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

Mortgage arrears

Several aspects of the continuing problems with mortgage default have been addressed by recent initiatives. A useful review is given in the House of Commons library briefing paper: *Mortgage arrears and repossessions* (November 2009).[1]

Notification to local authorities

Since 1 October 2009, mortgage lenders have been obliged to notify housing departments of local authorities when they are informed that hearing dates have been fixed for mortgage possession claims: Civil Procedure Rule (CPR) 55.10(2)(b). The thinking is that local authorities will be galvanised by receipt of the notice to take homelessness prevention measures. The notice must be sent to the authorities for the area 'within which the property is located' and that may not be the same local authority as the one for the area in which the county court is situated.

Some local authorities have been receiving a significant number of notifications for properties that are not in their areas. The Council of Mortgage Lenders (CML) has explained that its members are having difficulties because they have been directed to the 'Directgov' website to obtain local authority details by reference to property postcodes. It seems that the site lacks accuracy, particularly for properties in districts covered by both district and county councils. The CML has also updated its webpage of information relating to arrears and repossessions.[2]

In Scotland, the government has issued guidance on the notification obligations applicable there: *Homelessness etc (Scotland) Act 2003 guidance for local authorities on section 11* (Scottish Government, July 2009).[3] It has decided to collect and evaluate data on the number of notices received by local authorities. No such exercise appears to have been adopted in England and Wales. Shelter Scotland has suggested that some evaluation of local authority responses to notices received is needed: *Briefing: Implementing section 11 of the Homelessness (Scotland) Act 2003* (Shelter Scotland, March 2009).[4]

Access to support

On 8 October 2009, another drive to encourage homeowners with mortgage arrears to get advice and representation was launched in 22 hotspot areas which are being targeted as having a higher risk of repossessions because of the high level of unemployment and the number of court orders. In those areas, advertisements highlighting the range of government support available to homeowners will appear in local newspapers, online and on billboards. The 22 areas are: Barking and Dagenham; Birmingham; Bolton; Cannock Chase; Corby; Halton; Kingston-upon-Hull; Knowsley; Liverpool; Manchester; Newham; Northampton; Nottingham; Reading; Redditch; Salford; Sandwell; Sunderland; Swindon; Walsall; Wigan; and Wolverhampton: Communities and Local Government (CLG) news release, 8 October 2009.[5]

Mortgage Rescue Scheme

By autumn 2009, 23 housing associations were participating in the Mortgage Rescue Scheme (MRS) in England under which they buy the homes of defaulting homeowners using up to £285m available in government funding. The Homes and Communities Agency (HCA) has written to all its investment partners encouraging more housing associations to join the MRS and take advantage of the flexible grant packages available for investment in the scheme: HCA news release, 5 October 2009.[6]

Homeowners Mortgage Support Scheme

On 22 October 2009, the government published a copy of the *Master guarantee deed in respect of the Homeowners Mortgage Support Scheme* (CLG, April 2009). It contains the guarantee given by the government to lenders that participate in the Homeowners Mortgage Support Scheme (HMSS).[7] Borrowers' participation in the HMSS is governed by the scheme rules and accompanying guidance notes and the administrative rules set out how participating lenders should operate the scheme.

Tenants of borrowers

On 14 October 2009, consultation on the government's proposals for increased protection of the tenants of defaulting borrowers closed: *Lender repossession of residential property: protection of tenants. Consultation* (CLG, August 2009).[8] The responses both of the CML and the Housing Law Practitioners Association have been published.[9] Pending the outcome of the exercise, a useful briefing on the topic is available from the House of Commons library: *Mortgage repossession: rights of tenants* (August 2009).[10]

Litigation

Borrowers seeking to escape liability by reliance on technical non-compliance with the Consumer Credit Act 1974 by secondary lenders were dealt a blow by the Court of Appeal's decision on 5 November 2009 in *South Pacific Mortgage Ltd v Heath* [2009] EWCA Civ 1135. However, former borrowers engaged in litigation arising from sale and rent-back arrangements appear to have more success: see *Scrowther v Watermill Properties* [2009] EW Misc 6 (EWCC) and *Redstone Mortgages plc v Welch and Jackson,* Birmingham County Court, 22 June 2009: Shelter news release, 9 July 2009.[11]

Human rights and housing

The government has reiterated its view that provision of housing is not a 'public' function in *The Human Rights Act 1998: the definition of 'public authority'. Government response to the Joint Committee on Human Rights' ninth report of session 2006–07*, Cm 7726 (October 2009, Ministry of Justice (MoJ)).[12] The government has indicated that it will undertake a consultation exercise on the way that the definition of 'public authority' (in Human Rights Act (HRA) 1998 s6) is operating. It has also made submissions to the Equality and Human Rights Commission's inquiry into human rights: *Government response to the Equality and Human Rights Commission human rights inquiry report* (October 2009, MoJ).[13]

Housing and anti-social behaviour

In October 2009, the Home Secretary announced another tranche of measures to

be taken to control anti-social behaviour: Home Office press release, 13 October 2009.[14] They include an increased emphasis on prosecuting for breach of anti-social behaviour orders (ASBOs) (see *R v Charles* [2009] EWCA Crim 1570 below). This new drive against anti-social behaviour was signalled in a letter sent on 3 August 2009 by the Home Office to every local authority and police force in England.[15]

In a podcast on 31 October 2009, the Prime Minister said that 'every single one of the most chaotic families in Britain will be subject to a family intervention project with clear rules and clear sanctions'.[16] A description of the arrangements for new family intervention tenancies is given in *ASB Focus Issue 6*, p13 (Home Office, November 2009).[17]

Complaints in housing cases (local authorities)

On 30 October 2009, the Local Government Ombudsmen for England published their latest *Digest of cases 2008/2009* relating to complaints about English local authorities.[18] The chapter of the *Digest* on housing has been made available in PDF format (together with the housing chapters of *Digests* from 2002/2003 to date).

Cases in the *Digest* are selected from investigation reports issued each year, plus some 'local settlements' where the Ombudsmen discontinued an investigation because a council agreed to a remedy. The *Digest* identifies four common themes that feature in cases across different subject areas. These are as follows:

- not taking into account the needs of service users;
- ignorance of, or failure to follow, policies and guidance;
- delays resulting in injustice; and
- making assumptions; not checking information.

Complaints in housing cases (other landlords)

The *Housing Ombudsman Service annual report & accounts 2009* contains a case-work digest which includes housing complaints covering disrepair, rent arrears and anti-social behaviour in respect of a range of social landlords.[19] The service handled a 21 per cent increase in complaints, dealing with almost 4,000 new complaints in the last year.

Housing for offenders

The government has published research examining the delivery of suitable settled accommodation for offenders on probation: *Delivering better housing and employment outcomes for offenders on probation* (Department for Work and Pensions, October 2009).[20] The study explored good practice in counteracting homelessness and helping offenders. The subsequent publication *Homelessness prevention and meeting housing need for (ex)offenders: a guide to practice* (CLG, November 2009) contains practical non-statutory guidance supplementing the 2006 *Homelessness code of guidance for local authorities*.[21]

Landlords, tenants and water charges

The independent review of charging for household water and sewerage services: interim report (Department for Environment, Food and Rural Affairs, June 2009) found a 'striking level' of non-payment of water charges.[22] It concluded that, in relation to tenanted property:

- A statutory change is necessary to identify the property owner as responsible for paying the bill when the property is in multiple occupation (para 9.9.1).
- Water companies should develop more voluntary agreements with registered social landlords and local housing authorities so that water bills are paid with rent for unmeasured customers (para 9.9.5).

A final report is due later this year.

SOCIAL LANDLORDS

Public functions

■ R (Weaver) v London & Quadrant Housing Trust

Supreme Court,
6 November 2009

An appeal panel of three Justices of the Supreme Court has refused the Trust permission to appeal against the Court of Appeal judgment that the Trust's management and termination of a tenancy were not 'private' acts and that, accordingly, the HRA applied to such acts because it was a body undertaking certain public functions (see [2009] EWCA Civ 587, 18 June 2009; July 2009 *Legal Action* 32).

Replacement tenancies

■ Lewisham LBC v Litchmore

Bromley County Court,
2 October 2009[23]

Mr Litchmore became a tolerated trespasser following breach of an earlier suspended possession order. The level of arrears on the rent/mesne profit account varied between c£2,500 arrears and c£100 credit over a six-year period. It was anticipated that a disrepair claim for the full period would exceed the current rent arrears. New possession proceedings were brought by the council and Mr Litchmore brought a disrepair counterclaim. No challenge was made to Mr Litchmore's status before 20 May 2009; thereafter, he had a replacement tenancy. Mr Litchmore applied for an order that the replacement tenancy was to be treated as the same tenancy and continuous under Housing and Regeneration Act 2008 Sch 11 para 21. The council opposed the application. Mr Litchmore argued that as there had been no reduction in the charge for mesne profits, the council had acted as if it was bound by the original repairing obligations throughout. He also argued that to refuse the application would amount to a double penalty and be a breach of article 6 of the European Convention on Human Rights where the current rent arrears were an admitted debt which could be enforced by the council against him.

Deputy District Judge Bhogal made an order that the replacement tenancy be deemed to be the same tenancy and continuous from the date of possession in the original order, so that the counterclaim could include the full period of alleged disrepair. The council was granted permission to appeal. See also page 21 of this issue.

Right to buy

Local Government Ombudsman Complaint

■ Lambeth LBC

07B09106,
28 September 2009

The complainants were tenants of a council flat. In 2000, they applied to purchase it under the 'right-to-buy' scheme. The application was correctly refused because the council did not own the freehold of the block of flats and its lease had less than 50 years left to run. In 2005, the complainants reapplied to buy the flat after discovering that the council had acquired the freehold of the block of flats in 2001, only six months after their initial application.

The Local Government Ombudsman found maladministration causing injustice. The council knew in 2001 that the tenants wanted to buy their home and it should have notified them that they could do so when it bought the freehold. He recommended that the council should remedy the injustice suffered by permitting the complainants to purchase their flat now at a price of £62,000. Alternatively, it should proceed with the offer made to the complainants in 2006 and make the complainants an ex-gratia payment to cover the difference between the two valuations.

Security of tenure

■ **Mexfield Housing Co-Operative Ltd v Berrisford**

[2009] EWHC 2392 (Ch), 5 October 2009

In 1993, Mexfield Housing Co-Operative granted Ms Berrisford a tenancy. It served a notice to quit dated 11 February 2008 terminating the tenancy on 17 March 2008. Mexfield began a possession claim. Its primary submission was that the tenancy fell outside the provisions of the Housing Act (HA) 1988 because Mexfield was registered under the Industrial and Provident Societies Act 1965 and was a fully mutual housing co-operative association within the meaning of HA 1985 s5(2) and Housing Associations Act (HAA) 1985 s1(2), and so was not an assured tenancy (HA 1988 Sch 1 para 12(1)(h)). It applied for summary judgment. HHJ Mitchell dismissed that application. Mexfield appealed.

Peter Smith J allowed the appeal and made a possession order. The tenancy was a common law tenancy with no overriding statutory procedure to protect it. Given that, the tenancy could be terminated by service of the relevant contractual notice. The question of whether or not there were arrears was completely irrelevant to the overriding power to terminate the tenancy by an appropriate contractual notice: that was done. It followed that the tenancy terminated and there was no defence which had any prospect of success. Mexfield satisfied the exceptions under the HAA, and so the tenancy was nothing other than a common law contractual tenancy terminable on serving a notice with the minimum of four weeks. With regards suspension of any order, HA 1980 s89 was the only provision which applied. The power to adjourn was prescribed by that section and fell outside the wide discretion of the county court to adjourn.

PRIVATE SECTOR TENANCIES

Harassment and unlawful eviction damages

■ **Aricioglu v Kaan**

Clerkenwell & Shoreditch County Court, 16 October 2009[24]

Mr Aricioglu, a 25-year-old Turkish man, saw an advert in a Turkish magazine for a room. He visited the premises on 6 January 2009 and moved into one room on the first floor on the same day. The rent was £75 per week. He paid £150 deposit, and then £150 the next week for two weeks' rent. On 27 January 2009, he lost his job. He informed the landlord, Mr Kaan, the following day that he could not pay his rent. He was told that he could not claim housing benefit. Mr Kaan gave him a week in which to find work. On 4 February 2009, Mr Kaan agreed to give Mr Aricioglu a further week. On 12 February 2009, a local authority tenancy relations officer wrote to Mr Kaan stating that he must not evict Mr Aricioglu without due process. In response, Mr Kaan again threatened Mr Aricioglu and said that he would be thrown out if he did not leave by 18 February 2009. He continued to harass him on a daily basis thereafter. Despite visits by tenancy relations officers, on 20 February 2009, Mr Aricioglu was forcibly evicted by Mr Kaan and three or four other men. He was pushed and kicked. He fell down the stairs. He was put onto the street and barred from re-entering while his possessions were packed and brought down to him. He suffered a bruise to his head and a cut on his shoulder. He was left shocked, alone and scared on the streets. The police were called but would not help as he had no tenancy agreement and Mr Kaan had retained his keys. He was assisted by a local authority councillor and obtained bed and breakfast (B&B) accommodation over the weekend. On the following Monday, the same councillor found him a sofa where he could sleep for one night. He was then able, through friends, to find a place to stay for a short period. On 25 February 2009, he applied for readmittance and the case was adjourned to 4 March 2009. After the hearing, Mr Kaan and a friend, who had been at court, confronted Mr Aricioglu and threatened him to such an extent that he decided that he could not pursue the application for an injunction. He eventually found his own accommodation on 16 March 2009.

After a three-day trial, HHJ Mitchell awarded damages as follows:

- ■ Return of the deposit under HA 2004 s214(3) and an order that the defendant pays three times the deposit — £600
- ■ Harassment before eviction — £1,000
- ■ Trespass to person, premises and property on 20 February 2009 — £1,000
- ■ 23 days at £125 per night as a result of the eviction — £2,875
- ■ Aggravated damages:
  – to reflect the manner of the eviction, which was designed to cause maximum distress; and
  – to reflect the threats on 25 February 2009, which were aimed to prevent the claimant pursuing the matter through the courts — £2,500
- ■ Exemplary damages as the defendant was plainly seeking to short circuit the procedure for obtaining possession and had been warned clearly about the illegality of his actions and had agreed not to evict the claimant. He was not only attempting to short circuit proceedings but to prevent the tenancy relations officers' investigation into the issue — £2,000
- ■ Total — £9,975

In addition, the court ordered interest at ten per cent on the total damages for four months (ie, £332.50) and indemnity costs as there had been a Part 36 offer to settle for £5,000 to which the defendant had not responded.

Anti-social behaviour order

■ **R v Charles**

[2009] EWCA Crim 1570, 28 July 2009

In October 2006, Mr Charles, a landlord of private rented accommodation, was convicted of assaulting a police officer. Uxbridge Magistrates' Court imposed a post-conviction ASBO for three years (Crime and Disorder Act 1998). He was later tried for breaching the ASBO under s1(10) ('If without reasonable excuse a person does anything which he is prohibited from doing by an [ASBO], he is guilty of an offence'). The prosecution alleged that in April 2008 (within the period covered by the ASBO) Mr Charles went to a property which he owned at about 10 pm while one of the tenants was sleeping, woke him, demanded rent and made it clear that he intended to change the locks. He told the tenant that he had either to move or be locked inside. The tenant said that Mr Charles had two screwdrivers and used one of them to scratch the tenant's back after he had begun to change the lock on the interior door. Mr Charles's defence was that the tenant was in arrears of rent and that he was changing the lock so that the room could not be locked so as to persuade the tenant to pay his rent. He denied the assault. HHJ Peter Murphy directed the jury that the legal burden of proving whether a defendant acted with reasonable excuse rested on the defence. The jury convicted Mr Charles of breach of the ASBO. He appealed.

The Court of Appeal allowed the appeal and quashed the conviction. Thomas LJ said that there was 'no doubt at all' that paragraph 6.5 of *Anti-social behaviour orders: a guide for the judiciary*, third edition, 2007, published by the Judicial Studies Board was correct:

> *The prosecution must prove a breach of the order to the criminal standard. If the defendant raises the evidential issue of reasonable excuse it is for the prosecution to prove lack of reasonable excuse.*

Long leases

Setting aside possession orders

■ Forcelux Ltd v Binnie

[2009] EWCA Civ 854,
21 October 2009

Mr Binnie had a long lease of a flat at a ground rent with about 94 years left to run. Forcelux was the landlord. Mr Binnie fell into arrears with payment of ground rent and charges. In November 2006, Forcelux obtained a default judgment against him for £893 plus costs. No payment was made by Mr Binnie following that judgment. Forcelux then served a Law of Property Act 1925 s146 notice. There was no response to the notice. In July 2007, Forcelux commenced proceedings for possession. By that time, Forcelux had received no payment from Mr Binnie for over two years and had heard nothing from him for 12 months. The claim form gave the address for Mr Binnie as the address of the flat. A hearing date was fixed, under CPR 55.5, for 11 September 2007. The court attempted to serve the proceedings by post but the envelope was returned marked 'Gone away'. This was because, for some time, Mr Binnie had not been living in the flat and did not pick up any documents relating to this case. He was, in fact, then living with his girlfriend in another flat in the same building. Mr Binnie did not attend the hearing because he had no knowledge of the proceedings. The claimant's witness statement set out the history of arrears and the default judgment and exhibited photographs which showed that the flat had been boarded up and appeared to be unoccupied. District Judge Hudson made a possession order on the basis of the material before him. Mr Binnie first became aware that a possession order had been made on 22 October 2007 when his girlfriend saw two men who were attending at the flat to take possession on behalf of Forcelux. On 10 December 2007, Mr Binnie or his solicitors sent a cheque to Forcelux's solicitors for the outstanding amount. The cheque was subsequently returned in early January 2008. Mr Binnie applied to set aside the possession order under CPR 39.3(3). On 23 July 2008, District Judge Hudson made an order setting aside the order for possession and at the same time granted relief from forfeiture. HHJ Hampton dismissed an appeal. Forcelux appealed to the Court of Appeal.

The Court of Appeal dismissed the appeal. First, it considered whether or not the initial possession hearing was a trial within the meaning of CPR 39.3. Warren J noted that the word 'trial' is not defined for the purposes of this rule. The word must accordingly take its meaning from its context in r39.3 and in the context of the role of r39.3 in the CPR as a whole. The initial hearing of a possession claim issued under CPR Part 55, at which a tenant does not appear, but at which a judge makes a possession order, is not 'a process of determination and decision [which] can sensibly be called a trial as a matter of the ordinary use of the word'. Such a hearing 'can be seen more as a summary procedure in the sense of a procedure carried out rapidly with the omission of most of the steps which in an ordinary case lead to trial'. Accordingly, there was no power to set aside the possession order under CPR 39.3.

However, the Court of Appeal then considered CPR 3.1(2)(m) which gives the court power to 'take any other step or make any other order for the purpose of managing the case and furthering the overriding objective'. It held that even though a court does not have power to set aside a possession order made in a tenant's absence under CPR 39.3(3), CPR 3.1(2)(m) 'is amply wide enough to give the court power to set aside the possession order if, in its discretion, it considers that the interests of justice demand it'. Mr Binnie had a real prospect of successfully defending the claim. The claim for relief from forfeiture was compelling given the comparatively small amount of money outstanding (which Mr Binnie was able and willing to pay) and the consequence of forfeiture for Mr Binnie, namely the loss of the lease, a valuable lease at a ground rent with 94 years then left to run. After considering the checklist under CPR 3.9(1) 'so far as relevant by way of analogy', the Court of Appeal concluded that this was a case for the exercise of the discretion in favour of Mr Binnie.

HOUSING ALLOCATION

■ Birmingham City Council v Qasim and others

[2009] EWCA Civ 1080,
20 October 2009

The council adopted a housing allocation scheme based on priority bands, for the purposes of HA 1996 Part 6. A clerical officer employed in one of the council's area housing offices improperly manipulated the council's computer system to grant tenancies of more than six separate council properties without reference to the allocation scheme. The council sought possession against the defendants who had been granted those tenancies on the basis that they had not been allocated in line with its allocation scheme and were therefore void: HA 1996 s167(8). In the alternative, the council claimed possession under the statutory grounds in HA 1985 Sch 2. The defendants applied to strike out the claims.

Deputy Circuit Judge Brunning struck out all the claims. Applying *Islington LBC v Uckac* [2006] EWCA Civ 340; [2006] 1 WLR 1303, CA, he held that the secure tenancy regime had to be treated as a complete code under which possession could only be claimed on statutory grounds. These claims were doomed to fail because there was no evidence that any of the families had given any false information to obtain the tenancies or paid any premium for them: see December 2008 *Legal Action* 24.

The council appealed against the rejection of its claim that the tenancies were void for want of compliance with the allocation scheme. The Court of Appeal dismissed the appeal. The council's powers to grant tenancies lay in HA 1985 Part 2. Failure to comply with the allocation scheme under HA 1996 Part 6 did not render the tenancies void. Part 6 is concerned with selection and nomination and not with the grant of tenancies. Lord Neuberger MR said that allocation of housing under an allocation scheme and the granting of specific tenancies were distinct exercises:

> *It seems to me that Part II of the 1985 Act and Part VI of the 1996 Act are concerned with different, if in practice often closely connected, activities. Part II of the 1985 Act regulates the power of a local authority, such as the council, to effect disposals (including sales and lettings) of housing accommodation, and prescribes the consequences of any failure to comply with its regulatory regime. On the other hand, Part VI of the 1996 Act is concerned with requiring local housing authorities, such as the council, to prepare housing allocation schemes and to allocate housing in accordance therewith. In other words, Part VI of the 1996 Act is concerned with, indeed limited to, establishing and then managing priorities between applicants for residential accommodation (which may or may not be owned by the local authority in question) as it becomes available for letting, which effectively is preliminary to, and not part of, the actual letting of such accommodation, which is governed by Part II of the 1985 Act* (para 18).

The fact that the tenancies had been granted without reference to the allocation scheme did not render them void. That did not empty s167(8) of effect because:

> *… if an authority failed to allocate housing accommodation in accordance with their allocation scheme, an applicant who was prejudiced thereby could apply to the Administrative Court, seeking for instance, an*

order that the allocation in question be set aside. Such an applicant would, of course, have to act quickly if he wanted to stop a specific tenancy being granted; but, even if the application was made too late (or failed on grounds of discretion), it would still presumably have the effect of ensuring that the authority observed the terms of their scheme in the future (para 39).

■ R (Neville) v Wandsworth LBC

[2009] EWHC 2405 (Admin), 8 June 2009

The claimant's mother died in 2008. She had been a secure tenant, but in 2004 a suspended possession order was made requiring possession to be given on a specified date. It was subsequently breached but was never enforced. The claimant asked the council to allocate him a tenancy of his mother's home under the discretionary policy in its allocation scheme for non-statutory succession. The council declined because its policy referred to situations where 'a tenant dies' and, by operation of HA 1985 s82(2), the tenancy had ended on the first date of the mother's breach of the suspended order.

The claimant sought judicial review on the basis that:

■ his mother had been a 'tenant' at the date of her death;

■ if not, he should still be considered for a discretionary allocation; and

■ his application should be considered on the terms of the old allocation policy applicable at the date of his application, not the council's latest version.

Deputy High Court Judge Ockelton dismissed the application for permission to claim judicial review. He held that:

■ the mother's tenancy had ended when the possession order took effect so she had not been 'a tenant' at the date of her death. *Harlow DC v Hall* [2006] EWCA Civ 156 had not been overruled by the House of Lords in *Knowsley Housing Trust v White* [2008] UKHL 70;

■ both the old and new policy referred to 'a tenant' and the discretion did not extend to prospective successors of non-tenants; and

■ the council had been entitled to revise its policy and had made no error in deciding the application under its current policy.

The tenancy had not been restored in the mother's lifetime and the right to apply for its restoration died with her: *Austin v Southwark LBC* [2009] EWCA Civ 66.

Comment: The correctness of this decision may be considered by the Supreme Court when it hears the appeal in *Austin v Southwark LBC* in April 2010.

Public Services Ombudsman for Wales

Complaint

■ Vale of Glamorgan Council

2008/01344, 22 October 2009

The council operated a choice-based lettings system under HA 1996 Part 6 based on bands (gold, silver and bronze). The complainants were council tenants of a three-bedroom maisonette where they lived with a teenage child and two adult children. They were told by a housing officer that if the two eldest children left, their transfer application for a transfer would be moved into the gold band because of under-occupation. When the eldest children moved out, the application was recategorised into the gold band but only for bids they might make for flats. The complainants wished to bid for a house.

They sought a review by the council but the Lettings Panel conducting the review held that they were adequately housed and moved the application to the bronze category which meant they had no reasonable prospects of a successful bid for a house.

The Ombudsman found extensive maladministration.

■ The housing officer had given wrong advice to the complainants.

■ The application had then been wrongly recategorised to the gold band.

■ The council had then limited the bidding to flats when there was no provision for such limitation in its allocation scheme.

■ The family's circumstances had been misrepresented to the Lettings Panel which had not conducted a fair and proper process.

The council agreed to amend its scheme and its application form and the Ombudsman recommended apologies, compensation and staff retraining.

HOMELESSNESS

Applications

■ G v Haringey LBC

[2009] EWHC 2699 (Admin), 30 October 2009

The claimant, a British national, applied to the council for homelessness assistance under HA 1996 Part 7. The council decided that she was not homeless because she owned accommodation available to her in Colombia. The claimant sought a review on the basis that the accommodation there was not suitable for her youngest child, who was autistic, for whom appropriate care and support was not available in Colombia. The council's decision was upheld on review in September 2008 (and a subsequent appeal was dismissed) on the basis that although better support for the child might be available in the UK sufficient support was available in Colombia to render the accommodation there reasonable to occupy.

In January 2009 the claimant applied again, submitting more information about her child's circumstances and needs. In particular, fresh expert evidence indicated that the child would be unable to function positively without the support available in the UK. The council declined to entertain the application because it disclosed no new facts. The new expert evidence simply confirmed the premise that had already been accepted, viz that better provision could be made in the UK. A new application should only be entertained on new facts and there were none: *Begum v Tower Hamlets LBC* [2005] 1 WLR 2103; [2006] HLR 9, CA.

Burnett J quashed that decision. The factual position had moved on between September 2008 and January 2009. The new material from the expert showed not only that a lessened quality of support would be available in Colombia, but that having to live there would have a profound adverse impact on the youngest daughter. That was 'new' material and required the application to be entertained.

Local Government Ombudsman

Complaint

■ Canterbury City Council

08017330, 12 October 2009

The complainants were a couple living in unsatisfactory accommodation with other family members. They were sleeping on a living-room floor. Their application for a social housing allocation under HA 1996 Part 6 had very low priority. When the female complainant became pregnant, the couple applied to the council for assistance with obtaining accommodation in August 2008. They were told by a housing advice officer to look for private rented or shared-ownership accommodation. When the couple were asked to leave because the host family wanted to sell the home in which they were staying, they approached the council in November 2008 and were directed to estate agents and told to keep looking for private rented accommodation. By December 2008, the female complainant's condition was such that she used crutches indoors and a wheelchair outdoors. A housing advice officer said that if the council was required to supply emergency accommodation that would be B&B. In January 2009, the host family ejected the complainants and the council agreed to provide a room on the first floor of a hotel without a lift. The female complainant would have had to be carried up the stairs, but the

couple never took up the hotel room having been greeted at the door by drug dealers. The eventual decision on their homelessness application failed to notify the right to a review (HA 1996 s184) and a later letter concerning an offer of accommodation was 'badly worded and ambiguous'.

The Ombudsman was concerned about the following:

- Officers' failure to recognise that a homelessness application had been made.
- Officers' reliance on homelessness prevention as an alternative to taking a homelessness application (instead of pursuing the two in tandem).
- Officers' implied threat of B&B accommodation in an apparent attempt to dissuade the couple from making an application.

He found extensive maladministration established. In a withering critique of the council's Housing Options Service he wrote that the council had 'lost sight of' its statutory duties and that:

I am concerned that the advice given by officers may actively discourage people from making applications. In particular, I am concerned that while the council may use bed and breakfast accommodation only in emergencies when nothing else is available, officers routinely tell applicants this is where they may end up being placed. This may not be intended as a threat, but this is how it comes across.

... homelessness prevention activity does not absolve the council of the duties placed upon it by the [HA] 1996. I have been told that officers have to be sure that applicants are homeless or threatened with homelessness, yet that is what the enquiries required of the council under section 184 of the 1996 Act are intended to establish. Officers could not say when [the complainants] had made a homelessness application. This suggests that officers are so focused on giving advice that they are failing to spot when applicants are homeless or threatened with homelessness, with all the duties that places on the council. It would appear, therefore, that the council is failing to comply with those duties (paras 35 and 36).

In respect of the hotel room, the Ombudsman wrote:

The council says it explored all resources available to it to find suitable accommodation, but has provided no evidence to show this is the case either at the time or since. It seems unlikely that on the day in question this was the only accommodation available anywhere in the council's district (para 49).

In respect of the maladministration causing injustice, he recommended:

- £1,750 compensation;
- changes to policy and procedures for dealing with homelessness applicants and medical information provided in support of applications;
- changes to standard letters; and
- appropriate training of relevant staff.

Priority need

■ Couzens v Colchester BC
[2009] EWCA Civ 1063,
26 August 2009

The claimant, a single man aged 48, suffered with chronic fatigue syndrome (known as ME). On his application for homelessness assistance, the council decided that he had no priority need: HA 1996 s189. The decision that he was not 'vulnerable' was upheld on a review. HHJ Peter Dedman dismissed an appeal from that decision. The claimant sought permission to appeal on the bases that:

- the council had contracted out the function of undertaking the review, but the council's reviewing officer had then simply adopted the draft report of the contractor virtually word for word without proper consideration of it;
- a report of the claimant's GP had been referred to the council's medical advisers, NowMedical. After its advice had been obtained, a further GP's report was submitted but it was not referred back to NowMedical, which had not examined the claimant and yet an adverse view of vulnerability had been adopted; and
- the reviewing officer had not interviewed the claimant and the contractor had only spoken to him by telephone.

Arden LJ refused a renewed application for permission to appeal. She held that:

- the evidence of the reviewing officer was that he had read the report of the contractor and agreed with it, and only in those circumstances adopted it as his own in keeping with his usual practice;
- the reviewing officer's decision letter showed that he had considered all the medical advice received but, not least in the light of the fact that the claimant had slept rough for seven years, had formed his own view that the claimant would not be vulnerable if homeless; and
- while only conducting a review interview by telephone might give rise to an issue in some cases, that was not so in this case because it was not suggested that there had been any material not taken into account by the reviewing officer as a result of not conducting a face-to-face interview.

Notification

■ Ali v Birmingham City Council
B5/09/0334,
14 October 2009,
[2009] All ER (D) 150 (Oct)

The council owed the claimant the main housing duty under the homelessness provisions of HA 1996 s193. When the claimant failed to accept an offer of accommodation, made in writing, the council decided that its duty had come to an end. The claimant had a poor command of English and asserted that the obligation that he be 'informed' by the council of the consequences of the offer (see ss193(5) and (7)) – and of his rights to review - required the council to show that the information given to him had been understood properly. Recorder Tidbury dismissed an appeal.

On a second appeal, the Court of Appeal held that the obligation to 'inform' was different from the obligation to 'notify' used elsewhere in Part 7. It simply required that the relevant information be conveyed in understandable English in cases where interpretation and translation services had been declined. A translation was *not* required in every case.

Suitable accommodation

■ R (M) v Watford BC
[2009] EWHC 2712 (Admin),
23 September 2009

The council decided that although the claimant was eligible and had a priority need, she had become homeless intentionally. The council therefore provided her household with hostel accommodation in performance of its duty under HA 1996 190(2)(a). The claimant sought a review of the decision that she was not owed the main housing duty under s193 and the accommodation was continued pending review: s188. The reviewing officer upheld the finding of intentional homelessness. The claimant appealed to the county court. The council decided to exercise its discretion to accommodate pending the appeal and continued the hostel accommodation: s204(4). The appeal was delayed awaiting the outcome of an appeal in another case, but by September 2009 was expected to be heard within a further 12 to 15 weeks. The claimant asked to be moved immediately to other accommodation on the ground that while the hostel might have been suitable accommodation for a few weeks, it was no longer suitable accommodation. The council declined. The claimant sought judicial review.

Walker J refused permission to bring a claim for judicial review. There had been no arguable error of law by the council in deciding that the accommodation was

'suitable' for the relatively limited further period for which it would be occupied pending the county court appeal hearing.

■ **Mich-Onyibe v Wandsworth LBC**
[2008] EWCA Civ 1649,
4 November 2008

The council accepted that it owed the claimant the main housing duty under HA 1996 s193. It made her an offer of first-floor studio accommodation. She sought a review of the offer contending that it was not suitable on medical grounds and because she needed a carer. The reviewing officer decided that the accommodation offered had been suitable. After further extra-statutory reviews prompted by the submission of further medical evidence, the council decided that its duty had been discharged. The claimant appealed to the county court on a point of law relying on five grounds. Recorder Bueno dismissed the appeal.

On a second appeal to the Court of Appeal both parties agreed that the judge's reasons were inadequate, he had not dealt with the case as advanced to him and, accordingly, the appeal had to be allowed. The council invited the Court of Appeal to hear the substantive appeal against the review decision rather than remit it for a fresh hearing in the county court. The Court of Appeal declined. While there could not be an absolute rule that the court would never hear such an appeal rather than remit the appeal, it would not do so in this case because to do so would engage the resources of three judges rather than one; parliament had entrusted the appeal function to the county court and the council was not prejudiced by any delay because it was not accommodating the claimant.

Court orders

■ **MSA v Croydon LBC**
[2009] EWHC 2474 (Admin),
12 October 2009

In a claim for judicial review, the question arose whether or not a penal notice should be attached to a mandatory order against a local authority (see also page 30 of this issue). Collins J said:

> *... I do not think that a penal notice is necessary in orders made against a public body. A failure to comply with an order can be dealt with by an application to the court for a finding of contempt and, if necessary, a further mandatory order which may contain an indication of what might happen should there be any further failure to comply. Adverse findings coupled with what would probably be an order to pay indemnity costs should suffice since it is to be expected that a public body would not deliberately flout an order of the court. Were that to happen, the contemnor could be brought before the court and, were he to threaten to persist in his refusal, an order could be made which made it clear that if he did he would be liable to imprisonment or a fine* (para 12).

1 Available at: www.parliament.uk/commons/lib/research/briefings/snsp-04769.pdf.
2 Visit: www.cml.org.uk/cml/policy/issues/1629.
3 Available at: www.scotland.gov.uk/Resource/Doc/1125/0084485.doc.
4 Available at: http://scotland.shelter.org.uk/__data/assets/pdf_file/0009/184509/Briefing_on_Section_11_Fl...pdf.
5 Available at: www.communities.gov.uk/news/housing/1353465.
6 Available at: www.homesandcommunities.co.uk/hca-grant-flexibility-associations-mortgage-rescue.htm.
7 Available at: www.communities.gov.uk/documents/housing/pdf/1363989.pdf.
8 Available at: www.communities.gov.uk/documents/housing/pdf/1304815.
9 See note 2 and available at: www.hlpa.org.uk/uploads/LENDERREPOSSESSIONDCLG.doc respectively.
10 Available at: www.parliament.uk/commons/lib/research/briefings/snsp-05019.pdf.
11 Available at: http://england.shelter.org.uk/news/july_2009/landmark_sale_and_rent_back_ruling.
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21 Available at: www.communities.gov.uk/documents/housing/pdf/1357348.pdf.
22 Available at: www.defra.gov.uk/environment/quality/water/industry/walkerreview/documents/walker-call-for-evidence.pdf.
23 Charlotte Collins, Anthony Gold, solicitors and Michael Paget, barrister, London.
24 Ben Chataway, Hopkin Murray Beskine, solicitors and Tracey Bloom, barrister, London.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. Readers can visit their personal websites at: www.nicmadge.co.uk and at: www.gardencourtchambers.co.uk/barristers/jan_luba_qc.cfm. **The authors are grateful to the colleagues at notes 23 and 24 for transcripts or notes of judgments.**

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