

Recent developments in housing law



Nic Madge and Jan Luba QC continue their monthly series. They would like to hear of any cases in the higher or lower courts relevant to housing. In addition, comments from readers are warmly welcomed.

POLITICS AND LEGISLATION

Private rented sector

The worst housing in the private sector is concentrated in houses in multiple occupation (HMOs) and, in relation to separate dwellings, in small geographic areas of particularly poor housing. Housing Act (HA) 2004 Parts 2, 3 and 4 are respectively concerned with the licensing of HMOs; selective licensing of small areas of private rented housing; and management powers to take over the running of private lets. The functions are exercised by local housing authorities.

The government has launched a consultation exercise on new draft guidance on the operation of those parts of the HA 2004: *A guide to the licensing and management provisions in Parts 2, 3 and 4 of the Housing Act 2004*. DRAFT (Communities and Local Government (CLG), January 2010).¹ The consultation closes on 12 March 2010.

The implementation in England of the statutory provisions in Parts 2, 3 and 4 is described in *Evaluation of the impact of HMO licensing and selective licensing* (CLG, January 2010).² By June 2008, over 22,600 applications for HMO licences had been made.

Local authorities wishing to adopt either extended HMO licensing or selective licensing schemes locally for privately rented properties under HA 2004 currently require the approval of the secretary of state. A new consultation paper seeks views on the introduction of a general consent to enable authorities to adopt such schemes without seeking individual approval: *General consents for licensing schemes under Parts 2 and 3 of the Housing Act 2004*. Consultation (CLG, January 2010).³ This consultation also closes on 12 March 2010.

The government has published a summary of responses to its recent consultation on the use of planning controls relating to HMOs. The large majority of those who responded supported a change to the Town and Country Planning (Use Classes) Order 1987 SI No 764 (which defines how a property can be

lawfully used) and the introduction of a definition of what constitutes a HMO: *Houses in multiple occupation and possible planning responses – consultation*. Summary of responses (CLG, January 2010).⁴

Costs in housing cases

Lord Justice Jackson's *Review of civil litigation costs: final report* was published in January 2010.⁵ Chapter 26 is dedicated to a review of costs issues and costs regimes for housing cases and disputes.

PUBLIC SECTOR

Mutual exchange

■ **R (McIntyre) v Gentoo Group Limited** [2010] EWHC 5 (Admin), 4 January 2010

In 1984, Sunderland City Council granted Mr and Mrs McIntyre a secure tenancy. In 1996, Mr McIntyre left Mrs McIntyre and was granted a tenancy of another property owned by Sunderland. There, he fell into rent arrears and Sunderland obtained a money judgment for £597 plus costs of £133. Despite steps to enforce, Mr McIntyre did not pay anything towards the judgment. Later, Mr McIntyre became reconciled with his wife and returned to the original property. In 2001, all Sunderland's housing accommodation was sold to Sunderland Housing Company Limited, the parent company of Gentoo Sunderland Limited. Gentoo was a not for profit company limited by guarantee and a registered social landlord (RSL). Mr and Mrs McIntyre became assured tenants. That tenancy agreement included a specific provision for mutual exchange, stating: 'You have the right to exchange your home with another tenant, providing you meet certain conditions.' Those conditions included compliance 'with any reasonable condition attached to your local Housing Company consent relating to the payment of outstanding rent' (sic). In 2007, Mr and Mrs McIntyre applied for consent to enable them to exchange tenancies with

another tenant. Consent was refused on the ground of Mr McIntyre's outstanding rent arrears and court costs. Later, permission was granted, but subject to payment of the rent arrears and costs. Mr and Mrs McIntyre sought judicial review.

John Howell QC, sitting as a deputy High Court judge, after considering *R (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587, stated that whether to permit an exchange of social housing involved a decision to be taken in the discharge of the public function of managing and allocating social housing. It might result in a property becoming overcrowded or underoccupied and involve questions about how best to meet not only the need for social housing of those tenants wishing to exchange and their families, but also the need of others for it. The decision in *Weaver* was directly applicable. It applied not merely to decisions concerning the termination of a tenancy of social housing but also to those concerned with the mutual exchange of such tenancies. Even if the exercise of a contractual right may be unfettered as a matter of private law, that does not mean that the decision to exercise it may not be impugned in public law, for example, on *Wednesbury* grounds.

However, in addition, the right to exchange conferred by the tenancy agreement was one to be exercised by the assignment of the tenancy. The judge found that Landlord and Tenant Act (LTA) 1988 s1 applied. Accordingly, the landlord owed a duty to give consent, except in a case where it was reasonable not to give it, and that duty was not satisfied if consent was granted subject to any condition that was not a reasonable condition. The condition imposed by the company had nothing whatever to do with the personality of the proposed assignee of the tenancy. Furthermore, it was not the purpose of a qualified covenant against assignment to provide the landlord with a lever enabling it to recover debts which did not arise under the tenancy to be assigned. The condition was not one that could lawfully be imposed on any consent to assignment. Accordingly, the landlord erred in law and took into account something, namely the rent outstanding in respect of the other property, which was irrelevant to its decision. It thereby erred as a matter of public law.

However, an ordinary county court claim which only involved matters arising under LTA s1 was a suitable alternative remedy for a tenant who was refused permission for an assignment or only granted permission for it subject to a condition. There was no good reason why a tenant who had been refused permission to assign, or who had been given it subject to conditions, might not impugn the

legality in public law of the decision to do so in an ordinary claim which might also deal with the legality of the decision in private law. It was a well-established rule in respect of claims for judicial review that 'save in the most exceptional cases, the jurisdiction will not be exercised where other remedies were available and have not been used'. Judicial review was 'a remedy of last resort'. 'There [was] nothing exceptional in this case which would have made proceeding by means of an ordinary claim inadequate or inappropriate' (para 108). Having regard to the fact that an alternative remedy was available by way of an ordinary county court claim, the claim for judicial review was dismissed.

Resident wardens

Disability Discrimination Act 1995

■ **R (Boyejo) v Barnet LBC; R (Smith) v Portsmouth City Council**

[2009] EWHC 3261 (Admin),
15 December 2009,
(2010) Times 22 January

The claimants were disabled occupiers of sheltered housing schemes. In both cases, the councils decided to replace a residential warden service at such schemes with a visiting warden service. There was no express consultation with the occupiers about the impact of the proposed changes on them as disabled people. However, Barnet carried out two surveys of all its sheltered housing tenants and commissioned independent research on options for reform. Portsmouth surveyed a randomly selected cross-section of its sheltered housing residents to evaluate what aspects of sheltered housing were most important to them before informing all its sheltered housing residents that it would cease to provide a resident warden scheme. The claimants sought judicial review, claiming that there had been a failure to comply with Disability Discrimination Act 1995 s49A in that the councils had failed to have due regard to their disabilities or to encourage their participation in public life, and that the consultation process had been flawed. They argued that neither authority had made any express reference to the duty imposed by s49A.

HHJ Milwyn Jarman QC, sitting as a deputy High Court judge, following *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin); [2009] PTSR 1506, noted that failure to refer to s49A was not determinative. However, in these cases, there had been a failure to bring the duties adequately to the attention of the decision-makers. It was not possible to discern from the reports, documentation or decisions themselves that due regard had been had to

the need to take account of disabled persons' disabilities. Where a public body engages in a consultation process, it must be undertaken at a time when the proposals are still at a formative stage; sufficient reasons must be given to allow those consulted to give intelligent consideration and an intelligent response, and there must be adequate time for such a response – *R v North and East Devon Health Authority ex p Coughlan* [1999] EWCA Civ 1871; [2001] QB 213. Furthermore, Portsmouth had failed to consult adequately. The process adopted by the authority assumed that the abolition of the resident warden scheme was a foregone conclusion and merely sought to explain how the new regime would operate. The judge quashed the decisions.

Contractual terms

■ **R (Garbet) v Circle 33 Housing Trust**

[2009] EWHC 3153 (Admin),
7 December 2009

From July 2001, Ms Garbet was an assured tenant of sheltered accommodation provided initially by the United Women's Homes Association Limited ('UWHA'), and later by Circle 33, a RSL. When she first moved in, there was a resident warden, whose 'prime responsibility' was the well-being of the tenants and the maintenance of harmony between them. The tenancy agreement included a right to 'be consulted by UWHA before UWHA makes changes in matters of housing management or maintenance which are likely to have a substantial effect on the tenant'. The managers of the accommodation decided that the resident warden would be retired on her 65th birthday in January 2009. Residents wrote complaining about a lack of consultation. Munby LJ described 'a disturbing lack of frankness and openness on the part of both the defendant and [their managers] in their dealings with [Ms Garbet] and the other tenants' (para 28).

Ms Garbet sought judicial review of the decision 'to retire the current resident warden ... on her 65th birthday on January 31st 2009, with the view to not providing the residents with a new resident warden, and against the will of the current resident warden' (para 29). It was argued that she had a legitimate expectation that the arrangements for oversight and supervision by a resident warden would remain. In February 2009, Pitchford J directed that a 'rolled up' hearing be listed urgently, observing that there was a live issue about whether the defendant was a public body and/or performing a public function. The hearing began on 2 April 2009 and lasted two days before Munby J (as he then was). He adjourned the hearing pending

the outcome of the Court of Appeal decision in *R (Weaver)* (see above).

After considering further written submissions, Munby LJ concluded that the 'only' decision with which he was concerned was the decision not to continue to provide a resident warden following the existing warden's retirement. He found that the defendant's obligation under the tenancy agreement was to provide the service of a resident warden and that that obligation had been breached. Accordingly, Ms Garbet had established the 'core of her case', namely, that the defendant had acted in breach of its obligations and thus unlawfully. Munby LJ granted a declaration that the defendant had acted unlawfully in withdrawing the resident warden service.

Assured tenancies

Rents

■ **Earl of Cadogan v Chehab**

[2009] EWHC 3297 (Admin),
26 November 2009

A lease of a flat expired in 1993 and a periodic assured tenancy arose. That tenancy was assigned to Mr Chehab. It was agreed that the rent should be £17,000 a year. Cadogan served a HA 1988 s13(2) notice seeking to increase the rent to £29,120 a year. In accordance with s13(4), Mr Chehab referred the notice to the Rent Assessment Committee (RAC). Both parties put in evidence from surveyors who also acted as the parties' representatives at the hearing. Afterwards, they both sent in further representations which were copied by the RAC to the other party. However, at a later stage, Mr Chehab's surveyor submitted a second supplemental report to the RAC. It was not sent to Cadogan, which was not aware of it until receipt of the RAC's decision. It was common ground that Cadogan had no opportunity to read it or comment on it and that the RAC relied on it. Cadogan appealed.

Irwin J allowed the appeal. He said: 'It should never be the case that evidence which is germane to the decision and, indeed, which was relied on by the [RAC], should be submitted after the event without going to all parties who may have an interest in the outcome of the proceedings ... [I]t seems to me very highly desirable that if further material is to be submitted to a Committee after the conclusion of the oral proceedings, then the lawyers, or surveyors or other agents engaged in the particular hearing must ensure that the material goes directly to the other side ...' (paras 17 and 18).

Second, it was 'a fair implication' from the way the RAC expressed its decision that it had made no adjustment for security of tenure. Security of tenure was an advantage for the tenant. To proceed on the basis that

security of tenure was of no value to a tenant was not appropriate or rational. Irwin J declined to rule on the possible effect of the value of security of tenure taking the rent over £25,000 which would abrogate security of tenure (HA 1988 Sch 1 para 2). He quashed the RAC decision and remitted the matter for rehearing before a different RAC.

■ **Hughes v Borodex Ltd**

[2009] EWCA Civ 1356,
16 October 2009

Rimer LJ has given permission to pursue a second appeal against Collins J's decision that a tenant could not rely on HA 1988 s14 (which provides that the RAC should disregard any improvements carried out by a tenant) because she was not an assured tenant when the improvements were carried out (see [2009] EWHC 565 (Admin); May 2009 *Legal Action* 24).

PRIVATE SECTOR

Assured shorthold tenancies Tenants' deposits

■ **O'Brien v Hill**

Edmonton County Court,
9 September 2009

It has been pointed out that there were errors in the note of this case which appeared in 'Recent developments in housing law', January 2010 Legal Action 33. This is a corrected summary.

Mr O'Brien granted Mr Hill an assured shorthold tenancy for a fixed term of 12 months starting on 9 June 2008. The agreement recorded: 'Deposit is £700' against which was a note: 'Paid by and repayable to Barnet Council.' On 12 June 2008, the landlord served a notice under HA 1988 s21. On 2 July 2008, the landlord received the payment of the deposit from a third party, Barnet, which had previously agreed to pay the tenant's deposit. The landlord registered the deposit with the Deposit Protection Service (DPS) on 7 July 2008. In June 2009, he issued a possession claim under the accelerated procedure relying on the s21 notice served on 12 June 2008. The DPS deposit summary attached to the claim form stated 'Deposit paid 7/7/08'; this being the date it was paid to DPS. On that basis, it appeared that the deposit was paid to the landlord at the same time that the agreement was signed, but not paid into the DPS until after service of the s21 notice. Accordingly, District Judge Silverman, on that evidence, struck out the claim but gave the claimant permission to restore the claim if he thought that the order should not have been made. The claimant's solicitors wrote in response with evidence from Barnet that it

paid the deposit on 2 July 2008. They argued that HA 2004 s213 did not apply because, at the time that the s21 notice was served (ie, 12 June 2008), the landlord had not yet received the deposit from Barnet and therefore he was unable to protect the deposit with an authorised scheme. The landlord argued that the s21 notice must therefore be valid and requested that a possession order be made.

On the basis of the evidence provided by the claimant's solicitors, District Judge Silverman made a possession order without a hearing since it was clear that the deposit was paid to DPS within 14 days of receipt and was not paid when the agreement was made or the s21 notice was served.

Comment: If the landlord's solicitors had in the first place provided the evidence regarding receipt of the deposit monies after service of the s21 notice and clarified that 'paid by ... Barnet Council' did not mean the deposit had been paid at that date, there would not have been any problem in making a possession order when District Judge Silverman initially considered the papers.

HOUSING ALLOCATION

■ **Birmingham City Council v Qasim**

Supreme Court,
4 February 2010

An appeal panel of the UK Supreme Court (Lord Hope, Lady Hale and Lord Brown) has refused the council's application for permission to appeal from the Court of Appeal's decision ([2009] EWCA Civ 1080; December 2009 *Legal Action* 16) upholding the dismissal of the council's claims for possession against seven tenants. The council had contended that the tenancies were granted ultra vires its housing allocation scheme. The appeal panel's reasons stated that the Court of Appeal decision had been 'plainly right'.

■ **R (Osei) v Newham LBC**

CO/12287/2008,
27 January 2010

The claimant was a secure tenant in fear of domestic violence. She applied under the council's allocation scheme (HA 1996 s167(1)) for an out-of-borough transfer. The council indicated that her application would be accorded higher priority (in accordance with the scheme) if she cleared former tenant rent arrears that she owed. That reflected provisions in its scheme designed to give effect to HA 1996 s167(2A)(b) which itself permits priorities between applicants in housing need to take account of behaviour affecting suitability to be a tenant.

Lord Carlisle QC, sitting as a deputy High Court judge, dismissed a claim for judicial

review of that decision. Although some of the council's documents had suggested that a 'no debts' policy was being rigidly applied, the application had in fact been carefully considered under the provisions of the scheme and the decision was adequately reasoned.

■ **R (Bauer-Czarnomski) v Ealing LBC**

[2010] EWHC 130 (Admin),
18 January 2010

The council operated a choice-based lettings scheme with bands, adopted for the purposes of HA 1996 s167(1). The claimant applied for an allocation but was only placed in Band D (the lowest band). Band C would apply if 'the household's current housing conditions are having an adverse effect on their medical condition which creates a particular need for them to move' (para 3). The claimant considered that, for medical reasons, he should be placed in a higher band and submitted a report from his doctor.

The council commissioned medical advice that confirmed the GP's view that an adverse health effect arose in the current accommodation. However, the medical adviser (Dr Keen) went on to advise adversely about what priority should be afforded and about the necessity to move. The council obtained a further opinion from a psychiatric adviser who expressed the view that other housing applicants were in more unpleasant situations. The council relied on those reports and confirmed Band D status.

In proceedings for judicial review, Collins J quashed that decision. The council had relied on the advisers' expressions of opinion in respects which went well beyond a true medical advice remit. The judge held that the claimant should have been in at least Band C, if not Band B, and said at paragraph 12:

The problem here is that the doctors went beyond their medical remit. They agreed with the effect that the situation was having on Mr Bauer-Czarnomski. They then went on to give opinions as to whether he should be put on whatever band was considered appropriate, which was not, as I repeat, a matter for them and was an opinion which the council should not have relied on because it was an immaterial consideration and it rendered their decision irrational in the Wednesbury sense. I say 'in the Wednesbury sense', in fact in the sense that is indicated by Lord Diplock in the CCSU case: not perverse, but having regard to an immaterial consideration. But, in fact, having regard to the medical evidence, it would also, and indeed was, in my judgment, a perverse decision to keep him in Band D.

HOMELESSNESS

Applications

Local Government Ombudsman

Complaint

■ Hammersmith and Fulham LBC

09 001 262,

21 January 2010

The complainant left her private rented accommodation following an incident of domestic violence. She was eight months' pregnant. On making her application for assistance with accommodation, council officers encouraged her to find private rented accommodation. They did not explain that she could make a homelessness application under HA 1996 Part 7. She was not provided with interim accommodation when she became homeless: HA 1996 s188.

The Ombudsman found maladministration causing injustice. The standard of record-keeping by the housing officers was so poor and fell so far below acceptable standards that in itself it amounted to maladministration.

The council had also applied too strict a test when deciding whether it should provide temporary accommodation by insisting that the complainant provide proof of homelessness first. The Ombudsman said: 'The code [of guidance] makes it clear to authorities that "having reason to believe" a person may be homeless is a much lower test than "being satisfied" and so there is no need for an applicant to first produce "proof" of homelessness for the section 188 accommodation duty to be triggered' (para 64).

The council also failed to follow its own procedures for referring victims of domestic violence to a specialist advocate for support and advice. The liaison and exchange of information between officers was also ineffective. The Ombudsman recommended compensation of £750 and a review of systems, procedures and forms.

Intentional homelessness

■ Yemshaw v Hounslow LBC

B5/09/0910,

15 December 2009

The claimant fled her matrimonial home and applied for homelessness assistance. HA 1996 s177(1) provides that: 'It is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to domestic violence [or other violence] against him.' Hounslow decided that it would have been reasonable for the claimant to have continued to occupy her home and that she had become homeless intentionally by leaving it: HA 1996 s191(1). The council found on review that she had been subject to no actual or threatened violence even if there had been emotional, psychological and other 'abuse'.

A county court judge dismissed an appeal against that decision and the claimant, supported by the secretary of state, appealed to the Court of Appeal seeking a broad interpretation of 'violence' for the purposes of HA 1996 s177 in line with the *Homelessness code of guidance 2006*, para 8.21.

The Court of Appeal dismissed the appeal holding itself bound by the earlier decision of *Danesh v Kensington and Chelsea RLBC* [2006] EWCA Civ 1404; [2007] 1 WLR 69, that violence was limited to actual or threatened physical abuse. The statutory guidance could not operate to change the meaning of a word used in the statute.

■ R (Savage) v Hillingdon LBC

[2010] EWHC Admin 88,

28 January 2010

The claimant applied to the council for homelessness assistance: HA 1996 Part 7. It decided that she had become homeless intentionally: s191(1). It provided her with temporary accommodation but declined to help her with a deposit for private sector accommodation or with assistance under its Finder's Fee (FF) scheme (by which private landlords receive a flat rate fee for taking a homeless household). The claimant complained that in those circumstances the council had not lawfully performed the duties owed to her under HA 1996 s190 to provide her with advice and appropriate assistance.

Timothy Corner QC, sitting as a deputy High Court judge, found that the council had included a flexible provision in the FF scheme to enable it to help in cases of intentional homelessness where the particular facts justified such help. The council had wrongly failed to consider whether the circumstances of the claimant should, exceptionally, justify her being helped under that scheme and had accordingly failed lawfully to perform its duty to provide her with advice and assistance.

HOUSING AND CHILDREN

■ R (S) v Plymouth City Council

[2009] EWCA Civ 1490,

27 November 2009

On a renewed application by the council, the Court of Appeal refused permission to appeal against a decision of Holman J ([2009] EWHC 1499 (Admin); October 2009 *Legal Action 26*) that it had unlawfully failed to address the accommodation needs of the family of a disabled child. The family's housing needs had later been reassessed and they had been rehoused, but the council sought leave to appeal in order to overturn the adverse costs order and the finding that it had acted unlawfully. Wall LJ held that the judge's order had been based on a finely balanced exercise in granting

discretionary relief. On that basis, and as the matter had become academic, it would not be appropriate to grant permission to appeal.

■ R (F) v Lewisham LBC

[2009] EWHC 3542 (Admin),

17 December 2009

The Administrative Court listed for consideration and directions five claims for judicial review which challenged age assessments of young people made by housing and immigration authorities and said to be representative of a number of other such claims awaiting hearing. Holman J considered the implications for the litigation of the guidance given by the Supreme Court in *R (A) v Croydon LBC* [2009] UKSC 8. The secretary of state suggested that in the light of the Supreme Court's guidance the Administrative Court should adopt a 'truncated procedure in age dispute cases'. The judge said that he was 'sympathetic' to that approach but that the devising and adoption of that procedure would be a matter for a Practice Direction or a procedural direction from the President of the Queen's Bench Division.

■ R (FL) v Lambeth LBC

[2010] EWHC 49 (Admin),

19 January 2010

The claimant was a girl aged 17. She sought accommodation from the council claiming that she was owed a duty under Children Act (CA) 1989 s20(1)(c). That duty arises where a person who has been caring for a child is 'prevented' from providing him/her with suitable accommodation. The claimant said that, against the background of a number of extremely traumatic incidents she had experienced or witnessed, relations with her mother had become strained and she could no longer live in her mother's home. The council accepted that she was a 'child in need' for the purposes of CA s17. However, it decided that because the claimant's mother was ready and willing to accommodate her, and there was no evidence that she would be unsafe in remaining at home, no duty was owed under s20(1)(c).

Christopher Symons QC, sitting as a deputy High Court judge, dismissed a claim for judicial review of that decision. He held that whether a child requires accommodation under s20 is a matter for a fact-sensitive value judgment by a local authority. The council had been entitled to reach its decision.

- 1 Available at: www.communities.gov.uk.
- 2 Available at: www.communities.gov.uk.
- 3 Available at: www.communities.gov.uk.
- 4 Available at: www.communities.gov.uk.
- 5 Available at: www.judiciary.gov.uk.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder.