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

Allocating social housing

In exercise of his powers under Housing Act (HA) 1996 s169, the secretary of state at the Department for Communities and Local Government (DCLG) has issued new statutory guidance to local authorities in England about social housing allocation: *Allocation of accommodation: guidance for local housing authorities in England* (DCLG, June 2012).[1] The guidance replaces all previous statutory guidance issued under section 169. Its content reflects the outcome of a consultation exercise on a draft. A summary of the responses received has been published: *Allocation of accommodation: guidance for local housing authorities in England. Summary of responses to consultation* (DCLG, June 2012).[2] The summary indicates that new statutory instruments to protect the priority position of those applicants for social housing who have experienced military service will be published 'as soon as possible' (para 4.6).

Many housing authorities are expected to use the new flexibilities in housing allocation, reflected in the guidance, to exclude applicants from outside their own districts. The Chartered Institute of Housing (CIH) has recently published a report based on the work of the Housing and Migration Network which covers social housing allocation to new migrant households: *Housing and migration. A UK guide to issues and solutions* (CIH, May 2012).[3]

Social housing fraud

The UK government has announced that it will support a new private members' bill which seeks to introduce a new criminal offence of unauthorised subletting of social housing: DCLG press notice, 20 June 2012.[4] The Prevention of Social Housing Fraud Bill was introduced by Richard Harrington MP. It had a House of Commons second reading on 13 July 2012: *Hansard* HC Debates cols 616–654, 13 July 2012.[5]

The Welsh government (WG) has launched a consultation exercise on whether the law in Wales should be strengthened with greater powers and remedies to tackle social housing fraud: *Social housing fraud* (WG, May 2012).[6] Any responses must be submitted by 17 August 2012.

Under-occupation in social housing

A new guide has been published addressing the issues for social landlords arising from the effects of welfare reforms on working-age tenants who are under-occupying their homes: *Making it fit* (CIH, June 2012).[7] The guide is designed to help landlords develop a strategic and operational approach to the new size criteria for benefits, tailored to local circumstances.

The House of Commons Library has produced a useful note on the relationship between under-occupation and the upcoming changes to housing benefit (HB): *Under-occupation of social housing: housing benefit entitlement* (Standard Note: SN/SP/6272, June 2012).[8]

Higher-income social housing tenants

The UK government has launched a consultation exercise on whether power should be given to social landlords in England to levy higher (market) rents on tenants of social housing with significant incomes: *High income social tenants. Pay to stay consultation paper* (DCLG, June 2012).[9] The consultation closes on 12 September 2012.

Homelessness

The statistics on homelessness in England for the year 2011/12 have been published: *Statutory homelessness: January to March 2012 and 2011/12, England* (DCLG, June 2012).[10] They show that, during the 2011/12 financial year, there were 50,290 acceptances of the main homelessness duty (HA 1996 s193) by local housing authorities in England – an increase of 14 per cent over the previous year. Of those, 13,130 applicants were accepted as owed a main duty during the last quarter, January to March 2012, a figure 16 per cent higher than in the same quarter last year.

The UK government has announced that funding for the National Homelessness Advice Service will be £3.4m in 2012/13: DCLG press notice, 14 June 2012.[11]

Tenancy deposits

The housing charity Shelter has reported that calls to its helpline about tenancy deposit problems have increased by more than 80 per cent in two years: Shelter press release, 20 June 2012.[12]

The results of a recent survey published by the organisation Imfuna indicate that 65 per cent of the 1,000 tenants surveyed felt that deductions from their deposits were taken unfairly and that 16 per cent stated that no reason was offered by their landlord for deductions: Imfuna press release, 22 May 2012.[13]

New housing tribunal rules

A new 'Property Chamber' of the First-tier Tribunal will be formed in 2013 when the following tribunals in England will transfer into the new chamber:

- rent assessment committees;
- rent tribunals;
- residential property tribunals;
- leasehold valuation tribunals (LVT); and
- agricultural land tribunals.

In both England and Wales, the Adjudicator to Her Majesty's Land Registry will also transfer into the new Property Chamber.

The Tribunal Procedure Committee is conducting a consultation exercise seeking views on the draft rules for the new Property Chamber: *Tribunal Procedure Committee. Consultation on the proposed Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013* (Ministry of Justice, 2012).[14] The proposed rules will consolidate and reform the rules of procedure of the tribunals joining the new chamber.[15] Responses to the consultation should be made by 6 September 2012.

Housing and anti-social behaviour

The CIH has published a new guide on making the best use of the recently issued pro forma for landlords to identity the harm caused by anti-social behaviour: *How to ... use the Community Harm Statement* (CIH, May 2012).[16]

The UK government has announced that

every eligible council has agreed to run the Troubled Families programme in its area: DCLG press notice, 11 June 2012.[17] The programme operates through releasing payments to councils by 'results' for work with individual families. The eligible results include a 60 per cent reduction in anti-social behaviour across the whole family.

Homes on park sites

The House of Commons' Select Committee on Communities and Local Government has published a wide-ranging report covering the law relating to park home sites and calling for better enforcement: *Park homes HC 177–1, first report of session 2012–13. Volume 1* (HCP 177, June 2012).[18] The report contains a list of recommendations for improvements in the legal position of site home occupiers.

The UK government's recent consultation exercise on management of mobile home parks closed on 28 May 2012 – see *A better deal for mobile home owners. Consultation* (DCLG, April 2012).[19] In its response, the Local Government Association suggested that the measures that should protect park home residents are inadequate and out of date, and that current legislation does not give them the same rights as people living in other types of property.[20]

Housing tenure

Shelter and the Resolution Foundation have published research carried out by the Cambridge Centre for Housing and Planning Research analysing housing tenure in England: *Housing in transition: understanding the dynamics of tenure change* (June 2012).[21] The report is in two parts. The first part looks back at tenure change between 1993/94 and 2009/10, using the government's Survey of English Housing and its successor, the English Housing Survey. The second part projects forward to 2025, exploring how tenure structures may develop under different economic scenarios.

Housing and young people

The Joseph Rowntree Foundation has published new research on housing options for young people: *Housing options and solutions for young people in 2020* (June 2012).[22] It found that around 1.5 million more young people aged 18–30 will be living in the private rented sector in 2020, reflecting growing problems of accessing both home ownership and social renting.

HUMAN RIGHTS

Article 8

■ Bjedov v Croatia

App No 42150/09,
29 May 2012,
[2012] ECHR 886

Mr and Mrs Bjedov were joint tenants of a council flat in Zadar, Croatia, in which they had lived since 1975. In August 1991, when they were temporarily staying elsewhere, they heard that someone had broken into and occupied their flat. Mr Bjedov was taken ill and the couple stayed where they were until Mr Bjedov died in 1994. Mrs Bjedov did not return to the flat until 2001 when she heard that it had become empty again. She moved back into it. In 2006, the council obtained a possession order on the basis that the tenancy of the flat had been lost, under the applicable legislation, by an absence in excess of six months. With enforcement of that order pending, Mrs Bjedov applied to the European Court of Human Rights (ECtHR) asserting a breach of article 8 of the European Convention on Human Rights ('the convention').

The court held as follows:

■ The flat was Mr and Mrs Bjedov's 'home'.

■ An eviction order, even though not yet enforced, amounted to an interference with the right to respect for that home.

■ The interference was in accordance with the law and pursued the legitimate aim of ensuring unoccupied flats could be repossessed for those more in need of them.

■ However, on the question of whether an eviction was 'necessary', the domestic court had only considered whether or not there had been a good reason for the temporary absence. It should have looked at all the circumstances to determine whether it was reasonable and proportionate now to evict. That failure could not be made good by taking account of personal circumstances at the enforcement stage. They had to be considered by the domestic court when making the possession order. They had not been.

The ECtHR found a breach of article 8. Mrs Bjedov was awarded €2,000 for non-pecuniary damages.

Article 1 of Protocol No 1

■ Dukić v Bosnia and Herzegovina

App No 4543/09,
19 June 2012,
[2012] ECHR 1052

Mr Dukić was the occupier of a socially owned flat. The building in which it was situated was destroyed during the 1992–1995 war in Bosnia and Herzegovina. In 2002, Mr Dukić applied to the council for a replacement flat but the council did not respond. In 2004, he brought legal proceedings but the council failed to defend them. In 2005, he obtained a default judgment and an order that he be provided with a replacement flat. His attempts to enforce that order failed on the grounds that the order did not precisely specify what sort (or size) of flat he should be allocated. In 2008, the domestic constitutional court directed that he would need to start fresh proceedings to secure that outcome.

The ECtHR held that there was a breach of article 6 of the convention in the failure of the state to secure enforcement of a valid judgment. Requiring Mr Dukić 'to pursue another set of civil proceedings after he has already obtained a final judgment in his favour would place an excessive burden on him' (para 33). Although more than six years had passed since the domestic decision became final, Mr Dukić had not yet been allocated a suitable flat. There was also a breach of article 1 of Protocol No 1 to the convention because the entitlement to a flat under the default judgment was 'an asset' which Mr Dukić had a legitimate interest in securing. In view of the statement that the government would now provide accommodation, the court limited compensation to non-pecuniary damage of €3,600.

■ Lindheim v Norway

App Nos 13221/08 and 2139/10,
12 June 2012,
[2012] ECHR 985

The applicants were landowners who, as landlords, entered into ground lease agreements with lessees for either permanent or holiday homes. They complained that, in breach of article 1 of Protocol No 1 to the convention, under new legislation the lessees had been entitled to demand, and had demanded, an unlimited extension of the leases on the same conditions as applied previously, once the agreed term of lease had expired. The effect was to render it impossible to recover the land or receive more than a fixed rent which could only be increased by reference to price inflation. The government of Norway said that the legislation had struck a balance between the rights of owners and long leaseholders and that the state had a wide margin of appreciation in such matters as the case of *James v UK* (1986) 8 EHRR 123; App No 8793/79 (on collective enfranchisement) had demonstrated.

The ECtHR had to decide whether, and if so, the extent to which, the interference with the landowners' possessions pursued a legitimate aim in the public or general interest and whether there was a reasonable relationship of proportionality between the interference and any such aim. The court noted the low level of annual rents (less than 0.25 per cent of the plots' alleged market value) and the indefinite

duration of the impugned rent limitation. That interfered to a very significant degree with the landowners' enjoyment of their possessions. It also noted that lease extensions were for an indefinite duration without any possibility of upward adjustment of the rent. It did not appear that there was a fair distribution of the social and financial burden involved but, rather, that the burden was placed solely on the landowners. The court was not satisfied that the state, notwithstanding its wide margin of appreciation, had struck a fair balance between the general interest of the community and the property rights of the applicants, who were made to bear a disproportionate burden. The court had regard to several more recent rulings than *James* (especially *Hutten-Czapska v Poland* [2008] ECHR 355; App No 35014/97), 'representing jurisprudential developments in the direction of a stronger protection under article 1 of Protocol No 1' (para 135).

The ECtHR found that there was a violation of article 1 of Protocol No 1 but decided that the state should be dispensed from liability with regard to legal acts or situations which antedated the ECtHR's judgment, and so dismissed claims for compensation.

SOCIAL SECTOR

Possession claims

Appeals

■ Southwark LBC v Ofogba

[2012] EWHC 1620 (QB), 15 June 2012

Mr Ofogba was a secure tenant. In March 2009, Southwark issued possession proceedings based on alleged arrears of rent. A defence was filed and the case was allocated to the multi-track. At trial, HHJ Faber found that Mr Ofogba owed rent of £1,731.78 and entered judgment for that sum. The claim for possession was adjourned generally with liberty to restore. Mr Ofogba sought permission to appeal, contending both that the judge had erred in making a money judgment and that she should have dismissed the claim for possession. Globe J granted general permission to appeal.

Hickinbottom J revoked permission to appeal against the money judgment because any appeal in respect of that judgment must be to the Court of Appeal as it was a final decision in a claim allocated to the multi-track (Access to Justice Act 1999 (Destination of Appeals) Order 2000 SI No 1071 article 4(a)). The decision to adjourn the possession claim was not a final decision as it did not dispose of the case so any appeal was to the High Court (article 3). However, for case management reasons, Hickinbottom J transferred that appeal to the Court of Appeal to be heard together with the application for permission to appeal against the money judgment (see Civil Procedure Rules (CPR) 52.14).

Introductory tenancies

■ Camden LBC v Stafford

[2012] EWCA Civ 839, 20 June 2012

Camden gave notice to Ms Stafford, who was an introductory tenant, that it would seek possession. She applied for a review of the decision to seek possession. The reviewing panel upheld the notice but decided that alternative measures should be pursued instead of possession. The alternative measures failed. Without serving a further notice, Camden sought possession. HHJ Bailey dismissed the claim because it was a condition for bringing a possession claim against an introductory tenant that, if there had been a review, the decision on review had to have confirmed the earlier decision to seek possession (HA 1996 ss127–129). It had not done so.

The Court of Appeal dismissed the council's appeal. The reviewing panel had either confirmed the earlier decision without qualification or it had not. On the wording of the review decision letter, there had not been an unqualified confirmation. It was not possible to make confirmation conditional. Without unconditional confirmation the court had no jurisdiction to grant possession.

Assured tenancies

Succession

■ Amicus Horizon Ltd v Mabbott and Brand

[2012] EWCA Civ 895, 30 May 2012

Ms Mabbott, an assured tenant of the claimant housing association, died. Mr Brand remained in occupation. He claimed that he had lived with Ms Mabbott and her young daughter for ten years as if he was Ms Mabbott's husband and that, accordingly, he had succeeded to the tenancy under HA 1988 s17. Amicus did not accept that and sought possession. The judge made a possession order. Although the defendant had stayed at the deceased's home about three nights each week, he had spent the rest of the week at his mother's home. He used the mother's address when giving his details to the police and when opening a bank account. He and the deceased had separately claimed welfare benefits. The judge was satisfied that this degree of separateness was a demonstration of the deceased's unwillingness to commit fully to a relationship with the defendant.

The Court of Appeal dismissed an appeal. The judge had correctly weighed up all the circumstances and had reached a decision that could not be impeached.

PRIVATE SECTOR

Deposits

■ Garcia v Choudhury

[2012] EWCA Civ 731, 10 May 2012

Mr Choudhury let a flat to Mr Garcia. Mr Garcia claimed that Mr Choudhury had not protected the deposit of £280 under a statutory scheme and brought proceedings under HA 2004 s214. District Judge Rowley held that the statutory scheme did not apply because the tenancy was not an assured shorthold tenancy because the flat in which the tenant lived and the house in which the landlord lived were all part of the same 'building'. Accordingly the 'resident landlord' exception applied (HA 1988 s1 and Sch 1 para 10). The landlord then served a notice to quit and sought possession. District Judge Rowley rejected the defence that the notice to quit was invalid and made a possession order. Mr Garcia appealed both decisions. HHJ Powles QC dismissed those appeals.

The Court of Appeal refused permission to bring a second appeal. In relation to Mr Garcia's procedural complaints Moore-Bick LJ said: 'Most procedural irregularities are capable of being cured, and in this case they were' (para 12). The decision about whether or not the properties were part of the same building turned on issues of fact which raised no point of principle required to justify a second appeal. In relation to the nature of the tenancy, District Judge Rowley was entitled to make the finding about that which she made. Although the notice to quit was less clear than it might have been, it did in fact make it apparent to Mr Garcia when the tenancy would come to an end.

■ Lappin v Surace

Romford County Court, 13 June 2012[23]

On 20 April 2009, Mr Lappin granted Ms Surace an assured shorthold tenancy for a fixed term of 12 months, expiring on 19 April 2010. No subsequent fixed-term tenancies were granted. On the same day that he granted the tenancy, Mr Lappin served a HA 1988 s21 notice. Ms Surace paid a deposit of £1,500 which Mr Lappin arranged to protect. However, he did not serve her with any of the prescribed information relating to the protection of the deposit (HA 2004 s213(5) and (6) and the Housing (Tenancy Deposits) (Prescribed Information) Order 2007 SI No 797). After 19 April 2010, Ms Surace continued to occupy the premises as a statutory monthly periodic tenant. Mr Lappin served two more section 21 notices, relating to periodic tenancies (HA 1988 s21(4)). Each notice ended on the last day of a month (28 February 2011 and 31 October 2011). The notices did not contain any

savings clause. Deputy District Judge Oldham made a possession order. Without taking sworn evidence, he found that the deposit was protected and that it was not relevant whether or not Ms Surace knew that it was protected. He also found that the rent was due on the first of each month and so the statutory periodic tenancy expired on the last day of each month. The two section 21 notices were accordingly valid.

HHJ Wulwik allowed Ms Surace's appeal. He held that Mr Lappin could not rely on the 20 April 2009 section 21 notice because no prescribed information had been served at that date. The district judge had wholly failed to deal with the question of whether or not Ms Surace had been supplied with the relevant prescribed information and, if so, on what date. He also held that there was no conceptual difficulty in requiring a tenant to pay rent on the first day of each month while the tenancy started on the 20th day of each month and ended on the 19th day of each month (*Salford City Council v Garner* [2004] EWCA Civ 364; [2004] HLR 35, CA). The notices should have specified the last day of the period of the tenancy. Neither of the section 21 notices did that because the last day was the 19th of each month. Both the notices were invalid. HHJ Wulwik dismissed the claim for possession.

Notices to determine licences

■ Fitzhugh v Fitzhugh

[2012] EWCA Civ 694, 1 June 2012

The claimant and the defendant jointly granted a licence over land to a third party and the defendant jointly. The licence fee was not paid and the claimant (acting alone) gave written notice to terminate the licence. The claimant then sought an order for possession.

The Court of Appeal asked and answered this question: If A and B (described as 'the licensor') grant a licence to occupy land to B and C (described as 'the licensee'), and the licence automatically terminates upon the failure of B and C to remedy any remediable breaches within the time specified by a notice given by 'the licensor' to 'the licensee', can such a notice validly be given by A alone? It held that only A and B acting together could give notice to B and C. As the notice had been given by the claimant alone, it was invalid and the licence had not ended.

Notices to quit

■ Thompson v Roberts

[2012] EWHC (QB) noted on LAWTEL, 23 May 2012

A landlord and tenant did not agree about the period of notice to quit required to be given under a tenancy agreement. The landlord thought it was four weeks, the tenant thought it was two months. The landlord served an envelope on the tenant containing two notices to quit – one with four weeks' notice, the other with two months' notice. The tenant claimed that neither notice taken alone complied with the requirements of Protection from Eviction Act 1977 s5.

The High Court held that the tenancy agreement had required two months' notice and that the two documents could be read together as constituting a valid two months' notice.

Harassment and eviction

■ Henson v Blackwood and Blackwood

Mayor's and City of London Court, 29 June 2012[24]

On 6 April 2009, Mr and Mrs Blackwood granted Miss Henson an assured shorthold tenancy of a flat. She was 21 and moved in with her young daughter. Later that year, she became pregnant. Her pregnancy was complicated. On 24 March 2010, the landlord's agent served a HA 1988 s21 notice. On 4 June 2010, the day before the notice expired, Mr Blackwood attended the flat and rang the door buzzer. He shouted that Miss Henson was to leave the flat the next day. He became aggressive. On 5 June 2010, a man, believed to be Mr Blackwood's brother, rang Miss Henson's door buzzer continuously for five minutes. She left the flat shortly afterwards. When she returned, the supply of gas, water and electricity had been disconnected and someone had taken the fuses out of the fuse box. As a result, her daughter had to stay at a friend's house that night. Some of her possessions were missing, including a TV and video recorder. The following day, Miss Henson left the flat to collect her daughter. When she returned, the locks had been changed and she could not gain entry. As a result, she had to stay with her friend that night.

On 7 June 2010, Miss Henson's solicitors sent a letter before action to the agent, warning that, unless she was readmitted and all services reconnected, she would seek an injunction. The agent wrote to the Blackwoods warning them that they had acted unlawfully. The Blackwoods did not reply. Miss Henson issued a claim for damages and an injunction requiring the Blackwoods to readmit her to the flat. The injunction was granted and served on the Blackwoods later that day. The following day, Miss Henson's solicitors were informed by the agent that Mr Blackwood had re-let the flat and left Miss Henson's belongings in the hallway. The agents said that Mr and Mrs Blackwood were not prepared to re-admit her. Mr Blackwood had not in fact re-let the flat. He eventually agreed to provide Miss Henson with keys for the new lock. When a friend visited the flat on 9 June 2010 she found that Miss Henson's belongings had been placed in bin bags in the communal hallway. Her food had been cleared from the property and someone else had been cooking there. Miss Henson felt unable to return to the flat and stayed with her mother for a week.

On 14 June 2010, Miss Henson received a threatening call from Mr Blackwood, in which he told her that she should not have 'got other people involved' and that he would be 'sending more people'. As a result of that call, Miss Henson did not return to the property until 15 June 2010. When she did so, she discovered that someone had changed the locks back to the original ones. She continued to receive nuisance calls from Mr Blackwood. Eventually, she had to change her telephone number. About a week after moving back in, a man and woman, believed to be Mr Blackwood's brother and a female friend, let themselves into the flat. Miss Henson was in her underclothes. The man abused Miss Henson verbally and the woman attempted to assault her. On 14 November 2010, Miss Henson discovered that someone had applied glue to the outside of the Yale lock on the door to the flat. She was able to gain entry to the flat nonetheless. She later moved out of the flat.

HHJ Birtles awarded Miss Henson £9,870 damages and interest. He found that the claim for general damages broke down into three distinct periods and awarded:

- £2,000 for pre-eviction harassment, relying on awards (updated for inflation) made in *Daramy v Streeks* (Lambeth County Court, 15 November 2006) and *Khan v Iqbal* (Bury County Court, 13 March 2009);
- £1,000 for the eviction itself and the three nights for which Miss Henson could not enter the flat; and
- a further £2,000 for the harassment that Miss Henson suffered thereafter.

He also awarded Miss Henson £2,000 by way of aggravated damages and £2,000 by way of exemplary damages, relying on awards (updated for inflation) made in *Khan v Iqbal* and *Salah v Munro* (Willesden County Court, 29 March 2009). He assessed special damages at £500 and ordered the Blackwoods to pay interest of £370.

Anti-social behaviour

■ Amicus Horizon Ltd v Thorley

[2012] EWCA Civ 817,
30 May 2012

Mr Thorley was the tenant of a flat in a block designed for elderly residents. The claimant housing association obtained an interim anti-social behaviour injunction (ASBI) with a power of arrest, pending the trial of its claim against him for possession based on allegations of anti-social behaviour. There were two instances of breach of the injunction. The defendant was arrested but the committal application was adjourned and the defendant was released on bail. There were then two further breaches of the injunction. It was alleged that he was drunk, swore and shouted. The committal applications were tried with the possession claim. HHJ Hollis made a possession order and imposed sentences of immediate imprisonment for the breaches totalling four months.

On appeal, Toulson LJ said, 'although often the first sentence for breaching an anti-social behaviour order when the custody threshold is passed is a suspended sentence, [in this case] there were legitimate grounds on which the judge could pass an immediate sentence' (para 7). However, the Court of Appeal reduced the total sentence to six weeks' imprisonment. The original sentence had been excessive as the breaches were not of the most serious kind and the penalty was beyond the parameters suggested in respect of similar conduct by the Sentencing Guidelines Council's definitive guideline on breach of anti-social behaviour orders.

Long leases

Service charges

■ Patel v MRD Property Developments Ltd

[2012] EWCA Civ 727,
31 May 2012

Under the terms of their lease, three joint tenants were obliged to pay, in addition to their rent, an 'insurance rent' equal to the sum paid by their landlord to insure the premises. The sum would only become payable upon written demand. Each year, the landlord's agent sent one of the joint tenants a copy of the insurer's renewal notice showing the premium payable by the landlord. The tenants paid the amount claimed but later took the point that they had not received a 'written demand' each year.

The Court of Appeal held that, in the circumstances, the presentation of the renewal notice was sufficient written demand. It refused permission for the tenants to argue that service on just one tenant had been insufficient because the point had not been taken at trial.

■ 419 Archway Road Freehold Co Ltd v Ennison

[2012] EWCA Civ 831,
24 May 2012

The claimant was the freeholder of a building. The defendant was a leaseholder of one of the flats and had herself previously been the freeholder prior to its acquisition by the company. There was a dispute about service charges. A LVT held that the charges were reasonable and payable by the defendant. When she did not pay, the company claimed that her lease was forfeit. A judge made a possession order. He held that the charges amounted to 'rent' under the lease and were recoverable without a Law of Property Act 1925 s146 notice having to be served. He found that a possession order would not infringe the defendant's human rights.

The Court of Appeal dismissed a renewed application for permission to appeal. The defendant's human rights under article 8 of the convention were secured by the terms of her lease and the fact that she could apply to a county court for relief from forfeiture.

■ Winstone v Great Gate Management Co Ltd

[2012] EWCA Civ 776,
24 May 2012

The claimant was the tenant of a flat. The defendant landlord proposed to carry out repair works and recover the costs by way of service charges. The claimant considered that the proposed works were more extensive and more expensive than reasonably required and obtained a without notice injunction to prohibit the carrying out of any structural work. At the on-notice hearing to renew the interim injunction, HHJ Bidder, sitting as a High Court judge, discharged it on the basis that the issue was really about the cost of the works and that if the tenant could later show that the works were too expensive she could be compensated by damages. The claimant was ordered to pay costs of over £7,000. She appealed.

The Court of Appeal dismissed the appeal against that order. The judge's refusal to continue the injunction was right. The claimant had failed to obtain renewal of the injunction and her liability for costs flowed from that.

■ Maloney v Filtons Ltd

[2012] EWHC 1395 (Ch),
24 May 2012

The claimants were receivers appointed by a bank to take over the collection of rents and other income from a block of flats which had been given as security for a loan facility. The defendants claimed to have a two-year lease of the block expiring in December 2012 and binding on the bank. The claimants said that the lease was either void or a sham. The defendants counterclaimed for a declaration that, in the alternative, they were managing agents entitled to let and manage the flats, collect the rents and retain commission for doing so.

Peter Smith J held that the lease was a sham and, if not a sham, was void. He was satisfied that there was in truth a relationship of landlord and managing agent that was binding on the bank. However, in all the circumstances, it would be wrong to grant specific performance to continue rather than end that relationship. Not least, knowing of the appointment of the receivers, the defendants had wrongly continued to pay the collected rent over to the landlords. Against that background, the relationship of manager and agent should be treated as determined.

HOUSING ALLOCATION

■ R (Cranfield-Adams) v Richmond Upon Thames RLBC

[2012] All ER (D) 114 (Jun),
19 June 2012

The claimant was a private sector tenant. He applied for social housing under the council's housing allocation scheme. He was made an offer of accommodation but refused it. The council's allocation scheme provided that the effect of refusing a suitable offer would be that the application would be cancelled and any further application would be deferred for a period of two years.

The claimant was then made homeless and applied for accommodation under the homelessness provisions of HA 1996 Part 7. The effect of his being homeless was that he was entitled to a reasonable preference in the allocation of housing under the council's scheme: HA 1996 s167(2)(a). The council decided that he remained subject to a deferral.

Jeremy Stuart Smith QC, sitting as a deputy High Court judge, dismissed a claim for judicial review of that decision. Both the scheme and the decision to apply it were lawful given:

- the extreme pressure on social housing;
- the fact that the council had no housing stock of its own;
- the need for co-operation with the local providers of social housing;
- the legitimate interests of those housing providers in maximising rent; and
- the administrative burden on the council when an applicant refused an offer.

HOMELESSNESS

Applications

■ Complaint against Southwark LBC

10 000 207,
22 May 2012[25]

The complainant was a French national. She

was a disabled person with two children living in private rented accommodation. In April 2009 her landlord served a valid HA 1988 s21 notice requiring her to leave and later began proceedings for possession. She approached the council to make an application for homelessness assistance but was told to 'come back when the court had made an order for possession' (para 27). A county court made a possession order to take effect on 10 September 2009. She went back to the council without success. A council officer admitted that some of its caseworkers 'may advise applicants that nothing can be done for them until they have an eviction date', ie, a bailiff's appointment (para 33).

The council later decided that the complainant was not eligible for homelessness assistance as she was not a 'worker'. She sought a review and asked for accommodation pending review. The council then provided accommodation and, on 30 November 2009, notice was given that the review had succeeded.

The ombudsman found extensive maladministration by the council in its handling of the homelessness application including: failure to keep proper records; failure to decide whether or not it was obliged to provide interim accommodation prior to its decision on the application; failure to investigate the application properly; and excessive delay in handling complaints about its poor service.

The council agreed to provide additional training to homelessness staff on taking homeless applications, conducting homeless enquiries and offering interim accommodation. It also agreed to pay substantial compensation.

Eligibility

■ Manzoor v Wandsworth LBC

Wandsworth County Court,
5 April 2012[26]

Mrs Manzoor was a Pakistani citizen. She was granted limited leave to remain in the UK on condition that she had no recourse to public funds. She lived with her husband and two children who were all British citizens. On her application for homelessness assistance under HA 1996 Part 7 the council decided that she was not eligible because she was a person subject to immigration control: HA 1996 s185(1). Her solicitors sought a review on the basis that she had a right to reside in the UK by virtue of the decision of the Court of Justice of the European Union in *Zambrano v Office national de l'emploi* C-34/09; [2012] 2 WLR 886, and so was eligible for assistance. The reviewing officer decided that the effect of *Zambrano* was only to give Mrs Manzoor the right to reside in the UK and seek employment. That did not alter the fact that she was subject to immigration control.

HHJ Welchman allowed an appeal and varied the decision to a finding that Mrs Manzoor was eligible and was owed the main housing duty in HA 1996 s193. He said:

> *… on the basis of the* Zambrano *case, the appellant has an undoubted right to remain in the United Kingdom. She lives here. She is habitually resident here. Her children reside here and the fact that she has a husband who should be taken to have a responsibility for the children and can apply social benefits on their behalf does not in my judgment detract from the rights of the wife and mother* (para 17).

Intentional homelessness

■ Essex v Birmingham City Council

Birmingham County Court,
29 May 2012[27]

Mr Essex was a housing association tenant. He received jobseeker's allowance (JSA) which triggered an entitlement to full HB. In October 2010, he was admitted to hospital and thereafter stayed four months with his mother (a nurse) while she treated him. His JSA was stopped because he had ceased to sign-on as available for work. He assumed that, although he would lose his JSA, the HB would continue because his income was even lower than it had been on JSA. He did not contact his landlord and assumed that the rent would continue to be paid. On receiving notice that the JSA had ended, the council cancelled his HB award. Arrears accrued. In his absence, a notice seeking possession was served, a possession claim was issued and a possession order was made. The landlord wrote advising him to apply for homelessness assistance.

On that application, a reviewing officer accepted that Mr Essex had assumed that HB would continue to be paid but found that he had become homeless intentionally.

HHJ Worster allowed an appeal and varied the decision to one that Mr Essex had not become homeless intentionally. Mr Essex's omission to contact his landlord because of his assumption about HB continuing to cover his rent (which the reviewing officer had found was an assumption he had in fact made) had been in good faith for the purposes of HA 1996 s191(2). It could therefore not have been a 'deliberate' omission under section 191(1). Any other outcome would have required a finding by the reviewing officer that Mr Essex had been guilty of something in the nature of impropriety, dishonesty or wilful blindness to the facts: *Ugiagbe v Southwark LBC* [2009] EWCA Civ 31 at paras 24–28.

Reviews and appeals

■ Bubb v Wandsworth LBC

Supreme Court,
31 May 2012

The Supreme Court has refused an application for permission to appeal from the dismissal of an appeal by the Court of Appeal ([2011] EWCA Civ 1285) on the question of the extent to which a reviewing officer's decision could be challenged on grounds of error of material fact in an appeal brought under HA 1996 s204.

Accommodation pending review

■ R (Sadek) v Westminster City Council

[2012] EWCA Civ 803,
10 February 2012

Mr Sadek asked the council to accommodate him, pending a review, in exercise of its discretion under HA 1996 s188(3). The council decided not to do so, but offered to nominate him to two hostels. Neither nomination resulted in an offer of a place. Mr Sadek applied for a judicial review of the council's refusal to accommodate him and sought an interim injunction pending the trial of that claim. Thirlwall J refused the application for an injunction and Mr Sadek appealed.

Lewison LJ granted permission to appeal (because the judge had proceeded on the mistaken premise that the referrals to the hostels would have secured accommodation) but he dismissed the appeal. The council's decision had expressly applied the approach suggested in *R v Camden LBC ex p Mohammed* [1997] EWHC Admin 502; [1997] 30 HLR 315. In those circumstances, the court generally had no power to intervene: *Francis v Kensington and Chelsea RLBC* [2003] EWCA Civ 443; [2003] 1 WLR 2248. He added:

> *… to apply for the interim relief in the nature of a mandatory injunction, without notifying the council and giving them an opportunity to be heard, was a wrong procedural step …* (para 6).

1 Available at: www.communities.gov.uk/documents/housing/pdf/2171391.pdf.
2 Available at: www.communities.gov.uk/documents/housing/pdf/2170127.pdf.
3 Available at: www.cih.org/resources/PDF/Policy%20free%20download%20pdfs/housingandMigration2012.pdf.
4 Available at: www.communities.gov.uk/news/housing/2164756.
5 Available at: http://services.parliament.uk/bills/2012-13/preventionofsocialhousingfraud.html.
6 Available at: http://wales.gov.uk/docs/desh/consultation/120525socialtenancyfrauden.pdf.
7 Available at: www.cih.org/resources/PDF/Policy%20free%20download%20pdfs/Making%20it%20fit.pdf.
8 Available at: www.parliament.uk/briefing-papers/SN06272.pdf.

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10 Available at: www.communities.gov.uk/documents/statistics/pdf/2160776.pdf.
11 Available at: www.communities.gov.uk/news/corporate/2161261.
12 Available at: http://england.shelter.org.uk/news/june_2012/rent_deposit_complaints_up_80.
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21 Available at: www.cchpr.landecon.cam.ac.uk/outputs/detail.asp?OutputID=276.
22 Available at: www.jrf.org.uk/sites/files/jrf/young-people-housing-options-full_0.pdf.
23 Simon Mullings, Edwards Duthie solicitors and Liz Davies, barrister, London.
24 Laura Caiels, GT Stewart, solicitors and Dean Underwood, barrister, London.
25 Available at: www.lgo.org.uk.
26 Toby Vanhegan, barrister, London and William Flack, TV Edwards LLP, solicitors, London.
27 James Stark, barrister, Manchester and Magdalene Robinson, Community Law Partnership, solicitors, Birmingham.

Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. Nic Madge is a circuit judge. The authors are grateful to the colleagues at notes 23, 24, 26 and 27 for transcripts or notes of judgments.

Recent developments in public law – Part 1

Kate Markus and **Martin Westgate QC** continue their regular series surveying recent developments in public law that may be of more general interest to *Legal Action* readers. The authors welcome short reports from practitioners about unreported cases, including those where permission has been granted or that have been settled. Part 2 of this article will be published in September 2012 *Legal Action*.

CASE-LAW

Ultra vires/rationality

■ R (FDA and others) v (1) Secretary of State for Work and Pensions (2) HM Treasury

[2012] EWCA Civ 332, 20 March 2012

The appellants challenged the secretary of state's decision to change from the Retail Prices Index to the Consumer Prices Index as a basis for uprating state sector occupational pensions. The challenge was rejected by a majority of the Divisional Court (CO/3570/2011 and CO/4082/2011) and the appellants appealed.

Each year, the secretary of state was obliged to estimate whether or not there had been an increase in the 'general level of prices': Social Security Administration Act 1992 s150(1), and if so to lay an uprating order increasing specified benefits (which, in turn, were linked to public sector pensions) by the same amount or more. The appellants contended that the secretary of state could not take account of the national economic situation in deciding what index to use because the question of whether or not there had been an increase in the general level of prices was an objective one to which there was, at least in principle, a single right answer. The secretary of state countered that he could select any index which could fairly be described as a measure of the general level of prices for any rational reason, including cost savings. However, if this was right, it would mean that the secretary of state could deliberately choose an index that seemed to him less suitable simply in order to save money. To avoid this unpalatable conclusion, the court adopted a middle course and in so doing recognised a duty on the secretary of state to act proportionately, even though there were no rights under the European Convention on Human Rights ('the human rights convention') in issue. As Lord Neuberger MR put it:

... it seems to me that, before the secretary of state could invoke the benefit to the national exchequer by selecting an index he considered less good, three requirements would normally have to be met. Those requirements are (i) there would, in the secretary of state's view have to be little to choose between the indices in terms of reliability and aptness, (ii) the benefit to the national exchequer of choosing the less good index would have to be significant, and (iii) the need to benefit the national exchequer, in terms of the national economy and demands on the public purse, would have to be clear.

... In other words, the secretary of state could only select the less good index if it was proportionate to do so, and, bearing in mind the purpose of the uprating exercise, the circumstances would normally have to be unusual before it could be proportionate to select an index, or other method, which the secretary of state considered was less good than another (paras 63 and 64).

■ Simcoe v Jacuzzi UK Group plc

[2012] EWCA Civ 137, 16 February 2012

The issue in this case was the date from which interest runs on a costs order. The respondent claimed that the effect of Civil Procedure Rule (CPR) 40.8(1) was that the relevant date was the date of assessment and not the initial order. It lost on the construction point, but a further issue was whether or not CPR 40.8(1) was effective in county courts. County Courts Act 1984 s74 empowers the Lord Chancellor to make orders about interest on judgment debts 'with the concurrence of the Treasury'. The Treasury had not concurred in the making of this rule and Lord Neuberger held that this failure made the rule ineffective in county courts.

... As a matter of principle, it seems to me that, if parliament has stated in a statute that regulations made under that statute have to be made by one government department with the concurrence of a second government department, any regulations made by the one department, without the concurrence of the