Recent developments in housing law

Jan Luba QC and **Nic Madge** 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

Grounds for possession

The statutory grounds for possession against tenants with security of tenure are contained in Housing Act (HA) 1985 Sch 2 (secure tenants) and HA 1988 Sch 2 (assured tenants). The grounds relating to nuisance and other forms of anti-social behaviour are respectively grounds 2 and 14.

On 13 May 2014 those grounds were both amended, in relation to tenants in England, by the insertion of a new subparagraph. It extends the grounds to cover nuisance directed against the landlord or the landlord's staff wherever and whenever it occurs: Anti-social Behaviour, Crime and Policing Act (ASBCPA) 2014 s98 and the Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No 2, Transitional and Transitory Provisions) Order ('the Commencement No 2 Order') 2014 SI No 949 article 2. These changes also came into force in Wales on 13 May 2014: Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No 1 and Transitory Provisions) (Wales) Order 2014 SI No 1241.

From the same date, new discretionary grounds 2ZA and 14ZA have been added to the relevant Schedules in respect of tenancies in England: ASBCPA s99. They enable landlords to seek possession where tenants or adult co-residents have been convicted of offences during riots, or at the scenes of riots, wherever they take place. The new grounds are only available where the relevant offence was committed on or after 13 May 2014: Commencement No 2 Order article 7.

No commencement date has yet been fixed for the new 'absolute' grounds for possession contained in ASBCPA ss94–97.

Social housing allocation

New statutory guidance on the allocation of social housing in England was issued under HA 1996 s169 on 31 December 2013: *Providing social housing for local people: statutory guidance on social housing allocations for local authorities in England* (Department for Communities and Local Government (DCLG), December 2013).[1] The content had been subject to a consultation exercise.

More than three months after the guidance came into force, the UK government published:

- a summary of the responses to the consultation exercise: *Providing social housing for local people: statutory guidance on social housing allocations for local authorities in England – summary of responses to consultation* (DCLG, April 2014);[2] and
- an equality impact statement on its provisions: *Providing social housing for local people: statutory guidance on social housing allocations for local authorities in England – equality statement* (DCLG, April 2014).[3]

Immigration status of prospective tenants

Part 3 of the Immigration Act 2014 contains provisions relating to lettings of residential accommodation to migrants. Royal assent was given on 14 May 2014. Among others, the Refugee Children's Consortium has made representations on the likely adverse impact of the Act's provisions on homelessness.[4]

Social housing fraud

Regulations made under Prevention of Social Housing Fraud Act (PSHFA) 2013 ss7–9 enable councils to authorise staff investigating social housing fraud to obtain data about tenants from phone companies, banks, credit companies, fuel suppliers and water companies. The new powers came into force in England on 6 April 2014 (Prevention of Social Housing Fraud (Power to Require Information) (England) Regulations 2014 SI No 899) and on 28 March 2014 in Wales (Prevention of Social Housing Fraud (Detection of Fraud) (Wales) Regulations 2014 SI No 826).

The UK government is distributing almost £9.5m to local councils in England to help fund work on tackling social housing fraud: *Local authority recipients of social housing fraud funding 2013/14 & 2014/15* (DCLG).[5]

Accommodation for asylum-seekers

In 2011/12 the Home Office spent over £150m on providing accommodation for asylum-seekers who were awaiting decisions on their applications for refugee status in the UK. For 2012/13 it entered into new arrangements for just three contractors to provide such accommodation for over 20,000 people. An investigation by the Public Accounts Committee found that:

- the majority of the contractors were inexperienced landlords;
- there had been a failure to secure decent standards of accommodation;
- the complaints systems for residents did not work; and
- enforcement of contract terms had been undertaken too slowly by the Home Office: *Public Accounts Committee – fifty-fourth report. COMPASS: provision of asylum accommodation* (April 2014).[6]

Housing law reform

The Housing (Wales) Bill has passed the initial stages of its legislative process.[7] The National Assembly for Wales Communities, Equality and Local Government Committee published the results of its scrutiny in March 2014: *Housing (Wales) Bill: Stage 1 committee report*.[8] The motion to agree the general principles of the bill was carried in the Assembly on 1 April 2014; and its detailed Stage 2 consideration began on 15 May 2014.[9]

The Housing (Scotland) Bill[10] was the subject of a first stage scrutiny report from the Scottish Parliament in April 2014: *Infrastructure and Capital Investment Committee: 4th report, 2014 (session 4). Stage 1 report on the Housing (Scotland) Bill*.[11] The motion to agree the general principles of the bill was carried in the parliament on 24 April 2014.

Private renting

The housing minister (Kris Hopkins MP) has approved three redress schemes to 'ensure tenants and leaseholders have a straightforward option to hold their agents to account': DCLG press release, 15 April 2014.[12] Every letting or property management agent will be required to join either:

- the Property Ombudsman Scheme;
- the Ombudsman Services Property Scheme; or
- the Property Redress Scheme.

Where a complaint is upheld, tenants and leaseholders could receive compensation. The final date for agents to join a scheme is expected to be announced later in 2014. The Property Ombudsman has reported that about half of the complaints made to him about agents are in fact made by landlords: *The Property Ombudsman: annual report 2013* (April 2014).[13]

The housing charity CRISIS reports that over the last three years it has assisted in creating nearly 8,000 tenancies through its Private Rented Sector Access Development Programme which offers help and advice to tenants on finding suitable accommodation: *Crisis private renting team helps secure 8,000 tenancies* (21 March 2014).[14]

Rent arrears in social housing

In 2013, Citizens Advice Bureaux helped with 86,950 problems of social housing arrears, an increase of ten per cent over 2012. Of these, 10,702 problems involved people at risk of repossession after falling into debt, a 26 per cent increase compared with the previous year: Citizens Advice press release, 24 March 2014.[15]

The roll-out of universal credit will see more social housing tenants being paid their housing benefit personally rather than it going direct to their landlords. Those social landlords participating in the demonstration projects to test the new arrangements have reported that landlords' ability 'to protect their income stream, support tenants to make the transition to direct payment and safeguard the most vulnerable all crucially hinge on effective and timely information exchange with the benefit administering authority': *Direct payments demonstration projects landlord learning document* (March 2014).[16]

In Scotland, social landlords are already experiencing increased arrears when tenants are subjected to welfare benefit sanctions: *Cause for concern? Early impacts of benefit sanctions on housing associations and cooperatives in Scotland* (Scottish Federation of Housing Associations, April 2014).[17]

HUMAN RIGHTS

Article 8

■ Gustovarac v Croatia

App No 60223/09,
18 February 2014,
[2014] ECHR 363

In 1972, Mr and Ms Gustovarac moved into a flat owned by the Yugoslav People's Army (YPA). They were not granted a formal tenancy but were illicitly given a handwritten note by DV, an official in the YPA in abuse of his position within the army. DV was later court martialled and found guilty of disposing of the flat unlawfully. Mr and Ms Gustovarac remained in the flat paying rent. In 1991, following Croatia's independence, the flat became state property. In 2000, the state brought possession proceedings against them. A municipal court granted a possession order. This was upheld on appeal and Mr and Ms Gustovarac's complaint to the Constitutional Court was dismissed. In 2011 they vacated the flat. They applied to the European Court of Human Rights (ECtHR), arguing that their right to respect for their home under article 8 of the European Convention on Human Rights ('the convention') had been violated.

The claim was declared inadmissible. Although the concept of 'home' within the meaning of article 8 is not limited to premises which are lawfully occupied or which have been lawfully established, Mr and Ms Gustovarac had never had any legal right to occupy the property. They had been aware of this since the outset. In those circumstances, the interference with the applicants' article 8 rights was proportionate.

■ Croydon LBC v McNally, Angus and Veerasamy

[2014] EWCA Civ 526,
20 March 2014

Miss McNally, Mr Angus and Miss Veerasamy worked for Croydon as resident sheltered housing officers in accommodation owned and operated by the council. They were given homes in the housing scheme to enable them better to carry out their duties as housing officers. Under the terms of their employment, that housing went with their employment and would cease with their employment. In 2011, they were made redundant. A collective agreement with their trade union provided that there would be no obligation on the council to re-house the employees and those leaving service occupancies could be treated no differently to other homeless people. In a subsequent possession claim, HHJ Ellis made possession orders. The defendants sought permission to appeal, contending that:

■ Croydon had not addressed at all, in article 8 terms, the impact of the loss of their homes;
■ the judge was wrong to say that the cases were not exceptional; and
■ the judge wrongly focused on the proportionality outcome of the case and did not take sufficiently into account the council's conduct.

Sir Bernard Rix refused permission to appeal. There was no reasonable prospect of an appeal succeeding or any other compelling reason to give permission to appeal. The council had its human rights responsibilities in mind. It considered them. It negotiated these matters with the union. It consulted with each of the applicants in turn about their position. The judge, in a 'full and detailed judgment', had given careful attention to the relevant jurisprudence (para 17). Sir Bernard Rix concluded that although there was an 'interesting question … as to the difference between proportionality of outcome and proportionality of conduct, the facts of this case are too strong against these applicants for me to grant permission to appeal on matters which … are essentially matters of fact and assessment and which have already been considered, both by the council … and by a judge who added his own human rights assessments … over the top of that of the council' (para 22).

■ Muema v Muema

[2014] EWCA Civ 331,
21 January 2014

In a brief judgment, Arden LJ refused Mr Muema permission to appeal against the decision of Peter Jackson J ([2013] EWHC 3864 (Fam); March 2014 *Legal Action* 22) that there is no incompatibility between article 8 and the rule in *Newlon Housing Trust v Alsulaimen* [1999] 1 AC 313, HL – namely that a notice to quit served by one joint tenant is not a disposition for the purposes of Matrimonial Causes Act 1973 s37(2)(b).

■ Secretary of State for Defence v Nicholas

[2014] EWCA Civ 425,
13 March 2014

On 11 November 2013, on the papers, Lewison LJ gave Ms Nicholas permission to appeal against the decision of Burton J ([2013] EWHC 2945 (Ch); October 2013 *Legal Action* 32) on the single ground that the exclusion of Crown tenancies from all security of tenure is incompatible with articles 8 and 14. No date has been given for the hearing of the appeal. On a renewed application, Rimer LJ refused permission to appeal on the further ground that Human Rights Act 1998 s3 requires the court to read down the provisions of HA 1985 s80 so as to make its provisions convention-compliant by adding Crown landlords to the list of landlords who are there expressly identified as satisfying 'the landlord condition' for the creation of secure tenancies (para 6). That argument had no prospect of success on appeal.

Article 8 and article 1 of Protocol No 1

■ Zahi v Croatia

App No 24546/09,
18 March 2014

In 1961, a flat in Zagreb was nationalised. It was let to a tenant on a specially protected tenancy. In 1991, after that tenant had died, Mr Zahi entered the flat by breaking a window and the front door. The neighbours immediately informed the police, who attended the same day and found Mr Zahi and members of his family in the flat. The next day, a council official ordered them to vacate the flat, but the eviction was disrupted after the civil defence siren signalled an attack on Zagreb. There were further unsuccessful attempts to evict them. In 1993, the Zagreb Municipal Court issued a writ of execution ordering Mr Zahi and his family to vacate the flat, but that decision was never

enforced. In the meantime, in 1992, Zagreb Municipal Council's housing department granted Mr Zahi's wife and her family temporary accommodation in the flat because they were refugees – internally displaced persons. Later, though, the council indicated that the family had omitted to reveal in their application that they had unlawfully entered the flat and so they had no legal right to stay in it. In 1997, Mr Zahi applied to Zagreb Municipal Council for the right to purchase the flat on favourable terms. He relied on the decision to grant temporary accommodation and his status as a disabled war veteran. In 1998, the council granted his request and sold him the flat. In 1999, the council discovered that Mr Zahi was not in fact on the list of disabled war veterans and so had no legal right to purchase the flat. It lodged a civil action seeking to have the purchase contract declared null and void. In February 2004, the Zagreb Municipal Court granted that declaration. In June 2004, Mr Zahi's family moved to another flat which he had bought and, in May 2005, he opened a private medical practice in the first flat. Mr Zahi complained to the ECtHR that by the annulment of the purchase contract he and his family had lost their home contrary to article 8, and that his right to the peaceful enjoyment of his possessions had been violated contrary to article 1 of Protocol No 1.

The ECtHR found the application inadmissible. The annulment of the purchase contract did not in any manner interfere with Mr Zahi's possession of the flat as the council did not make an eviction request. Accordingly, no interference with his right to respect for his home under article 8 arose from the annulment of the purchase contract. With regard to article 1 of Protocol No 1, the nullification of Mr Zahi's title was in accordance with domestic law and the impugned measure was aimed at restoring justice and securing respect for the rule of law in the sphere of housing. It was therefore in the public interest. In assessing whether the fair balance required by article 1 of Protocol No 1 was achieved, the court found it decisive that:

- Mr Zahi did not acquire the property in good faith;
- he was reimbursed the full purchase price for the flat; and
- throughout the period he used the flat as a place to live and then for his private business activity.

The interference with his property rights was not disproportionate.

■ Popova v Russia

App No 59391/12,
7 March 2014

Ms Popova was a bona fide purchaser of a flat in June 2011. However, in December 2011 a court annulled her title and transferred it to the Town of Chelyabinsk because its interest took precedence as a previous owner. The court also ordered her eviction. In August 2012 Ms Popova complained to the ECtHR that there had been a violation of article 8 and article 1 of Protocol No 1.

The court has posed the following questions to the parties:

- Has the applicant been deprived of her possession in the public interest within the meaning of article 1 of Protocol No 1? If so, was that deprivation necessary to control the use of property in the general interest?
- Has there been an interference with the applicant's right to respect for her home, within the meaning of article 8? If so, was that interference in accordance with the law and necessary?

RENTS

Assured tenancies

■ Preston v Area Estates Ltd and London Rent Assessment Panel

[2014] EWHC 1206 (Admin),
26 March 2014

Mr Preston was an assured periodic tenant. At the beginning of the tenancy, the property was in disrepair. That was reflected in a low rent. Mr Preston carried out extensive improvements. Area Estates Ltd purchased the freehold and carried out its own improvement works. It then sought to increase the rent threefold, from £338 to £1,050 pm. The matter was referred to the Rent Assessment Panel. It decided that the rent reasonably to be expected was £1,020 pm. The panel took account of its own general knowledge of market rents in the area.

Upholding Mr Preston's appeal, HHJ Walden-Smith (sitting as a High Court judge), held that the panel had failed to go through the process required by HA 1988 s14 – which was to determine the value of the property in its current state, to determine the value of the improvements and then determine what the value should have been disregarding the improvements. Having failed to carry out the process, the panel failed to give the parties an opportunity to understand its underlying reasoning. Taking into account its own general knowledge without explaining it to the parties and allowing them to comment on it was contrary to natural justice. Accordingly, the matter was remitted for a new decision.

Affordable housing

■ Islington LBC and others v Mayor of London

[2014] EWHC 751 (Admin),
25 March 2014

Islington and eight other London boroughs sought to challenge the lawfulness of amendments to the London Plan made by the Mayor of London, which precluded them from imposing borough-wide caps on rent for affordable housing let by local authorities or private registered providers of social housing. The boroughs wished to have the power to introduce local planning policies imposing rent caps on affordable rented housing at levels below 80 per cent of the market value which were low enough to make the housing available to a wider class of potential tenants. They commissioned evidence which showed that if affordable rents were set at or close to 80 per cent of market rents, housing would not be affordable for a large proportion of households on low incomes or on benefits subject to cap.

Lang J characterised the real issue between the parties as being about economics, planning and housing policy. There was no error of law. The amendments were not contrary to the National Planning Policy Framework. The Mayor had taken into account the views of the expert and was entitled not to adopt them. The Mayor had reached a rational conclusion.

POSSESSION CLAIMS

Children Act 2004

■ Eastwood v Surrey CC

Guildford County Court,
17 March 2014

In May 2012, Mr and Mrs Eastwood brought a caravan and other possessions on to a plot on a Gypsy and Traveller site without the permission of the local authority which owned and managed the site. The local authority had a list of applicants and a strict allocation policy. The pitch had been allocated to another family who were in priority need. The local authority issued a possession claim. Mr and Mrs Eastwood defended the claim relying on alleged breaches of the Equality Act 2010 and the Children Act (CA) 2004 and the unlawfulness of the allocation procedure. District Judge George made a possession order. Mr and Mrs Eastwood appealed, alleging that the district judge had misdirected herself in relation to the obligation of the local authority towards their child, who was born after authorisation of proceedings but before issue, under CA 2004 s11.

HHJ Raeside allowed the appeal and directed that the claim be listed for a short directions appointment before the district judge. The local authority had failed to place the child's needs in primary place in their decision-making process. The reports did not mention the child, the child's likely needs, or the impact on the child if possession proceedings were commenced, or if an eviction order was made. She said: 'One would expect to see some sort of analysis of the welfare

needs of the child and its parents balanced with the need for the LA to run a fair system of allocation of places, remembering at all times that the child's needs are the primary consideration' (para 27).

Tenancy deposits, HA 1988 s21 notices and appeals

■ R (Tummond) v Reading County Court

[2014] EWHC 1039 (Admin), 10 April 2014

On 18 December 2012, Mr Tummond was granted a six-month fixed-term assured shorthold tenancy by Ms Pitcher, the landlord. He paid a deposit of £1,390 on the signing of the tenancy agreement. On the same day, Ms Pitcher served a HA 1988 s21 notice, entitling her to issue possession proceedings at the end of the fixed term. The tenancy agreement stated that the deposit would be protected by an authorised scheme but this was not done until 2 January 2013. After expiry of the fixed term, Ms Pitcher issued possession proceedings relying on the section 21 notice. Mr Tummond defended the proceedings, arguing that the notice had no effect as it had been given before the deposit had been protected (HA 2004 s215(1)(a)). District Judge Devlin made a possession order. Mr Tummond sought permission to appeal, but HHJ Oliver refused permission. Mr Tummond then sought judicial review.

Hamblen J dismissed that claim. After referring to *Moyse v Regal Mortgages Ltd* [2004] EWCA Civ 1269, and *Sivasubramaniam v Wandsworth County Court* [2002] EWCA Civ 1738, [2003] 1 WLR 475, he stated that the case did not come within the exceptional circumstances required for the Administrative Court to judicially review a circuit judge's refusal of permission to appeal against an order for possession. They are confined to 'very rare cases', where there is an excess of jurisdiction, or the denial of the right to a fair hearing (paras 18 and 19). Even if the judge was wrong in law, that did not create or involve a procedural irregularity. In this case, there had been no procedural irregularity and the hearing before HHJ Oliver had been fair. The complaint was that he had been wrong in law, which was not sufficient. In any event, Hamblen J held that there had been no error of law. Section 215 is a sanction for non-compliance. In the present case, there had been compliance by the landlord as the deposit had been protected with an authorised scheme within weeks of being received.

Secure tenancies: reasonableness

■ Croydon LBC v Cooper

[2014] EWCA Civ 295, 12 February 2014

Ms Cooper was a secure tenant. Croydon sought possession relying on rent arrears and acts of anti-social behaviour, including noise nuisance, fighting and the use of the property as a 'drugs house' (para 3). The judge found that there was a clear pattern of such anti-social behaviour from 2001 onwards, though there had been no evidence of any problems during 2013. He found that Ms Cooper was not remorseful, and made an outright possession order. Ms Cooper sought permission to appeal, arguing that the judge had improperly exercised his discretion in refusing to suspend the order.

The Court of Appeal refused permission to appeal. In reaching his decision the judge had taken into account all the relevant factors.

HARASSMENT AND QUIET ENJOYMENT

■ Shebelle Enterprises Ltd v Hampstead Garden Suburb Trust Ltd

[2014] EWCA Civ 305, 25 March 2014

The Trust was freeholder of a number of properties in Hampstead Garden Suburb. Shebelle had a 999-year lease of a property from the Trust which contained the conventional covenant for quiet enjoyment. The owners of the next-door property sought permission from the Trust to carry out substantial works, including the creation of a single-storey basement which would stretch under the garden and in which there would be skylights. The Trust's expert advisers recommended that the Trust grant permission. Shebelle sought an injunction restraining the Trust from granting permission on the basis that it would be in breach of covenant.

The Court of Appeal held that the covenant for quiet enjoyment was prospective and had to be seen in its context. If an unanticipated factual event arose, that did not mean that the covenant did not apply to it. The court should look at what reasonable parties would have envisaged and intended. The Trust was being asked to grant consent to works in accordance with an estate management scheme. That scheme existed to secure benefits to all the residents of Hampstead Garden Suburb. The proper and bona fide performance of the Trust's duties could not amount to a breach of the covenant for quiet enjoyment.

UNLAWFUL SUBLETTING

■ Viridian Housing Association v X

Wandsworth County Court, 26 February 2014[18]

The association discovered that one of its tenants was living and working abroad and had been subletting his rented flat.

At Wandsworth County Court, a district judge made an immediate outright possession order with costs and an unlawful profit order pursuant to PSHFA s5. The order was for £31,000, representing rent the tenant had received for the 31 months for which the association had been able to prove the subletting, plus costs.

■ Newham LBC v Adesokan

Bow County Court, 11 April 2014[19]

Ms Adesokan was a secure tenant. She sublet her two-bedroom flat to a family of four while she lived elsewhere. In accordance with PSHFA s5, she was ordered to pay the council £6,932.30 in respect of her unlawful profit, and costs of £724.50.

HOUSES IN MULTIPLE OCCUPATION (HMOs)

■ Bristol City Council v Digs (Bristol) Ltd

[2014] EWHC 869 (Admin), 27 March 2014

Bristol issued a summons against Digs alleging that the company had failed to obtain a licence in respect of a maisonette, as required by HA 2004 s55 and the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006 SI No 371. The maisonette was on the second and third floors of a house, but the stairs and relatively small areas on the ground floor and first floor formed part of the premises leased to the occupiers of the maisonette. The council's case was that the maisonette comprised four storeys and so fell within the statutory definition of an HMO. Digs' case was that it comprised only two storeys and so fell outside the definition. District Judge Zara dismissed the summons. The council appealed by way of case stated.

Burnett J dismissed the appeal. He stated that whether an HMO comprises three storeys or more:

> *... must be answered by giving the word 'storey' its ordinary meaning. Storey is a word that is applied to a building. A storey of a building or house would ordinarily be understood as meaning the whole floor, that is all the space on a given level, within that building. In the context of this legislation it would necessarily have a de minimis qualification* (para 27).

Applying the 'ordinary use of language', this was a two-storey maisonette (para 29).

CRIMINAL PROSECUTIONS

■ Health and Safety Executive v Valbond Management Ltd and Holbond Ltd

Westminster Magistrates' Court, 19 March 2014[20]

The Health and Safety Executive prosecuted two landlord companies under the Gas Safety (Installation and Use) Regulations 1998 SI No 2451 in relation to a block of privately rented flats in Hampstead, north London. The companies had failed to maintain appliances and flues and had not arranged annual gas safety inspections nor obtained gas safety certificates. On conviction, the companies were fined £48,000 and orderedto pay costs.

DEFAMATION

■ Mole v Hunter

[2014] EWHC 658 (QB), 27 March 2014

Ms Mole, an assured shorthold tenant, sued Ms Hunter, her landlord, for the return of her deposit. Ms Hunter served a defence and counterclaim alleging defamation in that Ms Mole:

■ had made complaints to the council; and

■ had accused Ms Hunter of being 'crook, scam, liar' on a website (para 8).

As the county court has no jurisdiction in respect of actions for defamation, the whole claim was transferred to the High Court. Ms Hunter obtained judgment in default on the counterclaim after Ms Mole had failed to attend a hearing of which she did not have notice.

After a detailed analysis of the history of the proceedings, Tugendhat J set aside the default judgment and, as the allegations did not pass 'a threshold of seriousness', the proceedings would 'achieve nothing of value' (see *Dow Jones & Co Inc v Jameel* [2005] EWCA Civ 75) and the number and identity of the readers or listeners was not clearly set out, he ordered that the counterclaim be struck out unless Ms Hunter obtained permission to amend it (para 78).

LONG LEASES

Terms of leases

■ H Waites Ltd v Hambledon Court Ltd

[2014] EWHC 651 (Ch), 11 March 2014

Hambledon Court comprised a block of flats and two blocks of garages. The claimant was a developer who wished to build a further flat on top of each of the garage blocks. The freeholder and various leaseholders of the flats and garages did not consent to such work.

Morgan J found that there was no implied covenant to restrain building of further flats on the estate but, on construing the leases for the garages, the court found that their demise included the floor, the roof and the walls. The garage leases therefore had to be treated as including the airspace above them and the foundations and subsoil below. The developer could not proceed in the absence of consent.

■ Proxima GR Properties Ltd v McGhee

[2014] UKUT 59 (LC), 6 February 2014

A lease included a prohibition against subletting without prior written consent, such consent not to be unreasonably withheld. The tenant sublet and retrospectively sought consent. The landlord sought a consent fee of £95. The leasehold valuation tribunal (LVT) held that it was not entitled to charge a fee.

On appeal, Martin Rodger QC, Deputy President of the Upper Tribunal, held that while it was reasonable for a landlord to seek reimbursement of administrative expenses, it was not reasonable to treat the requirement to obtain consent as an opportunity to charge a fee unrelated to the costs of routine enquiries or administrative tasks. In a routine case, where the tenant provided details of the proposed sublease at the time of requesting consent and did not dispute the landlord's entitlement to charge a fee, and where no other complications (such as retrospective consent) arose, a fee of £95 would not be reasonable for the minimal administrative tasks involved in granting consent. However, in view of the presence of those factors in the instant application, the sum of £95 sought was reasonable.

Service charges

■ Red Kite Community Housing Ltd v Robertson

[2014] UKUT 134 (LC), 24 March 2014

Ms Robertson was the long lessee of a flat in a block comprising 41 flats, eight of which were held on long leases. The remainder were let under periodic assured tenancies. Ms Robertson made an application to the LVT for the determination of the payability of service charges. The tribunal found that the service charges incurred were reasonable and payable except for some costs of 'cleaning/estate charges' which it reduced from £321.14 pa to £225 pa. Red Kite, the landlord, appealed, complaining about the adequacy of the tribunal's reasons and its reliance on its own knowledge and experience.

Siobhan McGrath, sitting as a judge of the Upper Tribunal (Lands Chamber), allowed the appeal and remitted the case to the same tribunal. She stated:

> *... the First-tier Tribunal (Property Chamber), is an expert tribunal. The knowledge and experience of an expert tribunal inform its decision making. It is wholly appropriate that an expert tribunal measure the evidence and submissions before it when reaching its determinations. The fact that it is an expert tribunal that is considering a case of itself enhances that decision making. However, the question in this case is whether the tribunal either erred in adopting an over-reliance on its knowledge and experience or alternatively whether it failed to give sufficient reasons explaining its decision and in particular whether it failed to explain the extent of its reliance on its own knowledge and experience.*
>
> *Ultimately this is a question of fairness* (paras 20–21).

She outlined a number of factors which a tribunal should take into account in considering how to achieve fairness and whether or not to seek comments from the parties before proceeding to apply its knowledge and experience. In this case, although the tribunal received comprehensive evidence from Red Kite, and no comparable evidence from Ms Robertson, it was not satisfied that the estate costs had been reasonably incurred. The issue was of particular importance to Red Kite because it might set a precedent for estate charges for the future management of the block and possibly for other blocks within its management. Accordingly, the tribunal was in error in failing to afford the parties an opportunity to comment on its view of the estate charges based on its knowledge and experience. Furthermore, the reasons given by the tribunal did not deal adequately with the evidence presented by Red Kite.

■ G & O Investments Ltd v Khan

[2014] UKUT 96 (LC), 26 February 2014

The lease of a flat provided that any demands, notices or other documents required or authorised to be given by the landlord 'shall be well and sufficiently given if sent by the lessor or the lessor's agent through the post by registered post or recorded delivery ... and any demand notice or other document sent by post shall be deemed to have been served forty-eight hours after such posting' (para 3). Service charge demands were sent by the landlord by ordinary second-class post. A LVT found that the demands had not been served in accordance with the lease.

Allowing an appeal, Judge Cousins, sitting in the Upper Tribunal, found that the requirement in the lease was not a mandatory requirement

that service of documents by post be exclusively by registered post or recorded delivery. The provision was permissive and did not prevent other means of service. The deeming provisions as to service 48 hours after posting were directly referable to the service of documents by ordinary post.

■ SCMLLA (Freehold) Ltd, Re Cleveland Mansions and Southwold Mansions

[2014] UKUT 58 (LC), 11 February 2014

A LVT determined substantive issues regarding disputed service charges raised by five of 140 tenants of two blocks of flats. The LVT also made an order under Landlord and Tenant Act 1985 s20C limiting the landlord's costs to 50 per cent and holding that they were to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by all (140) of the tenants.

Martin Rodger QC, Deputy President of the Upper Tribunal, held that an order under section 20C interfered with the parties' contractual rights and obligations and that a LVT does not have jurisdiction to make an order in favour of any person who has neither made an application of their own under section 20C nor been specified in an application made by someone else. He varied the order to relate to the five applicants only.

Right to manage

■ R (O Twelve Baytree Ltd) v Rent Assessment Panel

[2014] EWHC 1229 (Admin), 16 April 2014

A Right to Manage (RTM) company served a claim notice informing the landlord that it intended to acquire the right to manage under Commonhold and Leasehold Reform Act (CLRA) 2002 s79. A claim was issued in the First-tier Tribunal (Property Chamber), but two days before the trial was due to start, the RTM company wrote to the tribunal informing it that it was withdrawing the claim notice and the application. The tribunal accepted the withdrawal and vacated the hearing. The landlord objected and contended that the tribunal should not have accepted the withdrawal but should have listed a hearing to dismiss the claim and deal with the issue of costs under CLRA ss88 and 89. The tribunal considered that it had become functus officio. The landlord issued a claim for judicial review.

Lewis J allowed the claim. Section 86 allowed a notice to be withdrawn at any time, but as the RTM company was prima facie liable for costs, the tribunal retained jurisdiction, even in the face of the purported withdrawal. Except on rare occasions, tribunals should dismiss such applications and then deal with the question of costs.

HOUSING ALLOCATION

■ Cooleys' Application for Judicial Review

[2014] NICA 18, 12 February 2014

The claimants were mother and daughter. They owned separate houses on the same street in a recognised community interface area in Belfast which had seen serious sectarian disorder and violence. Both suffered criminal damage to their properties and repeated sectarian abuse and threats. One found that a bullet had been left in her hallway. They applied to the Northern Ireland Housing Executive (NIHE) under the special purchase of evacuated dwellings (SPED) scheme. Their applications were unsuccessful because the Police Service of Northern Ireland refused to issue a Chief Constable's Certificate certifying that they were at risk of death or serious injury (whether physical or psychological) if they continued to reside in their homes.

On a challenge to those decisions by judicial review, Treacy J held that the SPED scheme imposed a specific eligibility threshold which the police were entitled to decide had not been met: see [2013] NIQB 31.

The Court of Appeal allowed an appeal. The police had failed to give sufficient reasons why the 'bullet incident' did not meet the threshold for the scheme and had failed to deal lawfully with the medical reports on the impact of the incidents on the mental health of the claimants. The refusal of a certificate was quashed in each case.

■ Stetsenko v Russia

App No 26216/07, 17 April 2014, [2014] ECHR 433

The applicant was a war veteran born in 1923. In 1995 she obtained a court judgment requiring her local council to provide her with a council flat. The judgment was not enforced until September 2010. Despite her disabilities she had been forced to live in overcrowded accommodation with other family members. The applicant complained to the ECtHR.

The court found that the judgment had remained unenforced for a period of 15 years and five months, of which 12 years and four months fell within the court's jurisdiction. During that period, the authorities had provided flats to other people on the housing list, even though the applicant was in first place. The court found that there had been a breach of article 6 (right to a fair hearing) and awarded €6,000 for the distress and frustration the applicant had suffered.

HOMELESSNESS

Eligibility

■ Samin v Westminster City Council

Supreme Court, 25 March 2014

The Supreme Court has granted Mr Samin permission to appeal from a judgment of the Court of Appeal ([2012] EWCA Civ 1468, [2013] HLR 7, reported in January 2013 *Legal Action* 42) on the meaning of 'temporarily unable to work' in Immigration (European Economic Area) Regulations 2006 SI No 1003 reg 6(2)(a). The proceedings arise out of an appeal from a reviewing officer's decision that Mr Samin was not eligible for HA 1996 Part 7 services.

Priority need

■ Selvarajah v Croydon LBC

[2014] EWCA Civ 498, 28 March 2014

The claimant lived with his wife and their two adult children. On an application for homelessness assistance he submitted a medical report indicating that he suffered from a depressive illness, that there was an issue about whether he had a brain injury and that he would be unable to cope with street homelessness. The medical evidence obtained by the council suggested that there had been no cognitive testing for the possible brain injury and that, although depressed, he would be able to cope if homeless. A reviewing officer decided that he was not 'vulnerable' and had no other priority need: HA 1996 s189(1)(c). HHJ Ellis dismissed an appeal from that decision.

Elias LJ rejected a renewed application for permission to bring a second appeal. Although he was prepared to accept that there might be an arguable ground that further inquiry into the medical position was required prior to the reviewing officer's decision, that raised no new issue of principle sufficient to justify permission for a second appeal: Civil Procedure Rules (CPR) 52.13(2)(a). The circumstances in which inadequate inquiries might render a decision unlawful were well settled. Nor was the fact that the appellant faced the prospect of street homelessness some other 'compelling reason' to grant permission, particularly where investigations into his needs were pending under National Health Service and Community Care Act 1990 s47.

■ Faulkner v City of Westminster

Central London County Court, 12 November 2013[21]

Following the breakdown of his relationship with his wife, Mr Faulkner left the matrimonial home. He applied to the council for homelessness assistance. It decided that he was not in priority need. In June 2012 that

decision was quashed on an appeal. Mr Faulkner was suffering from depression with suicidal ideation, associated with alcohol abuse. Shortly after the first appeal, he attempted suicide. His circumstances were set out in a report from his GP in October 2012 which pointed to the devastating effect of homelessness upon him. There were further reports from a substance abuse worker and clinical psychologist which pointed to the dangers of him being street homeless. The council relied on a report from Dr Wilson of Nowmedical and decided on further review that he was not 'vulnerable': HA 1996 s189(1)(c).

Recorder Talbot QC quashed the decision. He found that:

- there was a failure by the reviewing officer to record properly or fairly the full nature and extent of the medical opinions about the depression and suicidal ideation;
- the reviewing officer had understated the facts relating to the suicide attempt; and
- the reviewing officer had not fairly summarised the level of concern identified by those treating Mr Faulkner.

The finding by the reviewing officer that, provided Mr Faulkner was able to access medical and other support, 'this should go a long way in stabilising his mental health (including his suicidal ideation) minimising any potential risk' could not stand as a fair, objective conclusion when set against the attempted suicide at a time when he was not street homeless and had been on his prescribed medication (para 40).

Intentional homelessness

■ Farah v Hillingdon LBC

[2014] EWCA Civ 359,
26 March 2014

Ms Farah was a single, disabled parent with three children. She was evicted from privately rented accommodation as a result of rent arrears. She applied for homelessness assistance. The council accepted that she was homeless and had a priority need. The question whether she had made herself homeless intentionally depended on whether it had been reasonable to continue to occupy her accommodation: HA 1996 s191. More particularly, on whether, on her income, she could afford to pay the rent. She said she did not pay because she could not afford it. The council conducted an income and expenditure assessment and decided that she could have afforded the rent. A reviewing officer's decision upheld that finding. Mr Recorder Widdup dismissed an appeal.

The Court of Appeal allowed a second appeal. It found that both the initial (HA 1996 s184) decision and the reviewing officer's decision (HA 1996 s202) were defective. As to the former it said:

The housing officer had already in his s184 decision letter made specific deductions in expenditure by removing the credit card and swimming payments. But he had not explained which of the remaining items was in his view excessive or why (para 32).

As to the latter it said:

Given that one of these items was the £50 spent on taxis (which was arguably essential) and the other items were money spent on food and clothing, it was … incumbent on the reviewing officer to re-visit this part of the assessment and to explain why she had reached the same conclusion. It is not enough to say that the appellant's solicitors failed to raise those specific points when requesting the s202 review. The reviewing officer was under a statutory duty to review the decision which had been taken and the reasons for it (para 32).

Furthermore, the review decision was fundamentally flawed because:

It makes no reference to the [Code of Guidance]; to the appellant's own explanation for her expenditure and the consequent arrears of rent; to the housing officer's judgment as to what items of expenditure were non-essential; or to the issue of whether other items of expenditure were excessive. Nor does it review any of the conclusions in the s184 decision. Instead, it merely states that the affordability assessment that was carried out shows that the rent would have been affordable had the appellant prioritised her expenditure. No reasons are given for accepting the correctness of that assessment (para 29).

The reviewing officer's decision was quashed and the case remitted for a fresh review by a different reviewing officer.

■ Kastrati v Westminster City Council

[2014] EWCA Civ 429,
4 March 2014

Ms Kastrati's husband was jailed for six years following serious assaults on her. During the prosecution, he had threatened to kill her unless she withdrew the charges. She relocated from Southend (where the family had lived) to London so that her husband would be unable to find her. She lived in private rented accommodation. By mistake, the Child Support Agency (CSA) disclosed her address to the husband on his release. The applicant later saw him in the street outside her home. She fled and applied to the council for homelessness assistance.

The council decided that she was both homeless and in priority need. The central question was whether it would have been reasonable for her to have continued to occupy the private rented accommodation: HA 1996 s190. That turned on HA 1996 s177: 'It is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to domestic violence (or other violence) against him'.

The council decided that she had become homeless intentionally. That decision was confirmed on review and an appeal to the county court was dismissed.

The Court of Appeal refused an application for permission to appeal. Vos LJ said:

It seems to me that the problem for the appellant here is that the reviewer did consider the apprehension of harm engendered by the husband's presence in the cul-de-sac in which she had lived, but the reviewer came to the conclusion … that nothing from the facts as presented to her enabled her to reach the conclusion that the husband had decided to trace the appellant after he had been contacted by the CSA, and that he did so in order to take revenge. She also concluded that there was no evidence that the appellant was victimised by the husband at the time the appellant and her children left their accommodation … the reviewer took this into account in considering whether it was reasonable for the appellant to continue to occupy and concluded that it was (para 22).

■ White v Southwark LBC

[2008] EWCA Civ 792,
19 June 2008

At the age of 13 or 14 Ms White was excluded from her mother's home, following an argument. She later applied to the council for homelessness assistance. Her mother told the council that Ms White had been put out because she would not comply with her mother's instructions about her behaviour in the parental home. The council decided that she had become homeless intentionally by her own 'deliberate' act: HA 1996 s191.

On a review, the reviewing officer accepted the version of events given by the mother, even though that version was disputed by Ms White. She found that the applicant acted deliberately in refusing to obey reasonable house rules set by her mother. She decided that the applicant knew that refusing to adhere to her mother's rules would lead to her being asked to leave. HHJ Simpson dismissed an appeal from that decision.

Ms White applied to the Court of Appeal for permission to bring a second appeal. She said that the appeal raised an important question of law as to whether a dependent child (who, by law, could not have made her own homelessness application) could be guilty of a 'deliberate' act. Peter Gibson LJ refused permission. He said:

I cannot see why a local authority cannot find that a 13- or 14- or 15-year-old is capable of such a deliberate act or omission even if, as I accept is the practice, the local authority will not accept that such a person can apply under the Act. That seems to me to be an entirely different question … the fact that at the time the applicant could not make an application does not mean that her conduct was not causative of the loss of her accommodation and it is to that question that the statute directs the local authority's attention (para 11).

Interim accommodation

Local Government Ombudsman

Complaint

■ Newham LBC

13 005 484,
17 March 2014

The complainant and her husband were an elderly and severely disabled couple. They lived in private rented accommodation with their son, daughter-in-law and two grandchildren. Their landlord defaulted on his mortgage and the lender obtained a possession order.

They applied to the council for homelessness assistance well before the bailiffs' warrant was received but were not seen until the day of eviction. On that day they were not interviewed but told, with others, that the only interim accommodation available was in Birmingham. They did not want to go to Birmingham so they split up and went to stay with relatives in London.

Following the threat of judicial review, the council offered temporary accommodation in London, which the complainant's husband could not access because of the stairs. The remainder of the family had to remain in this accommodation for ten weeks. Newham failed to notify acceptance of the main housing duty to the complainant or her solicitors: HA 1996 s184.

The Local Government Ombudsman found extensive maladministration causing injustice. She awarded the complainant £750 and made recommendations as to Newham's future conduct.

Suitability

■ Byrne v Solihull MBC

Birmingham County Court,
12 March 2014[22]

Ms Byrne was a council tenant. Her partner assaulted her and her children. He was arrested but then released on bail. He returned to the house and assaulted her again. He was again arrested, remanded in custody and sentenced to 12 weeks in prison. Ms Byrne was worried about what would happen on his release. She was advised by Women's Aid to leave the home and apply to the council for homelessness assistance. The council obtained police confirmation of the history of violence, information that the partner was a prolific offender, and accepted that it owed the main housing duty: HA 1996 s193.

The council made a single offer of accommodation. Ms Byrne refused it. The council decided that its duty had been discharged. On a review, Ms Byrne explained that she had refused the offer because of the risk to her and the children – a main bus route that she and her ex-partner had regularly used ran past the property and the bus stop was outside the property. She was frightened that her ex-partner or his associates would see her or the children or their parked car from the bus window and discover where they lived. The reviewing officer decided that the offer had been suitable and was reasonable to accept.

HHJ Worster allowed an appeal. The reviewing officer had focused on the possibility of discovery rather than on the consequences of discovery. The reviewing officer's decision on whether it would have been reasonable to accept the offer was flawed by failure to address 'the big points' viz:

- the nature and level of violence of which Ms Byrne was at risk;
- the effect of violence on the children; and
- that the fears of violence were genuine.

No rational decision could have been reached that it was reasonable to accept the property.

1 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/269035/131219_circular_for_pdf.pdf.
2 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/303576/140401_Providing_social_housing_for_local_people_-_SOR.pdf.
3 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/303579/140401_providing_social_housing_for_local_people_-_sor_-_equality_impact.pdf.
4 See: www.refugeechildrensconsortium.org.uk/.
5 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/180882/130328_-_Recipients_of_Social_Housing_Fraud_Funding_2013-15.pdf.
6 Available at: www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/1000/100002.htm.
7 See: www.senedd.assemblywales.org/mgIssueHistoryHome.aspx?IId=8220.
8 Available at: www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs/cr-ld9707-e.pdf.
9 See: www.senedd.assemblywales.org/ieListDocuments.aspx?Cld=226&MID=2155.
10 See: www.scottish.parliament.uk/parliamentarybusiness/Bills/70102.aspx.
11 Available at: www.scottish.parliament.uk/S4_InfrastructureandCapitalInvestmentCommittee/Reports/trr14-04.pdf.
12 Available at: www.gov.uk/government/news/stronger-protections-for-tenants-and-leaseholders.
13 Available at: www.tpos.co.uk/downloads/reports/TPO_Annual_Report_2013.pdf.
14 Available at: www.crisis.org.uk/news.php/801/crisis-private-renting-team-helps-secure-8000-tenancies.
15 Available at: www.citizensadvice.org.uk/index/pressoffice/press_index/press_20140324.htm.
16 Available at: www.cih.org/resources/PDF/Policy%20free%20download%20pdfs/Landlord%20Learning%20Document.pdf.
17 Available at: www.scottish.parliament.uk/S4_Welfare_Reform_Committee/Written_submission_-_SFHA.pdf.
18 See: www.viridianhousing.org.uk/about_us/News/tntFraudUpdate?time=635308459602137488%C2%A0%E2%80%A6.
19 See: www.newham.gov.uk/Pages/News/Tenant-must-pay-back-6900-from-illegal-sub-letting.aspx.
20 See: http://press.hse.gov.uk/2014/london-landlords-put-hampstead-tenants-at-risk/.
21 Edward Fitzpatrick, barrister, London and Meera Betab, Mary Ward Legal Centre, London.
22 Stephen Cottle, barrister, London and Eric Bowes & Co, solicitors, Solihull.

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