Housing Law Practitioners' Association

Minutes of the Meeting held on 20 January 2016
University of Westminster

Private Rented Sector - The New World

Speakers: **Adrian Berry, Garden Court Chambers**
David Smith, Anthony Gold Solicitors

Chair: **Rebecca Chan, Citizens Advice**

Chair: Welcome to the first HLPA meeting of the year. My name is Rebecca Chan. I was formerly of Arden Chambers, now at Citizens Advice heading up the housing team. The theme this evening is Private Rented sector - the New World, and we'll be covering all of the Deregulation Act changes that are now in force, from deposits to "use it or lose it" rules on s21 Notices, and we'll also be covering the Right to Rent Provisions before they come into force nationally on 1 February 2016.

Could I first ask if there are any amendments to the minutes of the last meeting? If not, I will introduce our first speaker, Adrian Berry from Garden Court Chambers. He does a lot of work in interrelated areas concerning migration, human rights and protection; he does EU citizenship and free movement of persons, human rights and family reunion work, homelessness and migrant welfare, and community care and welfare benefits as well as many other areas. He is well known for the Teixeira case which reached the European Union Courts of Justice and today he will be talking about the Right to Rent provisions.

Adrian Berry: Penalty regimes are quite common in immigration law, but perhaps less so in the field of housing law. At the moment we have a situation where in employment law we've had civil penalties since 2006 for people who employ people who don't have the correct immigration authorisation. Indeed, road hauliers and people who carry persons subject to immigration control on planes have carriers' liability legislation which also leads to a civil penalty regime, and so what I am about to describe to you tonight is new to us as housing lawyers, but the concept of a civil penalty regime for providing services of some description to persons subject to immigration control or facilities to persons subject to immigration control isn't new at all. So although we don't know exactly what's going to happen on 1 February 2016 when the civil penalty regime for landlords who rent to occupiers who don't have a right to remain is rolled out, we do have some experience to draw on from these related fields of carriers' liability law and also employment law, so much of what I'm about to say is drawn from two things.

Firstly I will set out the broad framework within which the new regime works and explain a little about how it affects landlords and also the sort of work that we might be undertaking in this field when the regime comes into force nationwide on 1 February, then I will also give you some tips. I have acted in civil penalty appeals and indeed in carriers' liability appeals and there are certain features which this new regime has in common which are quite important to bear in mind when you're advising clients at the outset, considering issues which might arise as to how to handle the potential imposition of a civil penalty, and considering also how to avoid the imposition of a civil penalty by conducting checks on occupiers - that's from the landlord's perspective.

So there are a number of issues which I will mention, but the headnote is that the Secretary of State for the Home Department is fed up with doing immigration controls all on her own and she'd like us all to join in. So if you employ anybody you can join in too; and if you're carrying anybody in your lorry or your aeroplane you can join in; if you run a bank and you might want to issue someone with a bank account you can join in; and why leave landlords out of the equation. They often have some services which people require. So they've been brought into it too.

In government there's an inter-ministerial working group which used to be called something like the Hostile Environments Working Group until they thought it might give them a bad name, and now has some other anodyne name, but you get the gist. It's designed to create an environment whereby people without lawful residence would voluntarily choose to leave the country of their own volition, life having been made so tough for them here. So it's a devolved form of immigration control and the theory is: if you benefit from things from an employer's perspective you should be prepared to police who works for you; and if you're a landlord and you will gain from a commercial arrangement you should be prepared to police it.

The headnote though is that it's not just about persons subject to immigration control. In order to classify the sheep and the goats you first need to ask the question of who are the sheep, and who are the goats, and so everybody has to be checked and so, from the outset, there is this form of identity control even in the absence of an identity cards regime. Because whether you're a British citizen, or an EU citizen or a person subject to immigration control from outside the EU a potential landlord cannot administer the scheme without checking everyone's documents. So you can't really look at this without understanding it as the general introduction of identity checks when supplying residential accommodation across the board to all potential tenants and indeed to occupiers who are authorised to occupy accommodation.

So where do we find all the useful information? On the handout I've listed some of the things you need to have in your toolkit but if you type in "right to rent" in Google the relevant government sites come up quite quickly. That particular phrase, "right to rent", will generate them but the first thing to know is that there are Codes of Practice. There was an initial version of this scheme that was rolled out in five local authority areas in the West Midlands last year and so you'll find references to the regime that was in place prior to 1 February of this year which largely pertained to those local authorities. From 1 February this year there is a national roll-out effectively of that, and there are Codes of Practice in the administration of the scheme for landlords, one of which generally is trying to tell you what to do in order to administer the scheme as a landlord, and the other one of which is telling you not to discriminate against people. Because you can see the problem - it's not just a question of whether or not someone has the right to rent, it's that if a landlord in a busy sector of the city in a busy district is confronted with eight people that want to rent his or her residential accommodation they might feel tempted to go for the easy win - the person who doesn't need the right to rent checks being carried out quite so quickly or the person that can prove readily that they have the right to rent, or the person who, on grounds that maybe to do with race or colour seems like a more obvious win. So there's a real temptation for unlawful discrimination even if it's indirect, and of course the provisions of the Equality Act apply to the supply of residential accommodation and the anti-discrimination provisions contained therein also apply. So to save landlords the trouble of wading through the Equality Act there's also a Code of Practice about how to avoid unlawful discrimination and hot tips. What it boils down to is check everybody, again. So on the basis of being equal, they extend the regime across the board. You can see the sense of that, but equally it's slightly odd as well because of course it's using something generous and good, the Equality Act, to justify something quite burdensome - universal identity checks.

So in addition to the Codes of Practice which you have to be familiar with, there is also Guidance. There is always Guidance. The Guidance changed on 15 January from the time when I first started thinking about this talk, to new guidance which has new pictures in it. The issue which I really pity landlords about is looking at immigration documents. The first version of the User's Guide has a lot of pictures of immigration documents, ie the sorts of things you ought to be looking for, but it's incomplete because there's always an infinite variety of immigration documents and any landlord who thought, "well I don't have the time to qualify in law, qualify as a solicitor, specialise in immigration and spend about five years in practice familiarising myself with documents, so I'll just read this guidance" – would not find out everything they need to know, because it takes you so far, but not all the way.

There is also a surprising amount of legislation for something which is so novel. There's the act itself, the Immigration Act 2014, both Part 3 Chapter 1 but also Schedule 3, and then four Statutory Instruments of relevance already, and you need to have them all to hand. So we have the regime which we are concerned with tonight which is a civil penalty regime for which the idea is that if you don't conduct the appropriate checks during the currency of a tenancy either beforehand, or sometime, for those with limited rights to stay here, you can be liable for the imposition of a civil penalty. There is a whole discrete language to all of this. There are concepts and terms here which you will be familiar with from common law, from landlord and tenant law generally. They all have their special meaning within the context of this regime, so you'll see a residential tenancy agreement is a tenancy which grants a right of occupation for premises for residential use and provides for the payment of rent whether or not at a market rent. You have to be careful about that, particularly as persons who are inclined to be generous and charge a peppercorn rent to help migrants could still be caught by these provisions, and it's not an excluded agreement. Excluded agreements are regulated by Schedule 3 of the Act which provides for a variety of categories like public sector accommodation and caravans, hostels and refuges, both women's refuges and refuges generally, to be excluded from the provisions.

So those are the three things. You need to have all of those in place and a tenancy includes a lease, a licence, sub-lease or sub-tenancy and an agreement for any of those things as well, so again you can see the vocabulary is all adapted to create this particular regime. An agreement grants a right of occupation for residential use if one or more adults - it's always about adults, it's never about minors - have the right to occupy the premises as their only or main residence (again forget any other language from other statutory provisions, that's a specific formulation for this specific regime) whether or not the premises may also be used for other purposes. Rent includes any sum paid in the nature of rent.

So there's the definition of the sorts of agreement which are included and the key points are, of course:

- you have to see if it's for residential use for adults;
- that they have the right to occupy, not just have the tenancy; and
- the premises are the only or main residence.

All of those factors have to be in place in order for a landlord to be subject to an arrangement whereby he or she may be liable for the imposition of a civil penalty. But then there's the more tricky issue, and this really is quite difficult because you have to become quite familiar with immigration law, which is slightly unfair really for those who are not.

You're disqualified as a result of your immigration status from occupying premises if you're not a Relevant National (we'll come onto what that term means in a second) and you don't have a right to rent in relation to the premise in question (and I'll come onto that in a second as well).

So Relevant National is a British citizen, but not any other form of British national; a national of an EEA state other than the United Kingdom, so that's the other 27 states of the European Union plus Norway,

Iceland and Liechtenstein; or a national of Switzerland. So if you're in one of those categories and you can produce evidence of the same - remember anybody who falls into that laundry list of nationalities who can't produce evidence of it, including a British citizen who can't produce evidence of it, is liable not to be able to satisfy a landlord who has to keep appropriate records. There are plenty of people who don't have passports or have complex lives and for a various reasons have difficulty in evidencing their situation.

Then we come onto the definition in relation to premises. A person does not have a right to rent in relation to premises if he requires leave to enter or remain but does not have it - so that's the basic grant of permission to stay in the UK, a positive authorisation - or his leave to enter or remain is subject to a condition preventing him or her from occupying the premises. It is quite possible under Section 3 of the Immigration Act 1971 to impose a condition preventing somebody from occupying particular premises or descriptions of premises in the exercise of immigration controls, so you need to be a bit careful about that. Although they don't tend to do it at the moment there is a power under s3 of the 1971 Immigration Act to do that. But the good news is you can be treated as having one if the Secretary of State grants you permission to occupy the premises. Of course there's no easy way of getting that permission, but there is a sense in which, for example in respect of asylum seekers who wish to occupy private sector accommodation rather than so called mass accommodation, asylum support accommodation, that they have to get the permission of the Secretary of State in order to do so, so there is at least one class of people who obviously would fall within that.

Then there are two sorts of concepts of right to rent, as we'll come on to see. There are those people who are here without restriction as to time for how long they can be here. So the most obvious class of persons are British citizens. But equally persons with the EU right of permanent residence or Irish citizens with a common travel area exemption or people with indefinite leave to enter or remain and the grant of that from the Secretary of State.

There are other people with a limited right to rent:

- A person who's been granted leave to enter or remain for a limited period
- Where you're (i) not a Relevant National so you're not one of those EEA citizens, or a Brit, or Swiss, and (ii) you're entitled to enter or remain under European Union Law provisions

And that last point, that (ii) is designed to cater for the third country national family members of EU citizens, so if you have a French worker and an Algerian spouse it would cater for the Algerian spouse and he or she had a right to reside derived from the French worker's right in the UK.

So the general prohibition is that a landlord must not authorise an adult to occupy premises under a residential tenancy agreement (remember that specific definition that we looked at in Section 20) if that adult is disqualified.

So it's about authorising the occupation of premises, not simply the grant of a tenancy, and there are two basic scenarios:

The first is where a residential tenancy agreement, ie a right to occupy premises, is either (a) granted to a tenant who is disqualified - so that's pretty straightforward - or (b) another adult who is named in the agreement, or (c) another adult who is not named but who, nonetheless, is disqualified. So if there's a general provision to allow people to allow additional people to occupy the premises with agreement - and these are called "pre grant contraventions".

In respect of (c) there is a contravention of that only if reasonable enquiries were not made of the tenant before entering into the agreement, or if reasonable enquiries were so made and it was, or should have been, apparent that the adult in question was likely to be a relevant occupier. So if there

was someone who was there with the person who was entering into the tenancy agreement who wasn't named in the agreement but it was obvious that they were some adult family member who might occupy there could be a contravention on the basis of (c). So (c) has a grey area in it that needs to be looked at.

That's the first case: a pre grant contravention. The second case is where the agreement has been entered into that grants a right to occupy premises to an adult with a limited right to rent, and that adult later becomes a person disqualified as a result of their immigration status, and continues to occupy the premises. So if, for example, you have limited leave to remain and it expires without an application to vary it being made you can move into being an overstayer, which is obviously a situation where you don't have any positive authorisation to remain in the UK and therefore you no longer have a right to rent.

Then there are provisions that speak to the sort of things that can be taken into account to ascertain whether or not there is a breach, or there ought to be the imposition of a civil penalty and at what level to include factors like there may be an agreement that prohibits occupation of premises by a person disqualified by virtue of their immigration, but any term of such agreement is to be ignored for the purposes of determining whether there is a contravention of the prohibition, where the landlord knew when entering into the agreement that the term would be breached, or the prescribed requirements - that is to say the document checks - were not followed. Bearing in mind that the whole idea behind the regime is that the landlord has to see and take copies of relevant immigration and nationality identity documents in order to discharge the liability to a civil penalty. This is a discrete scheme that won't affect the validity or enforceability of any other provision of a residential tenancy insofar as it governs the agreement and creates obligations between the parties.

Then there is a considerable amount of jargon within the scheme which you have to be aware of, including things like the term "relevant occupier": an adult who occupies premises under the agreement, whether or not named in the agreement. But the general scheme up until this point is that a landlord has to take precautions in order to avoid being liable for a civil penalty which involves the taking of and copying relevant documents to satisfy him or herself that the potential occupier has a right to rent. If there is a contravention of that, either because the documents haven't been kept or because the person does not have a right to rent then the Secretary of State may give the responsible landlord a notice requiring payment of a penalty, and there's a tariff at the moment, which we'll come onto later, but at the moment the amount must not exceed £3000.

In respect of employment civil penalties, these have increased over time and so we often see these penalty levels put at a modest level, particularly at the moment in relation to private accommodation and lodgers being taken into private accommodation. You will see that the tariff for a civil penalty is quite low, but over time there is a mission creep in the way that these civil penalty regimes work and I would expect, particularly for landlords of more properties who have perhaps more tenants and occupiers, that the tariff will be extended over time. It's a form of harvesting of rent really, a penalty that creates a lot of revenue. If you think about some of the hauliers who have civil penalties for transporting migrants through Calais through the Channel Tunnel, a lorry might have one or two people unlawfully present in it, and you get civil penalties of a certain amount, or in one case it had 42 people in the back of a lorry, and the civil penalties racked up because they are per person. So this can result in tens of thousands of pounds if you're not careful. So it remains to be seen how this particular civil penalty scheme is operating.

But one point to bear in mind in terms of pre-grant contraventions - before a tenancy agreement is entered into - the landlord is the landlord who enters into the residential tenancy agreement and in relation to post grant contraventions, where there are checks done on people who have had limited right to rent which may have expired, then it's the landlord at that time. So if the landlord changes

the pre-grant contraventions these always relate to the person who was the landlord at the time the agreement was entered into, but post grant contraventions during the currency of the tenancy relate to the person who is the landlord at the time in question. There is also provision for a person to be treated as a landlord because he or she has entered into the arrangement with the tenant or licensee, but that responsibility can be sloughed off onto a superior landlord by written agreement and so the superior landlord becomes responsible should that happen and you might see that because there is a landlord, a tenant and then a sublet underneath that.

What about the excuses - because obviously one wants to get out of this, the general idea is not to get caught. So in respect of pre-grant contraventions you have an excuse from paying the penalty if you complied with the prescribed requirements which relates to document checks or that you have an agent who was responsible for the contravention. A landlord can, by written agreement with an agent, make the agent responsible for the administration of the scheme.

Prescribed requirements must be complied with for the purposes of this sub section at any time before the residential tenancy agreement is entered into, but where the relevant occupier is a person with a limited right to rent the landlord is excused only if the requirements are complied with within such period as may be prescribed- and the prescribed period is 28 days prior to the agreement taking effect. But none of the excuses are available if the landlord had knowledge that entering into an agreement would be a contravention of the prohibition on renting this sort of accommodation to somebody who does not have the right to rent.

In respect of post grant contraventions, there are similar and different sorts of excuses, because, if you think about it, if you have someone with a limited right to remain and it expires, you've done your initial checks at the outset of the tenancy, not just on the tenant but on anybody named in the agreement or anybody who's authorised to occupy the premises. But when it expires, what do you do then? Because of course you have done the initial checks and it's partly because you've done the initial checks that you are aware that the leave to remain of the person has expired and then as the landlord you go on to think: Well what am I going to do now? Have you applied for any further leave to remain? No. So therefore what you do is you have an obligation to notify the Secretary of State of the contravention as soon as reasonably practicable. So the excuse to paying the penalty is that you don't have to because notification was made to the Secretary of State as soon as reasonably practicable; or the agent is responsible for the contravention; or the eligibility period (and we'll come on to what that is, as it's quite an important term) in relation to a limited right occupier has not yet expired.

The specific provision of what constitutes "as soon as reasonably practicable" in terms of notification to the Secretary of State is that you comply with the prescribed requirements at the end of the eligibility period - and again this term eligibility period comes up - without delay on it first becoming apparent that the contravention had occurred. So there's provision in the guidance for the methods of notification to the Secretary of State.

So the idea generally is if you have one of these post grant contraventions then there is a notice obligation which kicks in. Then there are provisions made again for imposing penalty notices on agents who, by written agreement, have assumed the obligation of the landlord and similar excuses which apply to them.

If you look at what the eligibility period is, that is whatever is the longest of the following periods:

- the period of one year beginning with the time when the requirements were last complied with;
- so much of any authorised period of leave to remain as remains at that time;
- so much of any validity period as remains at that time.

What that means is that you go for the longest time - so if it's a year then the eligibility period for a person with limited leave to enter or remain is a year, so you have an excuse within that period of the year. A leave period means the grant of leave to enter or remain. Validity refers to particular documents as well, so you might have a document, for example an EU residence card, which is valid for five years. It might be that you still have a right to reside after the five year period but the card is only valid for five years. So there is a slight difference between the validity period which relates to the document in question, and the leave period which affects the underlying period of time. Leave period is, again, defined exclusively for the purposes of this regime.

The Secretary of State can give a penalty notice without having established whether or not you're excused from paying a penalty. There are prescribed requirements for a penalty notice: that it must be in writing, telling you why you think you're liable; stating the amount; specifying a date at last 28 days after the notice date by when the penalty must be paid; and how it must be paid; and telling you how you can object and how the Secretary of State may enforce it. The remedies against this are twofold: you have an administrative review which is referred to as an objection; and then if you go through that and are unsuccessful you can have an appeal to the county court.

A separate penalty notice can be given in respect of each adult disqualified. Two or more persons who jointly constitute the landlord or agent may be jointly and severally liable, but a notice may not be given in respect of any adult who has ceased to occupy the premises concerned and a period of twelve months has passed since the adult last occupied the premises. So that's quite an important one to bear in mind.

Now, how can you object? The grounds for objection or appeal are essentially the same. You have to go through objection first and then appeal afterwards. You can object on the grounds that you're not liable to the imposition of a penalty or that you have a statutory excuse as we looked at before because you've kept copies of the prescribed documents; or the amount of the penalty is too high.

Why might you not be liable to the imposition of a penalty? Well, most obviously because you're not the landlord - you don't fall within the landlord definition. But secondly there's another reason which is critical which is that the person in question does have a right to rent and the Secretary of State is wrong. Now this comes up time and time again in employer civil penalty appeals. You receive a civil penalty, and particularly in an employment context you often employ a lot of people of the same nationality with a similar status, and so a panicked phone call comes in saying it's all very well I've got a civil penalty for this person, but I've got 42 other people in this factory with exactly the same situation. You check this and you find out that they're wrong.

This is partly because the Secretary of State has a habit of briefing these things out to certain firms - they don't use the treasury solicitors - who often get it wrong in practice and that's the reality of what's happening. The classic case is that you see a student resident permit which says work must be authorised, and then everyone gets excited and imposes a civil penalty because there's no obvious authorisation of work, but you know there is a general authorisation for students to work and so where it says work must be authorised on a student resident permit you know that there is such a general authorisation and yet employers have often had civil penalties imposed for employing students on a wholly false basis. So you need to check.

You also need to check that their home office records are accurate because if you have applied for a variation of leave to remain, and you look at the document it says leave has expired, there is a statutory extension by s3(c) of the Immigration Act 1971 which allows your leave to continue on terms by operation of law, and so you might well have leave to remain - you might not be a person who lacks a right to rent. Similarly you can get indefinite leave to remain under the Immigration Act 1971 by operation of law in s1, not by grant. There are all kinds of exemptions, and I don't want to turn this

into an immigration seminar, but the point to note is that there are many things which can happen which mean that the Secretary of State is wrong, not least their own record keeping which is notoriously flawed and full of errors. The one point when you read the guidance that you don't find is reference to the notion that the Secretary of State might be wrong and therefore the landlord might not be eligible. There are many references to: "Check that you're the landlord". Well that's very helpful. But the more significant point is that they might be wrong about the migrant. Particularly if you look at EU law situations, derived rights of residence and so on, many appeals in the employer context are won because your immigration law analysis is sharper than the Secretary of State's and so it's an important one to bear in mind and one that you won't find any assistance on in the guidance.

The procedure for objections relates to the remedies of the Secretary of State on reviewing your argument and reviewing the Code of Guidance. The Secretary of State can decide either that you're not liable or that you have an excuse or that the penalty is too high and can cancel, reduce, increase the penalty or determine to take no further action. If you're unsatisfied in general terms as a result of that you can go on to appeal to the County Court. Now if you lodge an appeal under Part 52 of the Civil Procedure Rules you can take the same points as you took before the Secretary of State but you might have a more sympathetic hearing, particularly if you're right. One of the issues about immigration where we have a number of administrative reviews, which are similar to the objections taken here, is that the administrative review process is pretty useless in many respects and it is only really when you get to court that you actually get a hearing on the substance of your argument and some active consideration of the merits of it. So the County Court Judge will have a similar jurisdiction to the Secretary of State but can cancel the penalty, reduce it or dismiss the appeal. Your grounds of appeal are again that you're not liable, you have a statutory excuse or the penalty is too high. County Court Judges have a free hand to determine the amount of penalty, they don't have to follow the Secretary of State's guidance just as long as they have regard to it. At the moment the tariff is fairly basic for when penalties will be imposed and what the level of penalty is, but in the employment field there's a bit more nuance and there's more to it, and there's quite a lot of scope sometimes if you've got very high penalties. A win can mean getting penalties reduced from tens of thousands or thousands down to very modest numbers, maybe £1000, maybe a few hundred pounds. It's not just about dismissing it.

Of course if you're right about your analysis that there is no liability because the migrant in question has a right to rent, and you're in the County Court, if the Secretary of State realises at the door of the court then she has to settle really by paying your costs in order to get rid of the appeal. So it's quite a useful point. There are frequent cases in employer appeals in the Central London County Court where if you win the Secretary of State pays your costs, the whole enterprise of defending, of resisting it and bringing the appeal is essentially funded by her, which is useful. You can only bring an appeal if you have already raised an objection and had that dismissed.

The regime does not apply in relation to residential tenancy agreements entered into before the commencement day or where the parties remain the same when a new agreement is entered into. However, bear in mind that one of the Statutory Instruments which I drew your attention to at the outset makes specific provisions for where there is a variation or an assignment or a surrender of a tenancy and then new occupiers also come in and have some interim agreement - so an agreement which is changed in some form between the before commencement date and the after commencement day can fall foul of the provisions.

There is a lot more jargon - just to remind you to keep an eye on the interpretation section of the provision because it is a self-contained set of terms. One of the points that struck me when reading this was that it's all very well if you're an immigration lawyer because you look at this and some of these terms are novel to you so you will refer to the definitions. But for housing lawyers who have to

administer the scheme, some of these terms seem quite familiar but have their own definitions here and so you have to be very conscious of them.

The other point just to note briefly is that there are excluded residential tenancy agreements particularly in relation to social housing, not just housing under parts 6 and 7 of the 1996 Act but also the grant of tenancies or licences generally under Part 2 of the 1985 Housing Act, so that includes other forms of social provision, and that the accommodation provided by a person by virtue of a relevant provision includes accommodation provided in pursuance of arrangements made under such provisions, so be careful about that where public functions are discharged in a public sector. There is a range of other excluded agreements, in particular regarding hostels and refuges, but a range of other things in relation to accommodation effectively either under the exercise of public powers or in relation to things like mobile homes, tied accommodation, student accommodation and long leases.

The one area you will need to be very familiar with in advising even at the outset is the Guidance. One of the points about the Landlord Guidance is that, although I was quite scathing about the pictures of the documents which they say are in there because it's non-exhaustive, many of them are very useful. The sort of checks that a landlord has to take prior to entering into a residential tenancy agreement are divided into two classes - two forms of lists. One is a list of documents for persons who have no time limit on their stay in the UK, so people such as British citizens and people with indefinite leave to enter or remain; and then there's a second list of those who have limited leave to remain.

One point which struck me about the permanent list is that it includes references to documents which have expired (ie passports), which you might think is quite unusual. However, the general gist is if you have had a British passport or if you have a grant of indefinite leave to enter in a foreign national passport, even if that passport has expired it clearly shows you have a right to rent.

However, bear in mind that it is possible for indefinite leave to enter or remain to be cancelled; it is possible for a person to be deprived of nationality; it is possible for EU permanent residence to be lost if you are away for more than two years; it is possible for indefinite leave to enter or remain to be lost if you're away for more than two years - and I would be very careful about that. Although at the moment it establishes a statutory excuse to the imposition of a civil penalty, it doesn't quite answer the question of whether or not a person actually has a right to rent, which is a different type of question. At some point that may prove difficult to administer in practice because you have one class of documents for those who ostensibly have no time limit on their ability to stay in the UK, which includes documents which have expired, and that creates obvious risks in administration of the scheme.

Those documents which pertain to people with limited rights to be here generally have to be within the currency if their grant so the regime is there. So if you're not familiar with immigration documents you need to start looking at the documents illustrated even though they're non-exhaustive and the pictures are a little bit small and grainy, you have to start coming to terms with them.

There are also all kinds of tricks sometimes in passports. If you have indefinite leave to enter or remain in one passport, and that passport had expired, you may see the acronym VIPP in the new passport which means Visa In Previous Passport. That's just a whistle from one immigration officer to another that you have something in another document, and so if you see little things which don't on the face of it appear in the illustrated guidance provided to landlords, don't despair, because it may well be that the person does have a right to rent, but a little bit of digging is sometimes required. In many cases it will be obvious but in others where leave is extended by operation of law because you're applying to vary leave to enter or remain; or where a right may be derived directly from EU law but yet to be evidence in documentation; or where some documents have expired (predominantly passports)

but new ones have been issued and there are these little scratchings and marks that immigration officers put in, there may be something in it that is worth persisting with.

Finally, in my experience in about 80 or 90% of the cases I have done in an employment context and carrier's liability there is no real difference between the landlord and the person subject to immigration control. Although the regime applies to landlords or to employers in cases in which I've been involved so far, there isn't a difference between them save where it is false documents that have been given to the employer or where the employer hasn't done something and seeks to blame the employee. So in most cases there isn't much of a difference between them and they're cooperative, but there are obvious situations whereby interests may diverge. Although the person subject to immigration control isn't heard on the imposition of the civil penalty, nonetheless they have an interest in it either because they have unreliable documentation for one reason or another; or because under provisions which are now in this year's Immigration Bill there are provisions for amending this regime to create rights to possession without having to go for a court order where the tenant does not have a right to rent, or mandatory grounds for possession in both the 1988 Housing Act and in the Rent Act oddly enough where one of the persons authorised to occupy does not have a right to rent. And an extra battery of criminal penalties to enforce on the landlord.

It's not just about the civil penalty regime, but where there is knowledge or deliberate effort then there will be a criminal sanction as well. Now that's not in legislation yet, but it's in Parliament at the moment so there may be extra scope for a divergence of interests between the occupiers and the landlords.

Chair: Thank you Adrian. Next I would like to introduce David Smith from Anthony Gold who will be talking about the Deregulation Act and the changes therein.

David Smith: What I would like to talk about particularly, and what I'm most interested in, and of course is coming to fruition over the next few months, is the changes to Section 21 brought by the Deregulation Act, particularly around retaliatory eviction and condition in properties and how those can potentially be used when some interesting new areas of defence to s21 start to appear, many of which I don't think the Government really anticipated.

The reasoning behind the model is, of course, as most of you are well aware, that s21 gets used for a multitude of sins. Sometimes landlords just want property back to sell. Sometimes the tenant is in rent arrears and the landlord can't be bothered to use the s8 route, or they don't understand it. Sometimes the tenant has made quite legitimate complaints about the property and the landlord can't be bothered to fix it. Particularly when you get into London, where there's obviously a significant pressure on private rented sector property, landlords are quite motivated simply to remove one tenant and replace them with another who might be less likely to complain and it's relatively easy to do.

During the passing of the Deregulation Act, Sarah Tether, for the Liberal Democrats, pushed in a series of amendments dealing with retaliatory eviction which were talked out by a couple of Conservative MPs. Unexpectedly, quite late in the day the government shoved those same amendments back in again in the House of Lords and they became the provisions that I'm going to talk about now.

It's important to understand that this doesn't apply across the board, so the application is quite tight. I'm going to say this now because I'll come back to it again and again. It's quite crucial. So these new provisions do not apply to all assured shorthold tenancies, they only apply to tenancies that have commenced on or after 1 October 2015, or have been actively renewed on or after 1 October 2015. So tenancies that commenced before 1 October 2015 and have continued as statutory periodic tenancies under s5 Housing Act 1988 are not dealt with by these changes.

On 1 October 2018 all assured shorthold tenancies will fall into this new structure, but until then there are effectively two modes of operation in play and you'll have to decide whether you fall within it or not. But many landlords are not aware of that change in situation. Many of them won't be aware, for example, that renewing the tenancy will mean that they fall into the new regime. Of course other subtle things like a change of sharers for example is a change of tenant and is a new tenancy and therefore that would fall into the new regime. So there's a couple of areas where things might change around which will bring things within the new regime without people entirely realising it.

The second point to bear in mind about this is it's not to do with disrepair. Disrepair under s11 is a totally different regime and this is about property condition under the Housing Health & Safety Rating System in the Housing Act 2004. So just in case you're not fully aware of this, disrepair basically of course is about things that are broken and HHSRS is about property. So lots and lots of property will not be in disrepair but may fall foul of the HHSRS as it's a much wider regime. So, for example, the HHSRS has 29 hazard profiles which includes such things as noise, security, cold and indeed being too hot - that's not one that's commonly used, but it is available - so in fact there are many situations where condition may be a factor where you will not be able to demonstrate disrepair in relation to the property at all under the traditional regime.

So to come to the restrictions. The restrictions are very tied to local authority enforcement of the HHSRS regime which is bit of a snag. Some of you may have noticed this week that Karen Buck MP published the results of a range of FOIA requests which showed that local authorities are only inspecting, never mind enforcement action, but only inspecting around half of the HHSRS service complaints referred to them. Now there is a bit of a problem. There is no duty on a local authority to inspect on an HHSRS service complaint unless they are asked to do so by a Justice of the Peace or a Parish Council. Inside London Parish councils are, I believe, a little bit thin on the ground so it can be difficult to force an inspection. However, the enforcement guidance does say that local authorities should inspect unless they have grounds to believe that the accusation is baseless or they have some other compelling reason. But do chase local authorities that don't respond - I have certainly in the past sent letters to local authorities asking them to give reasons why they won't inspect - and lo and behold they decided to inspect after all. So they can be pushed into it but they will be reluctant to do so.

So if a local authority inspects under the HHSRS and carries out enforcement action they must carry out a formalised enforcement action. If they serve an Improvement Notice or carry out emergency remedial action then the landlord is instantly precluded from serving a s21 notice for the next six months unless he can have that Notice overturned or quashed by a first tier tribunal. So there are a number of different levels of action local authorities can take. Obviously they can take no action at all; they can take informal action; they can serve a Hazard Awareness Notice, which is basically a notice which says 'you've got a problem here my son' but doesn't do anything else; then they can do an Improvement Notice which requires the landlord to improve the property inside a timescale; then emergency remedial action where they basically do the work themselves; and then up from there you start to get into prohibiting use of the property altogether or, my personal favourite, demolition orders. They don't do that very often, unfortunately. It probably should be done more often I suspect.

So it only applies where a local authority takes the fairly severe actions of an Improvement Notice requiring a landlord to do works, or taking emergency remedial action themselves. If either of those things are done a landlord is instantly precluded from serving a s21 notice for the next six months.

It is also open to a local authority to serve an Improvement Notice suspended in time, so either to suspend it for a period of time or to suspend it pending an event. If a local authority serves a Suspended Improvement Notice a landlord can still serve a s21 until the period of suspension goes away, so if it's suspended for six months the landlord could serve a s21 for the first six months but as

soon as the Improvement Notice kicks in and actually requires the landlord to do the work then the landlord will be precluded from serving a s21 notice for the next six months. It is an odd situation. I don't think the Government intended to do this but in practice local authorities only suspend Improvement Notices to pend an event. Usually that event is the tenant departing the property so they generally don't want to serve an Improvement Notice because then they're forced to re-accommodate the tenant. It's actually an obligation under the local authority homelessness duty at that point. So they tend to suspend them and say when the tenant leaves you will have to do the work. So it probably works quite well in that a landlord can either serve a s21 or have the tenant removed, at which point they will immediately have to do the work on the property - or they can decide not to remove the tenant, in which case they won't have to do the work on the property. So, arguably, at least they can't remove the tenant although the tenant of course is still not getting the benefit of the improvement, which is kind of a flaw in the system.

The second type of restriction is a bit more subtle. If a tenant makes a complaint about condition under any of the HHSRS service profiles the landlord is obligated to respond within 14 days in writing with what is called an **Adequate Response**. An Adequate Response specifies what the landlord intends to do about this and their timescale for doing it. If the response is inadequate, or consists of a s21 Notice as it so often does, the tenant can complain to the local authority and the local authority will then do an HHSRS inspection, in theory. If that inspection results in an Improvement Notice, or a Suspended Improvement Notice or Emergency Remedial Action, then any s21 notice served in the time period between the tenant's complaint and the service of the formal Notice is not validly served, in other words it's of no effect. Furthermore the landlord is then precluded for the next six months from serving a fresh s21 Notice. So they are completely out of luck.

It is this that is of particular interest to me because the tenant does not have to complain about the same issues that the local authority serves the Notice over. The tenant can complain about anything provided it falls under the HHSRS, and the local authority can serve a Notice about anything, provided it falls within the HHSRS, and this produces an incredibly powerful method.

Now there are some limits here. The tenant's complaint must be in writing. They can't complain orally unless the landlord has engineered a situation in which written complaint is impossible, so basically a landlord only turns up once a week with menaces to collect the rent and has provided no contact details for the tenant at all and they only know his name's Fred, or whatever it might be, take your pick. In that case the tenant's complaint is always deemed to have been made in writing so there is in effect a "get out of jail free card". But quite a lot of tenants of course use perfectly reasonable things like text messages and emails to make complaints. Provided they've done that they've made a complaint in writing.

I will come back to how you might use those restrictions in a minute, but I want to talk about a couple of other issues first. S21 Notices now are also invalid unless they are served on the prescribed form. There is now a prescribed form for s21 Notices. Do note, there are in fact two prescribed forms, because the Government produced the regulations prescribing a form, realised they had made a mistake, and a week later produced another set of regulations prescribing a slightly different form, which is the correct form to use.

It is also worth noting, as a complete aside, that the Government has published on the gov.uk website a s21 that is not the same as the one in the regulations. It has a footnote at the end. So it is open at least to debate as to whether the Government's s21 is in fact valid at all, but it depends of course if you've downloaded it from the gov.uk web site.

There are also information restrictions. It's now not possible to serve a valid s21 Notice if you haven't given the tenant a valid Energy Performance Certificate. In principle, of course, all landlords should

have done this and it's a criminal offence not to, but amazingly many landlords somehow forget. A landlord's Gas Safety Certificate has to be given - a valid one obviously I hasten to add. I saw a recent set of figures that suggested only 40% odd of landlords are giving a valid GSC, which was somewhat depressing and rather lower than I expected given it's been around for a while and isn't the most expensive thing in the world. Further, you must give a copy of the wonderful and beautifully written: How to Rent Guide. You must also give the copy of the How to Rent Guide that was in existence at the time the tenancy began or, if it had changed and you renewed the tenancy or it became statutory periodic, you must give the new How to Rent Guide if one has appeared since.

Now so far there's only been one, but there will be a new How to Rent Guide on or about 1 February because the government is adding some information about the right to rent, so that tenants aren't completely shocked when landlords ask to photocopy their passports. Well, they might still be completely shocked because no one in fact of course reads the How to Rent Guide. But there we are.

So you have to have given the correct How to Rent Guide and not everyone's doing that. In fact some initial studies I have seen suggest that somewhat less than a quarter of landlords are even aware of the existence of the How to Rent Guide and I expect many more probably won't be bothering to download and read its eight pages of beautiful government information.

So all of these three things have to be given as well. The Government is able to change that by regulation at any point but I don't know whether they intend to. They've not been particularly clear on that point.

So now I want to move on to the back page of my notes where I've set out a four point plan to consider how you might chose to deal with a s21 Notice. Clearly the first and most important point to consider is whether the s21 Notice your client has been served falls within the old regime or the new regime. If it's the old regime then your options are somewhat more limited, and you'll have to fall back on previous methods, and probably, realistically, something involving deposits more often than not.

If the new regime applies then the first thing you should look at is the Notice itself. Is it actually the correct version of the s21 Notice, or is it simply an old old Notice of the wrong type altogether in which case it's useless, or is it the intermediate wrong Notice that the government percolated out, which some people are using. So it's worth looking at.

The next point I would consider is have the three key pieces of information been served prior to the service of that s21 Notice? So is the tenant in possession of a valid EPC? Is the tenant in possession of a valid Landlord Gas Safety Certificate? Is the tenant in possession of the correct variant of the How to Rent Guide? There are a couple of websites already in place that are indexing How to Rent Guides with their dates of validity. In fact, I think it may be on the HLPA website. I know the RLA website and I think the ARLA website both have them, so are already indexing which How to Rent Guide you require, and by date. Obviously the lists are quite short at the moment but one presumes they will grow over time. So check the additional information and at the same time obviously I would look at all the usual deposit type stuff that you'll be habituated to looking for already.

But next is the clever bit. I would suggest you start looking for HHSRS matters and this can be very, very nebulous. If a tenant has sent a text message to a landlord complaining about noise, that is an HHSRS condition complaint, because noise is one of the 29 hazard areas. If a tenant has complained about security that is an HHSRS condition complaint, because security is one of the 29 hazard areas. If the tenant has complained that the windows stick and won't open, that is two HHSRS hazard areas, as it covers ventilation and fire safety because it's a means of escape. So it's quite likely in many cases that the tenant will have complained about something under the HHSRS, however lightly and in whatever roundabout fashion. It's actually quite had to complain about property without complaining under the HHSRS in some context.

If the tenant has made that complaint, the chances are the landlord will have said: Whatever, and not responded to it within 14 days. Now it doesn't actually matter whether the landlord's responded or not, even though it's in the legislation it's actually completely irrelevant to the entire operation of the system. But if a tenant's made a written condition complaint you have immediate grounds to complain to the local authority and ask them to do an HHSRS inspection based on the issues that have been complained about. If a landlord hasn't responded, then they should definitely do it because you should also point out the fact that the landlord has not responded to the condition complaint within an adequate time, as they are required to do under the Deregulation Act changes. While it doesn't affect the legislation it should affect the local authority's response and the level of response they give. They should be more likely to undertake formal enforcement action in respect of situations where the landlord has not responded. That's the whole point of the 14 day complaint in practice.

Now the reality is, if a local authority does an inspection they should in almost every case serve an Improvement Notice because the one issue that local authorities nearly always look for in property is fire safety. The fire safety standard adopted by the vast majority of local authorities in England and Wales is set out in the Guidance and requires battery backed mains powered interlinked smoke and heat detectors. Unless your property is built in conjunction with the Buildings Regulations 2000 or later you will not have them, and the vast majority of private sector landlords do not have those. Local authorities, by default, almost always serve an Improvement Notice if those things are not present because they take fire safety seriously, as they well should.

As soon as that happens, that means that any s21 Notice that was served in between the tenant's original complaint, whatever it was about under HHSRS, and the Improvement Notice that has been served in relation to fire safety is invalid, and the landlord can't serve one for the next six months. The only way they can do anything about that would be to appeal the Improvement Notice to the first tier tribunal and have it quashed, which they are unlikely to want to do.

This then immediately opens up a number of possibilities: either the tenant can stay for the next six months and enjoy it; or alternatively it opens up a window for negotiation because more likely than not the landlord may well enter and serve a s8 Notice. He may also be prepared to negotiate on a graceful exit that will suit the client's needs, for example by wiping out the rent arrears and you keeping quiet and letting them proceed on the s21 which will change the tenant's homelessness duty position in respect of the local authority. But it depends what sort of exit you want, or if you just want to stay. So there's a quite powerful set of movements that can be made.

Finally there are a couple of key points to remind you about. You must push hard for the local authority to do the inspection and serve the formal Notice, because if there is a possession hearing it is too late. You cannot unwind the Possession Order on the basis that a formal Enforcement Notice is served after the Possession Order has been made. So you must have a formal Enforcement Notice prior to a possession hearing otherwise it's no good. Now what is potentially open at court to argue is, if you have asked the local authority to inspect and they have not yet done so it would, of course, potentially be open for you to ask a Judge to adjourn a hearing on the basis that the local authority intends to carry out an inspection. At the moment I do not know if a judge would do that, but they probably would as it falls under their case management powers. They almost certainly would if you had been able to obtain a surveyor's report that highlighted HHSRS defects in the property which led to a reasonable conclusion that the local authority is likely to serve an Enforcement Notice if they are given the time to go in and do the inspection.

Obviously at the same time you might ask the judge to write a letter to the local authority or make some sort of statement you can then refer to the local authority to ensure they do the inspection they are supposed to be doing. The Government says this isn't an issue because local authorities will have four months to do inspections, but unfortunately I can assure you that local authorities don't do HHSRS

inspections within four months. Six might be reasonable, but of course, at the moment, the level of requests is quite low to local authorities. If it rises dramatically there is some question as to whether local authorities are in any way able at all to deal with this.

The last point that's worth noting is that landlords can appeal Enforcement Notices under the HHSRS, but so can tenants. So if a local authority serves an Enforcement Notice that is not good enough for your needs, ie they serve a Hazard Awareness Notice, it's perfectly in order for the tenant to appeal that to have it uprated to an Improvement Notice. Whether you would want to do that or not I leave open. But it's a no cost jurisdiction and it can be done on paper, you don't have to attend, so it is maybe something that would fall within capability of funding if you had some available, and if you felt the need. But the other side point to bear in mind, of course, is that tribunal fees are rising - in fact they're doubling from later this year in line with all other court fees.

Chair: Thank you David. Some very useful tactics there. I will now invite questions from the floor.

Charlie Kenny, Greenwich Housing Rights: In relation to the initial requirement to provide an Energy Performance Certificate and the other pieces of information, do we know how a landlord can retrospectively comply with that if they don't do it at the outset of the tenancy, and so therefore can they ever then serve a s21 Notice or would they possibly have to wait for it to become a statutory periodic?

David Smith: It's not an initial requirement, it's decoupled. So obviously failure to serve an EPC before the tenancy commences and a Gas Safety Certificate within 28 days are criminal offences, but the parts of those two regulations that actually have time limits do not apply to s21 so provided the landlord has given an EPC and a GSC before service of a s21 it doesn't matter when he got them. So you can do it late. It's not an initial requirement in that context unfortunately. It's worth looking at. It's not terribly well worded, but it's not there at the moment.

Sadaf Mir, Deighton Pierce Glynn Solicitors: This is slightly hypothetical question about the right to rent scheme. In terms of illegal eviction cases, if a landlord says that they had reasonable grounds for thinking this person didn't have the correct immigration status or weren't an excluded person under Schedule 3 and then they evict somebody without a Possession Order would that give them a defence, and on the flip side, does it give the landlords a defence where a tenant is saying that they're entitled to a Possession Order that this person is not capable of entering into a tenancy agreement?

Adrian Berry: At the moment the Bill which is in Parliament, what was the 2015 Immigration Bill but which will be this year's Act, contains a provision for relief from the Protection from Eviction Act provisions to allow a landlord to recover, in person, possession 28 days after serving a Notice to Quit. If that goes through, and there's no reason to think it will not, then that will be exactly the situation, that there will be relief from the need for a court order, which is extraordinary. That's where the tenant doesn't have a right to rent. But there are also provisions for mandatory grounds for possession where someone is authorised to occupy but may not be the tenant so does not have a right to rent, so you can see that there is still some prospective role. At the moment the situation is it's ungoverned by legislation as such, but we know that they are strengthening, or attempting to strengthen, the regime and obviously it creates plenty of scope for abuse by the because of the removal of judicial safeguards.

Deirdre Forster, Anthony Gold Solicitors: Am I right that there is still a provision that you can use, quite a simple provision, where you write a letter to the magistrates and they then require the local authority to request an inspection?

David Smith: I'm not aware of this provision included into the Act. I suspect what the Government was loosely intending was that it would fall off the back of an EPA complaint, for example, but I'm not

aware of that provision. Not to say it may not be there. The 2004 Act has so many provisions I'm always finding odd new ones I hadn't expected.

Adrian Berry: I find that under s79(1) of the Environmental Protection Act a local authority has a duty to investigate complaints about statutory nuisance, so if you can frame your HHSRS issue as a statutory nuisance you may be successful, particularly if you send them photos of damp and mould or other issues which could be a Category 1 or 2 hazard, because that links back into the relevant bit of s4 Housing Act 2004 which is determining whether there are Category 1 or 2 hazards. So you can put a duty on them to inspect under s79(1) and then they will carry out their HHSRS inspection.

Vivien Gambling, Kent Law Clinic: This is a question for Adrian about the right to rent scheme. I am not sure I've grasped it completely, but I just wonder what the position is if a landlord has either made a report to the Secretary of State that somebody without the right to rent is occupying premises or a penalty notice has been served and therefore, by definition, the Secretary of State is aware, what happens if the landlord simply does nothing

Adrian Berry: Pays up?

Vivien Gambling: Because would they then have a defence to any further alleged breach by saying, well you're already aware, I've made disclosure, or you're aware of this person, or is there any sort of positive requirement for the landlord to do anything?

Adrian Berry: I think the idea in theory, as all these great schemes are always designed with flawless government machinery in mind, is that there would then be enforcement action taken against the person subject to immigration control. But the reality is, as we know from the way that Home Office local enforcement teams work with local authorities, that these things are quite patchy in practice. There is a steep increase in the penalty regime if it's beyond the first offence, and so at the moment the regime is essentially one for which the financial penalty increases, but there are criminal penalties in the current Immigration Bill which are designed to reinforce, because the landlord would then, of course, know the status quite clearly, and effectively it would to put pressure on the landlord to evict. So the flaw in the regime has been identified in relation to enforcement, because the problem with the pilot in the five local authority areas in the West Midlands is that if you had a doubt you'd probably just rent accommodation in the adjoining boroughs or districts abutting onto those areas, so it doesn't tell you an great deal about how the scheme will work when it's nationwide. But the clear idea is that it won't be tolerated in the sense of continuing, because the ability to evict under the new measures in this year's Immigration Bill will create the situation where a landlord will effectively not be able to withstand the pressure by just writing cheques every time they get civil penalties, because if nothing else it would cost a lot of money and expose them to the commission of a criminal offence.

John Gallagher, Shelter: Another question for Adrian on the responsibility of, for example, a housing association which is letting property to a tenant. Am I right in thinking that the Housing Association has an obligation to ask the tenant about all the members of his or her household and check the status of all those members of the household even if the tenant is, for example, accommodating relatives without the right to rent?

Adrian Berry: Yes. Obviously if they are operating within the framework of an allocation then they fall within the exceptions in Schedule 3, but if they're operating on their own criteria then it would be a residential tenancy agreement. There are the three classes of persons: tenants; other persons authorised to occupy, named in the agreement; and where other people are allowed to occupy but they're not specifically named. If the landlord has reason to believe that one of those people is going to occupy then they can be liable for a civil penalty in those circumstances, so safety first, if you're a Housing Association landlord you would ask to check. There is a slightly grey area because if it's not

reasonably apparent prior to the commencement of the agreement then you wouldn't be obliged to check, but the only way you could vindicate that position would be in the County Court.

John Gallagher, Shelter: The corollary of that is if the occupier takes someone in once they are already a tenant and do not notify the housing association, because if they notify the housing association steps are bound to be taken.

Adrian Berry: Well there's nothing from the scheme which would require a tenant to notify, but I imagine a tenancy agreement drafted defensively may well include such provision so we can engage collateral obligations.

Chair: If there are no other questions I would like to thank the speakers once again and request any contributions for the information exchange.

Amy Just, Arden Chambers: I'm undertaking some research with a colleague into the impact of changes in civil legal aid to committal proceedings. I am particularly interested in any information from colleagues who have applied since March last year for an individual case contract in order to get civil funding for committal proceedings, which are now largely governed under criminal legal aid. If you have any information, please come and speak to me at the end or drop me an email to amy.just@ardenchambers.com.

Chair: If there are no other contributions I would like to thank everyone for coming and remind you that the next meeting will take place on 16 March and the topic will be Homelessness.