Housing Law Practitioners' Association

Housing Law Update

December 2019

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Shelter

1 Possession proceedings

Royal Borough of Kingston-Upon-Thames v Moss
High Court 29 November 2019
[2019] EWHC 3261 (Ch)

Mr Moss (M) was a secure weekly tenant of a council flat. He was granted a tenancy of the flat in October 1999 and the terms of that tenancy were varied with effect from 1 September 2003.

From January 2003 until August 2017, arrangements between Thames Water and the Council for the payment of for water and sewerage charges had been governed by a written agreement ("the 2003 agreement"). Under that agreement, the Council paid the charges made by Thames Water in respect of council properties, but the amount of the charges was reduced by an agreed "voids allowance" (of 3.5%) and by a "commission" (of 9.3% less the voids allowance).

Under his tenancy agreement, M was obliged to pay "water charges" to the Council. The terms of the tenancy referred to "the exact amount payable for the property to the water authority".

M argued that the arrangement between the Council and himself was governed by the Water Resale Orders 2001 and 2006. The effect of those Orders was that the charge payable by him to the Council should be reduced to reflect the fact that the 2003 agreement provided for the Council to have the benefit of a voids allowance and a commission. He also relied on the terms of his tenancy agreement, referring to "the exact amount payable". He submitted that "the exact amount" was to be arrived at by deducting the voids allowance and the commission from the charge made.

In the case of ***Jones v Southwark LBC*** [2016] EWHC 457 (Ch), Southwark had entered into an agreement with Thames Water which was on essentially the same terms as the 2003 agreement. It was held that Southwark was not acting as agent for Thames Water and, accordingly, that Thames Water was providing water and sewerage services to Southwark. Under the Water Resale Order 2006 Southwark had overcharged Ms Jones because it had not given her a reduction in the charges to reflect the fact that it had received a voids allowance and a commission from Thames Water. Ms Jones had therefore overpaid and was entitled to recover the overpayments. Southwark did not appeal the decision, and had repaid to their tenants a total of £28.6m..

In the M case, Mr Justice Morgan held that:

- The effect of the 2003 agreement was that the Council was a re-seller of water for the purposes of the Water Resale Orders;
- The Council was bound by the maximum charges provisions in the Water Resale Orders, and had accordingly charged M more than the maximum charges;
- M had a right to recover overpayments of charges under s.150(5) of the Water Industry Act 1991 and paragraph 10(1) of the Water Resale Order 2006 (the Council did not seek to rely upon a limitation defence to such a claim);
- M had overpaid the charges which were due under his tenancy agreement;
- It was not disputed that M may have a claim in restitution for recovery of those overpayments; however, the precise scope of such a claim and any possible defences to it were not explored at this trial;
- The Council had ceased to be a re-seller with effect from a Deed of Clarification and Agreement on 3 August 2017.

Rules of succession to secure tenancy do not discriminate unlawfully between widows and divorcees

L. B. Haringey v Simawi and Secretary of State for Housing, Communities and Local Government

Court of Appeal 31 October 2019
[2019] EWCA Civ 1770

Mr S's parents had a joint secure tenancy of a Council property, which started in 1994. S's father died in 2011 and his mother became the sole tenant by succession. She died in 2013. S had been living with her at the date of her death, and for at least the preceding twelve months. However, because only one succession was permitted under the Housing Act 1985, S was not entitled to succeed to the tenancy.

Two months later, the Council served notice to quit and then, after refusing his request for the grant of a discretionary tenancy, brought possession proceedings against S.

The county court made a possession order. On appeal to the circuit judge, the possession order was set aside. The judge transferred the proceedings to the High Court to deal with S's arguments on discrimination.

S argued that there was discriminatory treatment in that, if his parents had been divorced, and the tenancy had been transferred to his mother by court order in the course of the divorce proceedings, that transfer would not have counted as a first succession. In that situation, he would have been entitled to succeed to the tenancy on his mother's death. The fact that he could not do so on her death amounted to unlawful discrimination on the ground of his status. S's appeal to the High Court was dismissed.

Dismissing S's further appeal, the Court of Appeal held that it was difficult to see how the 'status' of being the child of a widow rather than the child of a divorcee could be a ground on which the alleged discrimination exists. The discrimination relied upon by S depended both on the nature of the tenancy originally granted (ie, a joint tenancy) and also on the manner in which the mother became the sole tenant. The agreement into which the Council and his parents chose to enter could not be regarded as anything to do with S's status.Those contractual arrangements, and the effect of the secure tenancy regime on those arrangements could not, therefore, be regarded as discrimination on the ground of a " status" for the purposes of article 14, ECHR.

The Court of Appeal also rejected S's second argument, namely that the succession rules amounted to indirect discrimination against women. On the face of it, the Court said, the advantages and disadvantages appeared to be in balance.

Disability discrimination / public sector equality duty

Judge's finding of proportionality not vitiated by the failure to consider the PSED
Forward v Aldwyck Housing Group Ltd
Court of Appeal 29 July 2019
[2019] EWCA Civ 1334

F was an assured tenant of the housing association (AHG). He and others had engaged in anti-social behaviour, involving drug use, in his flat. His flat had been taken over by others to deal drugs, a situation known as "cuckooing". The police considered F to be vulnerable.

Possession proceedings were taken on grounds 12 and 14. F stated that he was vulnerable to exploitation because of physical and mental disability and he had not given permission for the other people to be in his flat. F had a physical disability, in that he had severe back, hip and knee pain on the right side of his body.

The association did not carry out an assessment under the Public Sector Equality Duty (PSED) under s.149 Equality Act 2010 before issuing proceedings. Although an assessment was carried out before the hearing, F argued it was inadequate and that AHG had failed to have due regard to the PSED.

The county court judge made a possession order. F's appeal to the High Court was dismissed. He appealed to the Court of Appeal..
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The housing officer who made the decision to seek possession had accepted that the PSED assessment which she had carried out before trial was inadequate because, although she was aware of F's disability, she had not obtained any medical advice about it. She had not considered any alternative to the possession proceedings which were already in train.. It was therefore common ground before the lower courts that there had been a breach by the landlord of its PSED.

F argued that an admitted non-compliance with the PSED meant that the court had no discretion to refuse relief to the party affected.

However, the Court of Appeal held that there was always a discretion to grant relief for breach of PSED. While "major governmental decisions affecting numerous people may be liable to be quashed if the government has not complied with the PSED", that was not a presumption that should be turned into a rule for all PSED cases.

On the facts, the High Court judge had been entitled to find that full compliance with the PSED would have made no difference to the outcome. In response to the suggestion that, if the courts were able to exercise a general discretion, local authorities will have no incentive to comply with the duty and no opportunity to learn from their breach of duty, Lord Justice Longmore said:

> "For my part, I would resist the notion that the court should act as some sort of mentor or nanny to decision-makers… In deciding the consequence of a breach of PSED, the court should look closely at the facts of the particular case and, if on the facts it is highly likely that the decision would not have been substantially

different if the breach of duty had not occurred, there will (subject to any other relevant considerations) be no need to quash the decision. If, however, it is not highly likely, a quashing order may be made." [para 25]

Guidance on the application of the Public Sector Equality Duty in possession cases
London and Quadrant Housing Trust v Patrick
High Court 23 May 2019
[2019] EWHC 1263 (QB

P was the assured tenant of a social landlord, L&Q. Following incidences of anti-social behaviour toward one of his neighbours and toward L&Q staff, L&Q obtained an injunction against him under Part 1 of the Anti-Social, Behaviour Crime and Policing Act 2014, with a view to controlling his behaviour.

P breached the terms of the injunction shortly after it was granted by harassing his neighbour, and L&Q initiated committal proceedings. P admitted, in part, the allegations against him and he was sentenced to four weeks' imprisonment suspended for one year.

In the meantime, L&Q had started possession proceedings against P and, following the admission that he had breached the injunction, L&Q amended their possession claim so as to rely on mandatory ground 7A in Sch 2 HA 1988.

P, in turn, amended his defence to the possession claim, arguing that he suffered from a mental impairment and that in seeking to secure his eviction, L&Q were discriminating against him contrary to s15 Equality Act 2010 and had acted in breach of the PSED.

On 26 June 2018, two days before a hearing of the possession claim was due to take place, medical evidence was served by P's solicitors, establishing that P had a history of schizophrenia.

At the hearing, the judge took the view that the case was not 'genuinely disputed on grounds which appear to be substantial' and made a possession order summarily, with the date for possession postponed for the statutory maximum of six weeks to take into account P's disability. In relation to the PSED, he took the view that if there had been a breach, that did not prevent the court from making a possession order.

Following the making of the possession order, in September 2018, L&Q completed a written PSED assessment. They concluded that, having regard to the PSED and taking into account further medical evidence in relation to P's diagnosis of paranoid schizophrenia and the potential impact of an eviction on him, it would nevertheless be proportionate to enforce the possession order.

Dismissing P's appeal. Turner J gave the following guidance on the factors which are likely to be the most relevant in the context of possession cases in discharging the PSED:

- The PSED is not a duty to achieve a particular result. Rather, it is a duty to have 'due regard' to the need to achieve the results identified in s149 Equality Act 2010. This will require the landlord to weigh the factors relevant to promoting the PSED against countervailing factors, such as the impact of the disabled occupier's behaviour on others.

- Where the information available to the landlord raises a real possibility that the occupier may be disabled, then a duty to make further inquiry arises.

- The PSED must be exercised in substance, as opposed to form. It should not be reduced to a 'tick box' exercise. See ***R (Brown) v Secretary of State for Work and Pensions*** [2008] EWHC 3158 (Admin) at para 92.

- The PSED is a continuing duty. The duty is not fully discharged at any particular stage of the decision making process, such as the point at which a possession order is made. But where the PSED has been adequately considered, in the absence of a material change in circumstances, express reconsideration at a later stage will not normally be required.

- The PSED should generally be considered before seeking and enforcing a possession order, and not as a 'rear-guard action'. However, in cases where the landlord did not know or could not reasonably have known of the disability, then the duty will only bite at the point at which the disability becomes, or ought to have become, apparent. Where knowledge is acquired late, a less formal PSED assessment may be justified.

- The court must be satisfied that the landlord has carried out a rigorous consideration of the PSED. But it is not for the court, once satisfied of this, to substitute its own view for that of the landlord. The weight to be given to the relevant factors is a matter for the landlord.

Applying these principles to P's case, L&Q had been justified in adopting a less formal approach to the PSED assessment prior to the hearing of the possession claim, given the late stage at which the medical evidence had been disclosed. Even if there had been a breach, it had been remedied by the formal assessment that took place after the possession order. A breach of the PSED would not have made any difference to the outcome, and so the decision to seek possession would have been upheld in any event.

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See also **Powell v Dacorum Borough Council** [2019] EWCA Civ 23, 24 January 2019, in which it was held that the Council had not breached the Public Sector Equality Duty in seeking to enforce a suspended possession order following the tenant's continued drug-dealing. Even if the Council had been in breach of the PSED at the time it had decided to request the warrant, it was open to it to remedy that defect at a later stage in the proceedings

Landlord had failed to consider the PSED and its own policies in relation to the effect of eviction on the tenant and her autistic son
Guinness Partnership Limited v England
County Court at Slough 29 April 2019
Legal Action, October 2019, p.32

Ms E was the assured tenant of the Guinness Partnership (GP), a social landlord. She had two children, one of whom was autistic. She admitted an incident in which she had threatened an officer of GP over the phone in the period after her mother's death. There was also an admitted conviction and suspended sentence in July 2017 for possession of a bladed article in a public place.

GP served a s.8 notice on her, relying on grounds 7A (conviction of a serious offence in the locality), 12 (breach of any obligation) and 14 (conduct likely to cause nuisance or annoyance). E sought a review of the decision to serve notice. In her submissions, she said that her neighbours were racist towards her. GP upheld the decision on the basis that there was no evidence she was being racially harassed, and there had been complaints of harassment against her from neighbours.

GP brought a claim for possession. E defended the claim on the basis that GP had failed to comply with its own policies and with the Public Sector Equality Duty. Medical evidence was provided that Ms E had a depressive disorder with anxiety and panic attacks and that eviction would cause her mental health to deteriorate further. GP carried out an Equality Act assessment which concluded that it was appropriate for them to recover possession.

E then provided video evidence showing she was subject to racist abuse and harassment by a neighbour. She stated at trial that she had taken a knife into the street after provocation from this neighbour and this was what had resulted in the conviction

GP carried out a further impact assessment, but this did not address the recent evidence and did not accept that E was disabled.

The possession claim was dismissed. HHJ Bloom held that:

- GP had repeatedly breached the PSED and had still not observed it.
- There had been no regard to the impact of eviction on Ms E's autistic son.
- The impact assessment had rejected Ms E's evidence on her mental health without giving any reason for doing so.
- The most recent assessment had merely stated that Ms E and her son *might* be disabled, when there was clear evidence that both were.
- The evidence of the racial harassment was not considered in the context of explaining why the criminal offence had been committed.
- GP's own policy required it to consider whether the complaints of racial harassment meant that E should be considered as a victim and given support.
- GP's policy also required it to consider in such circumstances whether alternatives to eviction (eg a suspended order, acceptable behaviour contract or a transfer) were appropriate.

This was far from a situation in which the breaches of the PSED could be said to make no difference to the outcome, and the failure to comply with the duty was serious.

Second possession claim was not an abuse of process even though an earlier possession claim was still in existence
Salix Homes v Mantato
Court of Appeal 20 March 2019
l[2019] EWCA Civ 445

M was originally a secure tenant of Salford City Council. In 2008, Salford obtained a possession order against him on the ground of rent arrears. M was successful in having several warrants suspended on terms. He never managed to clear the arrears, so the possession order was never discharged.

Subsequently, Salford transferred its housing stock to Salix Homes (SH). After the stock transfer, in 2017, Salix brought possession proceedings for arrears of rent under grounds 11 and 12 Housing Act 1988. M did not appear at the possession hearing and a suspended possession order was made. The terms of the SPO were breached and M was evicted in September 2017.

On the same day, but after the eviction, M paid off all the arrears and costs. In January

2018, he applied to set aside the warrant and to discharge or rescind the 2017 possession order. He argued that the 2017 possession order was an abuse of process because it was barred by the doctrine of *res judicata*.

The district judge agreed, and set aside the order and the warrant, and struck out the 2017 possession claim. He held that the fresh claim was an abuse of process. SH appealed against that decision

The Court of Appeal allowed SH's appeal. The second possession claim included a money claim for the then arrears of rent. SH could not have relied upon the original possession order in order to obtain, for example, an attachment of earnings order to recover rent arrears which had accrued after the date of the original possession order.

The claim for possession could not be detached from the claim for rent arrears when considering whether the cause of action in 2017 was the same as that in 2008. It was sufficient that new arrears had accrued after the 2008 possession order. The fact that Salix could have sought to rely on the 2008 order (by seeking permission to issue a warrant after 6 years) was not relevant. Moreover, the rent arrears ground under the HA 1985 (for secure tenants), on which the 2008 order had been made, was different from grounds 10 and 11 under the HA 1988 (for assured tenants).

In any event, the district judge had failed properly to consider the question of M's delay in submitting his application (some five months after his eviction). Under CPR 39.3(5), an application to set aside an order had to be made promptly.

Livewest Homes Ltd v Bamber
Court of Appeal 10 July 2019
[2019] EWCA Civ 1174

In this case,the Court of Appeal held that s.21(1B) HA 1988 (requiring 6 months' notice of non-renewal of a fixed term social tenancy) does not apply to earlier termination of the tenancy by break clause or possession ground. The purpose of s.21(1B), which was introduced by the Localism Act 2011, was to give the tenant who remains until the end of a fixed term tenancy of two years or longer a proper opportunity to find other accommodation. As such, s.21(1B) was intended to inform the tenant under the AST that the tenancy will not be renewed at the end of the contractual term: not on its termination at any earlier point in time. It was only required where the term of the tenancy had expired by effluxion of time and not earlier on notice or by forfeiture during its term.

2 Private rented sector

A Section 21 notices

`Prescribed requirement' to give copy of gas safety certificate and energy performance certificate: s.21A, HA 1988

A landlord cannot give a section 21 notice to a tenant when he is in breach of this requirement. The regulations which specified the gas safety certificate and EPC are

expressed to ***apply only to assured shorthold tenancies granted on or after 1 October 2015*** (reg 1(3), Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015**).** They do not apply to tenancies which began before 1 October 2015, or to statutory periodic tenancies arising after 1 October 2015 where the fixed term tenancy began before that date (reg 1(4)).

Time for giving the gas safety certificate

In **Caridon Property Limited v Monty Shooltz**, Central London County Court *Nearly Legal* 11 February 2018, HHJ Luba rejected the landlord's appeal against the dismissal of its claim for possession by the district judge on the basis that CP had not complied with the requirements of reg 2 of the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015, in that a gas safety certificate had not been provided to the tenant at the start of the tenancy, before he took up occupation. A gas safety certificate had been provided some 11 months later, shortly before the service of the s.21 notice, but this was not sufficident to cure the original failure. The Judge said:

> *That seems to me to have been a 'once and for all' obligation on a prospective landlord in relation to a prospective tenant. Once opportunity has been missed, there is in my judgment no sense in which it can be rectified.*

See also **Trecarrel House Limited v Rouncefield**, County Court at Exeter, 13 February 2019 (see *Nearly Legal* blog, 19 February 2019). This appeal concerned reg 36(7) of the Gas Safety Regulations, which provides that, where there is no gas appliance in any room occupied by the tenant, the landlord may, instead of ensuring that a copy of the gas safety record referred to in reg 36(6) is given to the tenant, display the gas safety certificate in a prominent position in the premises. This had not been done. Following the reasoning in *Caridon v Shooltz* (above), it was held that a failure to comply with reg 36(7) prior to the tenant occupying the property cannot be remedied and it was not open to the landlord to serve a section 21 notice.

HHJ Carr considered that the reason for the regulations was self-evident. A tenant moving in needs to be sure that the gas installations are well-maintained and safe. It is rare that a tenant would have any control over that and the danger to life and limb was all too well-known. He distinguished between the nature of the obligations in reg 36(6)(a) and (b) and repeated in 36(7), on the basis that a tenant considering whether to move in to a new property had a decision to make as to whether to take it and the knowledge that it was safe would be of great importance.

In **Kaur v Griffith**, County Court at Bromley, 25 July 2019 (*Nearly Legal*, 3 August 2019), Ms G was the assured shorthold tenant of Ms K. A section 21 notice was served on G and an order for possession made on 13 June 2019. Ms G sought to set aside the order. K's evidence was that a gas safety inspection was done on 6 December 2016, which was the date of signing of the tenancy agreement and a copy of the certificate was given to the tenant on that date. K also stated that a further gas safety check was done on 21 January 2018, with the copy certificate given on that date. The District Judge held that the section 21 notice could not be validly served because the second gas safety check had not been carried out within 12 months of the previous one, as required by regulation 36(3) of the Gas Safety (Installation and Use) Regulations 1998

Energy performance certificates In HMOs

In a further county court decision, it has been held that the requirement to provide an energy performance certificate does not apply to the tenant of a room in an HMO: **Home Group Ltd v Henry,** County Court at Newcastle (*Nearly Legal* blog, 8 May 2019). The obligation under reg 6(5) of the Energy Performance of Buildings (England and Wales) Regulations 2012 only arose in the situations set out in those regulations. The 2012 Regulations provide that an EPC is not required for a room, but only for a building or a building unit. The landlord was not therefore required to serve an EPC for a bedsit in an HMO.

Prescribed information: the `How to Rent' booklet: s.21B, HA 1988

Reg 3 of the **Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015** SI 2015/1646 provides that the specific requirement is to provide tenants with a copy of the DCLG booklet ***"How to rent: the checklist for renting in England"***.

This provision does not apply to ASTs which were granted before 1st October 2015. This is the effect of s.41(3), Deregulation Act 2015.

The Guide must be provided as a printed copy or via email as a PDF attachment if the tenant agrees. Sending a link is not sufficient.

New How to Rent Guide

For all new assured shorthold tenancies, the current *How to Rent* booklet must be provided to the tenant for any subsequent s.21 notice to be valid. The version of the booklet which is given to the tenant must be the current version at the time. For any 'renewal' tenancies, the *How to Rent* booklet does not need to be provided again unless it has been updated in the meantime. (Note that a statutory periodic tenancy will be a new tenancy for these purposes.) If it has been updated, the current version must be provided, otherwise a subsequent s.21 notice is not valid.

Several editions of the *How to Rent* booklet have so far been issued. To check that the version used by the landlord was the version that was current at the time it was given to the tenant, see the **Nearly Legal** archive at http://nearlylegal.co.uk/how-to-rent-archive . See also `How to rent guides – sneak updates': *Nearly Legal*, 4 August 2019.

Prohibited payment or unlawful retention of a holding deposit under the Tenant Fees Act 2019

See page 13 for the Tenant Fees Act. Section 17(3) TFA 2019 provides that no section 21 notice may be given in relation to an assured shorthold tenancy if

- the landlord has previously required a tenant or other `relevant person' to make a prohibited payment and that person has made the prohibited payment "to the landlord"; or
- the landlord has breached Schedule 2 in relation to a holding deposit,

so long as the payment or deposit has not been repaid to the relevant person.

The payment or deposit is considered to have been repaid if it has been applied, with the consent of the tenant or other relevant person, to the rent or the deposit.

Note that the restriction on s.21 notices does not apply in respect of prohibited payments charged by a letting agent.

B Tenancy deposits

Multiple penalties

Howard v Dalton
County Court at Dartford 7 May 2019
Legal Action, July/Aug 2019, p.44

Ms H was the tenant of Mr D. The first tenancy was in 2007. An initial deposit of £900 was paid, and later, on signing the tenancy agreement, H paid an additional sum of £845 to D. A further seven tenancy agreements were entered into between the parties. The deposit was not protected in an authorised scheme until 2014, and no prescribed information was ever served.

H brought a claim for the s.214 penalty. She claimed breaches of s.213(3) (failure to protect) and s.213(6) (failure to provide prescribed information) in respect of eight tenancies. She did not plead how many penalty awards she was claiming.

The district judge held that there had been two separate breaches (failure to protect and failure to provide prescribed information) for each of the eight tenancies, giving a total of sixteen breaches. He also held that the sum of £845 was part of the deposit.The award was the maximum of 3 times the deposit of £1,745 for each breach, giving a total of £83,760.

D appealed to the circuit judge. Allowing the appeal, the judge held that failure to protect the deposit and failure to provide prescribed information amounted to one breach rather than two, and attracted one penalty. The requirement to provide prescribed information could not be independent from the requirement to protect. So a landlord can be penalised for either a failure to protect **or** a failure to provide the prescribed information, but not both.

In addition, although a limitation defence had not been pleaded, it was held that the limitation period for bringing a s.214 claim was six years after the relevant breach. The limitation period applied to the first four of the eight tenancies, thus reducing the claim to four tenancies.

The judge further held that the second payment of £845 was rent in advance, not a deposit. The s.214 award was accordingly one penalty for each of four tenancies, and the amount of each penalty was reduced from three times to two times the deposit (4 x 2 x £900 = £7,200). The penalty payable to H was therefore £7,200.

In **Parr v Sebastiampillai**, County Court at Central London, 11 April 2019 (*Legal Action*, June 2019, p.44), Ms P was an assured shorthold tenant of a private landlord, Mr Kadiwar (K). K protected P's deposit with the Deposit Protection Service (DPS) and gave P the prescribed information. In July 2014, Mr and Mrs Sebastianpillai (S) purchased the flat from K. In September 2015, the DPS transferred the deposit into an account in the name of Mrs S. In May 2015, the tenancy became a statutory periodic tenancy. S did not give P fresh prescribed information.

In March 2018, S served P with a s.21 notice. A possession order was made and P appealed. The appeal was allowed. Mrs S was treated as having received the deposit when it was transferred into her own account with DPS. That had triggered an obligation to re-serve the prescribed information. The s.21 notice was therefore invalid. S,215B HA 2004 did not rescue the landlords because they had not previously provided P with the prescribed information.

C Right to Rent

Right to rent provisions discriminatory and declared incompatible with Articles 8/14

R (on the application of Joint Council for the Welfare of Immigrants) v The Secretary of State for the Home Department
Interveners: Liberty, EHRC and the Residential Landlords Association
[2019] EWHC 492 1 March 2019

The "Right to Rent" provisions place duties on landlords to make sure they do not rent to a disqualified person, as defined in s21 of the Act. A landlord in breach will face civil penalties and criminal sanctions. Occupiers can be evicted summarily.

The objective behind the legislation, the Immigration Act 2014, was to create a hostile environment for those who did not have the Right to Rent, such that there would be an increase in voluntary returns and/or removals. The indirect benefit would be improved access to the housing market for UK residents and a reduction in the unregulated property market and rogue landlords.

JCWI argued that the restrictions on the Right to Rent has had little if any impact on these objectives and indirectly and unlawfully discriminated on grounds of race against BME persons who had the Right to Rent. Note that the claim was **not** about those persons who had no leave to remain in the UK (and thus did not have the Right to Rent).

The argument centred on whether Article 8 was engaged (given that Article 8 does not give a person a right to a home (***Chapman v UK***)), whether the scheme disproportionately discriminated, and whether the State was responsible for the discriminatory activities of private sector landlords.

On the issue of Article 8, the judge, Martin Spencer J held that the scheme does come within the ambit of Article 8 for the purposes of the right not to be discriminated against under Article 14, for two reasons. First, the case law of the European Court of Human Rights makes it clear that race discrimination is regarded with particular anathema. Secondly, to find that the legislation comes within the ambit of Article 8 would not (as the Government argued) amount to finding that Article 8 gives someone the right to a home. Although Article 8 does not give anyone the right to a home, it gives everyone the right to seek to obtain a home for themselves and their family even if they are eventually unsuccessful, and the playing field should be even for everyone in the market for housing, irrespective of their race and nationality. Where the State interferes with the process of seeking to obtain a home, it must do so without causing discrimination, and this either engages Article 8 or comes within its ambit.

The next issue was whether the scheme caused discrimination. The judge found that it did. The evidence, when taken together, strongly showed not only that landlords are discriminating against potential tenants on grounds of nationality and ethnicity but also that they are doing so because of the scheme. The extent of the discrimination was such that it was a short further step to conclude that this is having a real effect on the ability of those in the discriminated classes to obtain accommodation, either because they cannot get such accommodation at all or because it is taking significantly longer for them to secure accommodation.

The Home Secretary argued that the State could not be held responsible for the actions of private landlords, and that such discrimination, if it exists, arises from the voluntary

activities of third party landlords acting inconsistently with the requirements of the Immigration Act 2014, together with the codes and guidance issued under that legislation. This argument was rejected by Martin Spencer J:

> *"It is my view that the Scheme introduced by the Government does not merely provide the occasion or opportunity for private landlords to discriminate but causes them to do so where otherwise they would not. The State has imposed a scheme of sanctions and penalties for landlords who contravene their obligations and, as demonstrated, landlords have reacted in a logical and wholly predictable way. The safeguards used by the Government to avoid discrimination, namely online guidance, telephone advice and codes of conduct and practice, have proved ineffective. In my judgment, in those circumstances, the Government cannot wash its hands of responsibility for the discrimination which is taking place by asserting that such discrimination is carried out by landlords acting contrary to the intention of the Scheme."*

The judge concluded: "In these circumstances, I find that the Government has not justified this measure nor, indeed, come close to doing so."

The Court made a declaration that the scheme (ss 20-37 of the Immigration Act 2014) is incompatible with Article 14 when taken in conjunction with Article 8 and that introducing the scheme in Wales, Northern Ireland or Scotland without further assessment of its efficacy and discriminatory impact would breach the public sector equality duty in s149 Equality Act.

The Government's appeal is to be heard on **14/15 January 2020**.

D Tenant Fees Act 2019

This Act received royal assent on 12 February 2019 and came into force on **1 June 2019** . It has the effect of abolishing most upfront fees for tenants in England and will cap tenancy deposits at a maximum equivalent to five weeks' rent (assuming that the rent is under £50,000 p.a.). It also regulates how landlords and agents should deal with holding deposits.

The Act will apply to all tenancies which begin on or after 1 June 2019. For the first 12 months, it will not apply to:

- tenancies entered into before 1 June 2019; and
- statutory periodic tenancies that arise during the year after 1 June 2019 when a pre-commencement fixed term tenancy comes to an end.

However, all existing tenancies will become subject to the rules from 1 June 2020.

Overview of the Act

The Act bans landlords and their agents from requiring tenants and licensees of privately rented housing in England and persons acting on their behalf or guaranteeing their rent ("relevant persons") to make any payments in connection with a tenancy with the exception of:

- the **rent**;

- a refundable **tenancy deposit** which is capped at no more than **five weeks' rent** where the annual rent for the property is less than £50,000, and no more than **six weeks' rent** where the annual rent for the property is £50,000 or more;

- a refundable **holding deposit** (to reserve a property) capped at no more than **one week's rent**;

- payments in the event of a tenant losing their key or a security device giving access to housing, or paying rent more than 14 days late (**default payments**);

- certain **payments on assignment**, novation or variation of a tenancy when requested by the tenant capped at £50, or reasonable costs incurred if higher;

- payments associated with **early termination** of the tenancy, when requested by the tenant; and

- payments in respect **of utilities**, communication services, television licence and council tax.

Thus, the Act works by banning any fee or payment in the tenancy agreement unless it is exempt (ie, within one of the exempt categories above). Examples of banned fees are charges for:

- preparing a guarantor form
- credit checks
- inventories
- cleaning services
- referencing
- professional cleaning
- having the property de-flead as a condition of allowing pets in the property
- administrativecharges
- requirements to have specific insurance providers
- gardening services.

S.28 TFA 2019 defines "tenancy" for the purposes of the Act as an assured shorthold tenancy, a licence to occupy housing or a student letting of college accommodation. It does not include a long lease, a tenancy of social housing, or a licence to occupy holiday accommodation.

Holding deposits

Where a holding deposit has been taken, the Act requires agents and landlords to refund the holding deposit except in circumstances where the tenant:

- withdraws from the transaction,
- fails a right-to-rent check
- fails to take all reasonable steps to enter into the tenancy, or

- provides false or misleading information and the landlord is reasonably entitled to take into account that information or the tenant's behaviour in providing it in deciding whether to grant the tenancy

Landlords and agents must provide reasons in writing to the tenant or other relevant person if the holding deposit is retained.

Enforcement

- Trading standards authorities are placed under a duty to enforce the Act.
- Tenants and other relevant persons may recover unlawfully charged fees through the First-tier Tribunal
- Landlords cannot serve a valid `section 21' notice until they have repaid any prohibited payment or unlawfully retained holding deposit (see page 10).
- A breach of the fee ban will carry a financial penalty of up to £5,000. If a further breach is committed within 5 years of the imposition of a financial penalty or conviction for a previous breach, this will be a criminal offence. In such a case, local authorities will have discretion whether to prosecute or impose a financial penalty of up to £30,000 as an alternative to prosecution.
- A breach of the requirement to repay a holding deposit will be a civil offence and will carry a financial penalty of up to £5,000.
- Local authorities will be able to retain the money raised through financial penalties, which will be ring-fenced for future local housing enforcement.

E The end of assured shorthold tenancies?

In July 2019, MHCLG has published its consultation paper: **A New Deal for Renting: Resetting the balance of rights and responsibilities between landlords and tenants**

The background to the consultation is set out as follows:

> *On 15 April 2019, the government announced that it will put an end to so called 'no-fault' evictions by repealing section 21 of the Housing Act 1988. Under the new framework, a tenant cannot be evicted from their home without good reason. This will provide tenants with more stability, protecting them from having to make frequent moves at short notice, and enabling them to put down roots and plan for the future.*
>
> *The government also proposed to strengthen the section 8 eviction process, so landlords are able to regain their property should they wish to sell it or move into it themselves. This will provide a more secure legal framework and a more stable rental market for landlords to remain and invest in.*

The consultation sought views on:

> • the impact of removing assured shorthold tenancies, and whether there are any circumstances where a tenancy should be ended without the tenant being at fault

• whether the proposed reforms should relate to all those who use the Housing Act 1988 – in both the private and social sectors

• how existing grounds for possession covered by Schedule 2 of the Housing Act 1988 can be used effectively or reformed in the future once section 21 is no longer available and how new grounds should be added to cover the landlord selling or moving into the property; and

• how the courts could consider applications for possession orders under section 8 of the Housing Act 1988 more efficiently.

Under the heading `Improving the statutory framework under which a landlord can end a tenancy', the consultation paper proposes a range of changes to section 8 grounds for possession. These include:

- extending the ground for possession for re-occupation by the landlord to apply also for the benefit of the landlord's family;
- adding a new mandatory ground where the landlord wishes to sell;
- amending Ground 8 so that it applies where the tenant is on two months' arrears as now, but possession would be mandatory where one month's arrears exist as at the date of the court hearing.

The consultation period ended on 12th October 2019.

3 Bedroom tax (size criteria for occupiers of social housing)

Bedroom tax deduction for safe room in sanctuary scheme was contrary to article 14 ECHR (prohibition of discrimination)

J D and A v. the United Kingdom
European Court of Human Rights (First Section) 24 October 2019
Applications nos. 32949/17 and 34614/17)

A lived with her son in a three-bedroom property which has been specially adapted for them by the police. As a result of domestic violence, one of the rooms in the property had been modified under the sanctuary scheme to become a "panic room". The local authority, however, considered that this was a spare room for the purposes of the `bedroom tax', and A's housing benefit was reduced by 14%.

In 2016, the Supreme Court (Lady Hale and Lord Carnwath dissenting) decided that the Secretary of State for Work and Pensions was justified in imposing the bedroom tax on her.The Court found that the application of the size criteria for benefit purposes was not something that required a blanket exemption for a class of people, but could be dealt with on a case by case evaluation, which would often lead to the shortfall being made up by Discretionary Housing Payments (DHPs), which A had been receiving.

The European Court of Human Rights, by a majority of 5:2, has now found that the discrimination was not justified.

In A's case, there were two state schemes in operation: the sanctuary scheme, which had the purpose of ensuring her safety as a victim of domestic violence, and the bedroom tax,

which had the purpose of incentivising 'downsizing'. The two schemes had contradictory aims and operation. The Court noted that in previous decisions it had held that

> *… given the need to prevent discrimination against people with disabilities and foster their full participation and integration in society, the margin of appreciation the States enjoy in establishing different legal treatment for people with disabilities is considerably reduced…, and that because of the particular vulnerability of persons with disabilities such treatment would require very weighty reasons to be justified.The Court has also considered that as the advancement of gender equality is today a major goal in the member States of the Council of Europe, very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention.* [para 89]

So, 'weighty reasons' would be required to justify the discrimination. The purpose of the sanctuary scheme was to allow victims of domestic violence to remain in their homes. DHPs could not resolve the conflict between that aim and the aim of the bedroom tax, which was to incentivise A to move:

> *The Government have not provided any weighty reasons to justify the prioritisation of the aim of the present scheme over that of enabling victims of domestic violence who benefitted from protection in Sanctuary Schemes to remain in their own homes safely. In that context, the provision of DHP could not render proportionate the relationship between the means employed and the aim sought to be realised where it formed part of the scheme aimed at incentivising residents to leave their homes, as demonstrated by its identified disadvantages…*

As a result, discrimination against A was unjustified, and damages of €10,000 were awarded to her.

In the case of JD, however, which concerned the needs of the tenant's disabled adult daughter for an additional room in conjunction with major adaptations to the property, the appeal failed. In these circumstances, the availability of DHPs enabled the Court to conclude that the means employed to implement the bedroom tax were proportionate to the legitimate aim:

> *The Court acknowledges that the DHP scheme had a number of significant disadvantages which were identified by the domestic courts, namely that the awards of DHP were purely discretionary in nature; their duration was uncertain; they were payable from a capped fund; and their amount could not be relied upon to replace the full amount of the shortfall…. On the other hand, the scheme had some advantages in that it allowed local authorities to take individualised decisions, which the Court has identified as an important element to ensure proportionality… Moreover, the awards of DHP are made subject to certain safeguards, in particular the requirement on local authorities to take their decisions in light of the Human Rights Act and their Public Sector Equality Duty which in the Court's understanding would prevent them from refusing to award DHP where that could mean the applicant's need for appropriately adapted accommodation was not met. The Court observes that the first applicant has in fact been awarded DHP for several years following the changes to the Housing Benefit Regulation.*

Therefore, the difference in treatment identified in the case of JD was proportionate justified.

It is likely that this judgment will be appealed to the Grand Chamber.

Tribunals and local authorities had the power or duty to disapply HB regulations in respect of the `bedroom tax' in order to avoid human rights breaches

RR v Secretary of State for Work and Pensions
Supreme Court
[2019] UKSC 52 13 November 2019

RR lived with his severely disabled partner in a two-bedroomed social housing property for which he received housing benefit (HB). He and his partner required separate bedrooms because of her disabilities and her need to store medical equipment and supplies.

In November 2016, in the case of *R (Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58, the Supreme Court gave judgment in a series of judicial review claims concerning regulation B13 of the Housing Benefit Regulations 2006, which governed the application of the 'bedroom tax'. It declared that where there was a transparent medical need for an additional bedroom, which was not catered for in regulation B13, there was unjustified discrimination on the ground of disability, contrary to article 14 ECHR.

Consquently, regulation B13 was amended in 2017 by Parliament to reflect the judgment, but this was not retrospective.

The question arising from the Court's original decision in *Carmichael* was whether decision-makers in the housing benefit system – local authorities, and the First-tier Tribunal ('FTT') and the Upper Tribunal – had power to apply the principle of that decision to HB claims relating to periods before the amendment to B13.

A second issue was whether account should be taken of any discretionary housing payments ('DHPs') received by the claimant during the period, if the deduction to housing benefit should not have been applied.

The Supreme Court unanimously allowed the appeal against the local authority's decision in respect of the deductions from RR's housing benefit prior to the B13 amednment. It ordered that RR's housing benefit was to be recalculated without making the under-occupancy deduction of 14%, in order to avoid a breach of RR's rights under the Convention, contrary to s 6(1) of the Human Rights Act 1998.

Lady Hale, who gave the single judgment, said:

> "There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear."

Section 3 HRA 1998 provides:

> *(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*
>
> *(2) This section -*
> *(a) applies to primary and subordinate legislation whenever enacted;*

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents the removal of the incompatibility.'

Primary legislation which could not be read or given effect compatibly with the Convention rights must still be given effect, as must subordinate legislation if primary legislation prevents removal of the incompatibility. But the courts had consistently held that, where it was possible to do so, a provision of subordinate legislation which resulted in a breach of a Convention right must be disregarded, if it was possible to do so without affecting the statutory scheme. Lady Hale said:

> "…Where discrimination has been found, a legislator may choose between levelling up and levelling down, but a decision-maker can only level up: if claimant A is entitled to housing benefit of £X and claimant B is only entitled to housing benefit of £X-Y, and the difference in treatment is unjustifiably discriminatory, the decision-maker must find that claimant B is also entitled to benefit of £X."

On the question of whether any DHPs received by RR should be deducted from the housing benefit to which he was entitled as a result of the Supreme Court's decision, the issue in making the original decision was not concerned with anything other than entitlement to housing benefit. DHPs could not be taken into account at that stage. The Court was concerned with whether the initial decision was correct, and it was not. It was for the local authority to consider whether there were any steps which it could take to recover any DHPs and if there were, whether it wished to take them.

5 Housing conditions: Homes (Fitness for Human Habitation) Act 2018

The Act came into force on ***20 March 2019*** and applies to all new tenancies of less than 7 ears granted after that date as well as to all tenancies renewed after the commencement date (including statutory periodic tenancies that arise after an existing fixed term tenancy).

It will apply to all existing periodic tenancies from 20 March 2020.

The Act operates by amending the Landlord and Tenant Act 1985 sections 8 to 10 and inserting new sections.9A, s.9B and s.9C.

What does the Act do?

In England, the new s.9A(1) implies into any tenancy agreement a covenant by the landlord that the dwelling:

(a) is fit for human habitation at the time the lease is granted or otherwise created or, if later, at the beginning of the term of the lease, and

(b) will remain fit for human habitation during the term of the lease.

This cannot be avoided or contracted out of by the landlord, nor can any contractual penalty be levied on the tenant for relying on the covenant (s.9A(4)).

Unfitness

Tenants living in private rented or social housing may now obtain a remedy through the courts where their accommodation fails any of the fitness standards (which includes unfitness resulting from a "prescribed hazard" under the Housing Health and Safety Rating System), rendering the property unfit for human habitation.

How far does the obligation extend?

The obligation extends to the dwelling, and, if the dwelling forms part of a building (a flat in a block, or a room in an HMO), the obligation extends to all parts of the building in which the landlord has an estate or interest (s.9A(6)). This exactly parallels s.11(1A) L&TA 1985. So, where a landlord owns a block of flats, the tenant has a cause of action where unfitness arises from the common parts or the retained parts (eg, the outside walls, the windows, the roof).

Under previous legislation tenants generally only had a remedy through the courts where there was contractual disrepair. The Act will also enable tenants to claim compensation, if they can prove that they had to live in unfit accommodation owing to the landlord's failure to keep the property fit for habitation. Legal aid is available, as it is now for disrepair cases, where there is a serious risk of harm to health or safety.

What does unfit for habitation involve?

The amended s.10 provides as follows:

> *"In determining for the purposes of this Act whether a house or dwelling is unfit for human habitation, regard shall be had to its condition in respect of the following matters—*
>
> - *repair,*
> - *stability,*
> - *freedom from damp,*
> - *internal arrangement,*
> - *natural lighting,*
> - *ventilation,*
> - *water supply,*
> - *drainage and sanitary conveniences,*
> - *facilities for preparation and cooking of food and for the disposal of waste water;*
> - *in relation to a dwelling in England, any prescribed hazard;*
>
> *and the house or dwelling shall be regarded as unfit for human habitation if, and only if, it is so far defective in one or more of those matters that it is not reasonably suitable for occupation in that condition.*
>
> *(2) In subsection (1) "prescribed hazard" means any matter or circumstance amounting to a hazard for the time being prescribed in regulations made by the Secretary of State under section 2 of the Housing Act 2004.*

(3) The definition of "hazard" in section 2(1) of the Housing Act 2004 applies for the purposes of subsection (2) as though the reference to a potential occupier were omitted."

The key issue and question for the court's decision is whether the dwelling is ***'not reasonably suitable for occupation in that condition'***.

Incorporation of HHSRS hazards

Section 10(2) refers to the list of 29 Health and Housing Safety Rating System "HHSRS" hazards (see Housing Act 2004). If the HHSRS is revised, then s10(2) will encompass the new scheme. NB this encompasses both Category 1 and Category 2 hazards.

By virtue of s.10(3), the definition of 'hazard' at Housing Act 2004 s.2(1) as revised by the subsection would read:

> *"hazard" means any risk of harm to the health or safety of an actual occupier of a dwelling or HMO which arises from a deficiency in the dwelling or HMO or in any building or land in the vicinity (whether the deficiency arises as a result of the construction of any building, an absence of maintenance or repair, or otherwise)."*

So, in deciding whether a property is unfit, regard shall be had to whether there is a risk of harm to the health or safety of the actual, rather than potential, occupier.

Exceptions to the landord's responsibility to keep a property fit for habitation

There are certain exceptions to this obligation under s.9A(2) and s.9A(3). They are similar to the exceptions to s11.

- The landlord is not responsible for unfitness caused by the tenant's failure to behave in a tenant-like manner (s.9A(2)(a)), or which results from the tenant's breach of covenant (s.9A(3)(a)).
- The landlord is not obliged to rebuild or reinstate the dwelling in the case of destruction or damage by fire, storm, flood or other inevitable accident.
- The landlord is not obliged to maintain or repair anything the tenant is entitled to remove from the dwelling.
- The landlord is not obliged to carry out works or repairs which, if carried out, would put the landlord in breach of any obligation imposed by any enactment (whenever passed or made).
- Where the required works require the consent of a third party (eg, a superior landlord or freeholder, a neighbouring leaseholder or owner, or a council) and the landlord has made reasonable endeavours to get that consent, but it has not been given.

MHCLG have produced the following guidance:
Guide for local authorities: Homes (Fitness for Human Habitation) Act 2018
Guide for tenants: Homes (Fitness for Human Habitation) Act 2018
Guide for landlords: Homes (Fitness for Human Habitation) Act 2018
(all published 6 March 2019)