

Housing repairs update 2008



Beatrice Prevatt details the latest policy, legislation and case-law concerning housing disrepair in this annual review.

POLICY AND LEGISLATION

Small claims and case track limits

On 21 July 2008, the Ministry of Justice published its response to the consultation paper, *Case track limits and the claims process for personal injury claims*, which had been published in April 2007.¹ The consultation paper asked whether or not the small claims limit for housing disrepair cases should remain at the current level of £1,000 for the cost of the disrepair and £1,000 for damages arising from the disrepair. It also sought views on whether the process for dealing with these claims could be improved and simplified. The government has concluded that the limit for housing disrepair claims should remain at the current level. It will consider the handling of housing disrepair claims but there are no current plans to undertake any review in this area as the responses to the consultation confirmed that current procedures (including the pre-action protocol) appear to be working effectively. The general small claims limit is to remain at the current level of £5,000. However, the government is of the view that raising the fast track limit will provide greater flexibility and will result in more cases being heard in the appropriate track. It has concluded that the fast track limit should be increased to £25,000.

Comment: It is the writer's view, supported by Civil Procedure Rule (CPR) 26.8, that the fast track is only appropriate for relatively straightforward claims and should not be allocated routinely for all cases which are expected to last less than a day and are under the financial limit. With any increase in the financial limit, it will be even more important to assess which cases are sufficiently complex to warrant allocation to the multi-track.

Decent homes standard

The definition of what is a decent home was updated in 2006 to take account of the Housing Health and Safety Rating System (HHSRS). This replaced the fitness standard as the statutory element of the decent homes

standard. Decent homes must meet the current statutory minimum standard for housing (they must now pose no category 1 hazards), be in a reasonable state of repair, have reasonably modern facilities and services and provide a reasonable degree of thermal comfort.

In January 2008, the headline report of the English House Condition Survey 2006 was published.² This presents key findings from the English House Condition Survey 2006. It is the first time that decent homes figures incorporating HHSRS have been reported. Information was collected through the survey on both fitness and the HHSRS for 2006 to enable the impact of the change in the definition of decent homes to be assessed.

The replacement of the fitness standard by the HHSRS, as the statutory component of the decent homes standard, has led to an increase of 2.2 million in the number of homes defined to be non-decent. There is relatively little change arising from the new definition in the social sector where the number of non-decent homes increases from 1.1 million (29 per cent) to 1.3 million (34 per cent), but the number of non-decent private sector homes increases from 4.8 million (26 per cent) to 6.8 million (38 per cent).

Of the four criteria required for a home to be defined as decent, the HHSRS-based statutory criterion is the most commonly failed. Around 900,000 homes (four per cent) failed the statutory component under the previous fitness standard compared with 4.8 million homes (22 per cent) with category 1 hazards. Some 4.2 million homes (24 per cent) in the private sector have category 1 hazards present, compared with 500,000 (13 per cent) in the social sector. The most common category 1 hazards are excess cold and falls. One-fifth of non-decent homes (1.7 million) fail the repair criterion and less than one in ten because of a lack of modern facilities and services.

In 2006, 8.1 million homes (36.8 per cent) are non-decent under the new definition with 6.8 million of these in the private sector

compared with 1.3 million in the social sector. Half of privately rented homes are non-decent. This increase in the number of non-decent homes is as a result of the change in definition and does not indicate any deterioration of the housing stock. The housing stock as a whole has improved since 2005. Using the original definition of decent homes, 68 per cent of vulnerable households are living in decent homes in 2006, a considerable improvement compared with 43 per cent in 1996. Using the original definition there has been a reduction across all tenures in the proportion of households living in non-decent homes.

Housing: proportionate dispute resolution

The Law Commission's final report on this subject was published on 13 May 2008.³ In the light of the responses to its consultation paper, the commission no longer proposes that possession cases, homelessness appeals and housing judicial review works should all be transferred to the tribunal system, but suggests a number of pilot schemes instead. However, assuming that the Residential Property Tribunal Service becomes part of the new Land, Property and Housing chamber of the First-tier Tribunal, it does recommend that 'stand-alone' housing disrepair cases brought by tenants should be transferred to the new tribunal (para 5.54), with consideration being given to including housing-related statutory nuisance cases and Defective Premises Act 1972 cases as well (para 5.75). The commission does not recommend the transfer of those cases in which a tenant relies on disrepair as a counterclaim to a claim for possession (para 5.55). It recommends that there should be no change of jurisdiction without legal aid being made available before the tribunal on the same basis as it is available before a court (para 5.53).

Comment: While the recommendation for the availability of legal aid in any transfer of housing disrepair cases to the tribunal is to be welcomed, no consideration appears to have been given to the impact of the statutory change in respect of any damages awards, in the absence of any proposal that the tribunal should be able to award costs.

CASE-LAW

Practice and procedure

■ **Birmingham City Council v Lee**
[2008] EWCA Civ 891,
30 July 2008

A tenant instructed solicitors to pursue a claim for disrepair against her council

landlord. The solicitors took instructions, recorded defects and prepared a full statement under a conditional fee agreement (CFA). They then sent a letter of claim to the council invoking the pre-action protocol for housing disrepair cases. On receiving the letter, the council inspected and undertook the repairs which it stated cost £265. Compensation and costs were not agreed, so proceedings were issued seeking damages of between £1,000 and £5,000. The value of the claim meant that (in the absence of any claim for specific performance) it would be assigned to the small claims track and no legal costs would be recoverable. The deputy district judge refused the tenant an order for costs on the fast track basis at least until the date the repairs were completed. On appeal, the circuit judge ordered that the pre-allocation costs of both parties be reserved for consideration by the trial judge at the conclusion of the claim.

The Court of Appeal held that in order to make the CPR and protocol operate in the manner that must have been intended, some order for pre-allocation costs was necessary. The object of the protocol is clearly that, provided the claim was justified, it should be settled on terms that included the payment of the tenant's reasonable costs, and costs calculated according to the track to which the claims would fall if made by way of litigation. Without some order about pre-allocation costs, it would be open to a landlord that was liable for disrepair to adopt a deliberate policy of failing to repair until a protocol letter was received and then repairing without admitting liability so as to ensure that any subsequent claims fell to the small claims track. An order for pre-allocation costs is also necessary if the protocol is not to operate as a means of preventing recovery of reasonably incurred legal costs. The order made by the circuit judge left too much for later decision at trial. It was preferable to make an order which showed what the costs consequences would be if the tenant were to succeed in her claim, to facilitate settlement. The court ordered that the tenant was to have her legal costs on the fast track basis up to the date the repairs were completed, if she succeeded at trial.

■ **Business Environment Bow Lane Ltd (formerly known as Ravencap (No 2) Ltd) v Deanwater Estates Ltd (formerly known as Gooch Webster Ltd)**

[2008] EWHC 2003 (TCC),
31 July 2008

The landlord of commercial premises brought a claim for breach of repairing covenants against its tenant. The landlord claimed the sum of £423,734.89 in respect of works. The claim was supported by a schedule of dilapidations and a statement of truth. After a

meeting of the parties' experts, the landlord conceded that the work which had been carried out was not referable to dilapidation but to wholesale refurbishment to the building. The claim was settled for the sum of £1,073. The court ordered the landlord to pay the tenant's costs on an indemnity basis as the landlord had persisted, both before and after the issue of proceedings, in advancing a substantial claim which it knew or ought to have known was unsustainable.

■ **Onwuama v Ealing LBC**

[2008] EWHC 1704 (QB),
22 July 2008

In 2005, a council tenant brought a claim for damages for disrepair. The main problem was dampness in her home. She did not have legal representation or expert evidence. Her claim was dismissed. The judge found that there was no evidence of rising dampness or structural problems and that the likely cause of the dampness was condensation. In 2007, the tenant issued a second claim. She relied on expert evidence to show that the dampness had a structural origin, namely the absence of a damp-proof membrane in the floor. The claim was dismissed on the basis that it was 'estopped per rem judicatam', ie, the same issue had already been raised and decided by another court. The tenant argued that the principle of res judicata should not apply to Landlord and Tenant Act 1985 s11 as it imposed a continuing duty to keep the premises in repair and to apply the principle would frustrate the will of parliament.

The High Court dismissed the tenant's appeal. It was clear that the tenant was seeking to claim in the second action in relation to the same dampness of which she had complained in the first action. If there had been some new type of dampness or new cause of dampness asserted, a fresh claim might have been brought, but the tenant could not allege that the cause of the dampness which was the subject of complaint in the first action was other than as found by the judge. The tenant could not circumvent the pre-existing judicial decision about the cause of the same and continuing dampness.

Comment: This case emphasises how important it is to prove that any disrepair is actionable as it is clear that a tenant will not get a second chance to remedy any defects in the way his/her case is presented. It also shows why legal advice is necessary in many disrepair cases, contrary to the suggestion that is sometimes made that all disrepair cases are straightforward.

■ **Lambeth LBC v Austin**

Wandsworth County Court,
23 June 2008⁴

On 13 February 2008, an outright possession order was made against a secure tenant

because of arrears of £6,869.50. On 7 April 2008, a warrant of possession was suspended by consent. The tenant subsequently sought permission under CPR 20.4 to bring a counterclaim in respect of long-standing disrepair at her home. The council objected on the basis that the matter was over and that the tenant should issue a free-standing claim for damages. The tenant argued that:

- the claim for damages would be a set off to the money judgment obtained;
- the proceedings were not over until the possession order was enforced; and
- multiplicity of proceedings should be avoided.

District Judge Rowley gave permission for the counterclaim to be brought.

Conditional fee agreements

These agreements continue to give rise to some litigation despite the revocation of the Conditional Fee Agreements Regulations 2000 SI No 692 in respect of CFAs made on or after 1 November 2005, which were the basis for a number of technical challenges by defendants.

■ **Forde v Birmingham City Council**

[2008] EWHC 9010 (Costs),⁵
30 April 2008

Master Campbell, costs judge, rejected a number of arguments, including undue influence, in holding a CFA to be enforceable. He found that the success fee was irrecoverable for want of the required notice under CPR 44.15(2), although an application could be made for relief from sanctions under CPR 3.9. Master Campbell also considered whether or not a success fee could be recovered retrospectively. He decided that it could not be on the facts of the case, although it would be possible in certain circumstances.

However, he indicated that given that the tenant had obtained a conviction under Environmental Protection Act 1990 s82 and that the council had made an offer of £4,500 before the issue of proceedings, the litigation was relatively risk free. In these circumstances, he indicated that he considered a ten per cent success fee was appropriate if the case had concluded before the issue of proceedings and a 20 per cent success fee once proceedings were issued. However, had the matter proceeded to trial, it could have been argued with justification that the council had clearly considered that it would win so that the success fee should be 100 per cent reflecting 50/50 prospects of success.

Liability**Contractual liability****■ Sheffield City Council v Oliver***LRX/146/2007,**Lands Tribunal,**12 August 2008*

Ms Oliver held a lease of a council flat acquired under the right to buy. It had single-glazed, metal-framed windows which, although warped, were functioning. The council proposed to levy a service charge for the cost of replacing the windows with UPVC double-glazed units. The question arose whether or not the windows were part of the structure and exterior of the flat for the purposes of Housing Act 1985 Sch 6 Part III para 14(2), which implies an obligation on the landlord to keep in repair the structure and exterior of the dwelling house and of the building in which it is situated. After a review of the authorities, the President of the Lands Tribunal held that in principle:

... external windows will constitute both part of the structure and part of the exterior of the building or the dwelling-house to which they belong. It would be wrong to say that they will do so in every case, since facts are infinitely variable, but there is nothing to suggest that the metal-framed windows in the present case are exceptional (para 22).

■ Patrick and another v Marley Estates Management*[2007] EWCA Civ 1176,**15 November 2007*

This case concerned the liability to repair and decorate specific parts of a mansion house together with a structure called the chapel cloisters. The lessees covenanted to keep the demised premises in good and tenantable repair other than the main structure of the house and buildings, which the lessor was liable to maintain, repair, decorate and renew. The judge held that the lessee was liable to repair the chapel cloister and repair and redecorate the windows of the mansion house.

The lessees' appeal was allowed in part. The Court of Appeal held that the lessor was liable to repair the main structure of the chapel cloister as it had a floor, a roof, three walls and a colonnade forming the fourth wall. If such a structure was not a building within the normal meaning of the word, it was hard to know what it was. The lessee was obliged to repair the windows as a whole, both woodwork and glass, as they were comprised in the demised premises. However, the windows were also an important element in the exterior of the building and its visual appearance so that the lessor was liable for the decoration of the exterior surfaces of the window frames.

Tortious liability**■ Jackson v JH Watson Property Investment Ltd***[2008] EWHC 14 (Ch),**7 January 2008*

A long leaseholder claimed that his landlord was liable in nuisance for water penetration to his flat. The water penetration was caused by the defective laying of concrete to the light wells that adjoined the tenant's flat, which were in the control of the landlord. The defective workmanship had occurred when the building was converted into flats, by the landlord's predecessor in title, which was sometime before the commencement of the tenant's lease. The tenant had carried out remedial works and sought to recover the costs of these works and damages from his landlord. He argued that there was a continuing nuisance, which although not caused by the landlord, was adopted by his landlord when he bought the building and that the landlord was responsible for a failure to take reasonable steps to abate it.

The claim was dismissed. There was no breach of any repairing obligations as there had been no deterioration in the state of the premises since the commencement of the lease and there was no obligation to keep the structure in good repair going beyond the ordinary obligation to repair. The court also held that there was no liability in nuisance as the principle of caveat lessee applied: *Southwark LBC and another v Mills and others, Baxter v Camden LBC* [1999] UKHL 40, 21 October 1999; [2001] 1 AC1, HL. The tenant took the demised premises as they were and could not complain about any pre-existing defect. The court distinguished the case of *Sedleigh-Denfield v O'Callaghan and others* [1940] UKHL 2, 24 June 1940; [1940] AC 880, HL relied on by the tenant (where a landlord was held to have adopted a nuisance) as in that case the nuisance had been created after the commencement of the tenancy with the result that the principle of caveat lessee did not apply. The tenant could not rely on the law of nuisance to impose an obligation to put right faulty construction work by his landlord's predecessor in title.

Comment: Advisers commonly rely on nuisance to obtain remedies for design defects not covered by repairing obligations. In all such cases, it will be important to check whether the nuisance was created after the commencement of the tenancy.

■ Watson and others v Croft Promo-Sport Ltd*[2008] EWHC 759 (QB),**16 April 2008*

Homeowners brought an action in nuisance against the owner of a motor-racing circuit complaining of excessive noise. The houses

had been built near to the race circuit, nearly 30 years after the land had first been approved for motor racing. The homeowners sought damages and an injunction to restrict the nuisance. The defendant argued that as the use of the land for motor racing had been within the terms of the planning consent that they had been granted, the claim should be dismissed.

The High Court declined to grant an injunction restricting the motor racing but held that the defendants had no defence of 'reasonable user' to the nuisance claim. The mere existence of planning permission did not provide immunity to a nuisance claim. The noise was unreasonable and the homeowners were not barred from bringing a claim simply because they knew that the property was close to a race circuit at the time of purchasing it. Substantial damages were awarded.

Quantum**■ London & Quadrant Housing Trust v Riemy***Mayors and City County Court,**31 January 2008⁵*

In a possession claim for rent arrears, the tenant counterclaimed for mouse infestation resulting from holes in the floor. The tenant had first reported the infestation in 1991 but had been told that it was an old house and mice were to be expected. The trust had refused to take any action and the tenant had learned to tolerate the infestation until 2004, when his wife insisted he did something about it. In March 2005, the tenant fitted a new carpet to cover the holes in the floor. As this did not stop the mice entering, the tenant fitted laminate flooring in April 2005. The trust defended the claim on the ground that the mouse infestation was the responsibility of the tenant. It alleged that the fitting of the laminate flooring was a breach of the tenancy conditions which provided that written consent should be obtained before making any alteration or addition to the premises.

District Judge Trent held that the infestation was the responsibility of the trust and that its complaint about the laminate flooring was unreasonable. He accepted that the installation of the laminate flooring had abated the infestation, which he found to have been de minimus. He awarded general damages of £300 per year for 14 years (no limitation defence having been pleaded) and special damages of £1,300 to cover the costs of the carpet and laminate flooring, giving a total award of £5,500.

■ Murray v Kelly*Clerkenwell and Shoreditch County Court,**6 March 2008⁶*

The tenant counterclaimed for damages for disrepair for the following defects:

■ low water pressure to the shower from

August 1998 to February 2007;

■ lack of heating from January 2000 to March 2000;

■ leak from shower from May 2005 to February 2007;

■ no hot water for three weeks in early 2005;

■ leak from wash hand basin from late 2005 to February 2007;

■ leak from washing machine from early 2006 to 2007.

The tenant's rent had been £630 per month for most of the tenancy. As there had been different defects at different times, he sought damages of £10,395 calculated as follows:

■ August 1998 to February 2007 regarding the defective shower: 8.5 years at ten per cent of the rent = £6,426.

■ Lack of heating from January 2000 to March 2000 at 50 per cent of the rent = £945.

■ 2005 regarding lack of hot water for three weeks and leak from wash hand basin and shower at 15 per cent of the rent = £1,134.

■ 2006 regarding ongoing leak from shower plus leak from washing machine to bedroom, kitchen and hallway at 25 per cent of the rent = £1,890.

District Judge Manners awarded £9,000 general damages. She held that 25 per cent diminution in value for the leaks was a bit excessive and that she would lower the damages slightly as she was satisfied that the landlord had attempted repairs although these had been ineffectual. She also awarded interest of £225 making a total award of £9,225.

■ **Ferguson v Jones**

Birmingham County Court,
5 November 2008⁷

In a possession claim which was subsequently struck out, the assured shorthold tenant counterclaimed damages for disrepair. The tenant resided at the premises with her husband (until he died) and her six-year-old daughter. From the commencement of the tenancy and for a period of 17 months, there was no heating or hot water throughout the property. The tenant called the National Gas Emergency Service, known as Transco, following her concerns about the faulty gas system and her landlord's failure to repair it. Transco immediately declared the heating system to be dangerous and disconnected it. The cooker was also disconnected. There was no other significant disrepair. Although the tenant had bought two heaters, these were insufficient to keep the tenant and her daughter warm.

DJ Sheldrake held that the tenant was entitled to damages for inconvenience at the highest rate and, adopting a global approach, awarded damages at £2,700 pa. An award of £4,000 was made for the total 17-month

period. Special damages were awarded at £1,181.68, which included the cost of buying warm meals and two heaters.

OMBUDSMEN'S REPORTS

These reports are worth reading for the insight they provide into the way councils operate. These cases continue to show that Ombudsmen's awards appear to be lower than what is likely to be achieved by litigation. However, they also demonstrate the wider remit of Ombudsmen, who are able to award compensation for maladministration, even if it does not involve disrepair: see, for example, the awards for failure to carry out works of improvement and in relation to condensation dampness.

Investigations

■ **Watford BC and Hertfordshire CC**

06/A/17783 and 07/A/00758,
24 October 2007

Tenants lived in property owned by Hertfordshire but managed by Watford. From 2005, complaints about disrepair were not handled well by Watford and a dispute over which council was the tenants' landlord unnecessarily complicated discussions over which was responsible for certain works, including the provision of a stair lift and a bathroom adapted for disabilities. The Ombudsman found both councils to be at fault. He recommended that Watford pay £2,000 in compensation for unnecessary delays of over two years to refurbish the kitchen, 18 months to refurbish the bathroom and eight months to redecorate the lounge and bedroom. He also ordered Hertfordshire to pay £250 compensation.

■ **Bristol City Council**

06/B/05370,
12 December 2007

The tenant and her two children suffered from damp and cold housing conditions for about seven years because of the council's failure to repair defects in their home and its failure to review its refusal to provide additional heating after one son was treated for pneumonia. The Ombudsman found that although the council had made a number of inspections of the tenant's home, it had failed properly to identify and remedy the defects that caused condensation in the property. He recommended that the council should apologise to the tenant, and pay her compensation of £8,300, including £1,300 for loss of her belongings. He also ordered the council to arrange an independent structural survey of the property and if further defects were found to remedy them without further delay.

■ **Islington LBC**

06/A/14057,
22 January 2008

The tenant suffered from dampness in her flat for three years. Repairs carried out before the tenant moved into the premises did not resolve the problem. Subsequent works which resulted in the tenant having to vacate the flat for four weeks were also ineffective. It took 18 months to settle the tenant's insurance claim in respect of belongings damaged by the dampness. The council had also told the tenant that it would make storage areas in her basement habitable, but this had not happened. The council agreed to apologise to the tenant and pay her £5,000 in compensation. It also agreed to review its policy on empty properties and insurance claims. The Ombudsman also recommended that the council should pay the out-of-pocket expenses and rent that the tenant had to pay while unable to stay in her flat. He also said that the council should either resolve the dampness problems and complete the repairs in three months, or offer to rehouse the tenant.

■ **Birmingham City Council**

07/C/1179,
25 February 2008

The council damaged the decorations in a tenant's home when carrying out repairs but then wrongly refused either to redecorate or pay compensation. The Ombudsman found that the council had directly, and through its contractors, given misleading information about its legal obligations. The council agreed to compensate the tenant and review the wording of its tenancy agreement. The Ombudsman also recommended that the council should introduce procedures for the proper investigation of decoration claims that required decision-makers either to have visited the site or seen photographic evidence.

■ **Canterbury City Council**

07/A/00415,
11 August 2008

For four years a council tenant had problems because her toilet kept blocking. The council assumed she had been responsible for blocking it and told her that she would have to pay to clear further blockages. Tests ultimately showed that the blockages had not been the tenant's fault.

The Ombudsman found maladministration by the council and recommended £2,000 compensation as although the problems lasted for four years, they were not constant and the council did react quickly when called out. He referred to:

Our guidelines for compensation for disrepair suggest £500 to £2,000 per year. An unfit property where there might be injury

to health would be considered at the higher end of the scale (para 36).

Comment: Any such guidelines are clearly on the low side given that as long ago as 1998 the unofficial tariff for disrepair cases was £1,000 to £2,750, see *Wallace and others v Manchester City Council* [1998] EWCA Civ 1166, 7 July 1998; [1998] 30 HLR 1111. Furthermore, it does not appear that the Ombudsman is taking any account of rent levels or cross-checking awards against the rent, as suggested by *Wallace and English Churches Housing Group v Shine* [2004] EWCA Civ 434, 7 April 2004; [2004] 36 HLR 42.

■ Lambeth LBC

07/B/15371,

4 September 2008

The tenant took over the tenancy from his father. He notified the council that works were needed to the cottage which had not been repaired for many years. The council identified that major works were needed and commenced some in 2005 but did not complete the works before April 2007. The council agreed to pay £4,000 compensation for the two years' delay and complete the works within 12 weeks, but failed to do so.

The Ombudsman found further unreasonable delay due to a failure to implement proper project management controls. He recommended that the council pay a further £1,000 compensation for the further six months' delay in completing the works. He also ordered that the council pay for an independent survey of the property and complete any works required by the surveyor, within three months of the date of the report, to the surveyor's satisfaction.

1 Available at: www.justice.gov.uk/publications/cp0807.htm.

2 Available at: www.communities.gov.uk/documents/housing/pdf/headlinereport2006.pdf.

3 Available at: www.lawcom.gov.uk/housing_disputes.htm.

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Allocating social housing: the new CBL guidance



In August 2008, Communities and Local Government (CLG) published *Allocation of accommodation: choice based lettings: code of guidance for local housing authorities* ('the CBL code').¹ This article considers the impact of this new statutory guidance.²

Introduction

On 23 July 2002, the Court of Appeal gave judgment in *R (A) v Lambeth LBC; R (Lindsay) v Lambeth LBC* [2002] EWCA Civ 1084; [2002] HLR 57. Lambeth's allocation scheme was found to be unlawful because it did not have a rational mechanism for identifying those in greatest need and ensuring that they were given priority. In November 2002, the secretary of state issued *Allocation of accommodation: code of guidance for local housing authorities* ('the allocations code').³ In a letter to directors of housing of all local authorities in England and Wales and other interested bodies, which accompanied the allocations code, Frances Walker, housing policy adviser at the then Office of the Deputy Prime Minister, explained how the code sought to address the issue of how to offer applicants a choice of accommodation while continuing to give reasonable preference to those with the most urgent housing need.⁴ In

addition, she wrote that more detailed guidance would be issued before the end of 2003. The letter also noted that the allocations code did not contain detailed guidance on either decision-making or reviews. Local housing authorities (LHAs) were advised to ensure that their procedures were fair and complied with the European Convention on Human Rights ('the convention'). The case of *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5, 13 February 2003; [2003] 2 AC 430 was pending before the House of Lords and would establish whether or not the Housing Act (HA) 1996 Part 7 homelessness procedures were compatible with article 6 of the convention. The issue of further guidance would be considered in the light of this judgment. Finally, the letter noted that the eligibility rules discussed in the allocations code were to be replaced on 31 January 2003. However, despite various promises from the government, no further guidance materialised.

In the interim, LHAs have been criticised in a number of decisions by the courts and the

Local Government Ombudsman for their failure to allocate accommodation in line with their statutory duties. In January 2007, CLG finally published a consultation paper, *Allocation of accommodation: choice based lettings: code of guidance for local housing authorities*.⁵ The consultation period ended in April 2007. Thereafter, there was a further period of silence until both the CBL code and *Summary of responses to the consultation on the choice based lettings code of guidance* were published unexpectedly in August 2008.⁶

Responses to the consultation

Three legal professionals were among the 83 respondents to the consultation. These were the Housing Law Practitioners' Association (HPLA), the Social Housing Law Association and Garden Court Chambers. The lawyers were equally critical of the draft code and explained why it was insufficient to enable LHAs to comply with their statutory duties.

The secretary of state was urged to publish a single, comprehensive code, rather than one that sought merely to supplement the allocations code. It was suggested that the revised code should reflect the recent case-law and Ombudsman reports. Both HPLA and Garden Court Chambers urged the secretary of state against issuing the code in its then form, and suggested that, rather, major revisions were required. The delays in publishing the CBL code gave practitioners hope that these criticisms had been heeded. However, it is apparent that only modest amendments have been made.

Two codes of guidance

LHAs in England now have to work to two codes of guidance, namely the allocations code and the CBL code. There are differences of emphasis between the two codes (for example, the use of priority cards: see CBL code para 4.29 and allocations code para 5.12); in addition, there are areas of duplication (for example, see CBL code para 4.9 and allocations code para 5.9).