Recent developments in housing law

Nic Madge and **Jan Luba QC** 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

UK government housing policy

In May 2010, the new coalition government published its full programme of policies: *The coalition: our programme for government* (Cabinet Office, May 2010).[1] Housing-related policy commitments include:

- more protection against aggressive bailiffs and unreasonable charging orders;
- ensuring that courts have the power to insist that repossession is always a last resort;
- a ban on orders for sale on unsecured debts of less than £25,000;
- exploring a range of measures to bring empty homes into use;
- promoting shared-ownership schemes; and
- helping social tenants and others to own or part-own their homes.

The document also commits the government:

- to carrying out a fundamental review of legal aid 'to make it work more efficiently' (this is the policy responsibility of Jonathan Djanogly MP, parliamentary under-secretary of state, who has been allocated the portfolio for legal aid and legal services at the Ministry of Justice (MoJ));
- to introducing effective measures to tackle anti-social behaviour and low-level crime, including forms of restorative justice such as neighbourhood justice panels; and
- to establishing a Commission to investigate the creation of a British Bill of Rights.

In May 2010, the new Secretary of State for Communities and Local Government (CLG) and the new housing minister jointly announced that primary legislation would be introduced to abolish home information packs (HIPs): CLG news release, 20 May 2010.[2] Pending the passage of that legislation, the requirement for homeowners to prepare a HIP when selling a property was suspended from 21 May 2010 by the Home Information Pack (Suspension) Order 2010 SI No 1455. However, the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment) Regulations 2010 SI No 1456 introduced a new duty for sellers, from 21 May 2010, of residential property to secure the commissioning of an energy performance certificate before putting the property on the market.

In relation to the private rented sector, the new housing minister has said that the government believes that the existing statutory regime for the sector strikes the right balance: *Hansard* HC Debates col 446, 10 June 2010. As a result, the previous government's plans for further registration and regulation of private landlords and letting agents will not be pursued: CLG news release, 10 June 2010.[3]

Legal aid and advice about housing law

Since 1 April 2010, frontline Citizens Advice Bureaux staff have been able to access free online specialist support on housing law enquiries from Citizens Advice Bureaux colleagues at the National Homelessness Advice Service.[4]

The bid round for Legal Services Commission (LSC) contracts to provide LSC-funded housing possession court duty schemes opened in June 2010. The LSC is expected to notify the outcomes to applicants who have applied for contracts to deliver legal services in housing law from 14 October 2010 in early July.

Mortgage possession claims

The figures for mortgage possession claims handled by county courts in the first three months of 2010 show that 18,504 claims were issued in that quarter and 14,373 possession orders were made: *Statistics on mortgage and landlord possession actions in the county courts – first quarter 2010* (MoJ statistics bulletin, May 2010).[5]

In the same quarter, lenders which are members of the Council of Mortgage Lenders (CML) took physical possession of 9,800 properties: CML news release, 13 May 2010.[6]

Despite these significant figures, the number of 'offers' made to homeowners under the Mortgage Rescue Scheme in England remained relatively low: see *Repossessions and repossession prevention: Mortgage Rescue Scheme monitoring* (CLG statistics, table 1303, May 2010).[7]

The first task that the new secretary of state at CLG has allocated to the new housing minister is to 'take a fresh look at existing government schemes which help homeowners ... ': CLG news release, 13 May 2010.[8]

Shared ownership

Given the new government's policy of encouraging further shared ownership (see above), advisers should ensure that they have available the revised and updated version of *Shared ownership: joint guidance for England* (Homes & Communities Agency, CML and National Housing Federation (NHF), April 2010).[9]

Where possession of a shared-ownership home is at risk, reference should be made to *Guidance for handling arrears and possession sales of shared ownership properties* (CML and NHF, September 2009).[10] Readers are also referred to: 'The shared ownership lease – a misleading misnomer?', [2010] 14 L&T Review 88.

Housing legislation in Scotland and Northern Ireland

The Home Owner and Debtor Protection (Scotland) Act 2010 enhances statutory protection for secured loan defaulters in Scotland and confers rights of audience on approved lay representatives in possession claims. The Housing (Scotland) Bill, which will introduce a new regulator for social housing in Scotland, is expected to complete its passage through the Scottish Parliament in the current session. See also: James McMorrow, 'Eyeing a change', *Inside Housing*, 21 May 2010, p33.[11]

The Housing (Amendment) Act (Northern Ireland) 2010 gives the homeless in Northern Ireland a right to a review of, and appeal from, adverse homelessness decisions and makes a range of other changes to housing law in the province. The independent Housing Rights Service has produced a useful fact file on the Act: *Fact file – April 2010. The Housing (Amendment) Act (Northern Ireland) 2010.*[12]

Access to housing for EU nationals

The government has yet to issue any guidance on allocations and homelessness to local housing authorities in England or Wales following the decisions of the European Court of Justice (ECJ) in the homelessness cases of *Lambeth LBC v Teixeira* [2010] C-480/08 and *Harrow LBC v Ibrahim* [2010] C-310/08. In contrast, a new Housing Benefit Circular has been issued to local authorities on housing benefit entitlement for certain EU nationals

with children at school in the UK: *Right to reside – parent and primary carer of a child in education*, HB/CTB A10/2010 (Department for Work and Pensions (DWP), May 2010).[13] More general guidance about the impact of the ECJ decisions across the spectrum of welfare benefits is given in the memo *Right to reside – parent and primary carer of a child in education*, DMG 30/10 (DWP, May 2010).[14]

Decent homes

In March 2010, the House of Commons Public Accounts Committee published a review of the Labour government's Decent Homes programme in England: *The Decent Homes programme, twenty-first report of session 2009–2010*.[15] It concludes that the 2010 Decent Homes target will be missed and suggests that the government needs to do more to ensure that landlords can complete the outstanding work and properties are not allowed to fall back into disrepair.

Impact of poor housing conditions

Social impact of poor housing (ECOTEC, March 2010) highlights some of the effects that poor quality, overcrowded, and temporary accommodation can have on individuals' health and well-being, the likelihood of criminality, and educational attainment.[16]

HUMAN RIGHTS

Delay in enforcement

■ Hasanov v Azerbaijan

App No 50757/07,
22 April 2010

In January 1998, Mr Hasanov was issued with an occupancy voucher for a flat in a recently constructed residential building in Baku. However, he was not able to move in because it was occupied by internally displaced persons (IDPs) from an area conquered by Armenian forces. In June 1998, he obtained a court order evicting the IDPs from the flat. It was not enforced.

The European Court of Human Rights (ECtHR) found that, even though he did not own the flat, the claim based on an occupancy voucher constituted a 'possession' falling within the ambit of article 1 of Protocol No 1. The impossibility of obtaining execution of the judgment for more than seven-and-a-half years constituted an interference with his right to the peaceful enjoyment of his possessions, as set out in the first sentence of the first paragraph of article 1 of Protocol No 1. The ECtHR awarded €10,376 on account of loss of rent and €4,800 in respect of non-pecuniary damage.

The ECtHR reached similar conclusions in two other cases:

– In *Jafarov v Azerbaijan* App No 17276/07, 11 February 2010, a similar judgment remained unenforced for more than six years. It was not shown that the authorities had continuously and diligently taken measures for enforcement of the judgment. After finding a breach of article 1 of Protocol No 1, the ECtHR awarded €8,695 in respect of loss of rent and €4,800 in respect of non-pecuniary damage.

– In *Gulmammadova v Azerbaijan* App No 38798/07, 22 April 2010, a similar order remained unenforced for about nine years. After finding a breach of article 1 of Protocol No 1, the ECtHR awarded €11,042 in respect of loss of rent and €4,800 in respect of non-pecuniary damage.

■ Panchenko v Ukraine

App No 10911/05,
10 December 2009

In May 1997, Mr Panchenko instituted court proceedings seeking an order that the town council provide him with an apartment on a priority basis. After the claim had been dismissed at a number of hearings and Mr Panchenko had appealed each dismissal successfully, he obtained an order, in June 2003, that the Ministry of Defence provide him with an apartment within three months of the judgment becoming final.

The ECtHR found that Mr Panchenko had a 'legitimate expectation' of getting 'the apartment at issue into his private property'. It noted that the judgment remained unenforced for four years and two months. This delay was not justified. It found a violation of article 6 and article 1 of Protocol No 1 as a result of the lengthy non-enforcement of the judgment and awarded €1,200 in respect of non-pecuniary damage.

■ Privalikhin v Russia

App No 38029/05,
12 May 2010

In April 2003, the Tsentralny District Court ordered the local and regional authorities jointly ' ... to provide [Mr Privalikhin] with a flat in a state or municipal housing for a family of four people with a living surface measuring 36 sq metres, and taking into account the applicant's right to an additional living area of not less than 20 sq metres or in the form of a separate room ...' The judgment became binding in June 2003. Mr Privalikhin was not allocated a flat until February 2006.

The ECtHR noted that enforcement lasted two years and 11 months. It considered that this period was incompatible with the requirements of the European Convention on Human Rights and found a breach of article 6 and article 1 of Protocol No 1. It awarded €2,300 in respect of non-pecuniary damage.

Failure to protect from violence

■ ES and others v Slovakia

App No 8227/04,
15 September 2009

Mrs ES and her children were subjected to physical and sexual abuse by her husband. They moved out of the flat where they lived. Subsequently, he was convicted of ill-treatment, violence and sexual abuse. Before the ECtHR, the government admitted that the domestic authorities failed to take appropriate measures to protect the children from ill-treatment in violation of article 3 and that they had failed to meet the positive obligation to respect their family and private lives (article 8).

The ECtHR found that Mrs ES was not in a position to apply to sever the tenancy until her divorce was finalised, approximately a year after the allegations were first brought against her former husband. Given the nature and severity of the allegations, she and her children required protection immediately, and not a year or two years after the allegations first came to light. The ECtHR found that during that period, no effective remedy was open to Mrs ES by which she could secure protection for herself and her children against the acts of her former husband. The court found violations of articles 3 and 8 and awarded €8,000 jointly in respect of non-pecuniary damage.

SECURE TENANTS

Right to buy

■ Nessa v Tower Hamlets LBC

[2010] EWCA Civ 559,
20 May 2010

Mrs Nessa and her husband were joint secure tenants. They claimed the right to buy their flat. The council acknowledged their right and notified a purchase price of £159,000. Mrs Nessa and her husband accepted this. Before the transaction was completed, the council served a replacement offer notice specifying a purchase price of £209,000. The tenants, after receiving legal advice, accepted that offer too. They later sought to complete the purchase at the earlier, lower price and, when the council refused, Mrs Nessa brought a claim seeking to compel it to do so.

HHJ Dight concluded that:

■ the council had no power to withdraw or amend a notice given under Housing Act (HA) 1985 s125; but that

■ as the market value given in the first notice was significantly understated, the council had no power to sell the flat for £159,000.

He dismissed Mrs Nessa's claim and she appealed.

The Court of Appeal stated that it was

possible to imply a power enabling a council to correct clerical mistakes made in a s125 notice. That could be done by serving a corrective s125 notice. However, the acceptance of the offer made in the second notice discharged by mutual agreement all rights or obligations arising from the first notice. The tenants could not buy at the first-offered price. The appeal was dismissed.

ASSURED SHORTHOLD TENANCIES

Section 20 notices

■ Pilakoutas v Schofield

Sheffield County Court, 22 May 2009[17]

In 2007, Professor Pilakoutas bought a house in multiple occupation, believing that the occupants were assured shorthold tenants. Ms Schofield had been granted a tenancy of Flat 5 in April 1993. Before the grant of her tenancy, the then landlord served a HA 1988 s20 notice. Sometime before 1997, Ms Schofield moved to Flat 8 because it was a 'bigger, more spacious and nicer flat'. No new s20 notice was served. Professor Pilakoutas served a s21 notice and began a possession claim on the basis that she was an assured shorthold tenant. He argued that s20(4) applied and that Ms Schofield had entered into a new tenancy of 'the same or substantially the same premises'.

District Judge Mort rejected this argument. He noted that before amendment by HA 1996:

■ the s20 notice requirement was mandatory;
■ there was no provision allowing the court to dispense with service of such a notice; and that
■ there was no definition of 'premises' in HA 1988.

He found that Flat 8 was a distinct and separate dwelling from Flat 5. Ms Schofield was granted a new tenancy of Flat 8, which was not 'the same or substantially the same premises'. He also rejected an argument that Ms Schofield was estopped from relying on the remainder of s20. He dismissed the claim for possession.

RENT ACT 1977

Fair rents

■ Ahmed v Murphy

[2010] EWHC 453 (Admin), 10 May 2010

In 1974, Mr Murphy became the Rent Act-protected tenant of two furnished rooms, a scullery and a WC in a building in Brick Lane, east London. In 2008, his landlords applied to the rent officer to register a fair rent within the bracket of £140 to £180 per week. The rent officer decided that the rent was exempt from the Rent Acts (Maximum Fair Rent) Order (RA(MFR) Order) 1999 SI No 6, which prescribes a capped maximum fair rent, and registered a fair rent of £90 per week. The landlords referred that decision to the rent assessment committee (RAC). The RAC determined that the rent was subject to a capped maximum fair rent and determined a maximum fair rent of £8.50 per week. The landlords appealed to the Administrative Court under Tribunals and Inquiries Act 1992 s11.

HHJ Anthony Thornton QC, sitting as a deputy High Court judge, rejected the general complaint that the reasons given were insufficient. He said that a RAC:

... must give adequate reasons for its decisions. What amounts to adequate reasons can only be determined in the context of a particular decision.

... the reasons and reasoning could be brief and it would have been sufficient for the decision merely to identify the relevant factual findings that were made with brief reasoning that identified why those findings were made and any essential supporting evidence relied on to support and shape those findings.

... [They] should, therefore, be sufficient to enable it to be seen what the crucial findings of fact were and how those findings were applied to the relevant law. (paras 20 to 22).

However, the RAC's reasons were deficient when considering the landlords' contention that they were entitled to rely on RA(MFR) Order article 7 (exemption from capping where repairs or improvements carried out) because Mr Murphy had refused access to carry out repairs and refurbishment. The RAC had concluded 'without further explanation, findings or reasoning' that it was 'obliged to apply the capping order'. HHJ Thornton said: 'This crucial finding is not ... supported by any, or any sufficient, factual findings, reasons and reasoning' (para 49). To this extent, HHJ Thornton allowed the appeal, but, as the primary facts were contained in documents which were before both the RAC and himself, he was in the same position in undertaking a review as the RAC.

He therefore proceeded to identify the primary facts from the documents and decide the issue of law which they raised. He found that there had been no request for access or no reasonable request for access by the landlords. There was accordingly no basis for the landlords' contention that the tenant's rent should be exempt from the RA(MFR) Order. The appeal on that issue was dismissed.

However, he found that the RAC had erred in its use of the formula contained in the RA(MFR) Order, based on the retail price index (RPI). The RAC did not take into account the January 1987 rebasing of the RPI and did not make the appropriate arithmetical adjustment to the formula. Its method of applying the rent capping formula was 'nonsensical and incorrect'. The maximum fair rent that should have been registered was £12 per week.

■ Compatriot Holdings Ltd Co v Chairwoman of the London Rent Assessment Committee

[2009] EWHC 3312 (Admin), 20 November 2009

HHJ Thornton QC found that the RAC, which had also heard *Ahmed v Murphy* (see above), had erred in the same way in its use of the formula contained in the RA(MFR) Order. He delivered a similar judgment to that in *Ahmed v Murphy*.

POSSESSION CLAIMS

Mesne profits

■ Shi v Jiangsu Native Produce Import & Exprt Corp

[2009] EWCA Civ 1582, 6 October 2009

Mr Shi was employed by the defendant company. He was also given a bare licence to occupy premises. Mr Shi sued for arrears of salary. The company then terminated his licence and counterclaimed in the court proceedings for mesne profits. There was a joint experts' report from a valuer which stated that the rental value of the property for the appropriate period was £114,345. HHJ Ryland dismissed the claim for arrears of salary and the counterclaim for mesne profits, holding that there were exceptional circumstances. Both parties appealed.

The Court of Appeal dismissed Mr Shi's appeal, but allowed the employer's cross-appeal. After the licence was terminated, Mr Shi remained in possession as a trespasser. After considering *Ministry of Defence v Ashman* [1993] 25 HLR 514, *Ministry of Defence v Thompson* [1993] 25 HLR 552 and *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285, Dyson LJ said that the judge had assessed mesne profits as if the employer were claiming in restitution whereas the counterclaim clearly pleaded the claim as one for damages. It followed that the foundation for the judge's conclusion that there were exceptional or special circumstances which justified assessing the mesne profits at nil did not exist. The mesne profits should have been assessed in a sum representing the loss suffered by the employer as a result of

being deprived by Mr Shi of vacant possession of the property. There was no reason not to assess those damages in the sum of £114,345 in line with the experts' report.

Even if the claim had been advanced in restitution, there were no special circumstances which would justify a reduction from the open market rental value. The value to Mr Shi would not have been less than it would be to a typical potential occupant of the premises. He did have the choice of moving to other accommodation. The fact that he remained an employee was not a relevant special circumstance.

HARASSMENT AND UNLAWFUL EVICTION

Damages

■ Naughton v Whittle and Chief Constable of Greater Manchester Police

Manchester County Court, 30 November 2009[18]

On 21 March 2006, Ms Whittle informed Mr Naughton that she wanted him to leave a property, in which he had lived for 15 months, by 11 April 2006. On 4 April 2006, her brother approached him and threatened to put him out of the property if he refused to leave. On 11 April 2006, Ms Whittle physically accosted Mr Naughton's girlfriend and forcefully grabbed the keys to the property, injuring the girlfriend's hand. Mr Naughton immediately returned home to find the locks being changed. Police officers were called, but threatened Mr Naughton with arrest for breach of the peace. Police officers physically removed him from the property and he was locked out. He was, however, allowed to return on two further occasions to collect belongings. Mr Naughton brought claims against Ms Whittle and the Chief Constable.

The Chief Constable settled claims for trespass to person and land by paying £2,500. Ms Whittle defended the claim. She argued that there had been no payment of rent and the occupation amounted to a tenancy at will whereby occupation was granted on the basis of the payment of utility bills and the keeping of the property in good repair.

HHJ Morgan found that Mr Naughton had paid a weekly rent and there was no suggestion that the arrangement between the parties had been agreed to be temporary pending negotiations for a substantive tenancy. He made an award of £7,700 general damages, comprising £275 per day for the 28 days when Mr Naughton was deprived of occupation. He awarded £1,500 aggravated damages. He rejected an argument that the sum paid by the police should be deducted from damages awarded against Ms Whittle, stating 'each tortfeasor must pay appropriate damages for the wrong that they have done to the claimant'.

■ Shyngle v Simons

Slough County Court, 28 May 2009[19]

Ms Shyngle was an assured shorthold tenant. She paid a deposit of £300. The deposit was not protected in keeping with HA 2004 ss212 and 213. Ms Shyngle withheld some rent after a dispute over the previous occupants' utility bills. In August 2008, she returned home and found that the locks had been tampered with. She could not gain access. She obtained an injunction allowing her back into the premises, but was unable to enforce it because her landlord's mortgage lender had obtained possession as a result of mortgage arrears. She brought a claim against her landlord for damages for breach of the covenant for quiet enjoyment and a sum equal to three times the amount of the deposit under s214.

The court ordered the return of the deposit plus £900. It was accepted that the landlord had little knowledge of the changing of the locks since that was done by her son, but Ms Shyngle was awarded general damages of £175 per night for 29 nights, special damages of £90 and aggravated damages of £1,000 (total: £6,335 after deducting rent arrears).

ANTI-SOCIAL BEHAVIOUR

Closure orders

■ R (Siddique) v Newcastle Magistrates' Court

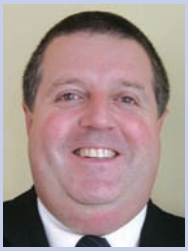
[2010] EWHC 1096 (Admin), 10 March 2010

The claimant owned a house in Newcastle. In January 2008, on an application made by the police, the magistrates' court made a closure order under Anti-social Behaviour Act 2003 s2. The court also ordered the claimant to pay £5,000 in reimbursement of the police costs of 'clearing, securing or maintaining' the premises under s8.

In August 2009, the claimant sought judicial review of the payment order. He argued that the costs claimed had included those incurred in the process leading up to the closure order which could not be reimbursed under s8.

Following the grant of permission to apply for judicial review, the Chief Constable indicated that a quashing of the payment order would not be opposed. The HHJ Langan QC rejected a claim for the costs of the judicial review proceedings. The claim would probably have failed given the delay and the availability of alternative remedies.

1 Available at: www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf.
2 Available at: www.communities.gov.uk/news/housing/1591781.
3 Available at: www.communities.gov.uk/news/housing/1612019.
4 Citizens Advice Bureaux workers need to log-in at: http://rdwebsso.cablink.org.uk.
5 Available at: www.justice.gov.uk/about/docs/stats-mort-land-q1-2010.pdf.
6 Available at: www.cml.org.uk/cml/media/press/2612.
7 Available at: www.communities.gov.uk/documents/housing/xls/1569310.xls.
8 Available at: www.communities.gov.uk/news/newsroom/1575584.
9 Available at: www.homesandcommunities.co.uk/public/documents/Shared_Ownership_Guidance.pdf.
10 Available at: www.housing.org.uk/Uploads/File/Policy%20briefings/Neighbourhoods/SO%20guidance%20final%20amended%200ct09.pdf.
11 Available at: www.insidehousing.co.uk/need-to-know/legal/eyeing-a-change/6509915.article.
12 Available at: www.housingrights.org.uk/publications/fact-files.html.
13 Available at: www.dwp.gov.uk/local-authority-staff/housing-benefit/user-communications/hbctb-circulars/2010-adjudication-and-operations/.
14 Available at: http://dwp.gov.uk/docs/m-30-10.pdf.
15 Available at: www.publications.parliament.uk/pa/cm200910/cmselect/cmpubacc/350/35002.htm.
16 Available at: www.housing.org.uk/Uploads/File/Policy%20briefings/Social%20impact%20of%20poor%20housing.pdf.
17 Graham Hogarth, Howells, solicitors, Sheffield.
18 Nicola Chadwick and Adrian McGurk, solicitors, Peasegoods, Manchester and John Hobson, barrister, Manchester.
19 Shelter Legal Services, London.



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