

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

New rules for social housing

In exercise of his powers under Housing and Regeneration Act 2008 s197, the Secretary of State for Communities and Local Government has issued new directions to the social housing regulator for England: *Implementing social housing reform: directions to the social housing regulator – consultation. Summary of responses*, Annex A (Department for Communities and Local Government (DCLG), November 2011).¹ The directions cover tenure, mutual exchange, tenant involvement, rent and quality of accommodation. They set out the requirements expected to be met by social landlords and to be enforced by the regulator. The form of the directions has been framed following a consultation exercise last year.

In light of the new directions, the current regulator (the Tenant Services Authority (TSA)) has issued a consultation draft of the new regulatory framework that will be adopted to give effect to them from April 2012: *A revised regulatory framework for social housing in England from April 2012. A statutory consultation* (TSA, November 2011).² The framework covers anti-social behaviour, tenure, quality of social housing, etc. Responses are invited by 10 February 2012.

The new separate arrangements for regulation of social landlords in Wales were brought into force on 2 December 2011: The Housing (Wales) Measure 2011 (Commencement No 1) Order 2011 WSI 2475.³

Social housing allocation

To coincide with the commencement of the allocation provisions of the Localism Act 2011 later this year (see page 23 of this issue), the UK government is expected to give further statutory guidance to English housing authorities under Housing Act (HA) 1996 s162. The housing minister has announced that the new guidance will invite local housing authorities in England to give more consideration to the needs of applicants

seeking accommodation so that they can foster or adopt children: DCLG news release, 18 November 2011.⁴

This announcement follows an earlier commitment made to military service personnel that the UK government would 'give councils a duty to put heroes who want a home in their area at the top of the local waiting list': DGLG news release, 11 November 2011.⁵

Social housing fraud

The Audit Commission's latest report describes housing tenancy fraud as the largest category of fraud loss across local government: *Protecting the public purse 2011* (Audit Commission, November 2011).⁶ It records a 75 per cent increase in the number of unlawfully occupied properties recovered by social landlords in 2010/11 compared with 2008/09 and gives examples of successful initiatives to repossess premises which have been sub-let.

Possession claims

The latest figures on county court housing possession claims in England and Wales show that while mortgage possession claims are falling, landlord possession claims are increasing: *Statistics on mortgage and landlord possession actions in the county courts in England and Wales – third quarter 2011* (Ministry of Justice (MoJ), November 2011).⁷

The Housing Rights Service in Northern Ireland has produced a useful video for homeowners facing possession proceedings, designed to encourage them to attend court hearings. It outlines court procedures and gives advice on available options.⁸

Court fees for housing cases

The MoJ is conducting a consultation on proposals to increase court fees for legal proceedings in the High Court and in the Court of Appeal (Civil Division): *Fees in the High Court and Court of Appeal Civil Division* (MoJ, Consultation Paper CP15/2011,

November 2011).⁹ Responses are invited by 7 February 2012.

Homelessness

Many applicants for homelessness assistance under HA 1996 Part 7 will be owed an 'advice and assistance' duty by the local councils to which they apply. In England and Wales, the content of such advice and assistance is the subject of guidance, not legislation. From 1 November 2011, new regulations in Northern Ireland have prescribed the appropriate forms of advice and the appropriate types of assistance: The Homeless Persons Advice and Assistance Regulations (Northern Ireland) 2011 SRNI No 339.¹⁰ Advisers in other parts of the UK could utilise the lists as helpful check-sheets.

The *Live tables on homelessness* provide the latest, most useful or popular data on homelessness in England, presented by type, geographical area and on a temporal basis. They have recently been adjusted and updated.¹¹

The Welsh Assembly Government (WAG) has commissioned research to help it decide how best to use its new law-making powers in relation to homelessness in Wales. The researchers will be arranging stakeholder meetings in 2012 and have issued a call for evidence to inform the review.¹²

Despite recent government initiatives, many people are still sleeping rough. The charity St Mungo's has published a report explaining why: *Battered, broken, bereft. Why people still end up sleeping rough* (St Mungo's, October 2011).¹³

Housing and anti-social behaviour

A commitment to bring into force in 2011 provisions extending the availability of gang injunctions to 14- to 17-year-olds was included by the UK government in its report: *Ending gang and youth violence* (Home Office, November 2011).¹⁴ The report indicates that at least ten gang injunctions have been made against adults since county courts were given the power to grant such injunctions in January 2011.

The WAG is conducting a consultation exercise on a new mandatory power of possession for anti-social behaviour and whether or not such a power is needed in Wales: *A new mandatory power of possession for anti-social behaviour* (WAG, November 2011).¹⁵ Responses are invited by 10 February 2012.

Housing facts and figures

The UK government has released the latest statistics on council housing in England: *Local authority housing statistics, England*,

2010–11 (DCLG, November 2011).¹⁶

The figures indicate that:

■ 87 per cent of councils now use choice-based lettings schemes;

■ 1.84m households are on housing waiting lists;

and that in 2010/11 councils in England:

■ evicted nearly 6,000 tenants; and

■ made 146,400 lettings.

Private rented sector

The Chartered Institute of Housing Northern Ireland, the Department for Social Development and SmartMove NI have jointly published *Making the most of Northern Ireland's private rented sector to meet housing need* (November 2011).¹⁷ The paper aims to further the debate on the role of the private rented sector as part of the wider housing agenda in Northern Ireland and to raise awareness of the sector as a valuable housing option.

Service charges

The Royal Institution of Chartered Surveyors (RICS) and other professional organisations engaged in advisory work in the leasehold sector have jointly published new guidance on the reporting and accounting procedures for drawing annual service charge accounts: *Residential service charge accounts. Guidance on accounting and reporting in relation to service charge accounts for residential properties on which variable service charges are paid in accordance with a lease or tenancy agreement* (RICS, October 2011).¹⁸

SECURE TENANCIES

Right to buy

■ Francis v Southwark LBC

[2011] EWCA Civ 1418,

1 December 2011

Mr Francis was a secure tenant of a flat. He had a history of rent arrears, which led to various claims for possession, but he was able to avoid eviction by reducing or clearing the arrears. In 2003, he submitted a right to buy application. At that time, his maximum discount would have been £38,000. This application was rejected by the council, which stated 'you have breached the terms of a possession order'. Mr Francis then applied in existing possession proceedings for the revival of his secure tenancy, and for an order that he had been a secure tenant from 1 September 1999 onwards.

In March 2004, District Judge Wilding found against him, but granted permission to appeal. In June 2005, HHJ Behar allowed that appeal and declared that Mr Francis had been a secure tenant from April 2000. In the

meantime, the council decided to demolish the block in which the flat was situated and in July 2004 it granted Mr Francis an introductory tenancy of another flat. He again accrued rent arrears, and in February 2006 the council began new possession proceedings. Mr Francis counterclaimed for damages for breach of statutory duty for the previous failure by the council to grant him the right to buy. HHJ Gibson dismissed the counterclaim. Mr Francis appealed.

The Court of Appeal dismissed the appeal. There was nothing in either HA 1985 s118 or s124 to suggest that parliament intended to create a remedy in damages. The mere fact that, in some circumstances, the remedy created by the Act was not complete, was not a justification for reading into it words which were not there.

POSSESSION CLAIMS

Suspension of warrants

■ Royal Bank of Scotland v Bray

Halifax County Court,

25 November 2011¹⁹

The claimant was granted a possession order in respect of Mrs Bray's home. The bank obtained, but then withdrew, five warrants for possession. It then obtained a further warrant. Mrs Bray wrote to the claimant's solicitors before the eviction date, offering to clear the arrears at lunchtime on 18 November 2011 as she had sold her car and would have cleared funds to make the payment. She did not apply to suspend the warrant. She heard nothing in response from the lender or its solicitors and went to work as normal on 18 November. Mrs Bray received a telephone call from her neighbours that morning indicating that they had seen someone in the garden. She ran to the house to discover the court bailiff, locksmiths and a dog handler at the property. Access had already been gained through the rear door. She explained that she could pay off the arrears and was advised by the bailiff to attend court to make an emergency application. Mrs Bray rushed to the court office and made an application to suspend.

The court officer referred the matter to the bailiff's clerk and the judge. The judge was incorrectly informed that the warrant had already been executed. As a result, the application to suspend was not heard and Mrs Bray was instead referred to the Citizens Advice Bureau. It made an emergency application to set aside the warrant on the basis that there had been oppression. Mrs Bray then sought to rely on the original application notice that she had completed at court on the morning of the eviction. She

submitted that it had in fact been made before the warrant had been properly executed, on the basis that the bailiff had not given quiet possession to the claimant at the point that she made the application.

Accordingly, the court still had its normal discretion under the Administration of Justice Acts to suspend the warrant. At the hearing, the bailiff confirmed that he had received a telephone call from the court informing him that the defendant was at the court asking to see the judge while he was still at the property and before it had been fully secured and both locks refitted.

District Judge Goldberg found that the warrant had not been executed at the time that Mrs Bray attended court and issued her application. He ordered that the warrant be suspended on payment of the arrears in full within seven days and thereafter on payment of instalments. (See Woodfall, *The Law of Landlord and Tenant*: 'not understood to be executed completely, [until] the sheriff and his officers are gone, and the plaintiff left in quiet possession'.)

LONG LEASES

Service charges

■ Church Commissioners for England v Koyale Enterprises

Central London County Court,

22 September 2011

Koyale Enterprises was the assignee of a 99-year lease of a flat. The lease contained a covenant to pay service charges. The claimant freeholder brought a CPR Part 7 claim for unpaid service charges. No acknowledgment of service or defence was filed and, in March 2011, a default judgment was entered for £7,919.50 in respect of rent, service charges, contractual interest and contractual costs. In April 2011, the claimant began a claim for forfeiture which was listed for hearing in June 2011. District Judge Lightman dismissed the claim on the ground that, even though the landlord had obtained default judgment in respect of unpaid service charges, the amount of the service charge payable by the tenant had not been finally determined within the meaning of HA 1996 s81. The Church Commissioners appealed.

HHJ Dight allowed the appeal. A default judgment is a determination for the purposes of section 81 (see *Southwark LBC v Tornaritis* Lambeth County Court, 11 May 1999 (HHJ Cox) and *Hillbrow (Richmond) Limited v Alogaily* Wandsworth County Court, 7 November 2005 (HHJ Rose)).

HOUSING ALLOCATION

■ **R (Adams) v Commission for Local Administration in England**

[2011] EWHC 2972 (Admin),
11 November 2011

In 2005 the claimant, a private sector tenant, applied for council accommodation in Lambeth and was placed in group F of the council's allocation scheme. In February 2009, her solicitors complained to the local government ombudsman that there had been maladministration in the handling of her application. In May 2009, the ombudsman expressed the provisional view that the complaint would be upheld. Eight days later the council agreed to move the claimant to group B and made an immediate offer of housing. That offer was accepted and the tenancy started in June 2009. The council also offered £2,000 by way of compensation, a figure proposed by the ombudsman. Given those responses, the ombudsman decided to discontinue the investigation.

The claimant applied for judicial review, seeking an order that the ombudsman should continue the investigation and, most particularly, recommend payment by Lambeth of her legal costs. Although she had been assisted under the Legal Help scheme she sought an order that would require Lambeth to provide reasonable remuneration for her solicitors' work at market rates.

Bean J dismissed the claim. The statutory scheme under which the ombudsman operated did not provide for costs orders of the type sought. Although this would mean that solicitors could not obtain anything better than legal aid rates, even when assisting a successful complainant, no other result could be derived from the legislation.

■ **R (Babakandi) v Westminster City Council**

[2011] EWCA Civ 1397,
2 November 2011

A transfer applicant challenged the legality of the council's social housing allocation scheme by way of judicial review. Nicol J rejected all four grounds advanced and the claim failed (see [2011] EWHC 1756 (Admin); August 2011 *Legal Action* 40). The claimant sought permission to appeal.

Sullivan LJ refused permission on the basis that none of the grounds had a reasonable prospect of success on appeal. On the first ground, an alleged failure to give the 'reasonable preference' categories of applicant (HA 1996 s167(2)) preference in the council's scheme at all times, he said: 'While of course the obligation to give reasonable preference is a continuing one and in that sense is absolute and required to be complied with at all times, it would be

wrong to assess whether or not it is being complied with by simply taking a snapshot of the operation of the scheme on a particular day or a particular week' (para 3).

HOMELESSNESS

Whether homeless

■ **Chawa v Kensington and Chelsea RLBC**

Central London County Court,
19 July 2011²⁰

Ms Chawa and her 11-year-old son lived in a privately rented studio flat. She applied for homelessness assistance under HA 1996 Part 7 but the council decided that, notwithstanding the overcrowding, it was reasonable for her to continue to occupy the flat: HA 1996 s175(3). The reviewing officer upheld that decision, having taken into account general housing circumstances in the area (HA 1996 s177(2)), most particularly the number of households on the council's waiting list with even more acute overcrowding.

HHJ Hand allowed an appeal. While it was open to a reviewing officer to draw on his/her experience with overcrowding in the council's area as part of the 'general housing circumstances', it was not permissible to conduct a comparative exercise and decide that the property was reasonable for the applicant to continue to occupy because 'there are others who are worse off than you'. This was particularly so when the comparators were those on the housing register who were, by definition, in the most housing need.

Temporary accommodation

■ **Ngesa v Crawley BC**

[2011] EWCA Civ 1291,
26 October 2011

Ms Ngesa was an unsuccessful asylum-seeker. She applied to the council for homelessness assistance in a false name and was provided with a non-secure tenancy of council housing as temporary accommodation. She fell into arrears. The council gave notice to quit, bringing an end to the tenancy, and then sought possession. No defence was entered and no point was raised relying on Human Rights Act 1998 Sch 1 article 8. Deputy District Judge Starke made a 28-day possession order and when that period expired the council obtained a warrant to execute it. District Judge Taylor granted a stay of the warrant but the council appealed. The council had by this stage discovered Ms Ngesa's deception and also contended that HA 1980 s89 imposed an absolute limit of six weeks for a delay in executing an order. HHJ

Hollis allowed the appeal and gave leave to re-issue the warrant.

Ms Ngesa sought permission to appeal out-of-time, contending that HHJ Hollis ought to have applied article 8 of his own motion and ought to have adjourned to get a fuller picture of the facts. The application was refused. Rimer LJ held that Deputy District Judge Starke had had, in the absence of any defence, no alternative but to grant possession. Once the possession order had been made, the powers of the court were circumscribed by HA 1980 s89. The decision in *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 WLR 287, in which the Supreme Court had decided that section 89 was not incompatible with article 8, spelt the end of Ms Ngesa's argument. HHJ Hollis had been right to lift the stay on the warrant.

Suitable accommodation

■ **Abed v City of Westminster**

[2011] EWCA Civ 1406,
9 November 2011

The council owed Ms Abed, who was homeless, the main housing duty in HA 1996 s193. In performance of that duty it offered her temporary accommodation in Ilford. She refused the offer on the basis that the accommodation was not suitable because she needed to remain in Westminster as daily carer to her disabled nephew who lived in the council's area. The council upheld the decision on review but compromised an appeal against that decision by undertaking a second review. The reviewing officer decided that the offer had been suitable and that the duty had ended: HA 1996 s193(5).

HHJ Baucher dismissed an appeal from that decision. On a second appeal, Ms Abed argued that the council had followed an unlawful process in offering the accommodation without having first made an assessment of its suitability for her, relying on *R v Newham LBC ex p Ojuri* (No 3) (1999) 31 HLR 452, and that this flaw was incapable of remedy on review.

The Court of Appeal dismissed the appeal. *Ojuri* had concerned a decision not capable of review under HA 1996 s202. Where, as here, a review process was available, and constituted a complete reconsideration of the facts, it was not fatal to the council's decision-making to show that suitability had not been considered before a section 193(5) offer was made. Just as in public law proceedings, once an initial decision had been wholly reconsidered on its merits, any public law challenge to the initial decision fell away. Any criticism had to be directed to the review decision. There had been no error in the review decision in this case.

■ Ikponwba v Haringey LBC

[2011] EWCA Civ 1302,
6 October 2011

Ms Ikponwba was homeless. The council owed her the main housing duty in HA 1996 s193. It provided her with temporary accommodation and registered her application for social housing. Under the council's choice-based lettings system, an auto-bidding mechanism caused her to be offered a property. She said that the property was neither suitable nor reasonable for her to accept. Both matters were decided against her on review. On appeal, she took the point that HA 1996 s193(7F) requires the issues of suitability and reasonableness to be considered to the satisfaction of the council before an offer is made.

HHJ Marshall QC found as a fact that there had been 'human intervention and consideration' between the auto-bid and the offer that was sufficient to meet the statutory requirement (para 4). Permission for a further appeal was refused by Arden LJ. There was no real prospect of upsetting the judge's finding that the relevant matters had been given proper consideration at the time of the offer.

Review procedure**■ Butt v Hounslow LBC**

[2011] EWCA Civ 1327,
5 August 2011

A decision that Mr Butt had become homeless intentionally (HA 1996 s190) was taken by council officer S. When a review request was received, officer S wrote letters suggesting that he was conducting the review. He made the procedural arrangements for the review and granted an extension of time.

The review decision notification was signed by officer F, a senior officer who had not previously been involved in the application. Mr Butt complained that there had been an irregularity and that in reality officer S had taken both decisions.

HHJ Faber allowed officer F to give evidence in which he explained that he had made the review decision. On that basis an appeal against the review was dismissed.

Mr Butt sought permission to bring a second appeal, complaining that the judge ought not to have allowed oral evidence on a homelessness appeal. Refusing permission, Lord Neuberger MR said that once the question of who took the review decision was in issue the judge was entitled to take oral evidence and reach a conclusion on it.

Appeals**■ Bubb v Wandsworth LBC**

[2011] EWCA Civ 1285,
9 November 2011

Ms Bubb was homeless. The council owed her the main housing duty in HA 1996 s193. It offered her accommodation under HA 1996 Part 6 which she refused on the basis that it was not suitable. The council could only treat the refusal as ending its duty if Ms Bubb had received a notice containing the information required by section 193(7) which provides: 'The local housing authority shall ... cease to be subject to the duty under this section if the applicant, having been informed of the possible consequence of refusal and of his right to request a review of the suitability of the accommodation, refuses a final offer of accommodation under Part 6.'

Ms Bubb said that she had not received the notice but a reviewing officer decided that she had received it. On appeal, Ms Bubb argued that the judge should decide for himself the question of whether the notice had been received as it was a precedent fact to the determination of the statutory duty.

HHJ Ellis dismissed the appeal. The Court of Appeal dismissed a second appeal. It held that the judge only had to decide whether or not the conclusion of the reviewing officer had been wrong in law. He exercised a supervisory jurisdiction and was not entitled to reconsider the factual issues for himself. There had been no error of law in the review decision in this case and no error by the judge in his consideration of it.

- 1 Available at: www.communities.gov.uk/documents/housing/pdf/2017529.pdf.
- 2 Available at: www.tenantservicesauthority.org/server/show/ConWebDoc.21636.
- 3 Available at: www.legislation.gov.uk/wsi/2011/2475/pdfs/wsi_20112475_mi.pdf.
- 4 Available at: www.communities.gov.uk/news/housing/2032823.
- 5 Available at: www.communities.gov.uk/news/corporate/2028339.
- 6 Available at: www.audit-commission.gov.uk/SiteCollectionDocuments/AuditCommissionReports/NationalStudies/20111110-ppp-2011.pdf.
- 7 Available at: www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/mortgage-landlord-possession-stats-q3-11.pdf.
- 8 See: www.housingrights.org.uk/about-us/news/199-new-resource-for-homeowners-facing-court-action.html.
- 9 Available at: www.justice.gov.uk/downloads/consultations/appeal-high-court-fees-consultation.pdf.
- 10 Available at: www.legislation.gov.uk/nisr/2011/339/pdfs/nisr_20110339_en.pdf.
- 11 Available at: www.communities.gov.uk/housing/housingresearch/housingstatistics/housingstatisticsby/homelessnessstatistics/livables/.
- 12 See: www.cplan.cf.ac.uk/homelessness/have-your-say.

- 13 Available at: www.mungos.org/documents/7269.pdf.
- 14 Available at: www.homeoffice.gov.uk/publications/crime/ending-gang-violence/gang-violence-detailreport?view=Binary.
- 15 Available at: <http://wales.gov.uk/docs/desh/consultation/111118housingantisocialen.pdf>.
- 16 Available at: www.communities.gov.uk/documents/statistics/pdf/2039199.pdf.
- 17 Available at: www.cih.org/resources/PDF/NI%20policy%20docs/Making%20the%20most%20of%20NI%20private%20rented%20sector%20to%20meet%20need.pdf.
- 18 Available at: www.icaew.com/~media/Files/Technical/technical-releases/legal-and-regulatory/tech-03-11-residential-service-charge-accounts.ashx.
- 19 Carl Jackson, Calderdale Citizens Advice Bureau.
- 20 Lindsay Johnson, barrister and Gemma Marrs, solicitor, Alan Edwards & Co, London.



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