

Recent developments in housing law



Nic Madge and Jan Luba QC continue their monthly series. They would like to hear of any cases in the higher or lower courts relevant to housing. In addition, comments from readers are warmly welcomed.

POLITICS AND LEGISLATION

Tolerated trespassers

On 20 May 2009 most of the provisions of Housing and Regeneration Act (H&RA) 2008 s299 and Sch 11 came into force in England and Wales: Housing and Regeneration Act 2008 (Commencement No 5) Order 2009 SI No 1261. The provisions are designed to prevent the creation of further tolerated trespassers and to confer replacement tenancies on most current tolerated trespassers. The Housing (Replacement of Terminated Tenancies) (Successor Landlords) (England) Order 2009 SI No 1262 extends the application of the new provisions to 'successor landlord' cases in England. That order was approved after debates on 27 April 2009 by the House of Commons Committee on Delegated Legislation and on 12 May 2009 by the House of Lords Grand Committee (*Hansard* HL Debates col GC351, 12 May 2009).¹ The equivalent provision for Wales is made by the Housing (Replacement of Terminated Tenancies) (Successor Landlords) (Wales) Order 2009 SI No 1260. Communities and Local Government (CLG) has issued non-statutory guidance explaining the changes: *Tolerated trespassers: guidance for social landlords* (May 2009).²

Three subparagraphs of H&RA Sch 11 (paras 3(3), 8(3) and 14(3)) have not yet been implemented. They would amend Housing Act (HA) 1985 s85(4) and HA 1988 s9(4). Commencement has been deferred for reasons explained at paragraphs 18–20 of the guidance. That deferral has sparked a lively exchange between housing practitioners. The Housing Law Practitioners Association has expressed its regret to CLG at the delay, but the North West Housing Law Practitioners Group has taken a different view in its representations to the department.³

Possession claims

On 15 May 2009, the Ministry of Justice (MoJ) published revised figures for the number of possession claims brought in

England and Wales during 2008. They show that 142,743 possession claims were issued by mortgage lenders – the highest annual total since 1991. The 2008 figures are contained in the latest statistical report for the first quarter (January–March) of 2009: *Statistics on mortgage and landlord possession actions in the county courts – first quarter 2009*.⁴ A note in that report states that the Mortgage Possession Pre-Action Protocol (MPAP) is already having an effect. It says:

The introduction of the MPAP coincided with a fall of around 50 per cent in the daily and weekly numbers of new mortgage repossession claims being issued in the courts as evidenced from administrative records. As orders are typically made (where necessary) around eight weeks after claims are issued, the downward impact on the number of mortgage possession orders made was seen in the first quarter of 2009.

The press statement accompanying publication of the figures (MoJ news release, 15 May 2009) contained a list of government measures designed to assist those facing eviction, and included the first public announcement of the Housing Arrears Pre-Action Scheme initiative: 'Housing Arrears Pre-Action Scheme pilots where the local social landlord has agreed for the court to send a letter to the tenant, before a claim is issued, inviting them to a meeting with a free legal adviser at the court to discuss ways to avoid legal action'.⁵

Private rented sector

On 13 May 2009, CLG announced its proposals for reform of the private rented sector. These include:

- a light-touch national register of every private landlord in England;
- full regulation for private sector letting agents;
- an improved complaints and redress procedure for tenants; and

- greater local authority support for good landlords.

The details are contained in a consultation paper: *The private rented sector: professionalism and quality. The government response to the Rugg Review consultation*. Responses to the government's proposals are sought by 7 August 2009.⁶

In a parallel consultation exercise, CLG is inviting views on the use of planning measures to control houses in multiple occupation: *Houses in multiple occupation and possible planning responses. Consultation* (CLG, May 2009).⁷ The deadline for responses is 7 August 2009.

Repealing housing legislation

CLG has announced that it proposes repeal, rather than implementation, of the right to enfranchise provisions in the Commonhold and Leasehold Reform Act 2002. They were designed to address the problem of qualifying leaseholders being deliberately excluded when fellow leaseholders exercise statutory rights to purchase the freehold of the building containing their flats.

Baroness Andrews said that it had become clear that implementation of the provisions would introduce a considerable amount of additional burdens, complexity and cost into the process: *Hansard* HL Debates col WS84, 12 May 2009.⁸ The consultation paper on this proposal invites responses by 3 August 2009: *The right to enfranchise (RTE) provisions. Consultation* (CLG, May 2009).⁹

Occupiers of park home sites

Recent initiatives have brought good news for about 200,000 people who live in static and mobile homes on park sites in England.

■ On 12 May 2009, CLG published *Park home site licensing – improving the management of park home sites*, which proposes the introduction of an improved park home site licensing system.¹⁰ Comments are sought by 4 August 2009.

■ On the same date CLG published its response to the May 2008 consultation paper *A new approach for resolving disputes and to proceedings relating to park homes under the Mobile Homes Act 1983 (as amended)*. The response sets out the government's intention to transfer the jurisdiction on appeals and applications under the Mobile Homes Act 1983 from county courts to residential property tribunals: *Dispute resolution under the Mobile Homes Act 1983 (as amended). Summary of responses and further consultation*.¹¹ It sought comments by 9 June 2009 on additional protections for residents subject to proceedings in relation to the termination of their agreements.

■ A new set of CLG factsheets about

park home residents' rights has also been published.¹²

These measures were announced in a ministerial statement: *Hansard* HL Debates col WS85, 12 May 2009.¹³

Disposing of housing association stock

Registered social landlords (RSLs) need the consent of the Tenant Services Authority (TSA) before they can lawfully dispose of their existing homes (whether to sitting tenants, to other social landlords or to the private sector). The TSA currently exercises powers of the former Housing Corporation to give or refuse consent and will soon start exercising its own powers as the new housing regulator. On 8 May 2009, the TSA issued a consultation paper about how it proposes its powers should be exercised: *Consent to disposals of land and charges to private lenders. A discussion paper*.¹⁴ The consultation period ended on 15 June 2009.

HUMAN RIGHTS

Delay in proceedings

■ Brajović-Bratanović v Croatia

App No 9224/06,
9 January 2009

Ms Brajović-Bratanović owned a flat. In 1992, R, a policeman, forcibly moved into the flat. In 1995, the Housing Commission granted him refugee status and legalised his occupation of the flat under the Temporary Takeover and Management of Certain Property Act 1995 which allowed municipalities to accommodate persons temporarily in the property of those who had left Croatia. In 2002, Ms Brajović-Bratanović instituted civil proceedings seeking R's eviction and lodged a request with the Ministry of Public Works, Reconstruction and Construction seeking annulment of the decision authorising R to occupy her flat. In 2008, after a number of hearings, the proceedings were still pending. Ms Brajović-Bratanović complained to the ECtHR alleging breaches of article 1 of Protocol No 1 and article 6.

The ECtHR accepted that the initial placement of persons in need of housing in another's abandoned property during the war, and for a certain period after the war, was justified, but did not find any justification for the occupation of the flat for such a long period, particularly in view of the fact that R was not and never had been a refugee or a displaced person. The state had ample time and opportunity to secure proper housing for R. Furthermore, the court noted that even after Ms Brajović-Bratanović had sought repossession of her property a period of more

than six years elapsed. No pressing need was made out to require R's further occupation of the flat. Ms Brajović-Bratanović's prolonged and continuing inability to recover possession of her flat placed a disproportionate individual burden on her. There was therefore a violation of article 1 of Protocol No 1 (para 43). With regard to article 6, it could not be said that the proceedings complied with the reasonable time requirement and so there was also a breach of that article. The ECtHR awarded €10,000 on account of pecuniary damage and €3,000 in respect of non-pecuniary damage.

■ Dubinskaya v Russia

App No 5271/05,
4 March 2009

In November 2002, the Leninskiy District Court ordered a local authority to provide Ms Dubinskaya with a flat within three months of the judgment's 'entry into force'. The judgment 'entered into force' in December 2002. In March 2004, the local authority offered Ms Dubinskaya a flat, but she refused it. In August 2004, the local authority offered Ms Dubinskaya another flat which she accepted. She complained to the ECtHR alleging that the delay in enforcement constituted breaches of article 6 and article 1 of Protocol No 1 of the convention.

The ECtHR reiterated that an unreasonably long delay in the enforcement of a binding judgment may breach the convention. The court did not know why Ms Dubinskaya rejected the first flat offered to her. It may well be that this rejection was unreasonable. However, that offer came more than one year after the judgment had become binding. That period was incompatible with the convention, given that the award concerned a basic necessity for a person in need: a flat for a homeless victim of terrorism. There was accordingly a violation of article 6 and article 1 of Protocol No 1 of the convention. The court awarded non-pecuniary damage of €1,600.

■ Čeh v Serbia

App No 9906/04,
1 October 2008

In October 1990, the owner of the flat in which Ms Čeh lived filed a civil action with the First Municipal Court in Belgrade, seeking her eviction. The owner maintained that Ms Čeh had lost 'the status of a protected tenant'. Between 1994 and 2004 there were four rulings in favour of Ms Čeh, but they were all quashed on appeal. In January 2004, she complained to the President of the First Municipal Court that the presiding judge in her case, despite repeatedly ruling in her favour, kept committing procedural errors on the basis of which higher courts always had grounds to order a retrial. In March 2004, the President of the First Municipal Court

accepted her request and assigned another judge to the case. Between April 2004 and July 2006, another 12 hearings were scheduled, but only three were effective. There were further hearings in September 2006, October 2006 and May 2007, but in 2008 the claim was still unresolved. Ms Čeh continued to live in the flat throughout the proceedings.

Ms Čeh complained to the ECtHR that there had been a breach of article 6. The court reiterated that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and, in particular, its complexity, the conduct of the parties and of the relevant authorities, as well as the importance of what is at stake for the applicant (para 53). The court concluded that the overall length of the proceedings failed to satisfy the reasonable time requirement. There was accordingly a violation of article 6. The court awarded €2,400 in respect of the non-pecuniary damage suffered.

Article 10 and satellite dishes

■ Mustafa and Tarzibachi v Sweden

App No 23883/06,
16 December 2008

Mr Mustafa and Mrs Tarzibachi were tenants of a flat. The tenancy agreement included a clause that: 'The tenant undertakes not to set up, without specific permission, placards, signs, sunblinds, outdoor antennae and the like on the house.' When they moved in, there was a satellite dish mounted on the façade, next to one of the windows of the flat. They used it to receive television programmes in Arabic and Farsi. A new landlord demanded that the satellite dish be dismantled, and then began proceedings seeking execution of a notice of termination. Although a Rent Review Board found in favour of Mr Mustafa and Mrs Tarzibachi, the Svea Court of Appeal found that they had disregarded their obligations as tenants to such a degree that the agreement should not be prolonged. They were evicted from the flat in which they had lived for more than six years. They complained to the ECtHR that their right under article 10 (freedom of expression) 'to receive ... information and ideas without interference by public authority and regardless of frontiers' had been breached.

The court reiterated that:

... under article 1 of the convention, each contracting state 'shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] convention' ... in addition to the primarily negative undertaking of a state to abstain from interference in convention guarantees, 'there may be positive

obligations inherent' in such guarantees. The responsibility of a state may then be engaged as a result of not observing its obligation to enact domestic legislation (para 31).

The genuine and effective exercise of freedom of expression under article 10 may require positive measures of protection, even in the sphere of relations between individuals. The ECtHR cannot remain passive where a national court's interpretation of a legal act appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the convention. The interference was 'prescribed by law' within the meaning of article 10(2) and pursued a legitimate aim (the 'protection of the ... rights of others'). When considering whether the interference was 'necessary in a democratic society', the court should determine whether the interference complained of corresponded to a 'pressing social need'.

The court concluded that 'even if a certain margin of appreciation is afforded the national authorities, the interference with the applicants' right to freedom of information was not "necessary in a democratic society" and that the respondent state failed in their positive obligation to protect that right' (para 50). There was accordingly a violation of article 10. The court awarded €6,500 in respect of pecuniary damage (the increased costs of journeys to and from work after their eviction) and €5,000 in respect of non-pecuniary damage.

Public bodies

■ **R (Weaver) v London & Quadrant Housing Trust**

[2009] EWCA Civ 587,
18 June 2009

Mrs Weaver was an assured tenant of London & Quadrant Housing Trust (LQHT), which was a RSL. Her tenancy terms and conditions contained a statement by LQHT that: 'In providing a housing service we will comply with the regulatory framework and guidance issued by the Housing Corporation.' By a claim for judicial review, she challenged LQHT's decision to seek an order for possession against her on HA 1988 Sch 2 Ground 8 (at least eight weeks' rent arrears). Relying on guidance issued by the Housing Corporation in respect of evictions (see, for example, its regulatory code and guidance (August 2005)), she argued that LQHT was in breach of a legitimate expectation in failing to pursue all reasonable alternatives before resorting to a mandatory ground for possession. She also argued that LQHT was 'a public authority' and, accordingly, Human Rights Act 1998 s6(1) made it unlawful for LQHT to act in a way which was incompatible

with article 8 and article 1 of Protocol No 1 of the convention.

The Divisional Court dismissed her claim for judicial review ([2008] EWHC 1377 (Admin); August 2008 *Legal Action* 38) but in doing so held that the management and allocation of housing stock by LQHT was a function of a public nature and LQHT was therefore to be regarded as a public authority within s6(3)(b). Ms Weaver did not appeal but LQHT appealed against the finding that it was a public authority.

The Court of Appeal, by a majority, dismissed LQHT's appeal. Elias LJ noted the important role that RSLs play in assisting local authorities to carry out their statutory housing policies and how deeply involved they are in assisting local authorities in their obligations towards the homeless. Some 54 per cent of RSL lettings in England are made to local authority nominees. He also noted that H&RA provides a statutory definition of social housing, and that it is a statutory prerequisite of registration as an RSL under s112 that the body demonstrates that it provides accommodation at rents below market rates to those in housing need. After considering *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 AC 95 and *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37; [2004] 1 AC 546, Elias LJ stated that:

■ the purpose of s6 is to identify those bodies which are carrying out functions which engage the responsibility of the UK before the ECtHR;

■ a public body is one whose nature is, in a broad sense, governmental;

■ in determining whether a body is a public authority, the courts should adopt a 'factor-based approach'. This requires the court to have regard to all the features or factors which may cast light on whether the particular function under consideration is a public function or not, and weigh them in the round.

If an authority is a core public authority, all its functions are public functions, as are all acts pursuant to those functions. An authority is a hybrid authority if only some of its functions are public functions. Even then, the particular act is not subject to convention principles if it is a private act: HRA s6(5). In determining whether an act is a private act, the source of the power is a relevant factor. However, that is not decisive since the nature of the activities in issue in the proceedings is also important. The character of an act is likely to take its colour from the character of the function of which it forms part.

It was conceded that LQHT was a hybrid authority. The essential question was therefore whether the act of seeking termination of the

tenancy was a private act. When considering that question, it was important to focus on the context in which the act occurred; the act could not be considered in isolation.

With regards LQHT's function of allocating and managing housing, there was a substantial public subsidy which enabled it to achieve its objectives. In its allocation of social housing, it operated in very close harmony with local government, assisting it to achieve the local authority's statutory duties and objectives. The provision of subsidised housing was a function which can properly be described as 'governmental'. 'Almost by definition it is the antithesis of a private commercial activity' (para 70). LQHT made a valuable contribution to achieving the government's objectives of providing subsidised housing and could properly be described as providing a public service. Taking all these factors together, the provision of social housing was a public function.

Elias LJ found that seeking the termination of a social housing tenancy was not a private act. He said:

... the act of termination is so bound up with the provision of social housing that once the latter is seen, in the context of this particular body, as the exercise of a public function, then acts which are necessarily involved in the regulation of the function must also be public acts. The grant of a tenancy and its subsequent termination are part and parcel of determining who should be allowed to take advantage of this public benefit. This is not an act which is purely incidental or supplementary to the principal function ... (para 76)

The protection afforded by the HRA extended to all tenants of LQHT in social housing and not just those in properties acquired as a result of state grants. However, those principles do not apply to those tenants of LQHT not housed in social housing and paying market rents. Lord Collins agreed with Elias LJ. Rix LJ dissented.

PUBLIC SECTOR TENANCIES

Possession claims *Adjournments*

■ **North Camden Housing Cooperative Ltd v O'Sullivan**

[2009] EWCA Civ 439,
26 March 2009

The claimants were a mutual housing association registered under the Industrial and Provident Societies Act 1965. After problems caused by Mr O'Sullivan, it obtained an injunction. It then began a possession claim against him. The trial was adjourned on

three occasions (once because no judge was available, once at Mr O'Sullivan's request, and once by consent). On the day before the fourth hearing, Mr O'Sullivan received a letter from his solicitors stating that they had no alternative but to apply for the discharge of his public funding certificate. It was clear that they believed that he had no defence. Mr O'Sullivan applied for an adjournment. HHJ Wakefield refused the application. Mr O'Sullivan sought permission to appeal.

Pill LJ refused permission to appeal. He said:

I can see no substantive defence to the claim and the judge's conclusion appears to me to be unassailable. That plainly was the view taken prospectively by the lawyers who successively have advised the applicant ... Courts must, of course, be scrupulous, giving parties reasonable opportunities to present their case and to be legally represented, if that is possible. Parties are not entitled to go to counsel after counsel or solicitor after solicitor and obtain an adjournment on the basis that there may be one further lawyer who is prepared to support his claim and who may find some point at which to criticise the approach of the counsel of the Cooperative, as confirmed and approved by the judge (paras 13 and 14).

Reasonableness

■ Knowsley Housing Trust v Prescott [2009] EWHC 924 (QB), 30 April 2009

Mr and Mrs Prescott were assured tenants. In April 2006, Mr Prescott pleaded guilty to conspiracy to supply cocaine and amphetamines. He had been involved in a drugs 'factory', which was about a minute and a half away on the same estate. It had produced drugs 'on an industrial scale'. He was sentenced to eight years' imprisonment. Knowsley Housing Trust, the couple's landlord, brought a possession claim in which it relied on the convictions (HA 1988 Sch 2 Ground 14). Although Mrs Prescott was present at the hearing, she did not give evidence. HHJ MacMillan made a postponed possession order, with a condition that Mr and Mrs Prescott did not allow the house to be used for drug dealing. Knowsley appealed.

Blair J allowed the appeal and made an outright order for possession. No good reason was given for Mrs Prescott not giving evidence. It followed that her witness statements were to be given very little weight, and in reality Knowsley's evidence was unchallenged. After referring to *Manchester City Council v Higgins* [2005] EWCA Civ 1423, *Canterbury City Council v Lowe* (2001) 33 HLR 53, *Sheffield City Council v Shaw* [2007]

HLR 25 and *Sandwell MBC v Hensley* [2007] EWCA Civ 1425, Blair J said that 'in general terms the more closely the criminal conduct in question is connected to the house in respect of which possession is sought, the more compelling the case for an immediate order of possession' (para 20). HHJ MacMillan had failed to make any findings about Mrs Prescott's knowledge of her husband's 'activities'. The inference to be drawn from her decision not to give oral evidence was that she did not consider that her denials would stand up to cross-examination. Blair J concluded that HHJ MacMillan had erred in principle because he:

... gave too little weight to the scale of Mr Prescott's drug dealing, gave too much weight to the fact that it was not happening at the house itself (when it was happening in the near locality), and did not direct himself in accordance with the principle that so far as postponement of possession in such cases is concerned, the court is looking to the future ... Before the judge could contemplate postponing the possession order, there had to be cogent evidence that the course of conduct which gave rise to the convictions would not be repeated, and there was none (para 27).

Suspended possession orders

■ Croydon LBC v Kamal

Croydon County Court, 6 May 2009¹⁵

In 2006, Croydon obtained a suspended possession order. Mr Kamal breached the terms of the order and became a tolerated trespasser. Croydon obtained a warrant for possession. On 23 March 2009, Croydon wrote to Mr Kamal. The letter was headed 'Replacement Tenancy'. It stated:

I am writing to inform you that on 6 April 2009, your status will automatically change from a tolerated trespasser to that of a secure tenant. This means that your status as a secure tenancy [sic] will be reinstated and you will be granted a replacement tenancy. As a secure tenant, the local authority must obtain a court order if we want to end your tenancy.

Mr Kamal made an application for a stay of eviction, arguing that this letter constituted the grant of a new tenancy. Croydon contended that the letter was sent in anticipation of the relevant parts of the H&RA coming into force and it was simply advising on the effect of that Act. District Judge Mills held that a new tenancy had come into existence on 6 April 2009 and 'dismissed the warrant'.

Setting aside possession orders

■ London and Quadrant Housing Trust v Gborie

West London County Court, 11 May 2009¹⁶

Ms Gborie was an assured tenant. After she fell into rent arrears, London and Quadrant (LQHT) sought and obtained a possession order postponed on terms. Ms Gborie breached the terms. After applying for a date to be fixed for possession, LQHT obtained a warrant for possession. Ms Gborie sought advice from a local advice agency and preliminary steps were taken to prepare an application to suspend the warrant. Following a mix up, Ms Gborie failed to submit the application to suspend the warrant. On the morning of the eviction, she set off to the advice agency with the intention of picking up the application notice and submitting it to the court. Before she reached her destination, she was informed by a friend that the bailiffs had arrived at the premises. She returned home without having obtained the application. When she arrived at the premises, the bailiffs were still present, as was a LQHT officer. Ms Gborie spoke to her housing officer by telephone and told him about her efforts to make the application to suspend. He advised her to attend court and make the application. He said that it would be in her interests to make the application before the warrant was executed. He refused to delay execution of the warrant. Ms Gborie attended court and made an application but by the time that she did so, the warrant had already been executed.

District Judge Nicholson allowed Ms Gborie's application to set aside the warrant on the basis of oppression. He referred to *Southwark LBC v Sarfo* (2000) 32 HLR 602, CA. He concluded that the housing officer should have gone 'the extra mile'. He should have phoned his colleague at the premises and delayed the execution of the warrant to allow Ms Gborie a fair opportunity for her application to be heard.

PRIVATE SECTOR TENANCIES

Rent Act 1977: reasonableness

■ Lee v Whitehouse

[2009] EWCA Civ 375, 14 May 2009

Mr and Mrs Whitehouse were granted a tenancy of a flat in Hampstead in 1963. It was a protected tenancy and became a statutory tenancy under Rent Act (RA) 1977. Dr Lee and her two siblings bought the building in which the flat was situated in 1969. Dr Lee lived in another flat in the building until 2003 when she retired to Australia. The siblings wanted to sell the flat

with vacant possession and so offered Mr and Mrs Whitehouse a tenancy of a flat in West Hampstead, but they were 'intransigently opposed to moving there from the home and locality they had known and loved for 45 years' (para 5). Dr Lee began a possession claim on the ground that the flat in West Hampstead was suitable alternative accommodation (RA 1977 s98 and Sch 15 Part IV paras 4 and 5). HHJ Mitchell found that it was suitable alternative accommodation. He said that 'most people would take the view that this was an attractive proposition as a place to live' (para 7). When considering reasonableness, he balanced the length of time that Mr and Mrs Whitehouse had lived in their existing flat, their involvement in the local community and the difficulties which they would face in having to leave against the siblings' 'perfectly reasonable case for wishing to realise their assets and assist them with regard to their pensions in their ... later life' (para 13). He found it reasonable to make a possession order. Mr and Mrs Whitehouse did not appeal against the finding of suitability but did appeal against the finding of reasonableness.

The Court of Appeal allowed the appeal and dismissed the possession claim. Rimer LJ said:

The question of whether it is or is not 'reasonable' to make an order for possession in a case such as this is one of fact entrusted by the legislation to the trial judge. The determination of that question requires the judge to take account of all the facts, matters and circumstances relevant to it; and then to evaluate all of them in forming an overall factual judgment. The evaluation exercise is akin to, although different in kind from, the exercise of a discretion ... The only circumstances in which it will ordinarily be open to the court to review the judge's decision on that question will be if it is satisfied that he acted under an error of principle or that his decision was plainly wrong (Bracknell Forest BC v Green and another [2009] EWCA Civ 238, paragraphs [22] to [30] (para 23).

After referring to *Cumming v Danson* [1942] 2 All ER 653, *Shreeve v Hallam* [1950] WN 140 and *Battlespring v Gates* (1983) 11 HLR 6, Rimer LJ accepted that 'the question is not whether it is reasonable for the landlord to claim possession, but whether it is reasonable to make the order' (para 29). HHJ Mitchell had misdirected himself.

The decision as to whether or not it was reasonable to make a possession order was not one that could be made merely by a

purported balancing of the reasonableness of the tenants' wish to stay in [their existing flat] against the reasonableness of the siblings' wish that they should go. It required him to look at the question from all the angles, in particular by considering the effect on the parties not just if an order was made, but also if it was not (para 30).

Rimer LJ noted that 'there is not a single sentence in his judgment as [to] why he concluded that it was reasonable to make the order'. In his view:

... what ultimately drove [the judge to his conclusion on reasonableness] was an unspoken assessment that, despite the tenants' reasonable opposition, it was reasonable for Dr Lee to ask him to make the order and therefore he should make it. If so, that was wrong (para 31).

He was also wrong in stating 'this is not a case where [Dr Lee] is anxious to make a pecuniary [gain]'. That 'was precisely what Dr Lee wanted to do' (para 32). The 'central criticism of the judge's judgment is that he did not, however, consider the effect on the parties (or at any rate on the siblings) if no order were made' (para 33). The siblings did not 'need' to sell. The judge had 'approached the determination of the reasonableness question on a mistaken basis' (para 35). His 'decision was not only arrived at as the result of a misdirection, it was obviously wrong' (para 39).

Harassment and eviction Damages

■ Salah v Munro

Wilkesden County Court,
29 April 2009¹⁷

Ms Salah occupied a room in a house as an assured shorthold tenant at a rent of £700 per month. Her tenancy commenced on 23 March 2008 and was for a fixed term of six months. She was granted housing benefit (HB), which was, even after appeal, less than the full rent. Her landlord had a policy of not accepting HB claimants as tenants. On discovering Ms Salah's HB claim, he told her to leave and said that he would return to throw her out. On 25 May 2008, the landlord's brother and girlfriend attended and demanded that Ms Salah leave and return her key. She refused, but left the property temporarily taking the key with her. On her return, she found that the locks had been changed and her belongings left in black bags on the driveway. Ms Salah found some of her belongings missing. She spent one night in hospital following an asthma attack, two nights in bed and breakfast accommodation

and eight nights on a sofa in a friend's flat before being readmitted following a court order. Following the readmission, the landlord continued to harass Ms Salah, including falsely accusing her of being a prostitute. Some of the room's furniture had been removed and was not replaced. Following the expiry of the fixed term, the landlord disabled the electricity and gas utilities forcing Ms Salah to sleep at a friend's property from 3 October 2008 to 7 November 2008. The electricity was reconnected one month after Ms Salah's solicitor's request and only on the landlord being notified that legal aid had been extended to cover a committal application. Thereafter, Ms Salah slept at the property only intermittently and otherwise continued to stay with her friend. On 3 January 2009, the landlord called the police to the property when he saw Ms Salah there. The police confiscated her keys.

HHJ Copley awarded £8,600 as general damages in respect of unlawful eviction for the 43 nights she was excluded from the property on the basis that the usual range was between £100 to £300 per night and the appropriate level in this case was £200; aggravated damages of £2,000; exemplary damages of £2,000; and special damages, conservatively estimated in the absence of any receipts, of £1,000. From the award, the judge deducted arrears of rent amounting to £750 having excluded totally the periods of Ms Salah's exclusion and abating by half the rent for the period when Ms Salah was deprived of gas.

HOMELESSNESS

'Homeless'

■ **R (McKenzie) v Waltham Forest LBC**
[2009] EWHC 1097 (Admin),
21 May 2009

The claimant lived in a hostel for single men and women in which toilet and bathroom facilities were shared by residents. She was an assured shorthold tenant. When she informed the hostel managers that she was pregnant with a baby due in December 2008, they served a HA 1988 s21 notice requiring her to leave in March 2009. She applied to the council for homelessness assistance in October 2008. Initially, it decided that it owed her no duty as she would not become homeless until March 2009. After representations made by solicitors, the council confirmed in early December 2008 that it had no reason to believe the claimant might be homeless and that it would not provide interim accommodation: HA 1996 s188. On 15 December 2008, a claim for judicial review was issued and on 18 December 2008 the council

provided accommodation.

Although the claim had become academic, the claimant pressed for a series of declarations establishing that it could never be reasonable for a pregnant woman in her third trimester to continue to share facilities with unrelated males: HA 1996 s175(3).

The claim was dismissed. Belinda Bucknall QC, sitting as a deputy High Court judge, held that for an academic judicial review claim to be tried 'the claimant must establish that two conditions are satisfied, the first being that a large number of similar cases exist or are anticipated and the second that her claim involves the resolution of a discrete issue which does not require detailed consideration of the facts' (para 25). No evidence had been adduced to meet the first condition. As to the second, whether it was reasonable for a particular applicant to remain in particular accommodation for the purposes of HA 1996 s175(3) was a fact-sensitive question and could not be addressed by a series of general declarations.

Applications

■ **Basildon DC v McCarthy**

(2009) 14 May, HL

The House of Lords has refused leave to appeal against a decision of the Court of Appeal ([2009] EWCA Civ 13, March 2009 *Legal Action* 24) which had allowed the council's appeal against a finding that its decision (in principle) to take direct action to evict Gypsies and Travellers from land around Dale Farm – before determination of their applications for homelessness assistance – was unlawful.

Reviews and appeals

■ **Tomlinson v Birmingham City Council**

(2009) 8 May, HL

The House of Lords has granted leave to the homeless applicants to appeal against a decision of the Court of Appeal that had dismissed a challenge to decisions made by the council's homelessness reviewing officers on the basis that the procedures for review under HA 1996 s202 did not comply with article 6 of the convention: see [2008] EWCA Civ 1228; January 2009 *Legal Action* 27.

Accommodation pending appeal

■ **Couzens v Colchester BC**

[2009] EWCA Civ 426,
23 March 2009

The council decided that although the claimant was homeless he did not have a priority need: HA 1996 s189. That decision was upheld on review and the claimant appealed to the county court: HA 1996 s204. He asked for accommodation pending appeal: HA 1996 s204(4). The council declined by

letter dated 13 February 2009. It said that although the council had considered the representations made and the information on its files, it was 'satisfied the review decision is sound'. The claimant appealed against that decision: HA 1996 s204A.

HHJ Dedman dismissed that appeal. The claimant succeeded in obtaining permission to bring a second appeal. Ward LJ said: 'I am reluctantly persuaded that the perfunctory nature of the decision of 13 February and the possible lack of engagement with relevant factors identified by Latham J, as he was, in *R v Camden LBC ex p Mohammed* [1997] 30 HLR 315, is enough to require this court to look at the practice of local authorities in dealing with this particular aspect and to give this court an opportunity to consider how fully reasoned these responses should be' (para 6). Permission was made conditional on the claimant succeeding in the substantive s204 appeal.

HOUSING FOR CHILDREN

■ **R (G) v Southwark LBC**

[2009] UKHL 26,
20 May 2009

The claimant was 17. He was excluded from his mother's home. After several weeks of sofa-surfing and sleeping in cars, he applied to the children's services department of the council for assistance. After assessment, it decided that he was a child in need (Children Act (CA) 1989 s17) and that he needed help in obtaining accommodation. It directed him to the council's homeless persons unit for assistance on the basis that he would be accommodated because he had a priority need: Homelessness (Priority Need for Accommodation) (England) Order 2002 SI No 2051 article 3. A claim for judicial review was dismissed and the Court of Appeal, by a majority, dismissed an appeal from that decision: [2008] EWCA Civ 877; September 2008 *Legal Action* 26.

The House of Lords held that because he satisfied all of the conditions in CA 1989 s20(1)(c), he had been owed an accommodation duty under that section. The children's services department could not release itself from the obligations of that duty by a referral to a housing department. Lord Neuberger said: 'The purpose of the 2002 Order was, as I see it, to fill [a] lacuna, not to enable a children's authority to divert its duty under section 20 to the housing authority, thereby emasculating the assistance to be afforded to children of 16 or 17 who "require accommodation"' (para 40). The advantage to the claimant of establishing a s20 duty was that he would benefit from the 'leaving care'

provisions of the CA 1989, as amended.

- 1 See: www.publications.parliament.uk/pa/cm200809/cmgeneral/deleg1/090427/90427s01.htm and www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90512-gc0003.htm respectively.
- 2 Available at: www.communities.gov.uk/publications/housing/toleratedtrespass.
- 3 Visit: <http://nearlylegal.co.uk/blog/2009/05/more-on-tolerated-trespassers>.
- 4 Available at: www.justice.gov.uk/publications/docs/stats-mortgage-land-q1-2009.pdf.
- 5 Available at: www.justice.gov.uk/news/newsrelease150509b.htm.
- 6 Available at: www.communities.gov.uk/publications/housing/responseruggreview.
- 7 Available at: www.communities.gov.uk/publications/planningandbuilding/housesmultipleconsultation.
- 8 See: www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90512-wms0001.htm#09051232000138.
- 9 Available at: www.communities.gov.uk/publications/housing/righttofranchiseprovision.
- 10 Available at: www.communities.gov.uk/publications/housing/parkhomesitelicensing.
- 11 Available at: www.communities.gov.uk/publications/housing/disputeresolutionparkhomes.
- 12 Available at: www.communities.gov.uk/housing/buyingselling/parkmobile/publications/aboutpark/.
- 13 See: www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90512-wms0002.htm#09051232000141.
- 14 Available at: www.tenantservicesauthority.org/server/show/ConWebDoc.18209/changeNav/13640.
- 15 Tony Martin, solicitor, South West London Law Centres®.
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- 17 Hemantha Warnapala, Warnapala & Co, solicitors, Southall, London and Bernard Lo, barrister, London.



Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. Readers can visit their personal websites at: www.nicmadge.co.uk and at: www.gardencourtchambers.co.uk/barristers/jan_luba_qc.cfm. The authors are grateful to the colleagues at notes 15–17 for transcripts or notes of judgments.