

**IN THE NEWS RECENTLY...**  
**By Clare Cullen, barrister at Field Court Chambers**

**Housing Court**

The Ministry of Housing, Communities and Local Government has [issued a call for evidence](#) considering the case for a housing court. Alongside, the department has published a report on the current experience of the county court and the First Tier Tribunal (Property Chamber). The report found that the accelerated possession procedure operates “*relatively well...up to the ‘possession order’ stage*” with the median average duration being 5.3 weeks from claim to order in the first quarter of 2018. The report also found that the main delays in the process related to enforcement. The call for evidence closes at **11.45 pm on 22 January 2019**.

**Homelessness Code of Guidance**

The [Homelessness Code of Guidance was updated](#) on 1 November 2018. The updated guidance has amended paragraph 1.1 and added new paragraphs 7.12 (eligibility), 8.40 (priority need) and 17.10 (suitability).

**Legal aid deserts**

A [BBC investigation](#) has found that up to a million people live in areas with no legal aid provision for housing and a further 15 million in areas with only one provider.

**Homes (Fitness for Human Habitation) Bill**

On 12 December 2018, the [Homes \(Fitness for Human Habitation\) Bill](#) reached committee stage in the House of Lords. No changes were suggested to the Bill so it goes directly to third reading on 19 December 2018.

**Tenant Fees Bill**

On 11 December 2018, the [Tenant Fees Bill](#) completed the report stage in the House of Lords. The Bill will proceed to third reading. The draft Bill now caps deposits at five weeks rent where the annual rent is less than £50,000.

**Private Rented Sector minimum level of energy efficiency**

The Ministry of Housing, Communities and Local Government has [announced](#) that it will

amend the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 to require landlords in the private rented sector to install energy efficiency measures in homes with the lowest energy performance ratings. It is anticipated that the upgrades will save tenants an average of £180 a year on their energy bills.

### **Case law update**

#### **Rent suspension clause**

[Baillie v Savage \[2018\] EWHC 3035](#)

The High Court has dismissed an appeal against a decision of the county court that a rent suspension clause had been activated after an external wall collapsed.

In 2008, the respondent entered into a two year fixed tenancy agreement of a property. The tenancy agreement did not contain a break clause. The respondent paid all of the rent (approximately £34,000) in advance.

The tenancy agreement contained the following term:

"The rent or a fair proportion of the rent shall be suspended if the Premises or any part thereof shall, at any time during the tenancy, be destroyed or damaged by any risk insured by the landlord so as to be unfit for occupation and use...

"The suspension of the rent or a fair proportion of the rent, according to the nature and extent of the damage sustained, shall remain until the Premises shall again be rendered fit for habitation and use."

Four months into the tenancy, part of one of the garden walls collapsed. The collapse blocked the side passage to the property and caused damage to a pipe for the heating system. Cracks subsequently appeared in the property itself. In February 2009, the respondent instructed a structural engineer who concluded that property was not safe as a habitable dwelling.

The respondent issued a claim against the appellant in the county court. The judge considered that the suspension term had been activated and ordered the appellant to pay the respondent £18,059 together with a release of the deposit.

An appeal to the High Court was dismissed. The judge was right in his construction of the rent suspension clause which required an occurrence of damage during the tenancy but, once damage had occurred, the real risk of further damage of a similar nature was sufficient to satisfy the requirements of the suspension clause particularly where further damage was potentially dangerous to the occupants.

### **Access terms**

[Network Homes Limited v Harlow \[2018\] EWHC 312 \(Ch\)](#)

The High Court has allowed an appeal by a housing association landlord after its claim for an access injunction was dismissed.

The assured tenant had refused access to the housing association to install a new fire safe front door. It was agreed that this would amount to an improvement rather than a repair.

The tenancy agreement contained the following relevant term:

"You must give all authorised employees and agents.....reasonable access to the Property to inspect or carry out essential maintenance, inspection and repair to the Property or to the building or estate in which the Property is situated. This includes treatment programs for pest eradication, improvement work and access to repossess your home if it is to be redeveloped or disposed of."

HHJ Luba QC dismissed a claim for an access injunction on the basis that the tenancy agreement did not permit access for improvements.

The High Court allowed the appeal and held the relevant term did permit access for improvements. The judge, in construing the provision, considered it necessary to bear in mind that the tenancy agreement was "*poorly drafted*" and the language "*may have been chosen infelicitously, and the court should be more willing to depart from the natural meaning of the words chosen than when considering a carefully drafted document.*" Whilst the normal meaning of inspection, repair and essential maintenance did not include improvement work, the term expressly included those matters within its scope.

## **Superior landlord and service of section 21 notice**

[\*Barrow v Kazim and others\* \[2018\] EWCA Civ 2414](#)

The Court of Appeal has held that a section 21 notice can only be valid if it is served by the immediate landlord at the time of service.

The respondents predecessors in title had let the property to an agency. The agency (with permission) sub-let an individual flat within the property to the appellants under a fixed term assured shorthold tenancy which subsequently became a statutory periodic tenancy.

The respondents became registered proprietors of the property and took steps to obtain possession from the agency. They served a notice to quit on the agency and the appellants. The notice was intended to constitute a notice under section 21(1)(b), Housing Act 1988 insofar as it concerned the appellants as subtenants. The notice to quit served on the agency brought the agency's interest to an end on the expiry of the notice

Section 18, Housing Act 1988 provides that an assured tenancy lawfully granted by a mesne tenant (in this case the agency) will:

“continue in existence as a tenancy held of the person whose interest would, apart from the continuance of the assured tenancy, entitle him to actual possession of the dwelling house.”

Section 21(1)(b), Housing Act 1988 provides that:

“a court shall make an order for possession of the dwelling-house if it is satisfied...the landlord or, in the case of joint landlords, at least one of them has given the tenant not less than two months' notice in writing stating that he requires possession of the dwelling-house.”

A possession order was granted at first instance on the basis that the respondents were entitled to serve a notice to quit on the inferior tenant at the same time. An appeal to a circuit judge was dismissed.

The Court of Appeal allowed a second appeal. The court held that a notice under section 21 must come from the landlord at the date the notice is given. If a mesne tenancy exists, the fact that it is to come to an end by the date specified in the section 21 notice will not render the head landlord a “landlord” for the purposes of section 21.

### **ECtHR, Art.8 and section 21**

[FJM v United Kingdom Application No. 76202/16](#)

The European Court of Human Rights (ECtHR) has confirmed that where a private landlord has taken possession proceedings under section 21, Housing Act 1988, an article 8 defence cannot be raised.

This was the case of [McDonald v McDonald and others \[2016\] UKSC 28](#) which had been taken to European Court of Human Rights (ECtHR).

### **Homelessness – suitability**

[Alibkheit v Brent, Adam v City of Westminster \[2018\] EWCA Civ 2742](#)

The Court of Appeal has considered two suitability challenges concerning out of areas offers and the requirements under section 208(1), Housing Act 1996.

Section 208(1), Housing Act 1996 provides that “so far as reasonably practicable”, local authority’s shall secure accommodation under Part 7 “in their district.”

Ms Adam was a single mother with three children. Westminster accepted that it owed her the full homelessness duty under s.193(2), Housing Act 1996. Westminster’s policy set out how applicants would be prioritised for accommodation within Westminster. Ms Adam did not fall within the priority groups under the policy. Ms Adam was offered accommodation in the London Borough of Sutton. The housing officer dealing with Ms Adam’s application noted that she was 696 on the housing list and was approximately 15 years away from an offer of social housing. It also noted that there was one suitable unit within the borough but that it was reserved for a household higher up the priority list. The decision was confirmed on review. The decision was challenged on the basis that Westminster hadn’t made sufficient efforts to comply with its duty to house Ms Adam in borough if reasonably practicable and that they

had failed to give adequate reasons for the decision. The challenge had been dismissed on appeal to the county court.

Ms Alibkhiet applied as homeless to Brent with his wife and four year old daughter. Brent accepted that he was owed the full duty under section 193(2). Brent maintained a temporary accommodation placement policy setting out when priority is given for applicants in borough or within Greater London. Mr Alibkhiet did not fall within the priority categories. The policy stated that an out of London placement will be made “where suitable, affordable accommodation is not available locally.” Mr Alibkhiet was offered a flat in Smethwick in the West Midlands. Mr Alibkhiet refused the offer and objected on the basis that his support network was in Brent, there was no Arabic community in the area and there were fewer job opportunities. The authority decided its duty was discharged and the decisions on suitability and discharge were upheld on review. The decision was appealed to the county court. During the course of the appeal, a witness statement from the reviewing officer revealed that at the time of the offer there was a property in borough and a property in the adjoining borough that was available. The review decision was quashed on the basis that there was no cogent explanation as to why the property in the adjoining borough had not been offered.

The Court of Appeal dismissed Ms Adam’s appeal and allowed Brent’s appeal. The Court of Appeal commented that:

*“[a] court must be wary about imposing onerous duties on housing authorities struggling to cope with the number of applications they receive from the homeless, in the context of a severe housing shortage and overstretched financial and staffing resources.”*

In respect of Ms Adam’s case, the Court of Appeal rejected that Westminster made no real attempt to locate in borough accommodation for Ms Adam and that enquiries as to available accommodation should have been repeated over a longer period of time. The Court of Appeal considered that Westminster had given sufficient reasons on the period of enquiries as to available accommodation particularly as the point hadn’t been raised on review. It was abundantly clear what Westminster did to comply with its duty under section 208 to secure accommodation in borough so far as reasonably practicable.

In respect of Mr Alibkhiat's case, the Court of Appeal considered that, whilst the decision letter could have been expressed better, the review decision was clear enough that applying Brent's policy, Mr Alibkhiat did not qualify for priority. The fact that there was one potentially available unit, or possibly two, did not undermine the application of the policy. The Court of Appeal also dismissed Mr Alibkheit's respondent's notice and held that Brent did not have to explain how it procured units of accommodation in London or provide further reasons for not accommodating Mr Alibkheit in an area closer to Brent than Birmingham. The Court of Appeal also considered that Brent was not required to give reasons at the point of offer.

### **Administration charges – forfeiture and waiver**

[\*Stemp v 6 Ladbroke Gardens Management Limited\* \[2018\] UKUT 0375](#)

The Upper Tribunal has reduced an administration charge concerning legal fees payable under the terms of a lease on the basis that forfeiture had been waived.

The appellants were long leaseholders. The respondent was their landlord. The lease contained the following covenant:

“That the Lessee will pay to the Lessor on demand all costs charges and expenses (including legal costs and Surveyor's fees) which may be incurred by the Lessor or which may under the terms of the Lease or otherwise become payable by the Lessor under or in contemplation of any proceedings in respect of the maisonette under section 147 or 147 (sic) of the Law of Property Act 1925 or in preparation and service of any notice thereunder respectively and arising out of any default on the part of the Lessee notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court.”

It was common ground that the second reference to section 147 should have been a reference to section 146. The appellants failed to pay the service charge for major works to the roof. The landlord decided to seek a determination of the liability and reasonableness of the service charge from the First Tier Tribunal ('FTT') so that it had a determination under section 81, Housing Act 1996 and could then service a section 146 notice. The statement of case to the

FTT pleaded that the landlord was contemplating forfeiture and that the application to the FTT was the first preliminary step in the preparation of a section 146 notice.

On 16 December 2016, the FTT determined an amount payable for the service charge which was subsequently paid. The respondents sought to recover as an administration charge the legal costs incurred in the proceedings before the FTT in the sum of £43,969.96. The appellants failed to pay this administration charge and a further application was made to the FTT. The FTT decided that £26,381.98 was due by way of a reasonable administration charge for legal costs and fees (this amounted to 60% of all of the legal costs).

In an appeal to the Upper Tribunal, the appellant relied on a number of acts which were said to constitute a waiver of the right to forfeit. The respondent contended that in light of the statutory fetters on the respondent's ability to enforce the right of re-entry, the respondent was not at any material time able to exercise the right and, therefore, unable to waive the right. Alternatively, the respondent had not waived the right to forfeit.

The Upper Tribunal held that in respect of an irredeemable breach (such as non-payment of the service charge on the date due), the right to forfeit can be waived before a determination is made under section 81, Housing Act 1996. The Upper Tribunal held that a demand on 3 September 2016 did amount to a waiver of the right to forfeit however earlier correspondence addressed to "leaseholders", including the appellants within major works consultation and the respondents insisting on entry under covenants in the lease (distinguishing the case of *Cornillie v Saha* [1996] 28 HLR 651 (CA)) did not amount to waiver. The administration charge was reduced to 60% of the costs prior to 3 September 2016.