Recent developments in housing law

Jan Luba QC and Nic Madge 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

New housing legislation for England

The Localism Bill had its second reading in the House of Commons on 17 January 2011. Part 6 contains provisions dealing with almost every dimension of housing law. It covers proposed new rules on: allocation of social housing; homelessness; security of tenure in social housing; succession rights; disrepair; an expanded role for the Housing Ombudsman; social housing regulation; abolition of Home Information Packs (HIPs) and much more. The bill will now be given detailed consideration in a standing committee. Amendments are likely to be drafted and promoted by several interested parties including the Housing Law Practitioners Association and Shelter.

The new housing association tenancies

The introduction, later this year, of the new form of housing association affordable rent tenancy does not require primary legislation. The tenancy will be an assured (or assured shorthold) tenancy under the Housing Act (HA) 1988. The necessary arrangements for housing associations to grant these new tenancies can be achieved by alterations to housing association funding arrangements by the Homes and Communities Agency and by amendment of regulatory conditions such as the Tenant Services Authority's (TSA) tenancy standard. On 16 December 2010 the TSA launched a consultation exercise on the changes: *Affordable rent – revisions to the tenancy standard: A statutory consultation* (TSA, December 2010).[1] The consultation closes on 2 March 2011.

Social housing fraud

In the financial year 2011/12, the 51 local councils doing the most to tackle social housing fraud (in particular unauthorised sub-letting) will each receive a share of £19 million from the Unlawful Occupancy Fund. Their work will be supported by a dedicated national action team, based at the Chartered Institute of Housing, which will be available to offer practical support and advice to local authorities looking to tackle tenancy fraud in their areas: Communities and Local Government (CLG) news release, 16 December 2010.[2]

Housing and anti-social behaviour

On 31 January 2011 the new powers for local authorities and the police to obtain county court injunctions to stop violence and other anti-social activity by gang members were brought into force. The primary statutory provisions are in Policing and Crime Act 2009 Part 4, as amended by Crime and Security Act 2010 ss34–39. The procedural arrangements for obtaining the new injunctions are contained in Civil Procedure Rule 65 Section VIII. The Home Office has published extensive statutory guidance on how the new powers can be exercised by local councils and the police: *Statutory guidance: injunctions to prevent gang-related violence* (Home Office, December 2010).[3]

Inspecting housing services

The housing services of social landlords (both local authorities and housing associations) are inspected under arrangements made by the TSA with the Audit Commission. The two bodies have jointly published the arrangements which will govern inspections until April 2011: *Transitional arrangements for the inspection of registered social housing providers* (Joint statement by the TSA and Audit Commission, November 2010).[4]

In a speech in Westminster on 24 November 2010, the housing minister announced the abolition of strategic housing inspections under which the Audit Commission had been monitoring the performance of local authorities in achieving the housing strategies for their areas.[5]

Tenancy deposit scheme for Scotland

The provisions of Housing (Scotland) Act (H(S)A) 2006 Part 4 which make arrangements in relation to tenancy deposits in Scotland were brought into force on 21 December 2010 (Housing (Scotland) Act 2006 (Commencement No 9) Order 2010 SSI No 436).[6] Sections 120 to 122 make provision about tenancy deposit schemes. Section 120 defines what is meant by 'tenancy deposit' and 'tenancy deposit scheme'. Section 121 contains regulation-making powers. Section 122 makes provision for the approval of tenancy deposit schemes, publicity and consultation requirements and the review of schemes.

Housing consents for local authorities

The coalition government has published a new set of 'general consents' giving local authorities power to dispose of their housing and to make monies available to housing associations and other landlords in their areas: *The general consents under section 25 of the Local Government Act 1988 (local authority assistance for privately let housing) 2010* (CLG, December 2010).[7] The document contains the general consents under the Local Government Act (LGA) 1988 s25 for the disposal of land to registered providers of social housing; the disposal of dwelling-houses to registered providers of social housing for refurbishment; financial assistance to any person; small amounts of assistance; and the disposal of residential care homes.

Service charges

On 29 December 2010, modifications took effect in the provisions governing the calculation for the inflation allowance to be added to a landlord's estimate of the service charges payable by the tenant for repairs and major works in the initial period of a right to buy lease. The changes were made by the Housing (Right to Buy) (Service Charges) (Amendment) (England) Order 2010 SI No 2769.[8]

HUMAN RIGHTS

■ Ismayilova v Azerbaijan

App No 18696/08, 9 December 2010

Ms Ismayilova was allocated a flat by the municipal authorities. She could not occupy it because it was already occupied by a family displaced by civil conflict who had nowhere else to live. She sought and obtained a possession order but it was not enforced for over a decade because there was no alternative accommodation for the occupying family. She complained to the European Court

of Human Rights (ECtHR) that there had been an interference with her right to enjoy her possessions.

The court held that it had not been established, either in the domestic proceedings or before the court, that any specific measures had been taken by the domestic authorities to comply with their duty of balancing Ms Ismayilova's right to peaceful enjoyment of her possessions protected under article 1 of Protocol 1 against the occupiers' right to be provided with accommodation. In such circumstances, the failure to ensure the execution of the judgment resulted in a situation where she was forced to bear an excessive individual burden. The court considered that, in the absence of any compensation for this, the authorities had failed to strike the requisite fair balance between the general interest of the community in providing the occupiers with temporary housing and the protection of the applicant's right to peaceful enjoyment of her possessions. It awarded Ms Ismayilova €4,800 compensation.

SOCIAL SECTOR

Possession claims

■ Leeds and Yorkshire Housing Association v Vertigan

[2010] EWCA Civ 1583,
9 December 2010

Mr Vertigan was an assured tenant. His landlord brought a claim for possession, relying on breaches of the terms of the tenancy agreement and anti-social behaviour. It was alleged that Mr Vertigan had sawn through floorboards to access a cellar, had damaged the landlord's padlocks and erected a metal structure outside the front of his flat which he had refused to dismantle. He had also failed to clear up dog mess. HHJ Belcher found some of the allegations proved and decided, given a history of non-compliance with the terms of the tenancy, that it was reasonable to make a possession order. She refused to suspend it. Mr Vertigan appealed. Peter Smith J gave permission to appeal because Mr Vertigan was 'truly remorseful' and had 'realised the enormity of his stupidity' ([2010] EWCA Civ 963, para 7). He was prepared to give undertakings which he had not offered to the trial judge.

The Court of Appeal dismissed the appeal. The offer of an undertaking did not constitute fresh evidence in any meaningful sense. If the undertakings were sincere, the place and time for them to have been offered would have been at or before the original trial. The making of a suspended order for possession involves an assessment of the tenant's future conduct, his past behaviour, and the reliance to be placed on his promise. That was the province of the trial judge, who had intimate knowledge of the facts of a particular case and enjoyed the benefit of having seen witnesses in person. In this case, the judge had drawn on all that material and her conclusion that it was not appropriate to suspend the order did not fall outside the range of decisions open to her, but was instead plainly right. Those who committed persistent breaches of tenancy agreements had to understand that they were at risk of immediate possession orders in certain circumstances; it was not the case that because individual breaches of tenancy agreements were small, a suspended order would be made. In this case, the judge had been exemplary in her approach to the evidence, to the issue for decision and in performing the balancing exercise, and she had been entitled to make the decision she had made.

Right to buy

■ Cochrane v Grampian Joint Police Board

LTS/TR/2009/10,
2 September 2010,
2010 SLT (Lands Tr) 19

Mr Cochrane, a former police officer with Grampian Police, sought to exercise the right to buy a house which he had occupied as a tenant since 1994. The landlords, Grampian Joint Police Board, opposed the application on the basis that he had never been required to pay rent or rates and, accordingly, that the tenancy was excluded from the right to buy provisions by virtue of H(S)A 1987 Sch 2, para 7(a)(i) (in England and Wales, see HA 1985 Sch 1, para 2(2)). He argued that the payment of council tax was equivalent to rates.

The Lands Tribunal rejected that submission. The term 'rates' had a well understood meaning in 1987. They were a species of taxation based on heritable property. Parliament did not intend the term to be wider than its well recognised meaning. Mr Cochrane had been free of any obligation to pay rent or rates. The case fell within the exemption in paragraph 7. Mr Cochrane was not a Scottish secure tenant and, accordingly, did not have the right to buy (see *Holmes v South Yorkshire Police Authority* [2008] EWCA Civ 51; [2008] HLR 32).

Notice to terminate licence

Housing Ombudsman Service
■ Complaint 200902401

23 November 2010

Ms B had a licence to occupy a room at a hostel from 5 March 2009. On 2 June 2009 a member of staff completed an incident report stating that she had witnessed Ms B's aggressive and abusive behaviour to another member of staff. Ms B was asked to attend a meeting on 4 June. She believed that it was scheduled for 7 pm, but the landlord's notes indicated it was to take place at 5.30 pm. When Ms B returned to the hostel at 6.50 pm she was told she was late and the appointment cancelled. The next day (5 June) the landlord served Ms B with a notice ending her licence and giving 14 days for her to vacate the hostel.

The notice stated that her licence was being terminated because 'the licensee has withdrawn from or breached the support agreement or has failed to engage with support staff'. This was one of the qualifying grounds on which the landlord could terminate a licence. However, there was no evidence, apart from notes for 4 June 2009, of Ms B missing any appointments with staff prior to service of the notice. There was also no evidence that the landlord had discussed any alleged breaches of the support agreement with Ms B or issued her with any verbal/written warnings before issuing the notice. This represented a further breach of the policy which stated that in the event of any breaches of the licence, except in cases where the safety of residents or staff was in question, a structured procedure must be followed – specifically, verbal warning, written warning, right to appeal, notice terminating occupancy, right to appeal, eviction.

The landlord reached an agreement with the local authority that it meet Ms B to carry out a needs and risk assessment and that the 'best outcome' would be for Ms B to move to another of the landlord's hostels. Ms B did not agree to move. The landlord extended the notice to quit until 26 June 2009 and Ms B sought advice from a solicitor. The landlord and Ms B subsequently signed an agreement on 19 June 2009 that she would leave the hostel by 14 September 2009 and the landlord would withdraw the notice. She was evicted from the hostel on 8 September 2009. Ms B complained about the landlord's handling of the notice to quit and the related matter of her complaint about a staff member.

The Housing Ombudsman concluded that there was maladministration by the landlord. The landlord failed to include within the notice evidence that Ms B had withdrawn from or breached the support agreement or failed to engage with support staff. The Ombudsman recommended that the landlord pay Ms B £200 for any distress and inconvenience caused by its handling of the notice to quit and a further £200 for any distress and inconvenience caused by its handling of a complaint about a staff member.

Defamation

■ Clift v Slough BC

[2010] EWCA Civ 1484, 21 December 2010

Ms Clift complained to the council about the way in which it had responded to a report by her of anti-social behaviour she had witnessed. The council's complaints investigator rejected her complaint, but was concerned about her own behaviour towards council staff, which he considered to be violent and threatening. He added her name to the council's register of violent persons, notified council staff and partner agencies of that fact, and cautioned them to be accompanied when visiting her and to take other measures when dealing with her. Ms Clift sued for libel and the council relied on qualified privilege; in particular, its duty to protect its staff. She also alleged malice by the complaints officer. In the High Court, a jury awarded £12,000 compensation to Ms Clift ([2009] EWHC 1550 (QB); September 2009 *Legal Action* 33). The jury rejected the claim of malice but also rejected the defence of justification.

The Court of Appeal dismissed an appeal. Its judgment considers how the Human Rights Act 1998 has affected a local authority's defence of qualified privilege in defamation cases.

PRIVATE SECTOR

Assured shorthold tenancy

■ BKD Ltd v Planer

[2010] EWCA Civ 903, 28 June 2010

After a trial, HHJ Faber declared that Mr Planer was an assured shorthold tenant of three floors of a property and not an assured tenant as he claimed. He sought permission to appeal, arguing that: (i) no reliance could be placed on a written agreement purporting to grant a tenancy to him because the agreement purported to grant a tenancy of the whole of the building when two other people already had possession of the first floor and the then landlord was in possession of the ground floor shop, and neither the landlord nor Mr Planer intended that he should have a tenancy of the whole building; and (ii) the judge's finding that the then landlord had served a HA 1988 s20 notice before the tenancy began was not supported by the evidence and was perverse.

Etherton LJ refused a renewed application for permission to appeal. With regard to the first contention, among others, the tenancy agreement would have operated as a grant of a reversionary lease which would give Mr Planer a right to possession on the termination of the prior tenancies of those already in occupation. Alternatively, there is nothing in the HA 1988 which requires an assured shorthold tenancy to be in writing or prevents it from being partly in writing and partly oral. The judge concluded that what everybody intended and agreed was that Mr Planer should have a tenancy of the second and third floors. The terms of the written agreement were to be interpreted in the light of the agreement as a whole, so that Mr Planer's tenancy extended to the second and third floors only of the building. With regard to the second contention, there was a written acknowledgment by Mr Planer, subsequent to the grant of his tenancy, confirming that a s20 notice had been served before the tenancy began. 'Appeals to this court are not a rehearing of the evidence; findings of fact are the primary task of the trial judge … this was pre-eminently a matter for the judge to decide' (paras 16–17). It would be impossible to persuade the Court of Appeal that the judge was not entitled to form the view she had about the service of the s20 notice.

Relief from forfeiture

■ Patel v K & J Restaurants Ltd

[2010] EWCA Civ 1211, 28 October 2010

The claimants owned the whole of a building which consisted of flats and business premises. The defendant's lease included a covenant not to use the premises for any illegal or immoral purpose. The police informed the defendant by telephone that one of the flats was being used by a sub-tenant as a brothel and later served notices confirming this. The defendant took no action. The claimants gave notice under Law of Property Act 1925 s146, stating that the breach was not capable of remedy. The defendant evicted the relevant sub-tenant. In subsequent proceedings, HHJ Bailey dismissed a claim for forfeiture and possession. The claimants appealed.

The Court of Appeal allowed the appeal in part. Although there was a breach of covenant, it was appropriate to grant relief against forfeiture as the breaches were not wilful and to grant vacant possession to the freeholder would be out of all proportion to the breaches or any resulting damage.

Damages for unlawful eviction

■ Strydom v Fowler

Brentford County Court, 24 November 2010[9]

Mr Fowler was an assured shorthold tenant. After expiry of the fixed term of his tenancy, he held over as a statutory periodic tenant. He fell into rent arrears which were eventually agreed to be £2,189 after deduction of his deposit. On 16 May 2008, his landlord, Mr Strydom, began a possession claim. He also claimed for damage to the property. Mr Fowler texted him to say that he would be 'out in two weeks, perhaps even sooner'. On 27 May 2008, he returned from holiday to find his keys would not fit the lock. He forced entry and found Mr Strydom holding an iron bar. Mr Fowler ran away, but broke his heel when climbing over a gate. In the possession claim, he counterclaimed for damages under HA 1988 ss27 and 28, breach of covenant for quiet enjoyment and trespass.

HHJ Oppenheimer awarded Mr Strydom £2,600 for rent arrears and damage to the property. On the counterclaim, he found that there was a threat of physical violence. The reference to Mr Fowler's intention to leave was only an expression of intention, not a determination of the tenancy. There was an unlawful entry and Mr Strydom did not have reasonable cause to believe that Mr Fowler had left because the beds were made and there were toiletries in the property. The agreed difference between vacant possession value of the property and its value with Mr Fowler in occupation was £12,500. However, it was unreasonable for the tenant not to have been in touch with the landlord for five weeks and not to have responded to text messages. Taking into account his conduct, pursuant to s27(7), HHJ Oppenheimer reduced the statutory damages to £2,500. However, he also awarded damages for breach of covenant in the sum of £3,000 and aggravated damages for trespass in the sum of £1,250. The total of damages on the counterclaim to be set against the judgment for the claimant was £6,750.[11]

Liability for rent

Local Government Ombudsman

Complaint

■ Newham LBC

09 003 325, 9 November 2010

The complainant was placed by Newham in temporary homelessness accommodation in Redbridge. She found a private landlord prepared to rent her a flat in the same block on a 12-month tenancy for whatever rent housing benefit would cover. Newham then gave the complainant and the landlord the wrong advice about that amount. They acted on it but Redbridge would not grant housing benefit for the full amount of the rent. Newham suggested the complainant abandon the tenancy to stop the shortfall accumulating.

The Local Government Ombudsman found maladministration and recommended compensation equal to the shortfall. He said:

I do not consider that it was reasonable

for the council to expect [her] to move home when its error came to light. [She] would still be contractually liable for the rent as a result of the assured shorthold tenancy agreement she had entered into with her landlord. Neither did she want the additional upheaval that a further move would cause her and her daughter, nor the additional expense which is inevitably associated with moving house (para 20).

Adverse possession

■ R (Diep) v Land Registry

[2010] EWHC 3315 (Admin), 3 December 2010

Mr Diep was the registered proprietor of a building and land. He and his predecessors used other land to the rear for storage purposes. No one else enjoyed access to it. He applied to the Land Registry for first registration of that land on the ground that he had acquired title to it by adverse possession. The Land Registry decided that it would register him as the proprietor of that land with possessory rather than absolute title because it was not its custom to grant any better class of title than a possessory title where the applicant's title was founded on adverse possession. Mr Diep applied for judicial review, submitting that the decision was irrational and/or unreasonable.

Mitting J dismissed the application. There was no evidence of the dispossessed owner's title or as to the identity of the owner of the paper title to the land. In those circumstances, the Land Registry did no more and no less than to apply its declared policy. Mitting J said: 'What the Act does is to strike a balance between the economic and social interest of having title to land firmly established to ensure that it can be freely marketed, and protection of the public purse against justified claims for indemnity as a result of mistakes in the register' (para 17). The Land Registry was entitled to take an ultra-cautious view of the position so as to avoid putting public funds at risk. Conveyancing threw up many surprises and the possibility of a claim detrimental to the public purse could not be wholly excluded. The decision to register possessory title could not be categorised as unlawful or irrational.

■ Ofulue v UK

App No 52512/09, 23 November 2010

The Fourth Section of the ECtHR has rejected as 'manifestly ill-founded' a complaint by Ms Ofulue that the application of the 'without prejudice' rule in her claim for adverse possession violated her rights under article 6, article 10 and article 1 of Protocol 1 (see *Ofulue v Bossert* [2009] UKHL 16; [2009] Ch 1; May 2009 *Legal Action* 25).

HOMELESSNESS

Suitability of accommodation

■ Nazokkar v Brent LBC

Central London Civil Trial Centre, 2 December 2010[10]

In performance of its duty under HA 1996 s193 the council offered the claimant accommodation. She accepted the offer but sought a review of its suitability: HA 1996 s202(1A). The property was a studio/bed-sit. The claimant complained that it was too small. She was epileptic and said that she was at greater risk of injury during a fit than she would have been in larger accommodation. The reviewing officer took medical advice and decided that the accommodation was suitable.

On appeal, HHJ Knight held that the reviewing officer was at fault for not ascertaining confirmation of epilepsy diagnosis, the type, number and rate of seizures, the medication and the amount of control the medication might have had. The officer did not obtain any information as to the risk or further risk that might be expected in small accommodation of this sort, given that the risk had been pointed out by the claimant's GP. He rejected a submission that the point was a bad one as there was a risk of injury from fits in any size of property. He did not accept that, had the information been obtained, there would have been no difference to the reviewing officer's conclusion. He allowed the appeal and quashed the review decision.[12]

HOUSING AND CHILDREN

■ R (A) v Camden LBC

[2010] EWHC 2882 (Admin), 12 October 2010

In 2007 the claimant came to the UK from Afghanistan as an unaccompanied minor and sought asylum. He gave his date of birth as 9 January 1992. The council initially provided him with accommodation under Children Act 1989 s20. Subsequently it conducted an age assessment which determined that his assessed year of birth was 1990. Further independent assessments were undertaken and the council took medical advice. Having regard to that, it confirmed its earlier assessment.

HHJ McMullen QC (sitting as a High Court judge) dismissed a claim for judicial review. He held that not only would the council's decision-making have survived a traditional public law challenge but to the extent that such cases required an independent judicial assessment of age, the claimant's correct year of birth was 1990.

HOUSING AND COMMUNITY CARE

■ R (Nassery) v Brent LBC

[2010] EWHC 2326 (Admin), 30 July 2010

The claimant sought accommodation from the council under National Assistance Act (NAA) 1948 s21(1A). It decided, following a needs assessment, an occupational therapy assessment and a risk assessment, that despite his medical problems he had no need of 'care and attention' for the purposes of the NAA.

HHJ Robinson dismissed a claim for judicial review of that decision. She held that although the final decision had made no mention of the risk of self-harm, it had been considered as part of a review of the medical reports. The mental health problems of the claimant and the risks they posed had been taken into account. The council had had proper regard to the prevention and management of the risks that the claimant potentially posed to himself and others. There had been no public law error in its decision-making.

1 See: www.tenantservicesauthority.org/upload/pdf/Affordable_Rent_-_Revs_tenancy_ standard.pdf.
2 See: www.communities.gov.uk/news/housing/1799890.
3 See: www.official-documents.gov.uk/document/other/9780108509599/9780108509599.pdf.
4 See: www.tenantservicesauthority.org/upload/pdf/TSA.AC_Joint_statement_11.10.pdf.
5 See: www.communities.gov.uk/speeches/corporate/cuttingcouncilsfree.
6 See: www.oqps.gov.uk/legislation/ssi/ssi2010/ssi_20100436_en_1.
7 See: www.communities.gov.uk/publications/housing/consentsprivatelets.
8 See: www.legislation.gov.uk/uksi/2010/2769/made.
9 Frances Ratcliffe, barrister, London.
10 Liz Davies, barrister, London and Charlotte Haworth Hird, Bindmans, solicitors, London.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. The authors are grateful to the colleagues at notes 9 and 10 for transcripts or notes of judgments.