  - Remember, social distancing and pandemic precautions still apply at court
- Oiling the wheels of online justice: Top-tips for success at remote hearings
  - Latest judicial guidance on remote hearings, available here
  - Bundling, not bungling! Accessibility and navigability key – see here for guidance
  - Access to the court for all, but *within* the rules and guidelines
  - In-hearing communications

Post-pandemic court practice – Avoiding the Kafka-esque trial

- Dealing with the post-pandemic backlog
  - Current problems, current solutions
    - Too many cases, too few judges
    - Reliance on Recorders and Deputies, sitting remotely?
    - Consider ADR – negotiation, mediation, arbitration
  - Top tips for listing success
    - Isolation, information, communication
- A specialist housing court or tribunal?



Post-pandemic trends in housing litigation and practice

- Changes in judicial attitudes to housing litigation?
  - Consider repossessions based on rent arrears, anti-social behaviour, unlawful sub-letting
  - Early and on-going assessment of litigation merits and objectives essential to cost and time-saving
- A focus on pre-, peri- and post-pandemic policies
  - Consider increased (and increasing) importance of local housing authority (LHA) and private registered provider (PRP) policy-making in the post-pandemic era, e.g. in respect of pandemic arrears, vulnerable tenants, out-of-borough placements
  - Increased focus on - and scrutiny of – LHA and PRP policies likely

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Housing Act 2004: Key developments in rogue landlord regulation

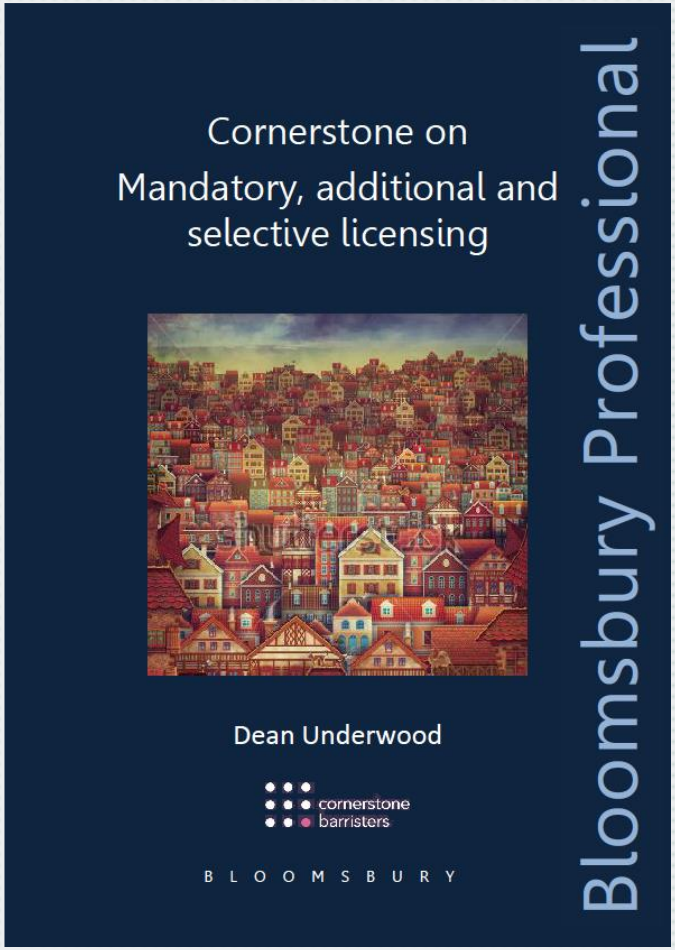
Dean Underwood, Barrister

Introduction

- The following slides and those appended to this presentation -
  - assume a basic knowledge of 2004 Act licensing and rogue landlord regulation
  - provide a summary of appellate licensing decisions in the last 24 months
  - include a summary of the most significant case law, including
    - *Waltham Forest LBC v (1) Marshall (2) Ustek* [2020] UKUT 35 (LC)
    - *IR Management Services Ltd v Salford CC* [2020] UKUT 81 (LC)
    - *R (Mohamed) v Waltham Forest LBC et al* [2020] EWHC 1083 (Admin)
    - *Valadamay v Stewart* [2020] UKUT 0183 (LC)
    - *Hussain v Waltham Forest LBC* [2020] EWCA Civ 1539; [2021] 1 WLR 922
    - *Rakusen v Jepsen* [2021] EWCA Civ 1150
  - include links to statutes, decisions and other materials throughout, where available: simply click (or right-click) on the link
- See also the helpful article by Cornerstone Barristers colleague, Tara O'Leary, here
- Any queries: deanu@cornerstonebarristers.com

A shameless plug …

- A new book for your shelves …
- Cornerstone on Mandatory, Additional and Selective Licensing
- Published by Bloomsbury Professional
- Part of the ‘Cornerstone on …’ series
- Expected 2022



The importance of LHA policy-making

Waltham Forest LBC v Marshall and Ustek [2020] UKUT 35 (LC)

Respect due to financial penalty policies

Essential facts:

- W imposed financial penalties on M and U, under s.249A HA 2004, for failing to license flats under their control, contrary to s.95(1)
- W calculated penalties according to its licensing enforcement policy and, principally, the seriousness of the offence, categorised in six bands in a Civil Penalties Matrix
- M's offence fell within Band 2, U's within Band 4; and M and U were penalised accordingly: £5000 and £12,000 respectively
- On appeal, the FTT reduced M's penalty to £1000 (equivalent to a low penalty for a Band 1 offence) and U's to £4000 (equivalent to a high penalty for a Band 1 offence)

Held (here): W's appeals allowed

- FTT may not entertain challenges to a LHA's policy: only Admin. Court may do so [52-53]
- **FTT must start from the LHA's policy** and consider any arguments that it should depart from it
- The appellant bears the burden of persuading it to do so [54]
- FTT must look at the policy's objectives and ask whether they will still be met if it departs from the policy [54]; and consider the need for consistency between offenders – the very rationale for having a policy [85]
- Further, FTT must "*afford considerable weight*" -"*special weight*"- to the LHA's decision [61-62]
- FTT had paid only lip service to W's policy and decisions: W's "*generous*" penalties reinstated [85-92] [97-101]

Ekweozoh v Redbridge LBC [2021] UKUT 180

Beware the policy petard

Essential facts

- E, who was resident abroad, had engaged agents to let and manage her flat, but neither of them licensed it under Part 3, HA 2004
- R's licensing enforcement policy provided that it would "always" use informal enforcement action before taking formal action, e.g. a penalty.
- R wrote to E informally in June 2018 asking her to license the flat; E, who had not provided R with a change of address, did not receive the letter.
- When, in November, her agent learned of the need to license the flat, E licensed it. Months later, R imposed a financial penalty
- The FTT dismissed E's appeal

Held (here)**: appeal allowed**

- FTT erred by failing to consider whether R should have imposed a penalty at all, and focusing exclusively on its amount
- Whether R acted reasonably before November 2018, and the reason why the steps it took were not initially successful, did not go to the substance of the issue: R's enforcement policy was a material consideration.
- **FTT should have begun by looking at the policy** and asking whether R should have taken informal action instead of a penalty.
- UT re-made the decision: Appropriate outcome was to deal with E's failure informally, without a penalty. The aim of the penalty regime was to support good landlords, and crack down on rogue landlords – which would not be advanced by penalising E.

The nature of 2004 Act offences

IR Management Services v Salford CC [2020] UKUT 81 (LC)

Breach of HMO management regulations: a strict liability offence

Essential facts:

- On inspection of an HMO managed by IR, S identified breaches of Reg.4(4), Management of HMOs (England) Regulations 2006
- S penalised IR £25,000 for the related offence under s.234(3) HA 2004
- On appeal, IR's director maintained he did not know the house was an HMO, and so had a reasonable excuse under s.234(4)
- FTT: (1) held that IR had not proved, on the balance of probabilities, that it had a reasonable excuse; and (2) increased its penalty to £27,500

Held (here): appeal dismissed

- IR appealed on two grounds, one being that the FTT had applied the wrong burden and standard of proof under s.234(4)
- It argued: it had an evidential burden only; once it produced evidence supportive of the defence, S had the burden of proving, to the criminal standard, that IR had no such excuse, i.e. the absence of a reasonable excuse was an element of the offence
- Argument rejected: **a failure to comply with the 2006 Regs. is a strict liability offence**, the elements of which do not include the absence of a reasonable excuse [27]
- So, a prosecutor does *not* have to prove the absence of such an excuse; and the burden rests with the defendant to establish, to the civil standard, that a reasonable excuse exists [27]

R (Mohamed) v Waltham Forest LBC [2020] EWHC 1083 (Admin)

Failure to license HMO a continuing and strict liability offence

Essential facts:

- In 2017, W prosecuted M for failing to license HMOs, contrary to s.72(1) HA 2004; and invited M to interview on suspicion of a further such offence
- M sought a JR of W's decision to interview him, alleging W had been wrong to treat s.72(1) as a strict liability offence
- M later sought a JR of the Magistrates' Court refusal to treat the summonses as a nullity, on the premise that:
  - W had not provided, and the court did not have, enough information about the offences to issue summonses lawfully;
  - W had not laid informations in time as (i) s.72(1) did not create a continuing offence and (ii) W had known about the offences in 2015/2016

Held (here):

- **s.72(1) created an offence of strict liability**: W did not have to prove that M knew he was managing or in control of an HMO [40] [48]
- Lack of knowledge that a house was occupied as an HMO *might* be relevant to a "reasonable excuse" defence under s.72(5) [44] [48]
- M conceded s.72(1) created a continuing offence, but argued that time ran once the LHA knew the HMO required a licence
- Argument rejected: if W proved the commission of an offence within 6 months of laying its information, the summons would be in time [51]
- W's informations, identifying the elements of the s.72(1) offence, with relevant names, addresses and dates, provided the court with sufficient information to issue summonses [25] [27]

The relevance of spent convictions

Hussain v Waltham Forest LBC [2020] EWCA Civ 1539

Reliance on spent convictions?

Essential Facts

- W refused and revoked licences under Parts 2 and 3 HA 2004, relying on conduct amounting to offences of which H and her husband had been convicted respectively under s.238 HA 2004 and the Forgery and Counterfeiting Act 1981
- H appealed to the FTT and applied to strike out all references to that conduct, on the premise that the convictions had become spent after one year under s.4, Rehabilitation of Offenders Act 1974, and W should not have had regard to them
- Application transferred to the Upper Tribunal
- The Upper Tribunal, comprised of the President and Judge McGrath, dismissed it.

Held (here): appeal dismissed

- s.4 enabled the FTT to receive and take account of evidence and submissions dealing with relevant conduct of a rehabilitated person. That included conduct, which was the subject of a now-spent conviction. The FTT had not erred in taking that conduct into account. [36-48] [54]
- Further, when deciding to refuse or revoke a licence, **LHAs – as "judicial authorities" - could require evidence about spent convictions if the interests of justice required it**. [49-53]
- Similarly, the FTT could admit evidence about spent convictions, if the LHA could prove that justice could not otherwise be done.

Calculating financial penalties and RROs: guiding principles

Vadamalayan v Stewart & others [2020] UKUT 0183 (LC)

Deductions from Rent Repayment Order amount strictly limited

Essential facts

- V failed to license a flat in multiple occupation, contrary to s.72(1), HA 2004.
- S applied for a RRO for a 12-month period of the offence, under Part 2, Housing and Planning Act 2016.
- The rent paid in that period was £28,599.96.
- V submitted, relying on *Parker v Waller* [2012] UKUT 0301 (LC) that the FTT should deduct amounts he had spent on the flat in that period. The FTT did so, deducting £5,373.89.
- The FTT then considered what sum would be a reasonable sum for V to pay and deducted a further 25% because V had "*fixed a number of problems*" at the flat.
- V appealed against the RRO of £17,420, averring that the FTT should have deducted further expenses and the amount of a financial penalty he paid under s.249A, HA 2004

Held (here):

- Construing s.44, HPA 2016, the starting point for calculating the RRO amount was the amount of rent paid by the tenant in the relevant period [12]
- **Restriction of the RRO amount to landlord profit was impossible to justify**; and the approach previously affirmed in ***Parker v Waller* should no longer be applied** [14] [52]
- Where the landlord pays for utilities, it may be appropriate to deduct expenditure from the RRO amount [16] [53]
- "*But aside from that, the practice of deducting all the landlord's costs in calculating the amount of the rent repayment order should cease*" [16] [53]
- Nor should fines imposed by the Magistrates' Court nor penalties imposed by local authorities be deducted [18-19] [55]
- UT would not have deducted anything from the maximum, but in the absence of a cross-appeal, substituted a RRO in the amount of £17,420 [56-58]

Sutton v Norwich CC [2021] EWCA Civ 20

Avoiding the double punishment of company directors etc

Essential facts:

- N imposed financial penalties on S and the company of which he was a director, F, totalling c.£236k each.
- Penalties for (a) failing to comply with improvement notices (s.30(1) HA 2004), and (b) breaching the Licensing and Management of HMOs (Additional Provisions) (England) Regulations 2007 (s.234(3) HA 2004).
- S and F appealed on grounds including that: (a) they did not know the house was an HMO, (b) they had relied on reputable professionals to carry out works at the house, so had a reasonable excuse under ss.30(4) and 234(4), and (c) by penalising both the company *and* its directors, the directors had in effect been punished twice.

Held (here) on transfer to the UT:

- **s.234(3) creates a strict liability offence**, subject to a reasonable excuse defence. [219] Once the facts of the offence were proved, S and F had to prove, to the civil standard, that they had a reasonable excuse. [214-215]
- Whether an excuse is reasonable or not is an objective question for the tribunal. [216]
- Lack of knowledge of facts that caused a house to be an HMO (e.g. that it was occupied by more than one household) *might*, in principle, provide a reasonable excuse; lack of knowledge of the *consequences* of the facts will not. [221]
- The penalties imposed on the company and directors were excessive and should have been fixed having regard to not only the statutory maximum, but each with regard to the penalty imposed on the other. [251] …….

Sutton v Norwich CC [2021] EWCA Civ 20

Avoiding the double punishment of company directors etc

- Held (here), on the director's appeal against the amount of the penalties: appeal dismissed
  - There was no rule that, where both a company and a director were penalised, the right course would be to first ask what penalty the offence merited, and then to apportion that figure between company and the director.
  - There was similarly no rule as to how the penalty imposed on a company should relate to the penalty imposed on a director. That would depend on the facts.
  - **There was a need, nonetheless, to beware of double punishment**: an individual with an interest in a company (e.g. directors who are shareholders) could be worse off to the extent of some or all of a penalty imposed on a company; and that had to be borne in mind when deciding what penalty to impose on the individual. The Upper Tribunal had been aware of that need. [38-45]
  - While there was a £30,000 cap on the penalty that could be imposed on one person in respect of an offence, there was no bar on the aggregate of penalties imposed on two or more persons exceeding £30,000. In principle, penalties of £30,000 could be imposed on both company and director. [46]
  - The Upper Tribunal had not erred in its assessment of the individual penalties.

Waltham Forest LBC v Mohamed and Lahrie [2021] EWMC

A fine record for licensing offences

Essential facts

- M and L were directors of numerous property letting and management companies in WF and owned a portfolio of about 600 properties in London, including houses and 200+ flats in Waltham Forest.
- M and L let six of the houses to the directors of lettings agencies, knowing that they would be let and occupied as HMOs.
- M and L sought to license the houses under Part 3 HA 2004 rather than Part 2, asserting that they were each let to a single household, while charging a rent commensurate with their letting as HMOs.
- WF investigated and prosecuted M and L for offences under s.72(1) HA 2004. M and L pleaded not guilty, only admitting guilt after they were convicted.

Held:

- DJ found that M and L's offences were planned, sophisticated, and intended to benefit them financially, by enabling them to let houses at a high rent while avoiding licensing costs and obligations. They involved a high level of culpability.
- While M and L had lately accepted responsibility, they did not do so at the start, and put WF through 5 years' litigation.
- Further, while the houses were well-appointed, some were overcrowded; and the offences risked an erosion of public confidence in WF's licensing designation and the statutory licensing scheme. They involved a medium level of harm.
- Fines: £126,500 for M; £60,500 for L

Too superior for rent repayment, alas

Rakusen v Jepsen [2021] EWCA Civ 1150

Superiority a bar to a rent repayment order

Essential facts

- Jepsen, Murphy & McArthur were tenants of a flat in Finchley.
- Kensington Property Investment Group Ltd was their immediate landlord; Rakusen the superior landlord.
- The tenants applied for rent repayment order (RRO) against Rakusen, under Part 2, Housing and Planning Act 2016.
- Rakusen applied to strike out the application
- Rakusen's argument? The FTT only had jurisdiction under s.40 to make a rent repayment order against a "landlord" (LL), which meant the immediate landlord.
- The FTT dismissed the application, and the UT dismissed Rakusen's appeal.

Held (here)**: appeal allowed**

- The phrase "the landlord under a tenancy of housing" in s.40(2) only enabled a RRO to be made against an immediate landlord, not a superior landlord. Among other reasons:
  - The statutory language connoted a direct relationship of landlord and tenant.
  - Had Parliament intended to extend liability to superior landlords, it could have said so easily; mere use of the indefinite article "a tenant" in s.40(2) was not enough.
  - The word "repay" in s.40(2) referred more naturally to a landlord repaying rent paid to him or her by the tenant, rather than money paid by the immediate landlord to a superior landlord
  - While the offences in s.40(3) could be committed by a superior landlord, many could be committed by persons who were not landlords at all, but s.40(2) did not make RROs available against them.

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Housing Act 2004: Key developments in rogue landlord regulation

Dean Underwood, Barrister

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Repossessions, practice and procedure

Matthew Feldman

Repossessions, practice & procedure

- Court Procedure

- Practice Direction 55C – Coronavirus: Temporary Provision in relation to Possession Proceedings

- PD55C is made under rule 55A.1 and provides for temporary modification of Part 55 during the period from 20 September 2020 until 30 November 2021, referred to as “the interim period” during which Part 55 has effect subject to PD55C

Extension of minimum notice periods in England for assured, secure, flexible, introductory, demoted and protected tenants

- 26 March 2020 to 28 August 2020 – at least 3 months

- 29 August 2020 to 31 May 2021 – at least 6 months but with exceptions for anti-social behaviour, rioting and false statement which returned to pre-pandemic lengths, and where at least 6 months rent was unpaid, a minimum of 4-weeks' notice was required; where a tenant had passed away or was in breach of immigration rules and did not have a right to rent a property in the UK, then a minimum 3-month notice was usually required

- 1 June 2021 to 30 September 2021 – at least 4 months but with exceptions for anti-social behaviour, rioting and false statement which remained at pre-pandemic lengths; notices in relation to death of a tenant and no right to rent returned to pre-pandemic lengths; where 4 months or more rent was outstanding, the notice period was 4 weeks; a notice period of at least 4 months was required for all other grounds, including s21 Housing Act 1988 notices, rent …

… arrears of less than 4 months and termination of local authority flexible tenancies; where rent arrears did not meet the threshold for the ‘serious’ notice period (4 months’ arrears), the notice period was 4 months between 1 June 2021 and 31 July 2021 and 2 months between 1 August 2021 and 30 September 2021.

Notice periods for possession claims in England post 1 October 2021 – all notices have returned to their pre-pandemic lengths

- In Wales:
  - 26 March 2020 to 23 July 2020 – notice periods were 3 months in all cases.
  - On or after 24 July 2020 to 31 December 2021 – must be at least 6 months with the exception of anti-social behaviour grounds which remained at 3 months until 28 September 2020 but have returned to their pre-Coronavirus Act 2020 lengths of 1 month or less, depending on the type of tenancy and grounds relied upon.

Notice periods for s21 Housing Act 1988 Notices in England

- 26 March 2020 to 28 August 2020 – at least 3 months
- 29 August 2020 to 31 May 2021 – at least 6 months
- 1 June 2021 to 30 September 2021 – at least 4 months
- **1 October 2021 onwards – pre-pandemic lengths**

- In Wales:
  - 26 March 2020 to 23 July 2020 – at least 3 months
  - On or after 24 July 2020 until 31 December 2021 – at least 6 months

Is the possession claim already in the court system?

- If claim was issued before 3 August 2020 but you have not yet received a hearing date and did not file a Reactivation Notice before 4 pm on 30 April 2021, the claim will be automatically stayed by the court. What needs to be done to progress the claim in those circumstances?

- If claim was issued on or after 3 August 2020 and you have not yet received a court hearing date following the processing of the claim?

- Covid-19 Case Marking – the Claimant must provide information to the court about the impact of the pandemic on the tenant. The Claimant or the tenant can ask the Judge to consider whether the hearing should take place remotely by requesting this in writing and sending it to the court. Both parties would need to agree on a remote hearing but it is ultimately a decision for the court.

- The tenant can also mark the claim as a Covid-19 case when completing the defence form.

- Other requirements for the Claimant are set out under PD55C para 6.1.

- Delays in the court system as a result of Covid-19? See *Possession Proceedings Listing Priorities in the County Court* issued by The Master of the Rolls dated 17 September 2020.

Enforcement

- Restrictions on bailiff enforcement of evictions was in place in England from 17 November 2020 until 31 May 2021 and in Wales from 11 December 2020 until 30 June 2021.

- The restrictions are no longer in force in England and Wales, so that all orders can now be enforced where the landlord has a valid warrant of possession but bailiffs must provide 14 days' notice of an eviction and have been asked not to carry out an eviction if they are made aware that anyone living in the property has Covid-19 symptoms or is self-isolating.

- Has the warrant expired or is it about to expire due to restrictions introduced as a result of the pandemic? If so, what should you do?

Court Practice

- Current practice after issue
- Court will set a date for a Review when the Judge will review the file and set a date for the substantive hearing -
  - see *Overall Arrangements for Possession Proceedings in England and Wales "The Overall Arrangements"* published by The Master of the Rolls Working Group on Possession Proceedings dated 17 September 2020.

- Requirements in advance of a Review?
- If an agreement can be reached at the Review hearing, a possession hearing will be fixed at least 28 days after the Review date, when the Judge will decide whether to make a possession order or give directions.
- Mediation between Review and the substantive hearing?

The Future

- What does the future hold for possession Claims?
- Will the Review/Substantive hearing system endure?
- What are the alternatives?

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Homelessness

Tara O’Leary

Homelessness after the pandemic

Where are we now?

- From *Everyone In* to the *Next Steps Accommodation Programme:* as of January 2021 11k+ in emergency TA and 26k+ helped into ‘move on’ accommodation
- No legislative change to Parts VI or VII Housing Act 1996 in response to the pandemic
- But - Domestic Abuse Act 2021 amended Pt VII with effect from 5 July 2021:
  - Amended definition of homelessness: s.177(1)
  - New category of priority need: s.189(1)(e)
  - New Chapter 21 Homelessness Code of Guidance

Key decisions on homelessness during the pandemic

- All rough sleepers are **not** automatically in priority need merely because of the pandemic: *Bankole-Jones v Watford BC* [2020] EWHC 3100 (Admin)
- Interim relief – usual *De Falco* test still applies:
  - *R (Nnaji) v Spelthorne BC* [2020] EWHC 2610 (Admin)
  - *R (Ncube) v Brighton & Hove* [2020] EWHC 3646 (Admin)
- Challenges to any decision refusing to accommodate under powers other than Pt VII are for JR, **not** s.202/204 - see *e.g. R (AQS) v SoSHD* [2020] EWHC 843 (Admin)

The Big One - *Ncube*

R (Ncube) v Brighton & Hove CC [2021] EWHC 578 (Admin)

- LHAs **CAN** lawfully accommodate NPRF persons and others excluded from support under Pt VII
- The correct powers: s.138 Local Government Act 1972 and s.2B National Health Services Act 2006
- Helpful clarifications: Pt VII does **not** extend to the NRPF and ss.1-2 Localism Act 2012 general powers of competence do **not** fill a lacuna

The Big One - *Ncube*

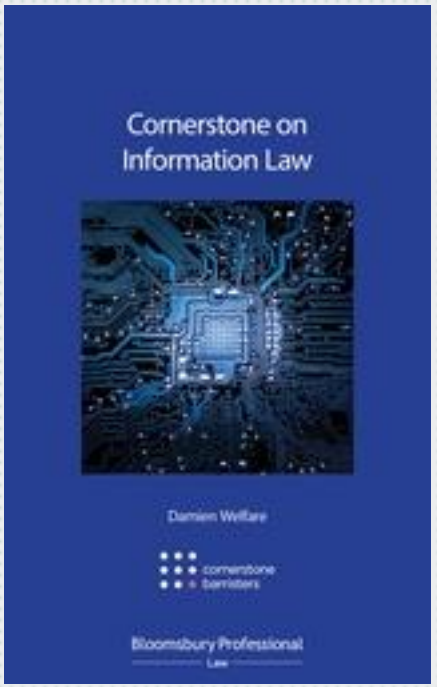
- Powers **not** duties: a fact specific exercise of discretion
- Unlikely if other avenues available, *e.g.* Home Office [64]
- Section 138 LHA 1972:
  - There has been or is an emergency or disaster;
  - The type of disaster is one involving danger to life or property;
  - LA is of the opinion that it is likely to affect its area or some of its inhabitants;
  - **If so, the local authority can incur such expenditure as it considers necessary to avert, alleviate or eradicate its effects or potential effects.**
  - ***Ncube:*** that power includes to provide temporary accommodation [64]
- Section 2B NHS Act 2006: local authority must take steps as appropriate to improve public health in its area – includes accommodation [74]

Practice and procedure

- Section 204 appeals: still often heard remotely
- *Please* arrange for video rather than telephone!
- Backlog and bundles
- Section 175(5): Threatened with homelessness if (i) valid s.21 notice served and (ii) will expire within 56 days
  - Section 21 notices are now back
  - Nothing requires court proceedings / defended
  - Remember s.195 prevention duty

Questions

Cornerstone Books



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Appendix (for delegate information)

Housing Act 2004: Key developments in rogue landlord regulation

Dean Underwood, Barrister

Luton BC v Altavon Luton Ltd [2019] EWHC 2415 (Admin)

Failure to license an HMO is a continuing offence

Essential facts

- L laid informations on 15.11.17, alleging offences by A, under ss.72(1) and 234(3) HA 2004, on 16.05.17
- A argued:
  - L had known of the offences since April 2017, or 12 May latest
  - informations were not laid within the time prescribed by s.127 MCA 1980, i.e. "within 6 months from time when offence was committed, or matter of complaint arose"
- DJ Dodd agreed: offences were "*continuing*", but time ran from when L "*became aware of*" them, i.e. April

On appeal (here): appeal allowed

- Parties agreed about "*continuing*" nature of offences, not when time would begin to run [21]
- As for the former, "*we do not understand how it could sensibly be argued otherwise*" [21]
- As for the latter "*As these were continuing offences … the offending continued until 16 May 2017 when* [L] *visited*." (Nicola Davies LJ at [23])
- Held:
  - the informations laid by L were not time-barred [26]
  - appeal allowed [27]

Taylor v Mina An Ltd [2019] UKUT 249 (LC); [2020] HLR 10

Licences are not transferable

Essential facts

- July 2016: T took a tenancy at a licensed HMO
- October 2016: M purchased the HMO
- May 2017: M applied for an HMO licence
- September 2018: licence granted
- T applied for a rent repayment order for the period from October 2016-September 2018
- FTT dismissed the application: HMO was licensed because the former owner's licence had not expired

On appeal (here): appeal allowed

- A licence is personal and cannot be transferred to another person: s.68(6)
- So, M could not rely on the former owner's licence and had to apply for its own
- Failure to do so = criminal offence
- cf the position when a licence holder dies: s.68(7-8)
- The fact that the former licence had not been revoked and continued in force was of no assistance
- Application remitted to FTT (but note: period of RRO will be less than claimed)

Waltham Forest LBC v Younis [2019] UKUT 0362 (LC)

Sufficiency of reasons in notices of intended financial penalties

Essential facts

- Notice of intent to impose a financial penalty ("NIP") must set out: the amount of the penalty; the reasons for imposing it; and info. about the right to make representations (Sched.13A, para.3, HA 2004)
- W served notice on Y for breaching a condition of his Part 3 licence, contrary to s.95(2) HA 2004
- W did not elucidate but exhibited statements detailing the offence, and referred Y to its online enforcement policy
- Y later appealed against W's final penalty notice, arguing that the NIP was insufficiently reasoned and invalid
- FFT found W's reasons insufficient, the notice invalid and allowed Y's appeal in full

Held: W's appeal allowed

- NIP must provide a sufficient account of a LHA's reasons to enable the recipient to understand what conduct or omission amounts to the offence [50]
- W had done so: there was no reason why a LHA's reasons could not be set out in more than one document [51-52]
- Still, a "*concise statement of the facts"* of the offence *"would be preferable*" [58]
- A mere link to an online policy would not be enough to explain the penalty amount [57], but W had provided enough info. with its NIP
- Insufficiency of reasons will not invariably invalidate a NIP [74]. Even if W's reasons had been defective, Y had not been prejudiced [76]

Berg v Burnley BC [2020] UKUT 91 (LC)

Training requirements a legitimate Part 3 licence condition

Essential facts:

- Like s.67 HA 2004, s.90(1) HA 2004 empowers LHAs to include such conditions in licences as they consider appropriate "*for regulating the management, use or occupation of the house concerned*"
- On appeal by B, FTT varied conditions included in his licence, including one requiring him to "*attend one Landlord Development Day covering how to manage tenancies*" and "*any additional Property Management training courses that the* [LHA] *from time to time requires to be undertaken*"
- B appealed, arguing e.g. that the condition was contrary to the decision in *Brown v Hyndburn BC* [2018] EWCA Civ 242 (here)

Held (here): appeal dismissed

- So long as a condition relates to the management, use or occupation of a Part 3 house, it is permissible [25]
- "*On that basis the training condition sought to be imposed here is perfectly in order*" [26]
- The fact that s.67(2)(f), under Part 2, expressly empowers LHAs to include conditions requiring a licence holder or manager to attend a training course, and that s.90 does not do so, does not mean that LHAs cannot impose training conditions under Part 3, "*because of the breadth of the permissive wording*" in s.90(1) [27]
- Further, the condition was not disproportionate [33-36]

Ficcara v James [2021] UKUT 38 (LC)

One RRO per tenant, no matter the number of offences in a period

Essential facts

- Landlord committed offences under s.72(1) HA 2004, s.1(2) and s.1(3) PEA 1977.
- Each of 3 tenants applied for a RRO against the landlord, under Part 2 HPA 2016.
- FTT granted the applications but refused to make a separate RRO for each offence.
- FTT held –
  - it could make only one RRO per tenant, whatever the number of offences,
  - an RRO was for repayment of rent and could not exceed the rent paid over 12 months,
  - the fact that several offences had been committed was relevant to the RRO amount, where the FTT had discretion

Held (here)**: Tenants' appeal dismissed**

- Under s.44(3), RRO amount was limited by reference to a period of time and the rent paid in that period, *not* by reference to the number of offences committed in that period [28]
- Amount recoverable for a single period could not therefore exceed the rent paid during that period, no matter the number of offences committed in the period. [28,34]
- The number of offences was however relevant to the amount of the RRO under s.44. [32-33]
- The RRO amount could not exceed 12 months' rent, however, even if the periods in which the offences committed were different and overlapped to span more than 12 months. [40]

Awad v Hooley [2021] UKUT 55 (LC)

Tenant's arrears clearly relevant to amount of RRO under section 44

Essential facts

- Tenant (T) had history of rent arrears and obstructing landlord inspections.
- The property let to her was not licensed under Part 3, HA 2004, and her landlord (LL) committed an offence under s.95(1).
- T applied for a RRO, seeking repayment of rent for a 7-month period in which she had made the most payments towards her rent.
- FTT granted her application but reduced the maximum available under s.44(3) HPA 2016 by 75% on account of T's conduct.
- FTT took account of arrears at the start of the 7-month period, rent due during the period, amount paid by T, amount paid by HB, and T's final arrears, among other facts.

Held (here)**: T's appeal dismissed**

- LL was not required to set off HB paid during the period against T's arrears at start of it: LHA could apply to recover that HB, and LL should not have to pay it back twice [21-22]
- FTT's exercise was an exercise in judicial discretion, and here it was unimpeachable.

"36. The circumstances of the present case are a good example of why conduct within the landlord and tenant relationship is relevant; it would offend any sense of justice for a tenant to be in persistent arrears of rent over an extended period and then to choose the one period where she did make some regular payments – albeit never actually clearing the arrears – and be awarded a repayment of all or most of what she paid in that period. That default, together with the respondent's kindness and the respondent's financial circumstances, led the FTT to make a 75% reduction in the maximum amount payable, and I see no reason to characterise any of those considerations as irrelevant or the decision as falling outside the range of reasonable orders [...]."

Kowalek v Hassanein Ltd [2021] UKUT 143 (LC)

Neither deposit nor rent paid after period of offence are recoverable

Essential facts:

- Landlord (LL) let property to tenants (T), who paid a deposit of £4920, but failed to apply for a licence under Part 3 HA 2004, and committed an offence under s.95(1).
- T stopped paying the rent, accrued arrears and later applied for a RRO for £24k.
- LL applied for a licence on 27 January 2020.
- The following day, T made a rent payment of £2k, but paid no further rent.
- T later sought to amend the RRO application to include the deposit and payment of £2k.
- FTT found that both the £2k payment and deposit were outside the scope of the RRO application, and reduced the maximum RRO amount of £24k by half because of arrears.

Held (here): Tenants' appeal dismissed

- s.44(2) HPA 2016 limited amount recoverable to rent paid *during* and *in respect of* the period when LL was committing the relevant offence.
- The £2k payment had been made after that period, which ended when LL applied for a licence; and the deposit had not been paid as rent, but as security for the performance of T's obligations. While they included paying rent, which T had not paid, LL did not have immediate access to the deposit, and it might never be used to off-set T's arrears. It was premature to consider it as rent. [27-34] [41-43]
- Under s.44(4) HPA 2016, no limit was imposed on the type of conduct that might be considered; and there was no reason why a tenant's conduct in relation to tenancy obligations should not be included. It was for FTT to decide what impact it should have, and the RRO reduction was justified. [35-40]

D'Costa v D'Andrea [2021] UKUT 144 (LC)

Council promise gives landlord a reasonable excuse for s.72 offence

Essential facts:

- s.43 HPA 2016 gives the FTT power to make a RRO if it is satisfied that a LL has committed an offence listed in s.40, e.g. s.72(1) HA 2004.
- By s.72(5) HA 2004, however, no offence is committed if a person has a reasonable excuse for managing or having control of an HMO without a licence.
- Here, the LHA informed LL that her HMO did *not* need a licence under Part 2 HA 2004, and that it would tell her if that position changed.
- In July 2019, it did so and she applied for a licence the next day. The HMO had needed a licence since October 2018 in fact.
- The tenants then applied for, and the FTT made, a RRO. It did not consider, or adequately address, whether the LL had a reasonable excuse for the s.72(1) offence.

Held (here): Landlord's appeal allowed

- "39. It is difficult to understand why a landlord would not have the defence of reasonable excuse to the offence created by section 72(1) of the 2004 Act where he or she has been told by a local authority employee that their property does not need an HMO licence and that they will be told if that situation changes, and I find that Ms D'Costa had that defence. She therefore did not commit the offence and no rent repayment order can be made against her."

Contact details:

Cornerstone Barristers
2-3 Grays Inn Square
London
WC1R 5JH

Tel: 020 7242 4986
Fax: 020 3292 1966

Email: kelvinr@cornerstonebarristers.com
mfeldman@cornerstonebarristers.com
tarao@cornerstonebarristers.com
deanu@cornerstonebarristers.com