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

Possession claims in the county court

In the last quarter of 2008, 29,095 possession orders were granted to mortgage lenders and 27,715 possession orders were granted to landlords by the county courts in England and Wales. The provisional total number of orders in 2008 was 114,296 granted in favour of mortgage lenders and 112,294 granted in favour of landlords. An introductory note to the latest statistical report suggests that the launch of the mortgage possession pre-action protocol was the likely cause of a fall of about half in the number of new mortgage-lender claims being issued weekly from October to December 2008: *Statistics on mortgage and landlord possession actions in the county courts – fourth quarter 2008*, Ministry of Justice, 20 February 2009.[1] For commentaries on the new mortgage possession protocol see District Judge Robert Jordan, 'Don't let it be misunderstood' [2009] March/April ROOF 41 and T Bailey and G Williams, 'Stemming a rising tide?' (2009) 159 NLJ 221.

The year on year increase in possession cases in Northern Ireland has reached over 63 per cent, prompting the independent Housing Rights Service (HRS) to establish a Preventing Possession Initiative which was launched on 13 February 2009. Under the initiative, emphasis is placed on securing advice for those facing the threat of eviction and on working with social landlords and mortgage lenders to stem the numbers of possession claims issued: HRS press release, 12 February 2009.[2]

A paper published by the Centre for Policy Studies (CPS) has suggested that more positive use of available judicial discretion could prevent large numbers of evictions each year: *Save 100,000 homes from repossession* (*CPS Pointmaker*, February 2009).[3]

In February 2009 the housing minister (Margaret Beckett MP) set out the progress that the government believed it had made in encouraging the establishment of the national Mortgage Rescue Scheme for England. She identified Havering, Portsmouth, Kettering and Penwith as being councils especially advanced among the 75 local authorities that will be operating the scheme and said that 'we expect to see the first people benefiting any day now'.[4]

Eligibility for social housing

Applications made to local housing authorities under Housing Act (HA) 1996 Part 6 (allocation of social housing) or Part 7 (homelessness) on or after 2 March 2009 will be subject to new statutory provisions as a result of the Housing and Regeneration Act (H&RA) 2008 s314 and Sch 15 being brought into force in England and Wales on that date by the Housing and Regeneration Act 2008 (Commencement No 1 and Saving Provisions) Order 2009 SI No 415. The new provisions amend HA 1996 s185(4) which was declared incompatible with rights under the European Convention on Human Rights ('the convention') in *R (Morris) v Westminster City Council* [2005] EWCA Civ 1184; [2006] 1 WLR 505. The amendments introduce a new class of 'restricted persons' for whom the primary method of discharging the main homelessness duty is to be the arrangement of a private sector tenancy. The details of the changes were set out in non-statutory guidance sent by Communities and Local Government (CLG) to all local authority chief housing officers in England on 16 February 2009.[5] The amendments introduce new requirements for HA 1996 s184 notifications, amend HA 1996 in respect of the full housing duty, and adjust the reasonable preference categories in HA 1996 s167(2).

The Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2009 SI No 358 amend the eligibility regulations made under HA 1996 Parts 6 and 7 to waive the normal habitual residence requirements in respect of British citizens and British nationals returning from Zimbabwe.[6] That change will enable them to access social housing and homelessness assistance in the UK on arrival. This reflects a scheme under which the government is to offer up to 3,000 elderly or vulnerable people still living in Zimbabwe the opportunity of assistance to settle in the UK. The new regulations came into force on 18 March 2009 and only apply to those arriving before 18 March 2011.

Housing and anti-social behaviour

Use by local housing authorities of the new premises closure order powers which became available on 1 December 2008 is documented in detail in *ASB Focus*, Issue 3 (Home Office, February 2009).[7] It reviews cases handled by Westminster, Camden, Leeds, Birmingham and Tower Hamlets councils.

The Home Office has also produced for MPs a handy guide to powers available to address anti-social behaviour: *Anti-social behaviour enforcement and support tools information pack for Members of Parliament* (Home Office, January 2009).[8]

Housing associations

Considerable numbers of properties developed by housing associations for shared ownership (part-rent, part-buy) remain unsold, while demand for social housing to rent is soaring. The Tenant Services Authority (TSA) has announced that, in response to that situation, 4,000 unsold shared-ownership homes have been released for use by housing associations for social rented housing: TSA press release 16/09, 23 February 2009.[9]

The portfolio of housing stock owned by some housing associations is fragmented over wide geographic areas. The TSA has published a new report illustrating how rationalisation can achieve benefits for both landlords and tenants and has invited associations to consider rationalisation of their stock holdings: *Location, location, location* (TSA, February 2009).[10]

Local authority powers

New guidance has been issued to local authorities designed to encourage greater and more imaginative use of the very broad 'well-being' power in Local Government Act 2000 s2: *Power to promote well-being of the area: statutory guidance for local councils* (CLG, February 2009).[11] The power enables a council to do almost anything to improve the well-being of its area by (among other things) assisting individual residents. Those advising residents with housing problems may find it useful to remind authorities of the very broad scope of these powers.

Improving the housing stock

The housing minister has set out the government's aspiration to 'retro-fit' the current housing stock to make it more energy efficient. This will involve basic measures like loft-lagging and cavity wall insulation for all homes by 2015, more substantial improvements to seven million homes by 2020, and by 2030 all homes are to benefit from 'all the cost-effective measures possible': Ministerial speech, 12 February 2009.[12] The detail is set out in papers generated by a government consultation exercise to which responses are sought by 8 May 2009.[13]

Meanwhile, more modest help with minor repairs and adaptations for elderly owner-occupiers will be available from local housing authorities. On 26 February 2009 the government released details of the 2009/10 grant allocation to each local authority for these 'handyperson' repairs.[14] It simultaneously published *The future Home Improvement Agency handyperson services report* (CLG, February 2009).[15]

Stock transfers

H&RA 2008 s294 contains amendments to the arrangements for consultation and balloting prior to stock transfer from local housing authorities to housing associations. The government is consulting on the new statutory guidance it will issue about these provisions: *Consultation before disposal to private sector landlord: statutory guidance – a consultation paper* (CLG, February 2009).[16] The closing date is 21 May 2009.

H&RA 2008 ss295–296 encourage more local authority tenants and residents to investigate options to transfer the management or ownership of their council housing stock. On 16 February 2009 the secretary of state issued a new general approval for housing management agreements under HA 1985 s27.[17] A letter sent by CLG to local housing authorities explains that the secretary of state has updated the general approval to take account of the coming into force of the Housing (Right to Manage) (England) Regulations 2008 SI No 2361 and a number of other changes in legislation.[18]

New advocacy for tenants

CLG has published proposals for a new National Tenant Voice organisation intended to represent the interests of tenants: *Citizens of equal worth* (CLG, January 2009).[19] Both a full report and a summary are available.

The government has also explained the progress that has been made towards establishing the national representative group for tenants and the further steps to be taken in consultation about, and recruitment to, the new National Tenant Council: *National Tenant Voice plans agreed – an update for tenants* (CLG, February 2009).[20]

Right to buy

The draft National Assembly for Wales (Legislative Competence) (Housing) Order 2009 has been laid before parliament for approval.[21] The Order would allow the Welsh Assembly to legislate for: (a) suspension of the right to buy in particular circumstances; and (b) modification of the right so that it ceases to apply in relation to particular classes of dwelling.

Land for housing

On 6 February 2009 the Department of Health issued directions to all NHS trusts and health service bodies under National Health Service Act 2006 s8 about the factors to be taken into account when selling off their land for housing development.[22] The directions cover the quality of the housing to be developed and the requirement for developers to provide an appropriate mix of tenures.

PUBLIC SECTOR TENANCIES

Human rights: article 8

■ Liverpool City Council v Doran

[2009] EWCA Civ 146,
3 March 2009

Liverpool granted Ms Doran, an Irish Traveller, a licence to occupy a pitch on a site which the council ran in accordance with the Caravan Sites Act 1968. There were allegations of anti-social behaviour by her and other members of her family. She denied these allegations. There were also complaints that Ms Doran and her daughter had moved additional caravans onto their pitches without permission and that unauthorised and highly dangerous electrical work had been carried out. The council served a notice to quit and then began a possession claim. At trial, the council sought summary judgment on the basis that a notice to quit had been served and it was irrelevant whether the council was able to prove that there had been breaches of the licence. HHJ Trigger granted the council summary judgment. Ms Doran appealed.

The Court of Appeal dismissed her appeal. Toulson LJ said that *Doherty v Birmingham City Council* [2008] UKHL 57; [2008] 3 WLR 636 had 'created a new battleground area' (para 46). He described the effect of *Doherty* as being two-fold.

> *49. First, there is no formulaic or formalistic restriction of the factors which may be relied upon by the licensee in support of an argument that the council's decision to serve a notice to quit, and seek a possession order, was one which no reasonable council would have taken. Such factors are not automatically irrelevant simply because they may include the licensee's personal circumstances, such as length of time of occupation. …*
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> *50. Secondly, the question whether the council's decision was one which no reasonable person would have made is to be decided by applying public law principles as they have been developed at common law, and not through the lens of the convention.*

Whether or not a 'council's decision was unreasonable has to be decided by applying public law principles as they have been developed at common law [and] it is to be remembered that those principles are not frozen' (para 52). He continued 'it is likely to be a rare case indeed where a council decides to issue a notice to quit and seek a possession order without any ground on which a reasonable council might have done so' (para 55). In this case, the submission that no reasonable council would have served a notice to quit was 'hopelessly unarguable' (para 56). The council had evidence of repeated breaches of the licence or anti-social behaviour.

'Whether [Ms Doran was] right or wrong, or whether it was six of one and half a dozen of the other, there [was] no denying the fact that the council had cause to believe that her family were trouble makers and that there had been repeated breaches of the licence.' He rejected 'as unarguable any submission that a reasonable council must have conducted the equivalent of a judicial investigation into where exactly the truth lay between the allegations and counter-allegations before deciding that it was appropriate to terminate [Ms Doran's] licence' (para 56).

■ Dublin City Council v Gallagher

[2008] IEHC 354,
11 November 2008

Mrs Nancy Gallagher, the defendant's mother, was the sole tenant of premises owned by the city council. Mrs Gallagher died in 2005. Mr Gallagher applied to succeed to his mother's tenancy, but the council found that he did not fulfil the criteria of its scheme of letting priorities created under HA 1966 s60. The council served a notice to quit and began possession proceedings. A district judge made a finding of fact that, except for a short period, Mr Gallagher had resided with his mother and regarded that dwelling as his permanent residence. This finding was contrary to that made by the council when rejecting his application to succeed to his mother's tenancy. In the light of this finding, the district judge expressed concern that the hearing of

the case would represent little more than a 'rubber stamp' of the council's decision and referred various questions to the High Court. In the High Court, Mr Doherty's advocate argued that the Irish Human Rights Act 2003 permitted judges hearing cases under the summary procedure to examine the circumstances which led to a decision to issue proceedings and that to comply with the convention, defendants should be entitled to a hearing on the merits before an independent and impartial tribunal – ie, the district court.

O'Neill J stated that if Mr Gallagher's contention that he had lived with his mother for many years was correct, the premises were 'clearly' his home within the meaning of article 8. The grant of a warrant would be 'a gross interference' with his right to respect for his home, and so his rights under article 8 would be engaged. The first step in considering whether that interference could be justified was to establish the true facts pertaining to his occupation of the premises. Any court or tribunal which had the jurisdiction to deprive him of possession would have to be satisfied that the grant of the warrant was justified in the terms set out in article 8(2). A warrant would be in accordance with national law (ie, HA 1966 s62) and in pursuit of a legitimate aim (regulating a limited housing stock). However, there was a requirement for procedural safeguards to enable consideration as to whether eviction was necessary and proportionate to a legitimate aim. O'Neill J continued '[t]he jurisprudence of the European Court of Human Rights suggests that in the realm of eviction proceedings there should, in principle, be an opportunity for an independent tribunal to adjudicate on the proportionality of the decision to dispossess'. In this case, the procedure which the council followed 'was unstructured, unregulated and specifically failed to give the defendant an opportunity to answer the concerns' which the council raised. It 'failed to give [him] an opportunity to challenge and test the view being formed by the [council], which was adverse to his case'. That failure to give Mr Gallagher the opportunity to offer an explanation of his position deprived him of a hearing of his case. O'Neill J found that that failure and the absence of 'procedural safeguards' breached articles 6 and 8 of the convention. He also found that the process of judicial review would not have given a hearing on the merits. He made a declaration of incompatibility.

Suspended possession orders

■ Austin v Southwark LBC

[2009] EWCA Civ 66,
16 February 2009

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 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) 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, arguing that *Knightley* predated the Human Rights Act (HRA) 1998 and was not compliant with the convention, specifically article 1 of Protocol 1. Flaux J dismissed the appeal ([2007] EWHC 355 (QB), 29 January 2008; April 2008 *Legal Action* 33). Mr Austin appealed further to the Court of Appeal.

The Court of Appeal dismissed the appeal. HHJ Welchman was right to decide that in this case the words 'an interest in a claim' in CPR 19.8(1) meant 'the claim to make an application under s85'. The 'claim to defend the possession proceedings had merged into the possession order' (para 18). Arden LJ said that *Knowsley Housing Trust v White* [2008] UKHL 70; [2009] 2 WLR 78, demonstrated 'that the proper approach to a question of statutory construction of [HA 1985] Part IV will in appropriate cases be a purposive and practical approach in order to achieve the purposes of the legislation', including the protection of secure residential tenants (para 24). However, that protection is not limitless. The Court of Appeal was bound by the ratio in *Knightley*. The right to apply under s85 was a personal right which could only be exercised by the tenant. Furthermore, the Court of Appeal held that article 1 of Protocol 1 was not engaged because the former tenant's right to apply under s85 was not a possession after his death.

Setting aside possession orders

■ Southwark LBC v Jackson and Jackson

Lambeth County Court,
27 January 2009[23]

Mr and Mrs Jackson were elderly secure tenants. In 2005, they left their home so that Southwark could carry out repairs. Their grandson looked after the premises in their absence. By early 2008, some, but not all the works, were completed. On 19 February 2008, Southwark served a notice to quit on the basis that the tenancy had ceased to be secure, because the tenant condition was no longer met. Mr and Mrs Jackson did not attend the hearing of the subsequent possession claim and an outright possession order with a judgment for rent arrears was made in their absence. A warrant for possession was executed. Mrs Jackson applied to set aside the possession order under CPR 39.3 (non-attendance at hearing), but was unable to give a good reason for failing to attend or for the delay in making the application. Shortly before the hearing of the application, it came to light that the notice to quit was invalid because it was served on Tuesday 19 February 2008 and stated that it would expire on Monday 17 March 2008 (ie, 27 days and not 28 days later). The saving clause was inadequate. At court, it was argued that the court had a separate power to set aside the order pursuant to CPR 3.1(7) (power to vary or revoke the order). Southwark agreed that the notice to quit was invalid, but argued that the court should not set aside the order.

After considering *Edwards v Golding* [2007] EWCA Civ 416 and *Collier v Williams* [2006] EWCA Civ 20; [2006] 1 WLR 1945, HHJ Gibson set aside the possession order. If the court had considered the invalid notice to quit at the first hearing, the order would not have been made. If the order stood, it would force the tenants from their home other than in accordance with the law. That would be contrary to the convention. HHJ Gibson also commented that at the initial hearing, the case had been dealt with very summarily, as a simple rent arrears case. The district judge did not appear to consider whether a prima facie case had been made that the tenancy had ceased to be secure. In particular, Southwark's own pleading mentioned the presence of the grandson and did not deal with whether he was there simply as caretaker for the tenants. The district judge did not appear to consider this key issue at all, and so there appeared to be a significant doubt about whether the tenant had in fact parted with possession. In these circumstances, the possession order would have been unlawful.

Possession claims against trespassers

■ Secretary of State for the Environment, Food and Rural Affairs v Meier

[2008] EWCA Civ 903,
31 July 2008,
October 2008 Legal Action 35

On 11 February 2009, the Appeal Committee granted leave to the occupiers to appeal to the House of Lords.

ANTI-SOCIAL BEHAVIOUR

Obligations of landlords towards neighbours

■ Mitchell v Glasgow City Council

[2009] UKHL 11,
18 February 2009,
[2009] 2 WLR 481,
(2009) Times 26 February

James Mitchell and James Drummond were neighbouring tenants of Glasgow City Council. Mr Drummond made threats towards Mr Mitchell, including a claim that he would kill him if he (Drummond) were to be evicted. The council was aware of Mr Drummond's threatening and aggressive behaviour, and in 2001 held a meeting with him, at which his possible eviction for anti-social behaviour towards Mr Mitchell was discussed. Shortly after the meeting, Mr Drummond attacked and killed Mr Mitchell. Subsequently, Mr Drummond was charged with murder, but the prosecution accepted his plea to culpable homicide. In 2003, Mr Mitchell's widow and daughter raised a civil action for damages against Glasgow City Council in respect of the death. The pursuers (claimants) maintained that the defenders (defendants) owed the deceased and his family a duty of care:

■ to instigate eviction proceedings against Mr Drummond within a reasonable time of complaints about his behaviour being made; and

■ to warn Mr Mitchell about the meeting with Mr Drummond.

They relied on the common law and article 2 of the convention (right to life shall be protected by law). After a debate (ie, a pre-trial hearing, where no evidence was heard), Lord Bracadale, the Lord Ordinary, dismissed the action as irrelevant. The pursuers reclaimed against that dismissal. An Extra Division of the Inner House of the Court of Session ([2008] CSIH 19, 29 February 2008; July 2008 *Legal Action* 21) held:

■ by a majority, that it was premature to conclude that the pursuers must fail on their claim that there was a duty to warn and that that element of the case should proceed to trial; but

■ by a majority, that the pursuers' case based on breach of article 2 was without foundation; and

■ unanimously, that there was no duty to instigate proceedings for eviction within a reasonable time of complaints being made.

Both parties appealed to the House of Lords.

The House of Lords allowed the council's appeal and dismissed the pursuers' cross-appeal. Lord Hope, with whom the other Law Lords agreed, concluded that 'it would not be fair, just or reasonable to hold that the defenders were under a duty to warn the deceased of the steps that they were taking … [As] a general rule … a duty to warn another person that he is at risk of loss, injury or damage as the result of the criminal act of a third party will arise only where the person who is said to be under that duty has by his words or conduct assumed responsibility for the safety of the person who is at risk.' 'The situation would have been different if there had been a basis for saying that the defenders had assumed a responsibility to advise the deceased of the steps that they were taking, or in some other way had induced the deceased to rely on them to do so. It would then have been possible to say not only that there was a relationship of proximity but that a duty to warn was within the scope of that relationship' (para 29).

With regard to article 2, the test is a high one. In this case, there was 'no basis … for saying that the defenders ought to have known that, when Drummond left the meeting, there was a real and immediate risk to the deceased's life' (para 34).

Public Services Ombudsman for Wales

Complaint

■ Conwy CBC

200701993,
12 January 2009

Mr and Mrs Smith were tenants of Clwyd Alyn Housing Association. They complained that they were subject to noise and disturbance from the family living next door, who rented their home from Conwy. Gradually, the Smiths became subject to direct intimidation, abuse and racial harassment which intensified after they gave evidence in court proceedings against the family. They said that this behaviour continued and that they made regular complaints to the council. They complained that they had never been advised of the procedures that Conwy had for dealing with anti-social behaviour and that the council had not communicated with them adequately over their complaints or properly investigated or acted on the family's behavioural problems and repeated breaches of their conditions of tenancy.

The Ombudsman reviewed five earlier public interest reports that had been issued on Conwy's previous handling of complaints involving racist abuse, anti-social behaviour and its failure to consider the position of victims of anti-social behaviour in relation to the HRA and the Homelessness Act 2002. While acknowledging that some administrative changes had been made by the council as a result of these reports, the Ombudsman was concerned to find in the Smiths' complaint evidence of replication of previous failings to deal with anti-social behaviour long after the compliance period for implementation of recommendations in the earlier reports, most notably after the establishment of an anti-social behaviour unit and after the council said it had provided additional training for staff. The ombudsman found a continuing lack of knowledge on the part of council staff in dealing with enforcement action. He recommended that Conwy pay the Smiths £2,500 for each of the four years during which the main aspects of maladministration and injustice occurred and recommended that a fulsome and detailed apology should be provided to them from the corporate level of the council. He also recommended that the council ensure that its staff conduct a further review of procedures for dealing with homelessness and anti-social behaviour and provide additional training and procedures to remedy the shortcomings identified in his report and for evidence of this to be provided to him within three months.

Breach of injunction

■ Cambridge City Council v Joyce

B5/09/0273,
24 February 2009

Mr Joyce was a secure tenant. His landlord obtained an injunction restraining him from committing any annoyance, or using surveillance equipment on the road in which he lived. He was also prohibited from using violence or intimidating behaviour and from entering certain local authority buildings. He breached the injunction. His landlord claimed possession, applied to commit him for contempt and sought a further injunction. The judge found that 11 breaches were proved on the balance of probabilities, and that three breaches were proved beyond reasonable doubt. After considering the medical evidence and the absence of remorse on Mr Joyce's part the judge made a possession order and sentenced Mr Joyce to 21 days' imprisonment, suspended on conditions that he give up possession and commit no further breaches. Mr Joyce appealed against the committal order.

The appeal was dismissed. There was no basis on which it could be said that the sentence imposed was clearly wrong. The judge had imposed a limited sentence with conditions to comply with the orders. There was no basis on which the court could interfere with the sentence.

Closure notices

■ Dumble v Metropolitan Police Commissioner

[2009] EWHC 351 (Admin), 6 February 2009

Ms Dumble was the tenant of a one-bed flat in a purpose-built block of flats. There were allegations of anti-social behaviour. At the request of the Metropolitan Police Commissioner, a closure notice was served under Anti-social Behaviour Act (AsBA) 2003 s1. The magistrates' court found that the premises had been used in connection with Class A drugs; a number of people had visited the premises day and night; drug paraphernalia had been found in the stairwell of the block of flats; members of the public and other residents of the block were subjected to disorder and nuisance; and that after service of the closure notice there had been no further incidents. The court made a closure order under s2. Ms Dumble appealed by way of case stated.

The Divisional Court dismissed the appeal. The justices had been entitled to conclude that the conditions in s2(3) were satisfied, despite a hiatus of two weeks and two days between the service of the closure notice and the date of the order. Scott Baker LJ, after referring to *Chief Constable of Cumbria Constabulary v Wright* [2006] EWHC 3574 (Admin); [2007] 1 WLR 1407 said 'it would be quite impossible to conclude that disorder or serious nuisance in this case had permanently ceased'. Furthermore, although article 8 of the convention was engaged because the closure order meant that Ms Dumble would lose her home, it was absolutely plain that a closure order was necessary. The mere fact that the justices did not specifically recite article 8 was not fatal to the making of a closure order.

■ R (Taylor) v Commissioner for the Metropolitan Police

[2009] EWHC 264 (Admin), 15 January 2009

The Metropolitan Police Commissioner made an application for a closure order under AsBA s2. After hearing evidence, Deputy District Judge Newton refused to make a closure order. However, she also declined to make an order for costs in favour of Mr Taylor on the basis that there was no jurisdiction to do so.

Lloyd Jones J allowed an appeal by way of case stated. He held that applications for closure orders have all the necessary characteristics of a complaint. Accordingly, magistrates' courts have jurisdiction to award costs under Magistrates' Courts Act 1980 s64.

Anti-social behaviour orders

■ F v Bolton Crown Court

[2009] EWHC 240 (Admin), 22 January 2009

After making observations about the importance of complying with the procedural requirements relating to hearsay evidence, the Administrative Court quashed an anti-social behaviour order made against a 13-year-old because there was no 'necessity' for it – see Crime and Disorder Act 1998 s1C(2)(b) and *R v Boness* [2005] EWCA Crim 2395; [2006] 1 Cr App R (S) 120.

PRIVATE SECTOR TENANCIES

Tenancy deposits

■ Piggott v Slaven

Great Grimsby County Court, 23 February 2009[24]

In April 2005, Mr Piggott granted Ms Slaven a tenancy of a house. She paid him a deposit of £600. On 14 February 2008, Mr Piggott granted Ms Slaven an assured shorthold tenancy of a different property, for an initial fixed term of six months. Of the deposit for the earlier premises, £75 was returned to Ms Slaven. The balance of £525 was retained by Mr Piggott. He said that £105 was for the first week's rent under the new tenancy, and the remaining £420 was 'rent in advance'. On 24 June 2008, he served a s21 notice, stating that he required possession on 27 August 2008. Ms Slaven defended the possession claim which Mr Piggott subsequently issued, stating that he had failed to comply with HA 2004 s213(1) (deposit to be dealt with in accordance with an authorised scheme) or s213(4) (initial requirements of a tenancy deposit scheme) and so, according to s215(1), was not entitled to serve a s21 notice. She also counterclaimed for an order that he pay her three times the amount of the deposit in accordance with s214(4).

After referring to s212(8), District Judge Richardson held that the question of whether or not money is to be held as security is to be judged objectively. It would be contrary to the purpose of the Act to allow landlords to avoid its consequences by stating that they personally did not intend to hold money as a security. He found that the sum of £420 was not paid as rent in advance, but was intended to afford Mr Piggott security should Ms Slaven breach any future obligations to pay rent under the tenancy agreement. It was accordingly a 'tenancy deposit' for the purposes of s212(8). It had not been dealt with in accordance with an authorised scheme, as required by s213. He dismissed the possession claim and ordered Mr Piggott to pay £1,260 within 14 days.

Harassment and eviction: damages

■ Evans v Ozkan and Hussein

Bromley County Court, 6 February 2009[25]

Mr Evans was an assured shorthold tenant of a room at a weekly rent of £100. Before signing the tenancy agreement and handing over a deposit of £400 he told his landlords that he was receiving income support and would need to claim housing benefit. About a month later, delays in payment led to an intimidating visit by Mr Hussein who demanded £1,000 which Mr Evans did not have. On 21 March 2007, Mr Evans returned home to find some of his belongings on the pavement and the defendants and two other men throwing out more of his things. Mr Hussein was verbally intimidating. The police became involved and Mr Evans was arrested, but, on his release that evening, he found many of his belongings lying on the pavement, crushed or smashed. The lilo he had been using as a mattress was deflated and full of holes. Other possessions were missing. His ruined belongings smelled of urine. Mr Evans spent the night in his car, but returned the next day to find that the locks had been changed. The defendants followed Mr Evans to the local pub, threatened him with baseball bats and demanded £1,000, making it clear that he would not get his belongings back until he had paid. Further threats were made. Mr Evans applied to the council for homelessness assistance and was rehoused. In the intervening period he spent 63 nights without a home and his health deteriorated. He also suffered from thoughts of suicide. Mr Evans claimed damages for trespass, harassment and unlawful eviction. The defendants' defence was struck out for failure to comply with directions. They appeared at trial and represented themselves.

After considering *Tvrtkovic v Tomas* August 1999 *Legal Action* 29; *Bamberger v Swaby* December 2005 *Legal Action* 21; *Poku-Awuah v Lenton* February 2006 *Legal Action* 30; *Hadden v Nicholson* November 2006 *Legal Action* 32; *Diallo v Brosnan* January 2007 *Legal Action* 23; and *Daramy v Streeks* June 2007 *Legal Action* 37, HHJ Hallan awarded general damages of £15,750 (£250 per day for the whole period that Mr Evans was homeless) and interest of £883.73 for the period from the day he was rehoused to the date of the hearing. The judge also awarded special damages of £5,000, aggravated damages of £1,000 and exemplary damages of £2,000 together with interest of £562.85 for the period from the date of the eviction to the date of the hearing. The judge considered that damages that would otherwise have been payable under the Protection from Harassment Act 1997 formed part of the award in

aggravated damages. Exemplary damages were awarded because the defendants had sought to avoid the due process of law and the costs attendant on that.

Discretionary housing payments

■ Acland v Great Yarmouth BC

[2008] EWHC 2916 (Admin), 3 November 2008

Mr Acland was awarded a discretionary housing payment. The payment ceased in 2007. Mr Acland made a further application, but this was refused. He appealed. The Appeals Committee agreed to reassess the application if Mr Acland: (a) submitted to medical examination by a medical practitioner of the council's choosing; and (b) sought, and, if offered, accepted a suitable council property. Mr Acland declined to visit the doctor nominated by the council. The Appeals Committee then confirmed the decision to terminate the discretionary housing payment.

Mr Acland sought to apply for judicial review, arguing that the decision breached his rights under the convention. On a renewed application for permission to apply for judicial review, Pitchford J concluded that the application had no prospect of success. The requirement that he submit to an independent medical examination was within the local authority's discretion. Mr Acland's failure to attend the medical examination precluded him from the exercise of the council's discretion. Pitchford J dismissed the application.

HOUSING ALLOCATION

Reasonable preference categories

■ R (Ahmad) v Newham LBC

[2009] UKHL 14, 4 March 2009

Newham operated a choice-based letting scheme with three bands. The largest band (from which 75 per cent of lettings were made) contained applicants who were entitled to a 'reasonable preference' under one or more of the categories in HA 1996 s167(2). When bids from members of that band were received for an available property they were ranked by registration date. The property would be allocated to the bidder with the oldest date. Two smaller bands dealt with (a) existing council tenants who had no grounds for 'reasonable preference' – transfer cases (able to bid for up to five per cent of lettings) and (b) non-council tenants with no reasonable preference (able to bid for sheltered and hard-to-let homes only). The council also operated a 'direct lets' scheme for 'decants' (households requiring rehousing as a result of council action) and others requiring an urgent move in exceptional circumstances.

The claimant had multiple housing needs spanning a number of reasonable preference categories and several members of his household had medical needs. His application for 'direct let' status was unsuccessful and he remained in the choice-based letting main band, queuing by date. He sought judicial review of Newham's scheme on the basis that: (a) it irrationally grouped the vast bulk of applicants into a single band distinguishing between them by date of registration rather than housing need; and (b) giving five per cent of lettings to the transfer band was incompatible with giving applicants who were within s167(2) a reasonable preference. The Administrative Court and the Court of Appeal upheld his claim but the House of Lords allowed the council's appeal.

It held that:

- the language of HA 1996 s167, as substituted by the Homelessness Act 2002, gave local housing authorities greater flexibility than hitherto. It no longer *required* that those in the reasonable preference categories who were in the greatest need should be housed first. Waiting time was a relevant factor in determining who should be allocated social housing. Newham's scheme could not be described as irrational for giving that factor pre-eminence. Cases of the most serious nature were still capable of being addressed by the 'direct let' arrangements;
- allowing transfer tenants to bid for up to five per cent of lettings, when they themselves would be releasing council property for allocation to others, did not amount to a denial of a 'reasonable' preference to those in the statutory categories.

Comment: Robert Latham and James Harrison will be explaining the full implications of this decision in the May 2009 issue of *Legal Action*.

The applicant's household

■ R (Ariemuguvbe) v Islington LBC

[2009] EWHC 470 (Admin), 24 February 2009

The claimant was eligible for an allocation of social housing by the council under HA 1996 Part 6. She sought accommodation for herself, her husband, their five adult children (aged between 22 and 31) and three grandchildren (all younger than two). The council decided that for the purposes of its allocation scheme her household would comprise only herself, her husband and the grandchildren. Nothing in the published scheme defined the term 'household'. The council declined to treat the adult children as part of the claimant's household because: (a) they were non-dependent; (b) they were subject to immigration control and their immigration status was precarious; and (c) they were subject to terms of entry that prohibited them from reliance on public funds. The claimant sought judicial review of that decision.

Cranston J dismissed the claim. He held that as neither HA 1996 Part 6 nor the scheme contained any definition of 'household' the question of whether a particular person should be treated as a member of another's household was at large within the wide discretion that governed allocation of social housing. There had been no error in the council's decision-making as to whether it would treat the adult children as members of the claimant's household.

Assessing applications

Public Services Ombudsman for Wales

Complaint

■ Gwynedd CBC

200800969, 11 February 2009

The complainant was the occupier of an overcrowded housing association property (an inspection in October 2007 established that the overcrowding was a Category 1 Hazard for the purposes of HA 2004 Part 1). She had applied to the council for allocation of council accommodation and had been waiting for ten years. It had a points-based allocation scheme. Although her points had been assessed and reviewed, her total was insufficient to trigger an offer of accommodation.

On investigating her complaint, the Ombudsman found that although the council's scheme offered additional points if an applicant was 'homeless' (in keeping with HA 1996 s167(2)(a) and (b)), no officer dealing with her application for allocation had considered the possibility that her housing conditions might be so bad as to render her homeless (HA 1996 s175(3)) and thus trigger additional points. The Ombudsman found that, following receipt of information in February 2005 that the applicant's nine-year-old son was having to live elsewhere, no reasonable authority could have been satisfied otherwise than that she was homeless. In consequence of that maladministration, the complainant had been deprived of additional 'homelessness' points for over three years.

The Ombudsman recommended that the complainant be offered the next available property in her area of choice and that she receive an apology and £2,500 compensation.

HOMELESSNESS

Applications

Public Services Ombudsman for Wales
Complaint
■ Conwy CBC
200702044,
11 December 2008
The council reorganised its housing services to provide a Housing Options and Support Team. Within that team were housing advice officers with delegated powers to determine applications under HA 1996 Part 7 (Homelessness). However, it was not possible (save in exceptional cases, such as street homelessness) to make an application direct to those officers. It was first necessary for applicants to be seen by officers of the Homelessness Prevention Team (HPT) who might, in appropriate cases, make a referral to the housing advice officers. Enquirers mentioning homelessness were directed to the HPT and the office procedure manual recorded that 'proof of homelessness or threatened homelessness is required'.

The complainant was a private sector tenant. In June 2007, following a visit by council officers in which it was found that the property was unsuitable for the complainant and her young child because there were no fire precautions and no safe means of escape from fire, her landlords gave her notice to quit. The HPT wrote to the landlords pointing out that the notice was invalid and setting out the requirements for a valid notice. On 31 August 2007 the landlords served a notice complying with HA 1988 s21 and expiring on 31 October 2007.

Despite numerous contacts with the council, during which the complainant's attention was drawn to other options in the private sector, no arrangements were made to deal with her as homeless or threatened with homelessness until, on 17 October 2007, a homelessness application was referred by HPT to the housing advice officer. A decision letter accepting the main housing duty (HA 1996 s193) was not issued until 11 December 2007.

The Ombudsman found maladministration in the failures: (a) to consider the possibility that the conditions in the complainant's home were so serious as to render her 'homeless' (HA 1996 s175(3)); (b) to issue a decision reasonably promptly between mid-October and mid-December 2007; and (c) to deal with an extant application for a review of the complainant's allocation points.

The Ombudsman said: '[I]t is possible that the failure to recognise the trigger for homelessness inquiries [HA 1996 ss183–184] occurs because emphasis is placed on the council's prevention of homelessness work to such an extent that homelessness inquiries are deferred … [T]he advice and written information given to [the complainant and her partner] could be perceived as seeking to actively dissuade them from seeking assistance from the council with their housing, persuading them instead to look in the private rented sector' (para 67).

Commissioner for Complaints
Complaint
■ Housing Executive
200700491,
6 November 2008
The complainant was severely disabled and in medical need. He applied for a transfer to other accommodation more suited to his needs but when that made only limited progress he wrote to the executive (the statutory homelessness authority for Northern Ireland) in December 2002 asking to be assessed as 'homeless'. The Housing (Northern Ireland) Order 1988 SI No 1990 defines as homeless a person in accommodation which it would not 'be reasonable for him to continue to occupy'. When the council took a year to determine the application (and find that a rehousing duty was owed) the applicant complained to the Commissioner. The chief executive told the Commissioner that there was no record of the December 2002 application but the Commissioner's investigation turned up both the December 2002 letter and the executive's reply sent to it.

The Commissioner found maladministration in the unacceptable failure by the executive to follow the requirements of the legislation and of its own guidance on carrying out homelessness investigations. Had the application been promptly investigated, a full duty would have been owed a year earlier than was acknowledged. An apology and payment of £4,000 was recommended.

Intentional homelessness

■ Ugiagbe v Southwark LBC
[2009] EWCA Civ 31,
10 February 2009,
(2009) Times 18 February
The claimant was an assured shorthold tenant with a fixed-term (one-year) tenancy. When that expired, the landlord gave her a little more time but then told her to leave and she did so. She applied for homelessness assistance under HA 1996 Part 7.

The council accepted that she had been in ignorance of the landlord's need to obtain a possession order to secure her eviction but decided that she had become homeless intentionally because her ignorance of that 'relevant fact' had not been in 'good faith': HA 1996 s191(1) and (2). It found that she had had advice that she should go to the council's Homeless Persons Unit (HPU) for assistance before leaving. She had not done that. Had she taken that step, she would have been advised not to leave without a court order. The decision was upheld on review and HHJ Welchman dismissed an appeal.

The Court of Appeal allowed a second appeal. The claimant had been in ignorance of a relevant fact *and* had acted in 'good faith'. She had not ignored the advice given but simply decided not to approach the HPU because she had not, at the time, wished to become homeless or be treated as homeless. After reviewing authorities on 'good faith' in homelessness cases spanning 25 years, Lloyd LJ said:

26. Her failure to go to the HPU for help could be said to have been foolish or imprudent. But neither of those would be sufficient to put her conduct into the category of not being in good faith, nor would it even if she were regarded as having been unreasonable.

27. The subsection provides relief against the otherwise potentially harsh consequences of subsection (1) … for those who act in relevant ignorance, but subject to the safeguard of the requirement of good faith. It seems to me that the use of the phrase 'good faith' carries a connotation of some kind of impropriety, or some element of misuse or abuse of the legislation.

Discharge of duty

■ Newman v Croydon LBC
[2008] EWCA Civ 1591,
17 December 2008
The council accepted that it owed Mr Newman the main housing duty under HA 1996 s193(2). It provided him with a non-secure tenancy. However, following complaints of drug-dealing and other anti-social behaviour, the council gave him notice to quit, obtained a possession order and, in November 2007, executed that order. It decided that its duty had been discharged because Mr Newman had become homeless intentionally: s193(6)(b). That decision was upheld on review.

Mr Newman appealed, contending that even if the review decision was correct he was in any event entitled to further temporary accommodation as an intentionally homeless person in priority need: s190(2)(a).

The appeal came before HHJ Ellis on 23 May 2008. By that date the applicant had been accommodated by friends and relatives for six months. The judge dismissed the appeal on the basis that it had become academic and futile. He accepted that any accommodation secured under s190(2)(a) would have been for a maximum of three

months, ie, that it would have expired in January or February 2008, long before the hearing. Nothing would be achieved by quashing the review decision.

Lawrence Collins LJ refused a renewed application for permission to bring a second appeal. He reserved for another occasion the question of whether a different result might be required in a 'starker case'. But the decision of the judge in this case had been justified on the facts and did not raise an important point of principle.

HOUSING AND CHILDREN

■ R (MM) v Lewisham LBC

[2009] EWHC 416 (Admin), 6 March 2009

At the age of 17, the claimant fled her home in fear of domestic violence and took shelter in a women's refuge. After she had been there for four months, a refuge worker telephoned social services to make a referral on the basis that the claimant was in need of support. Without making any further enquiries or conducting any proper assessment, the council decided that the claimant was not a 'child in need' because any support needs she might have could be met by a local voluntary organisation. A month later the claimant applied for homelessness assistance. However, no decision was made on the application for over four months. She made a further approach to social services but it again declined to assist on the basis that her accommodation needs would be addressed in the homelessness application and she was fast approaching 18.

On a claim for judicial review, Sir George Newman (sitting as a deputy High Court judge) found that had an adequate assessment been made under the Children Act (CA) 1989 on the initial referral no reasonable council could have failed to have been satisfied that the claimant was a child in need owed the s20 duty. He granted a declaration that she should have been accommodated for 13 weeks before turning 18 and was therefore enitled to further assistance as a 'former relevant child'. He added: 'I would urge the defendant to take action to ensure that: (1) child in need assessments are not carried out in a summary manner as occurred in this case; (2) ... its housing department do not simply fail to respond to applications in respect of children; (3) ... steps are taken to ensure that the imminence of a child attaining 18 years is not taken as a basis for failing to take any action; and (4) ... there is due and proper contact *between its housing authority and its* social services authority' (para 37).

■ R (Liverpool City Council) v Hillingdon LBC

[2009] EWCA Civ 43, 10 February 2009, (2009) Times 13 February

A young male asylum-seeker applied to Liverpool for accommodation. It carried out an assessment under CA 1989 s20 and decided that he was an adult rather than a child. It referred him to the National Asylum Support Service which initially provided him with accommodation in Liverpool but then moved him to a detention centre in the Hillingdon area. An immigration judge, having received medical evidence, was satisfied that the applicant was a child. He was released from the secure unit and approached Hillingdon for assistance. It gave him temporary accommodation under CA 1989 s17 but, on discovering he wished to live in Liverpool, sent him back to that council's area without conducting an assessment under s20 (as to age or otherwise). Liverpool's claim for judicial review of Hillingdon's conduct was dismissed.

The Court of Appeal allowed an appeal and held that Hillingdon had acted unlawfully. It found that Hillingdon had failed to satisfy itself about the age of the young man or carry out a welfare assessment under s20. It had wrongly treated his wish to go to Liverpool as determinative of its responsibilities. It remained under an extant duty to conduct an assessment and determine the extent of its duties (if any) under s20.

HOUSING CONDITIONS

■ Dobson v Thames Water Utilities Ltd

[2009] EWCA Civ 28, 29 January 2009

Residents living near the defendant's sewage treatment works brought a group action alleging nuisance and negligence in the operation of the works. They claimed to have been affected by odours and mosquitoes.

It was not in dispute that they might recover compensation for breach of article 8 of the convention if their enjoyment of their homes had been impaired. However, there was no agreement about the basis on which any such damages might be assessed, nor about whether such damages might be payable in addition to any damages otherwise awarded at common law.

The Court of Appeal's judgment – on an appeal against the findings of a judge on trial of preliminary issues – contains a review of the correct approach to the assessment of compensation under article 8 and the HRA.

1 Available at: www.justice.gov.uk/docs/stats-mortgage-landlord-qu4-2008.pdf.
2 Available at: www.housingrights.org.uk/docman/hrs/preventing-possession-initiative-launch/download.html.
3 Available at: www.cps.org.uk/latestpublications.
4 Available at: www.communities.gov.uk/speeches/corporate/realhelpnow.
5 Available at: www.communities.gov.uk/documents/housing/pdf/1155611.pdf.
6 Available at: www.opsi.gov.uk/si/si2009/pdf/uksi_20090358_en.pdf.
7 Available at: www.respect.gov.uk/members/article.aspx?id=9848.
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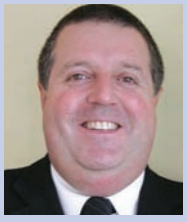
23 Giles Peaker and Timothy Waitt, solicitors, and Anthony Gold, London.
24 Christopher Stockdale and John Barkers, solicitors, Grimsby.
25 Dawn Amos and Thomas Dunton, solicitors, London, and Alastair Redpath-Stevens, barrister, London.



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