

Housing Team Legal Bulletin

Issue 27. November 2011



Minded to letters

Mitu—v- Camden LBC [2011] EWCA Civ 1249
[judgment](#)

Another case on the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999. Non-compliance with these regulations has been fertile territory for challenges to review decisions.

In short if there is a deficiency or irregularity in an original decision which means “something lacking” such as an issue not addressed, an error on the facts or law, an absence of reasoning, lack of enquiries etc then the reviewer if minded to find against the interests of the applicant must give them an opportunity to make further representations whether orally, in writing or both. It is for the applicant to choose which method and if they wish to make those representations orally to choose whether they wish to make them face to face.

Camden found Mr Mitu not to be in priority need and that he was intentionally homeless and Camden’s duty was limited to advice and assistance. On review it was found that he was not in priority need but the reviewer accepted that he was not intentionally homeless. Although of course no Section 193(2) duty arose to secure suitable accommodation was available for his occupation by virtue of Section 192(3) Camden now had a discretionary power to secure accommodation for him. The reviewer decided not to exercise that power in his favour.

Mr Mitu argued that as the original decision-maker was in error on the question of intentionality that Regulation 8(2) applied and he was entitled to receive a minded to letter to enable him to make further representations. Camden LBC disagreed on the basis it seems that the deficiency in the original decision had now been remedied in his favour and was therefore not a “relevant flaw” and the county court judge dismissed his appeal.

The Court of Appeal allowed Mr Mitu’s appeal. They held it was wrong to split an adverse decision into different issues to decide whether there was a deficiency in the decision. They held that to do so would be to write words into the regulation that were not there. LJ Rix whilst concurring in the result thought that it was important to stress that it was not any flaw in an original decision that would lead to the need to serve a minded

to find letter but only a flaw that justified an extra procedural safeguard.

COMMENT

The reasoning of the majority should I suggest be preferred in any event. The first question is whether there is a deficiency or irregularity in the original decision. That should be a question for the reviewer but once he has decided there is such a deficiency or irregularity then Regulation 8(2) applies. It is not for him then to decide whether he or she can dispense with serving a notice for the reasons identified in **Makisi-v- Birmingham CC [2011] EWCA Civ 355** [more](#) that it may be in the very cases where the reviewer thinks that further representations may make no difference that in fact oral or written representations may do just the opposite.

Hence, therefore it is important to remember that the question for advisers when considering whether their client should have received a minded to letter is the straightforward statutory test as to whether there is a deficiency or irregularity in the original decision – if there is then so long as the decision continues to be adverse to the applicant’s interest at review stage then the right to a minded to letter arises. The overriding questions are whether an important aspect of the case was neither addressed nor addressed adequately and there was not a full and reliable consideration of the material issues.

Appeals on these grounds should not be overlooked even if other grounds of appeal do not appear strong as they give the applicant a second bite at the cherry by which they can persuade the reviewer that there otherwise unchallengeable or lawful decision was wrong.

Oops! (starter tenancies)

Saxon Weald Homes Ltd-v- Chadwick [2011] EWCA Civ 1202 [judgment](#)

This case is a salutary lesson to registered providers of social housing when dealing with starter tenancies. Mr Chadwick was granted a “probationary tenancy”. This provided in its terms that the tenancy would automatically convert into an assured tenancy unless either possession proceedings had begun or a notice requiring possession had been served and it would

continue to be an assured shorthold tenancy until either the day after the proceedings ended if no possession order was made or until the tenancy was ended by the court order for possession.

The tenancy conditions then stated that if the tenancy converted to a fully assured tenancy that the landlord would send a letter confirming that to be the case.

The landlord alleged that the tenant had engaged in noisy parties and caused nuisance. The tenant was alleged to have depression and mental health problems but the landlord decided that the nuisance meant it should seek to evict him.

Six days before his tenancy was due to convert the landlord's solicitors served him with a Section 21 Housing Act 1988 notice and a notice seeking possession under Section 8.

On the expiry date of the 12 month period, however, a housing assistant employed by the landlord then sent him a letter confirming that he was now an assured tenant and set out his additional rights. The tenant argued that this was a notice that his tenancy was no longer an assured shorthold the requirements of which are set out in Schedule 2A para 2 Housing Act 1988 and that accordingly he was an assured tenant.

A deputy district judge found that as that letter was sent "in error" as the Housing Assistant was unaware of the solicitor's letter it did not fall within Schedule 2A and that the effect of the contractual terms were that the service of a Section 21 notice prevented the tenancy automatically converting to an assured tenancy.

The circuit judge disagreed and allowed the tenant's appeal on the basis that the letter on its face plainly stated that the tenant was now an assured tenant and accordingly fell within Schedule 2A para 2 and there was no room for an alternative construction whatever the intention of another part of the landlord's operation.

Although permission to appeal was granted on the basis it appears that there may have been a mistake which the tenant knew and was aware of that could not be pursued as there was no evidence as to what the tenant knew or had been aware of as he had not been cross-examined. Indeed, he was represented by his mother throughout as his litigation friend.

The landlord pursued its appeal on the basis that the letter on its face did not fall within Schedule 2A para 2 on the basis that the test in **Mannai Investments –v- Eagle Star Insurance** should have applied namely

what would a reasonable recipient of that letter have thought it conveyed and in context having already received a notice requiring possession the reasonable recipient would have presumed that it was not a notice but an incorrect statement.

The Court of Appeal rejected this submission and held that the circuit judge was plainly correct. The fact that the tenancy did not automatically convert under the tenancy agreement did not prevent the landlord serving a notice under Schedule 2A para 2. A statement that you are now an assured tenant is the same as a statement that you are no longer an assured shorthold tenant. The context could not assist the landlord. The tenant might quite properly take the view the landlord had changed his mind. It was not a **Mannai** type case where the mistake arose from the wording of the notice the mistake was in serving the notice.

COMMENT

This is an important decision as it stresses the importance of reading such a notice from a tenant's point of view at the time it is received. The fact that lawyers might later be able to appreciate that this was a mistake does not assist a landlord who sends such a notice plain on its face to a tenant who might simply think the landlord has changed their mind let alone a tenant who does not have capacity to consider the landlord's state of mind at all!

Informal Advice

Please bear in mind that barristers at GCN are always available to give informal advice on any housing matters. In the first instance please contact the clerks (Sarah Wright, Annmarie Nightingale or Nicola Carroll) on 0161 236 1840.

GCN housing team

[Sonia Birdee](#)

[Andrew Byles](#)

[Laura Cawsey](#)

[Jared Ficklin](#)

[Ben McCormack](#)

[Philip McLeish](#)

[Rory O'Ryan](#)

[James Stark](#)

[Kate Stone](#)

[Camille Warren](#)