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. Comments from readers are warmly welcomed.

POLITICS AND LEGISLATION

Housing and Regeneration Bill

On 27 November 2007, the new Housing and Regeneration Bill had its second reading in the House of Commons.[1] The bill will:

- allow councils to offer special tenancies for anti-social families;
- give priority to armed services personnel in housing allocation;
- extend security of tenure to Gypsies and other Travellers on local authority sites; and
- establish a new Office for Tenants and Social Landlords.

The bill will now be considered by a public bill committee until the end of January 2008. This may provide an opportunity for a range of other amendments to housing legislation to be considered. The government has set up a dedicated website bringing together a range of material on the bill.[2]

Housing and anti-social behaviour

In November 2007, the government published the third edition of *Standard Issue*, its journal for social landlords seeking to implement the Respect Standard for Housing Management.[3]

A consultation exercise on the content of draft guidance for social landlords using parenting contracts and parenting orders has been initiated by the Department for Children, Schools and Families' publication, *Draft guidance to local authorities and registered social landlords on the use of parenting orders and parenting contracts*.[4] Responses are sought by 15 February 2008.

The new provisions for withholding or reducing housing benefit (HB) where tenants have been evicted from their previous homes for anti-social behaviour are now in force in eight pilot areas. Guidance issued to benefit authorities by the Department for Work and Pensions (DWP) says: 'This measure has attracted a lot of interest and a lot of criticism from various quarters. It is therefore likely that interested parties will be monitoring the use of the sanction and potentially willing to assist households up to and including funding a challenge by judicial review' (para 12.4).[5]

Housing association tenants

In November 2007, the Housing Corporation published new guidance on security of tenure for housing association residents: *Tenure: good practice note 14*.[6] The note is intended to enable housing associations to comply with the law relating to occupancy agreements and with the corporation's requirements contained in the regulatory code and related circulars. The note covers occupancy agreements for 16 and 17 year olds and the circumstances in which associations are permitted to grant other occupiers licences and shorthold agreements rather than full assured tenancies. It restates the corporation's guidance that 'for all occupancy agreements, possession action should not be taken until all other interventions to resolve the problem have been exhausted' (p17).

The corporation has also issued a new circular for housing associations setting out its expectations on rents and rent increases: Circular 09/07 *Rents, rent differentials and service charges for housing associations*.[7]

Homelessness and housing allocation

In November 2007, the corporation launched a new *Access to Housing Information Sharing Protocol* to set a national standard on sharing information about applicants for rehousing.[8] The protocol encourages the exchange of information between councils (when nominating housing applicants) and housing associations.

The corporation has also published two new research reports on the role of housing associations in tackling homelessness and facilitating local authority nominations for tenancies:

- *Tackling homelessness: housing associations and local authorities working in partnership*;[9] and
- *Tackling homelessness: efficiencies in lettings functions*.[10]

Shelter has published a new report on the development of legal rights relating to homelessness: *Rights and wrongs: the homelessness safety net 30 years on*.[11]

In November 2007, Communities and Local Government (CLG) published an international comparative survey of homelessness and social housing: *An international review of homelessness and social housing policy*.[12]

Assured tenants

CLG's website now includes a new page of materials to help private and social landlords of assured and assured shorthold tenants to serve the right statutory notices on their tenants in relation to eviction and rent increases.[13] The page provides immediate access to all the prescribed forms.

Home information packs

On 14 December 2007, the Housing Act 2004 (Commencement No 10) (England and Wales) Order 2007 SI No 3308 brought Housing Act (HA) 2004 Part 5 and Schedule 8 into force in England and Wales in relation to residential properties with fewer than three bedrooms, other than properties to which the Building Regulations 2000 SI No 2531 (as amended) reg 17C (which imposes minimum energy performance requirements) applies.

The Home Information Pack (Amendment) Regulations (HIP(A) Regs) 2007 SI No 3301 extend the temporary measures relating to first day marketing in the Home Information Pack (No 2) Regulations 2007 SI No 1667. The HIP(A) Regs are necessary because of the later than expected commencement of HA 2004 Part 5 and in response to delays in the production of guidance to local authorities dealing with access to, and charging for, search information. The amendments also make further temporary provision dealing with leasehold information and minor amendments relating to the transfer of functions from the National Assembly for Wales to Welsh ministers.

Service charges

On 30 November 2007, the provisions of Commonhold and Leasehold Reform Act 2002 s153, requiring landlords to accompany any demand for service charges with a statement of tenants' rights, were brought into force in Wales: the Commonhold and Leasehold Reform Act 2002 (Commencement No 4) (Wales) Order 2007 WSI No 3161. The content of such statements is prescribed by the Administration Charges (Summary of Rights and Obligations) (Wales) Regulations 2007 WSI No 3162. These provisions came into force in England on 1 October 2007 as the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 SI No 1257 (see September 2007 *Legal Action* 14).

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 1 of Protocol No 1

■ Akimova v Azerbaijan

App No 19853/03,
27 September 2007

Ms Akimova was granted an occupancy voucher for an apartment in a state-owned residential building. She did not move in because construction had not been completed, but, four years later, allowed an acquaintance to move in free of charge. Later, in breach of that agreement, the acquaintance allowed a relative and his family, who were internally displaced persons from Nagorno-Karabakh, to move into the apartment. Ms Akimova filed a law suit requesting their eviction. Eventually she obtained an eviction order, but execution was postponed until Nagorno-Karabakh was liberated from Armenian occupation. Ms Akimova complained that she had been deprived of her property rights in breach of article 1 of Protocol No 1 of the European Convention on Human Rights ('the convention').

In finding such a breach, the European Court of Human Rights (ECtHR) stated that:

■ her claims to the apartment were sufficiently established to constitute a 'possession' falling within the ambit of article 1 of Protocol No 1; and

■ as the domestic judgment did not rely on any domestic legal provision which would serve as a basis for postponing execution, the interference complained of was in breach of Azerbaijani law and incompatible with her right to peaceful enjoyment of her possession.

Article 6 and article 1 of Protocol No 1

■ Maslenkovi v Bulgaria

App No 50954/99,
8 November 2007

Mr Maslenkovi was Chief of Staff of the Bulgarian Ministry of the Interior. In 1985, he was granted the tenancy of a state-owned apartment which belonged to the ministry. In 1986, Mr and Mrs Maslenkovi purchased the apartment from the ministry. In 1992, the ministry brought a rei vindicatio action against the couple; it claimed that the transaction was null and void as being contrary to the relevant provisions on the sale of housing. In 1995, the Sofia District Court found that the apartment had been larger than permitted by law for a family like that of Mr and Mrs Maslenkovi. The court granted the ministry's rei vindicatio claim. Mr and Mrs Maslenkovi appealed to the Sofia City Court. In 1997, the Sofia City Court quashed the lower court's judgment and dismissed the Ministry of the Interior's claims. The ministry submitted a petition for review (cassation) to the Supreme Court. In 1999, the Supreme Court quashed the Sofia City Court's judgment. The court upheld the Sofia District Court's judgment, thus granting the rei vindicatio claim. Mr and Mrs Maslenkovi complained under article 1 of Protocol No 1 that they had been deprived of their apartment under legal provisions which lacked sufficient clarity and had been applied selectively and arbitrarily. They also complained, under article 6, about the length of the proceedings, ie, six years and five months for three levels of jurisdiction.

The ECtHR dismissed the complaint under article 1. Although the judgments declaring the couple's title null and void and ordering them to vacate the premises constituted an interference with their right to peaceful enjoyment of their possessions, such interference was provided for by law and pursued a legitimate aim. The ECtHR was not convinced that there was 'arbitrariness, selective approach [or] lack of foreseeability of the relevant law'. However, the court upheld the complaint under article 6. The length of the proceedings was excessive and failed to meet the 'reasonable time' requirement. In reaching this conclusion, the court took into account the fact that significant delays were imputable to the authorities. It found that Mr and Mrs Maslenkovi must have suffered distress on account of the excessive length of the proceedings and awarded them €1,500 in respect of non-pecuniary damage.

■ Subocheva v Russia

App No 2245/05,
15 November 2007

In August 2000, Ms Subocheva's housing was destroyed by an earthquake. The District Administration established a list of people who had lost housing to provide them with housing certificates. However, Ms Subocheva was not put on that list. In September 2002, the Uglegorskiy Town Court recognised her right to a housing certificate and ordered the District Administration to put her on the list for housing certificates. In January 2003, she was put on the list for housing certificates, but she never received one. In May 2003, Ms Subocheva brought a new court action against the District Administration seeking monetary compensation for the purchase of housing instead of a housing certificate. In December 2003, the Town Court ordered the District Administration to pay her 389,600 Russian roubles. The judgment was not fully enforced until June 2006, ie, a delay of approximately two years and five months.

The ECtHR noted that the judgment was enforced with a substantial delay because the District Administration did not have sufficient funds. However, it reiterated that it is not open to a state authority to cite the lack of funds, or other resources, as an excuse for not honouring a judgment debt. By failing for years to comply with an enforceable judgment, the domestic authorities impaired the essence of Ms Subocheva's right to a court and prevented her from receiving the money she had legitimately expected to receive. There was, accordingly, a violation of article 6 and article 1 of Protocol No 1. Making an assessment on an equitable basis, the court awarded €2,000 in respect of non-pecuniary damage.

Articles 6 and 8, and article 1 of Protocol No 1

■ Khamidov v Russia

App No 72118/01,
15 November 2007

Mr Khamidov and his brother owned a plot of land, two houses and industrial buildings and equipment, including a mill, a bakery and storage facilities in Chechnya. In 1999, consolidated police units of the Ministry of the Interior moved onto the premises. Mr Khamidov and his family tried to return, but the police units denied them access, and so they spent the winter of 1999–2000 in a refugee tent camp. For over a year, Mr Khamidov was unable to take any legal action because the courts in Chechnya were not functioning, but in February 2001 a court concluded that the police units had adversely occupied the land and ordered their eviction. Enforcement proceedings were commenced, but a bailiff's attempts to enforce the judgment were unsuccessful because the police units refused to comply with the writ of execution. Later in 2001, the bailiff imposed a fine equal to 200 times the minimum monthly salary on the police units for their refusal to comply with the court judgment, but the fine could not be recovered because of delays in the payment of wages to military personnel in Chechnya. The police units left in June 2002. There was much damage to the property. Mr Khamidov brought proceedings for compensation, but the court rejected his claims. He complained to the ECtHR of breaches under articles 6, 8 and 13, and article 1 of Protocol No 1.

The ECtHR found breaches of articles 6 and 8 and article 1 of Protocol No 1. However, it found that the article 8 breach related only to the houses, not to the industrial premises. Although, 'the notion of "home" can be interpreted widely and can … apply to business premises … in the present case the court [did] not consider that the mill, bakery and storage facility, which appear to have been used entirely for industrial

purposes, would constitute the applicant's home.' (See too *Leveau and Fillon v France* App Nos 63512/00 and 63513/00, 6 September 2005, where a farm specialising in pig production and housing several hundred pigs could not be described as a 'home'.) Nevertheless, there were sufficient grounds, despite the findings of fact made by the domestic courts, to conclude that the damage to the applicant's property was caused by the police units. The occupation of the house was an interference with Mr Khamidov's rights and was not 'lawful', within the meaning of article 8 and article 1 of Protocol No 1. As Mr Khamidov was barred completely from any opportunity to obtain judicial protection of his rights and to seek eviction of the police from his property for over a year, he was denied 'the very essence' of his article 6 rights; this denial was clearly disproportionate. The ECtHR also found that by failing for over 15 months to comply with the enforceable judgment in his favour, the domestic authorities defaulted in their obligation to secure his right to a court; this too was a violation of article 6. The court awarded €157,000 in respect of pecuniary damage, and €15,000 for non-pecuniary damage.

SECURE TENANCIES

Application to revive tenancy

■ Lambeth LBC v Hamm

Mayor's and City of London County Court, 19 November 2007[14]

Ms Hamm was a former secure tenant who breached a suspended possession order granted in June 2003 and, as a result, became a 'tolerated trespasser'. Between 2003 and 2005, she took up and later left paid employment. The subsequent changes to her benefits status caused her rent arrears to increase significantly. Most, but not all of the increase in the arrears, was subsequently repaid by way of a successful application for backdated HB payments in February 2006. In 2005, Lambeth issued a warrant for possession. Ms Hamm applied to stay the warrant and to postpone the date for possession, thereby reviving her tenancy. The property was in a state of substantial disrepair and she wished to seek damages for breach of her covenant to repair. The application to stay the warrant succeeded in July 2006. The remainder of her application was adjourned generally on terms that she pay current rent plus £5 per week towards the arrears. The matter came before the court again in May 2007. Ms Hamm had complied broadly with the terms of the order of July 2006 and was, in fact, slightly ahead with her payments. At the hearing, Lambeth conceded that it would be reasonable to postpone the order and thereby revive retrospectively the tenancy and its covenants, but that this should be subject to a condition debarring Ms Hamm from bringing any action for damages arising out of the disrepair that existed at the property for the entire period for which she was a tolerated trespasser.

District Judge Jacey postponed the date for possession on terms that the defendant pay current rent plus £5 per week towards the arrears, but imposed a condition that there be no claim for damages for disrepair for the period between June 2003 (when the suspended possession order was made) and July 2006 when the warrant was suspended on terms with which the defendant had complied. Ms Hamm appealed against the imposition of the condition.

HHJ Matheson allowed the appeal. The district judge did not have the power to non suit the defendant as a condition of the postponement of the order. HA 1985 s85(3) cannot be construed as permitting the imposition of this kind of requirement as a condition of postponement. In a possession action based on rent arrears, any requirement imposed as a condition of suspension or postponement of the possession order ought to be relevant to the grounds on which possession is sought.

Furthermore, even if the district judge did have the power to impose this kind of condition in the circumstances of this case, the appeal would still have succeeded. Throughout the period from June 2003 to July 2006, Lambeth had charged the same rent as it would have charged a tenant with the benefit of a repairing covenant. Ms Hamm had complied with the order of July 2006 for nearly a year by the time her application to postpone was heard and continued to comply. The order of the district judge was varied so as to remove the condition preventing the defendant from bringing an action for damages for disrepair.

Succession

■ Wandsworth LBC v Randall

[2007] EWCA Civ 1126, 7 November 2007

Mr Randall's grandfather was a secure tenant. Mr Randall alone lived in the property with him. On 31 December 2004, the grandfather died. Mr Randall succeeded to the tenancy. In August 2005, at his request, his mother and half-sister moved into the property. In April 2006, Wandsworth issued possession proceedings relying on HA 1985 Schedule 2 Ground 16. A deputy district judge made an order for possession and held that:

- the accommodation afforded by the property was more extensive than was reasonably required by Mr Randall;
- suitable alternative accommodation in the form of a one bedroom flat had been offered; and
- it was reasonable to make an order for possession.

In reaching this conclusion, the judge left out of account the needs of Mr Randall's mother and half-sister, as he did not deem them members of his family at the date of Mr Randall's succession to his grandfather's tenancy. HHJ Birtles allowed an appeal.

The Court of Appeal dismissed a second appeal by Wandsworth. The correct date for establishing whether family members are residing with a tenant who has succeeded to a secure tenancy is the date of the hearing before the court, not the date of succession. Dyson LJ found it impossible to construe HA 1985 s84(2)(c), which provides that the court shall not make a possession order unless it both considers it reasonable to make the order and is satisfied that suitable accommodation will be available for the tenant when the order takes effect, as requiring a consideration of whether the accommodation is reasonably suitable to the needs of the tenant and his or her family as they were at the date of succession. It would be odd if the question of reasonableness were to be judged as at the date of the hearing, and the issue of the availability of suitable alternative accommodation were to be judged as at a date later than the hearing, but that the issue of whether the accommodation is more extensive than is reasonably required were to be judged as at the date of succession.

The case was remitted to a district judge to decide whether, when the order takes effect, there would be available to Mr Randall, his mother and half-sister accommodation that is reasonably suitable to their needs. The Court of Appeal said that it would be open to Wandsworth to establish that a three-bedroom flat would be sufficient for their needs.

Right to buy

■ Southwark LBC v Dennett

[2007] EWCA Civ 1091, 7 November 2007

In June 2001, Mr Dennett, a secure tenant of Southwark, gave written notice under HA 1985 s122(1) claiming to exercise the right to buy a long lease of his flat. In July 2001, Southwark served notice admitting his right to buy. Southwark's Valuation Service valued the flat at £145,000. Southwark should then have served a notice under s125 proposing a purchase price and other matters by early October 2001. The council did not do so until February 2002. In July 2003, Mr Dennett

stopped paying rent in protest at the delay. Southwark issued a claim for arrears of rent. Mr Dennett quickly paid the rent arrears and the proceedings continued on his counterclaim. Mr Dennett served two initial notices of delay in form RTB6, but as a result of 'a catalogue of delay, in large part the result of inactivity and incompetence by Southwark … this routine and straightforward transaction was still not completed' by January 2007. HHJ Bailey found, among other things, that unnamed and unspecified officials of Southwark had acted in bad faith and awarded damages for misfeasance in public office in the sum of £6,168, apparently calculated at the rate of £2,000 a year from November 2003 to the date of trial. He also ordered Southwark to complete the conveyance by 26 February 2007. Southwark appealed in relation to a number of matters.

The Court of Appeal allowed the appeal against the award of damages for misfeasance in public office. For misfeasance in public office, the public officer must act dishonestly or in bad faith in relation to the legality of his/her actions. Knowledge of, or subjective recklessness as to, the lawfulness of the public officer's acts and the consequences of them is necessary to establish the tort. Mere reckless indifference without the addition of subjective recklessness will not do. This element virtually requires the claimant to identify the person or people said to have acted with subjective recklessness and to establish their bad faith. An institution can only be reckless subjectively if one or more individuals acting on its behalf are subjectively reckless, and their subjective state of mind needs to be established. To that end, any such individual(s) needs to be identified. The Court of Appeal also allowed the appeal in relation to issues arising out of the initial notices of delay.

■ Blackwood v Saunders & Co

TLQ/07/0476 (QB),
8 November 2007

A secure tenant and members of the tenant's family wanted to exercise the right to buy their home. They were given the wrong legal advice by a firm of solicitors and as a result lost their chance to buy on their first attempt. They later completed the purchase on a new application at a higher price. In addition to claiming damages for the difference in value, they asked for compensation for 'stress and inconvenience' on the basis that their first attempt to buy had been a therapeutic exercise designed to bring the family together following the recent death of a family member.

The judge rejected that aspect of their claim. Even if the facts were made out, this was not the class of case in which such damages could be awarded.

ANTI-SOCIAL BEHAVIOUR

Possession claims

■ Hastoe Housing Association Ltd v Ellis

[2007] EWCA Civ 1238,
15 November 2007

In February 2003, Ms Ellis was granted an assured tenancy. During 2004 and 2005, complaints were made by neighbours about noise coming from the property. She failed to comply with a notice requiring her to reduce the level of noise. Hastoe brought possession proceedings, alleging breaches of obligations in the tenancy agreement. At a directions hearing, a district judge ordered dates for the filing and service of witness statements and trial. However, neither party prepared any evidence for trial, but instead entered into negotiations to try to settle the matter. In the week before trial, the county court office contacted Hastoe asking whether the trial date was still effective. Hastoe said it was, but that it required only one hour for the trial. A file note was made, but it was not received by the trial judge.

On the day of the trial, Hastoe asked the judge to adjourn the claim for possession and to approve a draft consent order, whereby Ms Ellis agreed to give undertakings to refrain from causing a nuisance to her neighbours for a period of two years. The judge refused to adjourn. He declined to accept the draft order, and dismissed Hastoe's possession claim, stating that he had not been minded to exercise his discretion under HA 1988 s9, in favour of Hastoe, given that the parties had failed to be ready for trial. Hastoe appealed.

The Court of Appeal allowed the appeal. The judge had failed to appreciate that the parties were requesting that he make an order embodying the terms of a compromise. The case was not one in which the parties were not ready for trial. Furthermore, although it was for the judge to exercise the discretion under s9, no good reason had been given for not granting an adjournment and for not approving the draft consent order. The orders made were set aside, and the possession proceedings restored for hearing.

Committal for contempt

■ Leeds City Council v MacDonald

B2/07/1509,
20 November 2007

The defendant was the tenant of a flat in a block. After he had admitted anti-social behaviour towards his neighbours, an interim injunction was made under HA 1996 s153A. The injunction prevented the defendant from engaging in behaviour that was capable of causing nuisance and annoyance to his neighbours and their visitors.

Within three months, the defendant had breached the injunction by hosting a gathering at his flat involving loud music, banging, and shouting and raised voices. On another occasion, the defendant caused alarm and nuisance when he was a passenger in a car, driven and parked erratically by a young woman. He admitted those breaches. On an application to commit him for contempt, a judge imposed a sentence of six months' imprisonment, suspended for two years. He warned the defendant that if he so much as dropped a plate on the floor he was liable to face imprisonment. The defendant appealed against sentence.

The Court of Appeal dismissed the appeal. The judge had been right to regard the breaches as serious. The defendant's persistent, intimidatory and boorish behaviour had had a serious effect on the lives of his neighbours. The judge's strong warning had been entirely justified and had needed to be reinforced by a strong sanction, especially since the defendant had largely ignored the interim injunction and had breached it within a very short time of it being made. In all the circumstances, the sentence imposed was entirely correct.

Publicity of anti-social behaviour orders

Information Commissioner

Complaints

■ Camden LBC

FS50123489,
13 February 2007

The complainant asked Camden to provide him with the identities of all residents who had been made the subject of anti-social behaviour orders (ASBOs). Camden provided him with an edited version of its ASBO database, but withheld any information that could be used to identify individuals. The council relied on Freedom of Information Act (FIA) 2000 ss40 (personal information) and 31 (law enforcement). The complainant complained to the commissioner under FIA s50 (application for decision by commissioner).

The commissioner upheld the complaint. He was not satisfied that s31 was engaged. He decided that Camden was wrong to rely on s40 to redact the names of all individual recipients of ASBOs, but that redaction was appropriate where:

- reporting restrictions were imposed by the court;
- the ASBO did not proceed beyond interim status;
- the ASBO recipient was particularly

vulnerable or would be put at real risk by disclosure; or
■ the ASBO had expired.

In reaching his decision, the commissioner considered several points particularly relevant including that:
■ an effective media strategy is essential to fulfil the protective purposes of ASBOs;
■ publicity should increase community confidence;
■ individuals who receive orders should understand that the community is likely to learn about them; and, furthermore,
■ it is usually appropriate to issue publicity when a full order is made, rather than an interim order.

DAMAGES FOR DISREPAIR AND HARASSMENT

■ Arabhalvaei v Rezaeipoor

Central London County Court, 7 November 2007, December 2007 Legal Action 30[15]

Mr Rezaeipoor was a protected tenant of a one-bedroom flat which he shared with his wife. From 1995 until January 2006, when the claimant, his landlord, transferred the property to his former wife, Mr Rezaeipoor and his wife suffered as a result of disrepair at the flat and because of harassment from the claimant. The harassment comprised verbal abuse, disconnection of the water supply, nuisance telephone calls, and locks to the property being filled with glue and, on one occasion, a window being smashed by a bottle. The defendant ignored letters from Mr Rezaeipoor's tenancy relations officer warning him that his actions could amount to harassment.

In 2000, Mr Rezaeipoor lost his job as a radio presenter with the BBC's World Service as he was finding it increasingly difficult to leave his wife alone in the property. In 2004, the claimant issued possession proceedings based on rent arrears. Mr Rezaeipoor counterclaimed for damages for harassment and disrepair. In August 2007, the claimant's claim was struck out and the claimant was debarred from defending the counterclaim.

District Judge Taylor awarded damages of £188,526.21, calculated as follows:
■ Disrepair: (50 per cent of the rental value over the period in question) £22,500;
■ Harassment: (at the rate of £6,000 per annum) £46,500;
■ Loss of employment: £67,500;
■ Special damages: £2,601.68;
■ Additional special damages for heating, cleaning and related damages: £2,325;
■ Aggravated damages: £5,000;
■ Exemplary damages: £5,000; and
■ Interest: £37,099.53.

For details of the issue of disrepair and the awards relating to it, see December 2007 *Legal Action* 30.

■ Evans v Copping

Ashford County Court, 14 November 2007[16]

The defendant landlord and his wife lived in the ground-floor flat of a Victorian conversion. The defendant's stepdaughter lived in the basement flat. The claimant lived in the top-floor flat and was entitled to use a laundry room which was on a mezzanine floor. It was a very small room housing a washing machine and tumble dryer. During ongoing refurbishment works, the defendant's wife and stepdaughter used the laundry facilities.

The claimant was excluded from the property when he returned from shopping and discovered that all the locks had been changed. He applied for an injunction permitting re-entry, but the defendant misled the court by indicating that the flat had been relet whereas, in fact, there was just an agreement to relet in a fortnight's time. Between eviction and the trial three months later, the claimant stayed with friends. The claimant sought damages.

Deputy District Judge Cagney held that the tenancy was not excluded under Protection from Eviction Act 1977 s3A. The defendant's wife's use of the laundry room was only temporary and transitory and so there was no shared accommodation through her activities. He also doubted whether the laundry room could amount to 'accommodation' for the purposes of s3A. The judge awarded the following:
■ General damages of £2,500;
■ Aggravated damages of £500;
■ Special damages of £240; and
■ Exemplary damages of £1,500 to condemn the deception of the court.

LONG LEASES

Service charges

■ Volosinovici v Corvan (Properties) Ltd

LRX 67 2006, Lands Tribunal, 16 July 2007

Ms Volosinovici applied to the Leasehold Valuation Tribunal (LVT) under Landlord and Tenant Act (LTA) 1985 s27A for the determination of the amount of service charges payable. She failed to comply with directions given. As a result, the LVT struck out parts of her claim.

HHJ Huskinson, sitting in the Lands Tribunal, held that the LVT has the power to dismiss an application in whole or in part under the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 SI No 2099 reg 11, where it appears to the LVT that the application is frivolous or vexatious or otherwise an abuse of process. This power is not limited to applications as originally made or within some limited initial time frame, as a decision on that point might only become possible once further information is provided under directions given by the tribunal. If a LVT concludes that, in the light of all the circumstances including failure to comply with case management decisions, an application or part of it is frivolous or vexatious or otherwise an abuse of process, it is open to the tribunal to exercise its powers under reg 11.

However, the LVT has properly to consider the matter and give a decision that is adequate in law. That requires the LVT to analyse the facts and give clear and sufficient reasons for its conclusions.

In this case, the LVT had made no reference to any consideration concerning whether or not the failure to comply with the directions had such an effect on Ms Volosinovici's case as to cause parts of her application to be frivolous, vexatious or an abuse of process, or whether or not the discretionary power to dismiss should be exercised. The LVT's decision was legally flawed and could not be allowed to stand. The whole of Ms Volosinovici's application, accordingly, remained outstanding before the LVT.

Appointment of a manager

■ Cawsand Fort Management Company Ltd v Stafford

[2007] EWCA Civ 1187, 20 November 2007

Long leaseholders applied under LTA 1987 ss21 and 24 to the LVT for the appointment of a manager for the property in which their flats were situated. The manager was to undertake a specified programme of work, including work to 'common land' including roadways and footpaths and 'amenity land' used for recreational purposes, which were all retained by the freeholder.

The freeholder did not object to the appointment of a manager, but asserted that the LVT's jurisdiction extended only to the defendants' individual buildings and their curtilages, not to the common land owned by the company. The LVT made an order appointing the manager. It conferred on him powers over both the land demised to the leaseholders and the common land owned by the freeholder. The freeholder's appeal to the Lands Tribunal was dismissed. It further appealed to the Court of Appeal.

The Court of Appeal dismissed the appeal. The LVT's power to appoint a manager may

extend to common land not within the buildings demised. There is nothing in the language of the LTA 1987 to justify limiting a manager's functions to those that must be carried out on the buildings themselves or the premises to which LTA 1987 Part 2 relates. The rights over the common land had been granted by the freeholder and were in relation to the demised premises.

HOUSING ALLOCATION

Local Government Ombudsman

Investigation

■ Leeds City Council

05/C/13157,
20 November 2007

A seriously ill and profoundly disabled woman was confined to bed in one room of her house. In October 2004, she and her husband applied for allocation of council accommodation suitable for her disability. They were given second highest priority on the council's choice-based letting scheme. The woman's husband had to check for available properties every week on the council's website or in its magazine and make bids. His bids were unsuccessful until March 2007. The Ombudsman said:

39. My investigation found no evidence of maladministration by the council in the way that it dealt with Mr and Mrs E's applications for rehousing. It was insensitive to expect someone in Mr E's position to devote time and energy to bidding for properties under the choice based lettings scheme in late 2004 and early 2005. This was not, however, contrary to any law, regulation, guidance or council policy. I am pleased that the council has now revised its lettings policy to allow for direct lets to be made in exceptional circumstances.

40. My investigator checked on the allocations of properties for which Mr E had unsuccessfully bid in late 2006 and early 2007 and on a sample of cases awarded higher priority. It is some measure of the extreme pressure on social housing, especially properties adapted to be wheelchair accessible, that she found that all the higher priority cases were in even more difficult situations than Mr and Mrs E and that the allocations had been properly made to applicants with higher priority.

However, the Ombudsman criticised the council's failure to recognise legal duties owed to the complainant (under the Chronically Sick and Disabled Persons Act 1970 s2) and its handling of her disabled facilities grant application. The Ombudsman recommended £6,605 compensation and a review of the council's procedures.

HOMELESSNESS

Priority need

■ McGrath v Camden LBC

[2007] EWCA Civ 1269,
16 November 2007

Mr McGrath was a self-employed photographer with little other income than £44.78pw in tax credits. He applied to the council for homelessness assistance for himself and his son. His son resided with both mother and father (under a joint residence order) spending roughly equal amounts of time with each. Mr McGrath claimed to have a priority need relying on HA 1996 s189(1)(b) ('a person with whom dependent children reside or might reasonably be expected to reside'). The council's reviewing officer decided that, given Mr McGrath's very modest income, he did not have priority need because his son was only 'dependent' on one parent: his mother. HHJ Knight QC dismissed an appeal against that decision.

Longmore LJ refused a renewed application for permission to bring a second appeal. It could not be said that – as a matter of law – a child who resided with each parent was dependent on them both. On whom a child was dependent was fact-sensitive. Although the decision was finely balanced it revealed no error of law.

Comment: It appears to have been accepted that Mr McGrath would only have priority need if his son was (at least in part) dependent on him. For the contrary view, see *Housing allocation and homelessness: law and practice*, Jan Luba QC and Liz Davies, Jordan Publishing, September 2006, paras 11.41–11.43.

■ Harper v Oxford City Council

[2007] EWCA Civ 1169,
30 October 2007

Following his involvement in a fatal road traffic accident, Mr Harper suffered from post-traumatic stress disorder (PTSD). He became incapable of work and was dependent on incapacity benefit. A consultant clinical psychiatrist reported that in addition to PTSD he suffered from depression. His relationship with his partner broke down and he was evicted from her home. On receiving his homelessness application, the council commissioned advice from NowMedical. After receiving a report from one of its doctors, the council decided that Mr Harper had no priority need. On review, both Mr Harper and NowMedical supplied the council with further medical reports. The original decision was confirmed on review. An appeal to the county court was compromised on the council agreeing to undertake a further review and it obtained a further report from Dr Keen of NowMedical. Further psychiatric evidence was supplied by Mr Harper's advisers. None of NowMedical's doctors examined Mr Harper. The reviewing officer considered all the reports, applied the *Pereira* test, and decided that Mr Harper was not vulnerable. HHJ Compston dismissed an appeal.

The Court of Appeal refused a renewed application for permission to bring a second appeal. Counsel for Mr Harper had submitted that there was 'now a strong argument for saying that NowMedical are biased in favour of their paymasters, the local authorities' (para 10) and that reliance on their reports would mean that there was an 'inherent fault' (para 11) in review decisions based on them. The Court of Appeal was satisfied that the reviewing officer had had regard to all the medical evidence and had reached his own – rational – decision that there was no vulnerability.

Eligibility

■ Ibrahim v Harrow LBC

Central London County Court,
18 October 2007[17]

Mrs Ibrahim was a Somali national, married to a Danish citizen, but they separated. They had four children, who were all Danish citizens. The two older children had been in state education since the family arrived in the UK in 2003. The husband had been a worker from October 2002 to May 2003. Between June 2003 and March 2004, he claimed incapacity benefit. He was declared fit to work, and left the UK. He returned in December 2006 and did not work again. Mrs Ibrahim did not work but claimed that she had an enforceable Community law right to reside in the UK as the parent and primary carer of children in education (see *Baumbast v UK* [2002] ECR I–7079). After the decision in *Baumbast*, the EU passed Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states.

Mrs Ibrahim applied to the council for homelessness assistance but it decided that she was not eligible because she did not have the right to reside in the UK and, therefore, she was subject to immigration control: HA 1996 s185. That decision was confirmed on review and she appealed.

Allowing the appeal, Recorder Hochhauser QC held that the 2004 Directive was not a full and final codification and had left untouched article 12 of the 1968 EEC Regulation No 1612/68. Article 12 was designed to enable children to complete their education within a member state and to ensure that they do not suffer any disadvantage by reason of their

parents having exercised free movement rights. The fact that the husband was no longer a qualified person as a result of ceasing to be unfit for work, rather than leaving the UK, was a novel, factual situation but similar considerations applied as in *Baumbast*. Mrs Ibrahim had a directly enforceable right as the parent and primary carer of children who had acquired directly effective rights of residence. She was not subject to immigration control because she was exercising a treaty right. Accordingly she was 'eligible' for homelessness assistance'.

Intentional homelessness

■ Gaskin v Norwich City Council

[2007] EWCA Civ 1239, 22 October 2007

Ms Gaskin was evicted from her privately rented accommodation after her lease was forfeited in a dispute about repairs and payment of rent (see *Norwich Cathedral v Gaskin* [2004] EWHC 1918 (Ch), 30 July 2004). On her application for homelessness assistance, the council decided initially, in January 2004, that she did not have a priority need. However, it withdrew that finding and, in October 2004, issued a fresh decision that although Ms Gaskin did have priority need she had become homeless intentionally because she had withheld her rent deliberately in the belief that she had been right to do so. That decision was upheld on review.

HHJ Barham dismissed an appeal. Ms Gaskin sought a second appeal. Her grounds included the assertion that the review decision was a nullity because the council had not notified an initial finding of intentional homelessness in its first decision in January 2004.

Chadwick LJ refused permission for a second appeal. The judge had held that the council had been entitled to proceed as it did because the issue of intentional homelessness 'did not arise until after' the earlier decision had been withdrawn. The reviewing officer's subsequent decision on intentional homelessness contained no error of law.

Late reviews

■ R (Casey) v Restormel BC

[2007] EWHC 2554 (Admin), 7 November 2007

The claimant was a homeless young woman. The council decided that she had become homeless intentionally: HA 1996 s191. When the claimant applied for a review, the council responded that the application was out of time and that it would not exercise its discretion to extend time: HA 1996 s202. The claimant said that she had not received notice of the original decision until a date within 21 days of her review application so that it was not out of time. The council did not accept that and required the claimant to leave her temporary accommodation. A claim for judicial review was issued and an interim injunction was granted that required the council to continue accommodating her pending trial.

Munby J rejected the council's subsequent application to discharge the injunction and granted permission to continue the judicial review claim. Whether or not the original decision had been notified - and when - were matters or 'precedent fact' on which the claimant had an arguable case. The judgment also gives guidance about the terms in which interim injunctions in homelessness cases should be granted and on the timetabling of urgent judicial review cases.

HOUSING FOR FAILED ASYLUM-SEEKERS

■ R (Matembera) v Secretary of State for the Home Department

[2007] EWHC 2334 (Admin), 10 September 2007

Having failed in his claim for asylum, the claimant applied to the secretary of state for assistance with accommodation under Immigration and Asylum Act 1999 s4, as amended, on the basis that he was destitute. No decision was made on that application for several days. The claimant began proceedings for judicial review and obtained an interim injunction ordering provision of board and accommodation. Subsequently, the claimant made a fresh asylum claim and was provided with accommodation under the National Asylum Support Scheme. He pursued the judicial review proceedings in order to contend that the failure to accommodate temporarily, pending his s4 assessment, had been unlawful.

Hodge J refused permission to pursue the judicial review. Parliament had not legislated for an interim scheme of accommodation pending a s4 assessment and no such scheme had been made by regulations. This was explained, in part, by the fact that a decision not to accommodate temporarily would trigger rights of appeal giving rise to issues of accommodation pending appeal and further appeals. What was required was an administrative system capable of dealing quickly with applications so that applicants did not need to apply for judicial review.

The judge said:

It should not be necessary for applicants to resort to the use of judicial review … In my judgment it is incumbent on the secretary of state to put in place a system which deals specifically with the problem … The secretary of state, through her officials, must act properly and promptly … I hope this case leads to a significant improvement in the timetable for such decisions both individually and on average (paras 16–18).

1 Available at: www.publications.parliament.uk/pa/cm200708/cmbills/008/2008008.pdf. The bill's explanatory notes are available at: www.publications.parliament.uk/pa/cm200708/cmbills/008/en/2008008en.pdf. The bill's impact assessment is available at: www.communities.gov.uk/documents/housing/pdf/HousingandRegBill.
2 Visit: www.communities.gov.uk/housing/strategiesandreviews/housingandregenerationbill.
3 Available at: www.communities.gov.uk/documents/housing/pdf/standardissue3.
4 Available at: www.dfes.gov.uk/consultations/conDetails.cfm?consultationId=1504.
5 *Housing benefit guidance on housing benefit anti social behaviour sanction for local authorities participating in the pilot scheme*, available at: www.dwp.gov.uk/housingbenefit/manuals/sanctions/hb-guidance.pdf. *Sanction of housing benefit in relation to anti-social behaviour. Guidance for pilot areas* is available at: www.dwp.gov.uk/housingbenefit/manuals/sanctions/anti-social-guidance-pilot-areas.pdf.
6 Available at: www.housingcorp.gov.uk/upload/pdf/Tenure07.pdf.
7 Available at: www.housingcorp.gov.uk/upload/pdf/Rents.pdf.
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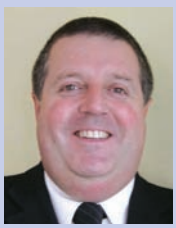
10 Available at: www.housingcorp.gov.uk/cfg/upload/pdf/Tackling_homelessness_Efficiencies_in_lettings.pdf.
11 Available at: http://england.shelter.org.uk/files/docs/33781/Rightsandwrongs.pdf.
12 Available at: www.communities.gov.uk/documents/housing/pdf/reviewhomelessness.
13 See: www.communities.gov.uk/publications/housing/assuredtenancyforms.
14 Niamh O'Brien, barrister, London.
15 Tina Conlan, barrister, London.
16 Kingsfords, solicitors, Kent, and Michael Paget, barrister, London.
17 Nicola Rogers, barrister, London.



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