Housing Law Update (Part 2)

Adrian Stalker* continues the second of this year's digests, part 1 being at 2019 SCOLAG 202

The following is part 2 of the Housing Law Update, which focusses on several English cases reported or decided between May and September 2019. Readers should approach English authorities with care due to the differences in the legislation and common law between the two jurisdictions. Full texts of the cases cited can usually be found on the web, in particular at <www.bailii.org>. Readers are asked to note that the citation "WLUK" is a reference to the citation system of *Westlaw UK*, and is used if there is no report in a published series, and no neutral citation for the case.

English Cases

Homelessness

***Samuels* v. *Birmingham* [2019] UKSC 28; [2019] HLR 32**

A person is intentionally homeless if he deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy: section 191(1) of the 1996 Act in England, section 26(1) of the Housing (Scotland) Act 1987 in Scotland. In deciding whether it would have reasonable to continue to occupy accommodation, one of the issues is *affordability*. This typically arises where the applicant has been forced to leave accommodation due to rent or mortgage arrears, and then seeks assistance from the local authority. In England, the Homelessness (Suitability of Accommodation) Order 1996 requires that the authority must take into account whether or not accommodation was affordable, and in particular, it must consider the applicant's available financial resources, including social security benefits, and the costs of the accommodation. Paragraph 17.40 of the 2006 Code of Guidance for England stated that authorities should "regard accommodation as not being affordable if the applicant would be left with a residual income which would be less than the level of income support or income-based jobseekers allowance that is applicable in respect of the applicant, or would be applicable if he or she was entitled to claim such benefit. … Housing authorities will need to consider whether the applicant can afford the housing costs without being deprived of basic essentials such as food, clothing, heating, transport and other essentials. … . " The Scottish Code of Guidance (at paras 7.13 and 7.14) draws a distinction between "wilful neglect [by the applicant] of his or her affairs" and "real personal or financial difficulties". It also states: "There is no absolute test of whether someone is in real financial difficulties – as distinct from the reasons for such difficulties. However, areas that should be considered include whether, if he or she continued to pay the housing costs, the amount of disposable income left would be equal to or less than the amount which someone reliant entirely on benefit would be entitled to receive in income support…"

Ms Samuels lived with four children in a property let to her by a private landlord. Her rent was £700 per month. She received housing benefit of £548.51 per month, so that there was a monthly shortfall of £151.49. She fell into rent arrears and her landlord gave her notice. In July 2011 she left the property and, in June 2012, she made a homeless application. She provided details of her income and expenditure for the time when she had been living in the rented accommodation. On the basis of that information, the authority decided that she was intentionally homeless because she could have afforded to remain in the property. Ms Samuels requested a review of the decision. Her solicitors provided revised details of her income and expenditure. Excluding housing benefit, her monthly income was stated to be £1,349.33, comprising income support (£290.33), child tax credit (£819) and child benefit (£240). Her monthly expenditure was stated to be £1,234.99, including £750 for food and household items. On 11 December 2013, the reviewing officer decided that the property had been affordable for the appellant. The decision letter recorded that he considered that £750 per month on food and household items was excessive. He concluded that he could not "accept that there was not sufficient flexibility" in the appellant's household income to enable her to meet the monthly shortfall. Ms Samuels appealed unsuccessfully to the county court and the Court of Appeal. She then appealed to the Supreme Court, where she argued that: (a) In considering whether the property had been affordable for her, the authority was not entitled to take into account any of the state benefits she received because those benefits were not intended to be used to meet housing costs; (b) In paragraph 17.40 of English Code of Guidance, the reference to income support had to be taken to include amounts available in respect of children by way of child benefit or child tax credit to the appellant. If so, the property had not been affordable because her residual income was less than the amount to which she was entitled by way of income support, child tax credit and child benefit.

Allowing the appeal, the Court held that, in deciding whether accommodation is affordable for an applicant, the 1996 Order requires the authority to take into account all sources of income, including all social security benefit. The Order also requires the authority to compare the applicant's income with the applicant's "reasonable living expenses", assessment of which cannot depend on the subjective view of the authority's officer. In paragraph 17.40 of the Code, the Secretary of State had recommended that authorities regard accommodation as unaffordable if the applicant's residual income would be less than the level of income support. Even if that recommendation in respect of income support is not interpreted as extending to benefits for children, the lack of a specific reference to those benefits did not make the level of them irrelevant. Benefit levels are not generally designed to provide a surplus above subsistence needs for the family. The benefit levels are material to the assessment of the reasonable living expenses of a household with children.

The defendant authority's reviewing officer had asked whether there was sufficient "flexibility" in the appellant's finances to enable her to cope with the shortfall of £151.49 between her rent and her housing benefit; the correct question, however, was not whether, faced with that shortfall, she could somehow manage her finances to bridge the gap but what were her reasonable living expenses (other than rent), that question being determined having regard to both her needs and those of her children, including promotion of their welfare; her monthly expenditure of £1,234.99 was well within the amount regarded as appropriate by way of welfare benefits (£1,349.33); accordingly, her expenditure had been reasonable.

It is not easy to draw conclusions from this decision, as to

how local authorities in Scotland might approach the question of affordability. Giving the reasons for the Court's decision, Lord Carnwath stated, at [32], "this is an appeal relating to a particular decision, made more than five years ago, on the information then available to the council, not a general review of the law and policy in this field." Also, the concept of "reasonable living expenses" has some importance in the Court's decision. However, that concept comes from article 2 of the 1996 Order, which does not apply in Scotland. The term: "reasonable living expenses" is not used in the Scottish Code of Guidance. That said, it is arguable that, standing the decision in *Samuels*, "reasonable living expenses" is one of the "areas that should be considered" for the purposes of paragraph 7.14 of the Scottish Code.

Shelter were interveners in the case. The evidence of Polly Neate, its Chief Executive, noted that there is a lack of any generally accepted guidance for local authorities to assess the reasonableness of living expenses under the 1996 Order. Shelter's research showed a wide variety of practice among authorities, and the absence of any "transparent or evidence-based guidance" for that purpose. 60% of authorities told Shelter that they had no internal guidance to assist them; only 17 of the 246 authorities who responded to Shelter's Freedom of Information Act requests provided any training to housing decision-makers on affordability assessment. [It seems reasonable to suggest the position of Scottish local authorities would be similar.] Commenting on that evidence, Lord Carnwath said: "[It] shows what appears to be an unfortunate lack of consistency among housing authorities in the treatment of affordability, and a shortage of reliable objective guidance on reasonable levels of living expenditure. It is to be hoped that, in the light of this judgment, the problem will be drawn to the attention of the relevant government department, so that steps can be taken to address it and to give clearer guidance to authorities undertaking this very difficult task."

Evictions: the role of the Public Sector Equality Duty

***London and Quadrant Housing Trust* v. *Patrick* [2019] EWHC 1263 (QB)**

The tenant, Mr Patrick, occupied a house under a tenancy with LQHT. He had behaved in an aggressive and intimidating manner towards the landlord's staff and towards his neighbour. His landlord obtained an injunction to prevent continued anti-social behaviour, but Mr Patrick breached it only a few days later. LQHT then brought committal proceedings and he was sentenced to four weeks' imprisonment, suspended for one year. It also commenced possession proceedings. Several months later Mr Patrick alleged for the first time through his legal representatives that he suffered from a mental impairment. They served medical evidence two days before the hearing fixed in the case, confirming that he suffered from schizophrenia. Mr Patrick argued that he was a disabled person and the landlord had failed to comply with its public sector equality duty. He also maintained that eviction would be contrary to section 15 of the 2010 Act, as his behaviour was a consequence of his disability. The judge found that seeking possession was a proportionate means of achieving a legitimate aim. He granted the possession order, but suspended it for six weeks to take into account the tenant's disability. The landlord subsequently carried out a formal assessment of the PSED duty and concluded that enforcement of the order was justified.

Mr Patrick appealed to the High Court. Refusing that appeal, Mr Justice Turner held that in the context of possession cases concerning public sector landlords, the following factors were likely to be relevant.

(a) When such a landlord was contemplating taking or enforcing possession proceedings affecting a disabled person it was subject to the PSED;

(b) The duty was to have due regard to the need to achieve the results identified in section 149. The landlord had to weigh the factors relevant to promoting the objects of the section against any material countervailing factors. In housing cases, the countervailing factors included the impact of the disabled person's behaviour on others.

(c) The landlord was not required in every case to take active steps to inquire into whether the tenant was relevantly disabled. However, where the available information raised a real possibility that that might be the case, then a duty to make further enquiries arose.

(d) The duty had to be exercised in substance, with rigour and an open mind, and should not be reduced to a "tick-box" exercise.

(e) The duty was a continuing one and was not discharged at any particular stage of the decision-making process.

(f) The landlord had to assess the risk and extent of any adverse impact, and the ways in which such risk could be eliminated before seeking and enforcing possession, and not merely as a rear-guard action following a decision. However, the duty to have "due regard" only took on any substance when the disability was or ought to have been apparent. In such cases, the lateness of the knowledge might impact on the discharge of the duty, and could justify a less formal assessment than would otherwise have been appropriate. Thus a tenant whose anti-social conduct had adversely affected neighbours for a considerable time, but whose disability was raised at the eleventh hour might find that the discharge of the duty did not necessarily mandate a postponement of the date or enforcement of a possession order.

(g) There was no duty to make express written reference to the regard paid to the duty, but recording the considerations taken into account in discharging it would reduce the scope for later argument. Cases might arise in which a conscientious decision-maker complied with the duty even where he was unaware of its existence.

(h) The court had to be satisfied that the landlord had carried out a sufficiently rigorous consideration of the duty, but it was not entitled to substitute its own views for the relative weight to be afforded to the competing factors informing its decision.

In light of these factors, the landlord had not breached the duty. The tenant had been legally represented throughout and requests by the landlord for his medical records had met with no response. The issue of his disability was pleaded very late in the day, and the medical evidence was not served until two days before the hearing. It was only on receipt of the medical evidence that the landlord could sensibly be expected to engage with the duty. The duty was not a trump card. The landlord considered the tenant's disability and concluded it was appropriate to pursue its claim for possession. Had the tenant's disability been apparent at an earlier stage, a more formal

approach to the performance of the duty would have been appropriate.

***Forward* v. *Aldwyck Housing Group Ltd* [2019] EWCA Civ 1334**

Reference is made to the discussion of the High Court proceedings, in the April 2019 update (2019 SCOLAG 84). Mr Forward (the appellant) was an assured tenant of Aldwyck Housing Group (the respondent). They obtained an order for his eviction, on the grounds of antisocial behaviour. He appealed against that decision. The respondent claimed that the appellant and others had engaged in anti-social behaviour, involving drug use, in his flat. The appellant maintained that he was vulnerable to exploitation, because of physical and mental disability and had not given permission for the other people to be in his flat. The police had previously obtained a closure order in respect of the flat. They considered the appellant to be vulnerable and that his flat had been taken over by others to deal drugs, a situation known as "cuckooing". The respondent did not carry out a public sector equality duty assessment under section 149 of the Equality Act 2010, prior to raising proceedings. An assessment was carried out prior to trial, but it was not disputed that it was inadequate and that there had been a failure to have due regard to the duty. However, the judge was not satisfied that the appellant was mentally impaired or that there was a link between his physical disability and the anti-social behaviour. She concluded that a possession order was proportionate and reasonable. In the High Court, the appellate judge had found that the appellant had succeeded in demonstrating that there was an error in the trial judge's approach to the PSED, in particular her conclusion that breach of PSED was incapable of being raised as a defence to possession proceedings unless connected to a private law right. Also, a simple proportionality assessment was not what the PSED required. A rigorous consideration of the impact of the decision to commence eviction proceedings, against the equality objectives encapsulated in the PSED was necessary. That must be done with an open mind and not as a defensive 'sweep - up'. This consideration must itself be set in the context of promoting the statutory objectives.

However, the appeal nevertheless failed because the appellant did not provide any support for his assertion that he had mental health difficulties to such degree as to enable the judge to conclude that the eviction should not be granted against him. If there had been clear evidence of disability and significant impact arising from the disability the trial judge's conclusion based on proportionality may have been over-turned but there was a substantial body of evidence that the appellant had been complicit in what had been going on at the flat for a substantial period of time. The respondent had engaged with him and steps had been taken to intervene and assist him. The trial judge had carefully assessed the alternative measures, short of eviction, suggested to her and reached rational conclusion on each one. When faced with an intransigent tenant whose behaviour causes distress to fellow residents over an extended period of time it cannot be necessary for the respondent to have tried every single option prior to seeking eviction. Accordingly, the failure to have due regard to the important matters set out in section 149 of the 2010 Act in the structured way required by the legislation was not a material error in this case. Looked at from the other end of these proceedings, it would be wholly unfair and disproportionate for to allow the appeal because of the errors in the trial judge's approach when the entitlement of the respondent to seek eviction and the reasonableness of making the order sought, had already been clearly established on the facts of the case.

Dismissing Mr Forward's further appeal, the Court of Appeal observed that there was no general rule that, if there was a breach of the PSED, any decision taken after such breach had to be quashed. In a possession action, the court, while having regard to the importance of the PSED, would also have available to it the facts of the particular dispute and be able to assess the consequence of any breach of duty. The appellant's submission that the court should quash a decision made where the PSED was not complied with and act as some sort of mentor to decision-makers had to be rejected. Rather, in deciding the consequence of a breach of the PSED, the court should look at the facts of the case and, if on those facts it was highly likely that the decision would not have been substantially different if the breach of duty had not occurred, there would be no need to quash the decision.

Applying those principles to the facts of the case, consideration of the appellant's disability would have made no difference to the respondent's decision to seek possession. The district judge had found that there was no viable option for the respondent other than to seek possession, particularly given the position of the other tenants in the block whose lives were blighted by the appellant's breach of the terms of his tenancy. Furthermore, it was not for the instant court to substitute its view for that of the lower courts in the absence of any error.

Abbreviations

Case reports

AC	Appeal Cases
HLR	Housing Law Reports
WLR	Weekly Law Reports

Neutral citation

EWCA	Court of Appeal (England & Wales)
EWHC	High Court (England & Wales)

Level of court (inserted after the case citation where not otherwise apparent)

CA	decision of the Court of Appeal in England
QBD	decision of the Queens Bench Division in England
Ch	decision of the Chancery Division in England

* Adrian Stalker is an advocate with Westwater Advocates (adrian.stalker@advocates.org.uk). He is a legal member of the Housing and Property Chamber of the First-tier Tribunal for Scotland, an expert in housing law he also practices in other fields of civil litigation. He is author of *Evictions in Scotland*, published by Avizandum (2007), and *Housing and Equality Law in Scotland*, published by Shelter Scotland (2018).