Devonshires

Housing Management Brief

Issue 22

In this issue

Welcome

Another six months since our last HM Brief and another six months of major policy development and new case-law in the social housing arena. Housing law continues to throw up complex legal issues and, not withstanding Brexit, new policy initiatives on housing continue to flow from central Government. In short, an awful lot for the social housing practitioner to keep up with, but hopefully this edition will help with that endeavour. Happy reading!

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The Social Housing Green Paper: A new deal for social housing?

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The Green Paper published on 14 August 2018 comes over 18 months after the Government pledged to fix the "broken housing market" in its February 2017 White Paper. Here we take a brief look at what the Green Paper proposes.

In the 18 month period between the White and Green Paper, the tragedy at Grenfell Tower on 14 June 2017 brought the reality of some of the issues facing social housing to the attention of the nation and the Government's Green Paper seeks to address those issues.

Unlike the White Paper, which focused on encouraging the supply of new homes in England, the Green Paper's stated focus is on fundamental reform to ensure social homes provide an essential, safe, well managed service for all those who need it and re-balancing the relationship between residents and landlords to ensure issues are resolved swiftly and residents' voices are heard.

Resident views already submitted to Government have resulted in five core principles being identified by MHCLG as the basis for improvements to social housing. These are:

a. Expanding supply and ownership
b. Ensuring safe and decent homes
c. Effective complaint resolution
d. Empowerment of residents and the Regulator
e. Ending stigma

This Green Paper represents a fundamental shift in the state's approach to social housing and the people who call it home. In seeking this change, the Green Paper identifies Five Principles to underpin the same:

1. A safe and decent home which is fundamental to a sense of security and our ability to get on in life.

2. Improving and speeding up how complaints are resolved.

3. Empowering residents and ensuring their voices are heard so that landlords are held to account.

4. Tackling stigma and celebrating thriving communities, challenging the stereotypes that exist about residents and their communities.

5. Building the social homes that we need and ensuring that those homes can act as a springboard to home ownership.

Nearly eight years have passed since the last review of social housing regulation, and the proposals in this Green Paper present the opportunity to look afresh at the regulatory framework. With the current consultation on the Green Paper continuing until 5 November 2018, we are yet to determine what impact this "*landmark opportunity… to improve fairness, quality and safety for residents living in social housing"* will have on the sector in practical terms but we will continue to provide updates as the consultation progresses.

Paragon Asra Housing Limited v. Neville:

Does proportionality need to be re-considered when a landlord seeks to enforce a warrant of possession?

On 26 July 2018, the Court of Appeal handed down judgment in Paragon Asra Housing Ltd v Neville [2018] EWCA Civ 1712. The judgment is of significance for social housing practitioners as it dealt with situations in which a tenant seeks to raise an argument of disability discrimination in a warrant suspension application.

Background

The case concerned possession proceedings originally brought by Paragon Asra Housing Limited ("Paragon") against their tenant, Mr. Neville, reliant on Grounds 12 and 14 of Schedule 2 to the Housing Act 1988 in relation to incidents of anti-social conduct of a serious nature.

In his Defence, Mr. Neville admitted a number of incidents but asserted that they arose as a consequence of a disability caused by his use of opioids and a consequent dependence syndrome and that Paragon were discriminating against him on the basis of this disability by seeking possession.

The matter did not proceed to trial as the parties agreed by consent to a suspended possession order ("SPO") approved on 11 April 2016, which recorded that (i) Grounds 12 and 14 were satisfied, (ii) that Paragon accepted that Mr. Neville 'has a protected characteristic for the purposes of the EA 2010' and (iii) that the court found it reasonable to make an order for possession but suspended on terms that Mr. Neville committed no further breaches of his tenancy.

Application to suspend warrant

Following the approval of the SPO, the ASB continued and Paragon sought to enforce the Order by way of warrant of possession. Mr. Neville applied to suspend the warrant of possession and the issue arose as to whether it was necessary to re-consider the disability discrimination point again now that Paragon were seeking to enforce the order.

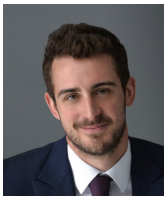
Paragon argued that, as there was no material change of circumstances, it was unnecessary for the court to re-consider whether the proposed eviction would discriminate against Mr. Neville. The judge at first instance agreed and refused to suspend the warrant.

The Defendant appealed and was successful on the first appeal before Mr. Recorder Williamson QC. However, the Claimant sought a second appeal on the basis that, save where there has been a material change of circumstances affecting the Defendant since the possession order was made, the enforcement of the SPO following further breaches is not discriminatory.

Court of Appeal

The Court of Appeal agreed and held that where, on the making of a suspended possession order, the circumstances are such that it can be inferred that the court found that the Order is not discriminatory against a disabled defendant, the court can also be taken to hold that the enforcement of the order in accordance with its terms will also not be discriminatory absent a material change in circumstances.

This is the case even if a judge has not demonstrated explicit consideration of the question of proportionality. In such cases, the Court will consider whether the question of proportionality has been considered in substance. The Paragon case was an example where it was clear from their Judgment that the District Judge had, in substance, considered whether the enforcement of the order was a proportionate means of achieving a legitimate aim.



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Incorrect and Unjustifiable Threats of Legal Action Can Amount to Harassment - Metropolitan Housing Trust -v- (1) Worthington (2) Parkin

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The recent case of Metropolitan Housing Trust v (1) Worthington (2) Parkin [2018] EWCA Civ 1125 serves as a stark reminder to landlords and their legal representatives that threats of legal proceedings should not be made against tenants without clear evidence of wrongdoing as this can amount to harassment.

Mr Worthington and Ms Parkin were long-term assured tenants of Metropolitan Housing Trust, living on the same estate. They had both complained to their landlord about long-standing anti-social behaviour in the local area.

As a result, Ms Parkin was given permission to install CCTV equipment at her home for security purposes by her landlord, and Mr Worthington formed a local residents group to collate and store evidence of anti-social behaviour.

Other neighbouring tenants of the landlord complained about Mr Worthington's and Ms Parkin's activities. It was said that Ms Parkin's CCTV recordings were causing a nuisance and invading the privacy of other residents. It was also alleged that both Mr Worthington and Ms Parkin were taking inappropriate photographs of other residents, including young children.

The landlord accepted these complaints and wrote several letters to Mr Worthington and Ms Parkin threatening to issue proceedings for an injunction to prevent supposed breaches of the tenancy as well as potential evictions. The landlord also instructed its solicitors to send threatening letters to Mr Worthington and Ms Parkin who did so. In fact, no proceedings were ever issued and all the landlord's allegations were found to be baseless.

Mr Worthington and Ms Parkin successfully sued their landlord for harassment under the Protection from Harassment Act 1997. The trial judge found that the landlord had failed to carry out an adequate investigation of the allegations made by the complaining residents against Mr Worthington and Ms Parkin, and failed to properly manage and supervise its employees.

The Court also found that correspondence sent to Mr Worthington and Ms Parkin contained inaccurate allegations. As such, the landlord had acted in an oppressive manner and its conduct constituted unlawful harassment. The trial judge awarded damages of £4,750 to Mr Worthington and £4,160 to Ms Parkin.

The Court of Appeal dismissed an appeal by the landlord.

Conclusion

This case serves as a useful reminder that behaviour that as first glance may appear "routine" or reasonable, such as threatening legal proceedings, can constitute harassment in certain circumstances i.e. when the allegations relied upon are without merit.

Landlords will need to ensure that all allegations and complaints by tenants are investigated adequately, and staff are sufficiently supervised in dealing with cases.

Landlords will not necessarily be able to rely on legal advice to evade responsibility where legal advice has been provided on the basis of inaccurate information.

For lawyers, this case is a reminder to ensure that any evidence or information provided by a client is sufficiently examined.

Sector Update:

A brief look at what's happening

Review of social housing regulation: Call for evidence

The Ministry of Housing, Communities and Local Government (MHCLG) have now opened their 'Review of social housing regulation: Call for evidence' consultation with the closing date set for 6 November 2018. The Government seeks responses from tenants, landlords and lenders addressing a key question: how is the current regulatory regime meeting its objectives? It marks the first stage of the review process following the recent Social Housing Green Paper.

Civil Procedure Amendments

The Civil Procedure (Amendment No 3) Rules 2018 will come into effect on 1 October 2018. There will be a small but important change to Part 83 of the Civil Procedure Rules 1998 - the Part which concerns the enforcement of a suspended possession order discussed in Cardiff City Council v Lee (2016) EWCA Civ 1034. The amendments will ratify the position (which practitioners have adopted for some time) that there will not be a requirement for a separate application for permission for a warrant where there is a breach of a suspended possession based on rent arrears (i.e. a failure to pay the rent and/or the arrears instalments). An application for permission is still required under Part 83.2 (3) (e) for all non-money payment breaches of suspended possession orders.

HMOs

The definition of a HMO subject to mandatory licensing will change from 1 October 2018. The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 will remove the requirement that a HMO must be of three storeys: the test will be whether there are 5 or more people in two or more separate households. It is expected that an additional 160,000 properties will require licencing following the amendment which will encompass flats and households in two and one storey properties. Further, the Licensing of Houses in Multiple Occupation (Mandatory Conditions of Licences) (England) Regulations 2018 set new minimum room sizes will apply to any new HMO licence from 1 October 2018 with a 18 month transition period for existing licensed HMOs.

Homes (Fitness for Human Habitation) Bill 2017-19

The last few months have seen the Bill move increasingly closer to the statute books. The Bill, if enacted, will remove

the rent limit found in Section 8 of the Landlord and Tenant Act 1985 meaning that all residential tenancies granted for an initial term of less than seven years require the property to be fit for human habitation when let and throughout the tenancy. There are also updates to the fitness standard by reference to the Housing Health and Safety Rating System. The Bill has its Report Stage in the House of Commons on 26 October 2018, the penultimate stage of the House of Commons phase of the Bill.

Section 21 Notices

The 1 October 2018 sees provisions of the Deregulation Act 2015 coming into force which will affect all assured shorthold tenancies commencing prior to 1 October 2015. From 1 October 2018, Section 41 of the Deregulation Act applies sections 33 to 40 to all assured shorthold tenancies. Previously, those provisions have only been relevant for new or renewal tenancies from 1 October 2015. In summary, the changes will relate predominately to the use of prescribed form 6A for Section 21 notices, the time limit to issue possession proceedings and retaliatory eviction provisions (where relevant). There will of course be a transition period and providers in any doubt as to the current position should seek legal advice.

Housing and Planning Act 2016

Phasing out of secure tenancies

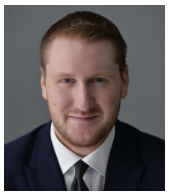
The Housing and Planning Act 2016 contained provisions that would have restricted the use of lifetime secure tenancies by local authority landlords if enacted. When brought into force, they would have required local authorities to generally grant fixed term rather than periodic tenancies. Regulations setting out the detail of how local authorities would be expected to operate fixed-term tenancies were expected in the near future.

However, on publication of the Social Housing Green Paper on 14 August 2018, the Government has announced that it will not implement these provisions “at this time” following concerns received about the impact of fixed term tenancies on tenants’ security and community stability and low take up of such tenancies since they were introduced on a voluntary basis in 2012.

Voluntary RTB Pilots

The Government is currently still running pilot schemes in the UK to see how the voluntary RTB scheme laid out at sections 64 – 68 of the Act may work in practice. An initial pilot ran during 2016-17 with five housing associations across England. A larger regional pilot was confirmed in the Government’s 2017 Autumn Budget.

The scheme is currently being piloted by the Government in the Midlands. The Pilot guidance has received ministerial sign-off and was published in May 2018. The regional pilot aims to test specific aspects of the policy not tested in the initial pilot, namely one for one replacement of housing sold, and portability of discounts for tenants who are unable to buy the property they currently live in.



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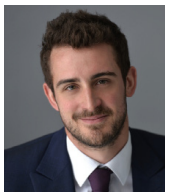

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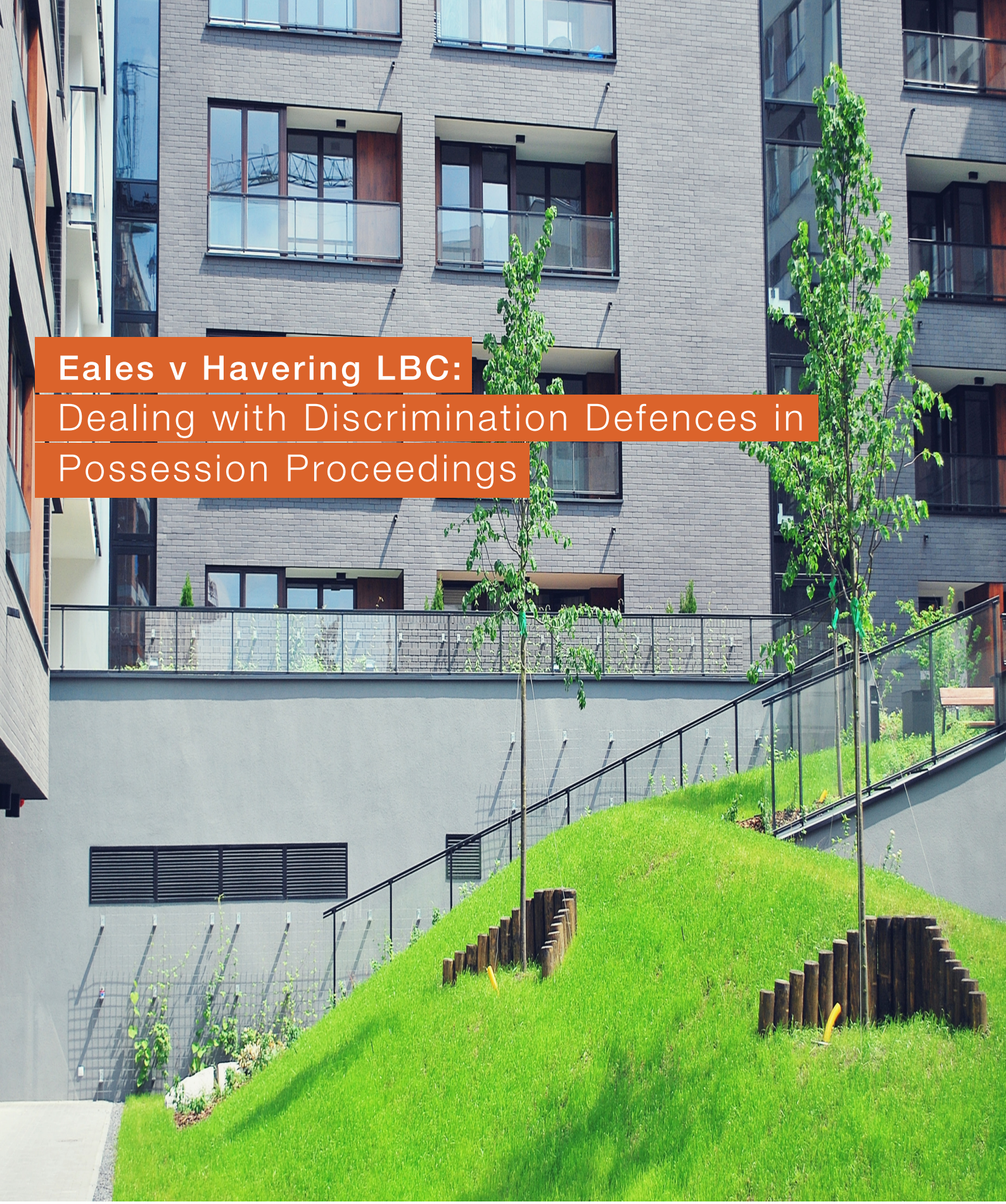
Eales v Havering LBC: Dealing with Discrimination Defences in Possession Proceedings



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The recent decision in Eales v Havering London Borough Council on 13 July 2018 is worthy of note and reinforces that an Equality Act defence must fail where no causal link between the disability and the behaviour is clearly established.

Ms Eales was a tenant of Havering London Borough Council pursuant to a non-secure contractual tenancy. Following a conviction for a racially-aggravated public order offence on a neighbour and a history of ASB towards neighbours, the local authority sought injunctive relief to exclude Eales from the property and issued possession proceedings on the basis of a Notice to Quit. Eales defended the proceedings on grounds of disability discrimination on the basis that she suffered from a personality disorder which gave rise to the behaviour. In addition, a defence on public law grounds for the alleged failure of the local authority to follow its policy and refer her to its vulnerable persons panel.

The Judge at first instance granted the injunction and possession order on the basis that the ASB complained of was not in consequence of the disability - it was Eales' drug and alcohol abuse which had been the direct cause of her behaviour, not her personality disorder.

Eales appealed the decision and her appeal was dismissed by the High Court.

In relation to disability discrimination, the High Court was satisfied that the Judge at first instance had closely and correctly followed the test as set out in Akerman-Livingstone v Aster Communities [2015]. The Akerman-Livingstone test requires a Judge to first assess whether the tenant's behaviour arose from a disability, and then whether eviction is a 'proportionate means of achieving a legitimate aim'. As no direct link could be found between Ms Eales' disability and her anti-social behaviour, her defence collapsed on the first limb.

In relation to the defence on public law grounds, the High Court stated that it was not the law that any breach of a policy was unlawful. Rather, the question was whether the decision reached in this case to issue proceedings was one which no reasonable housing authority could have taken. In this matter it was determined that the failure to refer Eales to the vulnerable persons panel was not a material breach.

The case serves as a good reminder that focusing on the absence or frailty of any causal link between the defendant's disability and the ASB could be the key to defeating a disability discrimination defence. From a practical perspective, social housing providers should ensure that they put defendants who claim to be disabled for the purposes of the Equality Act under pressure to provide cogent medical evidence of such disability at an early stage of proceedings. Further, that such disability is the cause of the ASB complained of. If the defendant fails to do so, not only should their defence fail, there may be some success in arguing that the discrimination defence be dealt with summarily on the basis.

Christopher Robertson v Gordon Webb (2018)

In this case the Upper Tribunal considered the jurisdiction and discretion to extend time for a tenant's referral of a rent increase notice out of time.

This case demonstrates the absolute time limits for referring notices of rent increase to the Tribunal as set out in the Housing Act 1988 and the consequences of filing documents out of time.

The facts

The tenant succeeded to his mother's assured periodic tenancy. In March 2017 the landlord sought to increase the rent and served a notice under Section 13(2) of the Housing Act 1988 proposing a rent increase to take effect from the following month. The tenant continued to pay rent at the original level. When the landlord queried this with him the tenant claimed that he had not received any notice. At the time the tenant had been ill and was being cared for by others at the house. He assumed that the notice was discarded along with junk mail by his carers.

The tenant submitted a late application to the First Tier Tribunal ("FTT") for a determination in respect of the rent increase. His application was 6 weeks outside the statutory time limit. There was no issue about the validity of the notice.

The FTT decided that they had no jurisdiction to determine rent because the application was made out of time. Permission to appeal was refused on the basis that the FTT's original analysis of their jurisdiction was correct.

The tenant then made an application for permission to apply for judicial review of the decision of the Upper Tribunal's refusal of permission to appeal. This procedure was potentially available to him as a result of the decision of the Supreme Court in *R (Cart) v Upper Tribunal [2012] 1AC 663.*

The decision

Permission to apply for judicial review was granted by the High Court. The tribunal did not request a substantive hearing of the claim for judicial review to take place under CPR 54.7 A(9) and the refusal to grant permission to appeal was instead quashed.

It was later held by the Upper Tribunal that, in granting permission for the judicial review, the judge had not

considered the FTT's jurisdiction to extend time limits or whether there had been an error of law. The judge had not addressed the relevant legislation or jurisdictional issue. Further, the judge had not applied the second appeal test required by Cart and by CPR 54.7A, he had simply taken the view that it was unfair not to allow the tenant to bring the case on its merits despite it being out of time.

Where permission was granted under 54.7.A the reasoning was very important and if the issues raised by 54.7A were not properly addressed the court would need to decide whether the claim should be heard in the High Court for the purpose of further clarification.

The Upper Tribunal considered the provisions of S13(4) and S14(1) and determined that they had no jurisdiction to deal with a tenant's referral in respect of a notice of increase out of time. The time limit set out in the statutory provisions was absolute and S13(4) expressly stated that without a referral made within the specified time limits the increased rent was payable.

The only remaining question for the court was whether there is any legal basis outside the express language of the 1988 Act which would allow a more flexible application of Section 13(4) and 14(1). The only provision suggested was Article 6(1) of the ECHR which reads:

"In the determination of his civil rights and obligations everyone is entitled to a fair and public hearing, within a reasonable time by an independent and impartial tribunal established by law".

The tenant submitted that in order to comply with Article 6.1 the word "referred" in Section 13(4) should be interpreted as requiring that the notice had been given by the tenant rather than received by the tribunal. The Court of Appeal rejected this argument.

In the Lester case the Court of Appeal did not consider whether Art 6.1 may require S 13(4) to be applied subject to discretion to allow the receipt of a tenant's notice in exceptional circumstances.

In the case of *Pomiechowski v District Court of Legnica, Poland [2012] 1WLR 1604* the possible effect of Art 6.1 was considered by the Supreme Court on a very short statutory time limit affecting personal liberty where a discretion was conferred to extend time in sufficiently exceptional circumstances.

The Upper Tribunal considered the above case and ruled that the tenant had not shown that he had been unable to comply with time limits for reasons that amounted to exceptional circumstances. Neither the legislation in the present case nor the considerations involved are remotely analogous and was not persuaded that a *Pomiechowski* discretion should be read into Section 13(4) and 14(1).

Where the discretion is potentially available, its scope is extremely narrow and only arises in small number of exceptional cases and is limited to preventing the impairment of the very essence of a right to a hearing and where they have demonstrated that they did all they could to bring a timely appeal.

The application for permission to appeal was therefore dismissed.

Conclusion

It is clear from the decision that there is no room for discretion to extend the statutory time limits set out by the provisions of the Housing Act 1988 in respect of a referral of a rent increase notice. The time limits are expressed in absolute terms and without a referral within the specified time the increased rent becomes payable.

In this particular case the rent increase was £400 per calendar month or £4800 per annum and was therefore substantial.

The upshot for tenants is that if rent increases are not challenged in time a tenancy that was once affordable may become unaffordable once the new rent takes effect.

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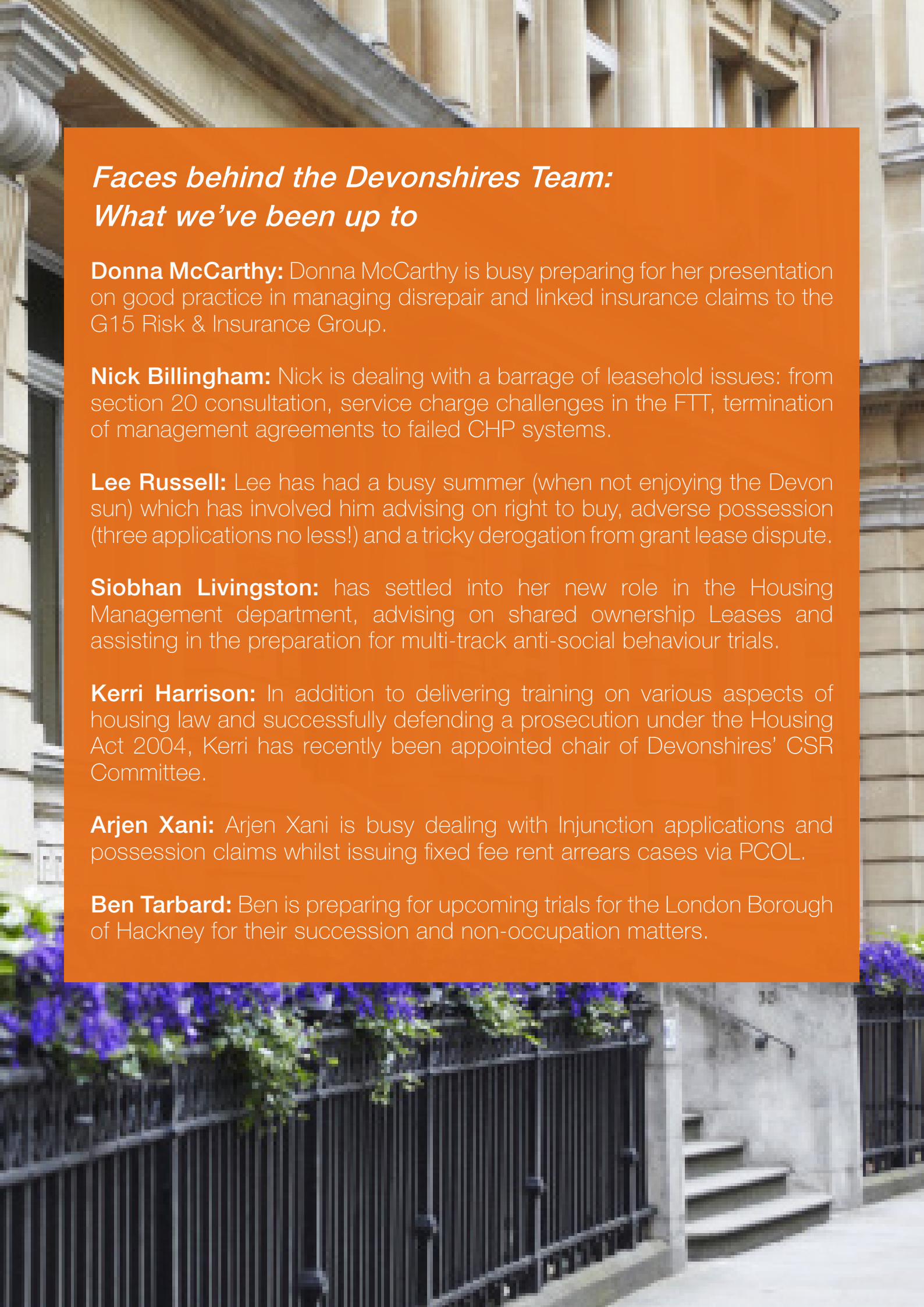

Faces behind the Devonshires Team: What we've been up to

Donna McCarthy: Donna McCarthy is busy preparing for her presentation on good practice in managing disrepair and linked insurance claims to the G15 Risk & Insurance Group.

Nick Billingham: Nick is dealing with a barrage of leasehold issues: from section 20 consultation, service charge challenges in the FTT, termination of management agreements to failed CHP systems.

Lee Russell: Lee has had a busy summer (when not enjoying the Devon sun) which has involved him advising on right to buy, adverse possession (three applications no less!) and a tricky derogation from grant lease dispute.

Siobhan Livingston: has settled into her new role in the Housing Management department, advising on shared ownership Leases and assisting in the preparation for multi-track anti-social behaviour trials.

Kerri Harrison: In addition to delivering training on various aspects of housing law and successfully defending a prosecution under the Housing Act 2004, Kerri has recently been appointed chair of Devonshires' CSR Committee.

Arjen Xani: Arjen Xani is busy dealing with Injunction applications and possession claims whilst issuing fixed fee rent arrears cases via PCOL.

Ben Tarbard: Ben is preparing for upcoming trials for the London Borough of Hackney for their succession and non-occupation matters.

Meet Our Team

Solicitor Spotlight - Hetal Ruparelia

How did I get into Housing Law?

My story is somewhat typical and in other ways not so much so! I went to school and sixth form in Hounslow where a quest for a good education was at odds with the rest of the students.

I took a year out before going to University and worked as an outdoor clerk for a high street firm specialising in Housing Law. Thereafter I read Law at Queen Mary University and completed my LPC at the College of Law in Bloomsbury.

It was at this stage that the agony of finding a training contract began. As soon as I interviewed for the position at Devonshires, I was convinced it was the place for me. I will never forget the feeling of being offered the position, I milked the celebrations for weeks on end. Six years on (two years as a trainee solicitor and four years of post-qualification experience in our Housing Management Team.

What interested me about housing management and leasehold?

My husband describes me as a 'fixer' and I consider that is one of the many reasons why Housing Management is so perfect for me. I enjoy being presented with problems my clients face and finding creative solutions for them. It is a constantly evolving area of law and the learning never stops.

No two days tend to be the same! I also take great pride in knowing that I work for one of the leading Housing Management teams in the country.

..... and finally tell us something interesting.

The book Wisdom of Psychopaths by University of Oxford psychologist Kevin Dutton states that the second most psychopathic profession is that of a lawyer. (The first is a CEO). Please rest assured that my colleagues and I are convinced that this does not include the lawyers at Devonshires!

Devonshires

Housing Management Training Programme 2018/19

Devonshires Housing Management Team is pleased to present the 2018/19 Housing Management training programme.

Seminar Programme

HM Update
9 October 2018
Half day session

Tips and Tricks: Dealing with the Courts and the effective instruction of Lawyers
27 November 2018
Half day session

Tenants Rights: A Guide for Social Landlords
16 January 2019
Half day session

Tackling Non Occupation, Subletting and Disputed Succession Claims
24 January 2019
Half day session

Mental Health and Housing
28 February 2019
Half day session

HM Update
28 March 2019
Half day session

Tackling Tenancy Breach
3 April 2019
Half day session

Local Authority Enforcement and the HHSRS: A practical guide for Landlords
9 May 2019
Half day session

Defending Actions for Disrepair and Claims under the Environmental Protection Act 1990
13 June 2019
Half day session

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