Housing: recent developments

Nic Madge and Jan Luba QC highlight important housing law news and legislative updates, as well as cases on human rights, possession claims, unlawful eviction, anti-social behaviour, houses in multiple occupation, long leases, allocation, homelessness, and housing and children.

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Housing law news and legislation update

Homelessness: new law

The Homelessness Reduction Act 2017 (Commencement and Transitional and Savings Provisions) Regulations 2018 SI No 167 will bring the Homelessness Reduction Act 2017 into force in England on 3 April 2018. Regulation 4 provides that the new Act does not apply in relation to an application for homelessness assistance made to a local housing authority before 3 April 2018.

Homelessness: new guidance

The new statutory code of guidance on homelessness in England, revised and updated to include guidance on the new Act, was published on 22 February 2018: *Homelessness code of guidance for local authorities* (Ministry of Housing, Communities and Local Government (MHCLG)). The final content follows a consultation exercise and the UK government's analysis of responses received to the draft code: *Homelessness code of guidance for local authorities. Government response to the consultation* (MHCLG, February 2018).

Homelessness: new regulations

The Homelessness (Review Procedure etc) Regulations 2018 SI No 223 were laid on 22 February 2018 and come into force on 3 April 2018 (except Part 4, which comes into force on 1 October 2018). These regulations revoke and replace the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI No 71, which made provision for reviews under Housing Act (HA) 1996 s202, and also make provision in relation to new rights of review introduced by the 2017 Act.

Homelessness: new guidelines on referrals

The Local Government Association has undertaken a consultation on revised guidelines covering procedures for referrals of homeless applicants from one local housing authority to another: *Procedures for referrals of homeless applicants to another local authority* (LGA, 13 February 2018). The main function of these non-statutory guidelines is the avoidance – and resolution without resort to legal proceedings – of disputes between local housing authorities concerning local connection and homelessness applications. The consultation ended on 13 March 2018.

Homelessness: rough sleeping

A new House of Commons Library paper provides background information on the problem of rough sleeping and outlines UK government policy on this issue: *Rough sleeping (England)* (Briefing Paper No SN02007, 6 February 2018).

The UK government has established a new panel, chaired by homelessness minister Heather Wheeler MP, that will help develop a national rough sleeping strategy to halve rough sleeping over the course of the parliament and eliminate it altogether by 2027 ('New government backed advisory panel commits to help eradicate rough sleeping', press release, MHCLG/ Heather Wheeler MP, 1 February 2018). The panel had its first meeting on 1 February 2018.

Rough sleeping counts carried out by local authorities in England between 1 October and 30 November 2017 (or their estimates) showed that 4,751 individuals were sleeping on the streets: *Rough sleeping statistics autumn 2017, England (revised)* (MHCLG, 16 February 2018). That number was up 617, or 15 per cent, from the autumn 2016 total of 4,134. The number of rough sleepers had increased by 173 in London and 444 in the rest of England since autumn 2016.

Homelessness: literature

Public Health England's South East Centre was asked by Portsmouth and Southampton City Councils to provide an independent review of the literature around homelessness, with particular reference to those who are street homeless and those who street beg. Its report is intended to support efforts to prevent and reduce homelessness and the associated adverse outcomes: *Evidence review: adults with complex needs (with a particular focus on street begging and street sleeping)* (Public Health England, January 2018). The report provides an overview of the national picture in relation to homelessness and insights into the current evidence base to support action in preventing and reducing homelessness.

Homelessness: Scotland

Scotland is thought to have some of the most progressive legislative arrangements in the UK for homelessness. A new report from Scotland shows that successfully reducing homelessness requires that a person's immediate housing needs are addressed alongside any underlying issues that led to homelessness: *Report on homelessness* (SP Paper 279, 6th Report, 2018 (Session 5), Local Government and Communities Committee, Scottish Parliament, 12 February 2018).

Housing standards

The Homes (Fitness for Human Habitation and Liability for Housing Standards) Bill passed its House of Commons second reading on 19 January 2018. The bill would require that residential rented dwellings in England are fit for human habitation at the start of a tenancy and throughout its duration. It has UK government support and has been referred to a public bill committee.

A House of Commons Library paper explains the provisions of the bill: *Homes (Fitness for Human Habitation and Liability for Housing Standards) Bill 2017-19* (Briefing Paper No CBP-8185, 14 January 2018).

A new report indicates that almost 6,000 'beds in sheds' have been identified in 20 London boroughs over the past five years: *Secret sleepers* (London Assembly member Susan Hall, December 2017). It suggests that councils set up beds-in-sheds taskforces, bringing together housing, planning, environment and finance departments, and monitor and report on detection and enforcement. It also recommends using heat map technology, which is reported to have helped identify 6,350 potentially illegal dwellings in Slough.

The Welsh government has published an annual report that includes information on houses in multiple occupation (HMOs) and on the condition of residential properties assessed by local authorities under the Housing Health and Safety Rating System: *Housing hazards and licences, 2016–17* (SFR 190/2017, 19 December 2017). The most common reason for identifying a category 1 hazard was 'excess cold'.

Housing and domestic violence

The Secure Tenancies (Victims of Domestic Abuse) Bill passed its second reading in the House of Lords on 9 January 2018. It is a UK government bill and will now be fully considered by parliament. It will give effect to the Conservative party's manifesto commitment for the 2017 general election that a Conservative government would 'take action' to ensure that 'victims who have lifetime tenancies and flee violence are able to secure a new lifetime tenancy automatically'.

A House of Lords Library paper outlines the content of the bill: *Secure Tenancies (Victims of Domestic Abuse) Bill [HL] HL Bill 76 of 2017-19* (Lords Library notes LLN-2018-0002, 5 January 2018).

Housing and human rights

The Equality and Human Rights Commission announced on 30 January 2018 that it is now accepting applications for funding from solicitors (both in private practice and the not-for-profit sector) and specialist advice centres for housing matters where there is a potential breach of Equality Act (EA) 2010 Part 3.[1]

Housing and anti-social behaviour

The statutory guidance issued in July 2014 to support the effective use of the new powers to tackle anti-social behaviour that were introduced through the Anti-social Behaviour, Crime and Policing Act 2014 has been updated: *Anti-social Behaviour, Crime and Policing Act 2014: anti-social behaviour powers – statutory guidance for frontline professionals* (Home Office, December 2017). The updated guidance emphasises the importance of ensuring that the powers are used appropriately to provide a proportionate response to the specific behaviour causing harm or nuisance without impacting adversely on behaviour that is neither unlawful nor anti-social.

Private rented sector

Banning orders

The Housing and Planning Act 2016 (Banning Order Offences) Regulations 2018 SI No 216 will come into force on 6 April 2018. They set out more than 20 offences that may be committed by a private landlord or letting agent and are defined as 'banning order offences'. A local housing authority in England may apply to the First-tier Tribunal (FTT) for a banning order against a person who has been convicted of a banning order offence: Housing and Planning Act 2016 s15(1). A person who is subject to a banning order made by a FTT is then banned from letting housing, engaging in letting agency work, engaging in property management work or doing two or more of those activities.

The House of Lords Secondary Legislation Scrutiny Committee drew the draft regulations to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House because '[g]iven concern expressed when the bill was under consideration, the House will be interested to see the banning order offences which the department now proposes should be specified under the 2016 Act': *13th report of session 2017–19. Draft Environmental Protection (Microbeads) (England) Regulations 2017; Draft Housing and Planning Act 2016 (Banning Order Offences) Regulations 2017* (HL Paper 49, 14 December 2017, page 4, para 15).

Letting fees in the private sector

On 16 November 2017, the then Communities and Local Government Committee (CLGC) announced that it would conduct a pre-legislative scrutiny of the government's proposals to ban letting fees imposed by landlords and letting agents on tenants: 'Scrutiny of government plans to ban landlord and letting agents fees' (CLGC news release). The committee plans to hold a series of oral evidence sessions in early 2018 with experts, tenants, letting agents, landlord associations and trading standards authorities. These will be held in tandem with the sessions for the committee's existing inquiry into the private rented sector.

Cold private rented sector housing

The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 SI No 962 will introduce new measures to improve the energy efficiency of private rented property in England and Wales from 1 April 2018. For a review of the provisions, see Clara Zang, 'It's cold outside,' LAG Housing Law blog, 17 December 2017.[2]

The UK government has also consulted on proposals to amend Part 3 of the regulations to introduce a potential need for some contribution from landlords of F- and G-rated domestic properties when meeting the domestic minimum level of energy efficiency: *Consultation to amend The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 in relation to domestic properties to remove the 'no cost to the landlord' principle* (Department for Business, Energy and Industrial Strategy, December 2017). The consultation sought views from landlords, tenants, agents, obligated energy suppliers and others with an interest in the energy efficiency of the domestic private rented sector. The deadline for responses was 13 March 2018.

The UK government has also published guidance that is intended to help landlords understand their responsibility for making energy performance certificates available when renting out domestic properties: *A guide to energy performance certificates for the marketing, sale and let of dwellings* (Department for Communities and Local Government (DCLG),[3] December 2017). This guidance also outlines what tenants and buyers should expect to receive when they begin the process of renting or buying domestic properties.

Gas safety in rented housing

The Gas Safety (Installation and Use) (Amendment) Regulations 2018 SI No 139 will come into force on 6 April 2018. Regulation 5 amends reg 36(3) (Timing of gas safety checks and record keeping obligations) of the main regulations. Regulation 6 adds a new reg 36A (Determination of date when next safety check due under regulation 36(3)). The amendments will assist landlords by providing greater flexibility around the timing of annual gas safety checks.

Landlords and tax relief

'Rent-a-room' tax relief was first introduced in 1992 to incentivise individuals to make spare capacity in their homes available for rent. The relief was intended to increase the quantity and variety of low-cost rented housing. On 1 December 2017, the UK government began a consultation on whether rent-a-room relief provides the right incentives for the rental market as it exists today: *Call for evidence – rent-a-room relief* (HM Treasury, December 2017). The consultation closed on 23 February 2018.

Right to buy

In the second quarter of 2017/18, local authorities sold an estimated 2,558 dwellings under the right to buy scheme: *Right to buy sales in England: July to September 2017* (DCLG, 13 December 2017). This is a decrease of 21 per cent from the 3,255 sold in the same quarter of 2016/17. Councils in London sold an estimated 509 of those dwellings. This is a decrease of 36 per cent from the 800 sold in the same quarter of 2016/17.

The House of Commons Library has published *Introducing a voluntary right to buy for housing association tenants in England* (Briefing Paper No CBP-7224, 24 November 2017).

In Wales, the Abolition of the Right to Buy and Associated Rights (Wales) Act 2018 (Commencement and Saving Provisions) Order 2018 SI No 100 appoints 26 January 2019 for the coming into force of ss6 and 7 of the Act, which abolish the right to buy and the right to acquire in Wales. It does not affect applications to exercise the right to buy that are served on social landlords before 26 January 2019. The Act itself received royal assent on 24 January 2018.

Park homes

The Mobile Homes Act 2013 made significant changes to the law on mobile home parks. The UK government gave a commitment to review this in 2017. The review is being conducted in two parts. Part 1 involved a call for evidence on the fairness of charges, the transparency of site ownership and on experiences of harassment. A summary of responses has been published: *Review of park homes legislation: call for evidence – part 1 – summary of responses* (DCLG, November 2017).

Part 2 is a call for evidence on how effective local authority licensing has been, how well the procedures for selling mobile homes, making site rules and pitch fee reviews are working and whether 'fit and proper' controls need to be applied in the sector: *Review of park homes legislation: call for evidence – part 2* (DCLG, November 2017). Responses were sought by 16 February 2018.

Human rights

Article 6

- **Delina v Bulgaria**
  App No 66742/11,
  18 January 2018

In December 2005, the Sofia Municipal Council approved the exchange of a municipal flat owned and occupied by Ms Delina. However, the mayor did not issue the necessary order and did not sign a contract for the exchange. Ms Delina brought judicial review proceedings challenging the mayor's tacit refusal to act. The Sofia Administrative Court quashed the mayor's tacit refusal, but in March 2010, the Sofia Municipal Council revoked its December 2005 decision approving the exchange. Ms Delina challenged that decision. The court instructed the mayor to issue an order for the conclusion of the exchange agreement. The mayor ordered the flat exchange in March 2013 and Ms Delina signed a contract for the exchange in June 2013. She complained to the European Court of Human Rights (ECtHR) under article 6 of the European Convention on Human Rights about the excessive delay in the enforcement of the judgment in her favour.

The court noted that it had repeatedly held that the right of access to a court includes the right to have a court decision enforced without undue delay (eg, *Kotsar v Russia* App No 25971/03, 29 January 2009 and *Kravchenko v Russia* App No 11609/05, 16 September 2010). While delays in enforcement may be justified in exceptional circumstances, only periods strictly necessary to enable the authorities to find a satisfactory solution are covered (*Yanakiev v Bulgaria* (No 2) App No 50346/07, 31 March 2016). There was a delay of almost three years after the 2010 court order became final. The authorities did not provide any explanation that could justify this delay. Accordingly, there was a violation of article 6. As the failure of the authorities to act in accordance with the final judgment must have caused Ms Delina emotional distress, the court awarded her €1,800 in respect of non-pecuniary damage.

Article 1 of Protocol No 1

- **Drahoš v Slovakia**
  App No 47922/14,
  9 January 2018

The applicants were owners of residential buildings or apartments that were subject to a rent-control scheme. Under the relevant legislation, the owners were obliged to let their flats to tenants while charging no more than the maximum amount of rent fixed by the state. The legislation precluded them from unilaterally terminating the leases or selling the flats to anyone other than the respective tenants. The situation was structurally and contextually the same as in *Bittó v Slovakia* App No 30255/09, 28 January 2014 (merits) and 7 July 2015 (just satisfaction).

On 15 September 2011, the Termination and Settlement of Tenancy (Certain Apartments) Act (Law no 260/2011) came into force. This legislation was enacted with a view to ending the rent-control scheme by 31 December 2016. The owners of apartments whose rent had been regulated were entitled to increase rent by 20 per cent once a year from 2011 and to give notice by 31 March 2012 of the termination of a tenancy contract. Such termination of tenancy took effect after a 12-month notice period. However, if a tenant was exposed to material hardship and applied for a substitute flat with the municipality, they would be able to continue to use the apartment while still paying a regulated rent, even after the expiry of the notice period, until a new tenancy contract with a municipality had been set up. Municipalities were obliged to provide a person exposed to material hardship with a municipal apartment at a regulated rent. If a municipality did not comply with that obligation by 31 December 2016, the landlord could claim from the municipality the difference between the free-market rent and the regulated rent. The applicants complained that there was a breach of article 1 of Protocol No 1.

The ECtHR noted that the government had not put forward any fact or argument capable of persuading the court to reach a different conclusion from that in *Bittó*. It found a violation of article 1 of Protocol No 1. When considering just satisfaction, it took into account all the circumstances, including: (i) the purpose and the context of the rent control and the level of the awards in *Bittó*; (ii) the size of the property in question; (iii) the duration of the application of the rent-control scheme in relation to each individual part of the property; (iv) its location; and (v) the ownership shares of the respective applicants in the property. The damages came to a total of €3,628,380.

- **King v Environment Agency**
  [2018] EWHC 65 (QB),
  19 January 2018

The claimants owned or farmed land adjacent to the River Severn. At various times, the land was flooded, despite the existence of a flood defence embankment that was erected and maintained by the Environment Agency and its predecessors. The Environment Agency adopted a strategy to increase the flood protection at the claimants' expense. The claimants argued that, in adopting this strategy, the Environment Agency had not assessed the burden which was imposed on them. They brought a claim pursuant to article 1 of Protocol No 1, in conjunction with article 14. They alleged that the Environment Agency discriminated against them on the grounds of property or other status by paying compensation to others in other parts of the country who were in a materially equivalent position.

It was common ground that the claimants' land and property were possessions and property for the purposes of article 1 of Protocol No 1. The issues were: (1) whether the Environment Agency had interfered with their land by adoption of the strategy whereby their land was used as flood protection to Gloucester; and (2) if so, whether, in the adoption of that strategy, a fair balance had been struck between the general interest of the community and the requirements of the protection of the claimants' rights.

Sir Ross Cranston dismissed their claim. He enumerated a number of principles:

- A fair balance requires 'a reasonable relationship of proportionality between the means employed and the aim sought to be realised' (*James v UK* (1986) 8 EHRR 123 at para 50, quoted at para 34 of the present judgment).
- At the domestic level, the margin of appreciation which the Strasbourg court exercises becomes a recognition that, in certain circumstances, public authorities other than the courts are better placed to determine how the interests should be balanced (*AXA General Insurance Ltd v The Lord Advocate* [2011] UKSC 46; [2012] 1 AC 868 at para 131).
- There may need to be the possibility of reassessing the balance of the respective interests at reasonable intervals (*Sporrong and Lönnroth v Sweden* App Nos 7151/75 and 7152/75, 23 September 1982; (1983) 5 EHRR 35 at para 70).
- The necessary balance will not be found if the property owner has had to bear 'an individual and excessive burden' (*Sporrong* at para 73, quoted at para 34 of the present judgment).
- Control of property can occur without payment of compensation, unless compensation is necessary to avoid an individual and excessive burden (*Sporrong* at para 73; *R (Alconbury Developments Limited) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295 at para 72).

He continued:

Where a delicate balancing of interests is required, where parliament has charged the Environment Agency with supervising flood risk management in England, and where the agency has considerable expertise, the court is in no position to second guess its expert judgment and cost/benefit analyses. The need for judicial deference in this type of case runs through the speeches of the law lords in Marcic v Thames Water Utilities Ltd *[2003] UKHL 66; [2004] 2 AC 42* (para 156).

As to the contention that there had been no consideration of the burden the claimants had had to bear, the judge noted that their land was in a floodplain. The embankment provided protection from flooding. By contrast, some landowners in the area did not benefit from any publicly funded flood defence. There was no basis to the claim of unlawful discrimination against the claimants, contrary to article 14. Article 14 was not engaged in this type of property case because the claimed discrimination was not on the basis of a personal characteristic (*R (Takeley Parish Council) v Stansted Airport Ltd* [2005] EWHC 3312 (Admin)).

- **Ahmadov v Azerbaijan**
  App No 22619/14,
  11 October 2017

In 1977, Mr Ahmadov purchased a house in Baku from EL. It had been built in 1938. Mr Ahmadov and his family lived there from 1979. In 2012, the State Oil Company of the Azerbaijan Republic (SOCAR) lodged a court claim seeking demolition of the house at Mr Ahmadov's expense because it had been unlawfully built on state-owned land that was allocated to SOCAR in 1963. The District Court allowed SOCAR's claim. Appeals were dismissed. Mr Ahmadov complained to the ECtHR that the demolition order without compensation was a breach of his rights as guaranteed by article 1 of Protocol No 1 and article 8.

The court has asked the parties:

- Was the deprivation of possessions in the public interest and in accordance with the conditions provided for by law? If so, was that deprivation necessary to control the use of property in accordance with the general interest? Did that deprivation impose an excessive individual burden?
- Was there an interference with Mr Ahmadov's right to respect for his home? If so, was that interference in accordance with the law and necessary? Was the decision-making process of the domestic courts such as to afford due respect to his interests?
- At the time the house was constructed, what was the legal status of the land on which it was located? When did the state authorities first become aware that the house existed? When did the state authorities first raise an objection in respect of the house? Since the lodging of the present application, has the house been demolished in accordance with the relevant domestic court decisions, and if so, when?

Possession claims

Grounds, reasonableness and the Equality Act 2010

- **Teign Housing v Lane**
  [2018] EWHC 40 (QB),
  16 January 2018

Teign Housing provided social housing. It granted an assured tenancy of a flat to Mr Lane, who was a vulnerable person. Later, Teign Housing claimed possession under HA 1988 Sch 2 grounds 12 and 14. The particular acts relied on included:

1. removing fixtures and fittings in the kitchen without consent;
2. removing a gas flue without consent;
3. excluding contractors from the flat;
4. installing CCTV without permission so that the cameras covered communal areas and unsettled the other tenants;
5. playing loud music so as to cause nuisance and annoyance;
6. behaving aggressively to neighbours;
7. threatening a member of Teign Housing's staff in a telephone conversation; and
8. leaving an untaxed car blocking access to the communal car park.

Mr Lane defended on the bases that:

1. breaches of the tenancy agreement had not been proved, in part because Teign Housing had given permission for works to be carried out, and Mr Lane had not caused nuisance and annoyance;

2. it would not be reasonable to make an order for possession; and
3. an order for possession would amount to disability discrimination.

A consultant psychiatrist, appointed as a single joint expert, produced a report stating that Mr Lane suffered from a paranoid personality disorder, possible adult attention deficit hyperactivity disorder and harmful use of alcohol. The personality disorder was 'a deeply ingrained, pervasive and maladaptive pattern of behaviour. Mr Lane had a pervasive distrust and suspicion of others and their motives' (para 11). It stated that compliance with any court order would be difficult for Mr Lane because of his condition. It was common ground that Mr Lane was disabled within the meaning of the EA 2010.

HHJ Simon Carr dismissed the claim for possession. The judge found that Mr Lane believed that he had been given permission to install cameras and carry out some works when no permission had been given. He stated, 'given Mr Lane's honest belief that it had been authorised, it cannot amount to a relevant breach'. He found some limited breaches of the tenancy agreement but stated that making 'a possession order would not be reasonable, proportionate or fair'. He did not address the EA 2010, but said that, in the light of the medical evidence, he would have concluded that a possession order would have amounted to disability discrimination. Teign Housing appealed.

Dingemans J allowed the appeal. He noted:

- The issue of whether there is a breach of a tenancy agreement does not require personal fault (*Kensington and Chelsea RLBC v Simmonds* (1997) 29 HLR 507).
- Serious breaches of tenancy agreements need to be marked (*West Kent Housing Association v Davies* (1999) 31 HLR 415).
- Neighbouring tenants are entitled to live free from the anxiety of a recurrence.
- The fact that treatment might improve the position of the tenant is a relevant factor (*Croydon LBC v Moody* (1998) 31 HLR 738).
- The trial judge's duty when considering the issue of reasonableness is 'to take into account all relevant circumstances as they exist at the date of the hearing … in a broad common-sense way' (*Cumming v Danson* [1942] 2 All ER 65 quoted at para 37 of the present judgment).
- Where a tenant has been induced by the landlord's agents to act in a particular way, this is relevant to the issue of reasonableness (*Upjohn v Macfarlane* [1922] Ch 256).
- Reasonableness involves a consideration of the position of both parties.
- On appeal, when considering reasonableness, the question is whether the judge 'has so plainly gone wrong in law that this court should interfere, presumably by way of order a new trial' (*Cresswell v Hodgson* [1951] 1 All ER 710 quoted at para 38 of the present judgment).
- Whether or not to suspend an order for possession is an issue that looks to the future. Courts need to look for evidence that the past behaviour will cease (*Manchester City Council v Higgins* [2005] EWCA Civ 1423; [2006] HLR 14).
- If it is inevitable that a tenant will breach the conditions of a suspended order, the court should not make such an order (*Lincoln City Council v Bird* [2015] EWHC 843 (QB); [2015] 2 P&CR DG12).
- Tenants need to produce 'cogent' evidence that there is a sound basis for hope for the future, thereby pitching the standard at a realistic level (*City West Housing Trust v Massey* [2016] EWCA Civ 704).
- Where there are issues of disability discrimination under the EA 2010, courts should adopt a structured approach and landlords have to show that there is no less drastic means of solving the problem than ordering possession (*Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15; [2015] AC 1399; May 2015 *Legal Action* 44).

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In this case, the court should consider:

1. whether Mr Lane could show that he had a mental disability;
2. whether he could show that there was a sufficient causal link between the mental disability and the conduct on which the decision to evict was based; and
3. if so, whether Teign Housing could show that evicting Mr Lane was a proportionate means of achieving a legitimate aim.

The landlord had to show that there were no less drastic means of achieving its aims and that the effect of eviction on Mr Lane would be outweighed by the benefits to Teign Housing.

Dingemans J stated that the fact that Mr Lane believed that his actions had been authorised did not provide him with a defence to the claims for breach of the tenancy agreement. The concept of 'relevant breach' was not a basis on which the judge should have rejected Teign Housing's claimed grounds for possession. The judge was therefore wrong not to have found that Mr Lane had breached the terms of the tenancy agreement by installing CCTV cameras. This amounted to a ground for possession. The judge had made insufficient findings of fact, either to allow Dingemans J to dismiss the appeal or to make a possession order. He therefore remitted the action to be retried.

Trespass and mesne profits

- **Farrar v Leongreen Limited** [2017] EWCA Civ 2211, 21 December 2017

A landowner claimed that Mr Farrar was a trespasser in a flat. In December 2012, it began an action seeking a possession order. It did not include a claim for mesne profits. In February 2014, HHJ Dight made a possession order. Mr Farrar vacated the flat in March 2014. In August 2014, the landowner began a new claim seeking mesne profits. HHJ Walden-Smith awarded mesne profits. Mr Farrar appealed, submitting that, by virtue of principles relating to the doctrine of res judicata, the landowner had lost the right to claim mesne profits. He relied on the speech of Lord Sumption JSC in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 at para 17.

The Court of Appeal dismissed the appeal. In the second action, the landowner was relying on causes of action that were distinct from the cause of action upon which it had relied in the first claim. The claim for possession only involved the landowner showing that it had a good cause of action as at the date of the order for possession. In that action, it had not maintained any claim in relation to any cause of action regarding the previous period of trespass. Its causes of action in the claim for mesne profits had not merged with the judgment given in the first action. There was no abuse of process.

Wales

- **Jardine and Burgess v Rees and Phillips**[4] County Court at Merthyr Tydfil, 26 October 2017

The defendants were granted an assured shorthold tenancy for six months from 11 April 2015. On expiry of that term, the tenancy continued as a statutory periodic tenancy. The landlord had previously charged the property. On 17 March 2017, the claimants were appointed as joint Law of Property Act (LPA) receivers pursuant to the terms of the charge. On 16 May 2017, they served a HA 1988 s8 notice, claiming possession under Sch 2 Ground 2. The notice gave the claimants' names and addresses as landlords.

The subsequent possession claim was defended on the basis that the claimants were neither registered nor licensed within the meaning of Housing (Wales) Act (H(W)A) 2014 s4 and so were not entitled to serve notice (H(W)A 2014 s7).

At the hearing, the claimants provided a screenshot which demonstrated that they had been registered under the scheme, but there was no evidence as to when the registration had occurred. The claimants were unable to prove that they, as LPA receivers, had either been registered or were licensed under the Welsh scheme. They argued that a HA 1988 s8 notice was not a notice to terminate a tenancy, and so H(W)A 2014 s7 did not apply.

District Judge Sandercock expressed concern that the obligations of LPA receivers under the H(W)A 2014 were not well defined and hoped clarity would be achieved. He dismissed the claim finding that:

(a) the burden of proving compliance with the statutory requirements fell on the claimants. It was not for defendants to prove that the claimants were not registered or licensed; and
(b) a HA 1988 s8 notice was a notice within the meaning of H(W)A 2014 s7.

Unlawful eviction

Damages

- **Lutman v Ashford BC**[5] County Court at Canterbury, 5 October 2017

In 2011, Ashford let a house to Mrs Lutman under a secure tenancy. It was also the home of her husband, Mr Lutman. Mrs Lutman began to suffer from dementia and was admitted to hospital at the end of 2012. In February 2013, Mr Lutman was sentenced to 18 months' imprisonment for breach of a sexual offences prevention order. His release date, with remission, was 12 November 2013. While he was in prison, Mrs Lutman left hospital and went into a residential home for further respite care. Rent and bills were paid from their joint account. Mrs Lutman made no attempt to contact Mr Lutman while he was in prison, 'clearly because of her condition'.

In early October 2013, Mrs Lutman signed a notice to vacate the house, using her own name printed in capitals. A Kent CC employee who felt pressured by Ashford to give her the form said that 'it would not be correct to say that [she] understood the notice'. On 3 October 2013, Ashford served a notice to quit on Mrs Lutman. It expired on

4 November 2013. When Mr Lutman was released on 12 November 2013 and returned home, he found that the locks had been changed. Ashford did not take court proceedings. It claimed to have taken possession on the basis that Mrs Lutman had ceased to occupy and Mr Lutman was in prison. Mr Lutman claimed damages for unlawful eviction and for lost goods that were never returned to him.

HHJ Simpkiss found that although Mrs Lutman was not forced to put her name on the notice to vacate, she 'had no idea what she was doing'. At the time she signed the notice to vacate, and purported to surrender the tenancy, she did not have capacity. The notice was of no legal effect. She did not hand over the keys. She would not have had capacity to surrender the tenancy if she had done so. At the time, Ashford was aware that she lacked capacity. Accordingly, Mrs Lutman was still the tenant when the locks were changed. She was not capable of making decisions about her residence and, in those circumstances, HHJ Simpkiss could not see how she could be said to be no longer residing in the premises for the purposes of the tenant condition (HA 1985 s81).

Although it was likely that Mrs Lutman would not have returned to live at the house, and probably could not have done so unless Mr Lutman was living with her, until a deputy had been appointed by the Court of Protection, her return could not be ruled out. She was therefore a secure tenant at the time when the locks were changed. Rent continued to be paid and accepted until December 2013. In view of Family Law Act 1996 s30, if Mr Lutman was in residential occupation, that was sufficient for the tenancy to remain secure. While in prison, the house remained Mr Lutman's principal residence. Changing the locks and not permitting Mr Lutman to enter was a breach of the Protection from Eviction Act 1977.

The value of Ashford's interest in the house on the assumption that Mr Lutman had ceased to have that right to occupy was £123,181. The value on the assumption that Mr Lutman continued to have the same right to occupy was £82,424. As a result, HHJ Simpkiss awarded damages under HA 1988 ss27 and 28 of £40,757. He rejected the defence of failure to mitigate because it had not been pleaded. He awarded damages for loss of Mr Lutman's belongings in the sum of £1,000.

- **Thompson v Chowdhury**[6]
  County Court at Clerkenwell and Shoreditch,
  6 February 2018

In May 2016, Mr Chowdhury granted Mr Thompson an assured shorthold tenancy of a room. In December 2016, Mr Thompson was locked out 'due to rent arrears'. He warned the agent that this was unlawful, but was not readmitted and ultimately had to force entry later that day. In June 2017, Mr Thompson returned from work to find that the front door locks had been changed and all his possessions removed from his room. They were never returned to him. Mr Thompson spent three nights on the streets and 14 nights staying with friends, before he was able to borrow money for a deposit for an alternative tenancy.

Mr Thompson claimed damages for unlawful eviction (trespass and breach of covenant for quiet enjoyment) and harassment (the course of conduct comprising the December 2016 and June 2017 incidents). He made an early Part 36 offer to settle for damages of £8,500. Mr Chowdhury failed to file a defence and default judgment was entered.

At the disposal hearing, District Judge Stone awarded:

1. £6,175 in general damages for the unlawful eviction (£425 per night for three nights sleeping on the streets and £350 per night for 14 nights staying with friends);
2. £1,000 in general damages for harassment;
3. £1,652.50 in special damages for possessions;
4. £1,500 in aggravated damages and £1,500 in exemplary damages; and
5. interest on costs and damages at 10 per cent above base rate (Civil Procedure Rules 1998 r36.17(4)(a)–(d)).

Discharge of injunction

- **JKMK Consultancy Ltd v Goldie Properties Ltd**
  High Court (Queen's Bench Division),
  18 December 2017

Under a tenancy agreement, the tenant was permitted to have an occupant in the property. In August 2017, the landlord served a notice to quit. The following month, the tenant obtained a without notice injunction permitting it to return to the property on the basis that: the eviction was unlawful; the notice to quit had not been properly served and had not complied with the tenancy agreement; the tenant was not in arrears; the permitted occupant had been forced to stay in a hotel following the eviction; and the balance of convenience favoured the granting of the injunction. The tenant made no attempt to apply to the court for a listing or hearing on or after the return date. The tenant's solicitors then came off the record.

The landlord had evidence which suggested that the property was being used for short-term lettings and had been advertised online on a holiday lettings site. There were reports from other residents of various people coming in and out of the property. The locks had been changed. There were also concerns about the tenant's liquidity and a suggestion that the tenant had misled the court as to the state of the rent account by saying that there were no arrears.

Choudhury J discharged the injunction. The tenant had not given the court the full picture when applying for the injunction. It had not appeared or been represented on the application to discharge the injunction and it could be inferred that it had no desire to participate. There was strong evidence that the property was being used for short-term lettings.

Anti-social behaviour

Injunctions

- **Waltham Forest LBC v Persons Unknown**
  High Court (Queen's Bench Division),
  12 January 2018

Travellers camped on land in breach of planning control. They caused a nuisance and health risks. The local authority incurred considerable expense in cleaning up the sites.

Lang J found that it was just and proportionate to grant a three-year final borough-wide injunction preventing Travellers from camping on any green spaces. She granted an interim injunction preventing them from camping on industrial sites.

Houses in multiple occupation

Prosecution

- **Luton BC v Hussain**
  Luton Magistrates' Court,
  9 January 2018

Mr Hussain, a landlord, was prosecuted for breaches of the Management of Houses in Multiple Occupation (England) Regulations 2006 SI No 372. Defects which put tenants' lives at risk included:

- a lack of fire doors;
- a lack of automatic fire and heat detection;
- obstructions to stairs and exits in the event of fire;
- unfinished electrical works throughout the property leaving bare wires hanging from ceilings and out of walls;
- bathrooms in a terrible state of disrepair;
- damaged ceilings;
- gas meter shut down due to a leak; and
- tampering with an electrical meter.

He was fined £70,000, and ordered to pay costs of £1,148.79 and a surcharge of £170. In sentencing, the chair of the magistrates' court said: 'It is clear to us that these offences are motivated by profit without any recourse to regulations or court processes.'

Long leases

Pets

- **Victory Place Management Company Limited v Kuehn**
  [2018] EWHC 132 (Ch),
  30 January 2018

The claimant was the management company of a gated residential development. There was a covenant in leases of flats that '[n]o dog bird cat or other animal or reptile shall be kept … without the written consent of' the management company. In 2014, Mr and Mrs Kuehn were contemplating taking an assignment of a lease. They owned a young Yorkshire/Maltese terrier and so asked the estate agent whether dogs were permitted. He replied that it would not be a problem. However, Mr and Mrs Kuehn probably knew of the 'no dogs' policy from the beginning. After purchasing the lease, Mr and Mrs Kuehn made an application to the freeholder for consent to keep the dog. That was granted in September 2015. In October 2015, their representative also emailed the management company to seek consent to keep the dog. That was refused. In December 2015, the management company issued court proceedings.

HHJ Cryan granted an injunction requiring Mr and Mrs Kuehn to remove the dog within 28 days. On balance, he was prepared to accept that *Wednesbury* principles applied to the way in which the management company exercised its discretion under the covenant. Otherwise, 'there would be a risk of tyranny by majority' (para 21). However, the policy did not violate these principles. Nor was the policy exercised in a way that violated *Wednesbury* principles. The management company was willing to consider special circumstances, but Mr and Mrs Kuehn did not provide any.

Mr and Mrs Kuehn appealed. It was common ground on the appeal that an obligation should be implied into the covenant that the management company should only take into account matters that it ought to have taken into account and not to take into account matters which ought not to have been considered. Sir Geoffrey Vos,

chancellor of the High Court, dismissed the appeal. On at least two occasions, the management company had made it clear to Mr and Mrs Kuehn that its policy was not to allow any pets save in special circumstances. The policy that requests would be refused save in special or exceptional circumstances was neither unreasonable nor irrational. The implied term was only to operate a reasonable process in considering requests. The judge had reached the right conclusion.

Service charges

- **Assethold Ltd v Abdelhadi** [2018] UKUT 22 (LC), 19 January 2018

The freeholder claimed, as service charges, administration charges of £561.35. These comprised legal costs of £510 and interest. They related to solicitors' costs incurred prior to the issue of proceedings against the lessee. The FTT disallowed those costs, finding that there was no evidence in relation to them, apart from the oral evidence given by the freeholder's representative. The tribunal stated that it would have expected to see a copy of the relevant invoice together with a breakdown to confirm what those costs represented. Further, the tribunal was not satisfied that those costs were recoverable under the lease because the only costs provision in the lease related to Law of Property Act 1925 s146. As the costs had been incurred prior to the issue of proceedings, the tribunal was not satisfied that they had been incurred in contemplation of forfeiture.

P D McCrea FRICS allowed the landlord's appeal. There was some evidence before the tribunal, namely a letter from the freeholder's solicitors to the lessee, which indicated that 'legal fees had been incurred of £510 inclusive of VAT "to date"' (para 20). There was also the evidence of the freeholder's representative. If the tribunal doubted the truthfulness of her evidence, it should have put its concerns to her and made a specific finding with proper reasons. Further, a letter from the freeholder's solicitors clearly signalled their intentions to forfeit.

Housing allocation

- **C v Galway CC** [2017] IEHC 784, 21 December 2017

Ms C, then a mother of three children, first applied to be placed on the council's housing waiting list in July 2010. She made a subsequent application in August 2011. In both applications, she indicated that in the previous five years she did not have a conviction for disorderly conduct in a public place. In 2017, the council decided to defer the housing application for a one-year period. It did so on the grounds that: (1) she had failed to provide full information in her 2010 and 2011 applications; and (2) that, together with her record of criminal offences, triggered a scoring matrix that justified a deferral. Ms C sought a judicial review.

O'Regan J dismissed the claim. As to the non-disclosure, she held that:

The applicant was clearly asked in her application in 2010 and again in 2011, if she had any conviction for disorderly conduct in a public place for the preceding five year period and on each occasion answered she did not, whereas in fact she had such a conviction in 2009. In the events the first named applicant has 89 convictions although it is asserted that these are minor offences … (para 26(2)).

As to the scoring matrix, she held that:

It identifies that repeat offences would be at the high end of the scoring scale with the provision of false information scoring either zero or five. Insofar as the scoring for timeline is concerned, it is indicated that if the offence is committed within the last two years and is habitual, scoring of four to five might be achieved. A deferral would be occasioned for a score greater than nine out of 20. The … applicant's most recent convictions were in January, June, and July of 2016 and the most up to date offence occurred in November, 2015. The deferral matrix document identifies that each applicant will be dealt with on an individual basis and the discretion in respect of all matters is an express right and can be applied where deemed appropriate. I am satisfied that the scoring identified by the respondent was made within jurisdiction with ample evidence available to the respondent to determine such a scoring and that the content of the matrix itself establishes that it is not an inflexible policy … (para 26(3)).

Homelessness

Priority need

- **HB v Haringey LBC**[7] County Court at Central London, 29 January 2018

The appellant was a single male refugee aged 47. He suffered from post-traumatic stress disorder, depression, flashbacks and reported suicidal ideation as a result of his experience of torture in Algeria. He also had musculoskeletal problems, feet and back pain and asthma.

His application for homelessness assistance initially led to an adverse review decision that was quashed on appeal by HHJ Lamb QC (see December 2015/January 2016 *Legal Action* 46). A new review decision was made in July 2017, which again found that the appellant did not have a priority need because he was not 'vulnerable'. The reviewing officer, Minos Perdios, wrote: 'You clearly have a number of issues medical and social and you may very well be more vulnerable than ordinary vulnerable but I am not satisfied that you are significantly more vulnerable than ordinary vulnerable.'

Recorder Bowdery QC held that this finding was identical, or almost identical, to the finding in *Smith v Haringey LBC* [2017] EWCA Civ 1624; [2017] HLR 48, in which the same reviewer had written: 'It may very well be the case that you are more vulnerable than ordinarily vulnerable but I am not satisfied that you are significantly more vulnerable or even [more] vulnerable than ordinarily vulnerable' (para 26). The Court of Appeal held that this approach connoted a comparative exercise, which should have resulted in a conclusion that Mr Smith had a priority need. It followed that the reviewer had interpreted 'significantly' as importing a quantitative threshold and the decision was wrong in law.

The recorder rejected the council's submissions that *Smith* was incompatible with *Hotak v Southwark LBC* [2015] UKSC 30; [2016] AC 811; July/August 2015 *Legal Action* 50 and therefore should not be followed. He also rejected the council's submission that reading the review decision as a whole, the reviewer had not fallen into error.

The appeal was allowed on the basis that the reviewer had applied the wrong test, as had been the case in *Smith*. The review decision was quashed.

- **Cherry v Tower Hamlets LBC**[8] County Court at Central London, 11 January 2018

The council decided, on review, that the appellant did not have a priority need for accommodation because he was not vulnerable: HA 1996 s189(1)(c).

The reviewing officer had been provided with a report from a psychiatrist who stated that the appellant had a diagnosis of depression of a moderate clinical degree, post-traumatic stress disorder at a mild clinical degree and harmful use of cannabinoids. She stated that these diagnoses had a significant impact on his global cognitive function and his ability to interact with others around him and noted that he remained untreated. She specifically stated:

In my opinion he is clearly disabled by his mental illness and thus significantly more vulnerable than an average person rendered homeless … His mental health will remain unchanged or deteriorate without treatment coupled with the added severe stress of his homelessness … I am concerned about his suicidality and hopelessness and it is my opinion his risk of suicide has increased since I reviewed him last.

The reviewing officer then obtained advice from Dr James Wilson of NowMedical. He did not meet or examine the appellant or have access to his medical records but advised that:

… it is not evident that the applicant is so disabled that he is unable to cope with the effects of homelessness or seek and maintain alternative forms [of] accommodation. The applicant has been able to attend appointments and access support, and on this basis, I would not consider him vulnerable as defined.

On appeal, Recorder Hollington QC varied the decision to one that the appellant did have a priority need. He held that:

1. The reviewing officer stated that the psychiatrist's first report contained nothing to raise warnings about the NowMedical reports but was wrong to do so.
2. The psychiatrist had several advantages over Dr Wilson of NowMedical:
   a. She had examined Mr Cherry twice whereas Dr Wilson did not.
   b. She was aware of his medical records whereas Dr Wilson was not.
   c. It was apparent from their respective CVs that the psychiatrist had considerably greater experience of personal and direct treatment of individual patients. The psychiatrist had had a settled position as a consultant since 2007 whereas since 2012 Dr Wilson had pursued a career that was more remote from the treatment of individual patients and more concerned with assessment or treatment of persons as an expert.
3. The reviewing officer alleged that the psychiatrist had not applied the correct test of vulnerability while Dr Wilson had done so. Again, he was

wrong. It was clear the psychiatrist was aware of and applied the correct test while it was also clear that Dr Wilson had applied too high a test: the test was not whether Mr Cherry was 'unable to cope' but whether he was 'less able than an ordinary person to cope with homelessness'.

4. The reviewing officer and Dr Wilson relied on Mr Cherry's ability to attend appointments and access support but that was 'a manifestly inadequate foundation for Dr Wilson, without further enquiry, to dismiss [the psychiatrist's] conclusions'.
5. The reviewing officer had clearly overlooked the fact that Dr Wilson had signally failed to engage with the great majority of the reasoning and conclusions carefully expressed by the psychiatrist in both her reports, which provided strong prima facie support for her view that Mr Cherry was vulnerable.
6. The independent living assessment did not address, sufficiently or at all, the psychiatrist's points about Mr Cherry's difficulty in engaging with strangers and his need for medical help. It was primarily focused on his ability to fend for himself with ordinary day-to-day activities.
7. There was no indication that the reviewing officer took seriously the psychiatrist's concerns about suicide.
8. Taking proper account of the evidence, particularly the psychiatrist's reports, and applying the correct test, any reasonable decision-maker would have reached the decision that Mr Cherry was vulnerable and therefore in priority need.
9. In any event, having regard to the criticisms made above of the manner in which the medical evidence was handled, it would not be just to subject Mr Cherry to the vagaries of a reconsideration of his case.

Housing and children

- **R (Stewart) v Birmingham City Council**
  [2018] EWHC 61 (Admin), 24 January 2018

The claimant and his partner had been provided by the council with assistance, including accommodation, under Children Act 1989 s17 because their child was considered to be in need. Their immigration status was such that they could not apply for homelessness assistance or a housing allocation. The council became suspicious that the family were receiving significant financial support from third parties as a result of their apparently very comfortable lifestyle. Enquiries made by the council were met with a 'wall of silence' from the parents (para 80). It decided that their child was no longer a child in need.

The claimant sought a judicial review, contending that the council had failed to take into account that the migrant status of the couple would mean they could not secure private rented accommodation because of the 'right to rent' scheme: Immigration Act (IA) 2014 ss20–23.

Jeremy Baker J dismissed the claim. Under IA 2014 s21(3), a person is to be treated as though they have a right to rent, if the secretary of state has granted them permission to do so. While permission could not be guaranteed, a letter to the council from the Home Office made clear, in line with the Home Office's own guidance, *Right to rent: landlords' penalties* (version 5, 1 December 2016), that permission would normally be granted to individuals such as the claimant and his partner who have outstanding in-country rights of appeal.

The judge said:

... I consider that given the context in which the determinations were made by the defendant, the parents' refusal to provide full disclosure about their supportive network of family and/or friends entitled the defendant to decide that Deirdre was no longer a child in need in this case. Moreover, given the permissive regime operated by the secretary of state under section 21(3) of the 2014 Act, the right to rent scheme did not affect the lawfulness of the decision (para 95).

1. www.equalityhumanrights.com/en/legal-casework/legal-support-project/legal-support-project-housing-and-social-security.
2. https://laghousinglaw.com/2017/12/17/its-cold-outside/.
3. DCLG documents were published before the January 2018 cabinet reshuffle, when the department became the MHCLG.
4. Shelter Cymru and Rachel Anthony, barrister, Cardiff.
5. Jo Holden, solicitor, Holden & Co LLP, Hastings.
6 Gillian Wildgoose, trainee solicitor, Philcox Gray, London and Daniel Clarke, barrister, London.
7. Liz Davies, barrister, London and Penny Hari, solicitor, Foster & Foster, London.
8. John Gorringe, solicitor, TV Edwards, London and Nicholas Nicol, barrister, London.

Nic Madge and Jan Luba QC 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 notes 4–8 above for providing details of the judgments.