Housing: recent developments

Jan Luba QC and Nic Madge highlight recent housing law news and legislative developments, as well as cases on human rights, assured shorthold tenancies, long leases, anti-social behaviour, HMOs, housing allocation, and homelessness.

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Housing law news and legislation update

Homelessness: England

The changes made to Housing Act (HA) 1996 Pt 7 (Homelessness) by the Homelessness Reduction Act 2017 take effect this month in respect of new applications to local housing authorities for homelessness assistance. In addition to the new statutory *Homelessness code of guidance for local authorities* (Ministry of Housing, Communities and Local Government (MHCLG), February 2018), the UK government has published 16 policy factsheets covering the main steps in the new process of handling applications for homelessness assistance. The topics covered are:

1. threatened with homelessness;
2. duty to provide advisory services;
3. assessment and personal plans;
4. prevention;
5. relief;
6. help to secure and suitability;
7. non-cooperation;
8. reviews;
9. duty to refer;
10. codes of practice;
11. local connection for care leavers;
12. updating the code of guidance;
13. secondary legislation;
14. the Homelessness (Review Procedure etc) Regulations 2018 SI No 223: regulatory procedure for issuing notices of non-cooperation;
15. the Homelessness (Review Procedure etc) Regulations 2018: review procedures; and
16. the Homelessness (Review Procedure etc) Regulations 2018: duty to refer.

The House of Commons Library has updated its key briefing note *Statutory homelessness in England* (Briefing Paper No 01164, 22 March 2018) to cover the changed regime.

The UK government is providing £72.7m to local housing authorities to meet the additional costs associated with the first three years of implementation of the 2017 Act. It anticipates that the new duties to prevent homelessness will lead to savings for councils thereafter. The financial allocations cover 2017 to 2018, 2018 to 2019 and 2019 to 2020. New burdens assessments explain how the government calculated the overall funding and how much each authority will receive. A *Methodology note* explains how the funding is distributed between local authorities. A separate *New burdens assessment* on the application of the duty to refer owed by social service authorities has been published. The government will not be providing additional funding to social service authorities for the duty to refer as the assessment concluded that the cost of referrals will be offset by savings as a result of preventing and resolving homelessness for actual and potential social care clients.[1]

Alongside commencement of the new 'duty to refer', the UK government is working with organisations to identify different ways that services can contribute to preventing homelessness and supporting the successful implementation of the 2017 Act ('Hospitals, prisons and Jobcentres to refer people at risk of homelessness', MHCLG/Heather Wheeler MP press release, 22 February 2018). In particular, it is working with the National Housing Federation to explore how housing associations can support implementation, including by making referrals, and is working with the National Police Chiefs' Council to develop a 'test and learn' project in Brighton and Hove focusing on homelessness prevention.

On 27 February 2018, there was a parliamentary debate on the homelessness aspects of the supplementary estimates (*Hansard* HC Debates vol 636 col 709). For the detail of the spending changes see *MHCLG supplementary estimate 2017/18: explanatory memorandum.* Proposed changes in relation to homelessness funding included: (1) to reduce 2017/18 current spending on preventing homelessness from £265.8m to £263.6m; and (2) to remove the £25m of capital funding previously allocated for reducing homelessness, which will now not be spent in 2017/18.

Homelessness: rough sleeping

The UK government has commissioned research to evaluate the effectiveness of rough sleeping interventions and provide estimates of the costs connected with homelessness. A new document explains: (1) why the government is doing the research; (2) what will happen to the information that individuals provide as part of the study; and (3) individuals' data protection rights: *Homelessness and rough sleeping research: further information sheet* (MHCLG, version 3, 28 February 2018).

A new House of Commons Library briefing paper provides an overview of the support and services – including accommodation, health, welfare, training, employment and voter registration – that are available for rough sleepers in England, and the challenges rough sleepers can face in accessing them: *Rough sleepers: access to services and support (England)* (Briefing Paper No 07698, 9 March 2018).

Liabilities of leaseholders

Commonhold and Leasehold Reform Act 2002 Sch 11 para 5A (inserted by Housing and Planning Act (HPA) 2016 s131) gives leaseholders a right to apply to courts and tribunals to restrict the ability of their landlord to recover, as an administrative charge, the landlord's costs of taking part in legal proceedings. The amendment took effect in April 2017. The UK government has now published guidance about the operation of the provision: *Limitation of administration charges: costs of proceedings – a guidance note on the changes which came into force on 6th April 2017* (MHCLG, February 2018).

A new briefing paper from the House of Commons Library considers leaseholder responsibility for paying for fire safety works on blocks of flats: *Leasehold high-rise flats: who pays for fire safety work?* (Briefing Paper No 8244, 16 March 2018).

Dispute resolution in housing

The UK government has launched a consultation exercise seeking views on redress for consumers of housing: *Strengthening consumer redress in the housing market: a consultation* (MHCLG, 16 February 2018). It covers:

- the current complaints and redress landscape, how it is working and if more can be done to improve it;
- what standards and services should be expected of a redress scheme/an ombudsman;
- how to fill the existing gaps between current services; and
- whether a single ombudsman service is needed to simplify access to redress across housing, and if so, what form that should take and what its remit should be.

The consultation closes at 11:45 pm on 16 April 2018.

Private renting

In a speech setting out UK government policy on housing, delivered on 5 March 2018, the prime minister said:

Private landlords play an important role in the housing market. Talk to tenants, however, and you'll repeatedly hear complaints that people are paying more and more for less and less. So this government is taking action to clean up the rental market and bring down the cost of renting.

Too many tenants have got used to being hit with rip-off fees by letting agents, facing huge upfront bills to check references or sign contracts. That's simply not fair, so we're banning letting agents from charging most tenants any fees at all.

Families face being uprooted every six months when their leases expire, so we're working to make longer tenancies the norm.

Rogue landlords have been flouting rules that protect tenants' rights and safety. So we've given local authorities new powers to crack down on such behaviour, and we're backing legislation that will ensure all rental properties are fit for human habitation.

With no regulation in property

management, the door has been open to cowboy agents – with tenants, leaseholders, freeholders and honest agents all paying the price. That's why we're working with reputable property managers and their clients to clean up and regulate the sector.

In order to improve standards in the private rented sector, the Local Government Association (LGA) has recommended that private landlords who commit certain housing offences should be fined a minimum of £30,000 under common sentencing guidelines: 'Rogue landlords taken to court should face minimum £30,000 fines' (LGA news release, 23 February 2018).

The HPA 2016 enacted a range of measures designed to drive up standards in the private renting market. The Housing and Planning Act 2016 (Commencement No 7 and Transitional Provisions) Regulations 2018 SI No 251 bring many more of the provisions into force, some from 6 April 2018. An overview of the changes is provided by an informative House of Commons Library briefing paper: *Implementation of the Housing and Planning Act 2016* (Briefing Paper No 8229, 28 March 2018).

The Housing (Management Orders and Financial Penalties) (Amounts Recovered) (England) Regulations 2018 SI No 209 came into force on 6 April 2018. They set out how a local housing authority must deal with any surplus monies recovered through management orders under HA 2004 ss110(5A) and 119(4B), made on breach of banning orders by private landlords, and any financial penalties received under HPA 2016 s23(8).

The Housing and Planning Act 2016 (Database of Rogue Landlords and Property Agents) Regulations 2018 SI No 258 came into force on 6 April 2018. They describe the information that must be included in an entry in the database of rogue landlords and property agents established under HPA 2016 Part 2 Ch 3.

The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 SI No 221 changes the prescribed description of houses in multiple occupation (HMOs) that are required to be licensed in England. It replaces the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006 SI No 371 and has the effect of extending the scope of mandatory HMO licensing in England to certain HMOs of less than three storeys. It will come into force on 1 October 2018. The order is accompanied by an explanatory memorandum and an impact assessment.

Data from the English Housing Survey (2015 to 2016) showed that only 60 per cent of homes in the private rented sector had all five recommended electrical safety features installed (modern PVC wiring, modern earthing, modern consumer units, miniature circuit breakers and residual current devices) compared with 74 per cent of local authority homes and 76 per cent of housing association homes (*English Housing Survey: private rented sector, 2015-16*, Department for Communities and Local Government, 13 July 2017, page 29, para 4.17). The UK government has launched a consultation exercise on proposals to introduce five-yearly mandatory electrical installation checks for private rented property: *Electrical safety in the private rented sector* (MHCLG, 17 February 2018). The consultation closes at 11:45 pm on 16 April 2018.

Human rights

Article 8

- **Valdgardt v Russia**
  App No 64031/16,
  6 February 2018

In 1994, Ms Valdgardt moved in with her partner, N, who lived in a flat in St Petersburg that he owned. In 1998, she lent him US$18,000 for two years. He undertook to give her his flat if he failed to repay her. In 1998, she was registered as living in that flat. Although they never married, she lived there with N for the next 15 years. N died intestate in May 2013. In October 2013, Ms Valdgardt instituted court proceedings seeking to have her property rights over the flat acknowledged on account of usucaption (the acquisition of a right to property by uninterrupted and undisputed possession). The court dismissed the claim.

In 2015, the district administration brought court proceedings against Ms Valdgardt, seeking her eviction from the flat, claiming that it was an heirless estate and so the property rights to it had to be transferred to the administration. The district administration, as the new owner of the flat, had the right to seek her eviction in accordance with article 304 of the Civil Code. The court found that N had let her live in the flat as a family member, and until his death had shared a common household with her. Therefore, after N's death, she had not lost the right to live in the flat. The district administration appealed successfully. The appeal court ordered her eviction.

In May 2017, bailiffs instituted enforcement proceedings. Ms Valdgardt complained that there had been a violation of her right to respect for her home under article 8 of the European Convention on Human Rights (ECHR).

The European Court of Human Rights (ECtHR) noted that Ms Valdgardt had already lived in the flat for more than 20 years when her eviction was ordered. The flat was therefore her 'home'. It was common ground that the eviction order amounted to an interference with her right to respect for her home. The court accepted that the interference had a legal basis in domestic law and pursued the legitimate aim of protecting the rights of individuals in need of housing. The central question was, therefore, whether the interference was proportionate to the aim pursued and thus 'necessary in a democratic society'. After referring to *Connors v UK* App No 66746/01, 27 May 2004; [2004] HLR 52 and *McCann v UK* App No 19009/04, 13 May 2008; [2008] HLR 40, the court reiterated that '[a]ny person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under article 8 … notwithstanding that, under domestic law, his right of occupation has come to an end' (*McCann* at para 50, quoted at para 31 of the present judgment).

In this case, the domestic courts did not weigh the interests of the local authorities against Ms Valdgardt's right to respect for her home. Once they had found that her right to reside in the contested flat had come to an end following the death of her partner, they gave that aspect paramount importance, without seeking to weigh it against her arguments. The national courts had failed to balance the competing rights and therefore to determine the proportionality of the interference with her right to respect for her home. There was accordingly a violation of article 8. The court did not discern any causal link between the violation and the pecuniary damage claimed, but awarded €7,500 for non-pecuniary damage.

- **Ali and Aslam v Channel 5 Broadcast Limited**
  [2018] EWHC 298 (Ch),
  22 February 2018

In April 2015, Mr Ali and Ms Aslam were evicted from their rented home by High Court enforcement agents (HCEAs) enforcing a writ of possession obtained by their landlord, Mr Ahmed. The eviction was filmed by a television production company, Brinkworth Films Ltd. Edited footage of the eviction was broadcast by Channel 5 as part of a series called *Can't Pay? We'll Take It Away*. The programme was viewed by 9.65m people. Mr Ali and Ms Aslam claimed compensation for the misuse of their private information, damages for distress and aggravated damages. Channel 5 denied that they had a reasonable expectation of privacy and, in the alternative, contended that the balance between Mr Ali and Ms Aslam's right to respect for their private life and Channel 5's right to freedom of expression came down in favour of the latter due to the public interest in the matter.

Arnold J stated that it was common ground that the first question to be addressed when considering a claim for misuse of private information was whether the claimants had a reasonable expectation of privacy in respect of the information in question, so that their rights under article 8 were engaged (*Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457). It was also common ground that the test was an objective one. The judge considered that the property remained their home until they left it. He also found that article 8 was engaged. Although Channel 5 was entitled to report that the county court had made an order for possession and that the tenants were evicted, that did not justify the filming and broadcasting of them in their home, in distress and being taunted. Furthermore, the impact of the programme on their children could not be justified by the 'open justice principle'.

The judge then proceeded to balance the claimants' article 8 rights against Channel 5's right to freedom of expression under article 10. Although he accepted that the programme did contribute to a debate of general interest, he considered that the inclusion of the claimants' private information went beyond what was justified for that purpose. The focus was not on the matters of public interest, but on the drama of the conflict between the HCEAs, the landlord's son and the claimants. That conflict had been encouraged by another of the HCEAs to make 'good television'. He added:

The justification relied upon by the claimants for restricting Channel 5's article 10 rights is their right to respect for their private and family life and their home. Notwithstanding the importance of freedom of expression, I consider that the restriction is justified and proportionate in the circumstances of this case. Accordingly, in my judgment the balance comes down in favour of protecting the claimants' article 8 rights (para 210).

After referring to *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch); [2016] FSR 12,

upheld by the Court of Appeal ([2015] EWCA Civ 1291; [2017] QB 149), and '[l]ooking at the matter in the round' (para 220), the judge awarded damages of £10,000 for each claimant.

Possession claims

- **Haringey LBC v Simawi**
  [2018] EWHC 290 (QB),
  19 February 2018

In 1994, Mr Simawi's father was granted a secure weekly tenancy of a two-bedroom maisonette. The property was the family home. The father died in June 2001. His wife, the defendant's mother, succeeded to his secure tenancy pursuant to HA 1985 s87. In October 2013, Mr Simawi's mother died. He asked for the tenancy to be transferred to him because, immediately prior to her death, he had been occupying the property as his only or principal home for over 10 years. Haringey refused, relying on ss87–88, stating that his mother had herself been a successor (the no second succession rule).

Haringey served a notice to quit and began possession proceedings, which Mr Simawi defended. He claimed that the no second succession rule was incompatible with Human Rights Act 1998 Sch 1 articles 8 and 14. In the light of the incompatibility issue, the claim was transferred to the High Court. The communities and local government secretary[2] was joined as a party. A trial was fixed for 2 October 2018.

The parties agreed that the issue would become academic if Haringey were to offer (and Mr Simawi were to accept) a new secure tenancy. The acceptance of a new tenancy would bring the claim for possession to an end and the incompatibility issue would become academic. The parties asked the court to determine whether, if the claim became academic before trial, the trial should proceed. Mr Simawi submitted that the point was of public importance and that the court should determine it. Haringey and the communities and local government secretary contended that no order should be made and that, if a secure tenancy was offered and accepted, the claim would be at an end in the ordinary way. All parties were agreed that the court had a discretion to determine a dispute that had become academic.

Nicklin J found that this was a point of real importance and significance that potentially affected a large number of people. It was likely to arise in several succession cases under HA 1985 ss87–88 and for many years to come. It was not some obscure legislative provision that affected only a handful of people each decade. The judge exercised his discretion to order the resolution of the issue, even if, subsequently, its resolution in this particular case was rendered academic.

Article 1 of Protocol No 1

- **Cassar v Malta**
  App No 50570/13,
  30 January 2018

In 1962, a third party rented out a 14-room house under a temporary contract. The rent was approximately €233 per year. In 1987, by operation of law, that contract was converted into a lease. In 1988, Mr and Ms Cassar bought the property from the third party for approximately €25,600 in the full knowledge that it was occupied under the lease and that the tenant had three children. However, since all the children had settled lives of their own, Mr and Ms Cassar expected that they would recover the property after the death of the tenant and his wife. In 2003, the daughter of the tenants returned to live with her parents in the property.

The tenant and his wife died in 2004 and 2008 respectively. Their daughter refused to vacate and requested that she be recognised as a tenant as she had been residing in the property at the date of her father's death. Mr and Ms Cassar refused to recognise her as a tenant or to accept rent from her. From 2009, as a result of a new law, the rent increased every three years in accordance with the inflation index. Mr and Mrs Cassar alleged that they had suffered a violation of article 1 of Protocol No 1 as a result of the forced landlord-tenant relationship coupled with the low amount of rent. They also alleged a violation of article 14.

The ECtHR stated that the rent-control regulations and their application in the present case constituted an interference with Mr and Ms Cassar's right (as landlords) to use their property. The parties did not dispute that the interference was lawful. The court accepted that the legislation pursued a legitimate social-policy aim, specifically, the social protection of tenants. However, the Maltese authorities had not struck a fair balance because Mr and Ms Cassar could not exercise their right of use, in terms of physical possession, as the house was occupied by tenants and they could not terminate the lease. Although they remained the owners of the property, they were subject to a forced landlord-tenant relationship for an indefinite period of time. They did not have an effective remedy enabling them to evict the tenants either on the basis of their own needs or those of their relatives, or on the basis that the tenants were not deserving of such protection.

Further, a rent based on the value of the property as it stood in 1962, with adjustment, was certainly not reasonable for the years following 2000. The court described the amount of rent as 'derisory' (para 60). It noted that state control over levels of rent fell into a sphere subject to a wide margin of appreciation by the state, but

[i]n the present case, having regard to the low rental payments to which the applicants have been entitled in recent years, the applicants' state of uncertainty as to whether they would ever recover their property, which has already been subject to this regime for nearly three decades, the rise in the standard of living in Malta over the past decades, and the lack of procedural safeguards in the application of the law, which is particularly conspicuous in the present case given the situation of the current tenant as well as the size of the property and the needs of the applicants, the court finds that a disproportionate and excessive burden was imposed on the applicants. It follows that the Maltese state failed to strike the requisite fair balance between the general interests of the community and the protection of the applicants' right of property (para 61).

There was accordingly a violation of article 1 of Protocol No 1.

The court also found a violation of article 14 in conjunction with article 1 of Protocol No 1. The court reiterated that the right not to be discriminated against in the enjoyment of the rights guaranteed under the ECHR is violated when states, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different. By applying an across-the-board legislative measure that failed to treat Mr and Ms Cassar (whose property was large, of a high standard and in a sought-after area) differently, the state violated their right not to be discriminated against in the enjoyment of their rights under article 1 of Protocol No 1.

The court noted that an award in respect of pecuniary damage under article 41 is intended to put the applicant, as far as possible, in the position they would have enjoyed had the breach not occurred. It awarded Mr and Ms Cassar jointly the sum of €170,000 as pecuniary damage and €3,000 in respect of non-pecuniary damage.

Comment: There appears to be a growing divergence between the way in which the ECtHR and the UK courts apply article 14. Compare *Cassar* with *King v Environment Agency* [2018] EWHC 65 (QB); March 2018 *Legal Action* 28.

Assured shorthold tenancies

Gas safety notices

- **Caridon Property Ltd v Shooltz**
  County Court at Central London,
  2 February 2018

In January 2016, Caridon let a flat on a 12-month fixed-term assured shorthold tenancy to Mr Shooltz. That term expired in January 2017. Prior to that, in December 2016, Caridon served a HA 1988 s21 notice. Mr Shooltz remained in occupation. Caridon brought a possession claim. Mr Shooltz argued that the landlord could not rely on the s21 notice because it had not, prior to the tenancy, provided him with a copy of the most recent gas safety certificate for the premises (see HA 1988 s21A, Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 SI No 1646 reg 2 and Gas Safety (Installation and Use) Regulations 1998 SI No 2451 reg 36). District Judge Bloom found that Caridon had not complied with the regulations and dismissed the claim. Caridon appealed.

On appeal, a circuit judge held that the purpose of reg 36(6) and (7) was not only to ensure that landlords checked and maintained gas appliances and flues, but also that tenants and prospective tenants had the assurance that this was done. Reg 36(6) imposed two separate and distinct obligations on landlords. First, chronologically, by reg 36(6)(b) a landlord was required to give a copy of the latest gas safety record for an appliance to any 'new tenant of premises' at a time 'before that tenant occupies those premises'. A second, and different, obligation is set out in reg 36(6)(a), which is, within 28 days, to give to an existing tenant a copy of a record relating to gas safety.

The judge rejected the contention that Assured Shorthold Tenancy Regulations reg 2 operated to disapply time in relation to both elements of reg 36(6). He also rejected the contention that a purposive interpretation of the regulations ought to be applied to give effect to the purpose of s21. The obligation in the Gas Safety Regulations to give or display notifications prior to the taking up of a tenancy by an incoming tenant was a 'once and for all' obligation on a prospective landlord in relation to a prospective tenant. Once that opportunity has been missed, there was no sense in which it could be rectified. The appeal was dismissed.

Setting aside possession order

- **Tutton v Family Mosaic Housing Association**[3]
  County Court at Chelmsford,
  15 February 2018

Ms Tutton was granted an assured

shorthold tenancy in June 2015. A notice seeking possession relying on HA 1988 Sch 2 Ground 8 was served in October 2015. A possession claim was issued in February 2016. Ms Tutton did not attend the hearing and District Judge Humphreys made a possession order on the mandatory ground in April 2016. In July 2016, the ceiling collapsed and the tenant was decanted. She was moved back into the property in February 2017. By notice of eviction dated 15 March 2017, she was informed that a warrant would be executed on 19 April 2017. This was the first she knew about the claim. She applied to suspend the warrant.

Although the court had no jurisdiction to entertain that application (HA 1980 s89), her witness statement in support of the application also stated that she wished to have the possession order set aside. On 19 April 2017, District Judge Humphreys dismissed the application to suspend the warrant. She made no mention in her judgment of the application to set aside the possession order. Ms Tutton appealed.

HHJ Middleton-Roy allowed the appeal. It was not necessary for the face of the application notice to state that the tenant sought to set aside the possession order. It was sufficient that her witness statement in support of the application made that clear. The judge remitted the application to set aside the possession order to be reconsidered by a different district judge.

Long leases

Service charges

- **E & J Ground Rents No 11 LLP v Various Leaseholders of Fresh Apartments, Salford**
  First-tier Tribunal (Property Chamber), Manchester, 24 January 2018

E & J was the freehold owner of flats let under long leases. The block, built in 2007, was constructed of steel, concrete and masonry. There was external aluminium cladding similar in nature to that on Grenfell Tower. Following that fire, as an interim safety measure, the freeholder deployed fire marshals as a 'waking watch' so that any fire could be quickly detected. The freeholder applied to the First-tier Tribunal (Property Chamber) (FTT) under Landlord and Tenant Act (LTA) 1985 s27A for a determination that the cost of providing fire marshals was recoverable through the maintenance expenses and service charge provisions of the leases.

The FTT found that the charges were recoverable. The provision of the waking watch was a means of complying with the freeholder's statutory obligations under the Regulatory Reform (Fire Safety) Order 2005 SI No 1541. Given the terms of the leases, that meant that the cost was contractually recoverable. Further, the decision to employ the marshals was reasonable and the amount of costs incurred was reasonable within the meaning of LTA 1985 s19.

Consent to assign

- **No 1 West India Quay (Residential) Limited v East Tower Apartments Limited**
  [2018] EWCA Civ 250, 21 February 2018

West India Quay let 158 residential apartments on long leases. In 2004, it granted East Tower Apartments Ltd (ETAL) 999-year underleases of 42 apartments. ETAL did not itself occupy any of those apartments, but its agents granted short-term assured shorthold tenancies of the apartments. Later, ETAL decided to sell its 42 apartments. Under the terms of the underlease, West India Quay's consent was required, 'such consent not to be unreasonably withheld'. After correspondence, West India Quay refused to give consent for the assignment of some leases, giving three reasons for refusing consent. Of those three grounds, two were reasonable; the third was unreasonable. Henderson J found that the bad reason vitiated the two good ones, with the consequence that West India Quay's refusal of consent was not reasonable ([2016] EWHC 2438 (Ch); [2017] 1 P&CR 8).

The Court of Appeal allowed an appeal. Lewison LJ noted that since *Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 1 WLR 1661, the exercise of a contractual discretion is to be judged by the same principles as the exercise of public law discretions. In a line of authorities, courts have held that where a decision-maker gives a good reason and a bad reason for a decision, there are cases in which the good reason is enough to support the decision. The theme running through those cases is that if the decision would have been the same without reliance on the bad reason, the decision (looked at overall) is good. In that situation, the bad reason will not have vitiated or infected the good one. In this case, the judge should have asked himself whether the landlord would still have refused consent on the reasonable grounds, if it had not put forward the unreasonable ground.

To put the point another way: the question is whether the decision to refuse consent was reasonable; not whether all the reasons for the decision were reasonable. Where, as here, the reasons were free-standing reasons each of which had causative effect, and two of them were reasonable … the decision itself was reasonable (para 42).

Anti-social behaviour

Injunctions

- **Rochdale MBC v Heron**
  High Court (Queen's Bench Division), 19 February 2018

Garnham J continued an interim mandatory injunction prohibiting the establishment of unauthorised Traveller encampments anywhere in the borough to prevent apprehended breaches of planning law. He noted the speed at which they had been set up and the serious consequences for public health and environmental damage.

- **Canary Wharf Investments Ltd v Brewer**
  High Court (Queen's Bench Division), 23 February 2018

Warby J granted interim injunctions to prevent urban explorers from trespassing on the Canary Wharf estate, where they had been climbing on buildings and cranes, and accessing restricted areas. The judge also ordered delivery up of photographs and videos taken of their unlawful conduct, which had been posted on social media.

Houses in multiple occupation

Selective licensing

- **Brown v Hyndburn BC**
  [2018] EWCA Civ 242, 21 February 2018

Mr Brown was a private-sector landlord. He let property in an area that the council had designated as a 'selective licensing area' in exercise of its powers under HA 2004 s80. This meant that before any property could be occupied, he had first to apply for a licence authorising its occupation. The council granted a licence, but imposed conditions that 'a suitable carbon monoxide detector must be provided' and that 'the premises are covered by a valid Electrical Installation Condition Report'. Mr Brown appealed to the FTT against the imposition of those conditions.

The appeal was substantially successful. The FTT determined that the council had no power to use the licensing regime to require landlords to upgrade their properties or to introduce new equipment or facilities, by way of licence conditions. The council appealed to the Upper Tribunal (Lands Chamber). HHJ Gerald allowed the appeal and reinstated the two conditions as originally imposed. Mr Brown appealed to the Court of Appeal.

The Court of Appeal allowed the appeal. At first blush, the powers given by HA 2004 s90(1) to include conditions considered appropriate for 'regulating the management, use or occupation of the house concerned' appeared broad. However, in HA 2004 Parts 1–3, there was a distinction between (a) conditions regulating the management, use and occupation of the house concerned, and (b) conditions regulating its condition and contents. Section 90(1) provided only for conditions regulating the management, use or occupation of the house concerned. It did not give power to impose conditions regulating the condition and contents of premises. The natural reading of the phrase 'regulating the management, use or occupation' did not allow the application of conditions that regulated the 'condition and contents' of a house or what 'facilities and equipment' should be available within it.

Prosecutions

- **Paramaguru v Ealing LBC**
  [2018] EWHC 373 (Admin), 27 February 2018

Mr Paramaguru was charged under Town and Country Planning Act 1990 s179(2) with one offence of breaching a planning enforcement notice which had required him to cease the use of his property as a Class C4 HMO. As a preliminary ruling, magistrates decided that children up to the age of 18 were 'residents' within the meaning of Class C4 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 SI No 764. As a result, he entered a guilty plea and the case was committed to the Crown Court under Proceeds of Crime Act (PCA) 2002 s70 for confiscation proceedings and sentence. He appealed by way of case stated.

Supperstone J dismissed the appeal. The magistrates were right to rule that children under 18 were included in the meaning of the term 'residents' in the case of property used as a Class C4 HMO.

- **Brent LBC v Shah**[4]
  Harrow Crown Court, 29 January 2018

Brent prosecuted the defendants for various offences under HA 2004 Parts 2 and 3 and the Management of Houses in Multiple Occupation (England) Regulations 2006 SI No 372. There was evidence that one property contained more than 25 people at any given time and that a monthly rent of at least £6,000 was generated. On

conviction, a district judge (magistrates' court) referred the case to the Crown Court for consideration of confiscation proceedings under the PCA 2002. The council argued that the rent received was the benefit of criminal conduct and not from a lawful contract. It was only possible to grant licences or tenancies by breaching the terms of the selective licence and so a benefit was derived by the defendants from their criminal conduct.

Recorder Stephen Rubin QC distinguished *Sumal & Sons (Properties) Limited v Newham LBC* [2012] EWCA Crim 1840 and set a timetable to enable Brent to seek confiscation under the PCA 2002.

- **Brent LBC v Lingurar, Florin and Pricop**
  Willesden Magistrates' Court,
  23 February 2018

Three head tenants rented out a three-bedroom house to 35 men. Council officers discovered eight men sleeping in one room with wall-to-wall mattresses. The kitchen contained a sleeping area. Another mattress was laid out under a canopy in the back garden with no protection against the night temperatures.

The defendants were sentenced for offences of failing to obtain a HMO licence and failing to respond to Brent's requests for information. Two defendants were each fined £9,000 as well as £1,470 in costs and victim surcharges. The third defendant was fined £1,000 and ordered to pay £1,350 in costs and a victim surcharge.

Housing allocation

- **R v Miah**
  Harrow Crown Court,
  9 February 2018

In 2007, the defendant was allocated a tenancy of a flat by Barnet Council. She worked as a housing officer for a different council. She immediately sublet the flat to a family member, while she moved into a house in Luton that she had jointly inherited. She always declared that she lived in the council property. When the fraud was detected, and she was interviewed under caution, she admitted she had never lived in the flat and immediately agreed to hand back the keys. She pleaded guilty to three counts of fraud by failing to disclose information.

Sentencing her to 12 months' imprisonment, HHJ Hall accepted that the deception was the result of a great deal of planning and that the nature of the defendant's work would have meant she was aware that her actions were dishonest. She was also ordered to pay compensation of £20,000 with £3,174 costs.

Homelessness

Priority need

- **Freeman-Roach v Rother DC**
  [2018] EWCA Civ 368,
  6 March 2018

Mr Freeman-Roach was aged 54. He had suffered two strokes and spoke with a significant speech impediment. In addition, he had osteoarthritis, asthma and high blood pressure. On his application for homelessness assistance, the council decided that he did not have a priority need because his conditions did not render him vulnerable: HA 1996 s189(1)(c). That decision was upheld on review. HHJ Bedford allowed an appeal. The council appealed to the Court of Appeal.

The appeal was allowed. Rose J held that the reviewing officer had correctly stated the relevant legal test and applied it. A fair reading of the decision letter demonstrated that, although the reviewing officer 'accepted that Mr Freeman-Roach suffers from mental illness and physical disability, his several conditions were either controlled by medication or did not cause him any particular functional impairment' and he had decided that 'none of Mr Freeman-Roach's problems would make a noticeable difference to his ability to deal with the consequences of homelessness' (para 32). Moreover, a decision on review 'cannot be faulted because it failed to define "vulnerable" or "significantly" or failed to list the attributes of the ordinary person if made homeless. In so far as the decision of HHJ Lamb QC in *HB v Haringey* [December 2015/January 2016 *Legal Action* 46] decides differently, then it should not be followed and was disapproved in *Panayiotou [v Waltham Forest LBC* [2017] EWCA Civ 1624; [2017] HLR 48; December 2017/January 2018 *Legal Action* 42]' (para 35).

The judge had erred in applying too rigorous a test to the review decision. Rose J said that '[t]here is also plenty of judicial guidance to county courts when considering appeals under section 204 about the circumstances in which they should interfere with a reviewing officer's evaluation and, just as important, the circumstances in which they should not … Judges have consistently emphasised that the county court must not be too zealous in the examination of a reviewing officer's decision in order to identify errors of law' (para 22).

Lewison LJ added that 'it is not for the reviewing officer to demonstrate positively that he has correctly understood the law. It is for the applicant to show that he has not. The reviewing officer is not writing an examination paper in housing law. Nor is he required to expound on the finer points of a decision of the Supreme Court' (para 52).

Longmore LJ emphasised that 'it is not for the decision letter to "demonstrate" anything; it is for the applicant to demonstrate an error of law, not the other way round' (para 56).

Intentional homelessness

- **Samuels v Birmingham City Council**
  Supreme Court,
  19 February 2018

An appeal panel has granted Ms Samuels permission to appeal against the decision of the Court of Appeal ([2015] EWCA Civ 1051; [2015] HLR 47; December 2015/January 2016 *Legal Action* 46) upholding a finding that she had become homeless intentionally because she could have made up the shortfall between her rent and her housing benefit, but failed to do so.

Accommodation pending appeal

- **Freeman-Roach v Rother DC**
  [2018] EWCA Civ 368,
  6 March 2018

Upon receiving an adverse review decision, Mr Freeman-Roach told the council he would appeal and asked it to provide accommodation for him pending appeal: HA 1996 s204(4). It declined. Mr Freeman-Roach challenged that decision by an appeal made under HA 1996 s204A. HHJ Bedford granted an interim injunction in that appeal on a consideration of the papers (s204A(4)(a)) and at a later hearing allowed the s204A appeal and quashed the refusal to accommodate (s204A(4)(b)). He did so because: (1) having accommodated the applicant pending review (s188), it was irrational for the council not to have acceded to the request to accommodate him pending his appeal; and (2) if not accommodated, the applicant would have to sleep in his car, which would prejudice his ability to pursue the appeal. The council made a second appeal to the Court of Appeal.

The appeal was allowed. There had been no error of law in the decision refusing accommodation pending appeal. The council had applied the correct test and considered all relevant factors. In respect of his first reason for allowing the appeal, the judge had ignored 'the key change in circumstances which is that Mr Freeman-Roach was, after 16 December 2016, a person who the council had decided did not have a priority need rather than a person whose status … was under review. That is a sufficient difference to justify the council arriving at a different conclusion in the exercise of their discretion whether to provide accommodation. There is no need to point to some difference in Mr Freeman-Roach's personal circumstances before and after the section 202 decision in order to justify the withdrawal of interim accommodation once the section 202 review has been completed' (para 42).

As to the second reason, the judge had not dealt with the council's case that the applicant could have stayed with relatives or in a homeless men's shelter rather than sleeping in his car. 'Further, the judge paid no attention to the point Mr Bolton made about the demands of other homeless applicants, nor did he explain how Mr Freeman-Roach would be prejudiced in pursuing his appeal given that, as Mr Bolton noted, the appeal is on a point of law' (para 43).

Suitability of accommodation

- **Complaint against Haringey LBC**
  Local Government and Social Care Ombudsman Complaint
  No 16 014 926,
  31 January 2018

The complainant applied for homelessness assistance. The council accepted it owed her, and her family, the main housing duty (HA 1996 s193). The temporary accommodation in which the family were initially placed was infested with mice. In October 2016, they were moved to a ninth-floor one-bedroom flat in an ageing tower block due for demolition. It had no cold running water in the kitchen. The lift was often broken, leaving the family to climb flights of stairs with a pram and large bottles of water. Other problems included a lack of heating because of a disconnected gas meter.

At the end of October 2016, the council was asked to review the suitability of the accommodation on the grounds that the prematurely-born baby in the household was at risk of respiratory problems from damp and mould on the bedroom ceiling. In November 2016, a surveyor visited the flat and said that the stains on the bedroom ceiling were not mould, but smoke damage.

The review decision should have been received no later than the final week of December 2016, but this did not happen. By February 2017, there had been no progress with the repairs and there was still no cold water in the kitchen – as a result, the washing machine could not be used. The family was spending £20 per week on bottled water and a further £15 per week on laundry costs. The lift often remained

out of order for days or weeks at a time.

In March 2017, the council did not issue the review decision that had been promised for that month. In July 2017, a manager wrote to the family accepting that the flat was unsuitable and apologised for the council's poor communication. During a meeting, the council agreed to provide bottled water but this never materialised. The family were finally moved to a two-bedroom property at the end of August 2017.

The ombudsman's investigation found the council at fault for placing the family in the flat when officers knew there were problems with the water supply. It also criticised the council's response to the family's request for a review of the accommodation's suitability and to their complaints.

The council agreed to apologise and to pay the family £300 per month for the 10 months they were placed in the unsuitable accommodation. It would also pay an additional £20 per week to reimburse them for the bottled water they had to buy, and £15 per week for their laundry costs.

Launching his report ('Family housed in London tower block had no cold water', LGSCO news release, 23 February 2018), the ombudsman, Michael King, said:

This is yet another case of a council housing a family in what I have described in the past as Dickensian conditions. The family spent 10 months in accommodation which had initial heating problems, no cold water, and inadequate lifts, having been moved out of one with a rodent infestation.

The flat was patently unsuitable, and the lack of cold water meant it fell below minimum acceptable standards. This caused the family real hardship.

1 The assessments and notes are available online at: www.gov.uk/government/publications/homelessness-reduction-act-new-burdens-funding.
2 Now the housing, communities and local government secretary.
3 Pauline O'Dwyer, Sternberg Reed Solicitors, London, and Riccardo Calzavara, barrister, London.
4 See also the magistrates' court judgment at: http://prospectlaw.co.uk/wp-content/uploads/2017/01/Brent-London-Borough-Council-v-Harsha-Shah-and-Others-1.pdf and also Edmund Robb, 'Where now Sumal?', Prospect Law, 6 February 2018.

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 note 3 above for providing details of the judgment.

Owner-occupiers: review 2018

In his annual review, Derek McConnell looks at developments in policy, legislation and case law relating to owner occupation.

Derek McConnell

Policy and legislation

Repossession statistics

Figures released by the Ministry of Justice (*Mortgage and landlord possession statistics tables: October to December 2017*, 8 February 2018) show that in 2017 19,836 mortgage possession claims were commenced in England and Wales, resulting in 13,000 possession orders (including suspended possession orders) being made. The figures for 2016 were 18,456 and 11,755 respectively. In 2017, 16,321 possession warrants were issued by mortgage lenders and 4,385 properties were repossessed through the bailiffs. In 2016, those figures were 17,627 and 4,754 respectively. In 2017, 132,642 residential possession claims were issued by landlords in the county courts in England and Wales.

Legislative reform and policy

Home ownership safety net

Welfare Reform and Work Act (WRWA) 2016 ss18–21 made wide-ranging changes to the way in which financial support is made available to owner-occupiers who are unemployed and who were previously able to receive assistance in respect of mortgage interest liability through the Support for Mortgage Interest (SMI) scheme. Social Security Administration Act 1992 s15A (which entitled certain benefit recipients to payment of mortgage interest) was abolished. The Loans for Mortgage Interest Regulations 2017 SI No 725 replace (with effect from 6 April 2018) the support previously given by way of a benefit payment with a loan to be made in respect of a person's liability to make owner-occupier payments for accommodation occupied by that person as their home: the Loans for Mortgage Interest (LMI) scheme. The changes apply to both new and existing claimants.

The LMI scheme provides for claimants in receipt of 'qualifying benefits', namely income support, income-based jobseeker's allowance, income-related employment and support allowance, state pension credit or universal credit (UC), to be offered a loan in respect of 'owner-occupier payments' that the claimant is, or is to be treated as being, liable to make in respect of accommodation that the claimant is, or is treated as, occupying as their home (reg 3). As before, there are waiting periods for working-age claimants, being 39 consecutive weeks or nine consecutive assessment periods for UC claimants.

Owner-occupier payments are defined as payments of interest on loans taken out to acquire an interest in the accommodation or loans that paid off another loan that was taken out for the acquisition of an interest in accommodation (Sch 1 Part 1 para 2(1) and Part 2 para 5(1)). For claimants (other than UC claimants) interest payments due in respect of loans taken out, with or without security, for carrying out certain defined repairs and improvements to the accommodation also qualify as owner-occupier payments (Sch 1 Part 1 para 2(4)).

A claimant is liable to make an owner-occupier payment where, in the case of a single claimant, the claimant or the claimant's partner (if any), or, in the case of joint claimants, either member of the couple, has a liability to make payments (Sch 2 Part 1 para 2(1) and Part 2 para 5(1)). A claimant is treated as liable to make owner-occupier payments where the person who is liable to make the payments is not doing so, the claimant has to make the payments in order to continue occupation of the accommodation, and it is reasonable in all the circumstances to treat the claimant as liable to make the payments (Sch 2 Part 1 para 2(2) and Part 2 para 5(2)).

The claimant's home is the accommodation normally occupied as the home (Sch 3 Part 2 para 3 and Part 3 para 12). Provision is made for the claimant to be treated as occupying accommodation as the home when they are required to move to temporary accommodation by reason of essential repairs (Sch 3 Part 2 para 5 and Part 3 para 13). The regulations apply slightly different criteria to UC claimants from other claimants. A claimant (other than a UC claimant) is to be treated as occupying accommodation as the home during absences where they intend to return to occupy the accommodation as the home, the accommodation has not been let or sub-let to another person, *and* the period of absence is unlikely to exceed 13 weeks (Sch 3 Part 2 para 9).

A claimant (other than a UC claimant) is treated as occupying accommodation as the home during any period not exceeding 52 weeks where the claimant intends to return to the property, that property is not let or sub-let, *and* the claimant is detained in custody on