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

Reforming social housing

In *Building Britain's future* (29 June 2009), the government announced its intention to make further changes in the law relating to social housing.[1] The four specific proposals (at chapter 5, para 52) are:

- a change in the rules for allocating social housing, enabling local authorities to give more priority to local people and those who have spent a long time on a waiting list;
- expansion of choice-based lettings nationwide and support to tenants who need to move to take up the offer of a new job;
- an autumn 2009 crackdown on housing 'fraud', freeing up homes for those in need; and
- reform of the council housing finance system to allow local authorities to keep money from their own council house sales and rents.

In a parliamentary written statement made the next day (*Hansard* HC Written Ministerial Statements cols 7WS–9WS, 30 June 2009) the housing minister announced a swathe of further changes including:

- with immediate effect, all new-build council housing will be excluded from the Housing Revenue Account (HRA) subsidy system which means that councils will retain in full the rent and capital receipts from those homes;
- a new self-financing scheme of funding for local authority housing will be introduced to replace the HRA, after a period of consultation;
- future large-scale, stock-transfer proposals will not gain any financial support beyond what would be provided under the self-financing scheme; and
- the open-market HomeBuy scheme has been closed to new applicants and in future the low-cost, home-ownership programme will be directed to schemes which support new-build homes.

More protection for tenants and homeowners

A range of new housing measures is also contained in the white paper, *A better deal for consumers. Delivering real help now and change for the future* (Department for Business, Innovation and Skills, July 2009).[2]

In the white paper, the government has said that it will be:

- inviting the Civil Justice Council to produce a definitive statement later this year on the powers available to the court in mortgage possession cases and the circumstances in which they can be used;
- asking the Law Commission to conduct a review of the fundamental principles of residential mortgage law;
- evaluating by the end of the year the effects of the Mortgage Possession Pre-Action Protocol, which was introduced in late 2008;
- consulting on proposals to amend the law to ensure that owner-occupied homes cannot be sold by lenders without taking court proceedings (to reverse the effect of *Horsham Properties Group Ltd v Clark* [2008] EWHC 2327 (Ch)); and
- introducing new legislation at the next opportunity to fill a gap in legal protection for private tenants when their landlords face a mortgage possession claim.

Preventing possession claims and possession orders

The Ministry of Justice (MoJ) has announced the expansion of the pilot Housing Arrears Pre-Action Scheme developed initially at Norwich County Court in conjunction with Norwich City Council, Shelter and Norfolk Community Law Service. The scheme works by calling tenants, who are likely to be made defendants to rent arrears possession claims, to a meeting at the court at which a duty adviser is present. It was designed to avoid rent possession claims being issued by Norwich City Council. The scheme in Norwich is now being extended to help prospective defendants in mortgage possession cases and the rent arrears element of the scheme has been extended to a further five pilot courts (in Brighton, Clerkenwell and Shoreditch, Durham, Nottingham and Sheffield) where it will run until October 2009: MoJ news release, 2 July 2009.[3]

Another government department, Communities and Local Government (CLG), presently funds 76 county court duty desks for possession days in county courts. The housing minister has announced that he is doubling the funding for the duty desks: CLG news release, 22 June 2009.[4] These schemes are separate from, and additional to, those funded by the Legal Services Commission (LSC).

For its part, the LSC has announced that all the contracts for the duty schemes which it runs presently will be extended until September 2010 and then will end. A bid round to win contracts to operate schemes post-September 2010 will be launched in April 2010 after new contracts for civil work have been awarded. Only contractors with a housing contract will be able to bid to operate a duty scheme and providers offering debt and welfare benefits expertise, together with housing, may have preference: *Civil bid rounds for 2010 contracts. A consultation response* (June 2009, paras 3.44–3.47).[5] See pages 3 and 4 of this issue.

Housing and anti-social behaviour

The Youth Taskforce is now leading the national strategy to tackle anti-social behaviour. *Youth Taskforce – progress report. Summer 2009* (Department for Children, Schools and Families, June 2009) covers intensive intervention projects, family intervention projects and progress with the Youth Crime Action Plan.[6]

In a speech delivered on 2 July 2009, the Home Secretary acknowledged pressure to speed up the handling of anti-social behaviour cases by the courts.[7] He said:

> *I know that victims of anti-social behaviour, and frontline professionals feel frustrated by delays in bringing cases to court and getting them concluded. I will explore, with the Secretary of State for Justice, what more can be done to speed this process up – in particular, how we can break down any barriers there might be between the courts and people bringing cases before them. Some of the ideas we might want to look at include better training for practitioners so they can present cases in court themselves where possible, and exploring whether we could set maximum waiting times and limits to the number of times a case could be adjourned.*

ASB Focus (Issue 4, Home Office, May 2009) features a report of action taken by the Safer Knowsley Partnership in February 2009 to secure premises closure orders in respect of three houses in one street, all occupied by

members of the same extended family. The properties were said to have been bases for persistent nuisance and anti-social behaviour.[8]

Homelessness

The latest quarterly statistics on homelessness in England show that the number of homeless households accepted for statutory assistance under the main housing duty (Housing Act (HA) 1996 s193) has continued to fall. Compared with the first three months of 2008, figures for the first quarter of 2009 are down by 26 per cent. The proportion of acceptances for mortgage arrears repossession has also fallen: *Statutory homelessness: 1st quarter* 2009, England (CLG, 11 June 2009).[9]

The June 2009 *HAT update* from the Homelessness Action Team at the Tenant Services Authority (TSA) covers mortgage rescue, possession prevention and private sector reform.[10] A new book, *Homelessness in the UK. Problems and solutions* (edited by Suzanne Fitzpatrick, Deborah Quilgars and Nicholas Pleace, Chartered Institute of Housing, June 2009) covers the subject in depth.

National standards for social housing

The TSA has launched a second round of consultation on the draft new statutory standards to apply from April 2010 to social housing providers in both the local authority and housing association sectors: *Building a new regulatory framework. A discussion paper* (June 2009).[11] Responses are sought by 8 September 2009. The consultation paper is accompanied by the findings from the National conversation consultation exercise with tenants: *National conversation. Phase one findings* (TSA, June 2009).[12] A further round of full statutory consultation – for the purposes of the Housing and Regeneration Act 2008 – will take place in autumn 2009.

Redress in social housing

The white paper *Communities in control: real people, real power* (Cm 7427, 9 July 2008) contained a government commitment to commission a review into redress for consumers when their council services (including housing) fail to meet agreed standards. The review team published its findings on 17 June 2009. The team looked at the experience of service and redress provision from the customer's viewpoint and how a customer-focused approach can be embedded in the culture of local councils, to ensure services deliver first time as well as deal better with complaints: *Getting it right, and righting the wrongs* (CLG, June 2009).[13] The team also produced a toolkit to help local councils to improve customer service: *Getting it right, and righting the wrongs. Practitioners' toolkit* (CLG, June 2009).[14] The government will support the testing and further development of the *Practitioners' toolkit* through a £900,000 pilot programme: see *Getting it right, and righting the wrongs. Practitioners' toolkit pilot programme* (CLG, 30 June 2009).[15]

For its part the TSA is encouraging best practice in social housing provision by inviting housing associations, local authorities and arms length management organisations (ALMOs) to make bids of up to £9,000 each for the development of 'local deals' between those landlords and their tenants: *Local standard pilot prospectus* (July 2009).[16] The 'deals' are intended to enhance the level of landlord services in response to particular local needs and to strengthen landlords' accountability to their local communities. Applications must be submitted by 5 August 2009.

Mortgage Rescue Scheme

Only six households in mortgage default have moved towards 'completion' of a buy-out by a housing association in the first five months of the government's Mortgage Rescue Scheme in England: *Table 1303. Repossessions and repossession prevention: Mortgage Rescue Scheme monitoring statistics, as reported by local authorities, by region*.[17] It was anticipated that the £250m scheme would help 6,000 vulnerable households within two years. The government said in May 2009 that the scheme would be kept 'under review to ensure any impediments to delivery are addressed effectively': *Government response to the House of Commons Communities and Local Government Committee report on the Department for Communities and Local Government housing and the credit crunch* (Cm 7619, p17).[18]

A survey conducted by Shelter and other advice agencies has revealed that while the primary mortgage lenders have mainly responded positively to the Mortgage Possession Pre-Action Protocol, the response of second mortgage lenders has been less constructive: *Mortgage and secured loan arrears: adviser and borrower surveys April 2009. Research from AdviceUK, Citizens Advice, Money Advice Trust and Shelter* (May 2009).[19]

Private rented sector

The government has published two impact assessments as part of the ongoing consultation about the future of the private rented sector. The first deals with the proposed national registration scheme for landlords: *Impact assessment of a national register for landlords* (CLG, June 2009).[20] The second deals with the proposed new independent regulatory scheme for letting agents and managing agents: *Impact assessment of regulation of letting and management agents by an independent body* (CLG, June 2009).[21]

A survey report from Citizens Advice has revealed that 94 per cent of letting agents impose charges on tenants going well beyond the deposit or rent in advance: *Let down. CAB evidence on letting agents and their charges* (May 2009).[22] The organisation has called for a strong system of regulation on letting agents, including a ban on such additional charges.

Sale and rent-back

On 2 June 2009, the government laid draft secondary legislation before parliament to bring sale and rent-back agreements within the scope of Financial Services Authority (FSA) regulation: HM Treasury press release 51/09, 2 June 2009. The government also published a summary of responses to its consultation on the sale and rent-back market: *Regulating the sale and rent back market: summary of responses to consultation* (HM Treasury, June 2009).[23] On 3 June 2009 the FSA itself published details of its interim regulatory regime, which commenced on 1 July 2009: *Regulating sale and rent back: an interim regime. Feedback on CP09/6 and near-final rules*.[24] The full FSA regulatory regime will come on-stream on 30 June 2010.

On the law relating to sale and rent-back cases see the articles by Rawdon Crozier at [2009] 13 L&T Rev 104 and LS Gaz 'Gazette in practice' 14 May 2009, p27.

Housing and disability

The UK ratified the United Nations Convention on the Rights of Persons with Disabilities on 8 June 2009. The Welfare Reform Bill (presently before the House of Lords) will give the government regulation-making powers to introduce a statutory 'right to control' for disabled people enabling them to exercise greater choice and control in the provision of services. The government has launched a consultation exercise on the scope of the new right: *Making choice and control a reality for disabled people. Consultation on the right to control* (Office for Disability Issues, June 2009).[25] The consultation ends on 30 September 2009.

A new publication from the Housing Learning and Improvement Network and the *Journal of Care Services Management* covers housing issues arising from dementia: *Journal of Care Services Management*. Volume 3 Issue 3: special issue on housing and dementia.[26]

Housing law in Northern Ireland

The Housing (Amendment) Bill passed its second stage in the Northern Ireland Assembly on 23 June 2009.[27] The bill would:

- introduce rights of review and appeal for the homeless who wish to dispute decisions made by the Housing Executive;
- require production of homelessness strategies;
- amend the definition of a house in multiple occupation; and
- deal with abandoned introductory tenancies.

Help with service charges

Local housing authorities have been able to offer arrangements to assist leaseholders with the payment of service charges since 6 April 2009. On 1 July 2009, CLG launched a consultation exercise seeking views on whether there should be a statutory upper limit on any administration fees that housing authorities can charge when offering such equity loan or equity share arrangements: *Capping administration charges for equity share and loan arrangements offered by housing authorities. Consultation.*[28] Responses are sought by 23 September 2009.

Housing in London

The Greater London Authority Act 2007 gives the Mayor of London responsibility for producing London's housing strategy. A consultation draft was published in May 2009: *The London housing strategy. Draft for public consultation* (Greater London Authority).[29] The objectives expressed for housing in London are:

- to raise aspirations and promote opportunity: by producing more affordable homes, particularly for families, and by increasing opportunities for home ownership through the new First Steps housing programme;
- to improve homes and transform neighbourhoods: by improving design quality, by greening homes, by targeting and delivering regeneration and by tackling empty homes; and
- to maximise delivery and optimise value for money: by creating a new architecture for delivery, by developing new investment models and by promoting new delivery mechanisms.

HUMAN RIGHTS

Discrimination and delay

■ Korelc v Slovenia

App No 28456/03,
12 May 2009

In 1990, AZ, an 86-year-old widower and the father of Mr Korelc's friend, invited Mr Korelc to live with him. He moved into a one-room apartment which AZ was renting from the Ljubljana-Šiška Municipality. In 1992, Mr Korelc registered his permanent residence at AZ's address. AZ declared on the back of the registration form that Mr Korelc lived with him in order to provide him with daily care. In 1993, AZ died. In 1995, the Municipality informed Mr Korelc that the HA 1991 was not applicable to the relationship established between him and AZ, since he was not a member of AZ's close family, and so was not entitled to take over the tenancy. The Municipality requested that he vacate the apartment within three months. In 1995, Mr Korelc instituted proceedings in the Ljubljana Local Court, seeking the right to succeed to the tenancy. In 1999, the Municipality counterclaimed, seeking Mr Korelc's eviction. In 2000, the court held that Mr Korelc 'was not entitled to continue the contract of lease … since he was neither the deceased's "spouse", nor a person forming a "long-lasting life community" with him, nor a close relative' (para 19). In 2003, the Constitutional Court dismissed Mr Korelc's appeal. It held that his cohabitation with AZ amounted only to an 'economic community' and did not fall within any of the categories listed in HA 1991 s56, namely, the tenant's spouse, a person who had lived with the tenant in a 'long-lasting life community' or one of the tenant's close family members. Mr Korelc complained to the European Court of Human Rights (ECtHR) under:

- article 14 in conjunction with article 8 of the European Convention on Human Rights ('the convention') that he had been discriminated against on the ground of gender in that he had been denied the right to succeed to a tenancy after AZ's death, on account of the fact that they were both men; and
- article 6(1) that the main set of proceedings had been excessively long.

With regard to article 14, the ECtHR noted that it was not Mr Korelc's contention that his relationship with AZ was of a homosexual nature or that he was discriminated against on the ground of his sexual orientation. His situation was therefore clearly distinguishable from *Karner v Austria* App No 40016/98, 11 September 2001. His 'sex was [not] a decisive element in the rejection of his claim … a person of the opposite sex would [not] have been treated any differently' (para 88). So, he had not been discriminated against on the grounds of either his sexual orientation or his sex.

With regard to article 6, the main set of proceedings was conducted at three levels of jurisdiction and lasted just over eight years. The length of the proceedings, in particular before the first instance court, was excessive and failed to meet the reasonable time requirement. There was therefore a breach of article 6. The ECtHR considered that Mr Korelc must have sustained non-pecuniary damage. Ruling on an equitable basis, it awarded him €3,000.

Possession claims and article 8

■ Central Bedfordshire Council v Taylor

[2009] EWCA Civ 613,
23 June 2009

The council was the freehold owner of land. The defendants were trespassers of dwellings on that land. At the hearing of the claimant's possession claim, HHJ Everall QC ruled that the occupiers had no legal right to occupy the dwellings. He also found that article 8 of the convention did not provide a defence. He made a possession order. The defendants appealed. On appeal, they argued, in the light of *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367; [2008] 3 WLR 636 that:

- in certain albeit exceptional circumstances a public authority was bound to consider and take account of the personal circumstances of trespassers;
- the circumstances arguably existed in this case; and
- the matter should be remitted to the county court to consider whether the council should be directed to reconsider its decision.

The Court of Appeal dismissed their appeal. Waller LJ noted that the facts in this case were very similar to those in *Kay v Lambeth LBC* [2006] 2 AC 465, and that if the landowner were a private landowner, there would be no question of that landowner being required to take account of the personal circumstances of the trespassers. The court would be bound to make an order for possession. He emphasised that the decision of a public authority can be made the subject of judicial review, and in the context of possession claims in the county court, the correct forum for that review, if an arguable point is raised, is the county court itself. Furthermore, even if in *Kay* Lord Hope intended gateway (b) to be confined to what Waller LJ might term a 'rationality' challenge, in his speech in *Doherty* Lord Hope intended to extend to some extent the scope of judicial review beyond rationality even if not as far as a straightforward challenge by reference to the convention (para 22).

He said that: 'There does appear to have been a tension between the views of the House of Lords as to the proper approach to article 8, and those of ECtHR, but hopefully the divergence is less serious than some

would suggest' (para 26). Although article 8 rights are engaged if a trespassing occupier has made a home on the land, the effect of Lord Hope's speech in *Kay* when 'holding that a defence which does not challenge the law entitling a landowner to possession but is based on personal circumstances must be struck out he must have also been holding … that there cannot have been any obligation on the public authority to consider personal circumstances' (para 29). He continued:

Prima facie [a public authority] has no obligation to find out what the true facts are and the burden is going to be on the occupier to demonstrate any grounds relied on as providing an article 8 defence. If the occupier informs the public authority of relevant circumstances, the public authority will have to take a further decision as to whether to commence proceedings. If no letter is received and the facts are only divulged just prior to the hearing, the public authority in reality has to take a further decision as to whether to proceed. Indeed if the revelation is only during the hearing, the council in deciding to continue to press for an order takes yet a further decision. I do not see why if any one of these decisions could be shown to be 'unreasonable' …, it could not be attacked (para 40).

He added:

… the question whether a decision of a public authority is 'reasonable' post-Doherty goes beyond the question whether it is rational. I would also accept that a public authority should take account of the personal circumstances of the occupier known to it, but it does not follow from this that there will ever be circumstances in which it will be unreasonable to seek possession against trespassers in situations similar to those in Kay (para 44, judge's emphasis).

It was not appropriate to remit this case to the county court. The council had an unqualified right to possession. The appellants did not allege any facts which provided some special claim to remain. Lloyd LJ said that the council's 'decision to press for a possession order at the trial was a proper and valid public law decision' (para 62). Richards LJ said 'the council's decision to press for a possession order could not be regarded as one which no reasonable person would consider justifiable' (para 64).

■ Defence Estates v JL

[2009] EWHC 1049 (Admin),
5 May 2009

Mrs JL was married to an army officer. He was violent to her and abused one of their daughters. In July 1989, he resigned from the Army following a court martial which found him guilty of 'ungentlemanly conduct'. Although the Army no longer had any duty to house Mrs JL, on compassionate grounds, because of her husband's misconduct towards her and the family, she was granted a licence of accommodation in Leeds where her children attended a boarding school. There could be no assured tenancy as a result of HA 1988 Sch 1 para 11. A notice to quit was served in 1990. A possession order was made in 1993. In 2001, after unsuccessful attempts to find Mrs JL alternative accommodation, a warrant for possession was sought, but refused because a new tenancy had been granted. In 2005, a new notice to quit was served. By this time Mrs JL suffered ill-health, was registered disabled, and had to use a wheelchair. She defended possession proceedings relying on article 8 of the convention.

Collins J reviewed *Harrow LBC v Qazi* [2004] 1 AC 983, *Connors v UK* [2005] 40 EHRR 185, *Blečić v Croatia* [2004] 41 EHRR 13, *Kay* (see above), *Doherty* (see above) and *Doran v Liverpool City Council* [2009] EWCA Civ 146. He indicated that he could see the force of the approach of what he described as the minority in *Doherty* who expressed regrets that it was not possible to allow 'express regard to be had to human rights convention principles in relation to any defence raised against a public authority …' (para 45). He continued:

Surely most people would consider that it was unreasonable to take action which constituted a breach of an article of the human rights convention. Nevertheless, the court at Strasbourg has clearly indicated that the test is one that requires that it be manifestly disproportionate, and that is certainly a higher test than merely disproportionate. But, again, there is no reason in principle, as far as I can see, why that test should not be as easily applied by county court judges as the test of irrationality. It would be for the judge to consider that matter on the facts of every case in which it was raised (para 46).

However, the decision of what he described as the majority in Doherty was binding on him. Collins J rejected the suggestion that it was irrational to bring these proceedings because of a failure to appreciate the full circumstances, including the presence of Mrs JL's daughter who had a disability. There was no obligation on the claimant to make that sort of enquiry. In this case, Mrs JL could not stay in the property forever. She could not have security.

However, the claimants 'must assist in the finding of suitable alternative accommodation' (para 53) and Mrs JL 'must co-operate in the attempts to find her and her family alternative accommodation' (para 57). Collins J concluded: 'She has no right to remain where she is, and there is no question but that the need of the Ministry [of Defence] to have available accommodation, including this accommodation for their purposes, is one which overrides the rights of the defendant under article 8' (para 57). There was no option but to make an order for possession.

PUBLIC SECTOR TENANCIES

Right to buy

■ Hanoman v Southwark LBC

[2009] UKHL 29,
10 June 2009,
[2009] 1 WLR 1367,
(2009) Times 16 June

Mr Hanoman was a secure tenant receiving housing benefit. He exercised the right to buy a lease of his flat. Initially, the local authority disputed his right to buy. He lodged several notices of delay and alleged that, as a result of the delay, the premium payable on grant of the lease should be reduced to nil under HA 1985 ss153A and 153B. After discussions with the local authority, he completed the transaction and paid the premium while reserving the right to take any dispute to the county court. HHJ Simpson held that Mr Hanoman was not entitled to a reduction in the premium because his rent was paid by way of housing benefit. Mr Hanoman appealed.

On appeal, Southwark argued that the county court had no jurisdiction to grant the relief sought by Mr Hanoman once the lease had been executed. The Court of Appeal allowed the appeal ([2008] EWCA Civ 624, 12 June 2008; [2009] HLR 6). On the jurisdictional point, there was a contract between Mr Hanoman and Southwark, collateral to the execution of the lease, that, notwithstanding completion, Mr Hanoman would be able to enforce any rights to have any outstanding dispute about the exercise of his right to buy determined by the county court. It also held that there was no material difference in legal terms between the payment of rent by a third party and the credit by the housing authority of rent from its housing benefit account to the tenant's rent account. Southwark appealed to the House of Lords on the 'payment' point.

The House of Lords dismissed the appeal. The periodic crediting to a tenant's rent account of a sum of money

for the purpose of reducing or discharging the periodic rent liability of the tenant could be described as a payment of rent for the purposes of HA 1985 s153B. A literal construction of the expression 'payment of rent' would produce anomalous differences between tenants entitled to housing benefit whose landlords, such as local authorities, could provide housing benefit by rent rebate, and those whose landlords, such as housing associations, could not do so.

■ Ryan v Islington LBC

[2009] EWCA Civ 578, 19 June 2009

Ms Ryan was a secure tenant. She gave notice exercising her right to buy a long lease. Islington sent her an offer notice which took into account known defects. Two months later subsidence was diagnosed and underpinning was recommended. Ms Ryan spoke to Islington and was told that there might be a six-month wait for the works. She accepted Islington's offer made under the right to buy. Conveyancing documentation was sent to her solicitors, but they did not reply. Eight months later Islington served a notice to complete within 56 days. The notice stated that Ms Ryan should serve written notice if 'any relevant matters are outstanding'. She raised queries about the underpinning but it was not until a second notice to complete was served that she stated that she could not obtain a mortgage until the works were completed. The time for completion expired and Islington treated the application as withdrawn. A recorder dismissed her claim for a declaration that the exercise of her right to buy was not deemed to have been withdrawn. She found that Ms Ryan had not complied with the first notice because 'relevant matters' were defined by HA 1985 s140(5). Ms Ryan appealed.

The Court of Appeal dismissed her appeal. Subsidence was not a structural defect in respect of which non-repair was an outstanding matter 'relating to the grant'. The 'grant' referred to was the conveyance or lease by which the property was to be transferred. The words 'relating to the grant' did not naturally embrace the physical condition of the flat or any disrepair or structural deficiency affecting it. Ms Ryan's stance that she had not been required to complete until the underpinning had been done had been wrong in law. She had not proved that she could not obtain a mortgage until it was done. She had not advanced any cogent reason during the currency of the two notices as to why they were unreasonably short, and there was no basis for concluding that they were.

Death and succession

■ Islington LBC v Freeman

[2009] EWCA Civ 536, 11 June 2009

Ms Freeman's father had a secure tenancy of a flat. His health deteriorated. In 2004, Ms Freeman moved in with him to provide full-time care. She left her own flat unoccupied. Her father died in June 2005. She asked Islington to accept that she had succeeded to the tenancy. It refused and began possession proceedings. The judge found that Ms Freeman was physically living in the flat seven days a week and that she was occupying the flat as her only home, but that she had not 'resided with' her father throughout the previous year. Accordingly, she was not qualified to succeed under HA 1985 s87(b). He made a possession order. Ms Freeman appealed.

The Court of Appeal dismissed the appeal. Mere physical presence is not enough to amount to 'residing with' for the purposes of s87. There must, to a significant degree, be an intention which can be characterised as making a home with the tenant. Just staying in the property is not enough (*Swanbrae Ltd v Elliott* (1987) 19 HLR 86, CA). The question of whether Ms Freeman had 'resided with' her father was one of fact and degree. It was not sufficient merely to invite the Court of Appeal to assess the facts and degree differently from the way it was done by the judge below. The judge had not misdirected himself or reached a conclusion that was perverse. The matters to which he referred were entirely proper considerations, and his reasoning could not be faulted.

■ Austin v Southwark LBC

[2009] EWCA Civ 66, 16 February 2009, April 2009 Legal Action 18

The House of Lords has given leave to appeal.

Possession procedure

■ Redbridge LBC v Blunsum

Ilford County Court, 21 May 2009[30]

Mr Blunsum was granted a non-secure tenancy under the main homelessness duty (HA 1996 s193(2)). The premises were managed by agents on behalf of Redbridge. The tenancy agreement stated that the agents were entitled to act for and on behalf of Redbridge in enforcing and carrying out the terms of the agreement and, where appropriate, to claim from Mr Blunsum the costs of any such action. Mr Blunsum incurred rent arrears: the shortfall between the contractual rent and housing benefit. The agents served a notice to quit which terminated the tenancy and issued possession proceedings in Redbridge's name. The claim form and particulars of claim stated that the claim was brought because of 'rent arrears'. The statements of truth in the claim form and particulars were each signed by the managing agents. Mr Blunsum applied to strike out the claim for non-compliance with the Civil Procedure Rules (CPR) 3.4(2)(c).

District Judge Millward held that the claim form and particulars of claim were deficient for two reasons. The claim was brought on the ground of rent arrears, but no statutory ground for possession was pleaded and in fact the ground was the termination of a non-secure tenancy. If the claim was brought on the ground of rent arrears, further details were required. More seriously, the claimant had not signed the statement of truth, nor had it issued the proceedings. The managing agents had issued proceedings and had signed the statements of truth. The judge had the option of either striking out the claim or giving the claimant permission to amend. It was a balancing exercise. There was prejudice to the claimant if there was delay and the arrears increased. However, there would inevitably be delay, whichever method was used. Given the deficiencies and Mr Blunsum's assurance that he had every intention of paying his rent so that the arrears would not get worse, it was right to strike out and give the claimant the option of starting again. District Judge Millward struck out the claim because the agents had no standing to issue it.

Anti-social behaviour

Anti-social behaviour orders

■ R (McGarrett) v Kingston Crown Court

[2009] EWHC 1776 (Admin), 8 June 2009

Mr McGarrett was a secure tenant. Following complaints of nuisance, Kingston obtained a suspended possession order. Later, Kingston served a noise abatement notice. After a Crown Court trial, Mr McGarrett was convicted of breaching it by holding a wedding reception. A Crown Court judge granted an anti-social behaviour order (ASBO) (Crime and Disorder Act 1998 s1C) prohibiting him from certain activity for an indefinite period. Mr McGarrett sought judicial review of the decision to make the ASBO, asserting that it had been neither necessary nor proportionate.

The Divisional Court allowed the claim. An ASBO must be both proportionate and necessary (*R v Boness* [2005] EWCA Crim 2395). The Crown Court had made no findings about necessity or proportionality, nor had it sufficiently stated the concerns that were intended to be addressed by the ASBO. The court had also failed to consider

the other orders to which the claimant was subject and the effect they had on the test of necessity. The existence of a possession order should have indicated to the court that an ASBO was not necessary.

■ Stirling Council v Harris

Stirling Sheriff Court,
11 March 2009

Mr Harris owned a farm. Mrs Bennie rented a neighbouring property. In February 2008, Mr Harris shouted at Mrs Bennie because one of her dogs had chased one of his cats. There was then 'a robust exchange of views' during which Mr Harris waved a torch around. Mrs Bennie was concerned by that behaviour. During a meeting with the council's anti-social behaviour unit, Mr Harris described Mrs Bennie and her family as 'chavs'. The council considered that this was racist behaviour. The council applied for an ASBO.

The Sheriff dismissed the application. It had not been established that Mr Harris had engaged in anti-social behaviour towards Mrs Bennie. An ASBO was not necessary for the protection of a relevant person.

PRIVATE SECTOR OCCUPANTS

Surrender by operation of law

■ Artworld Financial Corporation v Safaryan

[2009] EWCA Civ 303,
27 February 2009,
June 2009 Legal Action 33

The House of Lords has refused a petition for leave to appeal.

Eviction from a cave

A man being evicted from a cave where he has lived for 16 years has vowed to take his case to the ECtHR. Brighton and Hove City Council has obtained an injunction to stop Hilaire Purbrick, 45, from entering the cave on his allotment, as it has no fire exit. Granting the order at Brighton County Court, HHJ Simpkiss QC said there were legitimate health and safety concerns that the cave could collapse. Mr Purbrick said: 'I am still living there and intend to continue to do so, I know lots of people in this town who live in houses with only one door with no fire exit' (see the *Times* 18 June 2009 and the *Daily Telegraph* 17 June 2009).

Assured tenancies

Rents

■ London District Properties Management Ltd v Goolamy

[2009] EWHC 1367 (Admin),
16 June 2009

In 2001, Mr and Mrs Goolamy were granted an assured tenancy for a period of three years at a rent of £7,148 per annum, payable monthly. The lease contained a rent review clause which purported to increase the rent by five per cent every year. The rent was never raised by that percentage. Following the expiry of the fixed term of the lease, Mr and Mrs Goolamy continued in occupation and became statutory periodic tenants. In 2008, London District Properties served a HA 1988 s13(2) notice proposing that the rent be increased to £16,800 per annum (ie, more than a five per cent increase). Mr and Mrs Goolamy referred the proposed increase to the London Rent Assessment Panel. The panel declined jurisdiction on the basis that the review was governed by s13(1)(b) and that the terms of the lease were paramount. London District Properties appealed.

Burnett J allowed the appeal. On expiry of the fixed term, a statutory periodic tenancy came into being. Section 13 provided a statutory scheme governing the increase of rent. Section 13(1) drew a distinction between two different categories of assured periodic tenancy. Section 13(1)(a) was concerned with statutory periodic tenancies other than those which could not be an assured tenancy due to Sch 1 paras 11 and 12. Section 13(1)(b) was concerned with any other assured periodic tenancies. In respect of the latter category, the statutory scheme expressly did not apply where there was a contractual rent review clause binding on the tenant. The natural reading of s13, given the contrast between the subsections, was that a rent review clause in the original assured tenancy did not oust the mechanism for increasing rent found in s13 once that assured tenancy had been superseded by a statutory periodic tenancy (para 9). In view of s5(3), the rent review clause in the original assured tenancy, purporting to govern the position once it had been superseded by a statutory periodic tenancy, was of no effect. In those circumstances, unless there is agreement, the landlord must use the notice provisions of s13(2) (para 10). Having found that the tenancy was a statutory periodic tenancy, the panel fell into error in considering that s13(1)(b) was in play rather than s13(1)(a). The case was remitted to the panel to determine the rent (para 11).

Assured shorthold tenancies

Tenants' deposits

■ Woods v Harrington

Haverfordwest County Court,
19 May 2009

Ms Harrington granted Ms Woods an assured shorthold tenancy for 12 months from 1 May 2008. The tenancy agreement provided for payment of a deposit of £600 as 'security for faithful performance … of all the terms of this lease'. The deposit was not paid into any authorised scheme. During the term of the tenancy, Ms Harrington agreed to accept notice to terminate the tenancy early. As a result, Ms Woods delivered up possession of the property on 7 March. Ms Harrington did not return the deposit. On 13 March, without any prior warning, Ms Woods began proceedings seeking return of the deposit. Ms Harrington defended the proceedings, alleging that Ms Woods had caused damage to the property, but, in April 2009, paid the deposit into an authorised scheme.

District Judge Godwin noted that: 'As a matter of fact, [it was] undoubtedly correct that … at no time during the existence of the tenancy agreement, did [Ms Harrington] take action to comply with the requirements of Housing Act 2004 s213.' Both parties agreed that the tenancy was terminated before Ms Harrington took any action to place the deposit in an authorised scheme. District Judge Godwin concluded that the payment was made in 'the hope of avoiding the repercussions of not doing so as set out in [s214] … [S]uch action is not only contrary to the letter of the law but is also contrary to the spirit of the law and the public policy considerations that parliament was seeking to enhance when introducing the legislation'. It could not have been intended that a landlord could completely ignore the legislation during the subsistence of the tenancy and then, after the tenancy has been terminated, place the deposit with an authorised scheme and thereby avoid any order being made by the court under s214(3) and (4). Ms Woods was entitled to the return of the deposit and £1,800 (being three times the deposit) under s214(4). District Judge Godwin gave directions for the hearing of the landlord's counterclaim.

■ Delicata v Sandberg

Central London County Court,
2 June 2009[31]

On 16 July 2007, Ms Sandberg was granted a 12-month assured shorthold tenancy. She paid a deposit of £660, but it was not protected under an authorised tenancy deposit scheme until August 2007. The landlords served a notice under HA 1988 s21 on the day that the tenancy agreement was issued. On 11 April 2008, Ms Sandberg was sent to prison. Beforehand, she notified the landlords about this. They agreed that she could sublet while she was away. While she was in prison, she spoke by telephone on several occasions to the landlords and their agents. Without warning her, in July 2008 they began accelerated possession proceedings relying on the s21 notice served at the start of the tenancy. Ms Sandberg was not served with the proceedings in prison. A

possession order was obtained in September 2008. A warrant of possession was executed on 28 April 2009. Ms Sandberg returned to the premises on 4 May 2009. The landlords applied for a warrant of restitution to remove her from the premises. She applied to set aside the possession order and the warrants.

District Judge Avent accepted her argument that the possession order, the warrant of possession and the warrant of restitution should be set aside. The s21 notice should not have been relied on because it was invalid. It had been served well before the deposit had been protected under a deposit scheme (HA 2004 s215(1)).

Harassment and unlawful eviction

Damages

■ **Abbas v Iqbal**

Bow County Court, 4 June 2009[32]

Mr Iqbal granted Mr Abbas, an elderly man in frail health, a weekly periodic assured shorthold tenancy of a single room, with shared use of a kitchen and bathroom. The rent was £60 per week. In November 2007, Mr Iqbal told Mr Abbas that he had to leave the property as he intended to convert the entire building into flats. In April 2008, he served written notice on Mr Abbas that he – along with the other tenants in the building – was required to leave the property within two weeks. The notice did not comply with the requirements of HA 1988 ss8 or 21. Mr Iqbal did not obtain an order for possession. On 28 May 2008, Mr Iqbal instructed contractors to begin the conversion work on the building. On 30 May 2008, the gas supply to the property was disconnected. On 31 May 2008, again without warning, the water supply to the property was disconnected. Mr Abbas remained in occupation even though he was forced to buy bottled water to drink and was unable to prepare or eat meals, take his medication, wash or use the toilet due to the lack of water supply. On 9 June 2008, Mr Abbas obtained an injunction ordering Mr Iqbal to reinstate the water and gas supplies to the property. The landlord failed to reconnect the utilities and the building work continued around Mr Abbas. Within a week, the property was uninhabitable. Construction work rendered the building in which the property was situated a mere shell. Mr Abbas was unable to use the shared facilities and the building was unsafe. Consequently, he could no longer stay in the property and spent a number of nights sleeping in the business premises of friends, until the local authority housed him in temporary accommodation. On his return to the property on or about 13 June 2008, Mr Abbas discovered that all of his furniture and personal effects had been removed and disposed of.

HHJ Redgrave assessed damages at £39,194 comprising:

- £150 per day for the 13 days during which Mr Abbas endured building works and a lack of utilities (£1,950);
- £250 per day for the three days Mr Abbas was forced to sleep 'rough' (£750);
- £1,000 compensation for Mr Abbas having to vacate the property before his tenancy had been terminated;
- £10,000 aggravated damages;
- £7,500 exemplary damages;
- £2,000 per annum for cockroach and rodent infestations in the property over six years (£12,000);
- £500 for a toilet which had been defective for six months;
- £5,494 special damages (which figure, the court commented, was almost certainly 'an undervalue').

■ **Jarvis v Sherif**

Central London Civil Justice Centre, 28 May 2009[33]

The claimants, a husband and wife, were granted a 12-month assured shorthold tenancy. As a result of disrepair, conditions became 'extremely uncomfortable' for them. In August 2008, after many requests for repairs, they said that they would not pay rent until repairs were carried out. The landlord took the view that repairs would be too expensive and sent a letter threatening to change the locks. Two days later, on 17 October 2008, the night of their wedding anniversary, the tenants were unlawfully evicted. Mr Jarvis suffered mental illness and was in great distress. He was deprived of access to medication. Mr and Mrs Jarvis were only able to retrieve some of their belongings on 9 December 2008. By that time, the flat had been re-let. The tenants only found alternative accommodation on 20 January 2009, after a 'stressful' time living with the mother of one of the tenants.

HHJ Karsten QC awarded general damages (including aggravated damages) of £2,500 to Mr Jarvis and £2,000 to Mrs Jarvis, exemplary damages of £3,000 and special damages of £2,200 (total: £9,700).

HOUSING ALLOCATION

Local Government Ombudsman

Complaints

■ **Ealing LBC**

07/A/10617, 18 May 2009

The complainant lived in a two-bedroom council flat with his wife and three sons. In 1999 they were joined by his elderly and disabled mother-in-law. On a renewed transfer application, the council's medical adviser recommended that the mother-in-law be rehoused separately into sheltered accommodation. That resulted in loss of priority for the complainant's own application in November 2006. Only after the involvement of an advice agency, and a complaint to the Ombudsman, was priority restored and the mother-in-law treated as part of the complainant's household.

The Ombudsman found that the council had acted solely on the medical adviser's advice without proper consultation and assessment. That, and other mishandling of the transfer request, showed that the council had 'failed to give proper and timely consideration to the values and principles that underlay article 8' (para 54) (ie, the right to respect for family life). He recommended backdating of priority for the transfer application and £2,000 compensation.

■ **Havering LBC**

08/005/922, 16 June 2009

The council allocated the complainant a flat after it had been refurbished following a major fire. The tenancy was accepted on 29 September 2006 to start on 9 October 2006. By the start date, the gas supply necessary to operate the heating and hot water was not connected. The complainant could not move in and wrote to inform the ALMO responsible for managing the property. It arranged for a gas engineer to visit on 1 December 2006. He found that when the gas supply was turned on there was a major gas leak that he could not correct and he shut down the supply. The leak was not corrected and supply restored until some time between 7 and 9 December 2006. He then moved in, two months late, having meanwhile paid £1,550 for rent in private accommodation. The ALMO's complaints procedure produced an offer of £100 compensation.

The Ombudsman found maladministration. He said that: 'It is entirely reasonable to expect a property to have heating and hot water from the start of a tenancy' (para 21). He recommended:

- a payment of £1,550;
- a payment equal to the housing benefit that the complainant would have been awarded, had he been able to move in, to meet the rent liability on the council flat; and
- £350 further payment to reflect the tenant's time and trouble in pursuing the complaint.

HOMELESSNESS

■ Moran v Manchester City Council

[2009] UKHL 36,
1 July 2009,
(2009) Times 7 July

The claimant fled domestic violence in her home and sought shelter at a women's aid refuge. After two weeks she was involved in a dispute with staff and was asked to leave. On her subsequent application for homelessness assistance, the council decided that she had become homeless intentionally. She appealed, claiming that she had been homeless throughout because either:

■ the refuge did not count as 'accommodation' (HA 1996 s175(1)); or
■ it had not been 'reasonable ... to continue to occupy' that accommodation (HA 1996 s175(3)).

Her appeal was allowed in the county court but the Court of Appeal upheld the council's decision.

The House of Lords quashed the council's decision. It held that a woman who flees domestic violence and is taken in by a women's refuge normally remains 'homeless' while at the refuge because it is not accommodation that it would be reasonable for her to continue to occupy indefinitely (for the purposes of s175(3)). In those circumstances it was not necessary to decide whether a refuge counted as 'accommodation' and thus whether *R v Ealing LBC ex p Sidhu* (1982) 2 HLR 41 had been rightly decided.

■ Bavi v Waltham Forest LBC

[2009] EWCA Civ 551,
12 May 2009

The claimant lived in private rented accommodation and applied for homelessness assistance. He did so on the basis that conditions were so poor in his home that it was no longer reasonable to continue to occupy the accommodation: HA 1996 s175(3). The council decided that he was not homeless and that decision was upheld on review. Recorder Steynor dismissed an appeal against the review decision brought under s204. The claimant made a renewed application for permission to bring a second appeal. He contended, among other matters, that the recorder's judgment had listed a number of defects in his home but omitted the main one: rising dampness.

Aikens LJ refused the application. The recorder had properly directed himself in law in upholding the review decision and dismissing the appeal. His judgment demonstrated that he had appreciated that dampness was one of the main complaints. Nothing in the proposed grounds of appeal met the threshold for second appeals set out in CPR 52.13.

'Homeless'

■ Birmingham City Council v Ali and Aweys

[2009] UKHL 36,
1 July 2009,
(2009) Times 7 July

The claimants were tenants living in unsatisfactory accommodation. Birmingham accepted that they were all homeless either because it was not reasonable for them to continue to occupy their accommodation (HA 1996 s175(3)) or because it owed a duty to provide suitable accommodation but accepted that the accommodation was unsuitable (HA 1996 s193(2) and s206). It decided that all the applicants should wait where they were while being considered for an offer of accommodation under the council's allocation scheme (HA 1996 Part 6). Under that scheme, homeless households remaining in their own homes had a lower priority than homeless households placed by the council in temporary accommodation for the homeless.

In a claim for judicial review, they obtained declarations that the council had to secure suitable accommodation for them and that the allocation scheme was irrational (because, by definition, those in temporary accommodation provided by the council had 'suitable' accommodation). The Court of Appeal dismissed the council's appeal but the House of Lords allowed a further appeal.

It held that:

■ a local housing authority can properly decide that applicants for homelessness assistance are 'homeless' simply because it would not be reasonable for them to continue to occupy their present unsatisfactory home indefinitely. It is not necessary that conditions are such that they cannot continue in occupation for one day longer;
■ the authority can then perform its main housing duty under HA 1996 Part 7 by arranging for applicants to stay in that same accommodation for the short period for which it will be 'suitable' accommodation;
■ a local housing authority will not be performing its duty if it simply accepts the homelessness application and adds applicants to its allocation scheme for long-term housing;
■ it was doubtful whether, on the facts, the claimants had been dealt with lawfully but they had all since been rehoused;
■ the allocation scheme was irrational (but had been replaced).

HOUSING AND COMMUNITY CARE

■ R (Z) v Hillingdon LBC

[2009] EWHC 1398 (Admin),
1 May 2009

The claimant was a blind, adult, asylum-seeker. He had no settled accommodation and moved from place to place, staying with friends. He applied to Hillingdon for accommodation under National Assistance Act (NAA) 1948 s21. The council decided that he was entitled to services of support and assistance as a disabled person (under NAA s29 and Chronically Sick and Disabled Persons Act 1970 s2(1)), including provision of meals, but that because he did not 'need to be looked after' he did not qualify for accommodation under NAA s21.

Timothy Brennan QC, sitting as a deputy High Court judge, quashed that decision. Applying *R (M) v Slough BC* [2008] 1 WLR 1808; [2008] UKHL 52, he said (at paras 16–17):

The relevant principles which emerge from the Slough case are that the applicant for accommodation must be in need of some care and attention, in the sense of being 'looked after'. A need for accommodation by itself is certainly not enough for him to qualify under section 21(1)(a). If he is an able-bodied asylum-seeker, it is to NASS that he will have to turn. But the need for care and attention does not have to be one for nursing, or personal care; nor does it have to be a need for the '24 hour residential care or a full time carer' referred to in Hillingdon's letter. The need for care and attention can extend to a need for someone to assist with, or to perform, tasks which the applicant cannot or should not have to cope with on his own.

As to timing, a present need is enough. The question is whether the applicant needs the care and attention at present, even to a relatively small degree. That his position may improve in the future if provided with accommodation and care and attention is, in my judgment, not a relevant consideration, save, just possibly, in a factually different case where the improvement is likely to be practically immediate. The question is what the applicant needs now by way of care and attention, not what he might be likely to need in the future, after everything has settled down.

On the facts, the council's assessment showed that the claimant:

■ needed tuition in finding his way around his accommodation and its surrounding area;
■ if he does not have stable accommodation, his need for such tuition will be constantly refreshed;

■ cannot dress, or deal with his own laundry, without assistance;
■ needed help with his shopping;
■ cannot go out on his own: he needed assistance to keep him safe; and
■ his ability to feed himself – at any rate with an adequately varied diet – is severely circumscribed.

In those circumstances, the need for care and attention was made out for NAA s21 purposes.

1 Available at: www.hmg.gov.uk/media/27749/full_document.pdf.
2 Available at: www.berr.gov.uk/files/file52072.pdf.
3 Available at: www.justice.gov.uk/news/newsrelease020709b.htm.
4 Available at: www.communities.gov.uk/news/corporate/12519991.
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23 Available at: www.hm-treasury.gov.uk/press_51_09. htm and www.hm-treasury.gov.uk/d/consultsalerent_response020609.pdf respectively.
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25 Available at: www.odi.gov.uk/working/right-to-control.php.
26 Available at: www.dhcarenetworks.org.uk/IndependentLivingChoices/Housing/HousingNews/HousingNewsItem/?cid=5479.
27 See: www.niassembly.gov.uk/record/reports2008/090623.htm#1.
28 Available at: www.communities.gov.uk/publications/housing/cappingadministrationcharges.
29 Available at: www.london.gov.uk/mayor/housing/strategy/docs/london-housing-strategy09.pdf.
30 Neil Jeffs and Martin Hall, Sternberg Reed & Co, solicitors, London and Liz Davies, barrister, London.
31 Ami White, Duncan Lewis, solicitors, London and Jim Shepherd, barrister, London.
32 Tina Conlan, barrister, London.
33 Josephine Henderson, barrister, London.


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Recent developments in education law – Part 2

Angela Jackman and **Eleanor Wright** continue this twice-yearly series considering changes and developments in the law relating to education. This article reviews the revised School Admissions Code ('the Admissions Code') and School Admission Appeals Code ('the Appeals Code'), and case-law relating to this issue. It also examines case-law relating to disability discrimination, negligence, school reorganisation and special educational needs. See July 2009 *Legal Action* 24 for Part 1 of this article.

POLICY AND LEGISLATION

School Admissions Code

A new Admissions Code has been issued by the Department for Children, Schools and Families (DCSF) with effect from 10 February 2009.[1] It is intended to reflect requirements under the Education and Skills Act 2008 to strengthen the admissions framework to ensure the adoption of lawful admissions practices. The revised Admissions Code should be viewed against a background of increasing concerns about the admission process; for example, on 4 November 2008, the *Times* reported that the then Chief Schools Adjudicator, Sir Philip Hunter, suggested that half of schools admissions authorities were infringing the previous Code.[2]

The main changes to the previous Admissions Code are set out below.

Supervision of admission system

■ The Schools Adjudicator must enforce statutory requirements, including the mandatory provisions of the Admissions Code, and has a specific duty to consider the legality of admissions arrangements (para 4.10).
■ Greater supervision responsibilities are imposed on local authorities (LAs) and other public bodies. LAs must monitor compliance with the Admissions Code and compile a report to the Office of the Schools Adjudicator (OSA) by 30 June every year on admission arrangements for all schools and Academies within their authority (para 4.7). The LA may comment on admission arrangements and the OSA can investigate them if it thinks fit.
■ Admission authorities must ensure that admission arrangements comply with the mandatory provisions of the Admissions Code and are clear, objective and fair. Failure to comply may result in an objection to the OSA or, for Academies, a complaint to the secretary of state (paras 4.4 and 4.5).