

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

Reforming social housing law

The Localism Bill is expected to pass through its remaining stages in the House of Lords during October 2011. The housing-related clauses are in Part 6 of the bill. Royal assent is expected before the end of the year. The main housing provisions are unlikely to be brought into force until 2012.

Disposing of social housing

A consultation exercise is underway on proposals to give local councils in England greater flexibility over sales (and other disposals) of social housing and concerning how the sums realised by disposals can be spent. In particular, it is proposed that there be a broader consent to sell under Housing Act (HA) 1985 s32: *Streamlining council housing asset management: disposals and use of receipts* (Department for Communities and Local Government (DCLG), August 2011).¹ Responses are invited by 17 November 2011.

Homelessness prevention

The latest statistics on homelessness prevention activity in England (otherwise than under the homelessness provisions of HA 1996 Part 7) indicate that there were an estimated 188,000 cases of homelessness prevention or relief during 2010/2011 – an increase of 14 per cent on the previous year: *Homelessness prevention and relief: England 2010/11 experimental statistics* (DCLG, August 2011).²

Rent and mortgage arrears possession claims

The official statistics indicate that the number of possession claims brought by landlords, the majority based on arrears of rent, continues to grow. In the quarter April–June 2011, 34,946 claims were issued and 23,568 possession orders were made by county courts: *Statistics on mortgage and landlord possession actions in the county courts in*

England and Wales – second quarter 2011 (Ministry of Justice, August 2011).³ The same set of statistics indicates that 14,075 possession orders against homeowners were made by county courts in April–June 2011 on the ground of mortgage arrears. In response to this data, the UK government called on homeowners in difficulties to seek early advice: DCLG press notice, 11 August 2011.⁴

New information leaflets for landlords and tenants

The UK government has published three new factsheets covering the rights and obligations of landlords and tenants in England.

■ *Top tips for landlords* (DCLG, August 2011) giving advice on securing a suitable letting agent; the need for written tenancy agreements and inventories; and protecting tenants' deposits;⁵

■ *Top tips for tenants* (DCLG, August 2011) covering the legal requirements related to renting; how to deal with disputes; and what to expect from landlords;⁶

■ *Gaining possession of a privately rented property let on an assured shorthold tenancy* (DCLG, August 2011) dealing with routes landlords must take to recover possession; how much notice they must give;⁷ and ■ guidance on the procedures which can be used to help speed up the process.

Housing briefing notes

The House of Commons Library has published further helpful briefings on housing topics:

■ *After the 2011 riots – evicting social tenants* (Standard note: SN/SP/6064, 12 September 2011);⁸

■ *Anti-social behaviour in social housing* (Standard note: SN/SP/264, 9 September 2011);⁹

■ *Anti-social neighbours in private housing* (Standard note: SN/SP/1012, 8 September 2011);¹⁰

■ *Housing options for ex-service personnel* (Standard note: SN/SP/244, 10 August 2011);¹¹

■ *Tenants' deposits* (Standard note: SN/SP/02121, 9 August 2011);¹²

■ *Squatting in residential premises* (Standard note: SN/SP/355, 9 August 2011);¹³

■ *Homeless households in temporary accommodation (England)* (Standard note: SN/SP/110, 8 August 2011);¹⁴

■ *Homelessness in England* (Standard note: SN/SP/164, 8 August 2011).¹⁵

Affordable Rent tenancies

The Tenant Services Authority (TSA) and the Homes and Communities Agency (HCA) have jointly issued more guidance to local councils and housing associations that may be considering taking up new opportunities to let social housing at up to 80 per cent of market rents: *Delivering new Affordable Rent homes without HCA funding* (July 2011).¹⁶ The new guidance is directed particularly at those landlords seeking to develop social housing without HCA grant funding or through 'section 106' agreements under Town and Country Planning Act 1990 s106. See also Luba and Marshall-Williams 'Affordable Rent tenancies' in (2011) 14 *Landlord & Tenant Review* 159.

Rentcharges

The UK government has issued a range of guidance materials aimed at house owners in England who are affected by a 'rentcharge' (also known as a 'chief rent') or who pay a share of service charges for leasehold houses. The DCLG website providing a portal to those publications contains a description of the issues faced by such residents and a list of the recently published materials.¹⁷

Private sector letting agents

A new internet-based service, SAFEagent, has been launched, which is intended to protect consumers by enabling them to select a reliable letting agent. The SAFEagent scheme directs prospective tenants exclusively to those agents in membership of one of the trade organisations self-regulating letting agent quality and conduct.¹⁸

Housing in the UK

The National Housing Federation has published the report of research that it had commissioned from Oxford Economics on the state of the UK housing market: *Housing market analysis* (July 2011).¹⁹ The report draws attention to the diminished housing supply in the UK and the prospects for a fall in owner-occupation and for increased rents in the private rented sector.

Homes on water

Presently about 15,000 households in Britain live in houseboats moored on canals and rivers. The UK government has announced that local authorities in England may use the New Homes Bonus scheme to provide more

such homes through an increase in the number of residential moorings.²⁰ British Waterways (BW) has published guidance on the development of new residential mooring sites: *Guidance for development of new residential mooring sites (England & Wales)* (May 2011).²¹

Homelessness in Scotland

Local authorities in Scotland are working towards a December 2012 target of all homeless applicants being accepted as having 'priority need'. The latest statistics from the Scottish government show that single people aged between 26 and retirement age have already become the largest priority need group: *Operation of the Homeless Persons legislation in Scotland: 2010-11* (Scottish government, August 2011).²²

Right to buy in Wales

The Housing and Regeneration Act 2008 (Commencement No 2) (Wales) Order 2011 SI No 1863 brought Housing and Regeneration Act 2008 s309 (former right to buy and other flats: equity share purchases) into force on 26 July 2011 for the purpose of enabling Welsh ministers to make regulations. The Order also brought sections 308 and 309 (former right to buy and other flats: service charge loans) fully into force in relation to Wales on 19 August 2011.

The consequential regulations dealing with service charge loans are the Housing (Service Charge Loans) (Amendment) (Wales) Regulations 2011 SI No 1864. The consequential regulations dealing with equitable interests are the Housing (Purchase of Equitable Interests) (Wales) Regulations 2011 SI No 1865.

POSSESSION CLAIMS

Outright or postponed order?

■ Birmingham CC v Harrison

[2011] EWCA Civ 996,
19 April 2011

Mr Harrison was a secure tenant. Birmingham sought an order for possession on the ground that Mr Harrison had been guilty of conduct that caused nuisance or annoyance (HA 1985 Sch 2 Grounds 1 and 2). He accepted that he had been guilty of such conduct and that it was reasonable to order possession. He submitted, however, that having regard to the conduct of Birmingham and other occupiers in the locality, any order for possession should be postponed. HHJ Robert Owen QC rejected that submission and made an outright order for possession. Mr Harrison sought permission to appeal.

Etherton LJ refused a renewed application

for permission to appeal. The judge plainly did address the points raised by Mr Harrison and made findings of fact which wholly undermined his contentions. It was extremely difficult to see how the judge could fairly be criticised for failing to weigh the evidence. The defendant's conduct was 'serious and dangerous' (para 13). The judge dealt with the issue of proportionality in detail. It was clear that the overall effect of the judge's findings of fact was that he considered that Mr Harrison remained a dangerous person who had not reformed and had a low level of tolerance. His neighbours and other people in the locality would not be protected adequately by an injunction.

Proportionality

■ West Kent Housing Association Ltd v Haycraft

[2011] EWCA Civ 992,
22 July 2011

Mr Haycraft had a 'starter tenancy' (presumably an assured shorthold tenancy) under HA 1988. He was insulin dependent. As a result, he was vulnerable and suffered cognitive and comprehension difficulties. A neighbour made a complaint. Mr Haycraft denied the allegation, but a review panel decided that it preferred the neighbour's story. As a result, the housing association decided not to renew his tenancy and began a possession claim. Deputy District Judge Clough made a possession order. HHJ Simpkins dismissed an appeal. He said that he had to look to the interests not only of the tenant but also of the other tenants. The allegations were serious. He was not satisfied that if the facts were true it would have been disproportionate to seek possession.

In granting a renewed application to bring a second appeal, Arden LJ said:

... in the particular circumstances of this case, ... it is just about arguable that the proportionality of the making of a possession order should have been considered by the judge because there were factors which had not been taken into account, namely whether his conduct since the start of the tenancy had been of a different order and the question of whether given that he would be likely to be homeless and might be intentionally homeless as a result of the finding on disputed allegations (para 19).

Setting aside possession orders

■ Worthmore Ltd v Miskiniene

Brentford County Court,
30 June 2011²³

Ms Miskiniene was an assured shorthold tenant. Her landlord issued a claim for possession based on rent arrears. Ms

Miskiniene failed to attend the first hearing because, she said, the landlord had duped her into believing that she need not attend. A possession order was made under HA 1988 Sch 2 Ground 8 with a money judgment for arrears of £8,125. The level of arrears found by the district judge reflected a 'payment history' attached to the particulars of claim. Ms Miskiniene discovered the Order had been made seven days later and made an application to set it aside four weeks after the making of the possession order. On the hearing of the application, she explained the steps she had taken to obtain help and legal representation and the handicap of her limited English. She also claimed that she wished to defend on the basis of a set off and counterclaim for disrepair and an attempted unlawful eviction. The landlord disputed all this.

District Judge Jenkins set aside the possession order and money judgment. Applying the Civil Procedure Rules (CPR) 39.3(5) test, he found that the application had been made promptly. He also found that he ought to proceed on the basis of Ms Miskiniene's account of the discussion with the landlord that had led to her failing to attend without making any finding of fact. On that basis she had shown a good reason for not attending. Lastly, he found that Ms Miskiniene's evidence of disrepair was not sufficiently substantial or detailed to satisfy him that her counterclaim had a reasonable prospect of reaching a level where it might be set off so as to bring the level of rent arrears below two months and defeat the Ground 8 claim. Accordingly, Ms Miskiniene did not satisfy the CPR 39.3(5) test. However, the fact that the judge at the first hearing had been given incorrect information about the level of rent arrears by the landlord was an unusual and compelling reason for applying the wider CPR 3.1 case management discretion. It was incumbent on a landlord in such circumstances to provide accurate and proper evidence to the court. Applying that test, it was right to set aside the possession order and money judgment and permit Ms Miskiniene to advance her defence.

Secure tenancy

Succession

■ Islington LBC v Atkins

Clerkenwell & Shoreditch County Court,
20 May 2011²⁴

Islington began a possession claim alleging that Mr Atkins was an unauthorised occupier. He defended the claim on the ground that he had succeeded to the tenancy as he had lived with the former deceased tenant as if they were civil partners. He therefore argued that he was a

member of the latter's family as defined by HA 1985 s113(1)(a) even though neither had been open about their relationship. Neither had informed the authorities that they were partners. Islington disputed that Mr Atkins had lived at the property. It denied that he was anything more than a friend of the former tenant.

HHJ John Mitchell accepted the evidence of a friend of Mr Atkins, who said that she was one of very few individuals who knew of his relationship with the deceased. She said that homosexuality was not accepted within their community. The judge also accepted evidence about the type of care Mr Atkins had provided to his late partner while ill and found that the evidence was consistent with them living together as if they were civil partners, notwithstanding that they did not live openly as a couple. HHJ Mitchell held that Mr Atkins had succeeded to his late partner's tenancy and dismissed the claim for possession.

Assured shorthold tenants

Deposits

■ Forster v Hopper

Consett County Court,
1 June 2011²⁵

Ms Hopper was the owner of a house which she let in July 2009 to Ms Forster. Ms Forster paid a deposit of £495 to a letting agent. She lived in the property until June 2010. At the end of the tenancy Ms Forster, Ms Hopper and Ms Hopper's mother inspected the property and agreed that £361.75 would be deducted for damage to the property. Ms Forster later sued, claiming that the deductions from the deposit were unreasonable and that there had been no compliance with the tenancy deposit provisions of HA 2004. After the issue of proceedings, the parties reached a compromise that £164 would be paid to Ms Forster and that Ms Hopper would withhold the remaining amount of £197.75 for the damage to her property. An agreement was signed and a cheque was sent to Ms Forster. At trial, it was argued that no section 214(4) claim could be pursued because the deposit had been returned.

District Judge Howard accepted the defendant's argument that the deposit had been returned in full even though the 'entire' deposit had not been returned because an agreement had been reached under which Ms Forster had agreed to accept a lesser amount. (See *Green v Sinclair Investments Ltd* September 2010 *Legal Action* 37 and *Soens-Hughes v Lewis* March 2011 *Legal Action* 26.)

RENT ACT 1977

Notices of increase

■ Heartpride Ltd v Sawhney

[2011] EWHC (ChD),
16 May 2011

It has been pointed out to the authors that there was an error in our note of this case in 'Recent developments in housing law', July 2011 *Legal Action* 19. The tenant did not defend the proceedings on the basis that the notice of increase was invalid. The point was taken by a recorder at the hearing.

HARASSMENT AND EVICTION

■ R v Loxley

*Sheffield Magistrates' Court*²⁶

Ms Muscroft rented a flat from Mr Loxley. She lost her job as a café worker and applied for jobseekers' allowance and housing benefit, but there was a delay in the money arriving. Mr Loxley started sending regular text messages asking when the rent would be paid. None of these text messages contained any threats or obscene language, but Mr Loxley's advocate accepted that simply sending texts, just about every day, was conduct which could amount to harassment. Council officers warned Mr Loxley twice about his behaviour, but Ms Muscroft continued to receive the messages, including a warning that a lodger would move in the next day. In April 2010, Ms Muscroft moved her furniture out of the flat. A council tenancy relations officer warned Mr Loxley not to take any action until the tenancy had been formally surrendered, but he ignored the advice and changed the locks. When Ms Muscroft returned three days later she could not get in. Mr Loxley pleaded guilty to one offence contrary to the Protection from Eviction Act 1977.

District Judge Browne ordered Mr Loxley to pay a £250 fine, a £15 victim surcharge and £425 legal costs. He said:

Sending texts on a daily basis demanding rent would unsettle anyone. In the face of advice from the council, which was to do nothing, you took the thing back into your own control, which was unacceptable.

■ R v Gray

Croydon Crown Court,
21 June 2011²⁷

The three defendants were the landlords of a young couple. After violence and abuse from the defendants, the tenants moved out. As they packed their belongings into their car, they were attacked by Ms Gray. When one of them returned the following day to collect the

rest of her belongings, she was tied up, assaulted and threatened with death by the three defendants. Later, the three assaulted the other tenant: kicking him in the head, beating him with bottles and (one of them) stabbing him with a scalpel.

On guilty pleas, sentences of imprisonment totalling more than eight years were imposed.

LICENSING OF PRIVATE RENTED PROPERTIES

■ R (Peat) v Hyndburn BC

[2011] EWHC 1739 (Admin),
25 May 2011

The council, exercising its powers under HA 2004 Part 3, decided to designate part of its district for selective licensing of private rented properties. The decision was taken in March 2010 and was confirmed by the secretary of state. The new scheme began operation on 10 October 2010. In November 2010, six landlords of properties in the area sought judicial review of the designation. In April 2011, permission to seek judicial review was granted and objections based on delay were rejected.

At the full hearing in May 2011, McCombe J made an order quashing the designation. It found that there had been a failure to comply with the council's obligations to consult as set out in HA 2004 s80(9).

SERVICE CHARGES

■ Brent LBC v Shulem B Association Ltd

[2011] EWHC 1663 (Ch),
29 June 2011

Brent was the freehold owner of an estate comprising 15 flats in five blocks which were leased to Shulem B Association Ltd. Under the terms of the lease, Shulem covenanted to pay a proportion of the actual expenditure incurred by Brent in, inter alia, maintaining the exterior of the blocks of flats. Between 2004 and 2005, major works were carried out to the exterior. Brent made a series of payments to contractors. In February 2006, Brent sent a demand for payment of service charges to Shulem. The demand was expressed to be by reference to their proportion of the estimated cost of the works, as it was said that the final costs had not yet been calculated. Shulem did not pay the sums claimed and Brent issued proceedings. Shulem applied to strike out the claim on the basis that the February 2006 demand was not in keeping with the lease and/or recovery of some of the costs were barred by Landlord and

Tenant Act (LTA) 1985 s20B(1), which provides that a tenant is not liable to pay service charges which were incurred more than 18 months before a demand for payment was served on the tenant. A circuit judge dismissed the application.

Morgan J allowed Shulem's appeal. The demand was not made in keeping with the lease as it referred to estimated costs rather than actual expenditure. It followed that it could not be a valid demand for the payment of a service charge, such that LTA s20B(1) was engaged. Nor was the February 2006 demand a notification for the purposes of section 20B(2), which required written notification of the total costs that had been incurred by the landlord and a statement that the tenant would be required under the terms of his lease to contribute to those costs by payment of a service charge. Morgan J rejected an argument that a notice under section 20B(2) should also detail the proportion of those costs that subsequently the tenant will be required to pay and/or inform the tenant what the resulting service charge demand will be.

■ **Amourgam v Valepark Properties Ltd** [2011] UKUT 261 (LC), 4 July 2011

Mr Amourgam disputed his liability to pay service charges that had been incurred before to 1 October 2007, when LTA s21B came into force, but which had been demanded after this date. The demand had not been accompanied by a summary of rights and obligations as required by section 21B. The Leasehold Valuation Tribunal held that section 21B only applied where the costs had been incurred on or after 1 October 2007.

Allowing Mr Amourgam's appeal, HHJ Huskinson held that section 21B applies to demands for payment of service charges served on or after 1 October 2007, whether or not the costs to which the demands related were incurred before this date.

HOMELESSNESS

■ **Thompson v Mendip DC**

*Court of Appeal (Civil Division), B5/2011/0768, 28 June 2011*²⁸

The council had decided that conventional housing was suitable accommodation for the claimant, in performance of its HA 1996 s193 duty, even though she had lived for decades as a Traveller. On an appeal under HA 1996 s204, HHJ Bromilow quashed that decision: April 2011 *Legal Action* 31.

In the Court of Appeal, Lloyd LJ gave the council permission to appeal on the basis that:

The implications of the judge's ruling as to suitability of accommodation are sufficiently important for this housing authority and other such authorities to justify granting permission to appeal even though this is a second appeal.

The council later withdrew the appeal on terms that it pay the costs in both the Court of Appeal and the county court.

HOUSING AND COMMUNITY CARE

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

[2011] EWCA Civ 954, 10 August 2011

The claimant was a failed asylum-seeker with a history of mental health problems. He sought accommodation from Westminster under National Assistance Act 1948 s21. The council reached a decision that the only support he needed was a regular weekly meeting with a social worker and that his other needs could be met by the NHS. His claim for judicial review of that decision was dismissed by Burnett J: [2010] EWHC 3182 (Admin); January 2011 *Legal Action* 37.

The Court of Appeal allowed an appeal. The judge had underestimated the council's assessment of the claimant's needs for care and attention. He did need care and attention that was not otherwise available to him. The social worker was acting, in effect, as the claimant's care co-ordinator. It would be absurd to provide a programme of assistance and support through a care co-ordinator without also providing the obviously necessary basis of stable accommodation.

- 1 Available at: www.communities.gov.uk/documents/housing/pdf/1961898.pdf.
- 2 Available at: www.communities.gov.uk/documents/statistics/pdf/1968141.pdf.
- 3 Available at: www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/mortgage-landlord-possession-stats-q2-2011.pdf.
- 4 Available at: www.communities.gov.uk/news/housing/1964350.
- 5 Available at: www.communities.gov.uk/documents/housing/pdf/1973738.pdf.
- 6 Available at: www.communities.gov.uk/documents/housing/pdf/1973741.pdf.
- 7 Available at: www.communities.gov.uk/documents/housing/pdf/1973735.pdf.
- 8 Available at: www.parliament.uk/briefing-papers/SN06064.pdf.
- 9 Available at: www.parliament.uk/briefing-papers/SN00264.pdf.
- 10 Available at: www.parliament.uk/briefing-papers/SN01012.pdf.
- 11 Available at: www.parliament.uk/briefing-papers/SN04244.pdf.
- 12 Available at: www.parliament.uk/briefing-papers/SN02121.pdf.

- 13 Available at: www.parliament.uk/briefing-papers/SN00355.pdf.
- 14 Available at: www.parliament.uk/briefing-papers/SN02110.pdf.
- 15 Available at: www.parliament.uk/briefing-papers/SN01164.pdf.
- 16 Available at: www.tenantservicesauthority.org/upload/pdf/AR-outside-programme-guidance-note-270711.pdf.
- 17 Available at: www.communities.gov.uk/housing/homeownership/rentcharges/.
- 18 Available at: www.safeagents.co.uk/news/consumer-protection-goes-live-this-week-for-tenants-and-landlord-through-safeagent.
- 19 Available at: www.housing.org.uk/docs/oxford-economics.doc.
- 20 Available at: www.communities.gov.uk/news/housing/1974169.
- 21 Available at: www.britishwaterways.co.uk/media/documents/British_Waterways_guidelines_for_residential_mooring_sites_May_2011.pdf.
- 22 Available at: www.scotland.gov.uk/ResourceDoc/356601/0120522.pdf.
- 23 Hemantha Warnapala, solicitor, Warnapala & Co, Southall; Bernard Lo, barrister, London.
- 24 Karen Taube, solicitor, Traymans, London; Patricia Tueje, barrister, London
- 25 Peter Thubron, Solicitors, Tyne and Wear; Lewis Kerr, barrister.
- 26 See www.thestar.co.uk/news/local/landlord_fined_700_for_payment_harassment_1_3417126.
- 27 See www.croydonguardian.co.uk/news/9117041.Landlords_jailed_for_physical_assault_of_tenants/.
- 28 David Watkinson, barrister, London.



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