

HOMELESSNESS LAW AND PRACTICE: CORONAVIRUS UPDATE

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Though there is little firm evidence of the extent of the impact of the Covid-19 pandemic on the homeless population or the effectiveness of measures adopted by the government to mitigate that impact, it is clear that the crisis poses unique and urgent risks to this part of society. The Housing, Communities, and Local Government Committee has launched an inquiry into this issue which will meet for the first time next week, and it is more than likely that we will see more changes to this fast-developing area in the weeks and months to come.

In that context, this Q&A examines the key measures which have been adopted thus far to prevent people from losing their homes and to protect those who are already homeless. It considers the possible implications of the pandemic for the existing homelessness regime contained in Part VII of the Housing Act 1996, and explores the unresolved issues which will have to be addressed once the emergency period has ended.

WHAT MEASURES HAVE BEEN ADOPTED TO PREVENT PEOPLE BECOMING HOMELESS DURING THE PANDEMIC?

Stay on possession proceedings under CPR Part 55

Practice Direction 51Z imposes a stay on possession proceedings under CPR Part 55 for 90 days from 27 March 2020. At the time of writing the validity and scope of PD51Z is the subject of a challenge in *Arkin v Marshall*¹; judgment on an appeal heard by the Court of Appeal last week has yet to be handed down.

¹ *Arkin v Marshall*, County Court at Central London, 15 April 2020). The judgment is available online through the NearlyLegal blog at <http://431bj62hscf91kqmgj258yg6-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/ArkinMarshallStayJudgment.pdf>.

Extension of the notice period for possession

Section 81 (read together with Schedule 29) of the Coronavirus Act 2020 requires landlords to give at least three months notice before seeking possession. This requirement will remain in force until at least 30 September 2020.

Extension of the Pre-Action Protocol for Possession Claims

On 18 March the government announced it is planning to widen the 'pre-action protocol' on possession proceedings, to include private renters and to strengthen its remit². Although it is unclear exactly what the fortified Protocol will entail, the government has said that the objective is to 'support the necessary engagement between landlords and tenants to resolve disputes' and require landlords to 'reach out to tenants to understand the financial position they are in'.

Mortgage holidays for owner occupiers and buy-to-let landlords

The Financial Conduct Authority ('FCA') has issued guidance to lenders advising them to operate three month mortgage payment holidays for owner occupiers and buy-to-let landlords who are 'experiencing or reasonably expect to experience payment difficulties because of coronavirus'³. The hope appears to be that the holiday will enable buy-to-let landlords to offer their tenants greater flexibility than might otherwise have been possible, though there is as yet no requirement for such landlords to pass on any benefits derived from the mortgage holiday to their tenants.

Increase to housing benefit and universal credit

The government has announced an increase to housing benefit and universal credit such that the Local Housing Allowance ('LHA') will cover 'at least 30% of market rents' within a Broad Rental Market Area, implemented by the Social Security (Coronavirus) (Further Measures) Regulations 2020⁴. Though a welcome step in the

² UK Government Press Release, 'Complete ban on evictions and additional protections for renters' (18 March 2020). Available online: <https://www.gov.uk/government/news/complete-ban-on-evictions-and-additional-protection-for-renters>.

³ Financial Conduct Authority, *Mortgages and coronavirus: our guidance for firms* (Issued 20 March 2020, updated 25 March 2020).

⁴ SI 2020/371.

right direction, this measure has been widely criticised as being insufficient: the Commons Library Briefing Paper on 'Coronavirus: Housing Support' acknowledges that there are calls to go further and increase the LHA to cover the median of market rents. The question of how rent arrears accumulated during the emergency period and/ or as a result of the pandemic will be treated once the lockdown ends and the 90 day stay under PD51Z expires has yet to be resolved.

WHAT MEASURES HAVE BEEN ADOPTED TO PROTECT THOSE WHO ARE HOMELESS DURING THE PANDEMIC?

Those who are street homeless are likely to face real difficulties in complying with the government's advice on social distancing and self-isolation; this is acknowledged by the fact that the homeless are exempt from restrictions on movement which apply to the rest of the population⁵.

In a letter of 26 March 2020, Minister for Local Government and Homelessness Luke Hall MP called on local authorities to take steps to ensure that 'rough sleepers and other vulnerable homeless are supported into appropriate accommodation by the end of the week'. To this end, he directed that authorities should take the following programme of actions:

1. Convene a 'local co-ordination cell' to plan and manage the response to COVID and rough sleeping. This should bring together those within the authority with responsibility for housing, social care, and public health, as well as local NHS partners, and should report to wider local COVID structures.
2. Seek to stop homeless people from congregating in facilities where there is a higher risk of transmission (such as day centres and street encampments).
3. Urgently procure accommodation to be provided to those who are street homeless. The letter promises that the Ministry of Housing, Communities, and Local Government will assist authorities which are struggling to secure sufficient units.

⁵ Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, regulations 6(1) and 6(4).

4. Triage people into groups with: symptoms of Covid-19; no symptoms but pre-existing conditions which are known to be risk factors for Covid-19; those with neither of the above.
5. Ensure that 'social care basics' such as food and care reach those in self-contained accommodation who need it;
6. Where possible, separate people with significant drug and alcohol needs from those without.

Neither the letter nor any other legislation or guidance introduced in response to the crisis elaborates on what power the authority might exercise to provide the emergency accommodation which seems to be envisaged, nor is any light shed on what will happen to the people thus accommodated at the end of the emergency period. Indeed, the letter acknowledges that the approach is very much to act quickly and worry about the details later, quoting Dame Louise Casey (who has been charged with leading the government's response to Covid-19 and rough sleeping) as saying that 'It won't be perfect, but all of us together will do our best'. This is of course hard to criticise given the scale and urgency of the challenge posed by the pandemic; however, there will inevitably be a need for unravelling when the crisis is over which may well be made more difficult by the lack of clarity at this stage. It is also significant, and arguably concerning, that the programme outlined above is not supported by any statutory measures whatsoever; this will potentially make it difficult to hold authorities to account for any failure to implement the strategy effectively and fairly.

To support the strategy outlined above the government has made £3.2 million in emergency funding available to local authorities to support rough sleepers and vulnerable homeless people into alternative accommodation. There are scant details as yet as to how this is being spent, though authorities are being encouraged to make use of third party accommodation to comply with the Minister's request. To facilitate this, accommodation providers who would otherwise have been required to close pursuant to restrictions imposed by the Health Protection (Coronavirus, Restrictions) Regulations 2020 are permitted to remain open⁶. The Guidance for Social Landlords also indicates that although there is a general recommendation that moving home should be avoided unless essential, transfers will be regarded as being

⁶ Health Protection (Coronavirus, Restrictions) Regulations 2020, regulations 5(4)(b), 5(6)(c), and 5(7).

in the public interest where necessary to move a tenant on from temporary accommodation.

WHAT ARE THE IMPLICATIONS OF THE PANDEMIC FOR THE APPLICATION OF THE ESTABLISHED REGIME GOVERNING HOMELESSNESS APPLICATIONS?

The temporary safety measures outlined above do not mean that an authority may refuse to accept a homelessness application; the regime contained in Part VII Housing Act 1996 (hereafter 'HA 1996') continues to operate as before. However, the pandemic is likely to have a number of implications for the application of that legal regime.

The homelessness relief duty

Although the Minister for Local Government and Homelessness has not specified what power authorities should exercise to provide accommodation pursuant to his emergency request, one possibility is that the relief duty contained in section 189B HA 1996 might be used. Under this section an authority is required to take 'reasonable steps' to help an applicant who is homeless and eligible to secure that accommodation becomes available for their occupation for at least six months. Though these 'reasonable steps to help to secure' does not entail an obligation to provide accommodation, an authority has a power to provide accommodation as part of the discharge of their relief duty in appropriate cases⁷.

Priority need

Perhaps most obviously, the pandemic is likely to have implications for assessment of those in priority need for the purposes of section 189 HA 1996. Section 189(1)(c) provides that a person has priority need for accommodation if he/ she 'is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason'. It is well established that 'vulnerable' in this context means 'more vulnerable

⁷ Section 205(3) Housing Act 1996.

than an ordinary person if made homeless'⁸. An argument for priority need based on the applicant's vulnerability is likely to be strengthened where the applicant is particularly at risk from Covid-19, either because they are aged 70 or over, or because they have one or more of the underlying health conditions which have been identified as increasing the risk of a serious outcome of a Covid-19 infection.

Under section 189(1)(d), a person has priority need where they are 'homeless or threatened with homelessness as a result of an emergency such as flood, fire, or other disaster'. On first reading of this provision, there might appear to be an argument that a person who loses their home as a result of the coronavirus pandemic has priority need on this basis. The weight of authority is unhelpful to this argument, however. In *R v Bristol City Council ex parte Bradic*⁹, the leading case considering the interpretation of the phrase 'an emergency such a flood, fire, or other disaster', Roch LJ giving the lead judgment of the Court of Appeal suggested that 'the line is to be drawn so as to embrace all emergencies which consist of physical damage to the accommodation' (though this arguably did not form part of the *ratio* of the case, and the other judges framed their reasoning subtly differently, with Hobhouse J suggesting that a 'supervening event of some scale which has the consequence of rendering the person homeless' is required and Nourse LJ emphasising the need for the disaster relied upon to be 'of the same kind as' a flood or fire).

A further change which appears to have been inspired by, though it is not specific to, the pandemic is that domestic abuse victims will be regarded as being in priority need for the purpose of Part VII¹⁰. The government has announced that the Domestic Abuse Bill will be amended to implement this welcome change.

Reasonableness of continued occupation

Section 177(2) HA 1996 provides that in determining whether it is reasonable for a person to continue to occupy accommodation, a local authority may have regard 'to the general circumstances prevailing in relation to housing within its district'.

⁸ *Hotak v Southwark LBC* [2016] AC 811.

⁹ (1995) 27 HLR 584. The case in fact considered the construction of section 59(1)(d) Housing Act 1985, which was the predecessor to section 189(1)(d) Housing Act 1996 and was framed in identical terms.

¹⁰ Announced by Local Government Secretary Robert Jenrick speaking at the government's daily coronavirus briefing on 2 May 2020.

It is possible that an authority might argue that the pressure on their housing supply and services as a result of coronavirus (i.e. because they are unable to bring or progress possession proceedings, because they have offered accommodation pursuant to the request made by the Minister for Local Government and Homelessness, or because they are facing difficulties in moving tenants around) is so significant as to impact the 'general circumstances prevailing in relation to housing'. This might weigh in favour of finding it reasonable to for an applicant to continue to occupy their current accommodation during the pandemic, even where this might not have been the case during normal times.

Provision of accommodation pending review

Where a homeless application has requested a review of the local authority's decision on the main housing duty, the authority has a power (though not an obligation) to provide temporary accommodation while that review is carried out¹¹. The local authority must consider whether to exercise its discretion and do so in accordance with the criteria set out in *R v Camden LBC exp. Mohammed*¹²: (a) the merits of the substantive case; (b) whether there was new material on review that could effect the decision; and (c) the personal circumstances of the applicant. It seems likely that the fact that the individual in question will be street homeless during a public health crisis if accommodation pending review is not provided will be pertinent to the final limb of the *Mohammed* criteria.

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¹¹ Section 188(3) Housing Act 1996.

¹² (1997) 30 HLR 315.