HOUSING LAW UPDATE

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McDonald v McDonald [2016] UKSC 28

1. The facts of the case where that the appellant's parents had purchased a property for her to live in, which was financed by a loan secured by a mortgage from a finance company. The mortgage deed provided that the company could appoint receivers with power, among other things, to take possession. The appellant was granted an AST by her parents. Her parents fell into arrears and the mortgage company appointed receivers. They eventually served a s.21 notice on the defendant and issued proceedings in the name of her parents. The appellant defended the claim based on Art. 8. There was evidence that if she were evicted she would be severely distressed and may attempt suicide. A possession order was made as the Judge at first instance found that the appellant had no right to a review of proportionality as the landlord was a private landlord (further finding that if he were wrong about this, it would not be proportionate to make the possession order). The appellant appealed, unsuccessfully, to the Court of Appeal and then to the Supreme Court.

2. The Supreme Court held that even though Art. 8 was engaged when a judge made a possession order of a tenant's home in a claim by a private sector landlord, *subject to any authoritative guidance on the contrary from the European Court*, it was, as a matter of principle, not open to the tenant to argue that the order should not be made, based on Art. 8 (i.e. if the domestic law would mandate an order, then the order had to be made): Parliament had decided the legislative provisions which balanced the competing interests of private sector landlord and their tenants. To hold otherwise "would mean that the Convention would be invoked to interfere with the A1P1 rights of the landlord and in a way which was unpredictable": [41]. The purpose of the Convention was to protect citizens from having their rights infringed by the state, not to alter private contractual rights. It was not possible to read s.21(4) HA 1988 as allow such a challenge. In *Pinnock* and *Hounslow LBC v Powell* [2011] UKSC 8, the landlord were public authorities who were obliged to use their powers lawfully in accordance with general principles public law. A private landlord was under no obligation to give reasons for seeking possession when relying on a s.21 notice whereas the statutory schemes for introductory and demoted tenancies required such reasons. Neither s.6(1) nor s.7(1)(b) applied to private landlords. Looking at the European authorities, it was held that none of them pointed to a different conclusion as to the right to argue Art. 8 in the case of a private sector landlord: in *Belchikova*, *Zehentner, Brezec* and *Zrilic* the states had not challenge the applicability of Art. 8 so it had not been decided. *Zehentner* and *Zrilic v Croatia* did not concern the enforcement of a landlord's contractual rights which were subject to specific legislative protective provisions. *Zehentner* was concerned with statutorily created powers of a court to enforce debts owed by creditors by ordering the sale of the debtor's assets, including her home.

3. Although not necessary to do so, the Court considered, if it had found a proportionality defence was available, whether it would have been possible (s.3 Human Rights Act 1998) to read s.21 (HA 1988) in a way which was compatible with Art. 8. Recognising that private landlords needed a high degree of certainty that they will be entitled to a possession order if the correct procedure was followed, the

court held that if private sector tenants were entitled to a proportionality defence, it would have had to make a declaration of incompatibility.

4. Finally, it was said (*obiter*) that the appellant's circumstances could not have justified postponing the mortgage company's right to be repaid in full (which was due a mother after the first instance hearing), for a indefinite period. The most she could have hoped for, if a proportionality defence was open to her, would have been a possession order postponed for six weeks (s.89 HA 1980).

5. At [73], s.89 HA 1980 was considered and it was said that:-
"… The cases in which it would be justifiable to refuse, as opposed to postpone, a possession order must be very few and far between, even when taken as a proportion of those rare cases where proportionality can be successfully invoked. They could only be cases in which the landlord's interest in regaining possession was heavily outweighed by the gravity of the interference in the occupier's right to respect for her home. The evidence filed on behalf of Shelter indicates that the *Pinnock* case [2011] 2 AC 104 defences hardly if ever succeed against public authority landlords save in combination with some other public law factor (although they may well provide a helpful bargaining counter in particularly deserving cases). Were a proportionality defence to be available in section 21 claims, it is not easy to imagine circumstances in which the occupier's article 8 rights would be so strong as to preclude the making, as opposed to the short postponement, of a possession order".

6. In an editorial ((2016) 19(4) JHL 61-65) HHJ Madge referred to the case of *Ivanova v Cherkezov v Bulgaria* [2016] HLR 21. In that case, the first applicant owned a 77.5% interest in a plot of land, on which there was a dilapidated cabin. The second applicant was her partner. In around 2004, the applicants converted the cabin into a house, in which they subsequently lived. Before converting the cabin, they did not obtain the consent of the other co-owners of the land. In 2006, two of the other co-owners found out about the conversion and notified the first applicant that they did not agree to it. In September 2013, the National Building Control Directorate notified the first applicant that, as the house had been constructed without a building permit, the house had to be demolished. The first applicant sought judicial review of the Directorate's decision; her claim was dismissed by the Administrative Court, which held that the decision to demolish the house was lawful. Her appeal to the Supreme Administrative Court was dismissed. Neither court considered whether the proposed demolition would be a disproportionate interference with the applicants' right to respect for their home under art.8 of the European Convention on Human Rights, or the first applicant's right to peaceful enjoyment of her possessions under art.1 Protocol No.1. The applicants applied to the European Court of Human Rights, contending that there had been a breach of their Convention rights. It was held that both applicants had lived in the house for several years and it was their home for the purposes of art.8 of the European Convention on Human Rights, even though the second applicant did not have any legal right in the land; the decision to demolish the house was an interference with the applicants' right to respect for their home. The decision to demolish the house was in accordance with

the applicable domestic law and pursued the legitimate aim of ensuring the effective implementation of the regulatory requirement that buildings could not be constructed without a permit. In considering whether the demolition was necessary in a democratic society in accordance with art.8(2), the case was similar to cases concerning the eviction of tenants from public housing and the eviction of occupiers from publicly owned land; an analogy could also be drawn with cases concerning evictions from properties previously owned by applicants but lost by them as a result of civil proceedings brought by a private person or a public body, or tax enforcement proceedings; the applicants were therefore entitled, in principle, to have the proportionality of the demolition determined by an independent tribunal; there had therefore been a breach of art.8. In contrast with art.8 of the art.1 of the First Protocol does not require an assessment of the necessity of each measure which implements planning rules; the house had been built without a permit in flagrant breach of domestic building regulations; there had been no breach of the first applicant's rights under art.1 of the First Protocol.

7. HHJ Madge made the point that there was a strong indication that the European Court considered the possibility of a proportionality defence to be extremely wide-ranging.

8. In *Vrzic v Croatia* App. No. 43777/13; 12 July 2016 mortgage possession proceedings had been brought by a private individual (the lender). The court distinguished earlier cases in which it had held that any person at risk of eviction from his home should be able to have the proportionality of that measure determined by an independent tribunal because they concerned State-owned or socially-owned properties so there was no other private interest at stake. In *Vrzic* the applicant's had used the property as collateral and had agreed that the lender was entitled to enforce the debt by its sale. It was noted at [68] that the applicants had voluntarily used their home as collateral and the specific agreement that if the debts were not paid, the creditors were entitled to seek enforcement through the sale of the property. The sale was as a result of the applicants' failure to meet their contractual obligation and there was no violation of Art. 8. Like the Supreme Court, the European Court emphasised the importance of contractual rights between private parties and the limited role of the court in enforcing those rights.

<u>*Holley v Hillingdon LBC* [2016] EWCA Civ 1052</u>

9. The local authority granted a secure tenancy to a woman in 1976. In 2009 her husband succeeded to the tenancy on her death. He died in 2012 and the Appellant and his brother were in occupation. The Appellant had mental health problems and had lived at the premises all his life. There was no statutory or contractual right to a further succession so the local authority served a notice to quit and began possession proceedings. The Appellant defended the claim on the basis, among other things, on Art. 8 and that it would not be proportionate to evict him. The matter was listed for a summary hearing and at that hearing the Judge found that the length of a person's occupation was irrelevant to proportionality and found the defence was not seriously arguable and made an order for possession. The Appellant appealed. The Court of Appeal held that although it was relevant to an assessment of

proportionality, the length of a person's occupation could never be sufficient to found a proportionality defence in the case of a second succession because otherwise the prohibition on second succession's could not be compatible with Art. 8. Even where there were other factors, the length of occupation was unlikely to be a "weighty" factor. The Appellant also argued that the local authority's succession scheme was unlawful as it did not permit the exercise of a discretion and even if there was such a discretion, the local authority had failed to properly consider it. The Court of Appeal did not conclude whether there was sufficient residual discretion, but held that the authority's *ex post factor* evidence that had the discretion been considered, it would not have been exercised, defeated the Ground of Appeal.

City West HT v Massey; Manchester and District Housing Association v Roberts [2016] EWCA Civ 704

10. In *Massey*, the tenant's partner used one of the bedrooms for growing cannabis and he was convicted for this. The tenant denied all knowledge of this. Proceedings were possession were issued on the basis of Ground 12 (it was a term of the tenancy that tenant could not use the premises for unlawful purposes or allow others to do so) and Ground 14. The District Judge found that the tenant had lied about KNOWING about the cannabis as she was afraid of losing her home. He made a suspended possession order including a term that the landlord could inspect the premises on short notice (so that it could determine whether there was cannabis cultivation, which was relevant to another term of suspension). The landlord appeal, unsuccessfully to a Circuit Judge. In *Roberts*, the tenant covenanted not to use the premises for unlawful purposes of allow other to do so. A room in the premises was used for growing cannabis. Mr. Roberts said he had allowed another person to use the flat as a result of threats. He pleaded guilty to an offence of permitting the cultivation of cannabis at the premises. Again, proceedings for possession were issued on Ground 12 and 14. In this case, the Judge did not accept that Mr. Roberts had been truthful concerning how the cannabis came to be in the premises (a gang had used the bedroom, he had been paid £1,200 but he was took frightened of the gang to tell the police) but made a suspended order. The Judge accepted an offer from Mr. Roberts that one of the terms of suspension should be that the landlord was entitled to inspect on short-notice. The landlord, successfully appealed (an outright order was made) and Mr. Roberts appealed that order.

11. The Court of Appeal reiterated that before suspending an order for possession, there had to be "cogent evidence" or a "sound basis" to believe that the conduct would not recur. It was held that cogent evidence not simply evidence which showed there was some basis on which it could be said that the tenant would comply. To be "cogent", the evidence had to be more than simply credible; it had to be persuasive. The instant court had repeatedly made it clear that when making an SPO the focus was on the future and not on the past.

12. What the Court of Appeal did say was that the "cogent evidence" could come from any source (i.e. it did not have to be from the tenant). It could come from the tenant, from someone providing support or from the inclusion of a condition that allowed the landlord to inspect the premises. It was said that

whether it would be appropriate to expect a landlord to carry out such inspections was a fact-sensitive question, having regard to what was reasonable in the circumstances. It was a matter for the Judge to decide whether the prospect of inspection, or the tenant's perceived risk of inspection was sufficient to support the conclusion that the tenant would comply with the terms of the tenancy agreement in future.

13. The Court also dealt with the position where the court has found that the tenant has given false evidence and said that dishonesty in a tenant's evidence regarding the grounds for possession was not a complete bar to the making of an SPO. The warning was given that tenants should realise that if they lied in their evidence to the court, they ran the risk that the court would find that their evidence on other matters was not to be trusted and would not accept assurances from them regarding the future. Giving false evidence was a very serious matter and could have serious consequences for the tenant. There were, however, two stages to a decision whether or not to grant an SPO, involving the exercise of discretion and making findings of fact on the basis of which the discretion was to be exercised. The tenant should normally give evidence in court so that the court could assess his credibility. The court might want to cross-check any assurances given by reference to other objective evidence.

Cardiff CC v Lee [2016] EWCA Civ 1034

14. It was common ground in this case that CPR r.83.2(e) was applicable to suspended possession orders and that therefore a landlord would need the permission of the court to enforce such an order. The relevant rule is:-

    "A relevant writ or warrant must not be issued without permission of the court where:-

    …

    (e) under the judgment or order, any person is entitled to a remedy subject to the fulfilment of any condition, and it is alleged that the condition has been fulfilled…".

15. The question before the Court of Appeal was whether the court could and should remedy the failure to apply for permission under r.3.10. It was said that, as the tenant had applied to discharge the warrant, the "substance" of r.83.2(e) had been complied with and so there was no prejudice to the tenant if the court did remedy the default (which it found it had power to do), but it was made clear that this should not be the norm.

16. Until this case, it was understood that the issuing of a warrant was an "administrative" act, done on application (using form N325) by an officer of the court. The form does require the applicant to confirm that the whole or part of the instalments due under the judgment have not been paid, but nothing that applied in cases of ASB.

17. The previous case law had made clear that, to issue a warrant, no application to the court is necessary nor is the landlord required to notify the tenant of his request: *Leicester CC v Aldwinkle* (1991) 24 HLR

40, CA; *Jephson Homes HA* [2001] 33 HR 54, CA. In *Southwark LBC v St. Brice* [2002] 1 WLR 1537, it was decided that the issue of a warrant of possession in the County Court is an administrative act; the purpose of which is to enable there to be carried into effect the judicial determination, which has already been expressed in the order for possession in aid of which the warrant is issued. The issue of the warrant involves no determination of the former tenant's civil rights and obligations. His rights and obligations as a tenant have already been determined at a public hearing at the time when the order for possession is made. His right—as a former tenant who has remained in occupation following determination of the tenancy—to apply for an order under s.85(2) of the Housing Act 1985 is unaffected by the issue of the warrant.

18. It was said in *St. Brice* that "it is surely in no way unreasonable to expect the tenant, who is likely to be the party with the relevant information, to bring the matter before the court if there has been a change of circumstances which might persuade the court to intervene"…. the trial judge said in paragraph 16 of his judgment in the present case, implicit in that decision of the European Court is an acceptance of the principle that to cast upon the person whose rights are in issue the burden to initiate process is not intrinsically wrong. In my judgment it cannot possibly be wrong where, as here, there has already been a full hearing leading to an order as a result of proceedings initiated by the landlord.

19. It was also said that it would be absurd to require the landlord to prove against what he had proved to establish his right to possession, but the point is that there is no right to possession unless the SPO has been breached and this was something which had not already been proved.

<u>Tenancy Deposits</u>

20. In *Yeomans v Newell*, Canterbury CC, 25 May 2016, an AST was granted by the landlord in 2011. A deposit of £300 was taken but not protected until November 2015. On 22 December 2015 the landlord authorised the return of the deposit (through DPS). On 23 December he served a s.21 notice. The tenant did not receive the deposit via the DPS until 19 February 2016. Possession proceedings were begun and the tenant defended them on the basis that the deposit had not been returned "in full" (s.215(2A)) at the time the notice was served. The landlord drew an analogy with the "cheque rule" (see *Coltrane v Day* [2003] EWCA Civ 342 and said that the tenant had "had the ability" to obtain the deposit money once it had been authorised. The court agreed and held that the deposit had been returned in full on 22 December 2015 as it was available to the tenant.

21. In *Ahmed v Shah*, Bradford CC, June 2015, the tenant was granted an AST which commence din February 2014. A deposit was paid but not protected until 12 August 2014 and the prescribed information was never sent. The landlord sought to return the deposit through the DPS payment

system, although the tenant did not accept it. The landlord served a s.21 notice in October 2014 and issued proceedings. The tenant defended the proceedings on the basis that the deposit had not been protected within 30 days and had not been returned. In June 2015 the Claimant sent the Defendant a cheque and said that he had now returned the deposit. At trial it was accepted by both parties that the prescribed information had not been served and the Defendant had not accepted the return of the deposit. The landlord argued that the deposit had been returned as it was available for the tenant to accept and in any event, the deposit had been returned and s.215(2A) would not take effect. The court found that there was no evidence that the deposit had been available to the Defendant for her to accept. The Clamant relied on emails sent to the Defendant by DPS informing her that the landlord was seeking to return the deposit. The emails did not specify that it was the full deposit and there was no evidence from the letting agent that it would have been the full deposit repair. The court found that the deposit had not been returned. The court also found that returning a cheque did not retrospectively validate a s.21 notice.

22. In *Jhawer v Vatts*, Brentford CC, 18 February 2016, the first AST began in 2006. A deposit was paid to agents who later went out of business. In 2009 the same landlord granted the same tenant an AST of a different property and further tenancies of that property were granted in 2012 and 2014. Each tenancy agreement stated that a deposit had been paid. A s.21 notice was served and possession proceedings brought. The tenant did not attend the hearing and an order was made, but he subsequently applied to set it aside and strike out the claim. The tenant argued that the deposit for the first property should be deemed received in respect of the second property. The deposit had not been protected.

23. The landlord argued that the reference in the agreements to a deposit having been paid was an error (it was a template agreement).

24. The Judge held that *Superstrike* applied by analogy and the tenant had been entitled to the return of the deposit at the end of his tenancy of the first property (even though the agents had gone out of business). Any deposit requirement under the later tenancies was fulfilled by a right of set-off of the right to claim repayment of the first deposit and thus a deposit was "paid" for the later tenancies of the other property. The lack of repayment of the deposit, together with the tenancy terms in the later agreements showed a deposit had been paid and it had not been protected. The s.21 notice was not valid.

25. In *Okadigbo v Chan* [2014] EWHC the tenancy commenced in August 2012 but the deposit was not protected until March 2013 and the prescribed information was not provided until July 2013. The landlord issued a claim based on a s.21 notice and the tenant counterclaimed under s.214. The tenant asked for a "3x" payment and the landlord said it should be "1x". The court said:-

"I find that the Claimants are not experienced landlords, that this is the first time that they had let out any property and that they were letting out their home. That they quite properly put the matter in the hands of professional managing agents who let them down by not complying with the terms of the Act. I find this case to be at the lowest end of the scale of culpability for non-compliance. And for those reasons I award the sum of £1,520" (which was "1x" the deposit).

26. The tenant appealed to the High Court, who dismissed the appeal:-

> "In my judgment, however, the judge was entitled to regard the question of culpability as the most relevant factor in determining what order to make and was entitled to find that the culpability in this case fell at the lower end of the scale for the reasons which she gave. It is not as if the breach was uncorrected and therefore, although the appellants were lacking the protection for a period of some months, in the end matters were put right".

27. In *Russell-Smith v Uchegbu* [2016] SC Edin 64 at para. 9, Sheriff T Welsh QC said that each case turned on its facts. The court identified a method of calculation and aggravating factors, including:-
    (a) Failure to comply for a long period of the tenancy;
    (b) Whether the failure was dilatory or wilful;
    (c) Whether actual prejudice occurred;
    (d) Whether the purpose of the Regulations was defeated;
    (e) Whether the deposit was returned.

28. In *Bali v Manaquel Company Limited*, Central London County Court, 15 April 2016, a deposit was taken in respect of an AST. It was protected and the landlord purportedly served a s.21 notice and brought possession proceedings. At first instance, the issue was whether the landlord had complied with the requirements for prescribed information. The Judge found that it had and made the possession order. The tenant appealed and argued that the prescribed information was defective for the following reasons.

29. First, as (a) the landlord had not included the DPS leaflet (as required by reg. 2(1)(b) Housing (Tenancy Deposits) (Prescribed Information) Order 2007) only a print out of the DPS "terms and conditions". The appeal Judge held that the regulations required the landlord to provide "any information contained in a leaflet" but not the leaflet itself. As it was common ground that the "terms and conditions" included all the information that was contained in the DPS leaflet, the requirement had been met.

30. Second, the landlord had not properly provided a certification as required by reg. 2(1)(g)(vii). The certificate provided was signed with the landlord's name written in manuscript and signed "PP"

with illegible initials. The tenant argued that this did not comply with s.44 Companies Act 2006 which provides that:-

"(2) A document is validly executed by a company if it is signed on behalf of the company:-
(a) By two authorised signatories, or
(b) By a director of the company in the presence of a witness who attests the signature">

31. The question was whether the prescribed information certificate was a document that required "execution". The Judge held that it was, as it was a certificate of the accuracy of the information for a "formal legal purpose" and the requirement of s.2(1)(g)(vii) had not been met.

R (MacLeod) v Peabody Trust Governors [2016] EWHC 737 (Admin)

32. In June 2009, the Crown Estate Commissioners granted the claimant an assured tenancy of a flat. The tenancy agreement prohibited assignment. The agreement also specified that the rent could not exceed 60% of the market rent for the flat. In February 2011, the defendant housing association bought approximately 1,200 properties, including the flat, from the Commissioners. The association issued bonds to finance the purchase. The transfer of the properties to the association was subject to a Nominations Agreement which provided that the association could only let the transferred properties to "key workers", defined to include, inter alia, teachers, members of the police force and employees of the NHS or Transport for London, provided that they could afford to pay the rent without recourse to housing benefit and their total family income was less than £60,000. The association had a published policy pursuant to which tenants were allowed to exchange their tenancies with other tenants of social landlords. In May 2014, the claimant telephoned the association and asked if he could register his details on a website which facilitated mutual exchanges between tenants of social housing. He was told that he could do so. He went to see a property in Edinburgh with a view to a mutual exchange. On 6 July 2015, he completed the association's application form for a mutual exchange on which he added a handwritten note that he was disabled. On 9 July 2015, the association replied that it had made a mistake in telling him that he could register with the website and that he was only allowed to exchange his tenancy with another key worker in one of the transferred properties.

33. The claimant sought judicial review of the decision to refuse his application for a mutual exchange, contending that the association had failed to follow its policy and that the decision was irrational. He also argued the association had failed to discharge its public sector equality duty towards him as a disabled person. Shortly before the hearing of his claim, the claimant filed a witness statement in which he said that he had mental health problems. The association argued, among other things, that, in deciding whether to allow the exchange, it had not been acting as a public body.

34. His claim was dismissed. It was held that the housing association had purchased the claimant's flat, together with other properties, from the Crown Estate Commissioners using funds raised on the open market; although the properties were not let at full market rent, the rent levels were above those for most social housing and the properties could be let to families with an income of up to £60,000; the transferred properties were not social housing for the purposes of s.69 of the Housing and Regeneration Act 2008; in deciding not to allow the claimant to assign his tenancy, the association was not exercising a public function and the decision was not susceptible to judicial review. It was also said, *obiter,* that the claimant's tenancy agreement did not permit assignment; the association's power to let any of the transferred properties was limited by the Nominations Agreement; on the assumption that the association's policy on mutual exchanges applied to the claimant, the association was nevertheless entitled to depart from it. Also *obiter*, it was said that although the association could be criticised for the way that it had handled the claimant's application, its decision could not be said to be irrational. Finally, again *obiter*, the only information available to the association about the claimant's disability was a handwritten comment on his application form; the evidence that the claimant had put forward during the proceedings consisted largely of assertions which were not supported by medical evidence; the public sector equality duty made no difference to the decision that the claimant was not entitled to a mutual exchange.

Birmingham CC v Stephenson [2016] EWCA Civ 1029

35. The Court of Appeal considered whether a possession order in respect of an introductory tenancy was wrongly granted where *Akermanv-Livingstone* Art. 8 and Equality Act defences were raised. The tenant suffered from paranoid schizophrenia, symptoms were alleviated but not completely cured by medication. At the first hearing the matter was adjourned to enable the tenant's to instruct solicitors and used his "best endeavours" to file a defence. At the adjourned hearing, the solicitor had only been instructed on a preliminary basis and asked the court for an adjournment to put in a fully pleaded defence (EA 2010, Art. 8 and public law). The DDJ made a possession order on the basis that there was no substantial defence and the tenant had had ample time to file a defence. The Court of Appeal allowed an appeal stating:-

    "Had Mr. Stephenson been a well-resourced individual, with no mental disability, that view might well have been sustainable. But the fact is that the council's own evidence showed that Mr. Stephenson was living on benefits and that he had been seen begging in the local shopping parade. The Deputy District Judge's view also, in mu judgment took no account of Mr. Stephenson's mental health problems. Mr. Gilmore had only seen Mr. Stephenson some two working days before the hearing and had only take preliminary instructions. It was unrealistic to have expected him to have formulated a full defence by the time of the hearing".

36. There was a potential EA 2010 defence which shifted the burden of proof. Once the principal criteria had been established, the Supreme Court established that it will only be a rare case that can be

summarily disposed of and there are a range of order that can be made (the approach to proportionality being different from Art. 8).

37. The local authority relied on evidence before the Court of Appeal of noise nuisance and the effect on the neighbours as to proportionality. The Court of Appeal said that the court's jurisdiction is not binary under the EA:
"Thus, in my judgment, the flaw in both the Deputy District Judge's approach and the council's respondent's notice is to treat the question of proportionality as a binary choice between eviction, on the one hand, and doing nothing on the other hand. Clearly something must be done for the well being of Mr. Stephenson's neighbour. However there may well be intermediate steps that could be taken short of throwing Mr. Stephenson out on the street…".

38. There were a range of possibilities which could not be summarily ruled out.

Edwards v Kumarasamy [2016] UKSC 40, [2016] HLR 32

39. The defendant had a long lease of a flat on the second floor of a block. Under the terms of his lease, he had the right to use the entrance hall, lift and staircases giving access to the flat, as well as the right to use a communal bin store situated in the block's car park. A paved pathway, about three metres long, provided access from the front door of the entrance hall to the car park. The defendant granted the claimant an assured shorthold tenancy of the flat together with the other rights under his lease. In 2010, the claimant tripped over an uneven paving stone on the pathway while taking rubbish to the communal bin store. He suffered injuries to his right hand and right knee. He brought proceedings for damages for breach of s.11 Landlord and Tenant Act 1985. It was common ground that the defendant had not been aware of the disrepair prior to the claimant's accident. A deputy district judge awarded the claimant damages of £3,750. The defendant appealed to a circuit judge, who held that, as the defendant had not had notice of the disrepair, he could not be liable under s.11(1A) of the 1985 Act. She allowed the defendant's appeal. The claimant appealed successfully to the Court of Appeal who held that, because the defendant had an easement of right of way over the entrance hall, he had an interest in the entrance hall for the purposes of s.11(1A)(a) of the 1985 Act, and that the pathway was part of the exterior of the entrance hall. Furthermore, the defendant was liable for the disrepair under s.11(1A)(a), notwithstanding that he did not have notice of the defect.

40. The defendant appealed to the Supreme Court who allowed the appeal. It was held that the fact that a piece of land is a necessary means of access to a building is not of itself sufficient for it to constitute part of the exterior of that building; steps separated from the outside of a building by a two metre path cannot be said to be part of the exterior of that building; *Brown v Liverpool Corp* [1969] 3 All ER1345; [1969] 13 HLR 1, had been wrongly decided. The pathway was not in any normal sense part of the building and lay wholly outside it; it could be said to abut the immediate exterior of the entrance hall but it was not part of the exterior of the entrance hall; the defendant was not obliged to

repair the pathway under the covenant implied into the tenancy by s.11(1A)(a). It was also said, *obiter*, that although the grant of the tenancy to the claimant had deprived the defendant of any practical benefit from his easement of right of way over the entrance hall, he nonetheless retained the easement and had an interest in the entrance hall for the purposes of s.11(1A)(a). Further, also *obiter*, that where the subject matter of the repairing covenant implied by s.11 is in the landlord's possession, the landlord is liable for disrepair as soon as it arises, without the need for notice to be given; the defendant was not in possession of the pathway and had effectively disposed of his right over it for the duration of the claimant's tenancy; had the defendant been obliged to repair the pathway, he would only have been liable to do so once he had been given notice of the disrepair. Per Lords Neuberger, Wilson, Sumption and Reed, *obiter*, said that where a landlord has covenanted to repair the structure and exterior of a flat and has not demised the structure and exterior to his tenant, the landlord is liable for disrepair to the structure or exterior as soon as it arises, without the need for notice to be given to him; where, however, the structure and exterior has been included in the demise, the landlord is only liable for disrepair once he has been given notice.

Upcoming

41. On 14-15 December 2016 the Court of Appeal will hear *Hacque v LB of Hackney*, which is an appeal by the local authority from a decision in respect of a s.204 appeal at which the Circuit Judge found that the local authority had failed to apply the correct legal test for considering whether the accommodation was suitable having regard to the applicant's medical conditions and s.149 EA 2010 and that the s.202 decision failed to give sufficient (or any) reasons.

42. On 14 February 2015 the Supreme Court will hear *Poshteh v Kensington & Chelsea RLBC* (see [2015] EWCA Civ 711; [2015] HLR 36 for the decision in the Court of Appeal). The issues are:-
    (a) Whether the decision in *Ali v Birmingham CC* [2010] UKSC 8; [2010] 2 AC 39, that the right to accommodation under s.193 was not a civil right within art. 6(1) should be departed from in light of *Ali v UK* (Application No. 40378/10); [2015] HLR 46 and if so, to what extent and what, if any, impact does that have on the approach of a court determining an appeal under s.204 either generally or in relation to the suitability of accommodation and discharge of an authority's duty under s.193;
    (b) Whether the review officer should have asked himself whether there was a real risk that the applicant's mental health would be damaged by moving into the accommodation offered, whether or not her reaction to it was irrational, and if so, whether he did in fact apply the right test.