

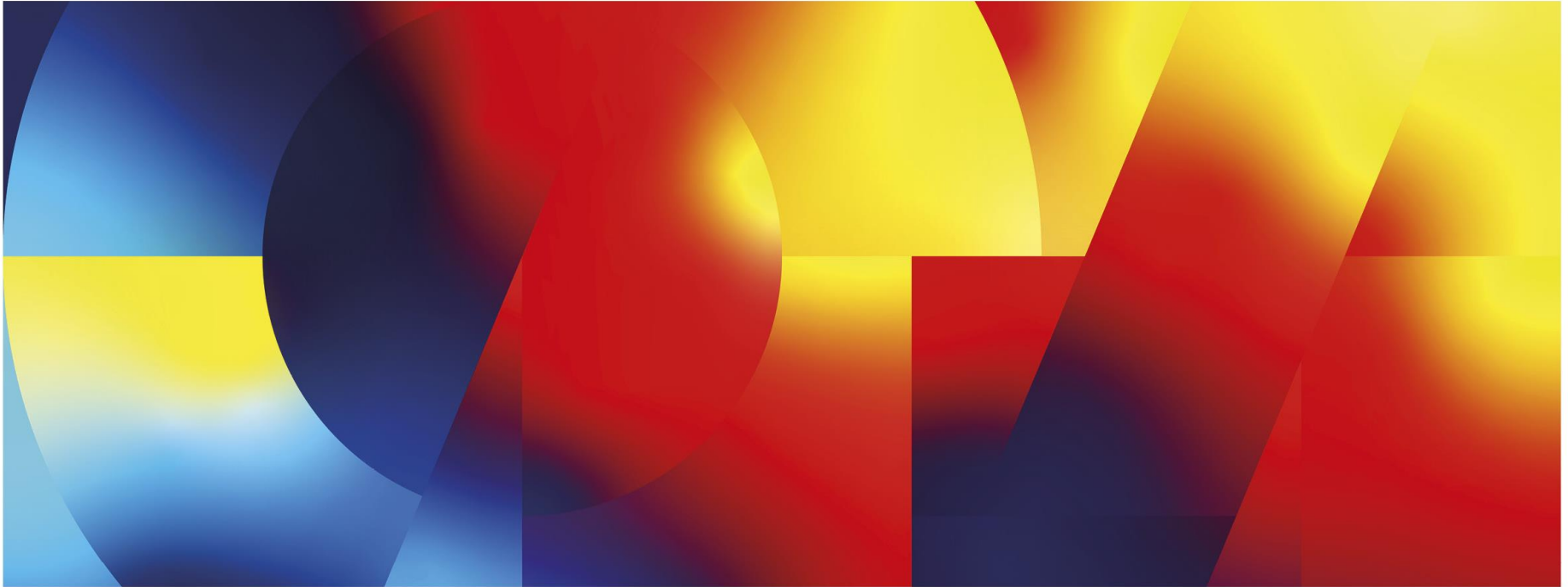
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Housing Management Law School



News



Regulator of
Social Housing

Jalili v Bury Council. Manchester County Court
(17 June 2021)



New Guideline Hourly Rates



Regulator issues notice against council over failure to carry out housing safety inspections



Building Safety

Overview

- Legislative response to
 - Grenfell Tower tragedy
 - Dame Judith Hackitt's independent review of Building Regulations and Fire Safety
- most fundamental reform of regulation across the construction and residential property sectors in living memory.

Higher Risk Buildings

- Buildings with
 - 7 or more storeys ; or
 - 18 metres or higher; and
 - have at least 2 residential units; or
 - are hospitals or care homes.
- Subject to a stronger regulatory regime as set out in the Bill

The Building Safety Regulator

- The Bill establishes the role of the Building Safety Regulator with the purpose of improving the safety and standard of buildings.
- The Regulator will have 3 critical functions:
 - Leading the delivery of the new regulatory regime for high-rise and other buildings in scope;
 - overseeing the safety and performance of all buildings; and
 - promoting the competence and organisational capability of professionals, tradespeople and building control professionals working on all buildings.

The Building Safety Regulator

- As part of these functions, the Regulator will establish and maintain three committees to advise on building functions, namely:
 - a residents' panel;
 - an industry competence committee; and
 - a building advisory committee.

The Building Safety Regulator

- Powers:
 - To investigate buildings which they have concerns about
 - To issue compliance notices: non-compliance = criminal offence.
 - To revoke registration of private building approvers who fall short of the Government's standards.
 - To recommend Government take over of failing Council building control departments.

Register of Building Inspectors and Building Control Approvers

- Regulator responsible for creating and maintaining registers of:
 - building inspectors (individuals); and
 - building control approvers (either organisations or individuals).
- This will allow the Regulator to set / enforce minimum standards and reporting requirements for building inspectors and control approvers
- those who are underperforming can face sanctions and ultimately, be removed from the register.

Accountable Person

- New concept:
- “the person who either has the legal estate in possession of, or is under the relevant repairing obligation, for any common parts of the building“
- common parts include
 - structure and exterior of the building
 - areas provided for the common use of residents.
- All occupied higher-risk buildings must have at least one clearly identifiable Accountable Person (“the Principal Accountable Person”).
 - If two or more Accountable Persons
 - provisions to determine which is assigned Principal Accountable Person
 - eg freeholder and management company PAP would be freeholder.

- numerous statutory obligations, including:
 - Compliance with the safety case and mandatory occurrence reporting requirements;
 - Conducting assessment of fire and structural safety risks for areas of responsibility;
 - Preparation and review of Residents' Engagement Strategy;
 - Provision to residents of relevant safety information about the building;
 - Retain and update prescribed information about the building; and
 - Take all reasonable steps to prevent a major incident occurring because of a building safety risk materialising and to reduce the severity of the incident.
 - *"major incident" defined as leading to a significant number of deaths/serious injury to a significant number of people)

Accountable Person

- Onerous and expensive role
- Failure to register the building or apply for a building assessment certificate may attract criminal liability.
- It is expected that many owners and managers may look to outsource this position to mitigate the risks of falling foul of the requirements.

Safety Management Systems

- Accountable Person must apply a “Safety Management System”
 - a systematic approach to managing safety, including
 - organisational structures
 - Accountabilities
 - policies and procedures.
 - to proactively identify and manage potential safety risks to mitigate risks and ensure residents feel safe in their homes.
- The Health and Safety Executive has released a guide to managing health and safety which promotes a "Plan, Do, Check, Act" approach to ensure the effective planning, organisation, control, monitoring and review of safety measures.

- No "one size fits all approach"
 - up to each Accountable Person to ensure that they are taking a responsible approach
 - ensure their Safety Management System to tailored to suit
 - size, nature and complexity of their operations
 - taking into account individual characteristics of each building
- AP must prepare a Safety Case Report including
 - description and overview of the Safety Management System for building
 - submitted for regulatory assessment
- Government has confirmed that "clear guidance" will be produced to assist Accountable Persons in managing their Safety Management Systems.

Gateway Points

- Bill has introduced 3 "gateway points" at which stage developers must demonstrate adherence to the requirements of the Bill when designing and building new high-rise blocks.

Gateway 1: Planning

- Town and Country Planning (Development Management Procedure and Section 62A Applications)(England)(Amendment) Order 2021 came into force on 1 August 2021.
- applications must discuss fire safety issues and include a fire statement

Gateway 2: Construction

- building control approval must be obtained from the Building Safety Regulator prior to construction
- developers could be prosecuted if they commence building without the Regulator's approval.
- Gateway 2 applications must demonstrate
 - how proposals comply with the building regulation requirements
 - that they have appropriate strategies in place to manage the construction phase to support compliance and reduce the possibility of risks arising.
- Those involved in design and construction subject to ongoing requirements including
 - co-operation
 - co-ordination
 - communication
 - record-keeping requirements between gateways 2 and 3.

Gateway 3: Completion

- before occupation the Regulator will
 - assess/inspect building
 - issue a completion certificate
- Regulator will have strong enforcement powers to deal with breaches of these obligations
- Developers will need to be familiar with procedures; close regulation and stop/go sign off points have potential to delay
 - commencement of development
 - final sale and occupation of buildings.

Refurbishments

- provisions to oversee the conduct of prescribed refurbishments.
- strengthen building control oversight before building work starts
 - assess whether proposals comply with building regulations
 - assure building safety : throughout the building work and onto completion.
- Building control approval to be obtained from the Building Safety Regulator who will work with local authorities and fire and rescue authorities when making decisions on applications.

- System currently falls short in holding to account all those who have a stake in the project for non compliance with Building Regulations
- Bill introduces regulations that place duties on “dutyholders” : i.e. those who procure, plan, manage and undertake building work.
 - Client;
 - Principal Designer;
 - Designers;
 - Principle Contractors; and
 - Contractors.
- Dutyholders required to work collaboratively to actively consider and manage building safety risks throughout the commissioning, design and construction process,
- ensure building work, including design work, complies with all relevant building regulations.

The Golden Thread

- concept of accruing information throughout the design and construction of new high rise buildings as to how the building has been designed, built and managed.
 - information provided to owner upon completion
 - stored electronically
 - added to throughout the lifetime of building by Accountable Person
- constructs coherent 'golden thread' of relevant information
 - point of reference in the event of any issues
 - for reference for any future freeholders/leaseholders/lenders
 - allow understanding of building to keep it safe.
- Upkeep of this golden thread of information could be seen as burdensome
- Freeholders/management companies, as Accountable Persons, may outsource to avoid risk of default.

- The Regulations introduced by the Bill don't just apply to new buildings being constructed.
- If existing building is failing to meet the Regulations, Regulator can apply to the First-tier Tribunal (Property Chamber) for an order
 - to put the building into "special measures"
 - appoint a "Special Measures Manager" to carry out necessary functions in place of the Accountable Persons.
- Bill will create an "Office for Product Safety and Standards" (OPSS)
 - power to recall from the market products considered to be a safety risk
 - prosecute UK manufacturers who fail to comply.
 - If OPSS declare a product as "safety critical", manufacturers will have to declare its use.
 - OPSS will maintain a national complaints system.

Claiming against Developers

- Bill extends limitation period for leaseholders to claim against the original developers of a building, from 6 to 15 years.
- Will include construction and refurbishment works and will apply retrospectively.
- Despite this radical extension, there are still many high rise buildings that will not benefit from this amendment.
- Bill will bring section 38 of the Building Safety Act 1984 into force:
 - leaseholders can claim against developers for breach of duty relating to building regulations.
 - will also apply for 15 years retrospectively.
 - amendment limited by difficulty leaseholders may have in accruing sufficient evidence to prove breach of the regulations at the time of construction.
- If a leaseholder's claim would contravene human rights or has already been settled or dismissed, this may be a defence to the extended limitation period.

- Bill does impose some duties on residents of higher-risk buildings:
- to keep in repair and proper working order/to avoid damaging any "relevant residents item" or "relevant safety item"
- to comply with a request made by the Accountable Person for the building for information reasonably required for the purposes of a duty;
- if it appears resident has contravened their duty or duties, Accountable Person may serve a notice effectively to specify corrective/compliance action to be taken.
- A relevant residents item is defined as any electrical or gas installation or appliance that is in the dwelling in which the resident resides or connected premises and not an installation or appliance that anyone other than the resident has a duty to keep in repair or proper working order.
- A relevant safety item is anything that is in, or forms part of, the common parts and is intended to improve the safety of persons in or about the building in relation to a building risk.

Resident's Duties

- Enforcement action available to the Accountable Person:
 - serve a corrective notice
 - thereafter through the County Court to obtain an order for the resident to provide specified information or do a specified thing,(or refrain from such) by a specified time.
- The Bill provides an ability for a Landlord to enter a dwelling for the purposes of carrying out prescribed building safety measures or inspecting or accessing any part of the building in connection with carrying out prescribed building safety measures where the tenant is a resident of the higher-risk building, to carry out these duties of a resident. It does not however (yet), prescribe any such measures

- Bill strengthens existing Regulatory Reform (Fire Safety) Order 2005.
- New regulations will expand obligations of Responsible Persons
 - ensure they are carrying out fire risk assessments with greater transparency and competency
 - obligations to record fire risk assessments in full
 - ensure they do not appoint third parties to assist with fire risk assessments unless that person is competent and identify and work with any other Responsible Persons that may be identified in respect of that premises.
- The Responsible Person is "a person responsible for the safety of themselves and others who use a regulated premises...normally a building owner, an employer, or other person in control of the premises". A regulated premises includes the common parts of buildings containing two or more sets of domestic premises.
- For 'higher risk buildings' Responsible Persons must take reasonable steps to ascertain if there is an Accountable Person for the premises and work collaboratively to carry out their duties under the Building Safety Bill (if in fact these parties are not the same person).

New Homes Ombudsman

- created to tackle building safety defects in new build homes.
- Developers will have to become members of the Ombudsman scheme
- failure to do so will attract sanctions.

Human Rights and Equality act

Proportionality Defences

1. Introduction
2. The Equality Act 2010
3. The Human Rights Act 1998
4. The Mental Capacity Act 2005
5. Relevance to housing cases
6. Can you challenge a lack of capacity?
7. How to challenge an Equality Act defence
8. How to challenge a Human Rights Act defence
9. Proactive case management
10. Cases

1. Introduction

- Equality Act and Human Rights Act defences nothing new
- Mainly where the Court had little / no discretion – but now much wider
- Delays and cost
- Can derail cases

2. The Equality Act 2010 (“EA 2010”)

- Protected characteristics
 - Age
 - Disability
 - Gender re-assignment
 - Marriage / civil partnership
 - Pregnancy / maternity
 - Race
 - Religion or belief
 - Sex
 - Sexual orientation
- Prohibition against discrimination

2. The Equality Act 2010 (“EA 2010”)

- S.6: definition of a disability
 - Physical / mental impairment
 - Substantial and long-term impact
 - Normal day to day activities
- S.15: no discrimination on account of disability
- S.35: no discrimination by manager of premises
- S.20: duty to make reasonable adjustments
- S.149: public sector equality duty (PSED)

3. The Human Rights Act 1998 (“HRA 1998”)

- Protects basic rights and freedoms
- Article 8
 - Right to respect for private and family life
 - No interference by public authority except in accordance with the law and as necessary in a democratic society
- Manchester CC v Pinnock [2010]
 - Article 8 engaged by a person’s “home”
 - Assumption of proportionality
 - Right to question proportionality
 - Power of the Court to refuse a possession order

4. The Mental Capacity Act 2005 (“MCA 2005”)

- S.1: presumption of capacity
- S.2: no capacity if –
 - Specific matter
 - Material time
 - Unable to make decision
 - Impairment / disturbance in mind or brain
- Capacity / disability?

5. Relevance to housing cases

- Possession order – EA 2010, HRA 1998
- Injunction – EA 2010
- Capacity
 - No injunction (*Wookie v Wookie*)
 - CPR Part 21 – no steps in Court proceedings without a litigation friend

6. Can you challenge a lack of capacity?

- Not really a defence
- Psychiatrist report
 - General / specific?
 - Relevant to issues in proceedings?
 - Unable to make decisions / unwise decisions?
 - External factors?
 - Medication?
 - Capacity in future?
- Think about your outcome...

7. How to challenge an Equality Act defence

- Most common with ASB / breaches of tenancy
- Expert evidence
 - What physical / mental impairment?
 - Substantial?
 - Long-term?
 - What activities?
 - Relevance to behaviour / actions?
 - External factors?
- Proportionality defences under S.15 and S.35 if treatment is “appropriate and necessary” in achieving a legitimate aim

7. How to challenge an Equality Act defence

- Landlord must show:
 - Real / serious issue
 - Other steps taken
 - Why possession / injunction is necessary
- Aster Communities Limited v Akerman-Livingstone [2015]
 - No eviction due to something arising from a disability
 - Be more considerate
 - Structured approach
 - Balance impact on tenant against landlord's aims

7. How to challenge an Equality Act defence

- R (Elias) v Secretary of State for Defence [2006]
 - “Structured approach”
 - Objective sufficiently important?
 - Rational connection?
 - Chosen means no more than necessary?

8. How to challenge a Human Rights Act defence

- No need to “prove” anything to start with
- Article 8 – public authority
- What is a “home”?
- ECtHR – “exceptional circumstances”; but not in the UK Supreme Court
- Article 8 should be considered summarily, unless “seriously arguable”
- Generally where occupier has no right to remain in law / no right for Court to exercise discretion

8. How to challenge a Human Rights Act defence

- Proportionality Defence
 - Slightly different to EA 2010 cases
 - Eviction a proportionate means of achieving a legitimate aim?
 - Landlord vindicating its ownership rights
 - Allow landlord to comply with duties regarding management of housing stock
 - The need to deal with ASB and protect neighbours' rights

9. Proactive case management steps

- EA 2010
 - Does the tenant have a disability?
 - Alternatives?
 - Behaviour linked to disability?
 - Risk to others?
 - Enforcement justifiable?
 - Objective justification?
- Record steps in writing
- Counter-sign by senior colleague
- Assume EA 2010 could apply if in doubt

9. Proactive case management steps


- HRA 1998
 - Best practice for all cases
 - Factual circumstances behind occupation?
 - Why possession?
 - Followed policies?
 - Appeal?
 - Alternatives?
 - Defendant's behaviour and effect on others?
 - Vulnerability?
- Record in writing
- Counter-sign by senior colleague

10. Cases

- Barber v Croydon LBC [2010]
- Eastland Homes Partnership v Whyte [2010]
- LQHT v Patrick [2020]
- Forward v Aldwyck Housing Group [2019]
- Paragon Asra Housing v Neville [2018]
- Eales v Havering LBC [2018]
- Swan Housing Association v Gill [2013]

Questions and answers

Thank you

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Southern Housing Group Ltd v Stephen Berry **(25 February 2021)**

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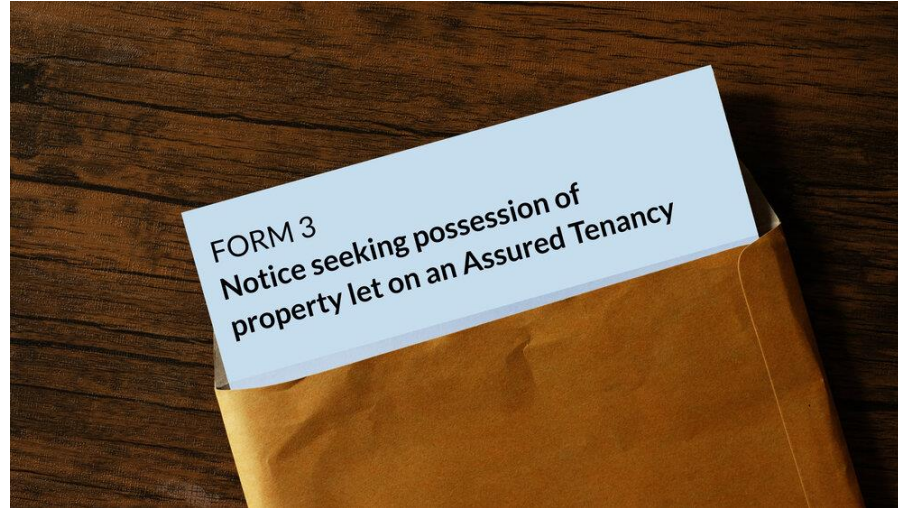


"Full disclosure, when there's a full moon I turn into a werewolf. So I can't work late."

£65million support package announced for vulnerable renters



Possession proceedings – end of the ‘overall arrangements’



Housing

Ombudsman Service

Housing Ombudsman - spotlight on damp and mould

