Housing Cases and Appeals Update

Andrew T. Arthur MPH MCIEH CEnvH
Arthur Associates

Aim of Session

- Recent Upper Chamber Decisions
- Recent cases taken to Court of Appeal

Recent Upper Tribunal (Lands Chamber) Cases

Hanley v Tameside MBC [2010] UKUT 351 (LC)

- Case is an appeal by way of review against RPT decision dated 20 June 2009
- RPT dismissed appeal but granted leave to appeal to UT because of "arguable point of law in respect of relationship between HA2004 requirements and Building Regs.
- Case involved PO prohibiting use of 2F attic room, plus other matters
- Appellant submitted that stairs in question already complied with Building Regs or could be made to comply with them and could properly have been included in an improvement notice
- RPT addressed relationship between B.Regs and HA 2004 as follows:
  - B.Regs prescribe minimum standards for the design and construction of buildings and change from time to time to keep abreast of modern developments and more sophisticated techniques and concepts.
  - HA2004 introduced new concept for housing assessment based on identification and removal of hazards
  - RPT also stated in many respects B.Regs and HA2004 purposes are the same; provision of safe accommodation for occupants

Recent Upper Tribunal (Lands Chamber) Cases

Hanley v Tameside MBC [2010] UKUT 351 (LC)

- Nonetheless, application of two different, albeit similar in purpose regimes, will necessarily give rise to inconsistency and conflict. Where, this arises the provisions of HA2004 prevail.
- RPT also considered that HA2004 is primary legislation whereas B.Regs are in subordinate legislation and under doctrine of implied repeal, presumption is that Parliament knows what it is doing and that any statutory provision which is inconsistent with later stat. Provision is deemed to be implicitly repealed by the later provision is so far as there is inconsistency.
- The effect of this is twofold, first where hazard identified under HA2004, compliance with B.Regs not a material consideration and secondly, compliance with B.Regs in any remedial works only material to the extent that it removes the hazard. The tribunal assessed the issues on that basis.

Recent Upper Tribunal (Lands Chamber) Cases

Hanley v Tameside MBC [2010] UKUT 351 (LC)

- UT concluded as follows:
- Function of RPT on appeal is not simply to review the decision of the LA, but to rehear the matter and make its own mind about what it would do.
- RPT asserted that B.Reg and HA regimes would “necessarily” give rise to inconsistency and conflict. UT concluded this was not necessarily so when the different purposes of the two regimes is born in mind
- RPT did not go on to identify any conflict or inconsistency that troubled them in this case, which taken on its own might not matter much, however, UT not confident that matter could be completely set aside as being of no significance and in the light of further comments on the matter made by the RPT, what was said might be thought to be an erroneous view of the proper weight to be given to compliance with B.Regs
- UT judgement also goes on to say it finds difficulty in seeing a distinction between primary and secondary legislation or how doctrine of implied repeal could have any relevance
- UT judgement states that RPT saying where hazard identified under HA2004 compliance with B.Regs is not a material consideration is an error in law

Recent Upper Tribunal (Lands Chamber) Cases

Hanley v Tameside MBC [2010] UKUT 351 (LC)

- UT also calls out inaccuracy of RPT in saying that compliance with B.Regs in remedial work only material to the extent that it removes a hazard. In the case of stairs there will always be some residual hazard, compliance with B.Regs might reduce the hazard. This reduction in hazard might mean a hazard of a different order if recalculated and that the RPT or LA might take a different view of the action needed
- Concluding, UT dismissed appeal despite errors of law as it was confident that the errors made no difference to the result

Recent Upper Tribunal (Lands Chamber) Cases

Vaddaram v East Lindsay DC [2012] UKUT (LC)

- Case refers to Hanley v Tameside
- Appeal to UT against decision by RPT to confirm a PO
- PO made to address issues relating to means of escape
- Appellant asserted that RPT had erred in law by not giving precedence to the fact that current layout of the premises conformed to B.Regs and that it erred in its conclusion that the windows in the flat in question were unsuitable for use as a fire escape as the LACORS guidance on fire safety (which had not been put before the RPT) was complied with
- One major factor in this case is that UT appeal was by way of re-hearing and that UT said of particular importance in the appeal was the physical change in layout and condition since the RPT hearing
- Significant matters in the UT judgement are as follows

Recent Upper Tribunal (Lands Chamber) Cases

Vaddaram v East Lindsay DC [2012] UKUT (LC)

- Significant matters in the UT judgement are as follows:
- RPT referred to an escape through the side window involving a fall onto a hard surface, but that the hardness of the surface is not a criterion that appears either in B.Regs or LACORS guidance. What matters is that the surface is level and free of obstrucction. Not a requirement that there be a soft landing surface such as grass
- The LA relied on paragraph 18.1 of the LACORS guidance to support their view that the windows did not provide a satisfactory means of escape. That paragraph is solely concerned with external stairways and dis not apply to the appeal
- RPT placed weight upon and quoted from a latter from Lincolnshire Fire Service dated 12 July 2002. The letter did not form part of the RPT bundle but was handed to the tribunal at the hearing. UT concerned that a very important document was not produced at the UT hearing and had been mislaid.
- Appeal allowed PO quashed. Costs awarded to appellant

Recent Upper Tribunal (Lands Chamber) Cases

Dhugal Clark v Manchester City Council [2015] UKUT 129 (LC)

This is an appeal which was allowed and which dealt with two issues, namely the proper approach to re-hearing and whether the LHA is entitled to impose minimum space standards in HMO bedrooms

Points to note from the appeal:

- Appeals by the first tier tribunal against the refusal to alter the terms of an HMO license should be by way of re-hearing and not by review which is considered what happened in this case.
- LHA cannot adopt mandatory standards. Doing so fetters their discretion and usurps the power of the SoS to prescribe national standards. What is required is a consideration of the room and the property as a whole on their merits rather than by reference to a fixed minimum floor area

Recent Upper Tribunal (Lands Chamber) Cases

Nottingham City Council v Parr [2016] UKUT 71 (LC)

- House in Multiple Occupation – licence conditions – whether conditions restricting use of under-sized bedroom to students or other persons living as a group may lawfully be imposed – S.67 HA 2004
- Appeals against terms of licence prescribed by Schedule 5 – dissatisfied parties mat appeal to RPT which may confirm, reverse of vary the decision of the LA and direct that licence granted on its terms
- Appeals to UT from decisions of RPT on points of law only (S11 of Tribunals, Courts and Enforcement Act 2007)
- Case involved two properties owned by business providing accommodation for students
- LA considered 8m2 is minimum acceptable size for bedroom in an HMO and in carrying out measurements, disregards all floor space with a ceiling height of <1.53 metres
- Both cases licences granted prohibiting use of “under-size” bedrooms for sleeping
- RPTs allowed appeals by owners and deleted relevant conditions
- RPTs referred to LAs reliance of professional practice note on amenity standards for HMOs published by IEHOs in Sept. 1994. (6.5m2 in HMOs occupied on shared basis)
- Both RPTs found the LAs guidance on space provision for HMOs reasonable as general guidance, but noted that some flexibility was permitted if other compensating features were present

Recent Upper Tribunal (Lands Chamber) Cases

Nottingham City Council v Parr [2016] UKUT 71 (LC)

- RPTs considered that in the rooms with reduced headroom, the areas with reduced headroom were of some value and it would be “arbitrary” to dismiss them summarily; assessment of particular characteristics of individual rooms needed assessment, because *“while in many instances such space may be of little value and thus quite properly disregarded, that is not universally the case”*
- RPTs took into account the communal living spaces in both HMOs, in both cases this was significantly larger than the minimum contemplated by LAs requirements for additional living space. Each RPT concluded that the attic rooms were adequate as study/bedrooms “where cohesive living is envisaged” and that there were sufficient compensating features to make them suitable for *“student or similar cohesive occupation for six persons in six households”*
- Allowing both appeals RPTs deleted the relevant conditions and the RPT in one case substituted an alternative licence condition of its own that the specified bedroom may only be used by someone in full-time education who resides in the dwelling for a maximum of 10 months in one year. No such condition was imposed in the case of the other property, where the RPT justified its conclusion by saying that”there are sufficient compensating features to make it suitable for students or similar cohesive occupation for six persons in six households

Recent Upper Tribunal (Lands Chamber) Cases

Nottingham City Council v Parr [2016] UKUT 71 (LC)

- UT granted permission to appeal on two grounds:

1. whether RPTs were wrong in law to distinguish between different types of occupants when framing licence conditions, and
2. It was not lawful for the RPT to impose a restriction on occupation of the relevant rooms for only 10 months out of 12

- Permission was also granted in the latter case on the additional ground that the condition was unenforceable
- UT concluded that there is nothing unlawful in a condition restricting the use of sleeping accommodation in part of an HMO to a person in full time occupation, if the decision maker is satisfied that , looked at as a whole the HMO is suitable for the number of households specified in the licence and also suggested an alternative condition.
- UT also concluded that references to ”cohesive living” and the 10 month restriction period on the use of a bedroom are not unlawful
- Both appeals were dismissed

Court of Appeal

Nottingham City Council v Parr [2017] EWCA Civ 188

- Nottingham City Council appealed to the Court of Appeal
- Lord Justice Lewison found that there was *"nothing intrinsically inimical to the regime governing HMOs in investigating the general characteristics and activities of an occupier".*
- He added: *"Since the words of section 67 (2) (a) [of the Housing Act 2004] on their face include the power to impose conditions restricting the 'use or occupation [of the HMO] by persons occupying it' and there is no context which would exclude a description of the class of persons entitled to occupy specified parts of the HMO, I would reject the Council's argument under this head. A restriction of occupation to 'occupation by students' is in my judgment a restriction on 'occupation by persons' "*

Court of Appeal

Nottingham City Council v Parr [2017] EWCA Civ 188

- And finally on this, the Supreme Court has granted Nottingham City Council permission to appeal after the Court of Appeal rejected the authority's challenge to terms in Houses in Multiple Occupation (HMO) licences restricting the occupation of bedrooms to a particular type of occupier.
- A three-justice panel comprising Lord Neuberger, Lord Clarke and Lord Sumption granted the council permission to appeal in August, it has emerged.

Recent Upper Tribunal (Lands Chamber) Cases

Hyndburn BC v Brown and Barron [2015] UKUT 489 (LC)

- S90 HA 2004 – LHA's powers to impose conditions upon grant of a license in respect of houses within a selective licensing area – nature and extent of conditions which can be imposed
- Appeal by LA against two decisions by RPT in relation to amendment and removal of conditions imposed in licenses under part 3.
- RPT varied condition requiring CO detector if gas supplied to property, and
- Removed a condition that throughout period of license that a valid Electrical Installation Condition Report was required
- RPT reasoning was there is no statutory requirement for CO detectors
- Installation of CO detectors and production of EICR were not functions of management, use or occupation, but "improvement" to the properties
- The conditions were unlawful as the hazards they were designed to reduce should have been addressed by Part 1 powers, not through license conditions.

Recent Upper Tribunal (Lands Chamber) Cases

Hyndburn BC v Brown and Barron [2015] UKUT 489 (LC)

- LA given leave to appeal to UT which was allowed
- With regards to the CO detector condition, condition as modifies was perverse and encouraged landlords to rip out existing CO detectors before licensing a house, rather than be potentially held liable for their maintenance.
- The fitment of CO detectors fell squarely within the definition of “management” and could not rationally be described as “improvement” and the absence of any statutory duty to fit CO detectors did not preclude their fitment by way of license conditions
- With regards to the EICR condition, as a detailed and professional examination of a house’s electrical system was not a matter within the competence of the Councils housing officers and does not form part of the council’s Part 1 inspection regime. Provision of an EICR and the duty to re-test if necessary related to the management of the property and as such fell within the discretion conferred by s.90(1) of the HA2004
- Both disputed conditions were reinstated into the respective licenses

Court of Appeal

Brown v Hyndburn BC [2018] EWCA Civ 242

- Court of Appeal allowed an appeal by landlord Mr.Brown and removed the conditions included in licenses
- Court held that the power to regulate the “management, use or occupation” of a house does not entitle a local authority to impose conditions requiring the introduction of “new facilities or equipment”.
- Authorities will need to carefully consider the content and purpose of any conditions and purpose of any conditions they want to impose on landlords under the selective licensing regime

Recent Upper Tribunal (Lands Chamber) Cases

Zohar v Lancaster City Council [2016] UKUT 510 (LC)

- This was an appeal to the Upper Tribunal against the dismissal of an appeal by the RPT in relation to a decision by Lancaster City Council to take emergency remedial action at a property under s.40 HA 2004
- Council carried out emergency remedial works to secure an entrance door . New lock fitted following day and a notice was served under s.41 on the appellant setting out the hazard it had identifies and its reasons for taking emergency action.
- Person served with s.41 notice has a right of appeal by way of re-hearing
- Appeal to RPT was dismissed and appellant ordered to pay the cost of the remedial works (£105) and ordered to pay £500 in costs
- Appeal to UT determined on written representations by HH Judge Huskinson

Recent Upper Tribunal (Lands Chamber) Cases

Zohar v Lancaster City Council [2016] UKUT 510 (LC)

The Judge outlined correct course of action by RPT to follow when faced with such an appeal was to be by way of a rehearing. The parties to such an appeal "and in particular the local housing authority" can be expected to place full evidence and argument before the RPT to enable it to "reach its own conclusions" upon:

1. *Whether a hazard existed at the property*
2. *Whether it was a category 1 hazard*
3. *If so, whether it constituted "an imminent risk of serious harm to the health or safety of any occupiers of those or any other residential premises."*
4. *Whether a management order was in force within s.40(1)*
5. *Whether the emergency remedial action taken fell within s.40 (2)*
6. *If taking such action was a course available to the local housing authority, whether it was "appropriate enforcement action within s.5."*

Judge concluded that in this case, the written material before the RPT did not give clear assistance to the tribunal in dealing with all of these points and that its decision should be set aside. RPT had erred in law by failing to deal with the appeal by way of a rehearing and failing to consider and to reach its own conclusions upon the various matters requiring consideration.

The case would be remitted to the RPT with directions to reconsider the case and reach its own reasoned conclusions. The judge also made a direction under s.12(3) of the Tribunals, Courts and Enforcement Act 2007 that the members of the RPT who will reconsider the case are not to be the same as those who made the decision which he had set aside

Recent Upper Tribunal (Lands Chamber) Cases

LB of Waltham Forest v Khan [2017] UKUT 153 (LC)

- Case deals with appeals about conditions imposed by LA under selective licensing
- Issue was whether LA may have regard to the planning status of a house when considering an application for a Part 3 licence
- Each appeal concerns converted flats created without the benefit of planning permission
- Licence may include such conditions as LA consider appropriate for regulating management, use or occupation of a house (s. 91(3)
- Waltham Forest Council has adopted guidance for its staff that in event of no “contra-indications” relating to applicant or property, policy is to grant a licence for the full 5 year period. Otherwise it will grant a new licence for 1 year. Policy explains that the shorter licence penalises the landlord since a new application needs to be made after 1 year, but it enables the property to be legally rented and allows for the issue that gave rise to the shorter licence to be remedied.
- Respondent appealed to RPT contending that planning considerations were not relevant to Part 3 licensing. RPT allowed the appeal and decided that licences be extended to 5 years
- LA appealed to UT and appeal was allowed

Recent Upper Tribunal (Lands Chamber) Cases

LB of Waltham Forest v Khan [2017] UKUT 153 (LC)

- Judgement made several points

1. Part 3 licensing should not be seen as an alternative to planning enforcement under the Town and Country Planning Act 1990, however, that did not mean that with buildings in breach of planning controls, those circumstances were irrelevant to a decision as to whether to grant a licence or its terms

It was not irrelevant whether a house had been built or occupied in breach of planning control, given the grounds on which the appellants had designated the area for selective licensing. In this regard, concerns of planning control and of licensing under Part 3 of the 2004 Act overlapped

Therefore legitimate for LA to have regard to planning status in deciding whether to grant a licence and when considering its terms. Also permissible for LA to refuse a licence until PP granted or could no longer be required

Because of potential difficulties with possession and exposure to prosecution, solution adopted by LA of granting a shorter period licence to allow the planning status to be resolved was rational and pragmatic and well within their powers

Licence also provided opportunity for landlord to demonstrate that he did not need PP or was entitled to PP.

Recent Upper Tribunal (Lands Chamber) Cases

LB of Waltham Forest v Khan [2017] UKUT 153 (LC)

It would be unsatisfactory to place the onus on the local authority to establish a breach of planning control in costly and time consuming enforcement proceedings when the landlord's requirement of a Part 3 licence provides an opportunity to require that he take the initiative of demonstrating that he does not need, or alternatively is entitled to, planning permission. The authority has a discretion over the duration of each licence it grants, and there is no automatic entitlement to a period of five years. Where there are grounds to believe that the applicant requires but does not have planning permission the grant of a shorter period is a legitimate means of procuring that an unlawful use (which itself may exacerbate anti-social behaviour) is discontinued or regularised

2. It was not appropriate simply to restore the original licences without any independent consideration of their terms. The respondent was entitled to a re- determination of his original licence application which took into account all relevant factors. The proper course was to continue the licences until two months after the date of the present decision, which would allow the respondent sufficient time to make new applications and thereby avoid committing an offence by being in charge of unlicensed Part 3 houses, and would also allow the appellants to make a decision on those applications with all of the information now at their disposal.

Appeal to High Court following conviction in Magistrates Court of failing to comply with I.N.

Odeniran c Southend on Sea BC [2013] EWHC 3888 (Admin)

- Odeniran had been convicted by Magistrates of failure to comply with and Improvement Notice under Sections 11(2) and 12(2) HA2004
- Case all related to service dates and operability
- High Court not impressed with Magistrates decision and regarded notice as defective
- Council did not appear, but had put in a skeleton argument seeking to uphold the submissions made to the Magistrates
- On the non-attendance, High Court were not surprised because it seemed that there could be no doubt that the notice was defective and accordingly, a prosecution for failure to comply with it was inappropriate
- Appeal allowed and costs to Odeniran, put forward at some £14000
- *Remember!! - 1st Class, 2 days and 2nd Class 4 days*

Recent Upper Tribunal (Lands Chamber) Cases

Bolton MBC v Patel [2010] UKUT 334 (LC)

- This is an appeal against a decision of the RPT. The RPT gave Bolton MBC limited permission to appeal to the UT on the grounds that the RPT had wrongly interpreted or wrongly applied the relevant law
- Councils case was that the RPT erred in that in determining that there was no imminent risk of severe harm from excess cold in that it treated “imminent” as imposing a higher threshold than was justified under the statutory provision. In particular, it was said that the RPT was wrong to equate an imminent risk of serious harm with there being “a good chance” of the harm in question occurring
- Counsel for Bolton MBC submitted that “imminent” bore the meaning in the OED of “impending, soon to happen” and said that he accepted that because “imminent” implied the risk was “soon to happen” it conveyed a sense of urgency. But in saying that there must be “a good chance” that the harm might be about to occur the RPT appeared to ignore the word “risk”, which in common English denoted only that there was a possibility or probability of a chance of something occurring.

Recent Upper Tribunal (Lands Chamber) Cases

Bolton MBC v Patel [2010] UKUT 334 (LC)

- The decision of the UT is particularly critical of the method of hazard assessment provided for in the HA 2004 and the Regulations. The following is a quote from the conclusions of George Bartlett QC, (President of the Upper Tribunal (Lands Chamber) 1998 – 2012
- *"It seems to me important that RPTs when determining cases under Part 1 of the Act should bear in mind the nature of such assessments as these and their limitations. The complicated set of provisions is designed to produce a numerical score for each hazard that is under consideration so that it can be seen to fall within a particular band and in either category 1 or category 2. The great danger of a numerical score produced in this way it that it creates the impression of methodological accuracy, whereas the truth may be that it is the product of no more than a series of value judgments based on little understood statistics of questionable validity"*
- *"The factual basis of the score for Excess Cold here was that the house was without central heating, with space heating being provided by halogen heaters. The actual occupants of the house were not relevant to the scoring system, since the score had to be based on the likelihood of a "relevant occupier" suffering harm as the result of the hazard, and the relevant occupier for Excess Cold is a person aged 65 or more (see paragraph 23 above). The NA (national average) case likelihood on the score sheet relates to the relevant occupier. It is not at all clear how useful a guide this is to the risk of harm due to a cold house, since it is simply derived from the total excess of winter deaths in the 65+ age group, a bare statistic, as I have said, that has no defined relationship to housing or housing conditions. In fact the technical officer appears to have based his assessment, not on the risk to the relevant occupier, but on the risk to Ms Brooks and her two year old child (paragraph 30 of the decision refers). For this purpose even the NA figure could have been of no assistance, and it appears that no other statistical guidance is provided."*
- Appeal dismissed . RPT decision discloses no error of law.


Questions?

Recovery of costs from your opponent in the First Tier Tribunal (Property Chamber) – recent guidance

Prior to 2013, the Leasehold Valuation Tribunal (now First Tier Tribunal (Property Chamber)) could only make costs' awards against parties up to a maximum of £500 and only where a party's conduct has been frivolous, vexatious, or where it amounted to an abuse of process.

The new rules governing the award of costs are set in rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 S.I. 2013 No. 1169.This provides that the Tribunal may make an order in respect of costs only:

1. under section 29(4) of the Tribunal Courts and Enforcement Act 2007 Act (wasted costs) and the costs incurred in applying for such costs;

2. if a person has acted unreasonably in bringing, defending or conducting proceedings in:

1. an agricultural land and drainage case,
2. a residential property case, or
3. a leasehold case; or
4. in a land registration case.

Until recently, there has been limited guidance as to how the Tribunal will apply rule 13(1)(b) in circumstances where it is alleged that a person has acted unreasonably in bringing, defending, or conducting proceedings.

The recent case of Willow Court Management Company (1985) Limited v Mrs Ratna Alexander (2016 UKUT 0290 LC) provides helpful guidance as to how Rule 13 is likely to be applied in the future.

In this case the Upper Tribunal outlined a three-stage test to be applied when considering whether to make costs' orders under rule 13(1)(b) where it is alleged that a party has acted unreasonably. The 3-stage test is as follows:

The first question to consider is whether a party as acted unreasonably.This is to be tested objectively and not set at an unrealistic level.Paragraph 26 of the judgement states "*We ... consider that tribunals ought not to be over-zealous in detecting unreasonable conduct*". Paragraph 28 of the judgement goes further and states:

"*...A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case.If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed...*"

There is therefore a high bar that must be reached in order to meet the required standard.

The second test involves the application of the Tribunal's discretion and asks that if the party has acted unreasonably, ought the Tribunal to make an order for costs? The Tribunal should consider whether in light of the unreasonable conduct, and taking into account all the relevant aspects of the case, it should make an order for costs.

If, having decided that a party has acted unreasonably, and that in light of such conduct the Tribunal would be making an order for costs, the Tribunal should then decide what the terms of that order should be. There is no general rule, unlike in traditional litigation through the courts, where the unsuccessful party is ordered to pay the costs of the successful party.In fact that only general rules are found in section 29(2)-(3) of the Tribunal Courts and Enforcement Act 2007 Act which provides that the Tribunal has full power to determine by whom and to what extent costs should be paid.This is subject to the Tribunal's procedural rules including an overriding objective to deal with cases fairly and justly and in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal.It will not therefore necessarily be the case that a party will be ordered to pay the whole of another party's costs in every case of unreasonable conduct.

It is clear from this case that in order to obtain an order for costs in the Tribunal as a result of a party's conduct, there is a high threshold that will need to be met and that such orders will only be made in exceptional or very clear cases.