THE BRYAN McGUIRE MEMORIAL LECTURE

5 April 2017

Known Unknowns: Dispute Resolution in Homelessness

His Honour Judge Luba QC

Bryan McGuire

1. I am truly humbled to have been invited to give this first lecture, in a series of lectures on Homelessness and other legal topics, established to honour the memory of the late and sorely-missed Bryan McGuire QC.
2. It was my privilege to have known Bryan through most of his professional career at the Bar. He was called just three years after me in 1983. By the time that I returned from the voluntary sector to private practice in 1992, he was well established as a formidable and talented advocate at the junior Bar. His intellect and eloquence left a marked impression on the judiciary and on his opponents alike. Bryan was a forceful but kind, charming and fair-minded advocate. He was an obvious candidate to take silk. It was <u>always</u> a pleasure for me to find myself in a case with Bryan.
3. As Housing law's leading blogger Giles Peaker recently put it *"Bryan McGuire QC was one of the giants of housing law and a warm and generous man"*. That he certainly was.
4. It is therefore right that we should be gathered here this evening to mark once again the contribution Bryan made to housing law, to local government law and to public law. He touched many lives.
5. Whether you knew him as a family member, a friend, a professional colleague or simply as the man whose legacy has caused you to be here this evening, can I ask that you help mark our collective memory of the life and work of late and much-missed Bryan McGuire by standing to join me in a round of applause to the great man.

6. As you settle down again to take your seats, I imagine Bryan doing likewise. Seating himself, with his usual broad smile, at the centre of the heavenly sofa reserved for housing lawyers. Flanked by the others of the Housing Bar with whom he is now in company - Linda Pearce, William Geldart, Joanne Harris and the rest. I imagine them shortly to be joined by two other cheeky chappies of the Housing world, now among the heavenly throng – the surveyor Pat Reddin and the formidable homelessness expert Bob Lawrence. Cue the consumption of an awful lot of heavenly spirit over the next hour or so – before, knowing Bryan, they switch channels to the football!!
7. For those in the audience tonight who were less familiar with Bryan, and his many talents as a barrister, may I commend to you the opportunity, if you can obtain it, to see the recording of him in action in the *Hotak*[1] case in the Supreme Court. I hope the footage is captured somewhere, perhaps on the Cornerstone Chambers website. Bryan there makes a 30 minute intervention on behalf of the charities Shelter and Crisis. In its power, succinctness and vitality his submission put all the many other advocates in the case (including me) to shame. It should be compulsory viewing for all who are in training for a career at the Bar.
8. As those who were fortunate enough to attend his funeral and memorial service will have discovered, Bryan was passionate about many things above and beyond his professional life as a barrister. His enthusiasm for his family, for sports, for music and for the interests of his local communities was insatiable.
9. But he also had another passion - addressing the social evil of homelessness.
10. It is therefore fitting that the focus of this first lecture in the series established in his memory should be on the topic of Homelessness.

Bryan and me

11. But why me as the first contributor?
12. That may be because I probably did my first really important homelessness case as an advocate alongside Bryan in 1998. It was a case called *Surdonja*[2]. The judgment established that even the interim accommodation that local housing authorities(LHAs) provide to the homeless, pending decisions on their applications, had to be 'suitable'

[1] *Hotak v London Borough of Southwark* [2015] UKSC 30 (13 May 2015) [2016] AC 811 [2015] 2 WLR 1341, [2015] 3 All ER 1053, [2015] BLGR 530, [2015] HLR 23, [2015] PTSR 1189.
[2] *Surdonja, R (on the application of) v London Borough of Ealing* [1998] EWHC Admin 988 (20 October 1998) ((1999) 31 HLR 686, [1999] 1 ALL ER 566, [1999] 1 FLR 650, [1999] Fam Law 85

for them to occupy. We were in many other housing cases together, both before and after that. In one housing case, called *Hickin*[3], we famously managed to divide the Supreme Court between our arguments in a narrow majority 3:2 split. In others, we grappled with a piece of singular housing law nonsense – the concept of the 'tolerated trespasser'. Ultimately, Bryan and I were involved together in 2015 in the last big case in his career, which was again a case about homelessness. That was *Hotak*.

13. Our own contribution to addressing the issue of 'homelessness' was probably most commonly channelled through our work as lawyers, rather than as campaigners or charitable donors.
14. It is therefore through the prism of the law, and of legal practice, that this lecture offers a contribution on the issue of homelessness in England.

Four topics in Homelessness

15. I should first set out the limits of what I can cover this evening by identifying four key areas into which I shall not trespass.
16. First, the *international dimension* of homelessness. Others, perhaps later in this series of memorial lectures, can review the different ways in which homelessness is now addressed in each of the four home nations and in yet other countries. They will be helped to do so by the excellent comparative work on homelessness in the four UK jurisdictions done by Wendy Wilson and her colleagues at the House of Commons Library and set out in their fine briefing paper on the topic.[4]
17. I digress slightly to mention that the Commons Library's output of research papers for MPs on homelessness issues is absolutely first class and is accessible free to members of the public on the UK parliament website. In recent years, I have been pleased to promote access to this excellent source of informative and well-presented material on homelessness and I commend these regularly updated briefings to any not already familiar with them.
18. For tonight, however, my own focus will be exclusively on homelessness in England.

[3] *Solihull Metropolitan Borough Council v Hickin* [2012] UKSC 39 (25 July 2012) [2012] 1 WLR 2295, [2012] 2 P&CR 16, [2012] 31 EG 46, [2012] 4 All ER 867, [2012] HLR 40, [2012] PTSR 1272, [2013] 1 FCR 279, [2013] BLGR 1

[4] *Comparison of homelessness duties in England, Wales, Scotland and Northern Ireland*, December 14, 2016 Commons Briefing papers CBP-7201

19. Second, I shall not be discussing the *social and/or political dimensions* of homelessness or the continuing scandal of rough sleeping on our streets. No doubt later in this lecture series other contributors will be recounting the vital contributions that Shelter, Crisis, St Mungo's and others have made to addressing the practical realities of homelessness in England and they will draw attention to the hardship it causes. Those interested in exploring the issues can find the latest material gathered in the excellent annual *Homelessness Monitor*, the 2017 edition of which was published last month by CRISIS and the Joseph Rowntree Foundation.[5]
20. But, for my own part, I cannot cover that territory tonight.
21. Third, I shall not be considering the new *Homelessness Reduction Act 2017*, which is shortly to receive royal assent. Perhaps next year's lecture will focus on this new development and its impact, if any, on the way in which homelessness is to be addressed by LHAs in England in the future.
22. Fourth, and perhaps most obviously given my current judicial office, I shall not be reviewing or exploring any of the *current raging controversies* in the development of the law relating to homelessness. Many of you will have thought that the recent burst of Supreme Court cases on homelessness would have resolved all the live issues. But, perhaps typically - and very fortunately for lawyers - they have simply stimulated yet more litigation as the parameters of those judgments fall to be tested.

Dispute resolution and the homeless

23. Having deflated you all by disposing of the many interesting topics that I might have covered but will <u>not</u> cover, let me identify that what I shall seek to consider this evening, from a purely personal standpoint.
24. It is but a single aspect of this huge homelessness landscape. It is the topic of the **resolution of disputes** between those who access statutory homelessness services and the local housing authorities from whom they seek assistance. It is to that subject I now turn.
25. Happily, it is no longer necessary in a lecture like this to set out the statutory framework of homelessness in England or the considerable body of court cases its

[5] *The homelessness monitor: England 2017* Suzanne Fitzpatrick, Hal Pawson, Glen Bramley, Steve Wilcox and Beth Watts Institute for Social Policy, Environment and Real Estate (I-SPHERE), Heriot-Watt University; City Futures Research Centre, University of New South Wales, March 2017

interpretation has thrown up. The need for that material has already been met by two textbooks. The longest standing is that originally authored by Andrew Arden QC, now written with the assistance of specialist co-contributors at Arden Chambers.[6] Its current edition is the 9th, published by Legal Action Group in December 2012. It remains as valuable a work as ever. With Liz Davies and Connor Johnson of Garden Court Chambers I have co-authored the other text.[7] Now in its 4th edition and most recently published by Jordans in May 2016. I hope those of you with any interest in the topic find either or both those two works helpful.

26. As those texts explain, statutory services for the homeless in England are primarily the responsibility of several hundred LHAs, primarily district and borough councils. They receive and process applications from the homeless in significant volumes each year. They make hundreds of thousands of decisions on those applications.

The big numbers

27. Since the modern form of statistical recording began in 1998, the peak year for applications for statutory homelessness assistance under the provisions of Part 7 of the Housing Act 1996 was 2003. In that year, LHAs in England determined 296,000 homelessness applications.
28. Thereafter, the number of recorded applications fell to a low point in 2009 with 93,000 decisions on applications made that year.
29. Last year, 2016, LHAs in England decided 116,000 applications.[8] That is about 450 decisions being made every working day.
30. Of those applications made, about half result in what the statisticians call "acceptances". They are the applicants notified that the LHA accepts that they are owed the highest duty, the main homelessness duty, i.e. the duty to provide them with temporary accommodation until an alternative home can be found.[9]
31. The other half, about 55,000 applicants annually, are refused the benefit of that duty. That may be because they are not considered to be homeless. Or they are found to be

[6] *Homelessness and Allocations* Andrew Arden QC, Emily Orme and Toby Vanhegan
[7] *Housing Allocation and Homelessness Law and Practice,* Jordan Publishing
[8] *Statutory homelessness and homelessness prevention and relief, England: October to December 2016,* National Statistics, March 2017
[9] Housing Act 1996 section 193

ineligible. Many will have been told that they do not to have a priority need. Others, that they have become homeless intentionally.

32. Those tens of thousands of applicants disappointed annually represent the bulk of the pool from which disputes might be expected to be generated that require resolution. But they are not alone. Many of those in the half of the intake actually *accepted* by LHAs later fall into the dispute category because they are dissatisfied about the way in which the LHA performs or ends the duty it owes.
33. It will be obvious from these figures that the number of potential disputes requiring resolution in the homelessness field is huge.

Into the unknown

34. Beyond that bare outline, our understanding of the number of disputes pursued - and of the ways in which they are resolved - totally breaks down.
35. As we shall see, there is only very limited data about how many disputes are pursued and how they are resolved.
36. What we do know, as I shall seek to show, is that the number pursued through official dispute resolution procedures is tiny.
37. First, however, a diversion into a little history.
38. When the modern statutory scheme of homelessness was first enacted in the Housing (Homeless Persons) Act 1977 it contained no discreet dispute resolution mechanisms.
39. Those who applied to LHAs, but were rejected, sought recourse, if properly advised, in the ordinary courts. Initially, lawyers thought that cases could be pursued in the county courts and the high court as actions for breach of statutory duty.
40. But by the early 1980s the judges had made it clear that cases could only be brought by invoking the supervisory jurisdiction of the courts through the process now known as judicial review.

Judicial review and homelessness

41. So that is how lawyers and legal advisers took up the early homelessness cases. We appeared in the Crown Office list, usually on a Friday morning, to make oral applications for leave to move for judicial review.

42. It was not long, however, before the senior judiciary thought there were too many such challenges. In February 1986, with the new legislation scarcely a decade old, Lord Brightman famously said in the *Puhlhofer*[10] case:

> "My Lords, I am troubled at the prolific use of judicial review for the purpose of challenging the performance by local authorities of their functions under the Act. … I think that great restraint should be exercised in giving leave to proceed by judicial review. …it is not, in my opinion, appropriate that the remedy of judicial review, which is a discretionary remedy, should be made use of to monitor the actions of local authorities under the Act save in the exceptional case."

43. To the best of my own recall, the tidal wave of litigation to which Lord Brightman was there referring, amounted to significantly less than 100 homelessness judicial review cases each year.
44. Although judicial review homelessness work continued to expand after that initial setback in 1986, the number of legal claims arising from homelessness disputes never exceeded more than a few hundred per annum.
45. The statistics were collected and analysed by commentators at the time but only ever represented challenges by a tiny proportion of those who were disappointed by the response of LHAs to their applications.
46. Indeed, successive editions of the statutory codes of guidance, issued under the Acts of 1977 and the consolidating Act of 1986, encouraged LHAs to operate informal in-house review procedures to head -off even that small number of cases from reaching the courts.
47. Today, the work of our Administrative Court in relation to judicial review of homelessness decisions is limited to dealing with that class of case in which an individual cannot use the modern statutory schemes of review and of appeal to the county court, to which I shall turn in a moment.
48. The number of homelessness judicial reviews is tiny. They form only a very small proportion of the less than 2000 civil non-immigration judicial reviews initiated each year. Indeed, there is no longer a housing or homelessness sub-category in the official judicial review statistics.
49. The best available data now comes from legal aid statistics, because homelessness cases brought by judicial review are almost always pursued with legal aid.

[10] *R v Hillingdon LBC, ex p. Puhlhofer* [1986] UKHL 1 (06 February 1986), [1986] AC 484.

50. In the last four quarters for which statistics are available, the numbers of legal aid certificates granted nationally for judicial review in housing cases were 135, 93, 80, and 101 respectively.[11] And that is *all* Housing cases pursued by judicial review, not just homelessness cases. Small fry indeed!
51. The remaining judicial review claims within the Administrative Court jurisdiction now deal with such residual matters as: the refusal to accept applications, the failure to undertake or complete a review which has been requested, refusals to provide accommodation pending review, and disputes about the way in which a duty is being performed.
52. It might properly be asked why this residual category of homelessness disputes, arising from applications made to LHAs under the statutory homelessness scheme, is allowed to remain in the judicial review jurisdiction at all.
53. It seems anomalous.
54. Why are these remaining cases not themselves transferred to join the appeals now within the jurisdiction of the county court? In same way as judicial reviews of asylum and immigration cases have been largely transferred to the specialist Upper Tribunal. That question calls for an answer. But it must come from others. Not from me.
55. Of course, the residual number of cases in the judicial review jurisdiction brought between disappointed applicants and LHAs is now dwarfed by the much larger number of such claims brought by the homeless who are *unable* (for whatever reason) to be assisted - or further assisted - under the statutory homeless schemes. Those are claims against children's services authorities and adult social services authorities made by claimants seeking help under the Children Act 1989 or under the modern adult care provisions. That litigation might usefully form the focus of a later talk in this series, but not this one.
56. Let me now return from that historical diversion, back to my theme of dispute resolution procedures, in order to examine the current arrangements for resolving disputes between applicants and LHAs emerging from the operation of the mainstream homelessness legislation.

The ombudsmen and the homeless

[11] *Legal Aid Statistics in England and Wales October to December 2016* Ministry of Justice Statistics bulletin, March 2017.

57. Happily, there is one form of dispute resolution which is well documented and largely transparent. That is the mechanism for complaints by the homeless to the relevant Ombudsman.
58. In England, complaints relating to homelessness lie to the Local Government Ombudsmen (LGO) in respect of the conduct of LHAs.
59. Since 2013/2014, when responsibility for complaints about housing *management* matters was transferred to the Housing Ombudsman, the LGO service has published the outcomes of all the complaints it receives and investigates in homelessness cases. The annual Homelessness Archive on the LGO service website[12] provides an invaluable source of information and training materials, for LHAs on the one hand and for homeless people and their advisers on the other. Sadly, it is a wholly underutilised resource. I commend it to all who want to learn more about individual homelessness disputes in England.
60. But this material again demonstrates how very few of the homeless, who are denied the main housing duty, or are in dispute about its operation, use this free and relatively straightforward dispute resolution procedure.
61. The figures for complaints recorded in the LGO's online Homelessness Archive are as follows:

- 2014/2015 157
- 2015/2016 175
- 2016/2017 132

62. That must be set against the more than 50,000 negative homelessness decisions made annually.
63. Notwithstanding these modest numbers, the LGO has been forthright in its encouragement to LHAs to undertake service improvements for the homeless.
64. Its work in recent years has highlighted two broad problems. First, that of what is colloquially called 'gatekeeping', or the failure of LHAs to accept and process legitimate homelessness applications. Second, the issue of families with children being unlawfully accommodated in B&B for more than the absolute statutory maximum of six weeks.
65. On the first issue, the difficulty some applicants have in making an application for homelessness assistance at all, the LGO has regularly given publicity to its hard-hitting individual reports about service failure. Most recently, in last month's high

[12] *Homelessness archive 2016-2017* at LGO.

profile investigation report on a complaint against *Barnet Council*[13], a woman was found to have applied to a LHA five times for assistance with her homelessness. On none of those occasions was she given a written decision. As the council explained to the ombudsman, it knew that she had a legal right to such a decision but it considered that it was too administratively onerous to give written decisions to all those turned away. The Local Government Ombudsman, Michael King, said:

> "Councils are legally required to issue a written decision to people who approach them as homeless. Without this those people are left in limbo; denied their review and appeal rights, and are potentially without access to accommodation which they might need. The LGO issued a special report on councils' duties to homeless people in 2011 and I am disappointed to see councils are still making errors in this area. As shown in this [Barnet] report, failing to deal with homeless people properly can have very real and serious consequences for some of the most vulnerable in society."

66. The LGO was there referencing the seminal LGO report *Homelessness: How councils can ensure justice for homeless people* first published in July 2011 and amended and reissued in December 2015. Sadly, the fact that the report failed to get a message about proper handling of homelessness applications home to LHAs is evident from not only the Barnet investigation but from many of the other decisions reported in the on-line archive.
67. Equally sadly, the work of the LGO has been just as ineffective in respect of the other major issue that its complainants have presented in recent years i.e. the use of B&B for more than six weeks for homeless households with children.
68. In October 2013, the LGO was sufficiently troubled to publish *No place like home: Councils' use of unsuitable bed & breakfast accommodation for homeless families and young people.* That report documented the systemic failure by LHAs to comply with the legal restriction on use of B&B and it said:

> "Despite councils telling us that an increase in homeless applications and changes to the welfare system are having a detrimental effect on their ability to provide suitable accommodation, this is not justification for failing to meet statutory duties".

69. But the LGO's reports and investigations on that second topic have failed to bring a halt to this dimension of lawbreaking by LHAs either. On 31 December 2016, just three months ago, there were 1260 families with children in England who had been in

[13] Investigation into a complaint against London Borough of Barnet (reference number: 16 002 971), 8 March 2017

LHA-arranged B&B accommodation for more than six weeks, in wholesale breach of the legal rules. And that was itself 38% higher than the figure on 1 December 2015.

Modern dispute resolution

70. If neither the LGO nor the judicial review system is able to provide a numerically significant and satisfactory route to dispute resolution for the homeless, what of the modern statutory schemes for internal reviews and of appeals to the county courts?
71. As the 1996 Housing Bill was going through Parliament, Shelter and others persuaded the then Government and then Parliament to incorporate new statutory arrangements for a right to a formal internal review by a LHA of most of its own adverse decisions, on request, and for a right of appeal to the county courts on a point of law from those review decisions.
72. This was to be a new form of accessible dispute resolution available to all, or almost all, applicants. It has now been in operation for two decades.

Internal review

73. So what proportion of the 55,000 disappointed applicants per annum utilise even the first part of the process, the internal review procedure?
74. Shamefully, the answer is that no-one knows. LHAs are not required to complete a statistical return to central government about the number of review requests received or processed, let alone give any breakdown of the outcomes.
75. There are simply no national or regional statistics.
76. The research work that David Cowan, Caroline Hunter and other academics undertook a dozen years ago showed that the numbers pursuing internal reviews were surprisingly low. The authors sought to explain some of the reasons why. The research was published in the journal *Legal Action* in July 2002 and March 2003. Nothing equivalent seems to have been reported since.
77. In the absence of any direct official figures, data might potentially be drawn from two other sources.
78. First, from the Legal Aid Agency (LAA). It keeps records of the number of claims for payment received from lawyers who help with homelessness review procedures and

are funded under the legal aid regime. But if such statistics are available, they too are unpublished. In any event, they would reflect the general decline in the uptake of legal aid housing law services. The latest quarterly legal aid statistics[14] report that:

> "The volume of legally-aided housing work halved between July to September 2012 and July to September 2013. The trend then fluctuated for around 18 months but since 2014 it has been falling, and in October to December 2016 there was a 12% decrease compared to the same quarter the previous year."

79. I should say that again. A 12% drop in legal aid activity on housing cases in a single year.
80. The second possible source of statistics about homelessness reviews might come from the independent contractors who are increasingly undertaking such reviews for LHAs under contracting out arrangements. The largest of them, the company Housing Reviews Limited, claims on its website that in the 15 years over which it has been operating it has "completed over 6,500 allocations and homelessness reviews". But divided over 15 years their figures too are very modest in comparison with the overall numbers of disappointed applicants.
81. In sum, we have no clear picture of the number of homelessness reviews or of their outcomes. The data could no doubt be readily obtained by a Freedom of Information Act request directed to each LHA but, for some reason, there has been no academic interest in pursuing the relevant statistics.

Appeals to the courts

82. Nor is there any published information about the number of cases pursued, at the next stage of individual dispute resolution, that is, on *appeal* to the county courts.
83. If the statistics are collected by HM Courts & Tribunals Service, they are not reported in any of the official data collections.
84. Again, there is another gaping hole in what we know about dispute resolution processes in relation to homelessness.
85. Thus far, I have recounted what is not happening on homelessness dispute resolution, or if happening, what no-one knows much about.

[14] See note 11.

Shining a little light

86. In a spirit of opening up homelessness and the law, which Bryan McGuire's own career did so much to advance, let me make a very personal contribution by sharing some of the information and insights I have garnered, about homelessness reviews and appeals, in the 15 months since my own appointment as a Circuit Judge sitting in the county court.
87. If it enables me to throw a little light into unexplored byways I hope some will find it helpful. My observations may be of particular assistance to those who make, and to those who challenge, homelessness review decisions.
88. I should stress that I shall not be speaking for the judiciary as a whole or even for those judges at my Court. I am not speaking in any official judicial capacity. What I can offer is an entirely personal reflection on the work relating to homelessness which comes to the court to which I am assigned, the County Court at Central London.
89. 'Central London', as I will call it, deals with all the statutory homelessness appeals generated by the homelessness work of the 33 London boroughs and the City of London.
90. On a very rough average, we receive about 40-60 statutory homeless appeals a month. That's about 2 or 3 per working day. About 500-600 per annum in all.
91. Obviously, that is an absolutely tiny proportion of all adverse decisions made by the 30-odd LHAs in the Greater London region.
92. The appeals we receive are heard in public by Circuit Judges or by their fee paid equivalents, Recorders. Our Court Lists are published on the internet. Thursdays are usually good days to catch a homelessness appeal. Indeed, we have three courts sitting to hear such appeals tomorrow!
93. The vast bulk of our appeals are issued directly at our offices at Central London, now based at the Thomas More Building in the Royal Courts of Justice.
94. For some reason, a much smaller number of appeals are still being issued by practitioners and litigants in person at other courts around the London area, even though they no longer have civil Circuit Judges. Those cases are then the victim of quite unnecessary delays while cases are referred-in to Central London from those courts. I do hope practitioners at least will in future issue *their* appeals at the right court centres to secure speedy consideration of their clients' cases.

95. I have there mentioned in passing 'litigants in person' (LiPs). There are growing numbers of litigants pursuing homelessness appeals in person. That causes me concern in two respects.

96. First, legal aid remains available for this class of legal work and most homeless applicants will be financially eligible for legal aid. They are not getting it. Second, appeals can only be pursued successfully by establishing error of law[15], something that the ordinary homeless person acting without legal help is unlikely to be able to achieve. In those circumstances, it is puzzling why the number of LiPs in homeless cases should be growing.

97. I hope I can be forgiven for observing that the Court at Central London has not historically gathered much of a reputation from court users for administrative efficiency. But times are changing.

98. For the six months August 2016 to January 2017, I personally case managed the intake of all homelessness appeals at Central London in a pilot scheme to see how our Court might improve service provision to both applicants and LHAs relating to these appeals.

99. I did not actually hear any greater number of these appeals than any other Circuit Judge or Recorder but I case managed all of them. I was able to record the types of appeals, the LHAs involved, and the broad subject matter of the appeals.

100. Almost all of the homelessness appeals issued were listed for a full hearing well within six months of the issue date. This means that I will shortly be able to review final *outcomes* of all the cases that I case-managed in the pilot. That is a compliment of 250-300 decided cases.

101. Initial indications are that, perhaps surprisingly, well over 50% of these cases settle or are otherwise resolved ahead of their listed court dates.

102. Sadly, there is no budget for any more detailed analysis of the cases which I have managed and reviewed and no academic researcher has yet expressed interest in examining them. Perhaps this lecture might prompt some thinking in that direction.

103. What I can offer are some highly subjective and personal insights on that limited caseload that might enable those involved in this form of dispute resolution to achieve more satisfactory decisions and earlier outcomes in future.

[15] Housing Act 1996 section 204.

104. I was pleased to be able to share some initial thoughts at the HLPA Conference 2016 and I am delighted to have this opportunity to take them a little further.

Tips for local housing authorities

105. I start with some feedback directed to assisting LHAs, and particularly those officers undertaking the task of drafting review decisions or upholding them. I have **five** specific suggestions.

106. *First,* a really simple point. Paragraph numbers and pagination of pages should routinely be used in review decision letters. Some of these letters are now really long. I have seen one that exceeded 38 pages. Many, perhaps now the majority, run to over 10 sides of A4. Without paragraph numbers, headings and pagination they become impossible to manoeuvre around or understand. Both for advocates on appeals, and for judges seeking to scrutinise them, such decisions are unnecessarily challenging. My own experience of review decision letters considered on the Bench is that, more often than not, the less that is written the more compelling the reasoning is.

107. *Second,* review decisions need to be routinely proof-read before being sent out. Some of the review decisions I see are embarrassingly poorly expressed. Others contain myriad spelling and other typographical and factual errors. This reflects poorly on the LHA. The impression created deflects attention from what might otherwise be a full and well-reasoned decision.

108. *Third,* the law already requires that every review decision letter must finish by reminding the applicant of their right to appeal to the County Court and of the time limit for doing so. But can I additionally commend reviewing officers to add the name and address of the solicitors or legal department on which any appeal should be served? Far too much delay and inconvenience is later created by appeals being directed to the address of the reviewing officer rather than to the legal department or to the solicitors who will actually conduct the appeal. This tiny modification will eliminate much waste of time and costs. I urge its adoption by all those who prepare review decision letters.

109. *Fourth,* LHAs will want to reduce exposure to the legal costs of fighting cases that, in fact, are best settled. Why then not end review decision letters with an

indication that the LHA would welcome advance notice of any anticipated appeal from any solicitors instructed by the applicant. One London borough has recently tried to plug the gap created by the absence of a pre action protocol for homelessness appeals by extending such an invitation in all its review decision letters. The hope is that an early flagging-up of a prospective appeal, with the legal department, will prompt an urgent review of a reviewing officer's decision which has not earlier been subject of any consideration by a lawyer. That can mean that cases which would settle later can settle earlier. Again saving costs, time and effort.

110. *Fifth*, nothing in my own limited experience on the Bench suggests that many LHAs are making representations to the Legal Aid Agency about reversing the grant of legal aid for homelessness appeals that plainly lack merit, are academic, or raise only factual disputes. Perhaps this facility for objecting to legal aid is not well known. The LAA does not appear to publish guidance for the opponents of legally-aided parties equivalent to the Scottish LAB's *Guidance for opponents in civil legal aid cases.*[16]Assuming it remains a feature of the legal aid landscape in England, the facility for making representations designed to achieve withdrawal of legal aid in hopeless cases seems seriously underutilised.

Pointers for appellants

111. I turn from those five points directed to Respondent LHAs to some feedback I hope I can appropriately offer <u>to Appellants' representatives</u> seeking to assist the homeless with appeals. Based on my experience over the past 15 months on the bench can I offer a very simple checklist of do's and don'ts for lawyers and legal advisers bringing homelessness appeals? I have a dozen, mercifully short, points.

112. *Use the right form.* To initiate a homelessness appeal a party is required to obtain and complete form N161 (the Appellant's Notice). The latest version was issued last month. It has the footer "03.17" on the first page. That is the one to use. Discard previous templates. Why not have a weed out tomorrow?

113. *Pay the right fee*. The fees to issue statutory appeals change from time to time. Make sure the right amount is paid. The practice at my own court, if too much or too

[16] SLAB, September 2016.

little is paid, is to return the cheque and all the forms un-issued. Given the tight time limit for homelessness appeals and the tendency to leave things to the last minute, many of the appeals returned later with the correct fee are out of time.

114. *Issue in time*. The time limit is 21 days.[17] Although there is a power to extend time, the Court does not have the usual general discretion to do so. Time can only be enlarged if the tight conditions set out in the statute are met.[18] If an appeal is not brought in time it will have to be struck out. If you need to apply for more time, make the application in Section 10B of the Form N161 and set out the evidence you rely upon to meet the *statutory conditions* in Section 11 of the form. The Court does not need a heart rending tale. It needs evidence that the pre-conditions are met.

115. *Keep the paperwork to the minimum.* All the Court needs in a homelessness appeal is the N161, the court fee, the decision subject of the appeal, the grounds of appeal and the proposed case management directions. We do not need: earlier decisions of the LHA, the housing file, policy documents, written representations, a massive appeal bundle or anything else. Please help us all save the rainforest!

116. *Comply with the specific Practice Direction*. Even experienced practitioners seem astonished to find that there are parts of the CPR that apply directly and exclusively to homelessness appeals. They are contained in the *Practice Direction 52D Statutory Appeals* at para 28. Find out what they require and how comply with them. Then do so.

117. *Grounds of Appeal.* CPR PD 52B - *appeals in the County Court and High Court* - provides at para 4.2(d) that "grounds of appeal …must be set out on a separate sheet attached to the appellant's notice and must set out, in simple language, clearly and concisely, why", in the present context, the reviewing officer's decision is wrong in law. The requirement is simple but too often ignored. It does not help if the grounds need to be extracted from a thicket of background facts or excised from a skeleton argument. They should be in a series of short numbered paragraphs on a standalone sheet.

[17] Housing Act 1996 section 204.
[18] Housing Act 1996 section 204(2A).

118. *Don't ask for things the Court cannot grant*. Too many N161 Appellant's Notices in homelessness appeals seek relief the Court simply cannot grant. In my experience the two most common errors are: (1) to complete Section 10A by seeking a stay of possession proceedings or a stay of physical eviction from homelessness accommodation; or (2) to complete Section 10C seeking an interim injunction. There is no jurisdiction in the county court to grant either of those forms of relief in a section 204 appeal. If a LHA is asked, but refuses, to accommodate pending a section 204 appeal *that* decision may be the subject of a different and separate appeal under section 204A of the 1996 Act. Only in <u>that</u> appeal is there an exceptional jurisdiction to grant an interim injunction. Even then, the injunction cannot stop a particular eviction. It can only require a LHA to accommodate – not specify how or where.

119. *If you need expedition, apply for it.* The county court will usually list an appeal for hearing some weeks or a few months after issue. If more urgent consideration is required, apply for expedition at Section 10C of the N161 and set out the evidence in support in Section 11. Approach the matter sensibly. Set out why it is that <u>your</u> appeal should be set apart from the many others brought by people who similarly contend they face street homelessness and are in apparent priority need.

120. *Co-operate with the Court and with the Respondent.* The parties to homelessness appeals, as with parties to so much other litigation, routinely overlook their own obligations under CPR rule 1.3. That provides that: "The parties are required to help the court to further the overriding objective." At a minimum that requires the parties to actually read and then comply with the detailed case management directions given by the Court itself. Additionally, by co-operating with each other, rather than by taking a hostile or belligerent stance, the parties can also further the objectives of resolving disputes in a timely manner at proportionate cost.

121. *Settle appeals in the right way*. As noted earlier in this lecture, a high proportion of appeals conclude in a settlement disposing-of the appeal without a final hearing. My own experience suggests that the parties' representatives, however experienced, simply do not understand how to go about that process properly. They are astonished to find that appeals cannot be 'withdrawn' or 'discontinued'. They can

only relevantly be dismissed or allowed. The rules about the terms on which appeals can be compromised by consent – whether dismissed or allowed - are set out in CPR PD 52A Section 6 – invitingly headed *Disposing of applications and appeals by consent.* What is written there is easy to follow. Please do follow it if you are compromising an appeal. Of course, assuming compliance with those provisions, the application for a Consent Order again needs to be accompanied by the relevant fee.

122. *Settle appeals on the right terms.* Not only are the CPR PD52A provisions on compromise overlooked but too many appellant's representatives appear prepared to sell themselves and their clients short when framing settlement agreements. If the LHA is prepared to withdraw the review decision, the proposed Consent Order should deal with the date by which the replacement review decision will be notified and also with the issue of whether the LHA will meanwhile accommodate the applicant. Likewise, if the LHA agrees to pay the Appellant's costs, surely the draft order should include provision for payment of a specified amount on account of those costs. Finally, on this note, please desist from asking the Court to determine costs questions on written submissions in cases which have settled. The inevitable result is more costs and more delay, in a context in which the principles for awarding costs in settled homelessness appeals are now readily understood and easily applied.[19]

123. *Preparation.* This is always the key factor in helping the Court reach the right conclusion on an appeal. I am not going to say anything about the content or calibre of representation. I have only three modest points on preparation.

First, make sure that the judge is going to see the skeleton arguments before the hearing. At Central London we have a dedicated CJSKEL email inbox address. Other major hearing centres will have a similar arrangement. Find out what it is. Then use your internet browser to find the published protocol that regulates its use. Then comply with it. Bring your Email receipt to the Court for the hearing.

Second, pay some sensible attention to the preparation of the Appeal Bundle. In the context of a homelessness appeal, the entire content of the housing file

[19] See, most recently, *London Borough of Croydon v Lopes* [2017] EWHC 33 (QB) (18 January 2017).

is rarely necessary. It is not helpful to have the review decision, to which reference will constantly be made, at page 323 in the second lever arch file! In my humble opinion no-one should be allowed to assemble an appeal court bundle unless and until they have read, any learned by rote, Sir Stephen Sedley's *Laws of Documents*.[20]

Third, the advocates should supply the court with a single agreed Bundle of Authorities. The items enclosed should be from the best available reports of cases. Not assorted downloads from on-line services. Almost all reported cases can now be accessed by downloading full PDFs of the case as it appears in print. Nothing less should appear in the Bundle for the Court. The days of including un-paginated transcripts of less than the best available reports in two overlapping sets of separately prepared bundles of authorities are over, certainly in my Court.

124. That completes my dozen points for the assistance of those conducting homelessness appeals. I trust they are of at least some limited help.

Endnote

125. I can now conclude this lecture by expressing the hope that, given the general absence of data and lack transparency about how dispute resolution is undertaken or conducted in homelessness cases, my own personal reflections will be of some value both to LHAs and to the applicants who apply to them.

126. I must thank the organisers, and most importantly, Bryan McGuire, for providing me with this opportunity to share my personal thoughts and reflections.

127. Thank you very much for kindly listening to them.

[20] *Sedley J's Laws of Documents* [1996] JR 37.