

to the resource implications, specifically at a time when the resources of public authorities are increasingly constrained.

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

Homelessness

The latest quarterly statistics on homelessness in England were released on 10 December 2009: *Statutory homelessness: July to September 2009. England* (Communities and Local Government (CLG) housing statistical release, December 2009).¹ They show further reductions in the number of applicants in respect of whom councils accepted the main housing duty under Housing Act (HA) 1996 s193 and in the number of households in temporary accommodation. Despite the fact that the use of bed and breakfast (B&B) accommodation has been effectively outlawed for most households by the Homelessness (Suitability of Accommodation) (England) Order 2003 SI No 3326, over 2,000 applicants were still in B&B at the end of September 2009. A further 4,350 were 'homeless at home', ie, owed the main housing duty but remaining (by consent) in the same accommodation or in self-arranged temporary accommodation.

Local housing authorities in England are expected to supply central government with regular statistical data on their homelessness work by completion of the quarterly return form P1E. To improve the content and accuracy of the data relating to homelessness prevention, CLG has reissued its April 2008 guidance on completing the form: *P1E guidance: homelessness prevention and relief. Recording cases where positive action is taken to prevent or relieve homelessness*.² It has in addition published further non-statutory guidance on recording homelessness prevention outcomes: *Recording homelessness prevention and relief at E10 of the P1E quarterly return. Further guidance for local housing authorities*.³

The Homelessness Action Team at the Tenant Services Authority has published the December 2009 issue of its *HAT update*.⁴

County court possession schemes

The Housing Possession Court Duty Scheme is funded by the Legal Services Commission (LSC) and covers 112 county courts in England and Wales and the vast majority of possession hearings. CLG funds a further 80 court desks to complement the LSC-funded scheme. The LSC's analysis of its scheme for 2008/09 showed that on the day of the court hearing:

- 76 per cent of clients were able to remain in their own home after the hearing;
- 16 per cent were not able to remain in their homes; and
- 8 per cent of results are unknown: Ministry of Justice news release, 29 December 2009.⁵

In December 2009, the housing minister announced a grant of £4m to keep 80 CLG-funded possession day duty desks and advice services operating into 2010: CLG news release, 15 December 2009.⁶

Council house rents

On 9 December 2009, the government announced that for the second year running it proposed to halve the guideline rent increase for council housing tenants. The average guideline rent increase for 2010–11 would be 3.1 per cent, rather than the 6.1 per cent previously agreed with local authorities. The chief finance officers of all local authorities were notified of these proposals by letter.⁷

Local authorities had until 25 January 2010 to respond to the details outlined in the consultation documents: *The draft Housing Revenue Account Subsidy Determination 2010–2011* and *The draft Item 8 Credit and Item 8 Debit (General) Determination 2010–2011* (CLG, December 2009).⁸

Help for homeowners in mortgage arrears

Figures released by the government in December 2009 indicate that:

- over 33,000 borrowers are benefiting from extended forbearance with lenders accepting less than contractual monthly payments or where loans have been modified to make



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monthly payments more affordable for the borrower;

- interest on 6,000 of these loans was being deferred as part of an arrangement equivalent to the Homeowners Mortgage Support (HMS) scheme, and only 15 have needed the formal backstop of HMS and been registered for the government-backed guarantee following the five-month qualification period; and

- since April 2009 over 7,000 households have received free, independent money advice where HMS and other options were discussed: CLG news release, 9 December 2009.⁹

On 29 December 2009, the government launched a consultation exercise on a proposal to require mortgage lenders to obtain a court order or the consent of the borrower before repossessing and selling residential owner-occupied homes:

Mortgages. Power of sale and residential property (consultation paper CP55/09).¹⁰ The proposed changes would prevent the decision in *Horsham Properties Group Ltd v Clark* [2008] EWHC 2327 (Ch) from applying to residential mortgages outside the buy-to-let market. The consultation closes on 28 March 2010.

Repair and improvements

The government's Decent Homes strategy comes to an end in December 2010. In December 2009, the housing minister announced that 'a full-scale assessment' of the strategy would be undertaken: CLG news release, 8 December 2009.¹¹ It is now clear that the target of achieving decent homes across the whole of the social rented sector will not be met:

- 27 local authorities have actually seen an increase in their non-decent stock;
- 13 still have over half their stock non-decent; and
- ten still have one-third of their housing stock non-decent.

Landlords, tenants and water charges

On 8 December 2009, the final report of the Walker Review of water charging was published: *The independent review of charging for household water and sewerage services. Final report*.¹² The report notes that 34 per cent of bad debt for water charges is owed by tenants, a significant proportion of which is accrued by tenants who leave a property without receiving or paying their bill. It recommends that landlords should become responsible for the provision of information to water companies about their tenants. The report suggests that if landlords do not provide information about tenants within 21

days of the start of occupation, they should become liable for the tenants' water bills if unpaid. This would provide a clear incentive for landlords to identify tenants to the water companies on occupation of their properties.

Housing legislation for Northern Ireland

The Housing (Amendment) Bill is presently making its way through the Northern Ireland Assembly and completed its Committee stage in December 2009.¹³ On 7 December 2009, the Minister for Social Development launched a consultation exercise on a further Housing Bill to be introduced before the Assembly elections in 2011: *The Housing Bill (Northern Ireland). A consultation document*, Department for Social Development, Housing Division.¹⁴ The consultation ends on 26 February 2010.

Housing benefit reform

On 15 December 2009, the government launched a consultation exercise on its latest proposals for reform of the housing benefit scheme: *Supporting people into work: the next stage of housing benefit reform*.¹⁵ The consultation period closes on 22 February 2010.

Mobile homes

On 16 December 2009, Ian Austin MP announced in a written statement that, subject to parliamentary approval, the government would transfer part of the county court's jurisdiction in disputes between site-owners and mobile-home occupiers to the Residential Property Tribunal on 6 April 2010.¹⁶ Following a consultation exercise, it has been decided that the county court will retain jurisdiction in termination/possession claims: *Further consultation on termination provisions in the Mobile Homes Act 1983 (as amended). Government response* (December 2009).¹⁷

HUMAN RIGHTS

Article 8

■ **R (Mortell) v Secretary of State for Community and Local Government** [2009] EWCA Civ 1274, 29 October 2009

The claimant and a large number of other residents were to be displaced by a compulsory purchase order made to replace an area of low-demand housing. The residents would be entitled to rehousing, compensation and home-loss payments. They complained that the secretary of state's decision to approve the order was unlawful. A claim for judicial review was dismissed. The first

ground of appeal from that dismissal was that there had been a failure by the secretary of state to consider the individual human rights of the residents under article 8 and article 1 of Protocol No 1 of the European Convention on Human Rights ('the convention'). It was common ground that the decision would need to have been proportionate (ie, to have taken account of the personal circumstances of the occupiers and balanced them against the case for making the order).

The Court of Appeal refused permission to appeal on that ground (and dismissed other grounds of appeal). A planning inspector had fully considered the personal circumstances of the objectors and the secretary of state had adopted his findings.

■ Paulić v Croatia

App No 3572/06, 22 October 2009, January 2010 Legal Action 29

The European Court of Human Rights (ECtHR) has amended its judgment to make it clear that if 'an applicant raises an article 8 defence to prevent eviction, it is ... for the opponent to rebut the claim' (see para 43).

Given the continuing tension between decisions of the ECtHR and the English and Welsh courts in relation to article 8 and possession claims (see, for example, *Article 8: La Lutta Continua?* [2009] JHL 43), the approach of the Supreme Court in other areas of law may be of interest. In *R v Horncastle* [2009] UKSC 14, a case involving the hearsay provisions of the Criminal Justice Act 2003, it was argued that the Supreme Court was 'bound to apply a clear statement of principle' by the Grand Chamber of the ECtHR. The Supreme Court did not accept that submission. Lord Phillips, giving a judgment with which all the other members of the court agreed, said:

The requirement [in Human Rights Act 1998 s2(1)] to 'take into account' the Strasbourg jurisprudence will normally result in this court applying principles that are clearly established by the Strasbourg court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg court (para 11).

Article 6 and article 1 of Protocol No 1: enforcement of orders

■ **Mirzayev v Azerbaijan**

*App No 50187/06,
3 December 2009*

In 1994, Mr Mirzayev was given an occupancy voucher for a flat in a recently-constructed residential building in Baku. He was unable to move into the flat because it was occupied by internally displaced persons (IDPs) from Lachin, a region under the occupation of the Armenian military forces following the Nagorno Karabakh conflict. In 2003, he lodged an action with the Surakhany District Court seeking the eviction of the IDPs from the flat. In December 2003, the court granted an eviction order. In February 2005, the Department of Judicial Observers and Enforcement Officers of the Ministry of Justice informed Mr Mirzayev that it was impossible to execute the judgment because the local authorities could not find other accommodation for the IDPs. In such circumstances, the authorities were barred from taking any measures to evict IDPs from their temporary place of residence. At that time, there were more than 25,000 IDPs temporarily settled in the Surakhany District. Mr Mirzayev complained to the ECtHR about the unjustified delay in the execution of the judgment and the violation of his property rights as a result of non-enforcement of the judgment.

The First Section of the ECtHR considered article 6 and article 1 of Protocol No 1 of the convention. The court reiterated that article 6 rights:

... would be illusory if a contracting state's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party ... Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of article 6 (para 32).

The ECtHR noted that the judgment remained unenforced for almost six years and that, although the dispute was between two private parties, the judgment also ordered the executive authorities to provide the IDPs with other accommodation. The authorities had not 'continuously and diligently attempted to find other accommodation' for the IDPs. Despite the large number of IDPs in the region, the court considered that there was no reasonable justification for the significant delay in the enforcement of the judgment.

It found a breach of article 6. Furthermore, although Mr Mirzayev did not own the flat, a claim based on an occupancy voucher constituted a 'possession' falling within the ambit of article 1 of Protocol No 1. The

impossibility of obtaining execution of the judgment constituted an interference with his right to peaceful enjoyment of his possessions. There was no acceptable justification for this interference and so there was also a violation of article 1 of Protocol No 1. It ordered the state to secure enforcement of the domestic court's judgment within three months.

Article 6 and delay

■ **Sika v Slovakia (no 6)**

*App No 868/05,
10 November 2009*

In September 2000, a housing co-operative filed an action against Mr Sika in the Trnava District Court seeking payment of a sum of money. There were a large number of hearings and appeals at various levels of jurisdiction, including in the Constitutional Court. In June 2009, the proceedings were still pending in the District Court. They had lasted for approximately eight years and eight months. Mr Sika complained to the ECtHR.

The Fourth Section of the ECtHR found a breach of article 6: '... the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute' (para 36). The ECtHR has frequently found violations of article 6 in similar cases. The Slovakian government had not put forward any fact or argument capable of persuading the court to reach a different conclusion in the present case.

DISCRIMINATION

■ **Rodriguez v Minister of Housing**

*[2009] UKPC 52,
14 December 2009*

Ms Rodriguez was the tenant of a Gibraltar government flat. She lived in it with her same-sex partner. They had been in a relationship for 21 years. Ms Rodriguez wanted to provide her partner with security in the event of her death and so applied to the Housing Allocation Committee, a statutory body responsible for allocating social housing, for them to be granted a joint tenancy. The committee had an unwritten and unpublished policy of granting joint tenancies only to couples who were married or, if unmarried, were the biological parents of a child who lived with them. As a result, it refused the application. Ms Rodriguez issued proceedings in the Supreme Court of Gibraltar, contending that the refusal to grant a joint tenancy was unlawful and discriminatory contrary to the

Gibraltar Constitution Order 2006 s14. Her claim was dismissed. Her appeal to the Court of Appeal of Gibraltar was also dismissed. She appealed to the Privy Council.

The appeal was allowed. Ms Rodriguez had been indirectly discriminated against on account of her sexual orientation. Furthermore, the discriminatory effect of the policy could not be justified because it was not rationally related to any legitimate aim.

PRIVATE SECTOR

Assured shorthold tenancies: deposits

■ **Universal Estates v Tiensia**

*Croydon County Court,
23 February 2009*

Universal Estates granted Ms Tiensia an assured shorthold tenancy. The deposit of £2,400 was paid in instalments. Later the landlord sought possession relying on HA 1988 Sch 2 Grounds 8, 10 and 11. Ms Tiensia defended the subsequent possession claim and counterclaimed for a payment under HA 2004 s214(4). The landlord subsequently registered the deposit with Tenancy Deposit Solutions Ltd, an online, insurance-based, tenancy deposit scheme. The certificate was faxed to Ms Tiensia on 3 November 2008. The terms of the scheme (as set out in the 'Information for tenants' leaflet) stated: 'Within 14 days of receiving the deposit from you, your landlord/agent must protect the deposit with the scheme as well as provide to you details of how your deposit is being protected and what to do if there is a dispute about the repayment of your deposit at the end of the tenancy agreement.'

On an application for summary judgment on the counterclaim, Deputy District Judge Clarke accepted that the 'initial requirements' of the scheme itself (as well as s213) required the landlord to protect the deposit and provide the required details within 14 days and that, therefore, this requirement could not be satisfied once the 14 days had passed. The judge ordered the landlord to pay Ms Tiensia £7,200. (For a fuller note of the first instance decision see May 2009 *Legal Action* 25.)

Subsequently, a circuit judge allowed an appeal, holding that the sanctions in s214(3) and (4) did not apply where the landlord had complied with the requirements of the scheme, and provided the information to the tenant by the date of the hearing. Permission for a second appeal to the Court of Appeal was granted by Lloyd LJ on 23 September 2009. The appeal is listed as a floater on 31 March/1 April 2010 before Arden, Maurice Kay and Patten LJJs.

■ Hashemi v Gladehurst Properties Limited

*Clerkenwell and Shoreditch County Court, 9 December 2009*¹⁸

Gladehurst granted Mr Hashemi and Mr Johnson (the tenants) an assured shorthold tenancy of a flat for a fixed term of one year from September 2007. The monthly rent was £2,080. A deposit of £6,240, the equivalent of three months' rent, was paid to Gladehurst in advance. The terms of the agreement provided that the deposit was to be held by Gladehurst. Contrary to the provisions of HA 2004 Part 6, the deposit was never registered or dealt with in accordance with the Act.

The tenants vacated the property in October 2008. An inventory clerk inspected the flat. He suggested that the premises had not been well cared for and that significant deductions should be made from the deposit. As a result, Gladehurst paid back the deposit minus various deductions. The tenants accepted some of these, but disputed £500 for the repainting of walls and £118 for other dilapidations. Mr Hashemi then wrote to Gladehurst requesting receipts and a breakdown of the sums deducted from the deposit. He put the company on notice that the tenants would make a claim for three times the deposit under s214. In February 2009, Mr Hashemi issued a claim against Gladehurst in both his own name and that of Mr Johnson. Gladehurst in its defence pleaded that it had not been fully aware of the impact of the HA 2004, but accepted that it applied. The defence also asserted that the landlord had all the necessary receipts for the dilapidations and other expenses paid on behalf of the tenants.

In April 2009, District Judge Manners, of her own motion on the papers, struck out the claim on the basis that the tenancy ended before the application was made. Mr Hashemi applied to set that order aside. District Judge Stary dismissed that application in so far as it related to the s214 claim, but reinstated the claim for the deductions of £618. Mr Hashemi appealed.

HHJ Cryan allowed the appeal and reinstated the claim. He noted that the landlord:

... never dealt with the deposit in the correct way in accordance with Part VI of the Act and still retains part of it ... There can be no question that in accordance with the scheme of the Act a landlord should not be holding any part of a qualifying deposit at this stage, or at least without the safeguards of the Act being in place.

He said that it was 'obvious upon a full

reading of Schedule 10 that the role of the scheme under the Act is every bit as operative after the tenancy has come to an end as during its course'. He rejected the suggestion that there was 'some species of equitable defence' based on an implied duty on the tenant to place a landlord on notice before making a claim.

HOUSING ALLOCATION

■ Minister voor Wonen, Wijken en Integratie v Woningstichting Sint Servatius

C-567/07, 1 October 2009

Servatius was a housing association providing public sector housing in the Netherlands. It established two Belgian subsidiaries to enable it to undertake a public sector housing development near Liège in Belgium, 30km from the Dutch border. The Dutch housing minister refused to authorise the initiative on the basis that it would not benefit the public housing sector in the Netherlands. The Dutch Council of State referred to the European Court of Justice (ECJ) a series of questions on whether or not the minister's decision was compatible with EU law.

The First Chamber of the ECJ held that the statutory requirement for associations to obtain ministerial approval before investing in cross-border ventures constituted an infringement of the EU right to free movement of capital within the Union. Such a restriction could only be lawful if based on objective, non-discriminatory criteria known in advance of an application being made. It was for national courts to decide whether or not those criteria were met.

HOMELESSNESS

■ Makisi v Birmingham City Council

Birmingham County Court, 6 January 2010

The council owed the claimant the main housing duty under HA 1996 Part 7: s193. It made her an offer of accommodation and notified her of a decision that the offer had operated to discharge its duty. The reasons given for the decision were that the council was 'satisfied that the accommodation offered to you was suitable for the needs of you and your family and that it was reasonable for you to accept it'. The claimant sought a review of that decision.

The reviewing officer wrote to the applicant that she was minded to reach the same decision but the letter concluded:

Your case has been rebooked to be heard on 23 July 2009. If [there is] any further information in response to this decision which you would like to be taken into account, you or someone acting on your behalf may make oral representations, further written representations, or both oral and written representations. The further information must be received by the hearing date above (para 13).

The claimant's solicitors responded that the claimant wished to make oral representations and invited notification of a time and date at which those representations might be made. The reviewing officer telephoned the claimant and had a telephone conversation with her. The reviewing officer then notified her of a decision that the council's duties had, indeed, been discharged.

The claimant appealed, inter alia, on the ground that she had been denied the oral hearing envisaged by Allocation of Housing and Homelessness (Review Procedures) Regulations (AHH(RP) Regs) 1999 SI No 71 reg 8(2)(b). The council denied that reg 8 had been engaged because the reviewing officer had not been satisfied that there had been any deficiency or irregularity in the original decision.

HHJ Worster held that:

■ reg 8(2) had been triggered. The original decision had simply set out the statutory elements necessary to achieve a discharge of the duty as contained in s193(7F). It had given no reasons. It was therefore deficient. In the absence of any evidence from the reviewing officer, the necessary inference from that deficiency and from the fact that the terms of her minded-to letter reflected the wording of reg 8(2)(b), was that she had concluded that reg 8(2) applied;

■ although the secretary of state had power to provide by regulations for a review to be by way of an 'oral hearing' (HA 1996 s203(2)(b)) that power had not been exercised. The AHH(RP) Regs referred only to oral 'representations'. In contrast, the review procedures regulations for introductory tenancy and demoted tenancy cases are based on similarly worded regulation-making powers but expressly refer to an 'oral hearing'; and

■ oral representations could be made at an oral hearing but could also be made in other ways, for example, by telephone. The claimant had raised no complaint that she had not been able to put her case properly in the telephone conversation with the reviewing officer.

The appeal was dismissed.

Comment: It does not appear to have

been argued that the words 'Your case ... to be heard on ...' and '... the hearing date ...' used in the reviewing officer's minded-to letter gave rise to a legitimate expectation that the reviewing officer would receive oral representations by way of a hearing in this particular case.

HOUSING AND CHILDREN

Local Government Ombudsman Complaint

■ Waltham Forest LBC

08 016 986,

21 October 2009

The complainant was a young woman who had lived with her mother. As a teenager she had approached the council's children's services department for assistance repeatedly but had not been helped. When eventually she became homeless she was dealt with only by the housing department. She was provided with temporary accommodation in a hostel and then in B&B accommodation where many of the residents were older men and she considered herself at risk of further abuse. When offered an unfurnished tenancy by a housing association, the only help given by the council was provision of a bed. The complainant complained that the council had failed to provide her with services initially under Children Act 1989 s20 and latterly under the leaving-care provisions.

The Ombudsman found that she:

... had suffered very serious abuse and was variously described as being extremely troubled; having behavioural and emotional difficulties; very vulnerable; having suicidal thoughts; problems due to lack of adult support; diagnosed as being depressed; her life was 'dangerous and unsupported and is hugely at risk'. Her relationship with her mother broke down to such an extent that she could no longer live there and became homeless.

Despite all of this, children's services continually turned her away, refusing to provide support and saying she was neither a child in need nor at risk of harm. Eventually, after considering her complaint, the council carried out a further assessment and concluded that she was a child in need. There was nothing new in her situation then and, if she were a child in need at that point, then she must have been one earlier. She should, accordingly, have received services from a much earlier date (paras 77-78).

He recommended an apology, compensation of £7,000 and a review

of the way the council assesses children in need.

- 1 Available at: www.communities.gov.uk/documents/statistics/pdf/1647480.pdf.
- 2 Available at: www.communities.gov.uk/documents/housing/pdf/1412057.pdf.
- 3 Available at: www.communities.gov.uk/documents/housing/pdf/1412030.
- 4 Available at: www.tenant-services-authority.org/upload/pdf/HAT_update_Dec_09.pdf.
- 5 Available at: www.justice.gov.uk/news/newsrelease291209a.htm.
- 6 Available at: www.communities.gov.uk/news/corporate/1413592.
- 7 Available at: www.communities.gov.uk/documents/housing/pdf/1408236.pdf.
- 8 Available at: www.communities.gov.uk/publications/housing/hrasubsidydetermination1011.
- 9 Available at: www.communities.gov.uk/news/housing/1408119.
- 10 Available at: www.justice.gov.uk/about/docs/mortgages-power-sale.pdf.
- 11 Available at: www.communities.gov.uk/news/housing/1406400.
- 12 Available at: www.defra.gov.uk/environment/quality/water/industry/walkerreview/documents/final-report.pdf.
- 13 Available at: www.niassembly.gov.uk/legislation/primary/2008/nia7_08.htm.
- 14 Available at: [www.dsdni.gov.uk/consultation-](http://www.dsdni.gov.uk/consultation-housing-bill.doc)

housing-bill.doc.

15 Available at: <http://dwp.gov.uk/consultations/2009/supportingpeopleintowork.shtml>.

16 Available at: www.communities.gov.uk/statements/corporate/parkhomesstatement.

17 Available at: www.communities.gov.uk/documents/housing/pdf/1412487.pdf.

18 William Ford, Osbornes, solicitors, London and Kevin Gannon, barrister, London.



Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. Readers can visit their personal websites at: www.nicmadge.co.uk and at: www.gardencourtchambers.co.uk/barristers/jan_luba_qc.cfm. The authors are grateful to the colleagues at note 18 for a transcript or notes of the judgment.

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