Housing: recent developments

Nic Madge and Jan Luba QC highlight recent housing law news and legislation, as well as cases on possession claims, assured shorthold tenancies, long leases, housing allocation and homelessness.

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Housing law news and legislation update

Homelessness: initial legal advice

With the coming into force of the Homelessness Reduction Act 2017 last month, the homeless should be obtaining earlier access to assistance from local housing authorities. In a parallel development, the Legal Aid Agency (LAA) has announced that the 2017 Act also means that legal advice will now be available in England for anyone threatened with homelessness within 56 days instead of the previous 28-day limit: 'Civil news: rule change for clients threatened with homelessness' (LAA news story, 26 March 2018).

Homelessness: emergency rehousing

On 22 March 2018, Sajid Javid MP, then the housing, communities and local government secretary, made a statement on the rehousing of those affected by the Grenfell Tower fire (*Hansard* HC Debates vol 638 cols 411–413). He said: 'There are still 82 households in emergency accommodation, including 15 in serviced apartments, with 25 families and 39 children among them. This is totally unacceptable.'

Homelessness: the detailed statistics

On 22 March 2018, the UK government released its latest statistics on homelessness in England: *Statutory homelessness and prevention and relief, October to December (Q4) 2017: England* (Ministry of Housing, Communities and Local Government (MHCLG)). They show that on 31 December 2017, the number of households in temporary accommodation was 78,930, up four per cent from 75,740 on 31 December 2016, and up 64 per cent from the low of 48,010 on 31 December 2010. The official figures are accompanied by a set of detailed tables: *Statistical data set: live tables on homelessness* (MHCLG, 22 March 2018). Table 793 (available in the document entitled *Temporary accommodation live tables: October to December 2017*) identifies the number of households with children unlawfully placed in B&B accommodation for more than six weeks, on an authority-by-authority basis.

The House of Commons Library has published an analysis of the official figures and of related policy issues: *Households in temporary accommodation (England)* (Briefing Paper No 02110, 22 March 2018). It has also published a more general analysis of local authority action to address homelessness: *Statutory homelessness in England* (Briefing Paper No 01164, 22 March 2018).

In Wales, at the end of December 2017, there were 2,034 homeless households placed in temporary accommodation: *Homelessness statistics* (Welsh government, 22 March 2018).

Homelessness: local authority funding

On 22 March 2018, the UK government's homelessness minister, Heather Wheeler MP, confirmed that councils across England would receive a share of over £215m from April 2019 to prevent homelessness, as part of the flexible homelessness support grant ('£215 million boost for council homelessness services', MHCLG/ Heather Wheeler MP press release). This includes a £15m fund for London councils to support their work to prevent and reduce homelessness. Information about how much of the flexible homelessness support grant particular local authorities are getting is available online.[1]

Homelessness: Scotland

The regulator of housing in Scotland has found that Glasgow City Council is not housing homeless people quickly enough: *Housing people who are homeless in Glasgow* (Scottish Housing Regulator, March 2018). In 2016/17, it housed around half of those it had a duty to house. The council also lost contact with around a quarter of people who were homeless while they waited for a home. The regulator found that the length and complexity of the process in Glasgow was a significant factor in this.

Homelessness: four nations

The House of Commons Library has recently updated and reissued its helpful paper comparing homelessness provision in the four home nations: *Comparison of homelessness duties in England, Wales, Scotland and Northern Ireland* (Briefing Paper No 7201, 5 April 2018).

Discretionary help with housing costs

The UK government has updated its official guidance to local housing authorities on the use of their powers to meet housing costs (beyond the housing benefit scheme): *Discretionary housing payments guidance manual (including local authority good practice guide)* (Department for Work and Pensions, March 2018).

Private renting: rogue landlords and local authority enforcement

On 6 April 2018, the UK government published four sets of new guidance for local housing authorities outlining the reach of their powers to improve standards in private sector letting:

- the database of rogue landlords and property agents;
- banning orders;
- civil penalties; and
- rent repayment orders.[2]

Private renting: regulating letting and managing agents

The UK government has set out its proposed approach for a new regulatory framework for letting and managing agents: *Protecting consumers in the letting and managing agent market: government response* (MHCLG, April 2018). The central proposal is for a mandatory code of conduct for such agents. The code will require:

- at least one person in every organisation to have a nationally recognised higher qualification to practice;
- all letting and managing agents to undertake continuing professional development and training;
- compliance with the requirements of a new independent regulator responsible for working practices of agents. The regulator will be given strong powers of enforcement – agents who fail to comply will not be permitted to trade;
- compliance with a new system to help leaseholders challenge unfair fees including service charges; and
- support for leaseholders to switch their managing agents where they perform poorly or break the terms of their contract.

The new code will be developed by a working group comprising representatives of letting, managing and estate agents, tenants and regulation experts. The group will be established as soon as possible and is expected to draw up final proposals in early 2019 ('New crackdown on rogue agents to protect renters and leasehold

homeowners', MHCLG/Heather Wheeler MP press release, 1 April 2018).

Private renting: fees paid by tenants

The UK government's draft Tenant Fees Bill (Cm 9529), published on 1 November 2017, is intended to introduce a ban on 'tenant fees', ie, fees chargeable to tenants by landlords and letting agents. Following an inquiry, the House of Commons' Housing, Communities and Local Government Committee has reported that it supports the aims of the draft bill, and broadly supports the proposed legislation, but was clear that some improvements could be made in order to better deliver the bill's aims: *Pre-legislative scrutiny of the draft Tenant Fees Bill. Third report of session 2017–19* (HC 583, 29 March 2018).

Private renting: monies held by agents

The UK government has published its response to a recent consultation exercise and set out its proposed approach for implementing mandatory client money protection for property agents in the private rented sector: *Mandatory client money protection schemes for property agents: government response* (MHCLG, April 2018). Membership of a client money protection scheme is currently voluntary, with approximately 60 per cent of agents signed up. On 16 April 2018, parliament was told that the UK government would 'bring forward secondary legislation to implement our commitment after Easter recess. We intend to give sufficient notice and a transition period for agents to comply with the requirement to join a client money protection scheme' (*Hansard* HL Written Question HL6814, answered by Lord Bourne).

Private renting: tenancy deposits

The UK government has been asked to legislate so that tenants can transfer part of their deposit to a new home once they have paid the final month's rent on their current tenancy. This 'passporting' of deposits is among the recommendations in a report on current tenancy deposit arrangements: *Rethinking tenancy deposits* (Generation Rent, March 2018).[3] The report drew on responses to freedom of information requests and Generation Rent surveys, and found that:

- Tenants are losing out on more than £80m a year in interest on the £4bn of their money held as deposits, with only two per cent receiving interest when they get their deposit back.
- The average deposit held and insured by letting agents is worth £1,240, 43 per cent more than the £867 average deposit held in accredited protection schemes. This suggests that the insurance schemes allow tenants' money to be treated as a cheap overdraft, and agents are taking advantage of it – 24 per cent of tenancy agreements allocate interest on deposits to the agent.
- New 'zero-deposit' schemes, which charge a non-refundable insurance premium in lieu of the full deposit, are, by and large, more expensive than simply borrowing the money for the deposit.
- The deposit protection system could be made fairer in the various ways outlined in the report.

Social housing

The Legislative Reform (Regulator of Social Housing) (England) Order 2018 implements the conclusion of the *Tailored review of the Homes and Communities Agency* (HCA) that responsibility for social housing regulation in England should be moved from the HCA (which currently operates both as Homes England and as the Regulator of Social Housing, through a single legal entity) and be given to a separate public body to be called the Regulator of Social Housing.

New guidance and a new application form have been published for use by registered providers of social housing wanting to apply to de-classify a property as social housing under Housing and Regeneration Act 2008 s76.[4]

Possession claims

Notices to quit

- **Hackney LBC v Pavey**
  County Court at Central London, 21 November 2017

The council let a flat to Ronald Pavey on a secure tenancy. He lived in the flat for many years but died in August 2014. The council decided that no one was qualified to succeed him and sought to determine the continuing contractual tenancy. On 19 December 2014, a housing officer delivered a document described as a 'Notice to Quit' to the property. It was addressed to 'The personal representative of Mr Ronald Pavey'. It stated that the council required delivery up of the property '[o]n Sunday 18 January 2015, or the day on which a complete period of your tenancy expires next after the 4 weeks from the service of this notice'.

At this time, Maxie Pavey, the son of the deceased tenant, and Sandra Steele, his mother, were living at the property. On 24 April 2015, the housing officer sent a copy of the notice to quit to the public trustee. A possession claim was issued in September 2016. On the hearing of a preliminary issue, as to whether there was valid service of the notice to quit, District Judge Swan found that the notice was valid, due to the operation of the saving provision, which had been triggered when the notice was served by delivery of a copy to the public trustee in accordance with the Law of Property (Miscellaneous Provisions) Act 1994 s18(1). Mr Pavey appealed.

A circuit judge stated that s18 requires service of the actual notice at the premises directed to the personal representatives and delivery only of a copy of it to the public trustee. The function of s18(1) is to indicate to all parties when such a notice shall have been 'sufficiently served'. In view of s18(1), a notice to quit is only treated as sufficiently served if the notice has been delivered in accordance with s18(1)(a) and a copy of it has been delivered (or, to use the statutory language, served) on the public trustee in accordance with s18(1)(b). Service in the saving clause must be a reference to sufficient or adequate service of the notice. In other words, the provisions of the saving clause are not triggered and do not run until the twofold method of service set out in s18 is achieved. However, this notice to quit failed on the test of validity for a lack of clarity, in the sense that the recipient of it, when the notice was delivered, could not reasonably understand from the notice the date on which the tenancy was to determine by operation of the saving clause. The judge stated:

First, it is of importance and significance that, in the twofold service methodology set out in section 18, the actual notice goes to the property addressed to the personal representatives and only a copy of it to the public trustee. Secondly, it is important that in both notices there is set out the same date for termination of the tenancy, or the same rubric for determining the date. It cannot have been envisaged by the Law Commission, or by parliament in enacting the 1994 Act, that the date for determination of the tenancy could or should be understood to be a different date in the hands of each of the two recipients, ie the addressees, the personal representatives, and the person to whom a copy was to be sent, the public trustee. Thirdly, it is important, particularly in the context of notices intended to determine interests, but also in relation to notices intended to affect interests, that the notices be clear (para 31).

The judge allowed the appeal and made a declaration that the notice to quit did not validly determine the tenancy.

Procedure

- **APL Management Limited v Baxendale-Walker**
  [2018] EWHC 543 (Ch), 19 March 2018

After a preliminary ruling in a mortgage possession claim, the defence rested entirely on alleged procedural defects, namely:

- the particulars of claim ought to have been issued in Form N120;
- there was no statement as to the claimant's knowledge of who was in possession of the property (Civil Procedure Rules 1998 (CPR) Practice Direction (PD) 55A para 2.1(5));
- the particulars of claim did not exhibit the mortgage (CPR PD 16 para 7.3(1));
- the basis for possession was not pleaded; and
- the claimant did not provide details of the defendant's circumstances (CPR PD 55A para 2.3(5)).

After referring to CPR r3.10 (error of procedure does not invalidate any step taken in proceedings unless the court so orders) and *Steele v Mooney* [2005] EWCA Civ 96, Henry Carr J found that the alleged errors (to the extent they were errors) were errors of procedure. Although they should not be ignored, it would be wrong to apply a rigid framework which fettered the exercise of the court's discretion. While Form N120 must be used according to CPR PD 55A para 1.5, the claimant had provided all the relevant information required in an N120 form. The defendant had not pleaded specific information that was missing from the particulars. Any defect was clearly not substantive but technical in nature. Its rectification would cause no injustice to the defendant.

As the claimant had pleaded that '[t]o the best of the claimant's knowledge the following persons are in possession of the property … the defendant is in possession of the property, but this is not within the claimant's personal knowledge', the claimant had complied with that requirement. Even if there had been an error, the substantive information had been provided and its rectification would cause no injustice.

The requirement to attach the written agreement to the claim form was not a mandatory provision. There was no failure to comply with CPR PD 16. Even if the provision was mandatory, the breach was subsequently cured by serving copies of the documents. The defendant was clearly aware of the

contents of them. Even if there was an error, its rectification would cause no injustice.

As Form N120 made no provision for the pleading of further details as to the basis of the possession claim, there was no need to do so. Finally, the claimant had provided information as to the defendant's circumstances. There was no failure in that regard.

In his draft judgment, the judge expressed the view that the defence disclosed no reasonable grounds for defending the claim and had no reasonable prospect of success. He therefore proposed to grant an order for possession. However, in the light of further submissions, he indicated that he would consider the claim further at a later hearing.

Grounds for possession

- **Metropolitan Housing Trust Limited v MA**[5]
  County Court at Clerkenwell and Shoreditch,
  4 January 2018

MA was an assured tenant. In February 2017, police raided her home and found class A drugs hidden under her bed. A visitor to the property (who was not personally known to MA) was arrested and subsequently convicted of possessing a controlled drug. Metropolitan served a notice seeking possession relying on a number of Housing Act (HA) 1988 Sch 2 grounds for possession, including mandatory Ground 7A (person residing in or visiting the dwelling-house has been convicted of a serious offence). However, the relevant clause of the tenancy stipulated 'we follow the grounds of possession currently in force in Schedule 2 of the Housing Act 1988 as amended by the Housing Act 1996, which are set out below'. The grounds set out 'below' did not include Ground 7A, which had come into force around one year after the tenancy was granted.

Metropolitan submitted that the word 'currently' referred to those statutory grounds of possession which were in force at the time of the possession proceedings and that the list of grounds in the tenancy agreement was for illustrative purposes only. MA argued that the grounds for possession listed were expressed as an exhaustive list. Metropolitan's interpretation required the court to disregard the words 'we follow the grounds of possession … which are set out below'.

Ruling on this preliminary issue, District Judge Bell accepted that 'a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract' (*Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1998] 1 WLR 896 at 912 per Lord Hoffmann) would interpret the tenancy as allowing the claimant to rely on only those grounds of possession as were set out expressly in the tenancy agreement. If the claimant wished to rely on alternative statutory grounds, the standard terms of the tenancy would need to be amended. Following this ruling, the parties agreed to the making of a suspended possession order on discretionary grounds.

Children Act 2004

- **Hertfordshire CC v Davies**
  [2018] EWCA Civ 379,
  6 March 2018

In January 2003, Mr Davies became the resident caretaker of a school. He was granted a service occupancy of a bungalow, where he and his family lived. Hertfordshire owned the bungalow and initially managed the school but was not a housing authority. In June 2015, Mr Davies was dismissed for gross misconduct. His licence to occupy the bungalow ended. He and his family (his wife and four children aged 19, 17, 15 and 11 at the time of the judgment) had no private law right to remain but continued to live there as trespassers.

In September 2016, the school was acquired and run by an academy trust. The school grounds were leased to the academy trust, but the bungalow was excepted from the lease, because Mr Davies and his family were still living there. Hertfordshire served a notice to quit and began a county court possession claim. One of Mr Davies' defences was that the service of the notice to quit was unlawful 'in a public law sense' because Hertfordshire did not have regard to the best interests of the children and the need to safeguard and promote their welfare.

The claim was transferred to the High Court. Laing J held that the council's failure to comply with its statutory duties under Children Act 2004 s11 and Equality Act 2010 s149 could not provide a defence to its claim for possession ([2017] EWHC 1488 (QB); July/August 2017 *Legal Action* 40). Mr Davies appealed on the s11 point.

The Court of Appeal dismissed the appeal. Sharp LJ stated that s11 places duties on local authorities to ensure that their functions, and any services they contract out to others, are discharged with regard to the need to safeguard and promote the welfare of children. After referring to *Huzrat v Hounslow LBC* [2013] EWCA Civ 1865; [2014] HLR 17; February 2014 *Legal Action* 31, *Mohamoud v Kensington and Chelsea RLBC* [2015] EWCA Civ 780; [2015] HLR 38; September 2015 *Legal Action* 53 and *Nzolameso v City of Westminster* [2015] UKSC 22; [2015] PTSR 549; June 2015 *Legal Action* 45, she stated that the s11 obligation 'is not confined to the making of strategic arrangements: it is to ensure that decisions affecting children have regard to the need to safeguard them and promote their welfare. That does not mean however that the particular function being carried out is redefined, and the reach or impact of the s11(2) duty is qualified both by the nature of the function being carried out, and what the particular circumstances require' (para 17). The making of the (discretionary) decision to serve the notice to quit was an exercise of a function that left room for a consideration of the children's welfare, although if the decision had been a factual one, the s11 duty could have had no part to play in making it.

However, in principle, it was open to someone in the position of Mr Davies to raise a s11 defence to possession proceedings brought by a local authority, notwithstanding the lack of a private law right to remain in possession. After referring to *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104, *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 AC 186; April 2011 *Legal Action* 28, *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367; September 2008 *Legal Action* 22 and *Mullen v Salford City Council* [2010] EWCA Civ 336; [2010] HLR 35; May 2010 *Legal Action* 21, Sharp LJ stated that she could see no practical reason to distinguish between the position of a defendant who wished to rely on a defence that in exercising a particular function the local authority did not have regard to rights under article 8 of the European Convention on Human Rights and that of a defendant who wished to rely on the failure of a local authority in precisely the same context to comply with its s11 duty. '[I]t makes perfect sense for issues about the wellbeing of children caught up in possession proceedings to be dealt with at the same time and before the same tribunal whether they are raised by reference to article 8 or s11' (para 28).

Laing J was wrong to find that s11 could not be raised as a defence, but it did not follow that the possession order should be set aside or that the matter should be remitted for a rehearing. The s11 duty had no relevance on the facts to whether an order for possession should be made or not. No mention was made of the position of the children in Mr Davies' skeleton argument. His defence did not particularise how, if at all, consideration of the children's welfare would have made any difference to the ultimate outcome of this claim. 'There was nothing in other words that supported even faintly, even at the pleadings stage, a case that any consideration of the position of the children when the notice to quit was served would have made any difference to the outcome of the action for possession' (para 30). If Hertfordshire had considered the best interests of the children by reference to s11 before serving the notice to quit, the outcome would inevitably have been the same.

Assured shorthold tenancies

Deposits

- **Howard Davies v Scott**[6]
  County Court at Clerkenwell and Shoreditch,
  18 January 2018

In April 2013, Mr and Mrs Howard Davies signed an assured shorthold tenancy for a fixed term of two years. They paid a deposit of £4,100. On the expiry of the tenancy, they held over on a statutory periodic tenancy for a further three months. After they had given notice, their landlord, Mr Scott, raised a complaint about moth damage to carpets in the loft area. At the end of the tenancy, Mr Scott refused to return the deposit and alleged other items of damage.

When asked about deposit protection, Mr Scott provided an ID number that later turned out to be in respect of a different property. He then claimed that he had failed to protect the deposit because he had been unaware that the threshold for high-rent tenancies had changed in 2010 and he had thought that his letting was exempt. He instructed a surveyor to negotiate with Mr and Mrs Howard Davies on his behalf. The surveyor quoted outdated law (*Gladehurst Properties Ltd v Hashemi* [2011] EWCA Civ 604; July 2011 *Legal Action* 19) to suggest that Mr and Mrs Howard Davies had no claim. At this point, they consulted solicitors. When further negotiations proved fruitless, they issued a claim for the return of the deposit plus two sets of penalties. Mr Scott counterclaimed for some £25,000 worth of alleged damage.

District Judge Rand dismissed most of Mr Scott's claim, finding that he 'had not been forthright'. She awarded three times the deposit as penalty for the failure to protect the deposit in April 2013, stating that a five-minute computer search would have told Mr Scott that the high-rent threshold

had changed in 2010 and that it was a landlord's responsibility to know the law. She stated that misleading tenants is conduct justifying a penalty at the high end of the scale. The judge accepted the proposition that the periodic tenancy arising at the end of a fixed term was a new tenancy (HA 1988 s5 and *Superstrike Ltd v Rodrigues* [2013] EWCA Civ 669; September 2013 Legal Action 29) but disagreed with submissions that a second penalty was payable when the statutory tenancy arose in April 2015. She referred to HA 2004 s214, which refers to 'a penalty, a tenancy and a deposit' in the singular, stating that while many district judges disagreed with her, many others shared her view. She ordered that the deposit be returned, less a deduction of £1,610, giving a total judgment in the sum of £15,978 plus costs. In addition, she ordered a payment of £15,000 on account of costs.

Damages for unlawful eviction

- **Raza v Karim**[7]
  County Court at Cambridge,
  7 March 2018

In June 2015, Mr Karim was granted an assured shorthold tenancy by the then owner of a property. He lived there with his wife and three minor children. In September 2016, Ms Raza purchased the property with the intention of moving in, believing that it would be delivered up with vacant possession. Over the ensuing months, Ms Raza attended frequently (sometimes up to 15 times a week), often without notice, and invariably with a number of other people (including builders). She considered that, having purchased the property, she was entitled to enter at will, and that Mr Karim had no right to quiet enjoyment. She received advice from the local authority and served a number of invalid notices seeking possession. A valid notice was served on 11 January 2017. Ms Raza informed the authority that no rent was payable at the property, causing housing benefit payments to stop.

On 30 December 2016, Ms Raza's builder (on her instructions) attended at the property and removed the kitchen and bathroom. On 4 January 2017, the authority demanded that Ms Raza replace the kitchen and bathroom. At some stage in February 2017, Ms Raza instructed her builder to install part of a kitchen; it remained inadequate. By the time of the trial, Ms Raza had still not replaced the kitchen or bathroom.

On 1 February 2017, Mr Karim made a homelessness application to the local authority. He remained in the property until 9 March 2017, when he was placed in temporary accommodation. The local authority subsequently accepted that it owed him the main housing duty. In October 2017, Mr Karim refused an offer of accommodation. At the time of trial, Mr Karim was still accommodated with his family in the temporary accommodation that consisted of a single room with the shared use of amenities.

In February 2017, Ms Raza brought a claim for possession of the property relying on rent arrears grounds. That claim was defended on the basis, inter alia, that the property was in a state of disrepair, that Ms Raza had breached the covenant for quiet enjoyment, and that she had effectively unlawfully evicted Mr Karim. By the time of trial, Ms Raza's possession claim had been struck out for non-payment of the hearing fee. The matter therefore proceeded only on the basis of the counterclaim.

HHJ Yelton held that: (i) there had been a breach of the covenant to keep the property in repair, a breach of the covenant for quiet enjoyment, and (intentional) effective unlawful eviction by making the property uninhabitable; (ii) no rent was payable by reason of Ms Raza's notification to the authority so that it was not appropriate to make any order in respect of the disrepair; and (iii) the appropriate period over which to make an award of general damages for breach of the covenant for quiet enjoyment was up to the point at which Ms Raza could lawfully have recovered possession. He ordered general damages of £10,000 and exemplary damages of £2,000. He did not order any aggravated damages.

Long leases

Service charges

- **FirstPort Property Services v Various Lessees**
  First-tier Tribunal Property Chamber (Residential Property),
  LON/00AH/LSC/2017/0435,
  9 March 2018

Two blocks, containing 95 flats, were constructed in 2001. All flats were let on long leases. The blocks were designed with external cladding on a metal frame system. Following the fire at Grenfell Tower, a fire test was carried out. The cladding failed that fire test. The manager then employed a fire marshal to patrol the buildings (a 'waking watch'). Subsequently, a second marshal was employed. A surveyor estimated that the cost of replacing the cladding would be £483,000. That sum was included in the budget which gave rise to interim service charge demands in September 2017. The manager applied to the First-tier Tribunal (FTT) under Landlord and Tenant Act (LTA) 1985 s27A for a determination as to the lessees' liability to pay for the waking watch and the cost of replacement of the cladding.

The tribunal concluded that the costs incurred in the provision of the waking watch up to December 2017 were reasonable and that a service charge was payable in respect of those costs. It was impossible to criticise the manager for the initial decisions both to implement a waking watch and then to have two fire marshals for that purpose. The cost of the fire marshals was not unreasonable. Further, the estimated costs of £483,000 for the replacement of cladding included in the 2017/18 budget were reasonable and a service charge was payable in respect of those estimated costs.

- **Urban Splash Work Limited v Ridgway and Cunningham**
  [2018] UKUT 32 (LC),
  1 March 2018

In accordance with LTA 1985 s27A, long lessees asked the FTT to determine the service charges payable for the years 2011 to 2016 as well as the charges that would become payable by them in 2017. The FTT determined the sums payable for some years but made no determination of the service charges payable for other years for which it considered it had insufficient evidence. It gave the lessor permission to apply for a further ruling when it could provide that evidence. The FTT considered that it was just and equitable to make an order under LTA 1985 s20C that none of the costs incurred by the lessor in the proceedings before it were to be added to any service charges payable by the lessees. The lessor had failed to provide accountant's certificates until required to do so by the tribunal and had indirectly caused the lessees' loss by failing to enforce the requirement to contribute to the sinking fund on a change of ownership. The lessor appealed, arguing that the FTT had not determined all the issues and that it had been wrong to make an order under s20C.

Martin Rodger QC, deputy chamber president, found that the FTT was right not to make a positive finding that some service charges and administration charges had been incurred and remained outstanding. The total was uncertified and included at least £2,000 that was either unexplained or for which there was no evidence of entitlement at all. After examining other aspects in detail, he found that some items were recoverable and others were not. He also remitted other issues to be determined by the FTT. He found that the FTT was entitled to make an order preventing the lessor from recovering any part of the costs of the proceedings. Three days of hearings had resulted in an 'inconclusive state of affairs' that was 'profoundly unsatisfactory' (para 105). Responsibility for that state of uncertainty lay very substantially with the lessor, which had failed to procure the certificates required by the lease and had failed to provide the evidence required to support its case. In all these circumstances, it was just and equitable that the lessees should not be liable to contribute towards the lessor's costs incurred before the FTT.

- **Avon Ground Rents Limited v Cowley**
  [2018] UKUT 92 (LC),
  21 March 2018

A mixed-use development, containing 49 residential flats and some commercial units, was completed in 2008. It was let to a variety of lessees on terms requiring them to contribute through a service charge to its repair and maintenance. In March 2015, Avon Ground Rents acquired the freehold reversionary interest. Soon after its acquisition, Avon discovered that water was penetrating through the surface of the central courtyard into some of the premises. It was common ground that liability for repairing this defect fell on Avon, and that, in principle, it was entitled to recover the cost of the remedial works from the lessees.

In January 2016, Avon's agents gave the residential leaseholders notice under LTA 1985 s20 that it intended to carry out remedial work to cure the defect, and invited their observations. One of the residential lessees pointed out that the building was the subject of three separate NHBC warranties. The same month, Avon's agents notified the NHBC of a claim under the warranties. In June 2016, the agents issued demands for the first instalment of service charges for the year, which included each leaseholder's apportioned part of the cost of the remedial works, which was estimated to be £291,008. The NHBC did not appear at any stage seriously to dispute its liability to contribute towards the cost of the necessary remedial works, but it did not immediately commit itself to paying a specific sum.

Avon issued an application under LTA 1985 s27A(3) to determine questions concerning the proposed remedial scheme and the liability of the leaseholders to contribute towards it. The FTT was satisfied that the proposed remedial works were reasonable and made a determination that, if the estimated costs of £251,954.64 were incurred together with surveyor's fees

and managing agents' fees, they would be recoverable through the service charge payable by each respondent 'subject in each case to deductions first in respect of insurance receipts from NHBC'.

In March 2017, the NHBC acknowledged liability for the full cost of the repair and said that it would offer a further 7.5 per cent for project management plus a 10 per cent contingency on the understanding that its offer would be in full and final settlement. However, the FTT determined that the contribution required from the individual lessees towards the cost of the remedial work was nil since the NHBC was liable to pay the full amount apportioned to the private residential leases. Avon appealed.

Martin Rodger QC, deputy chamber president, dismissed the appeal. It was common ground that Avon must, as it had always said it would, give credit to the leaseholders for sums it received from the NHBC. It could not have been intended by any of the parties to the various leases that Avon would be entitled to recover the cost of the remedial works both as a service charge and under the NHBC warranties. In *Oliver v Sheffield City Council* [2017] EWCA Civ 225; [2017] 1 WLR 4473; May 2017 *Legal Action* 41, the Court of Appeal agreed that a way had to be found to prevent all forms of double recovery by a landlord entitled to recoup its expenditure both through a service charge and from a third party.

The judge stated that whether an amount is reasonable as a payment in advance is not generally to be determined by the application of rigid rules but must be assessed in the light of the specific facts of the particular case. Avon's submission that an anticipated receipt from a third party could only be taken into account if the receipt was certain was too inflexible. However, the fact that a landlord's expenditure might be covered by a warranty or insurance policy did not mean that a landlord could never include that expenditure as part of a demand for an advance payment. In this case, by the time the first advance payment was demanded, there was no uncertainty over the NHBC's attitude to its own liability, since it had said 'in principle we find the claim to be valid'. Accordingly, the FTT was entitled to conclude that, as at June 2016, a contribution equal to the full cost of the remedial works was not a reasonable advance payment, because a payment of a near-equivalent amount was anticipated from the NHBC and there was no reason to believe it would be delayed.

Housing allocation

- **R (KS and AM) v Haringey LBC** [2018] EWHC 587 (Admin), 21 March 2018

The claimants were a mother and her six-year-old daughter. Both had disabilities. The mother had prolapsed discs in her back, a very painful condition in both shoulders, susceptibility to chest infections (as a consequence of a bout of pneumonia), and she suffered anxiety and panic attacks. The daughter had autistic spectrum disorder, language disorder and significant difficulties with adaptive function. She had difficulties with going to the toilet, with diet, with disturbed sleep and with speech. She also had no sense of danger, did not understand risk and did not know how to keep herself safe. She enjoyed running and climbing but was aggressive and violent towards other children, including her older brother, JM. He had the heart condition pulmonary regurgitation. The mother cared for AM and JM on her own because their father lived with his disabled parents for whom he was their full-time carer.

The claimants and JM lived in a two-bedroom, first-floor council flat. JM shared a room with his mother because AM woke frequently in the night and disturbed his sleep. The flat was not suitable, given AM's disabilities, because it had balconies at the front and back with a drop to ground of over four metres. The mother applied for a transfer to ground-floor accommodation with an outside play area, appropriate bathing and toilet facilities, and with three bedrooms (in order for JM's sleep not to be disturbed). A council social worker was 'very concerned that the home [was] a safety risk' and that the risk would increase with AM's age. A Children's Services assessment in February 2017 recognised that the family were in need of three-bedroomed ground-floor accommodation with a garden and that the current accommodation did not meet the individual needs of either of the children.

The assessment and a child in need plan were sent to the council's housing team in April 2017. It reviewed the priority of an earlier application for a transfer but confirmed in July 2017 that the application remained in band C of the housing allocation scheme. Most transfers were granted to band A or band B applicants and placement in band C meant that it was highly unlikely that the mother would ever have sufficient priority to bid successfully for alternative social housing.

In November 2017, a report from Dr Keen of NowMedical advised that there was not a serious medical need to relocate 'given a fall from a first floor is unlikely to be fatal, and that availability of ground floor properties may be so scarce as to potentially delay a relocation' (para 26 of judgment). In December 2017, the council's housing decisions panel concluded that 'the current housing situation is not so serious or critical as to warrant band A or band B priority' and that '[a] direct offer was not considered appropriate because there isn't a critical medical/welfare needs or serious safeguarding concern' (para 29 of judgment).

In January 2018, it was suggested that the mother might seek an alternative home elsewhere through Homefinder UK or explore a mutual exchange. In February 2018, the head of housing needs reported that between April 2016 and February 2018 the council had let 157 three-bedroom properties of which only nine were on the ground floor. There were hundreds of families in band C and hundreds more in bands A and B 'with an even greater need' (para 31 of judgment).

The claimants sought judicial review. There was no challenge to the council's allocation scheme; only to the decisions made on its application to the family's circumstances.

HHJ Walden-Smith, sitting as a judge of the High Court, held that the decision 'to keep the claimants within band C, without exercising the discretionary power within the allocation guidance or finding an alternative way to provide accommodation which is suitable, is irrational' in light of what had been known to the council since February 2017 (para 49). She stated:

What Haringey housing did in this case was to consider the family within the allocation policy and, while there can be no criticism of the housing policy itself, in my judgment the housing authority failed to give any, or any sufficient, weight to the information being provided by the social worker as to the very real difficulties that AM poses to her own safety and how, in the circumstances of this case, parental supervision could not be sufficient to prevent AM from getting on to the balconies and harming herself (para 50).

Permanent or automatic locks on the balcony windows had been ruled out by a fire safety assessment. Further, 'Haringey, as housing authority, failed to formulate a plan as to how to deal with the very real risks of AM harming herself and the very real and immediate harm to the welfare of both AM and her brother JM by reason of the overcrowding in the property' (para 53).

The council's decisions were quashed and mandatory orders made for the family's needs 'to be reassessed for the purpose of providing appropriate accommodation' (para 70).

- **R v Msokeri**[8] Southwark Crown Court, 15 March 2018

The defendant was a single woman living in a flat in Sutton, south London. Having heard of the fatal fire at Grenfell Tower, she applied for and obtained emergency accommodation and charitable aid by claiming that she and her husband had lived in the tower and that he had died in the blaze. She also sought longer-term council accommodation.

After a trial, she was convicted of four offences including that she had 'dishonestly and intending thereby to make a gain for herself, namely money and accommodation, made representations to representatives of the Royal Borough of Kensington and Chelsea, London W14, which were, and which she knew were untrue'. The total value of what she had gained by her fraud was £19,000.

On 6 April 2018 she was sentenced to 4½ years' imprisonment. Sentencing her, HHJ Michael Grieve QC said: 'These are callous and contemptible, indeed disgusting, offences for which only a custodial sentence can be justified, and one of some length. Your greed in taking advantage of the situation you had created was insatiable.'

- **Complaint against Windsor and Maidenhead RBC** Local Government and Social Care Ombudsman Complaint No 16 003 062, 15 February 2018

The council allocated social housing by nominating those it considered suitable applicants, for housing association properties, rather than by choice-based letting. Mr X had applied for an allocation of social housing when he was homeless. The council owed him the main housing duty from February 2016. He was told that the council had placed him in band A for a housing allocation. The records showed that he was in band B, consistent with the allocation scheme. He needed a ground-floor flat.

He was nominated for a housing association property in May 2016 but the association would not accept the nomination as the property was too close to his ex-wife's home. The following month, the association invited a nomination for another

ground-floor flat in one of Mr X's preferred areas. The council did not nominate him but nominated another band B applicant. There was no obvious reason why it did not nominate Mr X.

The ombudsman found that the council was at fault for failing to nominate Mr X for the available accommodation in June 2016. The result was that he lived in unsuitable temporary accommodation for eight months longer than necessary, until he eventually moved, in March 2017, to another housing association property to which he had later been nominated.

Homelessness

Applications from private tenants facing eviction

- **Complaint against Rother DC**
  Local Government and Social Care Ombudsman Complaint No 16 011 157,
  12 February 2018

Ms B was 68, in poor health and had mobility problems. In March 2016, she told the council that she was facing eviction by her private landlord, who had served a HA 1988 s21 notice. Contrary to statutory guidance, the council recommended that she wait until she was evicted by bailiffs. She suffered unnecessary distress arising from uncertainty, not knowing if or how the council might help her, for three months after receiving the s21 notice. Further, by telling her to wait for a possession order and then an eviction warrant, the council exposed her to unnecessary court costs, as she had no defence to the landlord's claim. The ombudsman decided that the council had been at fault in all these respects.

In July 2016, on her eviction, Ms B was placed in interim accommodation in a hotel room. That was not in the council's district but in a neighbouring borough. Ms B was told that 'there is no temporary accommodation in Rother'. Council officers told the ombudsman that this was because the council had no temporary accommodation in its own area, and regularly placed people in Hastings, Eastbourne and further afield in Kent. It placed over 300 households in temporary accommodation between April 2015 and February 2017. None of those received temporary accommodation within its district.

As to the hotel room, Ms B complained about the room's disrepair, claiming it was 'squalid, filthy and damp', that the toilet was 'caked in faeces', and that the room was infested with bedbugs and cockroaches. She struggled to climb the four flights of stairs needed to get to her room. She was not provided with other accommodation. When the council told her that it accepted that it owed her the main housing duty, it did not explain her right to a review of the suitability of the accommodation now that it was being provided in performance of that duty.

The ombudsman found that the council should have visited the hotel to check Ms B's room or at least checked that the local council had done so. This was especially given the photographs and comments from Ms B's support workers suggesting her complaints were not without foundation. The council was at fault for its failure to ensure adequate inspection of Ms B's room before she was permanently rehoused in September 2016.

The ombudsman recommended that the council provide an unreserved apology and pay £1,250 in recognition of the injustice suffered by Ms B, made up of:

- £250 for the distress caused by the delays in offering help to Ms B at the outset;
- £500 for potentially placing her in unsuitable accommodation without giving rights of review or appeal and not being able to offer temporary accommodation within its area;
- £250 for preventing her appealing its housing benefit decision restricting her benefit to one week in the hotel accommodation; and
- £250 for her time and trouble in needing to pursue complaints.

Further, it should settle the costs awarded against her resulting from her landlord taking possession proceedings (£350).

Commenting on the investigation report on 14 March 2018, Michael King, the ombudsman, said:[9]

The issues we have seen with councils' capacity to cope with the growing homelessness problem are spreading from London to the wider south east and beyond. This case is an example of what can happen when councils fail to plan, and the impact this has on local people.

Provision of accommodation

- **Complaint against Windsor and Maidenhead RBC**
  Local Government and Social Care Ombudsman Complaint No 16 003 062,
  15 February 2018

Mr X was a disabled man with impaired mobility and in priority need. He became homeless in December 2015 when his wife asked him to leave the matrimonial home on the breakdown of their marriage. On 23 December 2015, the council offered him interim accommodation pending a decision on his application. None of the accommodation offered was in its district and Mr X did not feel able to accept it. The council had no record of the accommodation offered or whether it considered it was suitable for Mr X. He stayed with his parents for a couple of nights over Christmas and then spent several weeks 'sofa surfing' at friends' places.

On 10 February 2016, the council accepted that it owed him the main housing duty. No offers of accommodation in performance of that duty were made until late March 2016. None of the accommodation provided was suitable until Mr X was offered permanent housing, a year later, in March 2017.

The ombudsman identified the following faults by the council, causing injustice to Mr X:

- it did not keep proper records of some of its decisions and of its contact with Mr X;
- it offered him unsuitable interim accommodation;
- it took too long to provide temporary accommodation and the accommodation it eventually offered was unsuitable;
- it used a standard letter when it offered interim and temporary accommodation, and that letter failed to notify applicants of their right to request a review of the suitability of temporary accommodation;
- it failed to deal with Mr X's complaint in accordance with its own complaints procedure; and
- it failed to deal properly with the ombudsman.

The ombudsman recommended that the council should:

- apologise to Mr X for the identified faults and for the injustice it caused him;
- pay £1,050 for the 3½ months he was without any accommodation;
- pay a further £2,875 for the 11½ months he lived in unsuitable temporary accommodation;
- pay £250 for his time and trouble pursuing his complaint (a total payment of £4,175); and
- review and improve its complaints-handling arrangements and its ombudsman liaison arrangements.

Commenting on the investigation report on 23 March 2018, Michael King, the ombudsman, said:[10]

This is another example of a council on the outskirts of the capital struggling to cope with homelessness within its boundaries.

And, while I appreciate the difficulties councils have in finding suitable accommodation, it is unacceptable that this man was placed in unsuitable accommodation for nearly a year, having been left for three months to fend for himself on the streets.

Accommodation pending appeal

- **Davis v Watford BC**
  [2018] EWCA Civ 529,
  20 March 2018

On 29 August 2014, Mr Davis applied to the council for homelessness assistance. On 8 December 2014, it decided that he was not in priority need. He sought a review of that decision. On 31 August 2015, the council sent a 'minded to' letter indicating that it proposed to uphold the original decision, but it did not make or notify any decision on the review within the statutory limit of eight weeks or within any longer mutually agreed period. On 27 October 2015, Mr Davis lodged an appeal in the county court, under HA 1996 s204(1)(b), against the original decision of 8 December 2014. He asked the council to continue his interim accommodation pending that appeal: s204(4). On 29 October 2015, the council refused the request, setting out its reasons in a form explicitly designed to reflect the decision in *R v Camden LBC ex p Mohammed* (1998) 30 HLR 315.

Although a refusal of accommodation pending appeal can itself be the subject of a further county court appeal (see s204A), the terms of s204A(1) are: 'This section applies where an applicant has the right to appeal to the county court against a local housing authority's decision *on a review*' (emphasis added). In the light of that, and in the absence of any review decision, Mr Davis issued judicial review proceedings in the Administrative Court challenging the decision of 29 October 2015. Mitting J held that the claim was misconceived, that an appeal should have been pursued in the county court, and that permission to proceed by way of judicial review should be refused.

The Court of Appeal allowed an appeal. The terms of s204A(1) were plain. An appeal under s204A was only available if there had been a decision on a review. Where an appeal was being pursued under s204(1)(b), precisely because a decision on review had not been made, any refusal of accommodation pending that appeal could only be challenged by judicial review.

Second appeals becoming academic

- **Ismail v Newham LBC** [2018] EWCA Civ 665, 28 March 2018

Mr and Mrs Ismail applied to the council for homelessness assistance for themselves and their children. The council decided that they were not eligible: HA 1996 ss185–186. That decision was upheld on review. HHJ Mitchell dismissed an appeal. In October 2016, the Court of Appeal granted permission to bring a second appeal on the sole ground that the children might meet the eligibility criteria.

Before the appeal could be heard, Mr and Mrs Ismail were given limited leave to remain in the UK and became eligible for homelessness assistance. The question arose as to whether the appeal should nevertheless be heard.

Applying *Hamnett v Essex CC* [2017] EWCA Civ 6, Patten LJ directed that the appeal should not proceed and dismissed it. Although the appeal might have reasonable prospects of success and raise an issue of general importance, it was not justified for an appeal to proceed where it could make no difference to the parties.

1 www.gov.uk/government/publications/flexible-homelessness-support-grant-2019-to-2020.
2 See 'New boost to rogue landlord crackdown', MHCLG/Heather Wheeler MP press release, 6 April 2018.
3 See also 'Making deposits work for tenants', Generation Rent, 26 March 2018.
4 Available at: www.gov.uk/government/publications/de-classification-of-a-dwelling-as-social-housing.
5 Dirghayu Patel, solicitor, GT Stewart, London, and Connor Johnston, barrister, London.
6 Deirdre Forster, consultant solicitor, Anthony Gold, London.
7 Dirghayu Patel, solicitor, GT Stewart, London, and Riccardo Calzavara, barrister, London.
8 'Woman who invented dead husband in Grenfell Tower fraud jailed', CPS news article, 6 April 2018.
9 'Council places homeless woman in "squalid" temporary accommodation miles away from vital support', LGSCO news article, 14 March 2018.
10 'Disabled man spends nearly a year in unsuitable accommodation because of council faults', LGSCO news article, 23 March 2018.

Nic Madge and Jan Luba QC are circuit judges. They would like to hear of relevant cases in the higher or lower courts. They are grateful to the colleagues at notes 5–7 above for providing details of the judgments.

Education: recent developments

Angela Jackman and Eleanor Wright highlight important developments in policy, legislation and guidance and recent cases on special educational needs, fitness to practise, negligence and discrimination.

Angela Jackman

Eleanor Wright

Policy and guidance

Transfer to education, health and care plans

The statutory deadline to complete transfers from statements of special educational needs (SEN) to education, health and care plans (EHCPs) expired on 31 March 2018. It was apparent for some time beforehand that many local authorities (LAs) would struggle to meet that deadline and the Department for Education (DfE) applied considerable pressure on them to do so. Many practitioners have reported unlawful practice from LAs cutting corners in order to meet deadlines, including repeated failure to comply with the requirements of the Children and Families Act 2014 (Transitional and Saving Provisions) (No 2) Order 2014 SI No 2270 (Transition Order).

The DfE's position was that the deadline should be met in a way that ensures good-quality assessments are undertaken and high-quality plans are in place. It said it would contact LAs that had not completed transfers to consider what action should be taken to complete them, but pointed out that where statements had not been transferred, they would remain in force until transfer reviews had been completed (*0–25 Special Educational Needs and Disability Unit January 2017 newsletter* and letter from Robert Goodwill MP, 12 September 2017).[1] It issued guidance through its March 2018 *0-25 SEND, alternative provision and attendance unit newsletter* to the effect that this would apply even when, under the previous system, the statement would have lapsed on the young person moving to a further education college (Annex A to March 2018 newsletter (pages 12–13)). Where the young person would reach the age of 19, it was stated that LAs must ensure arrangements are in place pending completion of the transfer review.

This is, however, a somewhat optimistic view of the effect of the Transition Order: under article 17, where an EHC needs assessment has not been secured by 31 March, the statement has effect 'as if the special educational provision specified in it were specified in an EHC plan'. It is questionable whether that can be the case where the statement has come to an end under the previous law. Further, since the new law applies, there is the problem that the Special Educational Needs and Disability Tribunal no longer has jurisdiction to deal with appeals concerning statements. It is to be hoped that these problems are purely theoretical but there can be no guarantees.

Trial of tribunal recommendations power

The Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017 SI No 1306 relate to a two-year national trial under which parents and young people can ask the tribunal to make recommendations about the health and social care provision specified in EHCPs, as opposed to being restricted to the education sections. They came into force on 3 April 2018 in relation to new EHCPs and LA decisions made after that date, and the DfE issued guidance, *SEND Tribunal: single route of redress national trial* in March 2018.

Notable points are:

- The trial will apply to all types of appeal except those against refusal of assessment.
- The tribunal will only be able to make non-binding recommendations on those issues. However, when recommendations are made, LAs and health authorities must respond within five weeks, stating what steps, if any, they have decided to take following consideration of the recommendation, and give reasons if they have decided to not follow all or part of the recommendation. Parents and young people will have the right to make formal complaints to the local government and social care ombudsman and the public health services ombudsman in that event, and also to take judicial review proceedings.
- The tribunal will not be able to consider these issues in the absence of an appeal in relation to education issues.
- LAs are required to notify parents of the extended appeal rights.
- They must, if requested by the tribunal, provide evidence from health and social care bodies on the issues raised.
- Health and LA social care commissioners must respond to requests from the tribunal for information and evidence within the time frame specified, and send a witness if required.