

HOUSINGLAWDIRECT - A PERSONAL VIEW

by Andrew Arden Q.C.*

Introduction

HousingLawDirect is an on-line service, provided by Arden Chambers, which allows Corporate and Fellow members of the Chartered Institute of Housing in England and Wales to access advice on housing law from specialist housing barristers, by means of a clearly defined, pre-determined fee structure, through an administrative arrangement made with the Institute.

HousingLawDirect is a direct response to the licence acquired by the Institute from the Bar Council, under the BarDIRECT scheme which permits qualified members of the Institute to instruct barristers to get advice on housing law matters on behalf of their employers, and to instruct barristers in housing law litigation on behalf of their employers, in the same way that solicitors instruct barristers and that a number of other professionals are entitled to do so (e.g. RICS members and chartered accountants).

This article is not concerned with BarDIRECT but with Arden Chambers' scheme, HousingLawDirect. It is a largely personal view of what I think it can do for housing, what is new or different about it, what it hopes to achieve, and how using HousingLawDirect is - or can be - different from instructing a solicitor, or instructing a barrister through a solicitor. As such, it is not concerned with the details of its operation (which can be seen by visiting HousingLawDirect), nor is it (at any rate directly!) a "sales pitch": of course I want people to investigate HousingLawDirect and - even more so! - to sign up for it. They will, however, only do so if it works for them. What this article is about, therefore, is why, in my view, it ought to do so.

Housing Officers and Law

Unlike consumer law or social security law, which only affect the individual at the point of sale or when a benefit is paid, housing law has a continuing relevance to people's lives, especially where rented accommodation is concerned. The whole life of a tenancy is regulated by law: from the moment of an application for a tenancy and its grant, through continuing payment relations, housing conditions and expectations (both of which change over time), to issues of conduct which may (and do) arise without warning yet with predictable regularity, to the bringing of possession proceedings.

There are two principal "parties" to housing law - the user and the provider. In addition, other occupiers may be affected by the conduct either of a neighbouring occupier or by that neighbour's provider, e.g. where poor conditions in one property impact on another, or works are executed. (If the apparently irresistible trend towards landlord liability for tenant conduct continues - perhaps as foreshadowed in the Law Commission proposal requiring social landlords to publish anti-social behaviour strategies - then in due course a landlord may come to be regarded as being as directly responsible for tenant conduct as for a failure to repair the tenant's roof causing leaks into an adjoining property).

The greatest claim to "ownership" of housing law lies with the users of housing. It is their lives that are most directly, most fully, most continually affected by it. That is not to say that the impact on those who administer it is in any sense minor or insignificant. To the contrary, even when unaware of it, housing law regulates the daily lives of housing professionals to such an extent that, in one sense, they may be called to account at law for virtually everything they do (perhaps years later). A brief exchange with a tenant may yet prove to be notice of disrepair or of the date of a succession. It may be a forewarning of some circumstance which later affects intentionality or allocation. A visit to a property may be portrayed as acquiescence in an alteration or a subletting. The minutiae of a response to unlawful occupation may be considered by a court when determining whether or not a new tenancy has been granted.

Most housing officers can look back at some event that seemed unimportant at the time but which subsequently took on a new significance, one they wished they had appreciated before it turned the course of a case and, perhaps, of a career. No one who represents social housing suppliers can fail to be struck by the confusion - sometimes anger, sometimes pain - of those who had striven to do a decent job, providing housing to those whose resources do not allow them to do it for themselves, only to find themselves cast as the villain of the piece, the wicked landlord incarnate, who should suffer not only judicial opprobrium but a substantial financial penalty (by way of compensation for the tenant).

Tenants have rights. By and large, they have the most rights. It is right that they should do so. They are, as noted, those most affected by housing law (rights). Few people working in housing would dispute this or - occasional mishap or abuse aside - would want it to be different. Yet, despite the aim shared by occupier and provider alike of securing decent quality, well-located, affordable housing in which to enjoy life (and, where young families are involved, perhaps to determine its course), housing has become a disproportionately adversarial area of life, and housing law a growth area of activity.

Why is this? Most tenants are not dissatisfied; most pay their rents; most do not cause trouble for their neighbours; most look after their properties, complain moderately when there is disrepair and do not rush off to see a lawyer if the landlord is not around the next afternoon to inspect and by the following morning to do the works. At the same time, housing officers are not anti-tenant, anti-social housing: to the contrary, their motives for going into social housing commonly derive from the same pool of sincere intentions as those of lawyers who hold themselves out as tenants' "champions".

Too much housing litigation happens because - despite their best efforts - housing administrators leave themselves

vulnerable to it. For all the complaints about tenants' lawyers abusing the system, touting for disrepair work, stirring up trouble (to turn into legal work), most tenants do not want any truck with lawyers or the law. They get involved with law only when they have to which, in turn, means (broadly) in one of two sets of circumstance: when the provider initiates action against the tenant; or, when the provider opens itself so widely to action that the tenant either has to resort to it in order to attain a reasonable, basic standard of life, or - at the lowest - comes within reach of a potential financial gain that s/he cannot be expected to reject.

In the first case, while action - e.g. to recover rent, to injunct or evict - may sometimes be unavoidable, it is simply not true that the action always (or even "nearly always") follows careful analysis not only of the options but also of the potential consequences to the provider (e.g. counterclaim for disrepair), so as to limit litigation to that which is truly in the provider's interest. In the second case, while it is theoretically possible for a provider wilfully to disregard its obligations (because the cost of compliance is greater than the cost of non-), that is rare. Usually, it is the result of ignorance either of the rights being offended, or of the circumstances offending those rights (where they ought to have been known about).

If this is correct, then part of the solution to the problem of adversariality is more knowledge on the part of the provider. This is a drum I have been beating for a long time and the more complex the subject, the louder the drum-beat needs to be! Having been party in the mid-1970s to shaping housing law as that term is today understood, it was obvious that if it was to be used to its fullest advantage, it had to be applied not only by or on behalf of tenants to improve their conditions, and not only in the courts to secure a more protective and consumer-oriented approach, but also by housing administrators.

There is a number of reasons why housing professionals have to build housing law into their skills, including the proposition that the more directly they are in contact with the latest and best information, the greater the contribution it can make to their continuing professional development. Another reason is "policy". Effective housing policy cannot be purely or even predominantly idiosyncratic, i.e. led by individual circumstances and individual needs. Any factors common to users of the supply must be built in. Design standards are an example of this; so too are "rights". If housing involves rights, then the provision of housing involves the provision of housing rights. Housing officers, administering housing policy, should be front line providers of rights as much as they are of stock. Nor can the providers of housing afford to be at odds with the new legal reality of the Human Rights Act. Finally, housing administrators unaware of the law would be operating in the costliest way possible, gambling on the outcome in court. (Court as a port of last resort may have been the message of the Woolf Report, but it was not - nor was it claimed to be - novel).

That brings me to one point on which I have not yet touched but which the housing professional will have not so much at the back of her/his mind but as the trump card to play in response: cost - resources - money. Surely, it may be said, the need for a higher level of legal awareness is as nothing compared to the need for more money, more access to money, to sufficient money.

There is one easy answer to this: there will never be enough. A second answer, in the same vein, is that what comprises "sufficient" is not an abstract concept, but one that is dependent on how money is used. These, however, are probably responses outside my sphere of competence. Within it, I have, albeit by way of asides, already addressed this issue: the absence of money is, simply, no defence in law to rights (as opposed to aspirations); to be forced to spend maintenance money reactively (and in damages) instead of pursuant to a programme is well known to be wasteful; and, to spend what one has by seeking to push out the envelope of the law is just about the most costly way of "getting it right". The less money available, the greater is the need to get it right in the first place.

Law and Housing Officers

The "message" then, is that housing professionals need to be more aware of housing law in their daily work, getting it right more and more of the time notwithstanding its complexity, averting unnecessary and costly litigation (as claimant, defendant or as defendant to a counterclaim), providing good housing conditions (in every sense of that word) that conform to occupiers' rights before they are compelled to do so.

I said earlier that what I wanted to address is what HousingLawDirect hopes to achieve, meaning what it hopes to achieve towards that end. This is hard to put into words, especially without running the risk (a risk that will be realised if the words are taken out of context) of seeming to compare it with existing services. Let me stress at once that this is not my intention, nor is it the intention of HousingLawDirect to replace existing legal services. As the promotional material spells out, there are numerous tasks for which HousingLawDirect is inappropriate - and HousingLawDirect will not hesitate to say so, and to refer the client on to a solicitor!

Indeed, though the BarDIRECT licence acquired by the Institute permits its Corporate and Fellow members in England and Wales to instruct barristers in housing litigation on behalf of their employers (whether as claimant or defendant), HousingLawDirect is a service which is not concerned with litigation. Whether or not qualifying CIH members choose to use their licences to instruct Arden Chambers (or any other barristers) directly, without using a solicitor to do so, is an entirely separate issue, and one I am not addressing here. In a sense, it is "off-message," because what I am concerned with here is litigation avoidance.

It is, perhaps, easier to say what HousingLawDirect does not do than what it does. In addition to litigation, conveyancing, negotiating, investigating, contracting, issuing notices are all outside its ambit, i.e. all the legal service functions that require an element of administration. If clients need a lawyer to do any of these things, then a solicitor is where they will continue to have to go. HousingLawDirect, rather, may help them do some of these things for

themselves.

The line is not easy to draw. I do not suggest that there is anything HousingLawDirect can do that the best housing solicitors could not, and would not, do. The solicitor who you can ring or e-mail, and who you can rely on to give you both specialist level housing law advice and advice that will avoid the need for litigation, is doing a first rate job. It is one we aspire to match. Whether you continue to go to her/him, or come to us, will be largely a matter of cost and/or convenience.

The reality, however, is that often housing officers cannot turn to solicitors for that sort of response, for a number of reasons. First, solicitors tend to be associated with litigation or, at any rate, work that is perceived to be costly. Secondly, a solicitor's daily experience - especially during training - is likely to be more generalist. By contrast, many barristers specialise from a much earlier stage, which allows access to specialism at a lower charging rate. At the bottom end of the Bar, and/or in non-commercial areas of legal activity, a barrister's income was traditionally made up of lower-paid advisory work expected to lead to higher paid court-work. This is, of course, another perception, and the truth of it today may be different. Nonetheless, what people do is partly a product of how they are used (which is to say, what they are perceived to do), which - in turn - becomes their experience.

There is no doubt that there is an area of activity for which housing professionals and indeed legal professionals regard specialist barristers as being the most suitable. Some at least of that work is work to which the solicitor in question is not called on to contribute much legally - because it is outwith her/his particular expertise, and/or because sending it to a barrister is more economic than doing it her/himself. Because barristers do more advocacy, they more commonly argue law, which necessarily involves more development of pure legal knowledge and, because they are free of the administrative functions I referred to earlier, they have the time to do it. Again, it may be hard to define the differences, but if there were none, we would not get that work now.

We see HousingLawDirect as an extension of the work several of us at Arden Chambers have been doing for a number of years to try to make housing law less complicated for everyone and above all more accessible to non-lawyers - through writing about housing law, teaching and other training exercises.

What we are trying to do here - which I believe is different from the bulk of legal services currently available - is to be available to housing professionals quickly, conveniently and at a clear cost so as positively to encourage them to turn for "a bit of law" - to check what they are doing before it is too late - where full-blown legal advice, and/or the formality of "going to a solicitor", is not called for, i.e. where "the case" has not achieved that level of intensity. We want to make our collective experience and expertise in housing law (we are, after all, the only substantial set of Chambers for whom this is the principal specialism, in which all its members are required to specialise) available to housing professionals in their daily working lives, rather than as a "special event" taking them out of their routines - hence our slogan, "putting housing law into the hands of housing professionals".

We want to reduce unnecessary litigation about housing, that is wasteful of resources both financial and human - hence our other slogan, "taking early advice to avoid a problem later".

Conclusion

This is the benchmark by which we expect to be judged - not by how much additional, litigation work we attract outside of HousingLawDirect, but by how much litigation we serve to avert. We believe that a dedicated team working directly with housing professionals rather than through another lawyer (solicitor) will extend our experience and our ability to apply it to a problem. We go a little further - we think it will not only make the housing law we do more useful to housing professionals, we also believe it will enhance its value to other housing lawyers (barristers and solicitors).

In the long run, we hope too that it will enhance its effectiveness for housing administrators at every level and for the tenants most directly affected by it.

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