Housing Newsletter

February 2016

INTRODUCTION

Welcome to the latest edition of Field Court Chambers' Housing Law Newsletter. For 2016 we have refreshed the format of our newsletter which we hope you'll enjoy.

Last year proved to be a very busy year for housing practitioners, with four major Supreme Court decisions and radical changes to the section 21 Housing Act 1988 regime. We have devoted this edition of our newsletter to summarising those significant legal developments for our readers, including:

- Redefining 'vulnerability' – *Hotak v Southwark LBC* [2015] UKSC 30
- The correct approach to assessing intentional homelessness – *Haile v Waltham Forest LBC* [2015] UKSC 34
- Summary determinations of Equality Act 2010 defences – *Akerman-Livingstone v Aster Communities Limited* [2015[UKSC 15
- Out of borough placements – *Nzolameso v Westminster CC* [2015] UKSC 22
- Damages for disrepair where tenant is absent from property – *Moorjani v Durban Estates Limited* [2015] EWCA Civ 1252
- Changes to the section 21 HA 1988 regime and tenancy deposits - Deregulation Act 2015

If you have any questions about matters in this newsletter you can contact any of the Housing Group through our clerks.

Field Court Chambers Housing Group

CONTENT

Hotak v Southwark LBC; Kanu v Southwark LBC; Johnson v Solihull MBC [2015] UKSC 30

An applicant has a priority need for accommodation if he or she is a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside: s. 189(1)(c) Housing Act 1996.

In this landmark decision, the key questions for the Supreme Court were:

1. does the LHA's assessment of whether an applicant is vulnerable involve a comparison and, if so, who is the correct comparator – is it the ordinary person if made homeless or the ordinary person who is actually homeless?
2. when assessing an applicant's vulnerability, can a LHA take into account support available to him or her from a third party?
3. does the public sector equality duty under the Equality Act 2010 add anything to the LHA's determination of priority need under s. 189?

Essentially, the Supreme Court provided the following answers:

1. an LHA's assessment of whether an applicant is vulnerable does involve a comparison, and the correct comparator is the ordinary person if made homeless;
2. therefore, the correct test to be applied by the LHA when assessing vulnerability is whether the applicant would be significantly more vulnerable if homeless than an ordinary person;
3. a LHA can take into account support available to an applicant from any third party, including family members, so long as the LHA are satisfied that the third party will provide that support on a consistent and predictable basis;
4. where the Equality Act applies (i.e where the applicant has a disability or another 'protected characteristic') the LHA is required to focus sharply on the extent of the disability and its likely effects, in addition to the other personal circumstances of the applicant, when assessing whether he or she is vulnerable.

Importantly, the Supreme Court has introduced a new test for LHAs to apply when deciding whether an applicant is vulnerable, as set out in 2 immediately above. In doing so the Court overturned the previous test laid down in *R v Camden LBC ex.p. Pereira* (1998) 31 HLR 317, which has been used by LHAs over the last 17 years.

Adrian Davis

Haile v Waltham Forest London Borough Council [2015] UKSC 34

H was a tenant of a bedsit in a hostel under a tenancy agreement which provided that the accommodation was for single occupancy only. H became pregnant and surrendered her tenancy because of unpleasant smells at the accommodation. She applied to the local authority for assistance under Part VII Housing Act 1996 and subsequently gave birth to her child. The local authority found her to have become homeless intentionally because the hostel accommodation would have been reasonable for her to continue to occupy until she gave birth. This decision was upheld on a s.202 review and by the county court on a s.204 appeal.

Held (Lord Carnwarth JSC dissenting):

1. The question of whether accommodation is reasonable for the applicant to continue to occupy for the purposes of s.191(1) falls to be decided as at the date he or she ceased to occupy the accommodation;
2. "reasonable to continue to occupy" means reasonable to continue to occupy for as long as he would have to occupy it if the local authority did not intervene, following *R(Aweys) v Birmingham City Council* [2009] UKHL 36;
3. There are 2 issues for a local authority to consider when determining whether an applicant became homeless intentionally:
   (a) Did A cease to occupy accommodation which was available for his/her occupation and reasonable to continue to occupy as a result of A's deliberate conduct; and
   (b) If so, is A's current homelessness the consequence of that deliberate conduct?
4. In relation to issue (b), a later actual event will break the chain of causation of A's homelessness if, in the light of that event, it cannot be said that "if A had not done that deliberate act (or made that deliberate omission) he/she would not have become homeless";
5. the chain of causation will also be regarded as having been broken if the proximate cause of A's homelessness is an event unconnected to A's earlier deliberate conduct, in the absence of which homelessness would probably not have occurred [e.g. where a couple give up a tenancy and move into temporary accommodation together, but the marriage subsequently breaks down and one spouse (A) moves out. The proximate cause of A's homelessness is the marriage breakdown, which is unconnected to the surrender of the earlier tenancy. A is therefore not to be

regarded as having become homeless intentionally].

On the facts of the case, it could not be said that, if H had not surrendered her tenancy, she would not have become homeless. She would have become homeless upon the birth of her baby in any event, because the bedsit accommodation was for single people only. Therefore she was not intentionally homeless for the purpose of s.193(1) Housing Act 1996.

Although the Court stopped short of overruling *Din (Taj) v Wandsworth LBC* [1983] 1 AC 657 it distinguished it on a very narrow basis and held that the case would be decided differently today.

Emma Godfrey

Akerman-Livingstone v Aster Communities Limited [2015] UKSC 15

In a claim for possession brought by a public sector landlord it is not unusual for a defendant to rely on defences based on Article 8 ECHR ('a *Pinnock/Powell* defence') and sections 15 and 35 of the Equality Act 2010 ('an Equality Act defence'). Both defences require the court to consider the proportionality of making a possession order.

The question for the Supreme Court was: in a claim for possession brought by a public sector landlord is a court entitled to take the same summary approach to an Equality Act defence as it does to a *Pinnock/Powell* defence?

The Supreme Court decided that the answer to that question was 'no'. It did so for the following reasons:

1. a *Pinnock/Powell* defence only applies where there is a public sector landlord. By contrast, an Equality Act defence applies to both public and private sector landlords;
2. the protection afforded by an Equality Act defence is stronger than the protection provided by a *Pinnock/Powell* defence. Parliament has decided to give special protection to a limited class of occupiers;
3. the burden of proof is different. Once a disability and the possibility of discrimination have been made out, the burden of proof under the Equality Act is firmly on the landlord to show there was not discrimination (s. 136). In contrast, if a *Pinnock/Powell* defence is raised the court will dismiss it summarily unless the defendant can cross the high threshold of showing his defence is seriously arguable; in the vast majority of cases, the defendant will fail even if he could make out all the facts he relies upon;

The Supreme Court went on to say this did not mean that a landlord whose possession claim is met with an Equality Act defence cannot seek or obtain summary judgment for possession. Possession could be summarily ordered if the landlord could establish that:

1. the defendant had no real prospect of establishing that he was under a disability;

2. in any event, it was plain that possession was not being sought because of something arising in consequence of the disability; or
3. in any event, the claim for possession and its enforcement plainly represented 'a proportionate means of achieving a legitimate aim'.

However, as the Supreme Court acknowledged, in practice it will be 'relatively rare' for a landlord to obtain a summary order for possession when faced with an Equality Act defence. This is because the three stages of such a defence are likely to give rise to factual disputes: the existence of a disability; whether possession is sought because of something arising in consequence of that disability; and whether the claim is a proportionate means of achieving a legitimate aim. Summary judgment 'is not normally a sensible or adequate procedure to deal with such disputes'.

Adrian Davis

Nzolameso v City of Westminster [2015] UKSC 22

This was an "out of borough" placement appeal. "Out of borough" placements are becoming increasingly common as authorities struggle to keep up with the demands placed on their stretched resources.

The Supreme Court addressed the duty contained in s.208 Housing Act 1996 to secure accommodation within district "so far as reasonably practicable". S.210 imports a stronger duty than simply being reasonable. If it is not "reasonably practicable" to accommodate in borough, authorities must generally, and where possible, try to place the household as close as possible to where they were previously living.

The 2012 Suitability Order (Homelessness (Suitability of Accommodation) (England) Order 2012 SI No 2601) contains various matters to which an authority must have regard, one of which is the significance of any disruption caused by the location of the accommodation.

In evidencing decisions, it is insufficient for local authorities to rely on "standard" paragraphs in its decision letters as to the general housing shortage in its area. Nor should courts be too willing to assume that reviewing officers are aware of the duties upon them, when consideration of relevant statutory matters are omitted from letters.

The Supreme Court emphasised the need for the findings of local authorities to be supported by adequate reasoning. This may entail identifying the location of suitable properties available to the applicant at the time an offer is made. If there is other suitable accommodation available within borough, or closer to where the applicant was previously living, an explanation as to why this was not offered to the applicant is required.

By way of guidance as to how local authorities are to go about explaining their decision as to the location of properties offered, Lady Hale suggested

that, ideally, an authority should have a keep up to date a policy for procuring sufficient units of temporary accommodation to meet the anticipated demand during the coming year. Where there was an anticipated shortfall of "in borough" units, the policy should explain the factors which would be taken into account in offering household those units, the factors which would be taken into account in offering those units closer to home, and if there was a shortage of such units, the factors which would make it suitable to accommodate a household further away.

Also intervening in Nzolameso with submissions on s.11 of the Children Act 2004, was Shelter's Children Services. S.11 requires the housing function to be discharged having regard to the need to safeguard and promote the welfare of children. "Well-being" is broadly defined, encompassing education, training, recreation as well as the more obvious factors such as physical, mental and emotional well-being.

S.11 does not in terms require the children's welfare be the paramount or even a primary consideration. However, Lady Hale considered suitability required the local authority to have regard to the need to safeguard and promote the welfare of any children in the household. In her view it was not enough to simply ask whether any children were approaching externally assessed exams. Disruption to their education and other support networks may be actively harmful to their social and emotional development, and: "….the authority have to have regard to the need to promote, as well as safeguard, their welfare. The decision-maker should identify the principal needs of the children, both individually and collectively, and have regard to the need to safeguard and promote them when making the decision."

It is unlikely anything said in Nzolameso will have a significant impact on actual out of borough placements. The pressure on housing stock continues to rise, unabated. Affordability is another statutory matter that is relevant to suitability. The housing benefit cap has reduced the availability of affordable accommodation in the private sector. The Homelessness Code of Guidance has yet to be updated to take account of the impact of this. Many local authorities report that private landlords can obtain much higher rents than their housing applicants could ever afford. Some of the private sector accommodation that remains affordable to applicants subject to the housing benefit cap may fail the suitability requirement on account of the condition of the property.

The real import of Nzolameso is its requirement that suitability decisions be more specific, both in evidential terms and the reasoning behind it, to demonstrate compliance with the statutory duty to secure accommodation within Borough insofar as reasonably practicable. If not practicable, authorities should seek to place applicants as close as possible to where they were previously living.

Genevieve Screeche-Powell

Moorjani v Durban Estates Limited [2015] EWCA Civ 1252

The Claimant was the tenant of residential premises and claimed damages for breach of his landlord's repairing covenants. During the relevant period the Claimant had been refurbishing the property and was living elsewhere. The trial Judge held that he was not entitled to general damages in relation to the period when he was living elsewhere, because he had not been required to vacate as a consequence of the disrepair, and had suffered no discomfort, inconvenience or distress as a result of the disrepair because he was living elsewhere.

Held:

In a disrepair claim the tenant's loss consists of impairment to the rights of amenity afforded to him/her by the lease. Discomfort, inconvenience and distress are only symptoms of that loss of amenity. It is therefore not fatal to a claim for general damages for disrepair that that the tenant has not been in occupation of the premises during the relevant period for a reason unconnected to the disrepair. However the non-use may be relevant to the question of mitigation of the tenant's loss. On the facts, during the period of his non-occupation the Claimant was entitled to damages calculated as a percentage of the notional rental value of the property, being 50% of what the court would have awarded had he been in occupation throughout.

Emma Godfrey

Legislation Update

Amendments to the Section 21 Housing Act 1988 regime by the Deregulation Act 2015

The section 21 HA 1998 regime has been significantly changed for tenancies of properties situated in England which commenced on or after 1st October 2015. Those changes were brought in by sections 33- 41 of the Deregulation Act 2015 and the principal amendments are:

1. the date stated in a notice given under s.21(4) no longer needs to be the last day of a period of the tenancy: s.21(4ZA);
2. landlords must now use the prescribed form for both s.21(1) and s.21(4) notices contained in the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) (Amendment) Regulations 2015, SI 2015/1725;
3. landlords cannot serve a notice under s.21(1) or s.21(4) within the period of 4 months beginning with the day on which the original assured shorthold tenancy began, save where the tenancy is a statutory periodic tenancy arising under s.5(2) HA 1998: s.21(4B) and (4C);
4. moreover, landlords cannot serve a notice under s.21(1) or s.21(4) at a time when they are in breach of a prescribed requirement or in breach of the requirement to provide prescribed information: ss. 21A and 21B. These are set out in the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015, SI 2015/1646;
5. generally, where a local housing authority has served a 'relevant notice' upon a landlord, he or she cannot serve a notice under s.21(1) or s.21(4) within the period of 6 months from the date of service of the relevant notice, or where the relevant notice is suspended within the period of 6 months from the day on which its suspension ends. A 'relevant notice' is a notice served under s.11, s.12 or s.40(7) of the Housing Act 2004: see s. 33 and 34 Deregulations Act 2015;
6. generally, landlords cannot commence possession proceedings until after the period of 6 months beginning with the date of service of the s.21(1) or s.21(4) notice: s.21(4D) and (4E);
7. a tenant of an AST is entitled to a repayment of rent from his or her landlord where, as a result of the service of a s. 21 (1) or s.21(4) notice, the tenancy is brought to an end before the end of a period of the tenancy, and the tenant has paid rent in advance for that period, and the tenant was not occupying the property for one or more whole days of that period: s. 21C.

Deregulation Act 2015 – Tenancy Deposits

Sections 30 to 32 Deregulation Act 2015, which came into force on 26th March 2015, amended the tenancy deposit provisions of sections 212 to 215 Housing Act 2004 and the Housing (Tenancy Deposits) (Prescribed Information) Order 2007 SI 2007/797. The most important changes are:

1. An application for compensation and/or an order requiring the repayment of the deposit under s.214 Housing Act 2004 may only be made where the deposit was paid on or after 6th April 2007;
2. The prohibition on serving a s.21 notice contained in s.215(1) HA 2004 now applies where:
    (a) A tenancy deposit is not being held in an authorised scheme, whether that deposit was paid before, on or after 6th April 2007;
    (b) A tenancy deposit was paid on or after 6th April 2007 and the initial requirements of an authorised scheme have not been complied with within 30 days of receipt of the deposit.

(The prohibition on in serving a s.21 notice when s.213(6)(a) has not been complied with, as set out in s.215(2), remains unchanged.)

3. Where a tenancy deposit was taken before 6th April 2007 in connection with a fixed term tenancy, and a statutory periodic continuation tenancy arose on or after 6th April 2007 upon the end of the fixed term, and the landlord had not already complied with the tenancy deposit legislation:
    (a) If the continuation tenancy was in existence on 26th March 2015 and all or part of the deposit continued to be held in connection with the tenancy, s.213 HA 2004 applies and the landlord was required to comply with subsections 213(3) and (6) within 90 days of 26th March 2015 (or, if earlier, the date calculated under s.215A(3)(b));
    (b) If the continuation tenancy had come to an end before 26th March 2015 or the entire deposit had been repaid by that date, the requirements of s213(3), (5) and (6) are treated as having been complied with.
4. Where a tenancy deposit was received on or after 6th April 2007, and the landlord complies with the initial requirements of an authorised scheme and the requirements of subsections 213(5) and (6)(a) at a time when the deposit is held in connection with the original tenancy, and the deposit continues to be held in the same authorised scheme in connection with a new tenancy which replaces the original tenancy when that original tenancy comes to an end, the requirements of subsections 213(3) (5) and

(6) are treated as having been complied with in relation to the replacement tenancy. This dispenses with the need for repeated deposit protection that had arisen as a consequence of the decision in *Superstrike Limited v Rodrigues* [2013] EWCA Civ 669.

Smoke and Carbon Monoxide Alarm (England) Regulations 2015, SI 2015/1693

These regulations, which came inform effect on 1st October 2015, provide that most private landlords are under a duty to provide certain safety alarms for their tenants.

The regulations do not apply if the landlord is a registered provider of social housing, or if the tenancy is an excluded tenancy falling within the Schedule to the regulations.

If the regulations do apply, then a relevant landlord must ensure that:

(a) during any period beginning on or after 1st October 2015 when the property is occupied under a tenancy-
  (i) a smoke alarm is equipped on each storey of the property on which there is a room used wholly or partly as living accommodation (which includes a bathroom and a lavatory);
  (ii) a carbon monoxide alarm is equipped in any room of the property which is used wholly or partly as living accommodation and contains a solid fuel burning combustion appliance, and

(b) checks are made by or on behalf of the landlord to ensure that each alarm is working properly on the day the tenancy begins.

If the landlord fails to comply with these statutory duties then the local housing authority are under a duty to serve a remedial notice upon him or her. The landlord has a duty to comply with that remedial notice. If he or she fails to do so the local housing authority (a) are under a duty to arrange remedial action; and (b) have a power to serve upon the landlord a penalty charge notice requiring the landlord to pay a penalty charge not exceeding £5,000. The regulations provide a procedure for landlords to seek a review of any penalty charge notice, or to subsequently appeal it to the First-tier tribunal.

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