**This issue of *Legal Action* marks the 25th anniversary of the 'Recent developments in housing law' articles by Jan Luba QC and Nic Madge. In this special feature, John Gallagher, principal solicitor at Shelter, writes about *Legal Action*'s most prolific and enduring writing team.**

# 'Recent developments in housing law' at 25

Twenty-five years ago, according to a well-substantiated urban myth, two youthful housing lawyers walked into LAG's offices and suggested that *Legal Action* might like to publish regular articles on recent developments in housing law. The first of a quarterly series 'designed to keep advisers abreast of recent changes in housing law and practice' appeared in September 1985. In those early days, the authors met to compile the articles in a wine bar near Kings Cross beloved of the voluntary sector. Their well-lubricated efforts were recorded on manual typewriters, though the reaction of other denizens of the hostelry to the intellectual activity taking place in their midst is not recorded.

The establishment has now gone upmarket, to the extent that even a QC and a judge (which the two young lawyers have now become) would struggle to afford its prices. However, with e-mail replacing the manual typewriters, though possibly not the red wine, the series has gone from strength to strength. In July 1998, the ever-lengthening quarterly articles became monthly, with the promise of shorter but more regular summaries. Yet such is the volume of material and the insatiable appetite of readers that each monthly article is now longer than the original quarterly articles.

## In the beginning

The landscape of housing law looked very different a quarter of a century ago, compared with the present-day vista. Housing law anoraks of a certain age tend to stroke their greying or non-existent locks and think fondly of those halcyon days. There was security of tenure for most occupiers in both the public and private rented sectors, and there were fair rents for protected tenants. Private landlords were given to pretending that they had a right to share their tenants' homes or to put other people into the accommodation, and to claim that those tenants were therefore mere licensees. The right to buy, introduced by the Housing Act (HA) 1980, had not quite yet plundered all the best council homes. Legal aid (then administered by the Law Society) was relatively plentiful and its bureaucracy negligible compared with present-day Community Legal Service forms.

The foundation of 'Recent developments in housing law' has always been the case-law, both the breadth of cases reported and the authoritative case summaries, which contain just the right amount of detail. The *Legal Action* citation is readily accepted by judges, whether as a digest of fully-reported cases or as a source of case-law unreported elsewhere. In the early days, case reports were hard to come by, and the authors encouraged readers to contribute transcripts of judgments and accounts of their own cases. The standing invitation has continued to the present day, and has resulted in a unique and invaluable fund of county court and magistrates' court decisions, and of higher court cases which have settled without judgment. This practice has been particularly important in reporting the amount of damages awarded or criminal sanctions imposed, both in cases of harassment and illegal eviction, and in disrepair cases before the latter was given its own billing in a separate *Legal Action* series.

Yet the articles are about much more than the case-law. Each one gathers together changes in legislation, guidance and briefings, ombudsman's reports, policy papers, consultations, press statements and campaigns, and much more of interest to the housing worker. A trawl through the 'Recent development in housing law' articles published in the past 25 years reveals a wealth of information about the issues which preoccupied the housing world at various times and provides a fascinating insight into what it was like – and what it is like now – to practise as a housing lawyer or adviser.

The late 1980s show the courts still struggling to free themselves of the assumption that the written agreement is conclusive, especially with regard to that 1980s device, the 'non-exclusive occupation' agreement, which, along with bogus holiday lets, was more often than not a sham or pretence. During the same period, the march of deregulation culminated in the HA 1988, whereby the private rented sector and housing association world changed utterly with

the advent of assured and assured shorthold tenancies. A broad consensus which had existed since 1915 regarding security of tenure in the private sector had been shattered.

Ironically, in 2010 we find the private rented sector increasingly heralded by local authorities as an alternative housing option and even as a provider of permanent accommodation, despite the fact that the bizarrely-named assured shorthold tenancy is now the norm and the legal infrastructure of long-term security has disappeared. The HA 1988 also brought us well-publicised thrills such as housing action trusts and the 'pick a landlord' scheme for council tenants, which have now become obsolete.

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*Jan Luba in 1986*

## The first of many

The first 'Recent developments in housing law' article in September 1985 included reports of two seminal cases: one on disrepair and condensation (*Quick v Taff Ely BC*) and the other on judicial review in homelessness cases (*R v Hillingdon LBC ex p Puhlhofer*), together with the first round of county court cases on tenancies masquerading as licence agreements in the wake of the House of Lords' decision in *Street v Mountford*.

The late 1980s and early 1990s brought a regular diet of cases concerning damages claims for unlawful eviction as some landlords, seduced by the prospect of letting on the new shorthold tenancies at market rents, predictably sought to remove protected tenants who wished, inconveniently, to remain in their homes at fair rents. The article in June 1988 *Legal Action* includes the 18-rated subheading 'The chain-saw eviction'. It records an incident in the Isles of Scilly in which a landlord used a chainsaw to enter a rented cottage and saw through the wooden legs on which the cottage stood. The local ombudsman found maladministration in the council's failure to take any steps to address the landlord's behaviour. The same article noted that the secretary of state had confirmed compulsory purchase orders made on four properties owned by the notorious landlord Nicholas van Hoogstraten on the ground of harassment alone.

While the 1980s and 1990s witnessed some truly Rachman-like abuses, there continues to be an undercurrent of harassment in the private rented sector even now, although fewer claims are brought and even fewer prosecutions. The paradox of assured shorthold tenancies is that their very insecurity appears to encourage a minority of landlords to believe that all controls are off or at least that there will be no comeback.

## From homelessness to human rights

Two particular themes emerge from the 1990s and early 2000s. First, there is the inclusion in the HA 1996 of a new test of eligibility for homelessness assistance based on immigration status. The criteria for European Union nationals are based on a right of residence under the EC Treaty and its Directives, which has required housing advisers to immerse themselves in EC law. Since April 2000, all but a few asylum seekers have been excluded from mainstream homelessness assistance. Second, ever more weapons in the legislative armoury have been deployed to address housing-related anti-social behaviour, including introductory, demoted and (more recently) family intervention tenancies, the remodelling of grounds for possession and anti-social behaviour injunctions.

The prevailing theme of the last decade, however, has been housing and human rights. Following commencement of the Human Rights Act 1998 on 2 October 2000, 'Recent developments in housing law' has taken us on a monthly rollercoaster of high expectation and free-fall disillusionment. Initial optimism that article 8 of the European Convention on Human Rights might provide a free-standing defence to possession proceedings has to date been confounded. The tension between European Court of Human Rights' (ECtHR) decisions such as *McCann v UK* and domestic law, notably in the House of Lords' cases of *Harrow LBC v Qazi*, *Lambeth LBC v Kay* and *Doherty v Birmingham City Council* seems set to continue in forthcoming decisions of the Supreme Court and Strasbourg. In the meantime, however, the monthly round-up of housing-related cases from the ECtHR, which has become a feature of 'Recent developments in housing law', serves to remind us that it would not be the end of the world as we know it if possession claims by public bodies were to be subjected to a proportionality review.

The articles have tracked every nuance of the law of homelessness since 1985. A random sample of influential cases must start with *Puhlhofer* (see above), in which Lord Brightman's assertion that he was 'troubled at the prolific use of judicial review' in homelessness cases has had a baleful effect on the courts' willingness to scrutinise local authority decisions generally and is still regularly quoted by the representatives of public authorities. In 1988, *R v Tower Hamlets LBC ex p Monaf* was a case in which, for the first time, authorities sought to treat as intentionally homeless families who had left accommodation overseas and exercised their right to join their settled fathers in the UK. In 1998, *R v Camden LBC ex p Pereira* attempted to make sense of the notion of 'vulnerability' by means of a comparison with a notional 'ordinary homeless person who [is] able to cope' without confronting the questions that are at the heart of all vulnerability decisions, ie, to what degree must the applicant be less able to fend for him/herself in order to be considered vulnerable, and what are the characteristics of the 'ordinary homeless person'.

Before the 1995 House of Lords' decision in *R v Brent LBC ex p Awua*, it was accepted that the housing duty owed by a housing authority to a homeless person continued until the person was permanently rehoused, but that judgment restricted the period of the duty to whatever the authority considered suitable. This ruling was soon overturned by the HA 1996, which limited the housing duty to two years. Now, since the Homelessness Act 2002, the duty is once again a duty to accommodate indefinitely, subject to discharge in prescribed circumstances. In addition, the HA 1996 produced two far-reaching structural changes. First, it introduced a strict demarcation between the functions of homelessness and of allocations: homeless persons would be entitled to 'reasonable preference' in assessing their priority for permanent accommodation, but the only route to such accommodation is through the allocation scheme. Second, the HA 1996 provided a new process for

challenging adverse homelessness decisions by a statutory review, followed by an appeal to the county court on a point of law, where previously there had been only judicial review.

## Improvements and missed opportunities

What improvements can we identify in 25 years? The housing health and safety rating system, which replaced the concept of fitness for habitation, and licensing of houses in multiple occupation (though limited in scope), both introduced by the HA 2004, deserve a welcome. The funding of duty advocate schemes for county court possession hearings has been a huge success (though no sooner have the schemes been established, than they are now threatened by the current tendering process and by contracts which impose unrealistic administrative burdens). However, there have been few positive reforms in substantive law, and those that can be welcomed are beset by uncertainty (the Unfair Terms in Consumer Contracts Regulations 1999 SI No 2083) and disastrous drafting (tenancy deposit schemes).

One major missed opportunity stands out. The Law Commission's *Renting homes: the final report* and draft Rented Homes Bill (Cm 6781-ll, May 2006) sought to simplify and codify housing law. Enactment of the draft bill, or similar reforms, would, at a stroke, bring some sanity to the present jumble of common law and statute, and greater access to justice for many tenants, especially those in the private sector. The draft bill remains on the shelf, still as necessary as ever, waiting to be dusted off and implemented by any government seeking to rationalise and clarify the law in an area which so closely affects its citizens' lives.

## Same as it ever was

Some things, regrettably, have not changed in 25 years, and familiar abuses re-surface in different forms. In June 1987 *Legal Action*, 'Recent developments in housing law' records complaints that insufficient time is allowed for county court possession hearings. Some private landlords exploit the power of the market and increasingly attempt to build all kinds of additional charges into their tenancy agreements. Mandatory possession Ground 8 (two months' rent arrears) is still used by some housing associations. In a perversion of a legislative scheme which aims to safeguard and promote the welfare of children, children's services departments still threaten routinely to take a homeless child into the care system rather than accommodate the parent and child together.

*Nic Madge*

Those who think that local authority 'gatekeeping' in homelessness cases is a post-millennium development may be interested to know that similar practices, though perhaps less subtle than present-day techniques, were abroad in the late 1980s. For example, in 1987/88, three London authorities closed their homeless persons units to personal callers, allowing access by telephone only: in December 1988 *Legal Action*, 'Recent developments in housing law' describes a successful challenge brought by Camden Community Law Centre® against the local council's use of such manoeuvres in order to reduce the volume of homeless applications. (See also page 4 of this issue.)

## The 'tolerated trespasser' doctrine

The benefit of hindsight gives us a perspective on issues that once loomed large, but which have been overtaken by changes in legislation or policy. By far the most striking example is found in the December 1987 *Legal Action* report of the case of *Thompson v Elmbridge BC*, in which the Court of Appeal held that a secure tenancy came to an end as soon as there was a breach of the terms of a suspended possession order. The case gave rise (via the House of Lords in *Burrows v Brent LBC* in 1996) to the doctrine of the 'tolerated trespasser', a judicial creation which was to haunt the corridors of housing law for most of the past 25 years. The authors' prescient comment on *Thompson* anticipated the chaos in store:

> *This extraordinary decision has considerable implications. It effectively undermines [the legislative scheme] ... It is certainly inconsistent with precedent in the private sector ...* (p13).

Twenty-three years later, these were exactly the arguments used by the Supreme Court in *Austin v Southwark LBC* (see August 2010 *Legal Action* 34) to discredit the reasoning in *Thompson* and subsequent cases. In *Austin*, Lord Walker, commenting on the 'definitive obituary of the "tolerated trespasser"' candidly acknowledged the damage done by this concept of an 'unfortunate zombie-like creature [which] achieved a sort of half-life only through a series of judicial decisions in which courts failed ... to face up to the theoretical and practical contradictions inherent in the notion' (para 43). By a strange collusion of events, the tolerated trespasser has been despatched to oblivion twice over within the last 12 months, once by the Housing and Regeneration Act 2008, and more recently – lest the creature should somehow rise from the grave – by judicial recognition that it should never have existed.

## Twenty-five years of housing law articles

'Recent developments in housing law' is a phenomenon, and its 25th anniversary is something to be justly celebrated. Whenever the history of housing law and policy in England and Wales comes to be written, the raw material is already there in the pages of *Legal Action*. It remains a mystery to the ordinary mortal how Jan and Nic survive the treadmill of compiling their material, reading and summarising the cases and producing their monthly copy, in addition to their day jobs.

However, for practitioners and advisers, their articles will continue to be what they have always been: an indispensable mine of information and guidance – arguably more essential than any textbook – and a cornerstone of access to justice in the housing world. Those early sessions in the Kings Cross wine bar have created a dependency culture of the best possible kind. As readers, we acknowledge our dependency and look forward to the next 25 years of *Legal Action* and of 'Recent developments in housing law'.

■ See page 34 of this issue for the latest 'Recent developments in housing law' article.