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Housing Law E-bulletin

INTRODUCTION

Welcome to the latest issue of our regular Housing Law E-bulletin.

There have been a number of significant cases in housing law recently. We think the highlights include:

- *Mitu v Camden LBC* – more guidance from the Court of Appeal upon Regulation 8(2) of the Allocation of Housing and Homelessness (Review Procedure) Regulations 1999, and featuring Emma Godfrey and Martin Russell of Field Court Chambers;
- Two further cases on tenancy deposits, *Hashemi v Gladehurst* and *Suurpere v Nice & Nice*; and
- *Oxford CC v Bull* – temporary accommodation and the residence of children.

Emma Godfrey, Adrian Davis, Genevieve Screeche-Powell©
Editors
Housing Team

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CASE UPDATES

Contacts: Sabina.Smith@fieldcourt.co.uk
Hayley.Walker@fieldcourt.co.uk

CASE UPDATES

***Mitu v Camden LBC* [2011] EWCA Civ 1249**

The local authority made a decision pursuant to s.184 HA 1996 that M was not in priority need and had become homeless intentionally; accordingly the duty owed to him was to provide advice and assistance. On a s.202 review the reviewing officer did not uphold the finding of intentional homelessness but did uphold the decision that M was not in priority need; accordingly the duty owed was to provide advice and assistance but the local authority also had a discretion to secure that accommodation was available for M under s.192(3). The reviewer went on to decide not to exercise the s.192(3) discretionary power. The decision letter made no reference to r.8(2) of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999.

On a s.204 appeal to the county court, M argued that the local authority should have followed the r.8(2) procedure, as the review officer must have considered there to be a deficiency in the s.184 decision as he had not upheld the finding of intentional homelessness. M also argued that if the local authority did not consider the r.8(2) procedure to have been triggered, it was obliged to state its reasons.

The local authority argued that, following *Hall v LB Wandsworth* [2004] EWCA Civ 1740, any irregularity in the treatment of the issue of intentional homelessness in the s.184 decision would not have triggered the r.8(2) procedure; any such flaw was immaterial to the fairness of the decision making process and did not justify an additional procedural safeguard, because the reviewer was minded to resolve the issue of intentionality entirely in M's favour and on the facts of the case the issue of priority need (the issue on which the reviewer was minded to find against M's interests) was entirely separate. The local authority argued that r. 8(2) should be given a purposive construction. The county court Judge dismissed the appeal and M appealed to the Court of Appeal.

HELD: (per Lewison and Sullivan LJJ): If the reviewing officer considers that the original decision maker was wrong on an important aspect of the case, then he has identified a deficiency in the original decision. The reviewer should therefore have followed the r.8(2) procedure. If M had been sent a r.8(2) "minded-to" letter he would have had the opportunity of making further representations seeking to persuade the reviewer (i) that an assessment by M's GP was unreliable, and (ii) to exercise the discretion under s.192(3) in M's favour (whether or not the reviewer was legally obliged to consider that question, he had in fact done so).

(per Rix LJ): Regulation 8(2) should be given a purposive construction. It is not *any* flaw in the s.184 decision that triggers the r.8(2) procedure, but only a material or relevant flaw, in the sense that it is of sufficient importance to the fairness of the procedure to justify an additional procedural safeguard. If it could have made no difference to M whether he failed on the issue of priority need or on the issue of intentional homelessness, then a flaw in the original decision on intentional homelessness could not have mattered, as the reviewer resolved that issue entirely in M's favour. As it was, the flaw did matter, because the reviewer found that M was owed the s.192(3) discretion.

Appeal allowed and s.202 review decision quashed.

Martin Russell appeared for Mr. Mitu
Emma Godfrey appeared for the local authority

***Hashemi v Gladehurst* [2011] EWCA Civ 406**

The court's powers under s.214(3) HA 2004 (to order the person holding a tenancy deposit to repay it to the applicant or pay it into the authorized custodial scheme) and s.214(4) HA 2004 (to order the landlord to pay the applicant three times the amount of the tenancy deposit) cannot be exercised after the tenancy has come to an end.

***Suurpere v Nice & Nice* [2011] EWHC 2003 (QB)**

Where the tenancy has not been lawfully determined, the landlord's obligation under s.213(5) HA 2004 to give the tenant and any relevant person the prescribed information about the tenancy deposit scheme continues, even if the deposit has already been repaid.

***Saxon Weald v Chadwick* [2011] EWCA Civ 1202**

The tenant held a probationary tenancy agreement with the registered social landlord, under the terms of which it was take effect as an assured shorthold tenancy, but if no steps had been taken to terminate it within 12 months of its commencement, it would automatically convert into an assured tenancy. A week before the one year anniversary, the landlord sent a Notice of Seeking Possession. One week later, on anniversary of the probationary period, the landlord sent, in error, a letter ("the Letter") confirming the tenancy was now assured.

Held: The Letter may have been sent in error, but this was not a mistake within the meaning of *Mannai Investment Co Ltd v Eagle Star Life Assurance Co*.. There was no ambiguity in the meaning or effect of the letter. It plainly, on a natural and objective reading, sufficed as a notice within the meaning of paragraph 2 of Schedule 2A to the Housing Act 1988. . A tenant was not ordinarily expected to enquire into, or think about, a landlord's reasons for serving an otherwise unambiguous notice in connection with a lease. In any event a tenant might well think that a landlord had simply changed its mind from its previous indicated intention. *Mannai* distinguished.

***Babakandi v Westminster CC* [2011] EWHC 1756**

The applicant was in occupation of severely overcrowded accommodation, comprising of a studio flat which he occupied with his wife and 8-year-old and 3-year-old daughter. The applicant had been on the transfer list under Westminster's choice-based letting scheme for 3 years. The applicant complained the scheme lacked transparency and was legally flawed because it automatically debarred tenants with arrears over a certain level from bidding for properties.

HELD: It did not follow from the statutory requirement on a housing authority to publish its allocation scheme that an applicant is entitled to be able to predict when and if he will actually be offered accommodation. The obligation on a local housing authority when framing its housing allocation scheme to give "reasonable preference" to groups specified in the Housing Act 1996 s.167(2) did not mean that such a preference had to be given at all times in relation to all properties. It was sufficient if the preference was given over the course of a reasonable period. Section 167(2A)(b) expressly permits a scheme to take account of the behaviour of a person which affects his suitability to be a tenant. Reliability in paying rent clearly affects a person's suitability to be a tenant. The practical advantage of automatic suspension for modest arrears was it increased the prospects of the arrears being cleared, and Westminster retained a discretion under the scheme in any event.

***Bubb v Wandsworth LBC* [2011] EWCA Civ 1285**

The Court of Appeal reaffirmed that a homelessness appeal under section 204 HA 1996 is in substance the same as that of a judicial review in the High Court, following *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5. The Court rejected Ms Bubb's submission that, in her particular case, the county court judge should have determined for himself whether or not she had received a material letter and, in order to do so, the judge ought to have received oral evidence.

***Oxford CC v Bull* [2011] EWCA Civ 406**

The Applicant separated from his wife and lived in a one room in a shared house. His three children decided they would prefer to live with the Applicant, and moved in. The landlord served a Notice to Quit and the Applicant and his three children were placed in temporary accommodation by the Respondent. The Applicant's wife wanted the children returned to her, and advised the Respondent the parties were attempting to sort out visiting rights. The Respondent decided, on review, that the Applicant was not in priority need because the children resided with the mother and the fact they were currently sharing the s.188 temporary accommodation did not amount to "residence" at the address. Further, the Applicant was intentionally homeless because he allowed the children into the shared house, making eviction inevitable. The county court varied the decision to declare the Applicant to be in priority need and not homeless intentionally.

HELD: The residence of children in temporary accommodation should be taken account in the same way that occupation of temporary accommodation fell to be taken into account for the purpose of determining local connection in *Mohammed v Hammersmith & Fulham [2001] UKHL 57*. The case of *Holmes-Moorhouse* was distinguished, concerned as it was with the second limb of s.189(1)(b) of the 1996 Act, namely whether the children of Mr. Holmes-Moorhouse "might reasonably be expected to reside" with him. Here, it was a question of fact whether the children resided with the Applicant at the relevant time. Clearly they did, and so the Judge was right to reverse the Respondent's decision on this issue. The Respondent was however, entitled to find on the evidence there was no need for the children to move into the shared house and so the Applicant's deliberate conduct had created a situation where he was forced to leave the room in the shared house. Accordingly, the Respondent's decision on intentionality was reinstated.

***Mew v Tristmere Limited* [2011] EWCA Civ 912**

The question for the Court of Appeal was whether two houseboats (converted WWII landing craft), once capable of floating but which for some time had been resting on wooden platforms secured on the harbour bed, were chattels or dwelling-houses. If the houseboats qualified as the latter then they attracted the protection of the Housing Act 1988 and their occupants would be assured tenants.

HELD: Applying the principles set out in *Elitestone Ltd v Morris* [1997} 1 WLR 687 and *Chelsea Yacht & Boat Co Ltd v Pope* [2000] 1 WLR 1941, the Court of Appeal held that the two houseboats were chattels, not dwelling-houses, and so HA 1988 did not apply. The houseboats were originally designed to be moveable and were so at the time they were placed on the supporting wooden platform many years ago. The fact that they could not be physically moved now without breaking-up was not material to the issue of whether they had become affixed to the land. That issue had to be addressed by reference to their condition at the time they were placed on the wooden platform.

***Windsor & District Housing Association v Hewitt* [2011] EWCA Civ 735**

WDHA granted Ms Hewitt an assured tenancy of a one bedroom property 'A'. Subsequently, in 2006, she applied for a transfer to a two bedroom property because she said she needed a second bedroom for her son who, she alleged, was her carer. At the end of 2008 WDHA granted her a tenancy of a two bedroom property, 'B'.

It subsequently came to light that Ms Hewitt was living alone in property B. In an interview she denied ever having said that her son was her carer. Consequently, WDHA issued possession proceedings on the basis, inter alia, of Ground 17 (inducing a tenancy by false statement). The essence of its case was that although her representations in 2006 were not false at the time they were made, they had become false by the time she signed for the tenancy of property B in 2008.

The District Judge dismissed the claim for possession. WDHA appealed.

HELD: (allowing the appeal):

(1) if any statement made before a tenancy is granted is material, the Court should infer that that statement did induce the landlord to grant a tenancy: following *Waltham Forest LBC v Roberts* [2005] HLR 2;

(2) before a Judge embarks on an inquiry into whether the representor remembers his or her earlier statement there must be some basis for supposing that the representor may have forgotten it. In the present case there was no such basis.

***Berrisford v Mexfield Housing Co-operative Limited* [2011] UKSC 52**

Mexfield, a fully mutual housing co-operative association, entered into an "Occupancy Agreement" with B, which provided that it would let the premises to her "from 13 December 1993 and thereafter from month to month until determined as provided in this agreement." The agreement provided that B could terminate it by giving one month's written notice, whereas Mexfield could bring the agreement to an end by the exercise of a right of re-entry only in certain specified circumstances.

Mexfield served a NTQ on B and brought a claim for possession, arguing that by application of the rule in *Prudential Assurance Company Ltd v London Residuary Body* [1992] 2 AC 386, the Occupancy Agreement could not take effect as a tenancy, and B was instead a periodic tenant, by virtue of her exclusive possession of the property and payment of rent, and the NTQ operated to determine that periodic tenancy.

HELD: The agreement was not capable of taking effect as a periodic tenancy, because it was intended that it could only be determined in the specified circumstances. Prior to 1926, the agreement for an uncertain term would have taken effect as a lease for B's life, subject to the express provisions set out in the agreement for earlier determination. Therefore, by virtue of s.149(6) LPA 1925, the agreement took effect as a lease for 90 years determinable on B's death. As B was still alive and none of the express provisions in the agreement for earlier determination applied, Mexfield was not entitled to possession and B's tenancy continued.

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