

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

Housing and Regeneration Act 2008

The implementation of the provisions of the Housing and Regeneration Act (H&RA) 2008 continues:

Tolerated trespassers

The new arrangements for tolerated trespassers contained in H&RA s299 and Sch 11 had been anticipated to come into effect on 6 April 2009, but the commencement of these provisions has been deferred again (see page 28 of this issue). The delay, likely to be until 'early May' 2009, was notified in a letter sent by Communities and Local Government (CLG) to chief housing officers in England on 18 March 2009.¹ The letter also indicates that CLG will in due course publish non-statutory guidance for social landlords on the effects of the amendments to be made by Sch 11.

Before the commencement of the new provisions, CLG has had to decide what to do about those trespassers occupying homes that have been transferred to new owners (for example, under large scale voluntary transfers). It sent out over 500 copies of a consultation paper in autumn 2008 but a published summary of the views of consultees indicates that it received only 18 responses.²

In the light of the responses, the secretary of state has decided to use regulation-making powers in H&RA Sch 11 para 24 to give each transferred tolerated trespasser a replacement tenancy with the closest similarity to his/her previous tenancy that the new owner is able to grant. The draft Housing (Replacement of Terminated Tenancies) (Successor Landlords) (England) Order 2009 was laid in March 2009 with an impact assessment explaining its intended effect.³ The Housing Law Practitioners Association (HLPAA) has released the text of a letter from CLG indicating why its own proposals for

aspects of the implementation of the new system for dealing with former tolerated trespassers were rejected.⁴

Changing the 'eligibility' rules

H&RA s314 was brought into force on 2 March 2009 by the Housing and Regeneration Act 2008 (Commencement No 1 and Saving Provisions) Order 2009 SI No 415.⁵ The section introduced changes to homelessness and housing allocation law – for applications made on or after 2 March 2009 – by creating a new class of 'restricted persons' in Housing Act (HA) 1996 for whom the primary method of discharging the main homelessness duty is to be provision of a private sector tenancy. The details of the changes are set out in non-statutory guidance issued to all local authority chief housing officers in England by CLG on 16 February 2009.⁶

New help on service charges

H&RA ss308–309 were fully brought into force on 6 April 2009 by the Housing and Regeneration Act 2008 (Commencement No 4 and Transitory Provisions) Order 2009 SI No 803 article 9. The sections have spawned two sets of new regulations that also came into force on 6 April 2009. The Housing (Purchase of Equitable Interests) (England) Regulations 2009 SI No 601 enable any local housing authority which is a landlord of a flat under a long lease to purchase an equitable interest in the flat in order to assist the tenant to meet some or all of the costs of service charge payments. The agreement of the tenant to the sale of part of the value of his/her home is required before service charges can be met in this way. The Housing (Service Charge Loans) (Amendment) (England) Regulations 2009 SI No 602 amend the arrangements for local authority loans to leaseholders in difficulties with service charges to enable those loans to be made on an interest-free basis.

Other provisions

The Housing and Regeneration Act 2008 (Commencement No 4 and Transitory Provisions) Order 2009 SI No 803 brought a further tranche of miscellaneous provisions of the H&RA, mainly consequent on the creation of the Homes and Communities Agency and the Tenant Services Authority, into force on 1 April 2009. The Housing and Regeneration Act 2008 (Commencement No 1) (Wales) Order 2009 SI No 773 brought H&RA s315 (amendments to the definition of 'local connection') into force in Wales on 30 March 2009. The section had been brought into force in England on 1 December 2008.

Changes to council landlords and council rents

On 1 April 2009, 44 local councils were replaced by nine new unitary authorities. Seven areas of England have been affected. Five of those areas now have one unitary council (Cornwall, Durham, Northumberland, Shropshire and Wiltshire) and two areas have been split into two unitary administrative units each (Cheshire will become Cheshire West & Chester and Cheshire East, and Bedfordshire will become Bedford Borough and Central Bedfordshire). Secure and introductory tenants of the abolished councils will become secure or introductory tenants of the new authorities.

Many local authorities increased the rents payable by their tenants from the first or second week of April 2009. However, on 6 March 2009, the housing minister announced that the government guideline rent increase was being reduced by 50 per cent, from 6.2 per cent to 3.1 per cent, with immediate effect (to avoid an adverse impact on tenants in the current recession) and that funding would be available to help councils seeking to introduce the lower rent increases: CLG news release, 6 March 2009.⁷

By the date that the announcement was made, most local authorities had already given their tenants the mandatory minimum four-weeks' notice of the higher rates of increase: HA 1985 s103(4). The journal *Inside Housing* has suggested that it will have cost each local authority about £10,000 to rescind earlier rent increase notices and issue new ones.⁸

On 26 March 2009, CLG invited comments from local authorities on the financial subsidy consequences of either ignoring or giving effect to the suggested and more modest increases. The deadline for comments was 24 April 2009.⁹

Homelessness

The latest statistics on homelessness in England were published on 12 March 2009

for the fourth quarter of 2008.¹⁰ They show that in the course of the six years since 2003, the number of acceptances of the full housing duty in HA 1996 s193 has fallen by 62 per cent. They also indicate that there are still 330 teenagers aged 16 or 17 placed in bed and breakfast (B&B) accommodation by local housing authorities.

Empty homes

The government estimates that three per cent of the English housing stock is lying empty and that 293,728 homes in England have been unoccupied for more than six months. To support measures to fill these empty homes, the government has endorsed new guidance encouraging local authorities to use their statutory powers under HA 2004 Part 4 to bring empty homes back into use: CLG news release, 10 March 2009.¹¹ The new guidance has been published by the Empty Homes Agency.¹²

Only 17 empty dwelling management orders made under HA 2004 Part 4 have been approved by residential property tribunals in England since the passage of that Act: *Hansard* HC Written Answers col 544W, 24 February 2009.¹³

Stock transfer

The impacts of housing stock transfers in urban Britain (2009) is a new report from the Joseph Rowntree Foundation reviewing the transfer of housing stock from councils to housing associations and concentrating on the 'second generation' of transfers carried out since 1997.¹⁴

Demand for council housing

A Local Government Association survey of increased demand for local authority services caused by the current recession found that in almost nine out of ten council areas, the demand for council housing showed a rise or expected rise. Fifty-seven per cent of authorities are already seeing more people in need of social housing and 31 per cent expect to. Demand for welfare advice has also risen (or was expected to rise) in almost every council area.¹⁵ The National Housing Federation's recent research suggests that a further 200,000 households will join waiting lists for social housing by 2011.¹⁶

Allocation of social housing

Government policy is that by 2010, each local housing authority should be operating a choice-based lettings (CBL) scheme, preferably in partnership with other authorities and/or registered social landlords. Financial support for the establishment of the last round of regional and sub-regional CBL schemes was announced on 20 March 2009 with bids

invited by 9 October 2009 for funding in 2010/11. The government will meet a maximum of 60 per cent of project start-up costs, up to a ceiling of £100,000 per scheme.¹⁷

Housing for migrants

Managing the impacts of migration. Improvements and innovations (CLG, March 2009) sets out the impact of recent inward migration on housing and homelessness support (at pages 25–30).¹⁸ Publication was accompanied by the announcement of a £70m fund to support local communities in managing local pressures from such migration: CLG news release, 19 March 2009.¹⁹

Consultation with tenants

Local Democracy, Economic Development and Construction Bill Part 1 Chapter 4 will establish a new body responsible for representing the views and interests of tenants in England (likely to be called 'National Tenant Voice') to require that the new body be consulted on matters of interest to tenants. The bill, if passed, will amend the consultation requirements in the H&RA.

Sites for Gypsies and Travellers

The report *Gypsies and Travellers: Simple solutions for living together* (Equality and Human Rights Commission, March 2009) sets out a series of recommendations for national and local organisations on means of achieving greater harmony between the static and mobile communities through additional authorised site provision.²⁰

A human right to housing

The green paper *Rights and responsibilities: Developing our constitutional framework* (Ministry of Justice, March 2009) restates the government's belief that: '... everyone should have access to a decent home at a price they can afford' (para 3.55).²¹ But there is no commitment to include a 'right to housing' in the proposed new legislation.

Meanwhile, the Committee of Ministers of the Council of Europe (responsible for enforcing judgments of the European Court of Human Rights (ECtHR)) will meet in June 2009 to consider the UK Government's response to *McCann v UK* App No 19009/04, 13 May 2008.²² HPLA has made a formal submission to the Committee.²³

The ECtHR itself is considering the submissions recently made by the complainant and the government in the pending case of *Kay and others v UK* App No 37341/06, 17 October 2008.²⁴

Private sector tenants

In *Housing and the credit crunch*, third report of session 2008–09, HC 101, February

2009, the Communities and Local Government Committee urged that more be done by the government to protect private tenants who have paid their rents but face eviction by their landlords' mortgage lenders.²⁵ The subsequent report *A private matter? Private tenants: the forgotten victims of the repossession crisis* (Chartered Institute of Housing, Citizens Advice, Crisis and Shelter, March 2009) highlights the problem.²⁶

Home information packs

Requirements for the content of home information packs under HA 2004 Part 5 changed on 6 April 2009. The leaflet *Home buying and selling: A guide to home information packs* (CLG, March 2009) has been revised to help buyers and sellers meet the new rules.²⁷ A separate guide concentrating solely on the new requirements is also available: *Changes to home buying and selling: Updates to home information packs* (CLG, March 2009).²⁸

New service charges code

A new statutory code of practice came into force on 6 April 2009 applicable to landlords and managing agents collecting service charges from private sector tenants. In the Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009 SI No 512, the secretary of state has approved the Service Charge Residential Management Code 2009 (ISBN 978 1 84219 168 2), published by the Royal Institution of Chartered Surveyors.²⁹

Enforcing housing law

The remaining provisions of the Regulatory Enforcement and Sanctions Act 2008 were brought into force on 6 April 2009 by the Regulatory Enforcement and Sanctions Act 2008 (Commencement No 2) Order 2009 SI No 550. The Act is designed to improve enforcement of regulatory law by local authorities and covers enforcement of housing and environmental health standards among others. Part 3 of the Act gives the secretary of state power to enable housing authorities to impose fixed financial penalties (rather than to prosecute) for offences under the Accommodation Agencies Act 1953, the Protection from Eviction Act 1977 and the Environmental Protection Act 1990 (Part 3).

Housing conditions in Scotland

The remaining provisions of the Housing (Scotland) Act 2006 Parts 1 and 2 were brought into force on 1 April 2009 by the Housing (Scotland) Act 2006 (Commencement No 7, Savings and Transitional Provisions) Order 2009 SSI No 122. They make arrangements for new

housing renewal areas and amend arrangements for the improvement or demolition of poor housing.

Rough sleeping

Rough sleeping. Compassion v coercion. Church, community & government responses (Housing Justice, March 2009) and *Underground lives* (Positive Action for Refugees & Asylum Seekers, March 2009) are two new reports highlighting aspects of the problem of rough sleeping by homeless people.³⁰ The latter details an investigation into the living conditions and survival strategies of destitute asylum-seekers in the UK based on 56 in-depth interviews with them.

HUMAN RIGHTS

Article 8

■ Pullen v Dublin City Council

[2008] IEHC 379,

12 December 2008

Mr and Mrs Pullen became council tenants in December 2004. Neighbours made complaints of anti-social behaviour. Mr and Mrs Pullen were interviewed by council staff on three separate occasions. In August 2006, the council served a notice to quit and a demand for possession. In September 2006, a summons was issued under HA 1966 s62 in which the council sought a warrant for possession. In November 2006, the district court, which had no jurisdiction to enter into the merits of the possession claim and having been satisfied with the formal proofs required by s62, granted the warrant for possession. Mr and Mrs Pullen's subsequent appeal to the circuit court was unsuccessful. They claimed that the absence of an independent judicial or quasi-judicial hearing, at which the finding of anti-social behaviour could be challenged before eviction, contravened article 6(1) of the European Convention on Human Rights ('the convention') and that the decision to terminate their tenancy and recover possession of their home, in the absence of adequate procedural safeguards, infringed article 8(1). They sought declarations to that effect.

Irvine J, after referring to s62, reviewed a number of cases from the ECtHR and England and Wales. She said that the Strasbourg jurisprudence may:

... overlook the lack of independence at the first stage of a process but it may only do so where, on the facts of the individual case, judicial review can be deemed to amount to a full hearing. To my mind, the nature of the issues in the present case, having regard to the lack of independence at the first stage of

the process, required a right to an independent merits-based hearing ... neither the investigation nor the subsequent decision involved, other than in the remotest way, broader issues of housing policy ... What the defendant did in the present case was to make findings of fact in relation to disputed events and this involved making judgments as to the credibility of the plaintiffs and their neighbours. This they did in the teeth of the plaintiffs' assertions that they were being victimised by their neighbours and their further complaint that the investigation process had been prejudged by those who were charged with that task.

The availability of judicial review proceedings did not comply with obligations under article 6(1). Accordingly, the council terminated Mr and Mrs Pullen's civil rights by a procedure that offended the provisions of article 6(1). Furthermore, following *Donegan v Dublin City Council* [2008] IEHC 288, the extent of procedural safeguards required where there is an interference by a local authority with a right under article 8(1) is 'the type of due process required by article 6'. The council had not satisfied the court that any of its objectives 'could possibly amount to a pressing social need such as to render it proportionate to evict [Mr and Mrs Pullen], using a procedure which failed to afford them an opportunity to dispute, before an independent body, the lawfulness and reasonableness of that decision'. There was accordingly a breach of article 8.

SECURE TENANCIES

Possession claims: reasonableness

■ Bracknell Forest BC v Green

[2009] EWCA Civ 238,

20 March 2009

In 1958, Easthampstead RDC, the predecessors-in-title to Bracknell Forest BC let a three-bedroom, semi-detached house to James Green. His daughter, Denise Green, lived in the house from 1958 until 1975 and again from 1984. His son, Harry Green, was born in the house in 1958 and lived there continuously. In 1969, after James Green died, Harry and Denise's mother was granted a tenancy of the house. That tenancy became a secure tenancy under what is now the HA 1985. Harry Green succeeded to the tenancy on the death of his mother in 2005. The council began a possession claim, relying on HA 1985 Sch 2 Ground 16 (under-occupation).

Recorder Flather QC dismissed the claim. He found that the accommodation was more extensive than was reasonably required and that alternative accommodation offered by

the council was suitable, but held that it was not reasonable to make an order for possession. In considering reasonableness, the recorder noted that the house was part of the council's dwindling social housing stock; that there was a long list of prospective tenants seeking social housing; that three-bedroom houses were needed for families with two or more children; and that the house was a public resource worth half a million pounds, which the Greens had used for 50 years. On the other hand, he considered Harry Green's circumstances; his age and the length of time that he had lived in the house; the permanently destabilising effect on him of being made to move; and the Greens' genuine emotional attachment to it 'as part of the family'. The council appealed.

The Court of Appeal dismissed the appeal. Mummery LJ said:

The recorder heard all the evidence and the arguments. He found the facts. It was for him to carry out the balancing exercise and assess the relative weight of all the circumstances relevant to the decision.

By its very nature the recorder's decision is difficult to appeal. The role of the Court of Appeal under [Civil Procedure Rules (CPR)] Part 52 ... is, in general, limited to a review of the decision of the lower court. The appeal is not a re-hearing or re-trial of the case (paras 22 and 23).

He referred to Lord Hoffmann's 'valuable analysis of the appellate function' and his overall conclusion that appellate courts should be "very cautious in differing from the judge's evaluation" of the facts in cases where a reference to, or an application of, an imprecise legal standard to the facts of the case is a matter of degree rather than of principle' (para 25) (*Biogen Inc v Medeva plc* [1996] UKHL 18; [1997] RPC 1). In Mummery LJ's words:

... the appeal process is not there merely for having another go at the kind of fact-based issue that the lower court is often better placed to assess than a law-oriented appellate court is.

... [The Court of Appeal] should be slow to upset [a county court judge's] evaluation of reasonableness on the possession order issue, unless it is clear that he acted under an error of principle or unless his decision was obviously wrong (paras 29 and 30).

In this case, notwithstanding the council's submissions, the recorder had the availability of suitable accommodation well in mind throughout his consideration of the council's claim. He gave it proper consideration before

deciding to refuse the application for a possession order.

Shared-ownership schemes and deaths

■ Birmingham City Council v Afzal

Birmingham County Court, 12 December 2008

In 1973, the council granted Mr Mohammed Afzal and his wife Mrs Hannah Afzal a joint tenancy. It became a secure tenancy. Mrs Afzal died in 1999 and Mr Afzal became the sole tenant. In April 2005, Mr Afzal and his son Asham Afzal (who lived at the property) made a joint application to exercise the right to buy, but they could not afford the mortgage and so the application was withdrawn. In 2007, Mr Afzal and his son sought advice about the council's shared-ownership scheme. On 21 June 2007, an advice worker telephoned the council and asked what happened to 'RTB/shared ownership if tenant dies before completion?' She was told that the 'sale passes on to executor of estate'. Mr Afzal's son considered that this was a representation from the council that a shared-ownership application would survive his father's death. On 19 July 2007, Mr Afzal and his son completed a shared-ownership application form, stating that they wanted to buy 25 per cent of the property. The council admitted the application on 24 July 2007. Mr Afzal died on 25 July 2007. Later, the council wrote stating that it was not possible to carry on with the shared-ownership application because it was a voluntary scheme which did not survive death. In January 2008, the council began a possession claim on the basis that the necessary notices had been served and that the son and other occupants had no right to remain. Mr Afzal's son counterclaimed that the council was estopped by proprietary estoppel from denying the right to proceed with the shared-ownership application.

Recorder Rhodri Davies QC found that it was likely that the telephone conversation took place and that Mr Afzal's son relied on the information when he made the shared-ownership application. However, in this case, the elements necessary to establish a proprietary estoppel were:

- a representation by the council that the occupant had or would have a proprietary right over the property. Such a representation must:
 - be clear and unequivocal;
 - be intended to be relied on; and
 - relate to a proprietary interest or 'a certain interest in land';
- actual reliance by the occupant on the representation to his detriment; and
- an overall state of affairs that renders it

unconscionable for the council to deny the occupant the proprietary right which it was represented that he would have.

Recorder Davies found that the statement that a right to buy or shared-ownership application passed to the tenant's estate if the tenant died was sufficiently clear and unequivocal. However, no specific property was identified in the conversation and there was no evidence that the council was told that a decision as to which application to make in relation to a particular property depended on the answer. He concluded that the representation by the council could not be construed as promising a proprietary interest in land. Furthermore, to allow the shared-ownership application to proceed would have been a disproportionate response to the single error by the council. He did not regard it as unconscionable to allow the council to correct its mistake and rely on its usual policy. Recorder Davies made a possession order and dismissed the counterclaim.

ASSURED TENANCIES

Rents and improvements

■ Hughes v Borodex Ltd

[2009] EWHC 565 (Admin), 25 March 2009

In 1977, an under-lease was assigned to Ms Hughes's mother. Before it expired by effluxion of time in 2003, her mother died. On expiry of the fixed term, Ms Hughes became an assured tenant in accordance with the provisions of the Local Government and Housing Act (LGHA) 1989. The parties could not reach agreement about the rent and so there was a reference to a Rent Assessment Committee (RAC) under LGHA Sch 10. It disregarded improvements which Ms Hughes had carried out in 1992 and determined a rent of £1,668 per month. After what appears to have been a further reference to the RAC, it determined that the rent payable with effect from April 2008 would be £2,340 per month. (In view of HA 1988 Sch 1 para 2, as amended, this meant that the tenancy ceased to be an assured tenancy because the annual rent exceeded £25,000.) In fixing the rent, the RAC seems to have taken into account the improvements. Ms Hughes appealed.

Collins J dismissed the appeal. He held that as Ms Hughes was not an assured tenant when the improvements were carried out, she could not rely on HA 1988 s14 which provides that the RAC should disregard any improvements carried out by a tenant. One of the conditions specified in s14(3) is that 'at all times during the period beginning when the improvement was carried out and ending on the date of service of the notice, the dwelling-

house has been let under an assured tenancy'. Schedule 10 did not apply to any application made under s13.

Assured shorthold tenancies Registration of houses in multiple occupation

■ Raco Limited v Roberts

Central London County Court, 6 March 2009³¹

Mr Roberts was an assured shorthold tenant. On 11 January 2008 his landlord issued accelerated possession proceedings relying on a HA 1988 s21(1)(b) notice served on 6 September 2006. Mr Roberts defended the claim arguing that the notice was invalid: first, because it had been served before the commencement of the tenancy; and, second, because at the date the notice was served his flat, which formed part of a house in multiple occupation (HMO) and was subject to the mandatory licensing regime, was not so licensed (HA 2004 s75). On 30 June 2008, the landlord served a HA 1988 s21(4)(a) notice. On 26 September 2008, the landlord issued a second set of accelerated possession proceedings relying on the 30 June 2008 notice. Mr Roberts defended this second claim on the basis that the notice was invalid because his flat continued to form part of a mandatory licensable HMO which ought to have been licensed on 30 June 2008 but which was not. Both claims were linked and listed to be heard in April 2009. On 30 November 2008, the landlord served a further s21(4)(a) notice. Once this notice had expired the landlord applied to amend both possession claims to rely on the 30 November 2008 notice.

District Judge Lightman dismissed the application to amend. Although amendments take effect from the date a claim is issued, not the date of the amendment, there is no longer an absolute rule of law or practice which precludes an amendment to rely on a cause of action which accrued only after the date of the original claim (see *Maridive & Oil Services (SAE) v CNA Insurance Co (Europe) Ltd* [2002] EWCA Civ 369). However, in *Lower Street Properties v Jones* (1996) 28 HLR 887, the Court of Appeal held that it was implicit that s21(4) did not entitle the landlord to possession unless the notice had expired before the issue of the claim. Given that s21(4) had been construed by the Court of Appeal in this way, the court had no power to allow the proposed amendments. The landlord's only option was to issue a further possession claim.

Return of deposits**■ Seghier v Rollings***Bow County Court,
6 March 2009³²*

In May 2007, Ms Rollings granted Mr Seghier an assured shorthold tenancy of a one-bedroom flat. He paid a deposit to her agent at some point before he signed the tenancy agreement. Ms Rollings was unaware of the existence of the tenancy deposit scheme and made no efforts to comply with its statutory requirements (HA 2004 s213) until shortly before a court appearance in June 2008. Then, she brought the certificate of deposit to court and, on the suggestion of the judge, gave a copy of it to Mr Seghier. However, it was not signed by Ms Rollings; Mr Seghier was not provided with a copy of the Tenancy deposit solutions leaflet; and Ms Rollings did not provide any information about the applicable procedures if either the landlord or tenant were not contactable at the end of the tenancy (see the Housing (Tenancy Deposits) (Prescribed Information) Order 2007 SI No 797). At the date of trial, the prescribed information had still not been given to Mr Seghier. Mr Seghier sought an order that Ms Rollings either repay the deposit or pay it into a designated account held by the scheme administrator and pay Mr Seghier a sum equivalent to three times the amount of the deposit (HA 2004 s214).

HHJ Redgrave distinguished *Harvey v Bamforth* Sheffield County Court, 8 August 2008; November 2008 *Legal Action 18* because in this case, Ms Rollings had still not complied with s213(6)(a). She concluded that the phrase 'as it thinks fit' contained in s214(3) meant that the court must choose either to order the return of the deposit under s214(3)(a) or order the money to be held in a designated account held by the scheme administrator under s214(3)(b). She ordered Ms Rollings to pay £2,780 (the deposit plus a sum equal to three times this figure) to Mr Seghier within 14 days.

■ Beal v McCartney*Plymouth County Court,
12 March 2008³³*

On 1 March 2008, Ms McCartney granted Mr Beal a six-month fixed-term assured shorthold tenancy. Mr Beal paid a deposit of £550. The tenancy agreement stated that: 'The deposit £550.00 ... will be registered with one of the government authorised tenancy deposit schemes (the "Tenancy Deposit Scheme") in accordance with the Tenancy Deposit Scheme Rules'. Mr Beal received no details of the scheme into which the deposit was paid. On 13 September 2008, Mr Beal received a letter from NatWest Bank addressed to 'the occupier' advising that a warrant for eviction

was being applied for (as a result of his landlord's mortgage arrears). On 15 October, he received a letter from solicitors advising that the date of eviction would be 22 October. On that date, he was evicted. Ms McCartney did not respond to a letter before claim requesting return of the deposit and three times the amount in compensation.

At a hearing of his subsequent county court claim, Deputy District Judge Challans stated that it was 'quite clear' that in accordance with HA 2004 s214(3) the court must award three times the deposit amount and that 'it is very silly of landlords if they don't take notice'. He also awarded the return of the original deposit. Regarding the breach of quiet enjoyment, he awarded £500 damages.

■ Universal Estates v Tiensia*Croydon County Court,
23 February 2009³⁴*

On 19 May 2008, Universal Estates granted Ms Tiensia an assured shorthold tenancy. The deposit of £2,400 was paid in installments, the last on 4 June. The rent was £2,400 per month, payable in advance. Ms Tiensia had problems with housing benefit and, immediately after the second month's rent became payable, the landlord served a notice seeking possession relying on HA 1988 Sch 2 Grounds 8, 10 and 11. Ms Tiensia defended the subsequent possession claim and counterclaimed for a payment under HA 2004 s214(4). The landlord subsequently registered the deposit with Tenancy Deposit Solutions Ltd, an online, insurance-based, tenancy deposit scheme. The certificate was faxed to Ms Tiensia on 3 November 2008. The terms of the scheme (as set out in the Information for tenants leaflet) stated: 'Within 14 days of receiving the deposit from you, your landlord/agent must protect the deposit with the scheme as well as provide to you details of how your deposit is being protected and what to do if there is a dispute about the repayment of your deposit at the end of the tenancy agreement.'

On an application for summary judgment on the counterclaim, Deputy District Judge Clarke accepted that the 'initial requirements' of the scheme itself (as well as s213) required the landlord to protect the deposit and provide the required details within 14 days and that, therefore, this requirement could not be satisfied once the 14 days had passed. The judge ordered the landlord to pay Ms Tiensia £7,200.

Harassment and eviction**Damages****■ Khan v Iqbal***Bury County Court,
13 March 2009³⁵*

Ms Khan occupied premises as an assured shorthold tenant at a rent of £650 per month. She lived with two children aged 15 and 12. She fell into arrears of rent. The landlord and his sons interrupted the supply of electricity and central heating and cut the telephone line. They made demands for rent. The landlord attended the premises and verbally abused Ms Khan. On 10 May 2008, one of the landlord's sons entered the property and began removing Ms Khan's belongings. Ms Khan protested and telephoned the police. Two PCs arrived and assured her that she could return to collect her belongings and gave her a telephone number for a women's refuge. The council accommodated her and both children in B&B accommodation immediately. When Ms Khan returned to the property, she found that the locks had been changed. Most of her possessions were missing or damaged.

HHJ Tetlow awarded £2,000 in respect of harassment up to 9 May 2008 against the landlord and his two sons on the basis that they were jointly and severally liable. He also awarded £10,200 (102 nights at £100) in respect of unlawful eviction; aggravated damages of £2,000; exemplary damages of £3,000; and special damages of £2,338.32.

TRESPASSERS**Adverse possession****■ Ofulue v Bossert***[2009] UKHL 16,
11 March 2009,
[2009] 2 WLR 749,
(2009) Times 13 March*

Mr and Mrs Ofulue were the registered owners of a property. They went to live abroad in 1976. In 1981, Ms Bossert and her father, Mr Bossert, were let into the property by a former tenant. In 1987, Mr and Mrs Ofulue took possession proceedings. Mr Bossert counterclaimed, alleging that he had been offered a 14-year lease in return for completion of extensive repairs. Without prejudice negotiations took place in which Mr Bossert offered to buy the premises, but agreement was not reached. In August 1996, Mr Bossert died. Mr and Mrs Ofulue failed to pursue the possession claim which was automatically stayed in August 2000. In September 2003, after serving two notices to quit, Mr and Mrs Ofulue began a new possession claim. In her defence Ms Bossert contended that ownership of the property had

passed to her by way of adverse possession. HHJ Levy QC held that she had acquired the property by adverse possession and that Mr and Mrs Ofulue's title had been extinguished. Mr and Mrs Ofulue appealed. The Court of Appeal dismissed the appeal ([2008] EWCA Civ 7, 29 January 2008; April 2008 *Legal Action* 34).

The House of Lords dismissed a further appeal. The defence referring to the offer of a lease, which was an acknowledgement of title, was served more than 12 years before the new proceedings. Conceptually, as a matter of language, an acknowledgment could cover a continuing state of affairs, but particularly where it has to be embodied in a signed statement, the more natural meaning of the word was that it arose as at the date of the document. Normally, for there to be a fresh acknowledgement of something previously raised in a defence, there would have to be a fresh written and signed document. It was indisputable that the without prejudice letter was written with a view to settling the earlier proceedings and that the Ofulues could have been in no doubt that the 'without prejudice' rule was intended to apply to it. Save perhaps where it was wholly unconnected with the issues between the parties to the proceedings, a statement in without prejudice negotiations should not be admissible in evidence, other than in exceptional circumstances.

■ **R (Smith) v Land Registry**

[2009] EWHC 328 (Admin),
13 February 2009

Mr Smith claimed title by adverse possession to some land to the north of Iram Drive, Willingham on the basis that his caravan and associated structures had been on the land for 12 years. He applied to the Land Registrar for first registration of title. The Assistant Land Registrar cancelled the application, stating that title cannot be acquired to a highway by adverse possession. Mr Smith applied for judicial review.

HHJ Pelling QC, sitting as a judge of the High Court, dismissed the application. To succeed in claiming adverse possession, Mr Smith had to establish that he had dealt with the land in question as an occupying owner might have been expected to deal with it and that no one else had done so. That could not occur other than by obstruction of the highway in breach of Highways Act 1980 s137(1), which makes such obstruction a criminal offence. It was therefore a legal impossibility to claim adverse possession to part of a highway by reference to the illegal obstruction of it for a period of 12 years.

ANTI-SOCIAL BEHAVIOUR

Anti-social behaviour orders

■ **Birmingham City Council v Dixon**

[2009] EWHC 761 (Admin),
18 March 2009

Birmingham applied for an anti-social behaviour order (ASBO) against the defendant, under Crime and Disorder Act 1998 s1, alleging that he was a member of a gang. The magistrates' court ruled that evidence of alleged anti-social behaviour after the making of the application for the ASBO was inadmissible. Birmingham appealed by way of case stated.

The Divisional Court allowed the appeal. To make good a complaint, it is necessary to prove the allegations in the complaint itself. However, evidence of post-complaint behaviour can be relevant as to whether behaviour during a period that formed the basis of a complaint was anti-social. There is no reason why later conduct showing propensity to commit an anti-social act would not be relevant to the question of whether an individual acted in an anti-social manner. Post-complaint behaviour is also relevant when considering whether an ASBO is necessary to protect the public.

Closure notices

■ **R (Longato) v Camberwell Green Magistrates' Court**

[2009] EWHC 691 (Admin),
18 March 2009

The magistrates' court made a closure order for three months on the basis that Ms Longato's home was a crack house. The police applied to extend the order. Although Ms Longato was granted a representation order, she did not receive it until after the hearing. She did not attend the hearing because she was not given notice of it. Although the judge was aware that Ms Longato had not been given notice of the hearing and wanted to participate in the proceedings, he extended the order. Ms Longato sought judicial review.

The Administrative Court quashed the extension order. The proceedings resulted in an irregularity and in real injustice, as it was clear that Ms Longato intended to resist the application. Simply to shut her out without giving her the opportunity to be heard, whatever the merits of her case, was clearly unjust and needed to be put right.

HOUSING ALLOCATION

■ **R (M) v Hackney LBC**

CO/1779/2008,
13 March 2009,
[2009] All ER (D) 146 (Mar)

The claimant was an elderly, disabled council tenant. He applied for a transfer. He was awarded medical priority and offered a ground floor flat. When he realised that the flat offered was near a school playground, he alerted the council to the fact that he was the subject of a sexual offences prevention order. He had several convictions for sexual offences against children. The council withdrew the offer and decided that the claimant was not eligible for consideration under its allocation scheme at all: HA 1996 s160A. The claimant sought a judicial review contending that the council had not given sufficient reasons and had not acted consistently with its own allocation scheme.

Cranston J dismissed the claim. He held that sufficient reasons had been given and the council had not acted unreasonably.

Local Government Ombudsman Investigation

■ **Medway Council**

08 008 647,
23 March 2009

The complainant left her home in fear of domestic violence and was accommodated in the Medway area in a women's refuge. She applied for an allocation of council accommodation under HA 1996 Part 6 and was accorded Band A priority under the council's scheme. In the course of an investigation into how that housing application was then handled, the Ombudsman found that since September 2002 the council had not had a full published allocation scheme as required by HA 1996 s167(1) and had been operating for over five years with an unlawful combination of a summary scheme and unpublished internal guidance. HA 1996 s167(8) provides that an authority shall not allocate housing except in accordance with its allocation scheme. The Ombudsman said that this 'raises questions about the legality of those allocations' that the council made during that period.

HOMELESSNESS

Handling applications

Local Government Ombudsman Investigation

■ **Redbridge LBC**

07/A/03275,
23 March 2009

The complainant was a single man with a hearing disability. Redbridge accepted his application under HA 1996 Part 7 and decided that it owed him the main housing duty in s193(2). Under that duty it placed him only in short-stay, accommodation provided on a night-by-night basis. Normally, he would then have been moved to other temporary

self-contained accommodation but that did not occur because there were outstanding rent arrears. When they were cleared, a move to self-contained accommodation was not actioned because of communication difficulties (resulting from the council's failure to arrange sign-language interpretation or a textphone facility).

The Ombudsman identified maladministration in the council's failure to make reasonable adjustments in its service provision to cater for the disabled contrary to the requirements of the Disability Discrimination Act 1995, as amended. He recommended payment of a further £500 compensation in addition to £750 already agreed by the council.

Eligibility

■ R (Mendes) v Southwark LBC

CI/08/2178,

24 March 2009,

[2009] All ER (D) 231 (Mar)

The claimant had applied to Southwark for homelessness assistance under HA 1996 Part 7. It provided interim accommodation under s188 but later decided that the claimant was not 'eligible' because although he was an EU national he was not a 'worker': s185. The claimant sought a review under s202 and, because the interim accommodation was to be withdrawn, also sought judicial review.

In that claim, the council conceded that its decision on his status had been wrong and the judicial review claim was compromised.

The judge made no order for costs. The Court of Appeal allowed the claimant's appeal on costs. The council had had no answer to the claim for judicial review and should have been ordered to pay the costs.

Terminating the housing duty

■ R (Best) v Oxford City Council

[2009] EWHC 608 (Admin),

25 March 2009,

[2009] All ER (D) 252 (Mar)

The council owed the claimant the main housing duty under HA 1996 s193. When the accommodation that had been provided under that duty was lost for non-payment of rent, the council decided that its duty had been ended because the claimant had become homeless intentionally. That decision led to a number of challenges including these proceedings for judicial review.

The claimant contended that as the council had known that she was dependent on income support and did not qualify for housing benefit it had failed to provide 'suitable' accommodation because such accommodation could only be provided to her either at nominal charge or rent free.

Geraldine Andrews QC (sitting as a deputy

High Court judge) dismissed the claim. She held that the council had been entitled to decide that the claimant did have the resources to pay for the accommodation that had been provided and that as a result of the loss of that accommodation the s193 duty was no longer owed.

HOUSING AND CHILDREN

■ R (JL) v Islington LBC

[2009] EWHC 458 (Admin),

12 March 2009,

[2009] All ER (D) 140 (Mar)

The claimant was a disabled child receiving extensive support services from the council. The council decided to adopt new eligibility criteria for its support services and, when those criteria were applied to JL, his services were significantly reduced.

Black J allowed a claim for judicial review of that decision. The council had been wrong to change the services being provided to JL without a reassessment of his needs. Moreover, the eligibility criteria failed to distinguish between cases in which children were being assisted under the absolute duties imposed by Children Act (CA) 1989 s20 (on which they could have no lawful impact) and cases being handled under discretionary powers such as those in CA 1989 s17.

■ R (M) v Lambeth LBC

■ R (A) v Croydon LBC

House of Lords,

11 March 2009

The House of Lords has granted leave to appeal to the claimants in these important cases concerning age assessments for young people seeking accommodation under CA 1989 s20.

- 1 Available at: www.gardencourtchambers.co.uk/imageUpload/File/090312%20-%20final%20letter%20to%20landlords.doc.
- 2 *Consultation on tolerated trespassers. Successor landlord cases. Summary of responses*, March 2009, available at: www.communities.gov.uk/publications/housing/toleratedtrespassersresponses.
- 3 *Tolerated trespassers: Successor landlord cases. Impact assessment*, March 2009, is available at: www.communities.gov.uk/publications/housing/toleratedtrespassersia.
- 4 Available at: www.hlpa.org.uk/uploads/TTsCLGLettertoHPLA.doc.
- 5 See: www.opsi.gov.uk/si/si2009/pdf/uksi_20090415_en.pdf.
- 6 Available at: www.communities.gov.uk/documents/housing/pdf/1155611.pdf.
- 7 Available at: www.communities.gov.uk/news/corporate/1167420.
- 8 'Rents U-turn to cost councils £10,000 each', 13 March 2009, available at: www.insidehousing.co.uk/story.aspx?storycode=6503635.
- 9 See: www.communities.gov.uk/documents/housing/pdf/hrasdeterminationletter.pdf.

- 10 *Statutory homelessness: 4th quarter 2008, England* is available at: www.communities.gov.uk/publications/housing/homelessnessq42008.
- 11 Available at: www.communities.gov.uk/news/housing/1170881.
- 12 Available at: www.emptyhomes.com/usefulinformation/papers_publications/edmo_guide/edmo_foreword.html.
- 13 See: www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090224/text/90224w0009.htm.
- 14 Available at: www.jrf.org.uk/sites/files/jrf/britain-housing-urbanFULL.pdf.
- 15 *Council leader survey on the impact of the economic downturn on local authorities – full report*, March 2009, available at: www.lga.gov.uk/lga/aio/1701316.
- 16 *Number of households on waiting lists projected to reach all-time high – as recession fuels demand*, 19 March 2009, available at: www.housing.org.uk/default.aspx?tabid=212&mid=828&ctl=Details&ArticleID=2062.
- 17 *Fund for the development of regional and sub-regional choice based lettings schemes: guidance for submitting a proposal*, CLG, March 2009 is available at: www.communities.gov.uk/documents/housing/pdf/1178352.
- 18 Available at: www.communities.gov.uk/documents/communities/pdf/1179350.pdf.
- 19 Available at: www.communities.gov.uk/news/corporate/1180107.
- 20 Available at: www.equalityhumanrights.com/en/publicationsandresources/Pages/GypsiesandTravellers-simplesolutionsforlivingtogether.aspx.
- 21 Available at: www.justice.gov.uk/publications/docs/rights-responsibilities.pdf.
- 22 See: www.coe.int/t/cm/humanRights_en.asp.
- 23 Available at: www.hlpa.org.uk/.
- 24 Available at: www.bailii.org/eu/cases/ECHR/2008/1193.html.
- 25 Available at: www.publications.parliament.uk/pa/cm200809/cmselect/cmcomloc/101/101.pdf.
- 26 Available at: www.citizensadvice.org.uk/index/campaigns/policy_campaign_publications/evidence_reports/er_housing/a_private_matter.htm.
- 27 Available at: www.communities.gov.uk/publications/housing/buyingandsellingguide.
- 28 Available at: www.communities.gov.uk/publications/housing/buyingsellingchanges.
- 29 Available at: www.isurv.com/site/scripts/download_info.aspx?downloadID=193&fileID=224.
- 30 Available at: www.housingjustice.org.uk/site/publications/hj/Rough%20Sleeping%20Compassion.pdf and www.pafras.org.uk/documents/UNDERGROUNDLIVES.pdf respectively.
- 31 Gareth Mitchell, Pierce Glynn, solicitors, London and Robert Latham, barrister, London.
- 32 Angela Jack, barrister, London.
- 33 Steve Webster, Shelter, Plymouth.
- 34 Nicolas Goss, Wandsworth & Merton Law Centre®, London and Sean Pettit, barrister, London.
- 35 Kevin Miles, solicitor, Bury Law Centre and Angela Pears, barrister, Cobden House Chambers, Manchester.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. The authors are grateful to the colleagues at notes 31–35 for transcripts or notes of judgments.