Housing: recent developments

Jan Luba QC and Nic Madge round up the latest political and legislative developments, and highlight cases on human rights, assured shorthold tenancies, licences, long leases, adverse possession, housing allocation, homelessness, and housing and the disabled.

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Politics and legislation

Homelessness

In December 2016, the House of Commons Library issued updated versions of its four helpful free briefing notes on homelessness:

- *Homelessness in England: social indicators page* (Briefing Paper No SN02646, 20 December 2016);
- *Statutory homelessness in England* (Briefing Paper No SN01164, 20 December 2016);
- *Households in temporary accommodation (England)* (Briefing Paper No SN02110, 20 December 2016); and
- *Comparison of homelessness duties in England, Wales, Scotland and Northern Ireland* (Briefing Paper No CBP-7201, 14 December 2016).

On 21 December 2016, the Department for Communities and Local Government (DCLG) announced the successful bidders for its programme of £40m of funding for targeted interventions to reduce homelessness: *Successful bids to the Homelessness Prevention Programme*. The programme comprises:

- £20m to establish a network of Homelessness Prevention Trailblazer areas to develop innovative approaches to prevent homelessness;
- a £10m rough sleeping grant fund to enable local areas to intervene early with rough sleepers before their problems become entrenched; and
- £10m of Social Impact Bond funding to turn around the lives of the most entrenched rough sleepers by getting them into accommodation and addressing their complex needs through personalised support.

Homelessness Reduction Bill

The bill is part-way through its consideration in the House of Commons. In November 2016, to assist with an understanding of its provisions, the DCLG published a series of 10 policy factsheets.[1] They cover:

- advice and information;
- assessment and personal plans;
- prevention;
- relief;
- help to secure and suitability;
- co-operation;
- reviews;
- duty to refer;
- codes of practice; and
- local connection.

Meaning of 'vulnerable'

Later this year, the Court of Appeal is expected to consider the first of a series of appeals concerned with the meaning and application of the phrase 'significantly more vulnerable' – the term approved by Lord Neuberger in *Hotak v Southwark LBC* [2015] UKSC 30 for distinguishing those who have a priority need from others who are rendered vulnerable by the very fact of being homeless. The conflicting first-instance decisions are helpfully gathered by Emma Dring in *When is an applicant 'significantly' more vulnerable than ordinarily vulnerable?*

Meanwhile, some assistance may be provided from the discussion of the phrase 'substantially impaired' in the criminal appeal *R v Golds* [2016] UKSC 61. Lord Hughes held that in ordinary usage, 'substantial' is capable of meaning either: (1) 'present rather than illusory or fanciful, thus having some substance'; or (2) 'important or weighty': para 27. Either sense can be used in legislation or judicial law-making and the word may take its meaning from the context in which it is used.

Eligibility

A parliamentary joint committee has picked up two drafting errors in the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2016 SI No 965: *House of Lords and House of Commons Joint Committee on Statutory Instruments, thirteenth report of session 2016–17* (HL Paper 68, HC 93-xiii, 18 November 2016). The committee reported reg 2(3)(c) and (4)(c) for defective drafting. DCLG has acknowledged the errors and undertaken to make an amendment at the earliest opportunity.

Assured tenancies

A landlord seeking to recover possession on one of the statutory grounds in Housing Act (HA) 1988 Sch 2 usually needs to serve a notice seeking possession under s8. The Assured Tenancies and Agricultural Occupancies (Forms) (England) (Amendment No 2) Regulations 2016 SI No 1118 contain the new prescribed form of s8 notice for use on or after 1 December 2016.

New grounds for possession

On 1 December 2016, HA 1988 Sch 2 Ground 7B was added as a new mandatory ground for possession against assured tenants. It is available where a property is occupied by a person who does not have the 'right to rent' as a result of his or her immigration status. The possession process is initiated by the home secretary serving a notice on the landlord identifying the occupier and indicating that he or she is disqualified as a result of his or her immigration status. The new HA 1988 s10A provides that, in certain circumstances, where Ground 7B is established in respect of a joint tenancy, but no other grounds are made out, the court has a discretion to transfer the tenancy into the name of one or more of the joint tenants who do have the right to rent. An analogous new ground in respect of Rent Act tenants is set out in Rent Act 1977 Sch 15 Case 10A. The changes were made by Immigration Act 2016 s41.

Warrants for breach of suspended possession orders

In *Cardiff CC v Lee (Flowers)* [2016] EWCA Civ 1034 (see December 2016/January 2017 *Legal Action* 40), the Court of Appeal recommended a review of Civil Procedure Rules (CPR) r83.2(3)(e) and the use of form N325 relating to applications for warrants, based on alleged breach of the terms of conditional possession orders. As a result, the Civil Procedure Rule Committee is considering the current wording of the relevant rules and forms and will be consulting interested parties.

In the interim, claimants will be asked by court staff to make their requests for warrants (where there are possession orders suspended on payment of rent or mortgage arrears) using form N325A – a variant of the current request form N325 – or N445 (reissue of warrant). The request must be filed on paper and supporting material on the breach must be provided, eg, a statement of monies due under the order and sums paid. There is no provision on Possession Claim Online (PCOL) for providing additional information required by the new form, so a paper application is required in all cases. The request will be referred to a district judge for a determination as to whether the warrant may be issued. A court order reflecting that determination should be drawn and served by the court in the usual way. If the request is granted, a court officer may issue the warrant. Similar arrangements are being made for the reissue of warrants.

Private renting 1

On 13 December 2016, the DCLG concluded its consultation – *Houses in multiple occupation and residential property licensing reforms: a consultation paper* (DCLG, October 2016) – on the UK government's proposed detailed changes to:

- the mandatory licensing of houses in multiple occupation (HMOs);
- national room sizes;
- the fit and proper person test;
- refuse disposal facilities; and
- regulation of purpose-built student accommodation.

Private renting 2

The Housing and Planning Act (HPA) 2016 introduced a power for the First-tier Tribunal (Property Chamber) to impose a banning order on a landlord or property agent. The DCLG has issued a consultation paper inviting views on which offences should constitute 'banning order offences' as defined by s14 of the Act: *Proposed banning order offences under the Housing and Planning Act 2016: a consultation paper* (DCLG, December 2016). Responses must be submitted by 10 February 2017.

Crown tenants

The Crown Tenancies Bill makes provision for Crown tenancies to be assured tenancies for the purposes of HA 1988, subject to certain exceptions. The bill's Commons second reading was scheduled to take place on 16 December 2016 but was postponed to 27 January 2017. A useful House of Commons Library briefing paper (*Crown Tenancies Bill [Bill 32 of 2016–17]*, Briefing Paper No CBP-7831, 12 December 2016) provides background information on the bill.

Letting social housing

In December 2016, the DCLG published the latest national statistics on social housing lettings in England based on data provided by local authorities and private registered providers: *Social housing lettings in England: April 2015 to March 2016* (revised 7 December 2016). The statistics record that:

- social housing lettings by private registered providers decreased by three per cent to 261,000 in 2015/16, continuing the fall from the previous year; and
- local authority lettings also decreased by three per cent, to 113,000 in 2015/16, a continuation of their long-term downwards trend.

Rents in social housing

On 21 November 2016, the housing minister, Gavin Barwell, announced that the UK government will not bring into force the provisions in the HPA 2016 that implement a mandatory 'pay to stay' regime for social housing rents: *Hansard* HC Written Statement HCWS274, 21 November 2016. Instead, it will be left to councils and housing associations to make their own arrangements to relate rents to tenants' incomes. The policy options are helpfully reviewed in the House of Commons Library briefing paper *Social housing: 'pay to stay' at market rents* (Briefing Paper No SN06804, 22 November 2016). When fixed-term social housing tenancies come to an end, household income will remain a relevant factor in deciding whether a tenancy should be renewed.

Regulating social housing in England

At the end of January 2017, the DCLG completed a consultation exercise on a legislative reform order which will introduce a stand-alone regulator for social housing in England, separate from the current Homes & Communities Agency (HCA): *Social housing regulation: using a legislative reform order to establish the regulator as a stand-alone body* (DCLG, November 2016). Subject to the consultation outcome, the deregulation measure will take effect on 6 April 2017.

In the same month, the HCA finished a statutory consultation about proposals to introduce fees for social housing regulation from April 2017: *Consultation on introducing fees for social housing regulation* (HCA, November 2016). The government believes that introducing fees will help the regulator maintain the right level of skills and capacity to regulate effectively and ensure that it remains adequately resourced.

Meanwhile, on 15 December 2016, the present regulator issued a revised version of the document setting out its operational approach: *Regulating the standards*. The paper is intended to help ensure that everyone knows what to expect from the social housing regulator in England.

Housing with support

A review has estimated that at the end of 2015 there were 651,500 supported accommodation units in Great Britain: *Supported accommodation review: the scale, scope and cost of the supported housing sector* (DCLG, 21 November 2016). The estimated annualised cost of the supported housing sector covered by housing benefit in Great Britain at the end of 2015 was £4.12bn.

The DCLG consultation on the detail of the future funding model for supported housing from April 2019 closes on 13 February 2017: *Funding for supported housing: consultation* (DCLG, November 2016). A House of Commons Library briefing paper spells out the issues: *Paying for supported housing* (Briefing Paper No SN06080, 28 December 2016).

Human rights

Article 1 of Protocol No 1

- **Alentseva v Russia** App No 31788/06, 17 November 2016

Before privatisation, a flat that had been owned by the City of Moscow was let to a tenant, R, who lived in it under a social housing agreement. In 1993, the title to the flat was transferred to R. He died in 1996. In October 1999, Yar applied to a notary seeking recognition as R's heir. He submitted a will allegedly signed by R. The notary granted the request and issued a certificate confirming that Yar had inherited R's flat. The Moscow City Committee for Registration of Real Estate Transactions registered the certificate, confirming Yar's title to the flat. In 2000, Yar sold the flat to Ms Alentseva.

In 2001, a criminal court found Yar guilty of fraud and sentenced him to five years' imprisonment and confiscation of property. In particular, the court established that Yar had fraudulently acquired R's flat and sold it to the applicant on the basis of a forged will. The prosecutor then brought a civil claim on behalf of the City of Moscow that resulted in the annulment of R's will and Ms Alentseva's title to the flat. Despite appeals, she was evicted. Ms Alentseva alleged that she had been deprived of her flat in contravention of article 1 of Protocol No 1 to the European Convention on Human Rights (ECHR).

The government did not challenge the fact that the flat constituted her 'possession'. It conceded that the reversion of the flat to the state had amounted to an interference with her rights under article 1 of Protocol No 1. As to the legitimate aim of the impugned measure, the European Court of Human Rights stated that it is for the national authorities to make the initial assessment as to the existence of a matter of public concern warranting measures of deprivation of property. They 'enjoy a certain margin of appreciation' (para 69). Turning to the question of whether there was a fair balance, the court considered that the state authorities had failed to ensure a proper expert review as regards the lawfulness of the real-property transactions. The court reiterated that mistakes or errors on the part of state authorities should serve to benefit the persons affected. In other words, the consequences of any mistake made by a state authority must be borne by the state and errors must not be remedied at the expense of the individual concerned (*Stolyarova v Russia* App No 15711/13, 29 January 2015).

The court concluded that the forfeiture of the title to the flat and its transfer to the City of Moscow placed a disproportionate and excessive burden on Ms Alentseva (*Gladysheva v Russia* App No 7097/10, 6 December 2011). There was therefore a violation of article 1 of Protocol No 1. The court considered that the most appropriate form of redress would be to restore Ms Alentseva's title to the flat and to reverse the order for her eviction. The court awarded €5,000 in respect of non-pecuniary damage.

For similar cases, see *Pchelintseva and others v Russia* App Nos 47724/07, 58677/11, 2920/13, 3127/13 and 15320/13, 17 November 2016; *Ponyayeva and others v Russia* App No 63508/11, 17 November 2016; and *Tomina v Russia* App No 20578/08, 1 December 2016.

Possession claims and article 8

- **Hillingdon LBC v Holley** [2016] EWCA Civ 1052, 1 November 2016

Mr Holley's grandmother, Mrs Hudson, was a secure tenant of a three-bedroom house until her death in March 2009. Her husband, Mr Hudson, then became a secure tenant by succession. He died in May 2012. In the subsequent possession claim, HHJ Karp proceeded on the basis that Mr Holley had lived at the property continuously since his birth in March 1979, slightly less than three years after his grandmother Mrs Hudson originally became a secure tenant there. Although he was a member of Mr Hudson's family who had resided with him throughout the period of 12 months ending with his death, he had no right of statutory succession since Mr Hudson was himself a successor (HA 1985 ss87 and 88).

It was common ground that he was a trespasser at the time of the hearing. He was 34 years old. Although it was a three-bedroom house, suitable for the accommodation of a family of six, its only occupants were Mr Holley and his brother, who had moved into the property to support Mr Holley because he had developed mental health

problems, including anxiety, panic attacks and depression following his grandmother's death. In defending the claim, Mr Holley relied on ECHR article 8. He argued that: (i) his eviction was a disproportionate interference with his right to respect for his home because he had lived in the property all his life and had mental health difficulties; and (ii) in deciding not to afford him an extra-statutory second succession, Hillingdon had, without justification, discriminated against him on the grounds of his age.

The judge rejected both those defences as not even seriously arguable and made a possession order. (For a case note dealing with this second aspect, see December 2016/January 2017 *Legal Action* 41.) Mr Holley appealed, contending that the judge's analysis of the effect of the length of Mr Holley's occupation of the home was flawed.

The Court of Appeal dismissed the appeal. After considering *Thurrock BC v West* [2012] EWCA Civ 1435; [2013] HLR 5, Briggs LJ stated that local authorities usually seek eviction as a proportionate means of achieving a legitimate aim because they will thereby vindicate their own unencumbered property rights, and be able to comply with their duties in relation to the distribution and management of scarce social housing stock. He continued:

[An occupant] seeking to rely on article 8 will need to demonstrate a minimum length of residence in order to show that the property in question is their home, so that article 8 is engaged. Secondly, the period of residence, however long, will not on its own be sufficient to found an article 8 proportionality defence in the second succession context because, if it would, then it is hard to see how the English statutory prohibition of second succession could be compatible with the convention (para 15).

Length of residence may form part of an overall proportionality assessment, in the sense that all the circumstances of the case may need to be reviewed, and their effect considered in the aggregate, but length of residence is unlikely to be a weighty factor in striking the necessary proportionality balance. A long period of residence may therefore form part of the circumstances, viewed as a whole, but is, in itself, of little consequence. The judge's decision on the article 8 arguability question was plainly right. Mr Holley's medical condition was not, on its own, a factor of anything like sufficient weight to render the decision to evict disproportionate. His lifetime residence at the property was neither exceptional, nor of significant weight, viewed on its own.

No significant added weight in the proportionality balance was achieved by aggregating his medical condition with his long residence. The evidence did not show, for example, that his mental condition was likely to be gravely exacerbated if he were to move from the home in which he had been born to some other home. Nor was the location of this particular property in any sense relevant in terms of making it easier for him to obtain the requisite treatment. This was a case in which the balance remained firmly tilted in favour of the weighty considerations that justified the council seeking eviction, against the much less weighty and unexceptional circumstances put forward by Mr Holley. There was no real prospect that a trial of the claim could lead to a successful article 8 defence.

Assured shorthold tenancies

- **Leeds City Council v Broadley**
  [2016] EWCA Civ 1213,
  6 December 2016

Mr Broadley let premises on assured shorthold tenancies for terms of '[6 or 12] months and thereafter continuing on a monthly basis unless terminated by either party'. In a second appeal from a decision of the Valuation Tribunal for England as to Mr Broadley's liability to pay council tax, the council contended that the question of the identity of the 'owner' of the relevant dwelling within the meaning of Local Government Finance Act 1992 s6, when that dwelling had no resident for the period in dispute, depended on whether it was legally possible to have what has been described as a 'continuation tenancy', namely a single property interest comprising both a fixed and periodic term. The council argued that that was not possible. The tribunal and Edis J held it was possible.

The Court of Appeal dismissed the council's appeal. After referring to Law of Property Act 1925 s205(1)(xxvii), *Doe d Chadbourn v Green* (1839) 9 A & E 658, *R v The Inhabitants of Chawton* (1841) 1 QB 247, *Brown v Trumper* (1858) 2 Beav 11, *Prudential Assurance Co Ltd v London Residuary Body and others* [1992] 2 AC 386 and *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52, McCombe LJ indicated that such a lease was valid. A term granted for a fixed period of months and then from month to month fell 'clearly within the genus of the statutory descriptions in s205(1)(xxvii), either as expressly covered by the words of the paragraph itself or because the paragraph envisages the possibility of creating terms of years, including a term for less than a year and a term from year to year (ie a periodic tenancy). [There was] no good reason why the statute should be taken to have rendered impossible the creation of an amalgam of the two, as had been familiar to the common law for centuries' (para 17). Accordingly, the tenants held throughout the tenancies, whether during the fixed term or thereafter, and so the tenant's liability for council tax continued while those tenancies subsisted as periodic tenancies and even if the tenant had gone out of occupation.

Licences

Eviction and termination of licence

- **Gibson v Douglas**
  [2016] EWCA Civ 1266,
  8 December 2016

Mrs Douglas owned and occupied a property. Mr Gibson lived there for some four or five years as a licensee. After some time, their relationship 'blossom[ed] in the sense that they became ... more than just landlady and tenant [sic]' (para 6). Mrs Douglas's health deteriorated and she developed advancing vascular dementia or Alzheimer's which called into question her capacity to enter into legal relations. She was admitted to hospital. Later, the hospital discharged her, but she did not want to go back to the property while Mr Gibson was there. Her son contacted the police who attended. As a result of the exchange with the police, Mr Gibson was forcibly ejected from the property and was taken away in a police car. Although Mrs Douglas was nearby, Mr Gibson's physical removal was effected by the police.

He claimed damages for unlawful eviction against her son. It was common ground that Mr Gibson was not a tenant and that his licence was an 'excluded licence' within the meaning of Protection from Eviction Act (PfEA) 1977 s3A. Accordingly, he was not entitled to the statutory period of notice under that Act. HHJ Wood QC dismissed the claim, stating that he was not satisfied that the son's role was anything more than simply a conduit of his mother's wishes to the police. Mr Gibson appealed.

The Court of Appeal dismissed the appeal. Neither Mr Douglas, nor for that matter Mrs Douglas, took any active role in what happened. There was no need for HHJ Wood QC to come to any conclusion as to whether the eviction was unlawful, either for want of notice or because Mr Gibson was given inadequate time to pack up and go. However, Sir James Munby, President of the Family Division, added some comments about the length of notice that would have been needed at common law to terminate Mr Gibson's licence, stating (at paras 20–21):

[I]t is clear law that, where the relevant period has not been specified by the licence itself, a licensee is entitled, following revocation of the licence, to whatever in all the circumstances is a reasonable time to remove himself and his possessions: see Minister of Health v Bellotti *[1944] KB 298 ... [I]t is impossible to define the principle with any greater precision and undesirable that we attempt to do so.*

... At one end of the spectrum, the unwanted visitor who presents himself at the front door, is asked in but then told to go, must leave immediately, taking the quickest route back to the highway and not delaying; so his period of grace may be measured in minutes: see Robson v Hallett *[1967] 2 QB 939. On the other hand, a period measured in years may in some cases be appropriate: see, for example,* Parker v Parker *[2003] EWHC 1846 (Ch), where the Earl of Macclesfield was held entitled to two years to leave the ancestral home, Shirburn Castle, which he had been occupying as a licensee for some ten years ... [I]n a case such as this[, it] depends on the circumstances. That said, I very much doubt that it would be a period measured in minutes, hours or even days. On the other hand, I can well imagine that it might typically be a period measured in weeks rather than months or years.*

Almshouses

- **Stewart and others v Watts**
  [2016] EWCA Civ 1247,
  8 December 2016

The claimants were the trustees of the Ashtead United Charity. The principal object of the charity was the provision of almshouse accommodation in three properties comprising a total of 14 residential flats. Under the charity's governing instrument, the trustees were to apply its income for the relief of persons in need, hardship or distress. The residents of its almshouses were to be 'poor single women of not less than 50 years of age who are inhabitants of the area of the ancient parish of Ashtead with a preference for such women who have been employed in domestic service'.

In 2004, Mrs Watts moved into one of the almshouses. Her terms of occupation were set out in an 'appointment letter', which provided that she was appointed 'as a beneficiary

of the charity'. She was to pay a weekly maintenance contribution of £33.42 towards the upkeep of the dwelling. The letter also stated that '[n]either the resident(s) nor any relation … will be a tenant of the charity or have any legal interest in [the] almshouse' and that '[t]he trustees may set aside the appointment of any resident who in their opinion – (a) persistently or without reasonable excuse either disregards the regulations for the residents or disturbs the quiet occupation of the almshouses or otherwise behaves vexatiously or offensively; or … (d) is suffering from mental or other disease or infirmity rendering him or her unsuited to remain a resident'. Mrs Watts acted in an anti-social manner and in breach of the terms of the appointment letter by: swearing, spitting and becoming aggressive to contractors and neighbours; making noise late at night; singing loudly; cooking in the early hours; running her taps all night; hoarding large amounts of junk; throwing rubbish and food from her window; etc. The trustees served a notice to quit and claimed possession.

HHJ Raeside held that: *Gray v Taylor* [1998] 1 WLR 1093, CA was binding on her; Mrs Watts did not occupy the property as a tenant; she did not have a defence based on discrimination compared with other occupiers of public sector and social housing accommodation in breach of ECHR article 14 when read with article 8; Mrs Watts was acting in breach of the terms of her appointment; the trustees did not owe a fiduciary duty to Mrs Watts; and there had been no breach of any fiduciary duty in choosing to terminate Mrs Watts's occupation of the property. She ordered Mrs Watts to give up possession. Mrs Watts appealed, arguing, among other things, that: (1) *Gray v Taylor* was decided per incuriam and was not binding, and so she was a periodic tenant; and (2) the occupiers of almshouse accommodation were entitled to security of tenure by virtue of article 14 when read with article 8.

The Court of Appeal dismissed the appeal. It was 'quite clear that the appointment letter did not grant legal exclusive possession to Mrs Watts' (para 37). As in *Gray v Taylor*, 'there was no question of the trustees trying artificially to colour the appointment letter as licence rather than a tenancy in order to disguise the true nature of the relationship. The trustees could only properly discharge the trusts of the charity … if a personal revocable licence was granted (which could be revoked if, for example, the occupier no longer became qualified under the scheme because they became wealthy)' (para 40). Mrs Watts was granted a personal licence to occupy the property on the terms of the appointment letter. Although it was not strictly necessary to consider the validity of *Gray v Taylor*, HHJ Raeside was entirely correct to hold that that case was not materially distinguishable from the present case and was binding on her. *Gray v Taylor* was correctly decided on its facts because the terms of the charitable trusts and the terms on which the defendant was let into occupation showed that she was never intended to have legal possession and was only ever granted a personal licence to occupy her flat in the almshouse.

The Court of Appeal also rejected the submission that *Gray v Taylor* was no longer good law because its effect was to give rise to a breach of article 14 rights. In the county court, it had been conceded on behalf of Mrs Watts that the charity was not a public authority within Human Rights Act 1998 s6, but in the Court of Appeal, counsel for Mrs Watts attempted to argue that the charity should be considered a public authority. The Court of Appeal stated that the status of the charity was a mixed question of fact and law. Had this been raised as an issue below, it would have been necessary for the court to hear evidence as to the nature of the charity. As the issue was not raised and the judge proceeded on the basis of Mrs Watts's concession, it was not appropriate for her to seek to reopen the issue. The Court of Appeal refused permission to withdraw the concession. After referring to a number of authorities, including *McDonald v McDonald* [2016] UKSC 28; [2016] 3 WLR 45, the court stated: 'The question as to when article 8 is engaged therefore remains unclear … However, for the purposes of the present case we are prepared to proceed on the assumption that its facts do fall within the ambit of article 8 for the purposes of engaging article 14' (para 75).

Although it was not necessary to come to a concluded view, a number of features strongly suggested that Mrs Watts's status as an almsperson was not a qualifying characteristic for the purposes of article 14. First, her residence in an almshouse was a matter of choice on her part. It was not an innate characteristic but one that was acquired. Second, there was a danger of defining a qualifying personal characteristic by the very differential treatment of which Mrs Watts complained (see the comments of Lord Bingham in *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54; [2007] 1 AC 484 at para 28). Third, there was no evidence before the court as to the factors or qualities that were said to be common to all residents of almshouses so as to permit the court to conclude that residence in an almshouse was a characteristic so central to a person as to attract the protection of article 14.

Bearing in mind the wide margin of appreciation accorded to contracting states in implementing social and economic policies in matters concerning housing, the Court of Appeal rejected the submission that there was no good reason why an almsperson should be denied the protections granted to the occupiers of any other form of social housing. In the context of almshouses, the exclusion of security of tenure for almspersons has been in place for many years. The grant of a tenancy would be inconsistent with the duty of the trustees to provide accommodation for deserving persons. The relationship was one of licensor and licensee. On the basis of the material before the court, that was not only the correct characterisation as a matter of domestic law but it also fairly balanced the competing interests of the charity and the resident in a manner which would not be achievable if residents had the status of tenants.

Licence for life determined by breach of condition

- **Zas Ventures Ltd v Forkner** [2016] EWCA Civ 1062, 1 November 2016

Miss Forkner had lived in her family's home all her life. On her mother's death, in 1985, ownership of the house passed to her brother and sister under their mother's will. In 2008, it was agreed that Miss Forkner would be entitled to occupy the house during her life or until she chose to leave, provided she maintained and insured it. After their sister's death, her brother sold the house to Landmark Investments.com Ltd. In 2011, Landmark sold the house to Mohammed Chaudhary at a price that reflected Miss Forkner's right to occupy it during her life. In September 2013, he transferred the property to Zas, a company of which his son, Asad Chaudhary, was a director. In 2012, Asad Chaudhary obtained a report on the condition of the property from surveyors. They identified a number of defects which required immediate repair. In 2013, solicitors acting for Mr Chaudhary wrote to Miss Forkner formally accepting as a repudiation her failure to comply with the terms of her licence.

A possession claim was issued on the grounds that Miss Forkner had failed to insure the property or keep it in good repair. Miss Forkner admitted that she had agreed to insure the property and keep it in good repair, and that she had failed to do either of those things, but she alleged that her predecessors in title had waived her obligations or had released her from them or that they had waived or acquiesced in her failure to perform them. HHJ Faber made a possession order. Miss Forkner appealed.

The Court of Appeal dismissed the appeal. The judge was right to proceed on the basis that the obligation to insure the property and keep it in good repair was a condition of Miss Forkner's right to occupy it, which, if broken, would provide grounds for termination. However, her brother and sister's failure (and subsequently that of Landmark) to require her to carry out any repairs over the course of 26 years, despite the fact that they were aware that the property was in a poor state of repair, and their failure to enquire whether she had insured it, amounted to a clear representation that they would not insist on performance of her obligations, at least without giving her reasonable notice of their intention to do so, and then only in respect of subsequent deterioration. Nevertheless, the judge was entitled to consider that a letter written in 2012 by Mr Chaudhary's solicitors had put an end to the waiver of her obligation to repair. The letter made it clear that he expected her to comply with her repairing obligations in the future.

Long leases

Service charges

- **Thomas Homes Ltd v MacGregor** [2016] UKUT 495 (LC), 14 November 2016

Planning permission was granted to convert a listed former hospital building, which was described 'as a large, rambling structure comprising many blocks and wings linked by corridors' into 130 'units' (ranging from one bedroom to four bedrooms) and a large communal hall. An agreement made pursuant to Town and Country Planning Act 1990 s106 contained a requirement that there should be 39 units of social housing, which were managed by Soha Housing. The remaining 91 units were the subject of open market private leases. Mr MacGregor was one of the open market private lessees.

Pursuant to the s106 agreement, the service charges payable by any occupier of an affordable housing unit were limited to £522 per annum at the time of first sale, with that cap being increased annually in line with the retail prices index. The s106 agreement did not make provision regarding who was to bear any shortfall between the service charge payable by any occupier of an affordable housing unit and

the cost of the services provided. In order to secure 100 per cent recovery of expenses, Thomas Homes, the freeholder, considered itself entitled to recover from the occupiers of the non-social housing units more than would need to be recovered from them if all of the units were open market units and there were no social housing units in the development.

No provision was contained in Mr MacGregor's lease obliging the occupiers of the non-social housing units to pay some identifiable surplus (beyond that which would normally have been payable) to make good the prospective shortfall arising from the cap on charges payable for the social housing units. However, his lease did require him to pay by way of service charge a percentage of the aggregate expenditure of repairing all the buildings, but there was a drafting error in drawing up the leases which meant that if the service charge percentages for all the non-social housing units were added together, the total was approximately 3,000 per cent, with the result that the freeholder would be entitled to recover through the service charges approximately 30 times the amount it actually expended in providing the services. In practice, the freeholder determined the service charge budget for the whole building, deducted the capped contributions for the social housing units and then allocated the balance to all the remaining private lessees according to a set formula, based on the number of bedrooms in the property.

Under Landlord and Tenant Act (LTA) 1985 s27A, Mr MacGregor challenged his service charge demand, partly on the basis that the occupiers of the non-social housing units were subsidising the occupiers of the social housing units. The First-tier Tribunal (FTT) concluded that the terms of the lease were clear and that there was no express or implied term to the effect that Mr MacGregor should subsidise the occupiers of the social housing units. The freeholder appealed.

HHJ Huskinson allowed the appeal. It was necessary to consider whether the sums demanded were reasonable. He rejected the argument that, in assessing the amount that it was reasonable to pay, the tribunal should have had in mind the prospective liability for the much greater sum that arose on the basis of the drafting error. In his judgement, the sums demanded constituted a reasonable sum that was properly recoverable under the terms of the lease and LTA 1985 s19(2).

- **Fairhold Freeholds No 2 Ltd v Moody**
  [2016] UKUT 311 (LC),
  31 August 2016

It was a term of a lease that the lessee 'indemnify the lessor against all actions proceedings costs claims and demands in respect of any breach non-observance or non-performance thereof'. The lessor sought the recovery of £50, as an administration charge, arising from the lessee's failure to pay the ground rent. The lessee paid the ground rent, but refused to pay the administration charge. The lessor subsequently instructed solicitors to recover the unpaid administration charges. The FTT held that such charges were not recoverable. The lessor appealed to the Upper Tribunal (UT).

The UT dismissed the appeal. In the context of a leasehold covenant, one essential characteristic of a covenant of indemnity is that the lessee's breach must have given rise to an obligation on the part of the lessor to make a payment to some third party. It followed that the lessor could not recover its own costs, in this case the administration charge, which it did not owe to a third party. It also followed that the lessor was not entitled to recover the costs of instructing solicitors to recover the administration charge.

- **Admiralty Park Management Company Ltd v Ojo**
  [2016] UKUT 421 (LC),
  20 September 2016

Mr Ojo was the long leaseholder of a flat. He did not pay the service charge demanded and the lessor brought proceedings in the county court. Mr Ojo defended the claim and the matter was transferred to the tribunal. At the final hearing, after the issues had been determined, the FTT, of its own volition and without giving the lessor an opportunity to adduce evidence in response, decided that the service charge had not been calculated in accordance with the lease and as a result was not recoverable. The lessor appealed.

The UT allowed the appeal in part. The FTT had been entitled to raise the point as the departure from the lease was so fundamental to the issues raised at the hearing. The FTT was entitled, especially when one party was unrepresented, to identify all of the important issues that needed to be considered even if they had been overlooked by the parties. The FTT must, however, as a matter of natural justice, give both parties an opportunity to make submissions and, if appropriate, adduce further evidence in respect of the issue.

- **87 St George's Square Management Ltd v Whiteside**
  [2016] UKUT 438 (LC),
  10 October 2016

The FTT ordered Mr Whiteside to pay 20 per cent of the landlord's costs of proceedings in the tribunal under Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI No 1169 r13. The landlord subsequently sought to recover the remaining 80 per cent as an administration charge under an indemnity clause in the lease. The FTT held that the landlord could not do so as it had, by obtaining an order under r13, exhausted its remedies for recovering the costs it had incurred.

The UT allowed an appeal. A landlord that first sought the recovery of its costs under r13 was not precluded or estopped from recovering any remaining balance under an indemnity covenant in the lease.

- **Southwark LBC v Proktor**
  [2016] UKUT 504 (LC),
  14 November 2016

A long lease required the council, before the commencement of each year, to make an estimate of the amount payable by the lessee as service charges. For the year 2012/13, Southwark served an estimate including ordinary or routine expenses, but it did not include any estimate for major works that were contemplated and, in particular, some 'emergency' lighting works that were planned. Relying on the decision of *Southwark LBC v Woelke* [2013] UKUT 349 (LC), Mr Proktor argued that this failure meant that he was not liable to pay any service charges for the year. The FTT agreed and decided, under LTA 1985 s27A, that no service charges were due for the year 2012/13. Southwark appealed.

HHJ Huskinson allowed the appeal. It must be possible to say immediately if an estimate is valid. Its validity cannot depend on subsequent events. It could not have been contended that the estimate for 2012/13 was invalid if Southwark's plans had been that no works to emergency lighting would be carried out until the following year. The judge rejected the proposition that an otherwise valid estimate could be rendered invalid by subsequent events. The estimate sent was valid and Southwark was entitled to recover service charges based on ordinary or routine expenses.

Adverse possession

- **Smith (personal representative of Hugh Smith (deceased)) v Molyneaux**
  [2016] UKPC 35,
  21 November 2016

The Smiths claimed possession of land in the British Virgin Islands from Mr Molyneaux, who had lived on the property for very many years. He claimed to have acquired a squatter's title by adverse possession. The central issue was whether the Smiths gave him permission to occupy the property so that he could not, as he claimed, acquire a squatter's title by adverse possession (Registered Land Act s135(1)). At first instance, Ross J made a possession order. The Court of Appeal for the Eastern Caribbean allowed Mr Molyneaux's appeal.

The Privy Council allowed a further appeal. In the light of Ross J's findings, permission arose by inference from the fact that Mr Molyneaux was told that he would have to leave when the Smiths wanted to develop the property. It was a necessary part of what Mr Smith was saying that Mr Molyneaux had permission to remain until then. Accordingly, he was not a trespasser and was not in adverse possession.

Housing allocation

- **Regulatory notice concerning the social landlord Expectations (UK) (4778)**
  December 2016

Social housing accommodation must meet the requirements of the social housing regulator for England's Home Standard, as to minimum standards for letting, before tenants take up occupation on being allocated a property. This notice relates to non-compliance with that requirement.

Expectations was a private registered social housing provider. It let around 300 units of hostel/sheltered accommodation located in HMOs in the Birmingham area. It leased the HMOs from a head landlord. Many of its tenants were vulnerable people.

The regulator (the HCA) received information indicating that Expectations had failed to ensure that its properties met the required standard. There were concerns regarding widespread non-compliance with the government's Decent Homes standard including in relation to fire safety requirements. The regulator received other information suggesting that Expectations properties had significant repairs and maintenance issues. Category 1 hazards were, or had been, present.

Expectations reported that it had had considerable difficulty securing appropriate repairs and that, as it had become aware of problems with properties, it had taken individual units out of use in order to ensure that clients

were no longer at risk.

The regulator issued the regulatory notice based on failure to observe regulatory standards. It found that 'there was an absence of effective general understanding by Expectations of the condition of its properties. Before Expectations was notified of, or otherwise discovered, problems with individual units, those units were tenanted. The regulator has not received assurance that Expectations effectively prevented tenants, including vulnerable tenants, being put at risk by poor conditions before it was made aware of problems in particular properties. The regulator has therefore concluded that this risked serious harm to Expectations' tenants.'

Homelessness

Definition of 'homeless'

- **CM v Westminster City Council**[2] County Court at Central London, 1 December 2016

CM was an elderly woman from India who had been granted British citizenship. On review of a decision on her application for homelessness assistance, Westminster decided that she was not homeless because she could return to India to reside with her children. It considered that accommodation was available to her there, with them.

On appeal, Recorder Genn quashed that decision. She held that the council had not made sufficient enquiries and had failed to consider properly whether the applicant had any legal entitlement to occupy her children's accommodation. The council had also not considered whether it was reasonable for CM to relocate to India, having been in the UK for 16 years (*Waltham Forest LBC v Maloba* [2007] EWCA Civ 1281; [2008] 1 WLR 2079 followed). The council had also failed to consider properly the cultural issues involved and had, in effect, wrongly required the applicant to prove her case.

Enquiries

- **Birmingham City Council v Wilson** [2016] EWCA Civ 1137, 17 November 2016

The council owed Ms Wilson the main housing duty: HA 1996 s193. In performance of it, she was provided from May 2014 with a flat on the 11th floor of a block of flats. In September 2014, the council made an offer of permanent accommodation in a council flat on the eighth floor of a different block. Ms Wilson declined the offer. The council treated its duty as discharged. In her request for a review of that decision, Ms Wilson wrote that her two sons had a fear of heights. The reviewing officer invited Ms Wilson to provide any further information in support of the review request but she provided none. In a telephone call, she mentioned that one of her sons had developed a problem with heights. The reviewing officer served a 'minded to' letter, indicating an intention to uphold the initial decision and invited a response. None was provided. The reviewing officer decided that the offered accommodation had been suitable.

On appeal, HHJ Oliver-Jones QC quashed the decision. He held that, in accordance with the approach suggested by *Pieretti v Enfield LBC* [2010] EWCA Civ 1104, the reviewing officer was on notice that there was a possibility the applicant's son had a disability that could be relevant and should have made further enquiries into that issue.

The Court of Appeal allowed a second appeal by the council. The judge had applied his own judgement to the question whether there was a real possibility of there being a mental disability (holding that there was), rather than asking the correct question, which was whether the reviewing officer could rationally conclude by the end of his investigation that there was no real possibility of either child having a mental disability. The answer to the correct question was that the reviewing officer:

- 'was entitled to expect Ms Wilson to bring forward any information which she had which might bear on that' (para 36);
- 'was entitled to conclude that the problems experienced by Ms Wilson's children of living in a high rise flat (which they had already been doing … for some months) were not at a level which had led her to think she should obtain any professional opinion or medical diagnosis' (para 37); and
- 'could rationally assess the position to be one where the children's fear of heights was within the normal spectrum and not indicative of any possibility that they had a disability within the meaning set out in the [Equality Act 2010]' (para 38).

Intentional homelessness

- **Doka v Southwark LBC** [2016] EWCA Civ 1320, 27 October 2016

Mr Doka became homeless intentionally in 2010 when he lost his private rented accommodation because of rent arrears. His employer allowed him to stay in his son's room, at a rent of £500 per month, for the finite period of two to three years that his son would be at university. When the son returned, Mr Doka sought homelessness assistance. On review, the council decided that he had not had 'settled' accommodation since becoming homeless intentionally. Recorder Hancock QC dismissed an appeal.

On a renewed application for permission to appeal, Patten LJ was satisfied that the question of whether accommodation could properly be considered 'temporary' rather than 'settled' under an occupation agreement for as long as two or three years raised an issue of principle. He granted permission for the appeal, which will be heard on 26 or 27 July 2017.

Suitable accommodation

On 14 February 2017, the Supreme Court will hear the applicant's appeal from the majority decision of the Court of Appeal in *Poshteh v Kensington and Chelsea RLBC* [2015] EWCA Civ 711; [2015] HLR 36 (see September 2015 *Legal Action* 54). The appeal concerns the 'suitability' of accommodation that, by the feature of a round window, reminded the applicant of a period of incarceration.

Priority need

- **Lloyd v Birmingham City Council** [2016] EWCA Civ 1348, 6 December 2016

Mr Lloyd was a single man aged 46. His application for homelessness assistance culminated in a decision, on review, that he had no priority need. In the course of the review, Mr Lloyd asked for an appointment for both himself and his solicitor to make representations, and said that he had suffered a heart attack and was at that time in a city hospital cardiology ward. The council wrote to Mr Lloyd's GP asking whether he had recently suffered a heart attack and seeking details of any diagnosis, treatment and medication. A doctor replied, enclosing medical records which revealed that Mr Lloyd had suffered from anxiety and low mood, and that he had presented with atypical chest pain. Nothing indicated that he had suffered a heart attack. The review decision explained that there was no evidence that Mr Lloyd had recently suffered a heart attack as he had asserted.

Recorder Mark Hill dismissed an appeal from that decision. Mr Lloyd made a renewed application for permission to bring a second appeal on a single ground – the council had failed to comply with the requirements of procedural fairness, and its own published procedure, in that a further 'minded to' letter had not been sent after the GP's reply and that Mr Lloyd had thereby been denied an appropriate opportunity to make representations before a final decision was taken against him: Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI No 71 reg 8(2).

Kitchin LJ dismissed the application. There was no 'deficiency' in the original decision under review such as to trigger reg 8(2). 'There was nothing lacking from it which has any bearing upon any issue which the applicant has raised. The original decision properly considered the applicant's health and came to a conclusion about which no complaint can properly be made. It is true that the applicant subsequently sent to the respondent the email to which I have referred suggesting that he had had a heart attack, and that this prompted the respondent to make the further enquiries of the applicant's general practitioner. Those enquiries revealed, as I have explained, that the applicant was suffering from precisely the same conditions as those the subject of the original condition' (para 22).

Housing and the disabled

- **R (SG) v Haringey LBC** [2016] EWCA Civ 1241, 15 November 2016

On a renewed application for permission to appeal, Moore-Bick LJ was satisfied that the decision at first instance in these judicial review proceedings ([2015] EWHC 2579 (Admin), see case note at October 2015 *Legal Action* 42) 'has raised a very great deal of uncertainty about the effect of the Care Act and whether local authorities are entitled to refuse accommodation in cases where the needs of the person concerned are accommodation-related' (para 9). Although subsequent events had rendered the point academic for the particular claimant, he granted permission to appeal. The appeal will be heard on 27 April 2017.

1 See: www.gov.uk/government/publications/homelessness-reduction-bill-policy-factsheets

2 Justine Compton, barrister, London and Gusta Glover of Advice4Renters.

Jan Luba QC and Nic Madge are circuit judges. They would like to hear of relevant housing cases in the higher or lower courts. They are grateful to the colleagues at footnote 2 for providing details of the judgment.