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Publications —— Summer 2018

Housing Litigation Update

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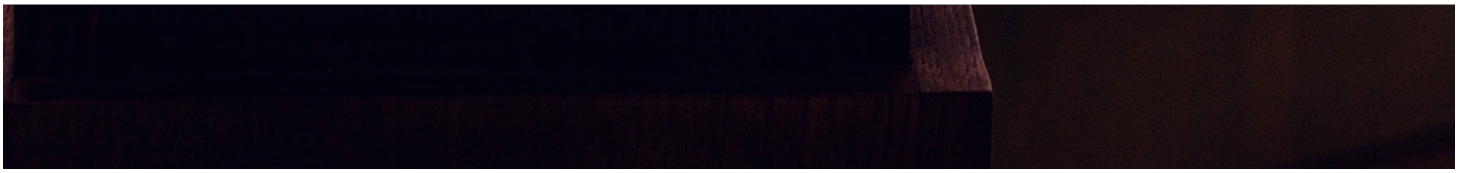

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Foreword

Welcome to the summer 2018 edition of Housing Litigation Update.

We begin by looking at one of our cases involving a stock transfer housing association and the use of mandatory Ground 7A.

We then move on to consider an interesting case where the basis of an appeal was whether a tenant's breach was a "relevant breach" for the purpose of possession proceedings.

We then look at a case where damages were awarded in an unlawful eviction case before moving on to consider guidance given by the Court of Appeal in respect of vulnerable people and in priority need of assistance under the Housing Act 1996.

We continue to see a number of public law defences being raised in possession proceedings, and so our focus turns to a recent case where such a defence was unsuccessfully raised before going on to consider a case involving an application to suspend a warrant of possession.

With so many Bills in the pipeline, we end with issues worthy of note, which includes an important correction to an article contained in our Spring Edition of HLU. We would like to thank one of our readers for drawing this error to our attention.

We hope that you find this edition of interest and value. We always welcome any feedback and suggestions for future articles, so please feel free to email us at hlu@trowers.com with any comments or observations.

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Stock transfer housing associations and the use of mandatory Ground 7A

Red Kite Community Housing Limited v Finlay **concerned the anti-social behaviour of Ms Finlay (F) which was directed towards a number of other residents and culminated in her serious assault of one of her neighbours in 2015.**

F pleaded guilty to assault occasioning actual bodily harm (categorised as a "serious offence" under Schedule 2A of the Housing Act 1985) and as a result F was sentenced to 35 weeks in prison.

Red Kite moved the victim of the assault to alternative accommodation and issued possession proceedings against F, who had an assured non-shorthold tenancy, based upon mandatory Ground 7A together with Grounds 12 and 14.

F was previously a tenant of Red Kite's predecessor, which was a local authority. Red Kite became F's landlord as a result of a large scale voluntary transfer (LSVT) of housing stock from the local authority in December 2011. In 2013, F signed a transferring tenancy agreement with Red Kite.

The tenancy agreement specifically stated:

- "You shall remain an assured tenant, so long as you occupy your home as your only or principal home. We can end a periodic assured non-shorthold tenancy only by obtaining a court order for the possession of your home on one of the grounds listed in Schedule 2 to the Housing Act 1988…. Specifically, we will not seek possession using Grounds 1 to 6 of Schedule 2 of the Housing Act 1988; Ground 8 of schedule 2 to the Housing Act 1988, or Ground 11 of Schedule 2 to the Housing Act 1988.
- The grounds listed below are the only grounds on which we will seek possession of your property… Specifically, we will not seek possession using Grounds 1 to 6 [or] 8 or [11]."

The tenancy agreement went on to list Grounds 7, 9, 10 - 14, 14A, 15 and 16 as the ones Red Kite would seek to rely upon to recover possession, namely the ones that were in existence at the time the tenancy was entered into.

Ground 7A was not in existence when the tenancy was entered into, as it was introduced by the Anti-Social Behaviour Crime and Policing Act 2014 and came into force with effect from 20 October 2014.

F was represented throughout the proceedings by solicitors and she argued that by relying on Ground 7A, there had been an unlawful breach of contract or, in the alternative, breach of legitimate expectation. The reason for this was that F felt that by specifically stating the grounds upon which Red Kite would seek to recover possession in the tenancy agreement, it had waived its right to rely upon this Ground 7A.

The trial of the matter took place in January 2018. The judge at first instance dealt with the Ground 7A issue as a preliminary issue and it was held that it would have been unreasonable to expect Red Kite to have excluded its ability to use Ground 7A when, in 2013, it did not exist.

In addition to other issues, the Defendant appealed the decision of the Deputy District Judge.

The appeal judge, Her Honour Judge Bloom, took the view that the tenancy agreement did not exclude the use of Ground 7A and that Red Kite, on creating the transferring tenancy agreement, could not have intended to prevent itself from relying on new grounds of possession introduced by future legislation.

Her Honour Judge Bloom felt the case of *North British Housing v Sheridan* [1999] 2 EGLR 138 was at least persuasive, if not binding. In that case the Respondent was an assured tenant and his tenancy agreement contained a number of rights enjoyed by secure tenants including the wording of Ground 14 before it was amended in 1996. The Respondent appealed against an order for possession made on the ground that he had been convicted of breaching an order under the Protection from Harassment Act 1997 Act for harassing his daughter who lived nearby the premises. The Respondent argued that as the tenancy agreement incorporated a version of the Housing Act 1988, before its amendment therefore, possession based on the new ground quoted by the landlord should not be permitted. His appeal was dismissed.

The same wording that appears in F's tenancy agreement appears in a large number of LSVT tenancy agreements drafted at around the same time. This is a result of the fact that the new LSVT landlords aimed to ensure their transferring tenants were no worse off as a result of the LSVT and this included terms in relation to how the landlord could recover possession. In essence, the new landlord was stating it would only seek to recover possession on a number of the discretionary grounds in Schedule 2 of the Housing Act 1988 which effectively mirrored those that could be used against secure tenants hence, none of the mandatory grounds were included. However, the position in relation to mandatory grounds has now changed in light of the equivalent Ground 7A being introduced by section 84A of the Housing Act 1985.

The decision in this Red Kite case will be a source of comfort to other LSVT housing associations when they are seeking to recover possession based on Ground 7A knowing that they are not precluded from relying on it.

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Is there a concept of relevant breach in possession actions?

In the recent appeal in the matter of *Teign Housing v Richard Lane* [2018] EWHC 40 (QB). the High Court considered the proper interpretation of s7 Housing Act 1988 and the meaning of reasonableness in making a possession order.

Mr Lane, had been a tenant of Teign Housing Association since August 2016. He had paranoid personality disorder. On moving in, the parties agreed to fence off an area of land in the communal garden for the tenant's dogs. Subsequently, Mr Lane moved the gas flue and fixtures and fittings in the kitchen in breach of his tenancy agreement. Due to his mental health condition, he believed that he had permission to do so. Neighbours then complained about Mr Lane playing loud music. Mr Lane installed a CCTV camera, again, believing he had permission to do so. His neighbours complained about it pointing into their personal living areas. Possession proceedings were commenced pursuant to Grounds 12 and 14 of the Housing Act 1988.

At the trial His Honour Judge Carr found that due to Mr Lane's honest belief that he had permission to carry out the works and install the CCTV camera, they were not "relevant breaches" of the tenancy agreement. Furthermore, even if that were not right, the Judge held that it would not be reasonable or proportionate to evict. He found that the evidence of noise nuisance was weak and therefore not made out.

Teign Housing Association appealed arguing that the Judge's concept of a "relevant breach" had no legal meaning. They also raised the issues that that the Judge failed to take proper account of the fact that Mr Lane could not comply with the terms of his tenancy or the impact of his behaviour on other residents, and the analysis of his mental health did not involve enough focus on the effect of his behaviour on others.

Dealing with the concept of "relevant breach", the Court held that the Judge was wrong to find that the installation of CCTV, even with a mistaken but honest belief that Mr Lane had permission, was not a relevant breach. There was a clear term in the tenancy preventing alterations without consent and that had been breached. The court held that there is no such concept as "relevant breach". The same comments were made in relation to the allegations of dog fouling and alterations to the communal garden. In relation to the lack of evidence of loud music, the Court held that the Judge was entitled to make that finding.

Mr Justice Dingemans however held that whilst the Trial Judge had found certain breaches of the tenancy agreement were made out, he should have found further breaches namely the installation of the CCTV and the dog fouling. As he had not upheld these further breaches, it was difficult to place weight on his conclusion that it would not have been reasonable or proportionate to make an order for possession. The case was therefore remitted back to the County Court for Trial.

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Non-access, aggression and disrepair – not a good mix

In *Breaks v Rimkiene* (QBD) the Court considered whether a landlord who had a duty to repair a damp problem had interfered with the repair process by claiming incorrectly that the tenant had refused access for the repairs to be completed.

The landlord issued a claim for possession and the tenant counter-claimed for disrepair, claiming that there was damp in various rooms of the property.

The landlord had instructed an agent to represent his interests and they attempted to make an appointment for the landlord's contractor to attend the property. The agent alleged that the tenant did not want any work to be carried out while she was in occupation, however she was happy for the contractors to inspect the property. The agent also alleged that the tenant had failed to make appointments for the landlord's contractor to attend the property.

The Court considered emails between the landlord's agent and the tenant's solicitor, which demonstrated that the agent had cancelled an initial appointment and asked the tenant to provide alternative times and dates. When the tenant's solicitor suggested the agent put forward an alternative time and date, the agent determined that the tenant was refusing to co-operate. Throughout the following week, the landlord's agent had sent emails to the tenant pressing the tenant to agree to disputed matters in the expert's reports or agree to the appointment of another expert. The tenant did not respond to any of these emails.

For technical reasons, the landlord's claim for possession was dismissed however, the tenants counterclaim for disrepair continued to trial. The landlord alleged that the tenant had prevented him from carrying out his duty to repair by refusing access.

At first instance, the Judge held that the landlord's agent had derailed the repair process and that a period of 18 months had lapsed whereby the landlord could have taken further steps to rectify the disrepair. Therefore, the landlord was liable to pay damages for this 18 month period.

The landlord appealed this decision to the High Court which concluded that the tenant had not refused to allow the landlord access. The Court found that it was the landlord's agents aggressive reaction that had derailed the repair process.

This case clearly highlights the importance of carrying out repairs as quickly as possible and working with the tenant and their solicitors (if any) in order to come to a mutually convenient time to inspect properties. Although many landlords are faced with difficulty in obtaining access, landlords should make all efforts to arrange an appointment and ensure they maintain clear written records of the access attempts.

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Damages in unlawful eviction cases

In the case of *Smith v Khan* [2018] EWCA Civ 1137, Mr Smith took an assured shorthold tenancy In June 2014 for 12 months from Mr Khan (the Defendant). His wife, the Claimant, had leave to remain in the United Kingdom but no recourse to public funds.

On 4 March 2015 Mr Smith left the marital home as when his benefits had stopped he had accrued rent arrears. He had gone to look for work in Scotland.

On 1 April 2015 the Defendant purported to terminate the tenancy by handing the Claimant a letter. She took advice from a housing law centre, who told the Defendant that the notice was invalid, that the Claimant had the right to remain in the property pursuant to family law and that he should get a court order for possession.

On 15 April 2015, whilst the Claimant was out, the Defendant changed the locks. The Claimant subsequently spent many months sleeping on a friend's floor.

On 11 May 2015 the Claimant issued proceedings for an injunction for re-admission to the flat and for damages. When it emerged that the Defendant had re let the flat, the claim proceeded for damages alone. Much of the legal argument that followed centred on what period of time the Claimant could claim damages for and how these should be calculated.

A District Judge initially awarded £1,500 aggravated damages, £1,200 exemplary damages, £1,000 special damages and £9,280 general damages.

In relation to general damages, the Claimant argued that these should be calculated at a daily rate of £220 for 232 days (from the date of the eviction on 15 April 2015 to the date of the Order on 14 December 2015). The District Judge accepted the period of 232 days but awarded a daily rate of £40. In so doing, the District Judge relied on a principle used in disrepair cases where awards are based on a monetary value for discomfort and inconvenience being placed on a landlord's breach of repairing obligations.

The Claimant appealed to a Circuit Judge, who held that the appropriate daily rate was £130. Unusually, the Circuit Judge then recalled his Judgment and at a further hearing he held that the tenancy had been surrendered on 15 April 2015. He substituted an award of £3,640 based on a 28 day period.

The Claimant appealed to the Court of Appeal against a finding that the tenancy had been surrendered and the period for which damages should be awarded. The Defendant cross appealed for substitution of the daily rate. The Court of Appeal held that:

- the tenancy did not terminate on 15 April 2015; and
- the period for an award of general damages was from the date of eviction until the end of the term of the tenancy (i.e. 30 June 2015). The reasoning being that as the Claimant's husband, who was still living and working in Scotland and who had taken no part in the proceedings, must have accepted by this date that their occupation of the property as their only and principal home had ceased. The parallel drawn with the assessment of damages in disrepair cases was wrong; in unlawful eviction cases damages, must compensate the Claimant for anxiety, inconvenience and mental distress in losing their home.

The figure of £130 was therefore upheld. The Claimant was awarded general damages of £9,880.

This case is a useful reminder of how high damages awards in unlawful eviction cases can be and it should not be forgotten that occupation by a spouse under matrimonial law can constitute occupation by the tenant themselves.

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Priority need for housing and the vulnerable

The Court of Appeal has handed down guidance on when a person is vulnerable and therefore in priority need of assistance in the case of *Panayiotou v Waltham Forest LBC* / *Smith v Haringey LBC* [2017] EWCA 1624, under the Housing Act 1996.

Section 189(1)(c) of the Housing Act 1996 (the Act) states that a person who is "vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason" has a priority need for housing.

The Appellants, Mr Panayioutou (P) and Mr Smith (S), appealed decisions by their respective local authorities that they were not in priority need of accommodation following their homeless applications as vulnerable persons. P suffered from depression and anxiety and S suffered from mental health problems and chronic leg pain. The reviewing officers had applied the test set out by *Hotak v Southwalk LBC* [2015] UKSC 30, [2016] A.C. 2011, namely that vulnerable meant "significantly more vulnerable than ordinary vulnerable" as a result of being homeless.

Following unsuccessful reviews they both appealed to the County Court alleging that too high a threshold had been applied when considering the question of vulnerability. Both appeals were dismissed and both appealed to the Court of Appeal for it to determine the meaning of "significantly" and to decide whether the reviewing officers had applied the correct test.

The Court of Appeal held that in relation to the meaning of "significantly" it was not helpful to draw a comparison with the definition of "disability" in the Equality Act 2010.

The Court of Appeal held that in defining "significantly" the question should be asked as to whether, compared to an ordinary person if made homeless, the applicant would suffer, or be at risk of suffering, harm or detriment which an ordinary person would not suffer or be at risk of suffering, such that the harm or detriment would make a noticeable difference to his ability to deal with the consequences of homelessness.

In P's case, the reviewing officer had concluded that P would not be at more risk of harm without accommodation than an ordinary person would be. As the officer had applied the correct test P's appeal was dismissed.

In S's case, the Court held that the reviewing officer “must have interpreted "significantly" as importing a quantitative threshold”. The Court held that it is a qualitative test, requiring consideration of the applicant’s particular characteristic and deciding whether that characteristic would have a noticeable difference in the applicant’s housing context.

For those dealing with homeless applications, the main point to take from this decision is that when considering vulnerability, the question to ask is would the applicant’s relevant characteristic make a noticeable difference to their ability to deal with the consequences of homelessness?

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Unsuccessful public law defence to possession proceedings

The recent case of *Turner v Enfield London Borough Council* [2018] EWHC 1431 (QB) concerned Mrs Turner (the Appellant) who lived in a three bedroom council house which had originally been let to her father. When he died, his wife/the Appellant's mother succeeded to the tenancy. Therefore, there could be no further succession when she died.

The local authority served Notice to Quit on the Appellant and her son and then initiated possession proceedings. Both the Appellant and her son had numerous medical issues. After possession proceedings were commenced, the Appellant made an application for housing. Doctors said a move would be detrimental to the Appellant's wellbeing. As a result, the local authority made an offer of a ground floor flat with level access. However, on making the offer, the local authority failed to notify the Appellant of her right to review.

The Appellant therefore complained and the local authority made a fresh decision to make two direct offers of accommodation and informed the Appellant of her right to review. The Appellant refused the offer that was made to her and she defended the possession proceedings. Following a trial, order for possession was made.

The Appellant appealed the decision to the High Court arguing that:

- the Trial Judge had been wrong to conclude that a possession order was proportionate for the purposes of Article 8;
- the local authority's decision making procedure was also defective.

The High Court held that the Possession Order was both necessary and proportionate. The Appellant's medical issues (which were serious: by the time of her appeal the Appellant had been diagnosed with lung and bone cancer) and long residence would not defeat a possession claim where there was no right to succession. The judge had not misunderstood the cases of *Thurrock Borough Council v West* [2012] EWCA Civ 1435 and *Holley v London Borough of Hillingdon* [2016] EWCA Civ 1052 (medical issues together with lengthy residence will generally not be enough to defeat a claim for possession). Even though the judge had accepted that this was a seriously arguable case, the judge had gone on to conduct a balancing exercise following which the decision to grant possession had then been made.

Insofar as the decision making process was concerned, it was held that there had been no breach of natural justice as the local authority had made a fresh decision after the first one that the Appellant had complained about.

This case primarily demonstrates just how hard it is for an Article 8/proportionality defence to succeed and how high the bar has been set by the appeal court.

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Challenge to eviction process – automatic discharge of a suspended possession order?

***Armstrong v Ashfield District Council* [2018] EWCA Civ 873 has provided clarity on whether the clock automatically stops on the discharge of a suspended possession order (SPO) when a landlord has already applied for a warrant for a breach of its terms.**

The tenant, David Armstrong was the secure tenant of Ashfield District Council (Ashfield). In June 2013, following a trial, a SPO was made. It could not be enforced so long as Mr Armstrong complied with certain terms of his tenancy agreement. Furthermore, it could only be enforced by Ashfield making an application in writing, with any hearing being reserved to the trial judge (if available). The Order was to be discharged on 4 June 2014.

Following further breaches of the tenancy, in October 2013, Ashfield applied to the County Court for a warrant which was issued in

accordance with usual court procedure, as an administrative act by the court. The application for the warrant was not made to, or considered by, any judge, as required by the SPO.

An application was made to suspend the warrant. After some months of delay the case came before a Circuit Judge on 25 June 2014 who dismissed Mr Armstrong's objection that Ashfield could not rely on the warrant as it had followed the incorrect procedure. His reasoning was that the judicial scrutiny required by the SPO was being achieved by virtue of the hearing before him.

The judge found the allegations of breach were proved and dismissed Mr Armstrong's application. Mr Armstrong appealed to the High Court and he argued that at the time the Circuit Judge ordered execution of the warrant, due to the lapse of time, there was no longer an extant Order in place. The High Court dismissed the appeal and the Court of Appeal dismissed a second appeal.

It was held that the provision for automatic discharge did not apply as Mr Armstrong had breached the conditions on which the order had been suspended during the lifetime of the SPO. Ashfield had made a valid application to enforce within that time period. The procedural argument was also dismissed as the Circuit Judge "was plainly entitled to adopt the approach he did" and was entitled to treat as immaterial the failure to follow the prescribed procedure.

It is reassuring to note that courts will not take issue with procedural breaches of orders and that a sensible approach will be taken in relation to SPOs where an application for a warrant was made before the order expired.

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A round-up of things worthy to note

- CORRECTION: In our article entitled "Assured shorthold tenancies and the six month requirement" in our Spring edition of HLU we incorrectly stated that from the expiry of a section 21 Notice landlords have just 2 months to issue accelerated possession proceedings when the correct time period is 4 months in accordance with section 21 (4D).

- A new 'How to Rent' booklet was published on 26 June 2018. The reason for this is the original version published on 26 June 2018 was entitled "How to Rent - A guide for current and prospective tenants in the private rented sector in England".

- The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 refer to a document entitled "How to rent: The checklist for renting in England", as published by the Ministry of Housing, Communities and Local Government. Due to the error made in the title of the booklet a further version was published on 6 July 2018 but was dated 26 June 2018.

- If any landlords served the incorrect version between 26 June and 6 July 2018, they should serve the correct version immediately as it must be provided to all new and replacement assured shorthold tenants. If the correct version of the booklet has not been given to a tenant, then for any post 1 October 2015 tenancies or replacement tenancies, no section 21 notice can be served.

- On 1 October 2018, the Licencing of Homes in Multiple Occupation (Mandatory Conditions of Licences) (England) Regulations 2018 come into force. These regulations will bring in minimum room sizes for HMOs. The regulations will apply to all new licences after 18 October 2018 with an 18 month compliance period.

- From 1 October 2018, the prescribed form of wording contained in Form 6A will need to be used in respect of all periodic assured shorthold tenancies regardless of when they began where possession is sought under Section 21.

- The Tenant Fees Bill had its second reading in the House of Commons on 21 May 2018. The purpose of this legislation will be to ban unfair fees imposed by landlords and letting agents on their tenants. The Bill will next be considered at report stage on a date to be announced.

- The Homes (Fitness for Human Habitation) Bill proposes to amend the Landlord and Tenant Act 1985. This legislation will require that residential rented accommodation is provided and maintained in a state of fitness for human habitation. It will also amend the Building Act 1984 in relation to liability for works on residential accommodation that do not comply with Building Regulations. On 14 January 2018 the government confirmed that it would support the Bill. Committee stage was completed on 20 June and its report stage is on 26 October 2018.

- The Sublet Property (Offences) Bill will make the breach of certain rules relating to sub-letting rented accommodation a criminal offence. It provides for criminal sanctions in respect of unauthorised sub-letting and for connected purposes. The Bill was presented to Parliament on 5 September 2017 and its second reading will take place on 6 July 2018 after which it will be printed.

More information about all of the Bills mentioned can be found at www.parliament.co.uk

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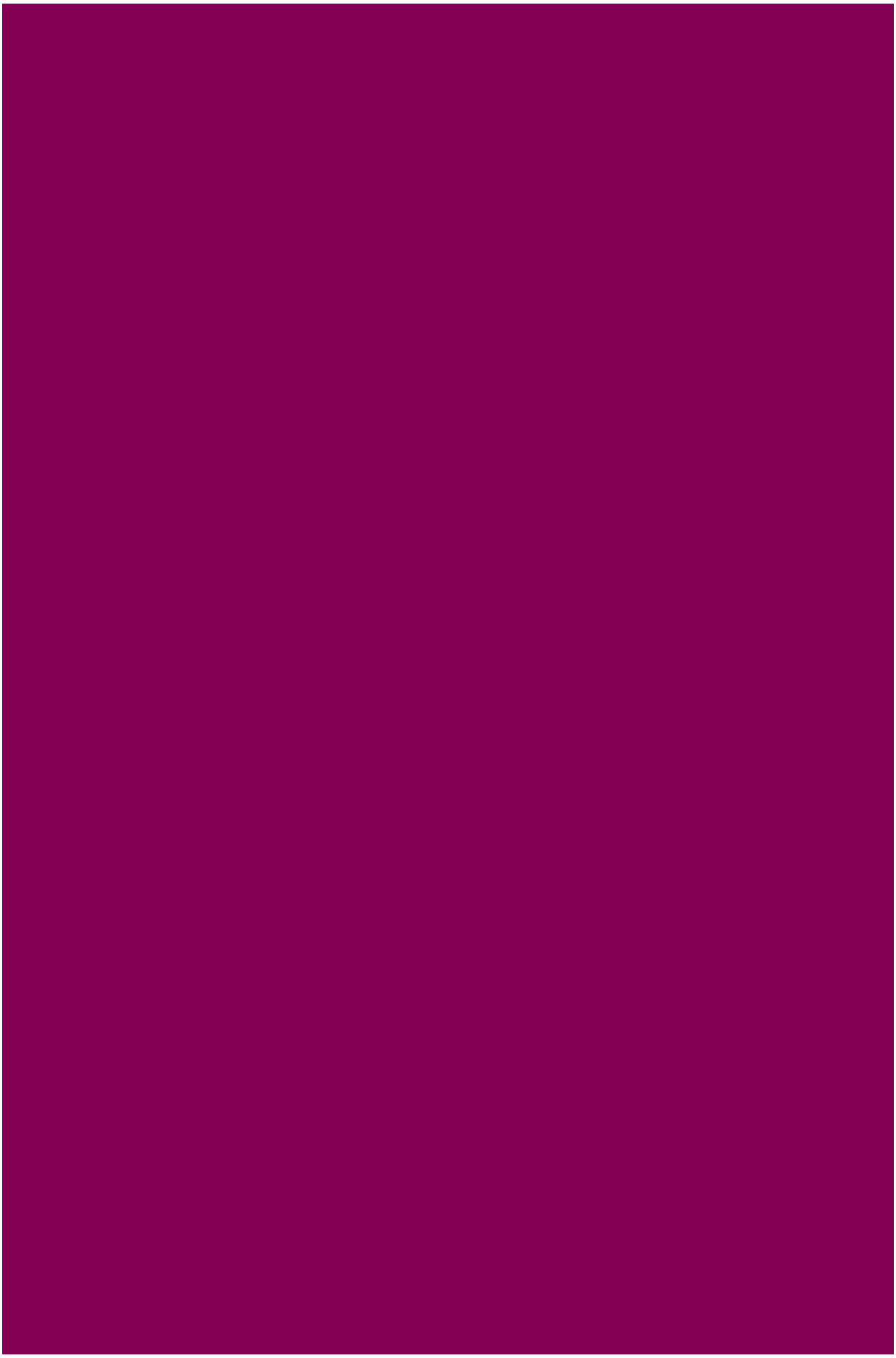

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Produced by Trowers & Hamlins LLP, 3 Bunhill Row, London, EC1Y 8YZ.

Front cover image: Shutterstock