Housing: recent developments

Jan Luba QC and Nic Madge highlight recent housing law news and legislation, as well as cases on possession claims, the Rent Act 1977, long leases, anti-social behaviour, criminal prosecutions, housing allocation and homelessness.

Jan Luba QC

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Housing law news and legislation update

Allocation of social housing

The Secure Tenancies (Victims of Domestic Abuse) Act 2018 received royal assent on 10 May 2018. It amends Housing Act (HA) 1985 s81B to require councils, when allocating their social housing, to grant 'old-style' secure tenancies if rehousing victims of domestic abuse who have had to give up their former home held on a sole or joint assured or secure tenancy. The Act will be brought into force by regulations. There is a helpful explanatory note.

The House of Commons Library has updated its useful briefing note on social housing allocation arrangements in England: *Allocating social housing (England)* (Briefing Paper No SN06397, 21 May 2018).

Housing and legal aid

On 16 May 2018, Ruth Cadbury MP led a House of Commons debate in Westminster Hall on housing and access to legal aid (*Hansard* HC Debates vol 641 cols 164WH-180WH). A useful House of Commons debate pack contains a wealth of material on the topic: *Housing and legal aid* (CDP-2018-0120, 15 May 2018).

The Labour Party's green paper on housing (*Housing for the many*, April 2018) states at para 134 that the party 'will look at ways of improving access to legal aid in housing cases, drawing on the findings of the Bach Commission'.

The Law Centres Network (LCN) has been granted permission to launch a judicial review in relation to the UK government's handling of new arrangements for legal aid funding of possession day schemes in the county court: Monidipa Fouzder, 'Enough is enough: law centres prepare to fight MoJ in court' (*Law Society Gazette*, 29 March 2018). The claim was tried on 21 and 22 May 2018 ('LCN challenges government on legal aid to prevent homelessness', LCN press release, 18 May 2018).

Private renting

Review of the sector

The House of Commons Housing, Communities and Local Government Committee has published the report of its major inquiry into private renting in England: *Private rented sector. Fourth report of session 2017-19* (HC 440, 19 April 2018). It proposes that, among other reforms:

- tenants need further protections from retaliatory eviction, rent increases and harassment so they are fully empowered to pursue complaints about repairs and maintenance in their homes;
- a specialist housing court would provide a more accessible route to redress for tenants;
- the Law Commission should undertake a review of private rented sector legislation;
- the Housing Health and Safety Rating System should be replaced with a more straightforward set of quality standards;
- a new fund should be established to support local authorities with enforcement work and councils should publish their private rented sector enforcement strategies online;
- local authorities should be able to levy more substantial fines, which might stand a chance of breaking the business models of the worst offenders; and
- councils should have power to confiscate properties from landlords committing the most egregious offences and whose business models rely on the exploitation of vulnerable tenants.

Letting agents' fees and tenancy deposits

The Tenant Fees Bill 2017-19 has been introduced in parliament by the UK government. It had already received scrutiny as a draft bill and the UK government had published its response to comments on the draft: *Government response to the Housing, Communities and Local Government Select Committee report: pre-legislative scrutiny of the draft Tenant Fees Bill* (Cm 9610, May 2018). The House of Commons second reading took place on 21 May 2018 (*Hansard* HC Debates vol 641 cols 641-672).

If passed, it will abolish most upfront fees for tenants in England and will cap tenancy deposits at a maximum equivalent to six weeks' rent. A new House of Commons Library briefing paper provides useful background on the bill, including information on current practice in Scotland, Wales and Northern Ireland: *Tenant Fees Bill 2017-19: analysis for second reading* (Briefing Paper No CBP-7955, 16 May 2018). It explains the bill's provisions and summarises reactions from tenants, landlords and letting agents. The bill itself is accompanied by an impact assessment. The bill began its Committee stage on 5 June 2018. Any written evidence to the Committee should be submitted by 12 June 2018. The Regulatory Policy Committee has published its opinion on the bill (RPC-MHCLG-4227, 30 April 2018).

'Right to rent' checks

The Immigration Act 2014 requires private landlords and letting agents to check the immigration status of tenants before letting to them. The impact of the requirements is reviewed by the Joint Council for the Welfare of Immigrants in its contribution to *A guide to the hostile environment* (Liberty, April 2018). In the first quarter of 2018, 39 penalties were issued for breach of the requirements to a total value of £23,500: *Immigration Enforcement data: May 2018* (Home Office, 24 May 2018). The UK government has updated its guidance to landlords in the light of modifications to the immigration status of 'the Windrush generation': *Landlords: guidance on right to rent checks on undocumented Commonwealth citizens* (Home Office/UK Visas and Immigration, 30 May 2018). On 25 May 2018, it published a PDF version of its *Right to Rent Code of Practice: scheme for landlords and their agents*.

Houses in multiple occupation

The Licensing of Houses in Multiple Occupation (Mandatory Conditions of Licences) (England) Regulations 2018 SI No 616 were made on 23 May 2018 and will come into force on 1 October 2018. Reg 2 inserts into HA 2004 Sch 4 paras 1A, 1B and 1C new conditions and qualifying provisions that require landlords: (a) to comply with minimum standards in relation to the useable floor area of rooms available as sleeping accommodation; (b) not to exceed the maximum number of occupants who are permitted to use each room as sleeping accommodation; and (c) to comply with any household waste storage and disposal schemes provided by the applicable local housing authority. The conditions must be included in a licence under HA 2004 Part 2 and apply only to licences granted or renewed on or after 1 October 2018.

Possession proceedings by landlords

The latest official statistics show that landlord possession actions at all stages have decreased: *Mortgage and landlord possession statistics in England and Wales, January to March*

2018 (provisional) (Ministry of Justice, 10 May 2018).

- Landlord possession claims (31,840) and orders (23,983) decreased compared with the same quarter of the previous year (10 per cent and eight per cent decrease respectively).
- Warrants of possession (15,984) decreased by 12 per cent.
- Repossessions by county court bailiffs (8,743) decreased by seven per cent (compared with the same quarter last year).

Low-income tenants

The UK government has updated its guidance for landlords letting to tenants who are receiving universal credit (*Universal credit and rented housing: guide for landlords*, 5 June 2018). The updates take into account modifications to that benefit and temporary accommodation changes taking effect from 11 April 2018.

Disabled tenants

The Equality and Human Rights Commission has published the results of its 18-month formal legal inquiry into housing and disability: *Housing and disabled people: Britain's hidden crisis* (May 2018). It found that disabled people have been left frustrated by a chronic shortage of suitable housing, and that unnecessary bureaucracy and insufficient support leave them trapped in unsuitable homes.

Right to buy

Although the UK government is committed to extending the right to buy to assured tenants of housing associations on a voluntary basis, no implementation date for a national scheme has been announced. A large regional pilot will begin in the Midlands later this year, which will inform the shape of the final scheme. A new House of Commons Library paper provides background on the policy and explains progress to date: *Introducing a voluntary right to buy for housing association tenants in England* (CBP-7224, 24 May 2018).

Possession claims

Secure tenancies: discharge of orders

- **Ashfield DC v Armstrong**
  [2018] EWCA Civ 873,
  25 April 2018

Mr Armstrong was a secure tenant. In June 2013, following breaches of the terms of his tenancy agreement, the landlord obtained a suspended possession order, which provided that it was 'not to be enforced and the tenancy will continue so long as [the tenant] complies with [specified] clauses … of his tenancy agreement … The [landlord] shall not be entitled to apply for a warrant for possession so long as the [tenant] complies with [specified] clauses … of his tenancy, and if such application is to be made it must be in writing'. Any hearing was reserved to the trial judge. The order concluded by stating that the possession order 'shall be discharged on 4 June 2014'.

Mr Armstrong did not comply with the tenancy agreement and continued in breach of the relevant terms, much as before. In October 2013, the council wrote to him setting out the further breaches of the tenancy agreement and applied to the county court for a warrant for possession. A warrant was issued. On 1 November 2013, Mr Armstrong was notified that the eviction would take place on 19 November 2013. On 11 November 2013, his solicitors issued an application to suspend the warrant. An interim order suspending the warrant was made on 18 November 2013 and a trial of the issue as to whether the terms of the order had been breached was ordered to take place between 23 June and 11 July 2014, ie, after the 4 June 2014 date mentioned in the June 2013 order. On 25 June 2014, after hearing evidence, HHJ Pugsley found that Mr Armstrong had continued to breach the relevant terms of the tenancy agreement. Accordingly, he dismissed the application to suspend the warrant. Mr Armstrong appealed.

At the appeal hearing before Patterson J, counsel for Mr Armstrong raised the jurisdictional point that at the time of the hearing before HHJ Pugsley, there was no extant order for possession because it had been discharged by the effluxion of time. Patterson J dismissed the appeal, holding that the automatic discharge of the suspended possession order did not apply where Mr Armstrong had breached the terms of the tenancy agreement during the period of the suspension and the council had made a valid application for a warrant.

Mr Armstrong's second appeal to the Court of Appeal was dismissed. The validity of a warrant for possession depends on there being in place a valid order for possession. If an order for possession has been discharged, there is no order in place that can be executed. The June 2013 order had to be interpreted in the light of this legal framework, including HA 1985 s85. Patterson J was right to construe the provision for the discharge of the June 2013 order as being predicated on the absence of some relevant event occurring before that date. The true meaning of the order was: 'If the events referred to … have not occurred … [the] order shall be discharged on 4 June 2014.' Since the council had asserted a breach of the conditions of the order in the period up to 31 October 2013 and had applied for a warrant for possession well before 4 June 2014, the possession order was not discharged.

In any event, the Court of Appeal had power to exercise the powers of the courts below (Civil Procedure Rules 1998 (CPR) r52.20) and under CPR r3.1(2)(a) it had power to 'extend or shorten the time for compliance with any … court order'. Accordingly, the Court of Appeal had jurisdiction to extend the time limit for discharge of the possession order. '[I]t would be unduly formalistic and potentially productive of injustice to construe CPR [r3.1(2)(a)] as precluding an application for an extension of time retrospectively … [W]ere it necessary to do so … it would be right for the court to extend time retrospectively' (paras 25–26).

Almshouses: judicial review of refusal of permission to appeal

- **R (Watkins) v Newcastle Upon Tyne County Court**
  [2018] EWHC 1029 (Admin),
  2 May 2018

Ms Watkins lived in an almshouse operated by The Aged Merchant Seamen's Homes, a charity. In January 2017, the charity served a notice to quit alleging that she had been in breach of the terms of the letter of appointment. In a subsequent possession claim, a district judge, after considering *Stewart and others v Watts* [2016] EWCA Civ 1247; [2017] 2 WLR 1107; February 2017 *Legal Action* 47, concluded that she was a licensee and not a tenant. Ms Watkins sought permission to appeal. HHJ Kramer refused permission. A date was set for execution of a warrant for possession, but Ms Watkins brought judicial review proceedings against the County Court at Newcastle. Jeremy Baker J refused permission. He concluded that in order for Ms Watkins to succeed she would have to show that the district judge's decision on the substantive tenancy issue was wrong. Having read that judgment, he concluded that there were no arguable grounds.

Turner J refused a renewed application for permission to challenge the decision of HHJ Kramer. The proper approach to such challenges is set out in *R (Ogunbiyi) v Southend County Court* [2015] EWHC 1111 (Admin). HHJ Kramer was arguably right to conclude that the tenancy issue was not open to appeal because it never fell within the pleaded parameters of the matters that the district judge had been called upon to determine. However, even if he were wrong, the reasons given by the district judge were correct on the tenancy point and his conclusion was one that he was entitled to reach. Whichever perspective was taken, it was clear that 'there [had] been no wholly exceptional collapse of fair procedure in this case consequent upon the refusal of permission to appeal' (para 18).

Writ of restitution

- **Wellcome Trust Ltd v Soni**
  Queen's Bench Division,
  20 April 2018

Mr Soni held a long lease of a flat. Wellcome brought a possession claim against three defendants. It appeared from the electoral register that Mr Soni and the second defendant were the same person. It also appeared that the second and third defendants were husband and wife, and were living in the flat. There were a number of hearings at which no defendant appeared. The defendants also failed to comply with court orders and only communicated with Wellcome and the courts via email. However, Wellcome and Mr Soni reached a settlement by which he agreed to give up possession on 31 August 2017. This was recorded in a consent order made by a district judge.

The third defendant then applied for the consent order to be set aside on the basis that she had not been aware of it and her signature had been forged. The matter was listed for hearing in February 2018. She also applied to join a fourth defendant who, she said, was living in the flat. Wellcome discovered that the flat was being advertised for occupation under a holiday letting. The third defendant failed to attend the hearing but was represented and sought an adjournment because she had to take her daughter to a medical appointment. The hearing was adjourned to 1 March, but the third defendant again failed to attend and was not represented. A judge dismissed the third defendant's applications and transferred the matter to the High Court for enforcement. He found that:

- the application had no real prospect of success;
- there had been no reason for her absence when that order had been made;
- there was no defence to the possession claim; and
- fraudulent assertions had been made about the daughter's medical appointment.

A master granted a writ of possession. Wellcome entered the property and

changed the locks. Two days later, a master granted a stay of the writ of possession and the defendants re-entered the property and changed the locks. The flat was again advertised as a holiday let.

On Wellcome's application, Graham Wood QC, sitting as a deputy High Court judge, ordered an expedited hearing and granted a writ of restitution. There was a history of deliberate evasion and delay, evidence of profiteering, and no evidence of residence in the UK. Any appeal against the possession order was doomed and there was no prospect of any defendant successfully challenging the refusal to adjourn the application to set aside. Convenience and justice were overwhelmingly in favour of granting Wellcome's application.

Rent Act 1977

Rent registration

- **Augousti v Bailey Holdings Limited** [2018] UKUT 149 (LC), 30 April 2018

Mr Augousti had been the Rent Act regulated tenant of a flat in a mixed residential/retail building for over 50 years. The rent was registered in 2001 and again in 2008 at £5,526.50 per annum or £460.54 per calendar month. In April 2017, the landlord applied to the rent officer for the registration of a fair rent. It sought a rent of £7,200 per annum. In the application form, it stated that it provided services described as 'cleaning, lighting of public ways, entry phone system' and suggested that £30 per week of the rent was attributable to those services. Mr Augousti criticised the services provided.

In May 2017, the rent officer determined the rent at £597.50 per calendar month. He attributed £40 per month to services. Mr Augousti objected to the rent that the rent officer had determined, and the matter was referred to the First-tier Tribunal (FTT). The FTT determined a fair rent to be £600 per month including £40 per calendar month attributable to services. Mr Augousti appealed. The Upper Tribunal (UT) granted permission only on the ground that the FTT did not explain why it agreed with the rent officer that the services provided by the landlord should be valued at £40 per month in the light of the criticisms of those services by the tenant.

His Honour John Behrens allowed the appeal. After referring to Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI No 1169 r36(2)(b) and *Tintern Abbey Residents Association Ltd v Owen* [2015] UKUT 232 (LC), he noted that it was clearly Mr Augousti's contention that there should be an allowance to reflect the difference between services provided in the notional market rent and those actually provided by the landlord. Regrettably, the decision was completely silent on that issue. It set out Mr Augousti's allegations but made no further reference to the service charge at all. There were no findings of fact and no consideration of the issue at all. The FTT had failed to give sufficient reasons and, as a result, the UT was not in a position to understand the FTT's thinking or determine whether Mr Augousti had justifiable grounds of complaint. The decision of the FTT was quashed.

Long leases

Use for Airbnb

- **Bermondsey Exchange Freeholders Limited v Koumetto** County Court at Central London, 1 May 2018

The claimant was the freehold owner of a former warehouse building which had been converted into 18 flats that were all sold-off on long leases. One lessee used his flat to provide short-term accommodation for transient and temporary occupiers who were booking the accommodation through online portals such as Airbnb. The claimant contended that this breached the terms of the lease and applied for an injunction.

District Judge Desai found that there were a series of arrangements for short-term, transitory occupation by strangers by way of what she described as 'commercial hire'. She held that the terms of the lease prohibited such use and granted an injunction to enforce its terms. With regard to the granting of the injunction, she found that:

- breach of the lease had been established;
- relations between the parties (once cordial) had broken down;
- it had not proved possible to resolve the matter by way of an undertaking; and
- short-term arrangements – through Airbnb-style platforms – were a modern phenomenon offering new 'opportunities' in changing times that might tempt other residents on the development.

She considered that the case was tipped in favour of the grant of an injunction by the interests of clarity and certainty. The lessee appealed.

A circuit judge dismissed the appeal. He held that a covenant '[n]ot to part with or share possession of the whole of the demised premises or permit any company or person to occupy the same save by way of an assignment or underlease of the whole of the demised premises' prohibited both parting with or sharing possession of the premises, on the one hand, and, on the other hand, permitting someone to occupy the premises. It was a covenant designed to capture both unauthorised leases and unauthorised licences. The restriction on parting with possession was directed to unauthorised sub-lettings. The restriction on permitting occupation was directed to unauthorised licences.

Further, a user covenant 'not to use or permit the use of the demised premises or any part thereof otherwise than as a residential flat with the occupation of one family only' prohibited use of the flat for any 'commercial' purpose such as hotels or bed and breakfast-style letting, for example, through Airbnb or such letting as the defendant had done. The covenant was breached when the flat was not being used as a residential flat but as short-term temporary accommodation for transient visitors paying for such use by way of commercial hire.

Finally, the appropriateness of the grant or refusal of an injunction involved weighing up the facts and arguments on both sides and the careful judicial exercise of a discretionary judgement as to whether to grant an equitable remedy. The district judge's judgment and reasons amply demonstrated that that was the task she undertook and discharged. There was no justification for interfering with her assessment.

See also Mark Sefton QC and Cecily Crampin, 'Stepping into the breach?', *New Law Journal*, 18 May 2018, page 13.

Service charges

- **Reedbase Limited v Fattal** [2018] EWCA Civ 840, 19 April 2018

The claimant company was the landlord of a block of flats let on long leases. The lessees were obliged to contribute to the costs of certain works by service charges. The landlord intended to carry out works to the roof. Before doing that, it went through the statutory process of circulating proposals, obtaining estimates and making estimates available for inspection as required by the Service Charges (Consultation Requirements) (England) Regulations 2003 SI No 1987. There were then changes to the proposed works, resulting in an uplift in costs of £31,000 or six per cent of the full cost of the works. Some lessees argued that because of changes to the proposals, the second stage had to be repeated with fresh estimates. In the county court, HHJ Hornby rejected that contention. The lessees appealed.

The Court of Appeal dismissed the appeal. Arden LJ said (at para 36):

... the relevant test, in the absence of any explicit statutory guidance, as to when a fresh set of estimates must be obtained, must be whether, in all the circumstances, the [lessees] have been given sufficient information by the first set of estimates. That involves ... comparing the information provided about the old and the new proposals (and that comparison should be made on an objective basis) (para 36).

In this case, the difference was not the only relevant factor and it would not be right to conclude that there had been a material change in the information provided on the basis of that one factor. She continued (at para 36):

*In my judgment, in the light of the statutory purpose, as expounded in [*Daejan Investments Ltd v Benson *[2013] UKSC 14; [2013] 1 WLR 854; May 2013* Legal Action *35], it must also be considered whether, in all the circumstances, and taking account of the position of the other tenants who did not object to the changes, the protection to be accorded to the tenants by the consultation process was likely to be materially assisted by obtaining the fresh estimates.*

In this case, the answer to that question was 'no'. First, the lessees who contended that there should have been a fresh tender knew about the change in the works, approved it, and did so without contending at that point that there should be a fresh tender. This was not a case where the landlord was seeking to ambush the lessees by doing some fundamentally different set of works from that originally proposed. Second, the change in cost was relatively small in proportion to the full cost of the works, especially when account was taken of the fact that the increase in cost due to the lessees' choice of materials was primarily for their sole enjoyment, and yet was being borne by the service charge. Third, it was on the face of it likely to be unrealistic to think that contractors who had estimated for the full works, but not obtained the contract, would be likely to tender for a small part of it. There was no evidence that there would have been any saving in cost. No other contractor had been put forward by the lessees. Fourth, the retendering process would have led to a loss of time

in completing the works, which might have prejudiced other lessees. Fifth, the lessees continued to have their protection under Landlord and Tenant Act 1985 s19.

Anti-social behaviour

Committal for breach

- **Brentwood BC v McIvor**[1]
  County Court at Basildon,
  27 March 2018

Mr McIvor and Ms T enjoyed a long friendship, but neighbours of Ms T reported their concern at hearing instances of shouting, screaming and physical abuse when he visited her. Ms T was a vulnerable adult known to social services. She was also being assisted for substance misuse. Ms T reported to her housing officer that Mr McIvor had knocked her front teeth out. Brentwood sought an anti-social behaviour injunction (ASBI). That application was supported not only by Ms T, but also by several of her neighbours, who reported Mr McIvor as an aggressive, loud and obnoxious character whom they would prefer not to come to their building any longer.

On 2 February 2018, Brentwood obtained an ASBI against Mr McIvor in his absence, restraining him from verbal and physical abuse of Ms T, causing a nuisance, and from being within 150 metres of the building in which she resided. The order was made final at a return hearing on 8 February 2018, which Mr McIvor did not attend.

On 10 February 2018, Mr McIvor was seen by one of the neighbours entering Ms T's flat. The police were called. When they knocked on Ms T's door, she let them in. Mr McIvor was arrested while hiding in a wardrobe. He was brought before the court and remanded for eight days. Mr McIvor admitted the breach. District Judge Humphreys determined that the time that Mr McIvor had spent on remand was sufficient punishment. Mr McIvor's application to set aside the injunction was unsuccessful.

On 21 March 2018, Mr McIvor saw Ms T while she was out shopping and followed her home. He knocked on her door and asked to enter. Ms T said 'no'. He barged past her and told her that he had nowhere else to go. The ensuing argument was heard by neighbours, who called the police. They again arrested Mr McIvor and brought him before the court. He was remanded in custody and the trial was listed for 27 March 2018. At the trial, Mr McIvor said that he was a prison leaver and homeless, and that Ms T's home was the only place to which he could reasonably go. He made counter-allegations of violence against Ms T.

District Judge Humphreys applied the principles in *Hale v Tanner* [2000] 1 WLR 2377 and *Amicus Horizon Ltd v Thorley* [2012] EWCA Civ 817 (the Sentencing Council's *Breach of an anti-social behaviour order – definitive guideline* also applies to breaches of ASBIs). In the present case, six weeks was the starting point, bearing in mind the number of previous breaches, the short time that had elapsed since the making of the order and the seriousness of the breach. Mr McIvor was sentenced to eight weeks' immediate custody.

Criminal prosecutions

Data protection

- **R v Shepherd**[2]
  St Albans Crown Court,
  29 March 2018

In August 2015, Islington LBC took back control of the tenant management organisation (TMO) for a housing estate after its former chairman was convicted of child sex offences. The council had additional concerns regarding the behaviour of three other people who had either been employed or contracted by the TMO and so conducted a safeguarding investigation. A draft copy of the subsequent safeguarding report was sent to solicitors representing the former TMO, stating that it was only for circulation among relevant legal representatives and the TMO board, and requesting an undertaking that the document would not be disclosed further. The document included information that could have identified a young person who was said to be a potential victim of alleged misconduct, and two men also involved with the TMO who were accused of protecting individuals who were a risk to children.

The defendant, Paul Shepherd, obtained a copy of the document from a source he declined to reveal, and then shared it with 83 people, including council members and staff, in order to highlight grievances that he had with the council. He was found guilty after trial of three counts of unlawfully disclosing personal data in breach of Data Protection Act 1998 s55. He was fined £200 on each count and was also ordered to pay £3,500 costs.

Housing allocation

- **R (H) v Ealing LBC**
  UKSC 2017/0209,
  15 March 2018

An appeal panel of the Supreme Court dismissed an application for permission to appeal from the decision of the Court of Appeal ([2017] EWCA Civ 1127; September 2017 *Legal Action* 33) in this housing allocation case. The panel stated: 'There may be points of law of general public importance in relation to both article 8 and section 11 of the Children Act 2004 but as both [the challenged policies in the housing allocation scheme] have been withdrawn this is not a suitable case in which to consider them.'

- **R v Boaitey**[3]
  Inner London Crown Court,
  16 May 2018

The defendant applied to Lambeth LBC for an allocation of social housing accommodation. She obtained a three-bedroom property by pretending that she had a third child, a son, who was in fact her nephew. Her application spun a 'web of lies and deceit'. Having obtained the property, she let out the rooms in the house while living elsewhere. She used a series of bank accounts to conceal her income and enjoyed a 'jet-setting' lifestyle while sending her children to a private fee-paying school.

After a trial, she was convicted of offences of fraud. In his sentencing remarks, Recorder Nigel May said that the defendant had been spared prison 'by a hair's breadth'. He sentenced her to 18 months' imprisonment suspended for two years and ordered her to complete 180 hours of community service. She was also ordered to pay £5,000 towards court costs.

- **Complaint against Bristol City Council**
  Local Government and Social Care Ombudsman Complaint No 16 003 575,
  3 April 2018

The complainant (Mr X) became homeless having been evicted from private rented accommodation. The council operated a social housing allocation scheme under which applicants were expected to apply for an allocation online. Mr X said that he tried to make an online housing application. He said that because he had been evicted from his last settled home and the council had found him intentionally homeless, the screen told him he was not eligible and the system did not allow him to complete the application. The council said this would only happen if Mr X said he had been evicted for poor behaviour or rent arrears. It confirmed that if Mr X had made an application, it would not have been accepted due to unacceptable behaviour in his previous private tenancy.

He applied again later, following a change in his household's circumstances. In the online application process, he answered 'yes' when asked if he had ever been evicted and was not allowed to complete the application. In January 2017, the council changed its online housing pre-qualifier. As a result, if an applicant said they had been evicted in the last three years, on account of their behaviour or rent arrears, they could complete the application. They would then get a message to say that it was unlikely they would be accepted, but a member of staff would check the application. Mr X successfully applied under the new process in March 2017. In May 2017, he bid for a property, which was allocated and let to him in June 2017.

The ombudsman found that the council's practice had been unlawful. He stated:

Between March 2015 and January 2017 applicants whom the council considered might be excluded from the register were prevented from registering online. This is against the law and the council's policy. If the council intends to exclude someone from the register it must give the reasons for this in writing and the applicant has a right of review. As the council has not kept records of who used the pre-application checker we cannot know how many people the council denied a right of review (para 103).

As to the impact on Mr X, the ombudsman found that 'Mr X missed the opportunity of an earlier offer of suitable settled accommodation and spent longer than necessary in the cramped hotel room. On the balance of probabilities, if the council had properly assessed an application from Mr X in 2014 he would have made a successful bid within 12 months' (para 114).

The ombudsman recommended a payment of £9,000 compensation. That included '£350 a month (£8,400) for a delay of at least two years in the council taking action to help the family find suitable accommodation' (para 124). The recommendation also took account of failures in dealing with Mr X's application for homelessness assistance.

Homelessness

Applications from applicants lacking capacity

- **WB v W District Council**
  [2018] EWCA Civ 928,
  26 April 2018

In September 2015, the Court of Protection declared that, for the

purposes of Mental Capacity Act (MCA) 2005 s15, Ms WB lacked capacity to make decisions about where she should live or to enter into a tenancy agreement. She made an application to the council for homelessness assistance. On her appeal to the county court against an adverse decision by the council, HHJ Moloney QC held that she lacked capacity to make an application under HA 1996 Part 7 at all and dismissed the appeal. He followed and applied *R v Tower Hamlets LBC ex p Ferdous Begum* [1993] AC 509 and *R (MT) v Oxford CC* [2015] EWHC 795 (Admin); May 2015 *Legal Action* 45.

On an appeal to the Court of Appeal, it was argued that:

1. the exclusion of persons lacking mental capacity could be classed as an obsolete statutory provision ('the obsolescence argument'); or
2. HA 1996 s189(1) can be interpreted, using Human Rights Act 1998 s3, 'in a manner which puts applicants for priority housing with mental disability … on the same footing as those by persons with no such disability' (para 16; the 'human rights interpretation' argument); or
3. the effect of *ex p Ferdous Begum* is simply to prevent a person from signing a tenancy agreement but allows them to make an application under Part 7 (the 'narrow ratio' argument).

The court rejected all three arguments and dismissed the appeal. Arden LJ stated that 'the basis of the decision in *ex parte Ferdous Begum* is that it is implicit in the statute that a person has the capacity to make decisions about the choice of accommodation. The applicant has to decide whether to accept the accommodation offered, which must be suitable accommodation within the meaning of Part VII of the HA 1996' (para 22). That ratio remained binding. Because the Court of Protection had declared that WB lacked such capacity, she could not apply under Part 7.

The court noted that, under MCA 2005 ss17–18, the Court of Protection could appoint a deputy for a person who lacked capacity and the powers vested in the deputy could include decision-making about where the disabled person should live. Arden LJ said 'the deputy may be given power to make an application under HA 1996 Part 7, including power to make the various choices that an applicant may be required to make' (para 34). A deputy had not been appointed to make the application for WB.

Reviews and appeals

- **Servis v Newham LBC**
  Queen's Bench Division,
  1 May 2018

The council decided that accommodation provided to the applicant was 'suitable'. That decision was upheld on review by a reviewing officer employed by a company to which the council had contracted out the review function. The applicant appealed to the county court: HA 1996 s204. In response to standard case management directions, the council disclosed the housing file and a report to the council's cabinet recommending entry into a contracting-out arrangement together with the minute of adoption of that recommendation. The applicant applied for specific disclosure of the actual agreement made between the council and the contractor. A circuit judge sitting in the County Court at Central London on 21 August 2017 refused the application on the grounds that the document was not relevant to any ground of appeal and the application had been made too late in the proceedings.

Butcher J dismissed an appeal from that decision. There was no ground of appeal putting in issue the authority of the officer to make the review decision. The appeal challenged the decision on the basis that the reviewing officer had not had access to certain information. Nothing in that ground rendered the contracting-out agreement relevant. As the appeal failed on the 'relevance' point, it was unnecessary to consider the 'delay' point.

- **Alexander v Redbridge LBC**
  QB/2017/002,
  April 2018

Ms Alexander sought a review of the council's decision on her application for homelessness assistance. In the review process, she was assisted by a solicitor who wrote to the council on her behalf by email. The review decision was sent by email to the solicitor on 1 August 2016 and received. The solicitor was on leave and did not see the email until her return on 4 August 2016. An appellant's notice was filed on 25 August 2016. The appeal had to be presented within '21 days of [the applicant] being notified of the decision': HA 1996 s204(2). If the date of notification was 1 August 2016, the appeal was out of time.

A circuit judge sitting in the County Court at Central London on 2 December 2016 held that the decision had been notified on 1 August when it was sent by email to the applicant's solicitor's email address and received in her inbox. The date of notification was not deferred until the email was opened and read. The judge followed and applied *Salazar-Duarte v USA* [2010] EWHC 3150 (Admin). The appeal was, accordingly, out of time.

The applicant appealed to the High Court. The appeal was listed for hearing but was dismissed by McGowan J by consent, with no order as to costs.

- **Muloko v Newham LBC**[4]
  County Court at Central London,
  6 April 2018

Newham decided that Ms Muloko was homeless but did not have a priority need: HA 1996 s184. She requested a review of that decision: HA 1996 s202. Newham did not produce its decision on review within the statutory time period under HA 1996 s203(7) and Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI No 71 reg 9. Ms Muloko brought an appeal against the original decision: HA 1996 s204(1)(b).

Later, Newham notified her of what purported to be its decision on the review. Ms Muloko considered that her earlier appeal had become academic and sought its dismissal with an order that Newham pay her costs, in accordance with the principles set out in *M v Croydon LBC* [2012] EWCA Civ 595; July 2012 *Legal Action* 43.

A circuit judge dismissed the appeal as requested but made no order as to costs. Acknowledging that he was potentially departing from what had previously been a common understanding among housing law practitioners, he held that Newham's review decision, having been provided outside the statutory time limit, was not in fact a decision under HA 1996 s202, but merely a purported decision under that section. Therefore, it did not render the s204(1)(b) appeal academic and the principles in *M* did not apply.

He held that an appellant in these circumstances was entitled to elect whether or not to validate the out-of-time decision (and thus bring it within HA 1996 s202) by agreeing an extension of time retrospectively under Review Procedures Regulations reg 9(2): see *Jobe v Lambeth LBC* February 2018 *Legal Action* 45. If she elected to validate the decision, she could then bring an appeal under s204(1)(a) against the s202 decision, which would effectively supplant the earlier s204(1)(b) appeal (*William v Wandsworth LBC* [2006] EWCA Civ 535; June 2006 *Legal Action* 36 per Chadwick LJ at para 55), leaving only the issue of costs in relation to the earlier appeal.

If, however, she elected not to validate the purported s202 review decision, she was entitled to proceed with her appeal under s204(1)(b) against the s184 decision. That course was available to her notwithstanding that the purported review decision set out the local housing authority's up-to-date consideration of the facts, which might well form the basis of any new s184 decision if the appeal succeeded.

Proceeding with the first appeal and successfully obtaining a quashing of the s184 decision would have a number of potential advantages to the appellant, such that it could not be said that it was academic, namely:

1. on receipt of a new s184 decision, if adverse, she would have a right to a further review, made by a different officer, who might come to a different conclusion (a 'second bite at the cherry');
2. she would have the opportunity to make further submissions and submit further evidence for both the new s184 decision and any later s202 review;
3. there would inevitably be a delay before the new s184 and s202 decisions were made, during which time her position might be improved; and
4. until the new s184 decision was made, the interim accommodation duty under s188(1) would arise again.

1 Elizabeth England, barrister, London.
2 'Former housing worker convicted by jury of data protection offences', Information Commissioner's Office news, 29 March 2018.
3 See Tristan Kirk, 'Mother claimed to have third child to get bigger house — then let it out', *Evening Standard*, 17 May 2018.
4 Daniel Clarke, barrister, London and Simon Marciniak, partner, Miles & Partners, London.

Jan Luba QC and Nic Madge 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 1 and 4 above for providing details of the judgments.