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

New housing legislation and policies

The Queen's Speech for the new 2010/2011 parliamentary year included the statement that: 'A bill will be introduced to … give local communities control over housing and planning decisions'. That bill is the Decentralisation and Localism Bill, which will:

- lead to abolition of home information packs (use of which is currently suspended);
- create new trusts to make it simpler for communities to provide homes for local people; and
- facilitate a review and possible replacement of the Housing Revenue Account basis for council housing finance.

The bill is expected to be introduced in the House of Commons in the autumn. In the meantime, a series of more detailed housing policy announcements have been made.

- The housing minister, Grant Shapps MP, has announced that the new coalition government will abolish the present Housing Revenue Account arrangements for council housing finance after considering the results of the consultation exercise on a replacement system which concluded on 6 July 2010: Communities and Local Government (CLG) news release, 8 June 2010.[1]
- On 9 June 2010, the government issued a new edition of its *Planning policy statement 3 (PPS3): housing* (CLG, June 2010).[2] It sets out the government's strategic housing policy objectives in planning terms. It replaces *Planning policy guidance 3: housing* (PPG3) published in March 2000 and earlier editions of PPS3 published on 29 November 2006 and 19 January 2010.
- When asked for an assurance that future tenants of social housing would enjoy the same security of tenure as existing tenants, the housing minister told the House of Commons that:

> *There are 1.8 million families languishing on that social housing waiting list, and it is right and proper that we look at the way in which we can reduce that list. It may include looking at tenure for the future* (*Hansard* HC Debates col 451, 10 June 2010).

- On the same day, the minister announced that the new government would not be taking forward the previous government's plans for the private rented sector, such as the National Register of Landlords in England, further regulation of letting and managing agents and compulsory written tenancy agreements. However, in respect of 'bad' landlords, the minister announced that he was 'putting councils on alert to use the range of powers already at their disposal to make sure tenants are properly protected': CLG news release, 10 June 2010.[3]
- The government also announced where savings would be made on the *current* government grant (2010/2011) to local authorities. In relation to housing, the housing market renewal grant has been cut by £50m, the Gypsy and Traveller site grant by £30m and the housing and planning delivery grant by £146m: CLG news release, 10 June 2010.[4] In addition, the 'ring fence' is being removed from the Think Family grant (£94m) used to establish family intervention projects and from the housing market renewal grant (£236m): see *Ring-fences removed from local government funding streams* (CLG, June 2010).[5]
- The government has also said that it will be reversing measures introduced on 6 April 2010 to use general planning controls to prevent unauthorised conversion of properties into houses in multiple occupation: see 'Recent developments in housing law', June 2010 *Legal Action* 33. The measures were expected to generate more than 8,000 new planning applications. However, local authorities will now be able to use local planning powers to require planning applications only where they consider them appropriate: CLG news release, 17 June 2010.[6]
- Further details of the new Community Land Trusts, designed to enable groups of local people to deliver affordable housing, were given in a speech made by the housing minister on 29 June 2010.[7]

Social housing regulation

On 24 June 2010, the housing minister announced that the government is reviewing the role and purpose of the Tenant Services Authority (TSA), established under the Housing and Regeneration Act (H&RA) 2008, and considering the best new framework for regulating social housing.[8] The review will consider the full range of options in line with the government's commitment to reduce the number and cost of quangos.

The TSA funded 39 trailblazer pilot projects in 2009/10, with grants of up to £9,000 from the Tenant Excellence Fund, to demonstrate how the 'local offers' aspect of its new regulatory regime could be delivered by social landlords. The successful bidders worked on negotiating local service initiatives with tenants. The report, *Going local. Landlords and tenants working together to raise standards* (TSA, June 2010) summarises the results from the pilots.[9] The TSA has also produced a toolkit to help other social housing providers agree local offers with their tenants: *Local offers toolkit* (TSA, June 2010).[10]

On 1 July 2010, the TSA's chief executive wrote to all social housing providers to confirm that, while the review of social housing regulation is underway, the provisions of the H&RA remain in force.[11] The TSA will continue its current regulatory functions and the letter urges all registered providers to complete their first annual report to tenants by 1 October 2010 and to have locally negotiated 'offers' in place by 1 April 2011.

Legal aid in housing cases

The Lord Chancellor has announced the launch of an internal departmental review of legal aid policy intended to take 'a fundamental look at the legal aid system'. The government will consider the policy it wants to adopt and intends to seek views on a proposed new approach in the autumn: Ministry of Justice news release, 23 June 2010.[12] He gave further detail of the outline of the review in a speech on 30 June 2010.[13]

In June and July 2010, the Legal Services Commission (LSC) ran a tender process for the provision of LSC housing possession court duty schemes under contracts to start in October 2010. The LSC will only contract with one single legal entity per scheme. The award of a contract to provide housing services is a condition of an award of any duty scheme contract.[14] The announcement of the awards of those housing contracts (either

housing plus family or housing plus debt/welfare benefits) was due in July 2010.

The Community Legal Advice service (funded by the LSC) has reported that, in 2009/2010, its 'specialist advisers' helped 28,328 members of the public with housing law problems.[15]

Housing and anti-social behaviour

On 22 June 2010, the TSA and the Chartered Institute of Housing (CIH) published the findings of their survey of recent activity undertaken by social landlords in relation to anti-social behaviour: *Taking action against anti-social behaviour: Baseline findings* (TSA, June 2010).[16] The information gathered through the survey will help shape how services can be tailored to support the more than 100 providers that have requested help and guidance to improve their anti-social behaviour services by the TSA's anti-social behaviour action team (based within the CIH).

The government's general policy direction in relation to tackling anti-social behaviour was set out by the minister for policing and criminal justice, Nick Herbert MP, in a speech given on 23 June 2010.[17]

More help for homeowners

The Financial Services Authority (FSA) has adopted new rules applying from 30 June 2010:

- to mortgage arrears recovery procedures used by mortgage lenders; and
- to sale and rent-back schemes.

The rules provide that:

- mortgage lending firms must no longer apply a monthly arrears charge where an agreement is already in place to repay the arrears;
- payments made by customers in financial difficulties must first be allocated to clearing the missed monthly payments, rather than to arrears charges; and
- repossessions should always be the last resort.

The detail is contained in two documents: *Policy statement 10/9. Mortgage market review: arrears and approved persons. Feedback to CP10/2 and final policy* and *Policy statement 10/8. Regulatory reporting for sale and rent back firms. Feedback on CP10/4 and final rules* (FSA, June 2010).[18]

Homelessness

The latest national statistics on statutory homelessness in England for the period January to March 2010 were released on 10 June 2010: *Statutory homelessness: March quarter 2010 England* (CLG, June 2010).[19]

The housing minister has announced that the government will undertake an overhaul of the arrangements for measuring the number of rough sleepers: CLG news release, 16 June 2010.[20]

A ministerial inter-departmental committee has also been established to take forward measures to tackle homelessness: CLG news release, 16 June 2010.[21]

Housing fraud

The Audit Commission report on *The National Fraud Initiative 2008/09* (May 2010) indicated that 97 units of social housing were recovered by social landlords in that year using the data-matching service provided by the National Fraud Initiative (NFI).[22] The report recommends that housing associations should take part in future NFI anti-fraud exercises and that the TSA should encourage them to do so.

Accommodation for Gypsies and other Travellers

Two early measures from the new government have serious repercussions for the Gypsy and Traveller community's accommodation needs. First, the new Communities Secretary wrote to all local planning authorities on 27 May 2010 to inform them that regional planning considerations no longer need to feature in determination of planning applications.[23] The regional spatial strategies were being developed to ensure sensible distribution of provision for Gypsies and Travellers and are to be scrapped, as are the regional data collection exercises and other regional plans relating to Gypsy and Traveller provision.

Second, there has been a cut of £30m from the Gypsy and Traveller site grant (see above). That effectively ends the programme which was designed to refurbish existing official sites. Concerns about these developments were raised in the House of Lords by Lord Avebury on 27 May 2010 (see *Hansard* HL Debates col 200, 27 May 2010) and in correspondence with ministers.

HUMAN RIGHTS

Article 1 of Protocol No 1

■ Đokić v Bosnia and Herzegovina

App No 6518/04,
27 May 2010

Mr Đokić was a lecturer in a military school in Sarajevo. In 1986, he was allocated a military flat. In 1992, he bought the flat under the Military Flats Act 1990. Although he paid the full purchase price, the local authorities refused to register his title. In 1992, the military school was transferred from Bosnia and Herzegovina to Serbia. Mr Đokić left Bosnia and Herzegovina to continue lecturing at the military school. In 1998, he made an application for the restitution of his flat. It was rejected by the authorities and the courts. In 2005, the Ministry of Defence formally allocated the flat to a former member of the ARBH (Bosnia and Herzegovina Armed Forces) who had been living in the flat since 2000. Mr Đokić complained to the European Court of Human Rights (ECtHR).

After considering the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons ('the Pinheiro Principles'), the court found a breach of article 1 of Protocol No 1. Mr Đokić had been treated differently because of his service in the Yugoslav army. The government had failed to demonstrate that measures depriving people such as Mr Đokić of their flats had freed housing space needed to accommodate those deserving of protection. It ordered the state to pay €60,000 as pecuniary damage.

■ Saghinadze v Georgia

App No 18768/05,
27 May 2010

Mr Saghinadze, a former high-ranking official in the Abkhazian Ministry of the Interior, was appointed Head of the Investigative Department within the Georgian Ministry of the Interior. As a result, he and his family were settled in a cottage belonging to the ministry. Later, a new Minister of the Interior ousted Mr Saghinadze from office 'in a degrading manner'. In October 2004, police officers visited the cottage, and although they could not produce any court decision, instructed Mr Saghinadze and his family to vacate the cottage. They did not do so. In November 2004, a group of approximately 60 armed special forces agents wearing black balaclava-like masks broke into the cottage. Although they did not have any legal document authorising eviction, they forcibly ousted the family from the cottage. Mr Saghinadze brought civil proceedings and filed a criminal complaint. The courts concluded that the ministry, as the rightful owner of the cottage, had been entitled to recover possession.

Mr Saghinadze and his family complained to the ECtHR, alleging breaches of articles 2, 3, 6 and 8 and article 1 of Protocol No 1. They referred to 'the family's degrading and arbitrary eviction from the cottage … and the resulting loss of their home' (para 73). In relation to article 1 of Protocol No 1, the court concluded that Mr Saghinadze had a right to use the cottage as his accommodation and that this right had a clear pecuniary dimension. It should therefore be regarded as 'a possession' for the purposes of article 1 of Protocol No 1. The eviction and dispossession occurred in the absence of any court decision. Furthermore, the domestic courts failed to afford Mr Saghinadze 'the

relevant protection' to which he was entitled. The interference with Mr Saghinadze's peaceful enjoyment of his possession was not lawful. A subsequent judicial review was arbitrary and amounted to a denial of justice. It was accordingly unnecessary to ascertain whether or not the interference pursued a legitimate aim.

There were violations of article 1 of Protocol No 1 and article 8. The court considered that the most appropriate form of redress would be to allow Mr Saghinadze's return to the cottage. Alternatively, he should be provided with other accommodation or compensation. The court awarded non-pecuniary damage of €15,000.

Article 8

■ Băcilă v Romania

App No 19234/04,
30 March 2010

Ms Băcilă lived in Copșa Mică near to one of the largest non-ferrous metal plants in Europe. It discharged significant amounts of sulphur dioxide and dust containing heavy metals, mainly lead and cadmium, into the atmosphere. It was nationalised in 1948 and was run by the state until 1998 when it was sold to a Greek company. Ms Băcilă left the town in 1973 as a result of the pollution, which was affecting the health of her children. She returned in 1996. Analysis carried out from 1998, by public and private bodies, established that heavy metals could be found in the town's waterways, in the air and soil, and in vegetation, at up to 20 times the maximum levels permitted. The rate of illness, particularly respiratory conditions, was seven times higher in Copșa Mică than in the rest of the country. In 2000, the local authorities indicated that they would not take short-term measures against the factory because they had proved ineffective in the past, and that shutting down the plant would trigger social problems. In 2007, the Regional Environmental Protection Agency fined the company 600,000 Romanian lei (about €180,000) for exceeding the sulphur dioxide emission thresholds. In 2005, analysis indicated that the concentration of lead in Ms Băcilă's blood exceeded the permissible limit. She was admitted to hospital with frequent, irritant coughs, voice modification, asthenia and digestion disorders. Ms Băcilă alleged a breach of article 8, complaining that the pollution generated by the plant had had severe detrimental effects on her health and her living environment. She also complained about the inaction of the local authorities in failing to take steps to address the pollution problem.

The ECtHR reiterated that severe environmental pollution can affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely: *López Ostra v Spain* App No 16798/90; (1994) 20 EHRR 277 and *Guerra v Italy* App No 14967/89. States have a positive obligation to adopt reasonable and adequate measures to protect individual rights. They have a duty to regulate the authorisation, operation, safety and monitoring of hazardous activities and to guarantee the effective protection of citizens whose lives could be endangered by such activities. The damage to health caused by the plant's atmospheric emissions had been established by numerous reports from public and private bodies and by medical reports provided by the applicant. The municipal authorities of Copșa Mică had not been directly responsible for the harmful emissions.

However, the state had a duty to take measures to protect residents' well-being. The authorities had failed to strike a fair balance between the interest of ensuring the town's economic well-being (preserving the business of the main employer in the town) and Ms Băcilă's effective enjoyment of the right to respect for her home and for her private and family life. The court held unanimously that there had been a violation of article 8.

POSSESSION CLAIMS

Anti-social behaviour

■ Croydon LBC v Crawford

[2010] EWCA Civ 618,
11 May 2010

The defendant was a secure tenant of the council. It sought an outright possession order on the ground of anti-social behaviour (drug-dealing from the premises by the tenant's son and another male). After a trial, HHJ Ellis made a conditional suspended possession order lasting three years. The defendant sought permission to appeal on the ground that it was not reasonable for any order to be made, or that the order should have been postponed rather than suspended, or that the order should have been for a shorter duration. He also complained about the use of hearsay evidence.

The Court of Appeal refused permission to appeal. No real prospect of success had been established. Morgan J stated:

Insofar as the evidence was hearsay, it was for the judge to assess the weight to be given to it. It is clear from his reasoned judgment that he did assess that matter with care. He felt that he could act upon the evidence … The judge was entitled to assess this evidence in the way which he did (para 23).

Both Morgan J and Carnwath LJ drew attention to County Courts Act 1984 s77(6)(ee), which forbids the court from entertaining an appeal on any question of fact in a case of this type.

Public law defences

■ Brent LBC v Stokes

[2010] EWCA Civ 626,
27 April 2010

The defendant occupied, without permission, a pitch on an official council Gypsy caravan site. When she declined to move to an alternative pitch to enable a site office to be built on the occupied pitch, the council sought possession. The defence asserted that the decision to evict had been taken in breach of public law principles and relied on an 'article 8 gateway B' challenge to that decision. HHJ Copley granted a possession order and the High Court (King J) dismissed an appeal ([2009] EWHC 1426 (QB); September 2009 *Legal Action* 31).

The Court of Appeal refused permission to bring a second appeal. The council was under no statutory obligation to give further reasons for, or otherwise explain, its decision to evict a trespasser. In the absence of any positive evidence that the council had failed to take account of relevant considerations, the defence was not seriously arguable.

■ Husband v Solihull MBC

[2010] EWCA Civ 684,
9 June 2010

Mr Husband sought to challenge by judicial review a decision to bring a possession claim after his wife had terminated their joint tenancy by service of a notice to quit. Beatson J refused permission ([2009] EWHC 3673 (Admin); May 2010 *Legal Action* 22).

Lord Neuberger MR refused a renewed application. The issue was academic because of the state of the law and Mr Husband was free to raise the issues which he wanted decided in the county court possession claim.

■ Harrow LBC v Wilson

[2010] EWHC 1574 (QB),
28 June 2010

The defendant became a secure tenant in 1992. After she married, the tenancy was transferred into the joint names of herself and her husband. They had a daughter, but Mrs Wilson's mental health deteriorated and by the end of 2006 her husband decided that he could no longer live with her. A housing officer met him and discussed the implications of him serving a notice to quit and moving out. In January 2007, the housing officer gave him a blank notice to

quit and explained that if he served it on the council it would end the tenancy for both himself and his wife. He completed and served the notice in March 2007. The council made a decision to institute possession proceedings and in so doing took into account article 8 considerations. After a possession claim was issued, a litigation friend was appointed and the claim defended by challenging the validity of the notice to quit and asserting that it was incompatible with article 8. HHJ Million made a possession order.

Foskett J dismissed the subsequent appeal. Unless the terms of a tenancy agreement provide otherwise, a notice to quit given by one joint tenant without the concurrence of any other joint tenant is effective to determine a periodic tenancy (*Hammersmith and Fulham LBC v Monk* [1991] UKHL 6; [1992] 1 AC 478, HL). Foskett J held that the rule in *Monk* is compatible with article 8. Even if a converse position was arguable, he would have been bound to follow the guidance given in *Kay v Lambeth LBC*; *Leeds City Council v Price* [2006] UKHL 10; [2006] 2 AC 465, HL. Foskett J gave permission to appeal.

Domestic violence

■ Metropolitan Housing Trust v Hadjazi

[2010] EWCA Civ 750,
1 July 2010

Mr Hadjazi was a periodic assured tenant of a four-bedroom house. Metropolitan Housing Trust sought possession on Housing Act (HA) 1988 Sch 2 Grounds 12 (breach of tenancy obligation), 14 (nuisance or annoyance) and 14A (domestic violence). HHJ Ellis found that the violence or threats of violence that caused Mr Hadjazi's wife and children to leave the property occurred not while they were a couple living together in the property, but after Mr Hadjazi left and went to live temporarily elsewhere. He continued to be violent towards them until they left the property. He then returned to live there on his own. HHJ Ellis found that none of the grounds was proved, and that even if they had been, it would not have been reasonable in all the circumstances to make a possession order. Metropolitan appealed. The issue on appeal was whether or not Ground 14A was confined to cases where a couple were living together in the dwelling house immediately before the victim of the violence left.

The Court of Appeal allowed the appeal. First, there was nothing ambiguous about either the concept or wording of Ground 14A that could properly attract a principle of interpretation favouring the party to a marriage or civil partnership or equivalent relationship who had been violent or threatening towards the other party to the relationship, thereby causing the other party to leave the property in which they had lived together. Second, the use of the past tense did not expressly or impliedly require the parties to the relationship to be living together as a couple at the date of the causative violence or at the date of the relevant triggering event. Ground 14A covered the facts found by the judge and his construction defied common sense. The case was remitted to the county court for reconsideration of reasonableness.

Death and succession

■ Austin v Southwark LBC

[2010] UKSC 28,
23 June 2010,
[2010] 3 WLR 144

Alan Austin was granted a secure tenancy in 1983. In 1986, as a result of rent arrears, Southwark brought a possession claim. In 1987, a suspended possession order was made, but Alan Austin defaulted and became a tolerated trespasser. His brother, Barry Austin, went to live with him in 2003. Alan Austin later died and Southwark brought a new possession claim against Barry Austin. He made an application under Civil Procedure Rules (CPR) Part 19 to be joined as a party to the earlier possession claim, to represent the estate of his brother and retrospectively to postpone the date for possession so that he would be entitled to succeed to the tenancy under HA 1985 s87(b).

HHJ Welchman dismissed the application. Following *Brent LBC v Knightley* [1997] EWCA Civ 917; (1997) 29 HLR 857, he held that the right to apply for a postponement of an order for possession under HA 1985 s85 was not an interest in land which was capable of being inherited. Any right ceased on the brother's death. Barry Austin appealed, first to the High Court and then to the Court of Appeal. Both appeals were dismissed. He appealed further to the Supreme Court, arguing that:

- a secure tenancy does not end on breach of a conditional suspended possession order but endures until the order for possession is executed; and, alternatively,
- a tenant's statutory right to apply to postpone the date for possession, and thus revive the secure tenancy, survives his/her death and passes to the estate of the deceased former tenant.

The Supreme Court unanimously allowed the appeal. In relation to the first argument, there were 'very good reasons for accepting that the law as declared in [*Thompson v Elmbridge BC* [1987] 1 WLR 1425, CA], however unsatisfactory it can now be seen to be, should not be disturbed' (Lord Hope, para 31). In relation to the second argument, Lord Hope pointed out that the powers contained in s85(2) are exercisable 'at any time before the execution of the order'.

The possibility that the tenant may have died in the meantime is not mentioned. If it had been the intention that the powers should not be exercisable on the tenant's death it would have been easy to say so. Indeed, given the width of the phrase that is actually used, one would have expected words to that effect to have been inserted (para 38).

Knightley was wrongly decided and should be overruled. The fact that the former secure tenant had died did not deprive the court of its jurisdiction to exercise the power to postpone the date of possession under s85(2)(b). Barry Austin was able to represent the estate of his brother and to apply under CPR 19.8 for the date of possession to be postponed. His s85(2) application was remitted to Lambeth County Court for determination. In a concurring judgment, Lady Hale gave a 'trenchant analysis' and 'definitive obituary of the "tolerated trespasser"' (para 43). Lord Walker described the former status of 'tolerated trespasser', abolished by the H&RA, as an 'unfortunate zombie-like creature [which] achieved a sort of half-life only through a series of judicial decisions in which courts failed, or did not need, to face up to the theoretical and practical contradictions inherent in the notion' (para 43).

ASSURED SHORTHOLD TENANCIES

Tenant's deposit

■ Baafi v Mapp

Central London County Court,
24 June 2010[24]

Ms Mapp was the assured shorthold tenant of a house owned by Ms Baafi. A deposit was paid by the tenant and registered by the landlord with the tenancy deposit scheme provider 'Mydeposits.co.uk'. The certificate provided by Mydeposits.co.uk stated on its face:

Part 1 [of the certificate] does not satisfy the legal requirement for the landlord/agent to tell the tenant what to do if at the end of the tenancy agreement the landlord/agent or tenant cannot be contacted. Nor does it explain the circumstances in which the landlord/agent will retain part or all of the deposit. This information will normally be included in the tenancy agreement.

The tenancy agreement had been drafted

before the commencement of the tenancy deposit scheme legislation and so made no specific reference to tenancy deposit schemes or the prescribed information required by HA 2004 s213(5) and the Housing (Tenancy Deposits) (Prescribed Information) Order 2007 (H(TD)(PI) Order) SI No 797. It was common ground that the tenant had not been given any information other than that contained in the Mydeposits. co.uk literature and the tenancy agreement.

In a possession claim, at first instance, District Judge Gerlis applied what he called a 'purposive approach'. He decided that, so long as the deposit had been put into a scheme by the landlord, the lack of the prescribed information did not prevent a landlord from seeking possession by using a HA 1988 s21 notice. He therefore made an order for possession and dismissed the tenant's counterclaim for three times the deposit. The tenant appealed.

Allowing the appeal, HHJ McMullen QC found that as the statutory framework was clear, a purposive approach to the legislation was not necessary. He also stated that had a purposive approach been necessary, he would have found that the purpose of the regulations was to protect a tenant when a landlord disappeared after taking a deposit. The tenancy deposit scheme certificate in this case said on its face that it did not provide all of the information required by the regulations. The tenancy agreement was an 'archaic' document which had been drafted before the introduction of tenancy deposit legislation and did not comply with the regulations. He therefore found that a s21 notice could not be relied on until the information in the regulations had been provided to the tenant. He set aside the possession order and allowed the counterclaim for three times the deposit. He held that if the regulations had not been complied with, the court had no discretion in the matter.

■ O'Brien v Jones

Northampton County Court, 12 February 2010

In June 2008, Mrs Jones granted Mrs O'Brien an assured shorthold tenancy. At the same time as signing the tenancy agreement, Mrs O'Brien was given a document headed 'Prescribed Information Housing Act 2004'. Mrs O'Brien paid a deposit to the landlord's agent which registered it with The Dispute Service (TDS) within 14 days. TDS issued a certificate confirming that the deposit had been protected. The certificate did not include the landlord's name and address. However, the tenancy agreement gave the landlord's address for service as that of the agent and the telephone number of the agent appeared on the inventory. Mrs O'Brien argued that this did not comply with H(TD)(PI) Order article 2, which requires provision of:

(g) the following information in connection with the tenancy in respect of which the deposit has been paid … (iii) the name, address, telephone number, and any e-mail address or fax number of the landlord.

She appears to have claimed three times the amount of the deposit in line with s214. The tenancy came to an end by mutual agreement in December 2008.

District Judge Watson found that there was no failure to provide the prescribed information by failing to give the landlord's home address or telephone number. Even if there had been a breach by providing the agent's address and telephone number, it had been remedied before the application had been made. In any event, the judge did not interpret the regulations as requiring the giving of the landlord's residential address. He dismissed the claim (see too *Harvey v Bamforth* Sheffield County Court, 8 August 2008; November 2008 *Legal Action* 18).

TRESPASSERS

■ Mayor of London v Hall

[2010] EWHC 1613 (QB), 29 June 2010

Ms Hall pitched her tent on Parliament Square Gardens in London as part of the Democracy Village peace camp. The Mayor of London sought a possession order against her and the other protesters on the gardens. The Greater London Authority Act 1999 vested title to the gardens in the Queen but gave management and control to the Greater London Authority (GLA), acting through the Mayor. Ms Hall defended on the basis that the Mayor could not maintain a possession claim in the absence of a right to possession or, alternatively, that a possession order would infringe her rights to assemble and protest.

The High Court granted a possession order. The judge said that the functions of the GLA under the Act put the Mayor in sufficient control of the gardens to amount to occupation and to sustain a possession claim. A possession order would not infringe Ms Hall's human rights as it was a proportionate response to an unauthorised encampment.

IMPLIED SURRENDER

■ Sable v QFS Scaffolding Limited

[2010] EWCA Civ 682, 17 June 2010

In a case in which it was claimed that there had been a surrender of the tenancy of a builder's yard by operation of law, Morgan J extracted a number of propositions from *Woodfall*:

- There is no legal distinction between a surrender by operation of law and an implied surrender.
- The term surrender by operation of law is applied to cases where a landlord or a tenant has been a party to some act, the validity of which he is afterwards estopped from disputing, and which would not be valid if the tenancy had continued to exist.
- The principle does not depend on the subjective intentions of the parties but on estoppel.
- In this context, there is no estoppel by mere verbal agreement; there must in addition be some act which is inconsistent with the continuance of the tenancy.
- In point of time, the surrender is treated as having taken place immediately before the act to which the landlord or the tenant is a party.
- The conduct of the parties must unequivocally amount to an acceptance that the tenancy has ended; there must be either a relinquishment of possession and its acceptance by the landlord, or other conduct consistent only with the cesser of the tenancy.
- It has been said that the circumstances must be such as to render it inequitable for the landlord or the tenant to dispute that the tenancy has ended.
- An agreement by the landlord and the tenant that the tenancy shall be put an end to, acted on by the tenant's quitting the premises and the landlord by some unequivocal act taking possession, amounts to a surrender by operation of law; the giving and taking of possession must be unequivocal.
- Where the tenant requests the landlord to let the property to a third party, and the landlord does so, the lease is surrendered at the time of the new letting; the surrender does not take place before the time of the new letting; it is essential that the new letting is effected with the consent of the original tenant; if the original tenant does not consent or know of the new tenancy, there is no surrender; the original tenant's consent may be inferred from conduct or from long acquiescence in the new arrangement.
- A surrender by operation of law may take place where the landlord, with the original tenant's consent, accepts a new tenant as his direct tenant; the consent of the landlord and the original tenant is needed.

Morgan J also stated that the requirement that the conduct of the parties must be inconsistent with the continuation of the lease has been described as 'a high threshold'.

HOMELESSNESS

Offers of accommodation

■ Ravichandran v Lewisham LBC

[2010] EWCA Civ 755,
2 July 2010

The claimants were owed the main housing duty under the homelessness provisions of HA 1996 Part 7 (s193). While they were in temporary accommodation, the council offered them long-term accommodation through its allocation scheme. The offer was refused on the basis that the property did not meet the medical needs of the family. The suitability of that property was, however, upheld on review. The council informed the claimants that it had decided that the refusal had released it from its s193 duty: s193(7). The claimants asserted that it had not been reasonable to accept the offer given their fear of racial harassment in the area of the offered property: s193(7F). On a further review, the council upheld the decision to treat the duty as discharged but did not address whether the non-acceptance of the offer had been reasonable. HHJ Faber dismissed an appeal.

The claimants appealed to the Court of Appeal. The council sought to uphold the decision on the basis that even if the reasonableness of accepting the offer had not been considered, the offer still operated to discharge the duty under s193(5): see *Omar v Birmingham City Council* [2007] EWCA Civ 610. The Court of Appeal allowed a second appeal. The court held that *Omar* had to be confined to its own facts. The court set out the following principles on the notification of accommodation offers and review rights:

(1) Section 193(5) is concerned with offers of temporary accommodation to meet a local housing authority's duty ... Section 193(7) is concerned with offers of permanent accommodation pursuant to the authority's allocation scheme under Part VI ...

(2) An authority making an offer of accommodation, the refusal of which it intends to rely upon in discharge of its duty under section 193(2), should always make clear to the applicant whether the offer is intended to be within section 193(5) or within section 193(7). Where the authority makes clear that the offer is intended to be within section 193(7), it cannot subsequently treat the offer, and any refusal of it, as made under section 193(5).

(3) In the case of an offer under section 193(7), section 193(7F) requires the authority to be satisfied that, in addition to the accommodation being suitable for the applicant, it would also be reasonable for the applicant to accept the offer. Although there is a significant area of overlap between the suitability of accommodation and the question whether it would be reasonable for the applicant to accept the accommodation, these are distinct and different requirements.

(4) The reasonableness requirement in section 193(7F) is not satisfied merely by the authority making an offer which it considers reasonable. What is required is an offer which it would be reasonable for the applicant to accept.

(5) The applicant is entitled to a review of the suitability requirement in section 193(7F) by virtue of section 202(1)(f) of the 1996 Act and of the reasonableness requirement in section 193(7F) by virtue of section 202(1)(b). It is both possible and desirable for both requirements to be reviewed at the same time. The right to a review of both requirements, and the intention to review both at the same time, should be made clear to the applicant.

(6) The applicant is also entitled to a review of the decision of the authority as to the discharge of its duty under section 193(7) by virtue of section 202(1)(b). If the review takes place before refusal of the final offer of accommodation, it will strictly be a review of the intention that the offer will, on refusal, result in cessation of the authority's duty. If the review takes place after the refusal of accommodation, it will be a review of the authority's confirmation that its duty has ceased by virtue of satisfaction of the statutory pre-conditions for such cessation. The applicant should be informed of the right to such review.

(7) It is desirable that such a review of the decision of the authority as to the discharge of its duty under section 193(7) takes place at the same time as the review of the suitability requirement and the reasonableness requirement in section 193(7F). If it is intended that it will take place at the same time, the applicant should be so informed.

(8) If the review of the suitability requirement and the reasonableness requirement and the decision of the authority as to the discharge of its duty under section 193(7) take place at the same time, by virtue of section 202(2) there will be no further right to review of the decisions on any of those matters. If, however, the decision of the authority as to the discharge of its duty does not take place at the same time as either the review of the suitability requirement or the reasonableness requirement, matters relevant to those requirements which were not taken into account on the earlier review must be taken into account by the authority on the decision review if the matters existed prior to the refusal of the offer, even though they were not raised by the applicant at the earlier review (para 35).

1 Available at: www.communities.gov.uk/news/corporate/1609065.
2 Available at: www.communities.gov.uk/documents/planningandbuilding/pdf/planningpolicystatement3.pdf.
3 Available at: www.communities.gov.uk/newsstories/housing/16026231.
4 Available at: www.communities.gov.uk/news/corporate/1611138.
5 Available at: www.communities.gov.uk/documents/localgovernment/doc/1611282.doc.
6 Available at: www.communities.gov.uk/news/housing/1617158.
7 Available at: www.communities.gov.uk/speeches/corporate/1626687.
8 Available at: www.communities.gov.uk/speeches/corporate/1623835.
9 Available at: www.tenantservicesauthority.org/server/show/ConWebDoc.20483.
10 Available at: www.tenantservicesauthority.org/server/show/ConWebDoc.20496.
11 Available at: www.tenantservicesauthority.org/upload/pdf/Letter_to_providers_100601.pdf.
12 Available at: www.justice.gov.uk/announcement230610b.htm.
13 Available at: www.justice.gov.uk/news/sp300610a.htm.
14 See: www.legalservices.gov.uk/civil/cls_news_11481.asp?page=1&dm_i=4P,6H59,61A18,G0LY,1.
15 See: www.communitylegaladvice.org.uk/en/adviserinformation/lateststatistics.jsp.
16 Available at: www.tenantservicesauthority.org/server/show/ConWebDoc.20516.
17 Available at: www.justice.gov.uk/news/announcement240610a.htm.
18 Available at: www.fsa.gov.uk/pages/Library/Communication/PR/2010/106.shtml.
19 Available at: www.communities.gov.uk/documents/statistics/pdf/1611050.pdf.
20 Available at: www.communities.gov.uk/news/corporate/161113811.
21 Available at: www.communities.gov.uk/newsstories/housing/158770411.
22 Available at: www.audit-commission.gov.uk/nfi/reports/Pages/default.aspx.
23 Available at: www.planning-inspectorate.gov.uk/pins/rss/10-05-27%20-%20SofS%20to%20Council%20Leaders%20-%20Abolition%20of%20Regional%20Strategies.pdf.
24 SA Law Chambers, solicitors, Ilford and Alastair Panton, barrister, London.

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 note 24 for the note of the judgment.