

## housing update

Summer 2009

### Authority owed no duty of care to couple at risk from youths

The Court of Appeal has ruled that a local authority owed no duty of care to move a couple with learning difficulties to emergency accommodation before they were assaulted by local youths – even though it knew they were at risk.

The couple lived with their children in a flat provided by Hounslow Borough Council. They were befriended by local youths who then exploited them and used their flat for illegal activities.

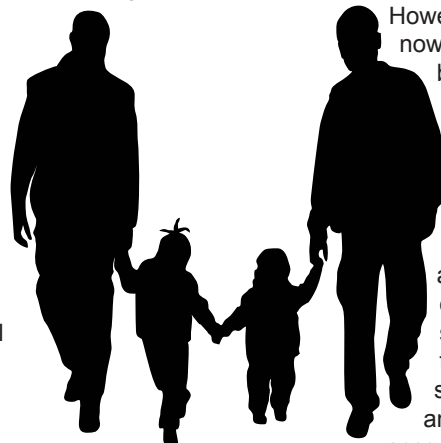
The social worker became aware of the problem and informed the police and the children and families department. She also informed the housing authority that the couple were vulnerable and that their application to be re-housed should be considered urgently.

The housing department also received a petition from other tenants on the estate complaining about the activities in the flat involving the youths. The social worker

and housing officer visited the couple at their flat and they were sent a housing transfer form.

Matters then came to a head one weekend when the couple were imprisoned in the flat by the youths. They were abused and repeatedly assaulted, both physically and sexually. Some of the youths were later convicted of criminal offences.

The couple subsequently claimed that the authority should have recognised that they were at risk and should have re-housed them. The High Court held that the authority owed a duty of care to the couple and had breached that duty by failing to re-house them before the assaults took place.



However, that ruling has now been overturned by the Court of Appeal which said it was clear that the authority owed no duty of care to the couple. Both the social worker and the housing department had simply sought to carry out their statutory duties and no more in accordance with the

National Assistance Act 1948 and the Housing Act 1996.

No one had suggested that the authority was in breach of any statutory duty that could lead to a private action for damages and, accordingly, the way the authority had exercised its duties in the case did not create a duty of care. It was also accepted that there was no assumption of responsibility, nor was there any other “special” factor that could impose a duty of care on the authority.

It was true that a housing officer had visited the flat and the department had considered the matter, but that did not mean it had assumed responsibility. It was also important to remember that, as a landlord and a supplier of housing, the local authority had to take into account many conflicting interests.

In those circumstances, it would not be fair or reasonable to impose the kind of duty of care claimed by the couple.

▶ The House of Lords has ruled that Glasgow City Council had not been negligent in failing to warn a tenant that he was at risk of violence from a neighbour.

The tenant was later fatally assaulted by the neighbour who was facing eviction. The Lords held that the council would only owe a duty of care to the tenant if it had shown that it had assumed responsibility for his safety. It had not done that and so was under no obligation to issue warnings.

### LVT decision overturned as it was based on a false assumption

A decision by a Leasehold Valuation Tribunal (LVT) could not be allowed to stand as it was based on the assumption that the two parties were in agreement about the valuation evidence when in fact there was no such agreement.

That was the ruling of the Lands Tribunal (LT) in a case which involved the sale of a property comprising of several flats.

The purchaser was entitled to acquire the flats under the Leasehold Reform, Housing and Urban Development Act 1993. The leaseholds on the flats were for 73 years and one month. Both the purchaser and the owners of the freehold had agreed that the leasehold value of the property was £830,000 and that the value of the leasehold interest on a “no-Act” basis was £790,000.

Both sides also agreed that they would need to apply an uplift of 5.5% in order to obtain the value of the freehold reversion and the value of the participant’s interest after the

acquisition. That was as far as the agreement went, however, because the seller believed the uplift should be applied to the current leasehold value whereas the purchaser believed it should be applied to the value of the leasehold on the “no-Act” basis. The LVT found in favour of the purchaser.

However, that decision has now been overturned on appeal by the Lands Tribunal.

It held that the LVT had reached its decision on the basis that both sides were in agreement on the valuation evidence whereas they were not. It meant the LVT had been required to make a valuation decision rather than a decision on a point of legal principle. It had therefore proceeded on the basis that the freehold value of the property with vacant possession was the same as the value of the flats with a share of the freehold.

The LT ruled that there would have to be a new hearing to determine the issue.

# Pregnant woman fails to get a judicial review of housing authority decision

A woman has failed in her attempt to seek a judicial review of the way her local authority handled her application for accommodation after she became pregnant.

The woman had been living at a single person's hostel. She had a bedroom and a living area to herself but had to share a bathroom with a male resident. Her landlord served notice when he became aware that she was pregnant and due to give birth in December last year.

However, he accepted that she should not be evicted shortly before the birth or immediately afterwards.

The woman then applied to Waltham Forest Borough Council as a homeless person on the basis that it was not reasonable for a pregnant woman, or a woman with a baby, to live in a hostel and share facilities with male residents.

The authority accepted her application

but refused to provide accommodation until further inquiries had been carried out. It submitted that she was not homeless because she could continue living at the hostel until March this year - the earliest date when possession proceedings could begin.

The woman then applied for a judicial review of the authority's decision.

In the meantime, however, the authority found accommodation for her and so discharged its legal duties. This meant her claim had now become academic.

She decided to press ahead with it anyway, claiming it was unreasonable for an authority to refuse to provide accommodation for a pregnant woman or a woman who had just given birth.

She also submitted that it could never be acceptable for a pregnant woman to have to live in a hostel which required

**Claim had become purely academic**

her to share a bathroom with a man who was not a member of her family. The woman sought a declaration that Waltham's decision had been 'Wednesbury' unreasonable - that is, so unreasonable that no reasonable authority could come to such a conclusion.

However, the High Court refused to determine her claim because it had become purely academic. The court held that an academic claim should only be heard in "exceptional circumstances" or if it raised matters in the public interest.

Such situations might arise if there were several cases involved or if there was an important legal point that needed to be clarified.

## Courts should not intervene in housing allocation schemes unless...

Lord Neuberger has said that courts should not intervene in local authority housing allocation schemes unless there are "clear and exceptional circumstances".

He made the comments when giving the lead judgment in the House of Lords in a case involving Newham Borough Council.

Newham's housing allocation policy included two ways of offering properties - a choice based letting arrangement and a direct offer arrangement. Applicants who were subject to the direct offer system generally took priority.

That system was challenged by a Mr Ahmad who had been waiting for council accommodation for eight years. The Court of Appeal ruled that the council's housing allocation policy was unlawful but that has now been overturned by the House of Lords. Lord Neuberger said that the living conditions endured by Mr Ahmad and his family would be sure to evoke sympathy and concern.

However, there were many factors to consider. He said: "It could well be an unfair suspicion on my part, but this may indicate that, when they came to consider the scheme, the courts below were impressed by the fact that, despite their very unsatisfactory living conditions, Mr Ahmad and his family had still not been provided with council accommodation after eight years.



"However, save in the most exceptional circumstances, it would be wrong in principle to have any regard to the housing circumstances and requirements of an individual applicant when considering the validity of a housing allocation scheme."

He added that although the Ahmads were in difficult circumstances, there were many other applicants whose housing needs could be considered by most people as even more pressing. "This point also highlights how inapt it is for the courts to interfere with housing allocation schemes, save in clear and exceptional circumstances.

"This follows from the striking imbalance between supply and demand for housing, the very large number of families with an urgent need to be housed under Part 6 of the 1996 Act, and the almost infinite number of different permutations of circumstances giving rise to the urgency.

"Knowledge of the circumstances of

applicants generally, long term strategy considerations, expertise, political and social awareness, and local knowledge all have a part to play when it comes to formulating and implementing a housing allocation scheme.

"With information essentially consisting of the scheme itself, the circumstances of the particular applicant and a few statistics (of questionable mutual consistency), the court should be very slow indeed to second guess Newham."

The other four Law Lords agreed that Newham's appeal should be allowed.

While expressing her judgment, Baroness Hale said it would be dangerous to give examples of schemes which might be considered irrational but she did offer some guidance.

"One possibility might be a policy which ensured that small families had priority over large ones, or that people coming from outside the borough had priority over those living within it, or that people who had been waiting the shortest time had preference over those waiting the longest.

"But it is not irrational to have a policy which gives priority to some tightly defined groups in really urgent need and ranks the rest of the 'reasonable preference' groups by how long they have been waiting."

## Deferment rate 'should be higher' when valuing ground rent only

The deferment rate applicable when making a valuation involving ground rent only should be higher than when valuing a site on which a property was already standing.

That was the ruling of the Lands Tribunal (LT) in a case involving the freeholders of some properties in the West Midlands. The freeholders had appealed against a decision by the Leasehold Valuation Tribunal (LVT) to apply a deferment rate of 5.5%. They argued that the tribunal should have applied a deferment rate of 4.75%, the figure considered to be appropriate for houses in central London by the Court of Appeal in *Earl Cadogan v Sportelli*.

The freeholders submitted that although *Sportelli* had been decided on the basis of deferment rates for standing houses, the principles should also apply to ground rents as the factors involved

were broadly the same. For example, they argued that the rental value of a site wasn't any more volatile than the capital value of a house.

In making their appeal, the freeholders also submitted that there was no evidence to justify any difference in deferment rate between houses in central London and those in the West Midlands.

In reaching its decision, the LT examined how the risks involved in long reversions were volatility, illiquidity, deterioration and obsolescence. It considered that the increase in value of a completed house was likely to create a more than proportionate increase in the residual site value.

The purchaser of a site only would therefore require a higher risk premium to compensate for the risk of extra



volatility and illiquidity. However, that increased risk would be partly offset by the reduced risk of deterioration and obsolescence that would apply if a house were involved.

The overall effect should therefore be to increase the deferment rate in cases like this to 5%. That was higher than the freeholders had wanted but lower than had been set by the LVT.

## Tenant's needs 'outweigh pressure on housing'

A local authority has lost its appeal to take possession of a house it considered too large to be occupied by just two people.

The Court of Appeal held that the Housing Act 1985 clearly anticipated cases where the pressure on public housing could be outweighed by a tenant's particular circumstances and difficulties.

The case involved a 50-year-old man who had lived in a three-bedroom house owned by Bracknell Forest Borough Council nearly all his life and had taken over the tenancy when his mother died. His wife and children had been with him when he took over the tenancy but they had since moved out.

The tenant was living in the house with his sister when the authority applied for a possession order under s.82 of the Housing Act because it considered the property to be too large for just two people and because it would be more



suitable for other people whose needs were greater.

The recorder accepted that the house was larger than the tenant needed and also accepted that the authority had offered him suitable alternative accommodation. However, he declined to grant the possession order on the grounds that it would be unreasonable taking into account all the circumstances, including the fact that the tenant had lived at the property for so long.

The authority appealed saying the recorder had been wrong to focus so

much on the tenant's circumstances and had failed to take into account the fact that suitable alternative accommodation had been offered. He also failed to take into account other factors such as the house being under-occupied when he considered the reasonableness of granting an order.

However, the Court of Appeal has upheld the recorder's decision. It said the recorder had considered the under-occupation and the offer of alternative accommodation but had still reached the conclusion that these factors were outweighed by the tenant's personal circumstances. These included his age, the length of occupation and the possibility that a possession order might have a permanently destabilising effect on him.

The recorder was entitled to reach such a conclusion as the Housing Act made it clear that there could be cases where personal circumstances outweighed pressures on public housing needs.

## Concept of tolerated trespassers finally abolished

The concept of tolerated trespassers has been abolished with the introduction of Schedule 11 of the Housing and Regeneration Act 2008 which came into effect on 20<sup>th</sup> May this year. It means that a tenancy will no longer come to an end simply as a result of a possession order being made. The tenancy will now remain in place until the order is executed.

Schedule 11 doesn't address situations in which a landlord may have obtained a possession order but then transferred

his interest in the property. Such issues are dealt with by provisions in the Housing (Replacement of Terminated Tenancies) (Successor Landlords) England Order 2009 which also came into effect on 20<sup>th</sup> May.

The provisions in the Order mean that a new tenancy will arise provided that the successor landlord is entitled to let the property and he has not entered into any other agreement with the tenant after the termination of the previous tenancy. If a legal authority transfers its

interest in a property to a registered provider of social housing then former secure tenants will become assured tenants.

Possession orders which bring an end to the original tenancy remain in force against the new tenancy. As far as succession rights are concerned, the new tenancy will be classed as a continuation of the original tenancy to protect the concept that there should only be one succession to a secure or assured tenancy.

# Rescinding leasehold sale contracts must be done promptly

The right to rescind a contract for the sale of leasehold property must be exercised promptly within reasonable time limits or else it would be forfeited. That was the ruling of Mr Justice Sales in the case of *Alchemy Estates v Astor and Another*.

The court heard that Alchemy exchanged contracts to buy a leasehold property from Astor on 15<sup>th</sup> January 2008. The contract was due to be completed on 13<sup>th</sup> March but this was delayed because the landlord's consent had not been obtained

in time. Both parties continued to act as if the contract was still going to continue to completion. However, on 19<sup>th</sup> May 2008, Alchemy served notice that it was going to rescind the contract because the seller had failed to obtain the licence to assign by the agreed completion date.

The Astors disputed that Alchemy had a right to rescind and further submitted that if there was such a right, it had been

lost because of the delay in exercising it.

The terms of the contract relating to the point under dispute were based on condition 8.3 of the Standard Conditions of Sale (4<sup>th</sup> Edition).

The contract required the seller to take all reasonable measures at his own expense to obtain the landlord's consent, and obliged the buyer to comply with reasonable requests for information and references.

It also stated that if consent had not been obtained three working days before completion, then in line with condition 8.3, the contract could be rescinded by either party as long as they weren't in breach of their obligations.

In giving judgment, Mr Justice Sales said the objective of standard condition 8.3 was to allow each side to assess their positions in the event of the landlord's consent not being obtained in those few days before completion. It gave them the opportunity to reconsider and possibly rescind if it became apparent that there might be difficulty in obtaining consent.

However, Alchemy could not use condition 8.3 to rescind the contract because it had not served notice to exercise its right in the three days up to the contract completion date.

Nor had it served notice within a reasonable time afterwards, such as one or two days. In fact, it had not served notice until more than two months later.



## J&P key line of enquiry *Are you collecting your service charge debts at no cost?*

Increasingly as budgets and the cost of management are scrutinised, the need to recover outstanding debts becomes ever more important. However, this is often difficult to achieve where there are pressures on internal resources.

By outsourcing the recovery process on a collective conditional fee basis, landlords can ensure that debts are pursued quickly and efficiently with little or no cost to the home ownership department. The collective conditional fee agreement covers all work from instructions through to forfeiture actions if necessary.

Judge & Priestley's research shows that 93% of service charge debts are recovered\*. The average cost to the client after the fee has been recovered is -1.13%, which means that many of our clients are recovering debts at no cost.

Stage of recovery	Percentage recovered at this stage	Percentage net cost to client after fee
Letter before action	31%	0.89%
After claim form issued	12%	1.81%
Defence	1%	14.84%
Judgement	18%	-2.76%
Enforcement	32%	-3.77%

\* The 7% of cases not closed as recovered are predominantly cases closed on instruction from the Client and may reflect further payments made direct to the Client

Our debt recovery team is supported by experienced solicitors in leasehold and service charge matters and we can therefore deal effectively with any disputes that arise.

If you would like to discuss service charge debt recovery please contact Steve Griva, Head of Debt Recovery for further information. Telephone 020 8290 7301 or email [sgriva@judge-priestley.co.uk](mailto:sgriva@judge-priestley.co.uk).

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