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

The Housing and Regeneration Bill concluded its House of Commons committee stage on 31 January 2008. The Public Bill Committee had reviewed a number of amendments drafted by Shelter, the Housing Law Practitioners' Association and others dealing with matters as diverse as Housing Act (HA) 1988 Schedule 2 Ground 8, tolerated trespassers, overcrowding, domestic violence and homelessness. The committee's debates are available verbatim on the internet.[1] The bill will now move to its House of Commons report stage when further amendments will be proposed and considered. The long title of the bill is so broad that it will enable amendments to be incorporated dealing with almost any housing law issue. The version of the bill as amended in committee is Bill 54/3 of the 2007/08 session.[2]

Tolerated trespassers

During the committee stage debates on the Housing and Regeneration Bill (see above), the government indicated that it was positively considering bringing forward its own amendments to address the problem of 'tolerated trespassers' at a later stage of the bill's parliamentary passage.

On 25 January 2008, the magazine *Inside Housing* published a report reviewing the problems that tolerated trespasser status is causing for many social housing providers and the inconsistency in treatment of tolerated trespassers by social landlords.[3]

Homelessness

The *Reducing re-offending housing and housing support resource pack* is aimed at those working with homelessness and the other housing needs of ex-offenders. The pack was published by the National Offender Management Service in January 2008.[4]

The latest homelessness statistics for Wales show a decline in the number of applications accepted by Welsh local authorities of nine per cent, mirroring the decline in such numbers in parts of England. At the end of September 2007, there were almost 3,000 households in temporary accommodation supplied by Welsh local authorities under HA 1996 Part 7: *Statistics for Wales. Homelessness (July to September 2007)*, SDR 7/2008, January 2008. The ministerial statement accompanying release of the figures emphasised that bed and breakfast accommodation should only be used as a last resort for the homeless and that the Welsh Assembly Government will this year be developing a new ten-year plan to tackle homelessness.[5]

Private sector

The government has appointed a team of academics from York University to head the independent review of private renting that was announced in December 2007: Communities and Local Government (CLG) news release, 23 January 2008.[6] The review team will report in late autumn. The review team's terms of reference have also been published.[7]

On 22 January 2008, Karen Buck MP tabled an Early Day Motion (EDM) on the issue of 'retaliatory evictions' in the private rented sector of assured shorthold tenants who seek housing repairs by their landlord.[8] The EDM is now available for other MPs to sign.

Disability and housing

In January 2008, the government announced an injection of a further £11.5 million into the budget for Disabled Facilities Grants (DFGs) for the current financial year (2007/08): CLG news release, 14 January 2008.[9] That followed an earlier announcement in December 2007 that the DFG budget for 2008/09 would be increased to £146 million: CLG news release, 4 December 2007.[10] Advisers assisting clients who are thinking of making a housing adaptation to deal with the effects of an occupier's disability might need to encourage a swift DFG application.

The Housing Corporation has issued *Circular 10/07: Housing association disability and gender action plans* to accompany the regulatory guidance already provided to housing associations in its *Good practice note 8: equality and diversity* (Housing Corporation, November 2007).[11]

Housing-related support

On 16 January 2008, the government published *Research into the financial benefits of the Supporting People programme*.[12] The report commissioned from Capgemini UK plc suggests that the billions of pounds in public funds ploughed into the Supporting People schemes of housing-related support since 2003 have had a substantial cost-benefit outcome by avoiding costs arising elsewhere in the social care system.

Housing conditions

The latest figures from the 2006 English House Condition Survey published in January 2008 indicate that there are 1.3 million social sector non-decent homes and a further 1.4 million private sector vulnerable households living in non-decent homes. Some 4.8 million homes (22 per cent) have category 1 hazards as assessed under the hazards rating system of HA 2004 Part 1. *The English House Condition Survey 2006 headline report* contains the full details.[13] For an update on how information about housing conditions is being gathered for future years see *Housing Surveys Bulletin*, issue 2, January 2008.[14]

Housing and anti-social behaviour

The government has published the results of research into intensive family support projects (IFSPs). The projects seek to provide families at risk of eviction because of anti-social behaviour with intensive support to address their often multiple and complex needs. The research suggests that 70 per cent of families using the schemes had managed to sustain or achieve positive change with no further complaints about their behaviour: CLG Housing Research Summary, number 240, 2008.[15]

The Housing and Regeneration Bill (see above) contains provisions in clauses 283–284 exempting accommodation let to participants in such schemes from normal security of tenure.

Service charges

In 2005 the government announced that it would not bring Commonhold and Leasehold Reform Act 2002 s152 (regular statement of account to be provided to service charge payers) into force in its enacted form

(Office of the Deputy Prime Minister press release 2005/0156). In July 2007, the government issued a consultation paper with alternative proposals.

The results of that consultation exercise were published in January 2008: *A consultation paper on regular statements of account and designated client accounts: summary of responses*.[16] The government has decided both to amend the primary legislation (presumably through the Housing and Regeneration Bill – see above) and to set out detailed requirements for landlords in regulations, with particular modifications for social landlords.

In Wales, the service charge provisions of the Service Charges (Summary of Rights and Obligations, and Transitional Provisions) (Wales) Regulations 2007 SI No 3160 took effect on 30 November 2007.

HUMAN RIGHTS

Article 1 of Protocol No 1

■ Werle v Romania

App No 26521/05,
13 December 2007

In 1950, two buildings which belonged to Ms Werle's parents were nationalised and seized by the state. Ms Werle continued to live in a flat situated in one of the buildings as a tenant of the state. In 1996, she claimed restitutio in integrum of one building and compensation for the other building. The Bucharest Town Council rejected her demand. Ms Werle contested the decision before the courts. In 2002, the town council allowed the application and granted restitutio in integrum.

However, despite obtaining judicial recognition of her property right, she was unable to recover possession of some of the flats because, in 1996, the state had sold them to other tenants. In 2002, Ms Werle asked the court to find that the sale by the state was null and void. In 2005, the Bucharest Court of Appeal dismissed the request for the rescission of the sale contracts on the ground that the state had complied with the provisions of the relevant legislation and that the tenants had made their purchases in good faith.

The European Court of Human Rights (ECtHR) stated that the sale of another's possessions by the state amounts to a deprivation of possessions. That deprivation, in combination with the total lack of compensation, was contrary to article 1 of Protocol No 1. The state had not fulfilled its positive obligation to act efficiently and in due time with regard to the issue of restitutio in integrum and sale of property nationalised during the Communist regime. Failing restitution of the property, the ECtHR held that the state was to pay pecuniary damage corresponding to the current value of the property.

■ Gashi v Croatia

App No 32457/05,
13 December 2007

Mr Gashi was an employee of a glass factory. In 1988, the factory granted him and his family a flat in Pula. In 1991, parliament enacted the Protected Tenancies (Sale to Occupier) Act, which regulated the sale of publicly-owned flats previously let under protected tenancies, giving the right to holders of such tenancies to purchase them from the provider of the flat under favourable conditions. In 1996, under that Act, Mr Gashi as the buyer and the Pula Municipality as the seller concluded a contract for the sale of the flat. The State Attorney's Office gave approval for the sale. In 1998, the Pula Municipal Court recorded Mr Gashi's ownership of the flat in the court's land register. In 2000, the Istra County State Attorney's Office brought a civil action against Mr Gashi and the Pula Municipality, seeking annulment of the sale contract. It argued that Mr Gashi could not have obtained a protected tenancy of the flat because the factory had no right to dispose of the flat. The Municipal Court accepted these arguments and annulled the sale contract. The judgment was upheld by the Pula County Court.

The ECtHR found that there was a deprivation of property within the meaning of the second sentence of article 1 of Protocol No 1 and that the nullification of title was in accordance with domestic law. After referring to the margin of appreciation, the court stated that it must examine whether an interference with the peaceful enjoyment of possessions strikes the requisite fair balance between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights, or whether it imposes a disproportionate and excessive burden on the applicant. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his/her possessions.

In this case, Mr Gashi was an ordinary citizen, enjoying no special privileges, who bought a flat according to laws applicable to all holders of protected tenancies of publicly-owned flats, and not reserved for some privileged category of citizen. The flat was social property, intended to meet the essential housing needs of Mr Gashi and his family. The argument that Mr Gashi obtained the tenancy of the flat from the glass factory, not from the Pula Municipality, could not be accepted, because the Pula Municipality sold the flat in question to him. Furthermore, the contract of sale was submitted for approval to the Istra State Attorney's Office. The authorities had an opportunity to verify the contract and to prevent its taking effect if they found any ground justifying such a measure. The mistakes or errors made by the state authorities must be borne by the state and the errors must not be remedied at the expense of the individual concerned. The government did not advance any arguments that the national courts pursued a legitimate aim.

The ECtHR found it difficult to discern any possible legitimate aim on the part of the national authorities in annulling the sale contract at issue and found that the interference with Mr Gashi's property rights failed to strike a fair balance between the public interest and his article 1 of Protocol No 1 rights. There was therefore a violation of article 1 of Protocol No 1.

■ Urbárska Obec Trencianske Biskupice v Slovakia

App No 74258/01,
27 November 2007

Land owned by the predecessors of the members of a registered association of landowners was put at the disposal of an agricultural cooperative. The owners' formal title to the land remained unaffected, but they had no possibility of using it in practice and the rent paid was very low.

The ECtHR concluded that the compulsory letting of land at such a low level of rent, which bore no relationship to the actual value of the land, was incompatible with the right to peaceful enjoyment of possessions. There was accordingly a violation of article 1 of Protocol No 1.

■ Pietrzak v Poland

App No 38185/02,
8 January 2008

Land owned by Mr and Mrs Pietrzak was designated under a local development plan for expropriation at some undetermined future date so that a new road could be built. This meant that they could not obtain a building permit to construct a new house or plant an orchard. Under domestic legislation they were not entitled to any compensation for the interference with their ownership rights resulting from the future expropriation. They claimed that the legal uncertainty surrounding the status of the land, the lack of any effective domestic remedy capable of rectifying the situation and the absence of any compensation was a breach of article 1 of Protocol No 1.

The ECtHR found that there was a violation of article 1 of Protocol No 1. Mr and Mrs Pietrzak's situation was adversely affected not so much by the mere prospect of expropriation, but by the fact that this future

expropriation was to be carried out at an undetermined point in time and in the absence of any indication, even approximate, as to its future date. They had no right to compensation for the fact that they could not freely use and dispose of the property in the light of the future expropriation. Although the measures complained of, taken as a whole, in law left intact their right to continue to use and dispose of their possessions, in practice they significantly reduced the effective exercise of that right. There was accordingly an interference with the peaceful enjoyment of their possessions. It did not, though, amount to expropriation and could not be regarded as control of use of property. Accordingly, the interference fell to be examined under the first sentence of article 1 of Protocol No 1. The interference complained of was 'provided by law' and pursued the legitimate aim of securing land in connection with the implementation of the local land development plan. However, the state of affairs, seen as a whole, disclosed a lack of sufficient diligence in weighing the interests of the owners against the planning needs of the municipality. A fair balance was not struck between the competing general and individual interests. Mr and Mrs Pietrzak had to bear an excessive individual burden. Ruling on an equitable basis, the court awarded €5,000 as non-pecuniary damage.

■ De Bierre v Secretary of State for Communities and Local Government

CO/4383/2006,
21 January 2008

Bean J upheld a planning inspector's decision that a compulsory purchase order (CPO) of properties which had remained empty for eight years would be a proportionate interference with the owner's rights under article 1 of Protocol No 1. It was for the inspector to balance the public good in making the CPO against the effect of its acquisition on the owner.

Article 8

■ South Cambridgeshire DC v Gammell

[2007] EWHC 2912 (QB),
7 December 2007

Gypsies occupied land without planning permission. South Cambridgeshire, the local planning authority, sought an injunction under Town and Country Planning Act 1990 s187B to restrain actual and apprehended breaches of planning control and an order that the Gypsies vacate the land.

Andrew Edis QC, sitting as a deputy judge of the High Court, found that the defendants undoubtedly occupied the plots as their homes and that engaged the protection of article 8 of the European Convention on Human Rights. The fact that the defendants did not own the land did not count against them. The land remained their home for the purposes of article 8. However, he concluded that granting the remedy sought was proportionate to the legitimate aim of the local planning authority. In this case, the decision of the local planning authority was entitled to be given considerable weight. The personal circumstances of the defendants did not outweigh the need to enforce planning control.

TENANTS OF LOCAL AUTHORITIES

Non-secure tenancies

■ City of Westminster v Boraliu

[2007] EWCA Civ 1339,
2 November 2007

Westminster leased premises from Pathmeads Housing Association. That lease contained a stipulation that Westminster should not 'use the premises or any part thereof otherwise than for the purposes of temporary housing accommodation in accordance with the provisions of paragraph 6 of Schedule 1 of the 1985 Act'. It also provided that 'on expiry of the term … or when required by the lessor … the council shall give to the lessor vacant possession of the whole of the premises'. Westminster owed Ms Boraliu the main housing duty under HA 1996 s193.

In February 2005, the council granted her a tenancy of one of the flats which it leased from Pathmeads. The tenancy agreement stated that it was non-secure under HA 1985 Sch 1 para 6 (premises leased to landlord on terms enabling head-lessor to obtain vacant possession). There was no reference to Sch 1 para 4 (tenancy granted under homelessness obligations contained in HA 1996 Part 7) in either the lease or the tenancy agreement.

Later, Pathmeads told Westminster that it wanted the premises back and the council served a notice to quit on Ms Boraliu. In the subsequent possession claim, Westminster relied only on Sch 1 para 4 as the basis for the tenancy being non-secure. Ms Boraliu was unrepresented and an outright possession order was made. HHJ Knight QC allowed an appeal (see November 2007 *Legal Action* 36), holding that a tenancy could not come within both paragraphs 4 and 6, and that this was a case which fell within paragraph 6. Westminster appealed.

The Court of Appeal allowed the appeal by consent. In giving full reasons, Chadwick LJ said that the tenancy fell within paragraph 4. It was a tenancy granted in pursuance of a function under HA 1996 Part 7 and the local housing authority had not notified the tenant that the tenancy was to be regarded as a secure tenancy. The fact that paragraph 6 also applied to circumstances which fell within paragraph 4 was not a sufficient reason for qualifying the plain words of paragraph 4 itself. There was a real purpose in having both paragraphs 4 and 6: the paragraphs were not to be regarded as mutually exclusive.

Possession claims

Local Government Ombudsman

Investigation

■ Preston City Council

06/C/15905/JCG[17]

Council tenants were incorrectly advised by a council officer not to appeal against a warrant for eviction due to rent arrears. They also complained that their request to backdate housing benefit failed to trigger any urgent action by the council and was not taken into account when the council decided to proceed with the eviction.

The Local Government Ombudsman found maladministration and that the eviction could have been prevented if the tenants had appealed or if the council had decided to postpone the eviction until the claim for backdated housing benefit had been decided. She recommended compensation of £3,000 for the loss of possessions, £2,000 for the eviction and £1,000 for the stress of living in overcrowded accommodation and the time and trouble of pursuing the complaint.

Introductory tenants

■ Sandwell LBC v Constantinou

Walsall County Court,
16 November 2007[18]

Mr Constantinou was an introductory tenant. In February 2007, Sandwell, his landlord, served a HA 1996 s128 notice, relying on alleged rent arrears of £219.90 (less than four weeks' rent). Mr Constantinou requested a review but, at the review hearing, the decision to serve the notice was upheld. In the subsequent possession claim a deputy district judge made an order for possession, ruling that he was bound to make a possession order if a valid s128 notice had been served and a review carried out. There was no application by Mr Constantinou, who was acting in person, to adjourn the proceedings to seek judicial review of the decision to seek possession. Mr Constantinou then:

- sought permission to appeal against the possession order; and
- issued judicial review proceedings seeking to review the decision of the council to issue possession proceedings and obtain a possession order against him.

HHJ Oliver Jones QC allowed the appeal and set aside the possession order. At the time that the possession order was made, there had been no accompanying affidavit or

witness statement from the council, explaining how the procedure was operated in the individual case. Such an affidavit or witness statement should have dealt with:
■ the degree of independence of the tribunal from persons who took the original decision;
■ the way the hearing was conducted; and
■ the reason for taking the decision to continue with the proceedings (see the direction given by Waller LJ in *McLellan v Bracknell Forest BC* [2001] EWCA Civ 1510; (2001) 33 HLR 86, CA). The court must not be seen to be supporting an unlawful act.
HHJ Oliver Jones QC also stated that he would raise the issue of the requirement for an accompanying witness statement in introductory tenancy possession proceedings with the Civil Procedure Rules committee.

Subsequently, Mitting J refused permission in the judicial review proceedings observing:

The claimant's public law challenge to the lawfulness of the decision to claim possession is justiciable in the county court; Kay v Lambeth LBC *[2006] 2 AC 465 at paragraphs 30, 50, 86, 175 and 208. Accordingly the claimant has an alternative remedy to judicial review which he should pursue.*

Tolerated trespassers

■ Helena Housing Limited v Mower and Molyneux

Liverpool County Court,
28 November 2007

Both Mrs Mower and Mr Molyneux were secure tenants. After falling into rent arrears their then landlords, St Helens BC, obtained suspended possession orders in the 1993 form of N28. This form of order, modelled on the traditional suspended order, provided not only for possession to be postponed on the basis of the payment of the current rent plus payment of a sum off the arrears, but also included the term: 'When you have paid the total amount mentioned, the plaintiff will not be able to take any steps to evict you as a result of this order.' Neither tenant complied initially with the terms of the order for possession. Later, both then began to do so.

After a stock transfer from St Helens BC to Helena Housing Limited (HHL) in 2003, both tenants paid off their arrears of rent and went into credit. HHL stated that it considered offering both tenants new assured shorthold tenancies but in fact did not do so. Mrs Mower sought to exercise her right to buy but this was rejected on the ground that she was an 'entrenched tolerated trespasser', following the decisions in *Marshall v Bradford MDC* [2001] EWCA Civ 594 and *Swindon BC v Aston* [2002] EWCA Civ 1850. Mr Molyneux fell into further arrears of rent and, relying on the above cases and *London & Quadrant Housing Trust v Ansell* [2007] EWCA Civ 326, HHL alleged that he was a mere trespasser and could be evicted at will.

Mr Molyneux defended the possession claim. Mrs Mower sought a declaration that HA 1985 s85(4) and the term in the order meant that the order for possession was discharged. They argued that *Marshall, Aston* and *Ansell* were wrongly decided because the Court of Appeal had not had its attention directed to the earlier decision of *Payne v Cooper* [1958] 1 QB 174, CA. In that case, when considering the extended discretion provided by the Rent Acts, in identical form to HA 1985 s85, the Court of Appeal held that, although a literal reading of the words might suggest otherwise, the effect of such a term in the order was to discharge the order for possession. There was no other source of the power to make such an order than the discharge power contained within the section. It would be a wholly unwarranted technicality to require the tenant to return to court to obtain another order.

On the hearing of a preliminary issue, HHJ Mackay declined to follow *Marshall, Aston* and *Ansell* on the basis set out by the Privy Council in *Baker v R* [1975] AC 774, ie, where an inferior court was faced with two directly conflicting decisions of a higher court, it was entitled to choose the decision that appeared to it to be the most logical. HHJ Mackay held that had the question been simply a conflict between *Payne* and *Marshall* he might have been minded to leave the question to the Court of Appeal. However, after considering *Aston* and the obvious injustice this could cause where a tolerated trespasser who had sought to remedy his/her default would be in limbo forever and unable to retain tenancy status, he held that the effect of the order was to discharge the order for possession when the arrears were paid off. See also page 23 of this issue.

Anti-social behaviour

■ Birmingham City Council v Cadogan

Birmingham County Court,
10 January 2008[19]

Birmingham sought injunctions under Local Government Act 1972 s222 to prevent alleged gang members from congregating together and/or to exclude them from large areas of the city, including the locality where they had been living. It also sought orders preventing two defendants from wearing green clothing (said to be the colour of the gang to which they belonged) and from associating with any group larger than two in any public place. The claimant relied on police intelligence material showing that the defendants had been seen in the company of other members of a gang ('Birmingham's Most Wanted' (BMW)), that a companion had been found in possession of an imitation firearm, that a knife had been seen etc. The defendants gave evidence denying general criminal activity. They admitted being members of BMW, but said that it was a very small group of people who wrote and performed music.

After a thorough review of the authorities, HHJ MacDuff QC summarised the scope of s222 by saying:

A local authority may sue in its own name to obtain an injunction to prevent breach of the criminal law, but only where (i) there is 'something more' than a mere threatened breach; (ii) the case is an exceptional one and it is clear that nothing short of an injunction will prevent the defendant's unlawful acts and (iii) where it has a responsibility for the enforcement of that branch of the law. It may sue in its own name to obtain an injunction to prevent a public nuisance … within its area.

HHJ MacDuff noted that the orders sought were Draconian and would:

not prohibit anything which in itself [was] a crime, a nuisance, or anything which [was] otherwise unlawful. There is nothing inherently unlawful in being within all areas of the city and/or in associating with a group of other people.

He concluded that s222 did not permit injunctive relief in the circumstances existing in this case but that, even if there had been jurisdiction, on the evidence, he would not have made the orders sought.

SERVICE CHARGES

■ Home Group Limited v Lewis

LRX/176/2006,
Lands Tribunal,
3 January 2008

In July 2002, Warden Housing Association Ltd let a bungalow in a sheltered housing development to Mr Lewis on a monthly assured tenancy. The agreement provided for a net monthly rent of £298 and a service charge of £56. The agreement obliged the landlord to provide the services of a resident manager, communal cleaning, lighting, gardening, alarm system and TV aerial. Rent was defined as the sum of the net rent and the service charge. There was provision for the rent to be varied by service of a notice of increase, subject to the tenant's right to refer the rent to the Rent Assessment Committee sitting as a Leasehold Valuation Tribunal (LVT) to have a market rent determined. The

service charge element was calculated by estimating the costs of providing the services for the forthcoming year and including a management fee but, once set, the monthly service charge was a fixed charge for the financial year and did not vary according to the actual costs during the course of that year. If the actual expenditure exceeded the amount tenants were contractually liable to pay, the landlord absorbed the shortfall itself. If the actual expenditure was less, it retained the difference. There was no 'year end' accounting and no payment of a balancing charge.

Mr Lewis referred the question of whether he was liable to pay service charges to the LVT, purportedly under Landlord and Tenant Act (LTA) 1985 s27A. It found that the service charge was a variable service charge and that it had jurisdiction to make a determination under s27A. The landlord appealed to the Lands Tribunal, contending that it was not a service charge within the meaning of s18(1)(b) ('an amount … the whole or part of which varies or may vary according to the relevant costs'). The landlord submitted that to fall within s18(1) a charge must be one which either was directly related to (and varied with) the costs incurred or was a charge payable on account with a balancing charge (by way of further payment or credit/refund) being made at the end of the relevant period once the relevant costs were known.

HHJ Huskinson, sitting in the Lands Tribunal, allowed the appeal. The tenancies were subject to the statutory code for the alteration of rents and the contents of and restrictions on notices of increase. There was nothing in the tenancy agreements indicating that any altered rent was to be calculated in any particular manner, or linking any alteration in rent (including service charges) with an alteration in the costs of providing any relevant services. The sum payable did not vary in accordance with the relevant costs. There was no direct relationship between the amount of costs and the amount of the service charge as a consequence. Accordingly, s18(1)(b) was not satisfied. The LVT had no jurisdiction to deal with the application.

■ Continental Property Ventures Inc v White

LRX/60/2005,
Lands Tribunal,
15 February 2006

Long lessees sought a determination in the LVT that service charges were not payable, on the ground that the costs had not been reasonably incurred. One issue considered by the LVT was the cost of damp-proofing and redecorating for which the landlord claimed a total cost of £55,174. The LVT determined that only £3,525 had been reasonably incurred. The reasons for the reduction were twofold. First, the LVT held that all the works to one flat were covered by an earlier guarantee. Second, the LVT held that the works for another flat were made necessary because the landlord had neglected to carry out repairs to a leaking pipe within a reasonable time. If the landlord had complied with its repairing covenant the cost would have been only £3,525. Accordingly, the sum reasonably incurred was only such sum as would have been incurred but for what was described as 'the historic breach'. The landlord appealed.

HHJ Michael Rich QC dismissed the appeal. The LVT had held as a matter of fact that the landlord could have had the guarantee works carried out under the guarantee at no charge. It concluded therefore that to carry out those works at a cost was to incur the cost other than reasonably. HHJ Rich accepted that conclusion. With regards to the 'historic breach' argument, HHJ Rich stated that the 'relevant costs', which by LTA 1985 s19(1)(a) are limited to what is 'reasonably incurred' are defined by s18(2) as the 'costs … incurred by … the landlord … in connection with the matters for which the service charge is payable'. Those matters include 'repairs maintenance etc'. The question of what the cost of repairs is does not depend on whether the repairs ought to have been allowed to accrue. The reasonableness of incurring costs for their remedy cannot, as a matter of natural meaning, depend on how the need for remedy arose. However, breach of the landlord's covenant to repair gives rise to a claim in damages. If the breach results in further disrepair imposing a liability on the lessee to pay service charges, that is part of what may be claimed by way of damages. It would give rise to an equitable set-off, and as such constitute a defence to a claim for service charges. This would not mean that the costs incurred were not reasonably incurred, but would mean that there would be a defence to their recovery.

The determination of claims for damages is outside the jurisdiction of the LVT, but the tribunal does have jurisdiction to determine claims for damages for breach of covenant in so far as they constitute a defence to a demand for service charges in respect of which the LVT's jurisdiction under s27A has been invoked. There is no reason of principle why such jurisdiction should not extend to determining even a claim for loss of amenity or loss of health arising from breach of a repairing covenant.

■ Eltham Properties Ltd v Kenny

LRX/161/2006,
Lands Tribunal,
3 December 2007

A LVT determined that a LTA 1985 s20 consultation notice referring to proposed external painting works, which formed part of the lessees' service charge obligations, was defective because it failed to comply with the requirement under the Service Charges (Consultation Requirements) (England) Regulations 2003 SI No 1987 to invite each tenant to propose the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

The Lands Tribunal, allowing the landlord's appeal, held that it was reasonable under s20ZA to dispense with the consultation requirements. In deciding whether or not it was reasonable to do so, reasonableness had to be judged in the light of the purpose for which the consultation requirements were imposed. The most important consideration was likely to be the degree of prejudice that there would be to lessees in terms of their ability to respond to the consultation process if the requirements were not met. No evidence had been produced by the lessees to show that they had been prejudiced by the defect and the LVT had not made such a finding. It was reasonable to give dispensation from the consultation requirements where there had been a minor breach of procedure which had not caused any prejudice.

CONTEMPT OF COURT

■ HM Attorney-General v Smith

CO/4222/2007,
16 January 2008

Mr Smith went to Willesden County Court to commence proceedings on behalf of a friend who was having trouble with his landlord. He signed an application for an injunction and swore an affidavit, both in his friend's name. The next day he appeared before a judge and again represented himself as his friend. He was granted an interim injunction. A few days later he came to court with his friend. Mr Smith admitted that he had misrepresented who he was. The judge referred the matter to the Attorney-General who took proceedings for contempt and applied for an order for Mr Smith's committal.

The Administrative Court held that although Mr Smith had an impeccable record and had worked in the public sector trying to provide help for people in a social work context, where there was an interference with the administration of justice, which included

perjury, it would normally lead to a sentence of imprisonment. It is only in exceptional circumstances that the court can deal with contempt of that sort in any other way. An immediate sentence of three months' imprisonment was imposed.

HOMELESSNESS

Homelessness

■ Birmingham City Council v Aweys

[2008] EWCA Civ 48,
7 February 2008[20]

Birmingham accepted that a number of applicants for homelessness assistance (including council tenants and private sector tenants) were 'homeless' because their accommodation was no longer reasonable for them to continue to occupy: HA 1996 s175(3). It agreed that it owed them the main homelessness duty: s193(2). Its policy was that such applicants should remain in their existing homes to await offers of permanent housing under HA 1996 Part 6. Such applicants were placed in band B of the council's allocation scheme and known as 'homeless at home'. Other homeless applicants, who were provided with suitable temporary accommodation by the council in performance of Part 7 duties because they were 'street homeless', were placed in the higher band A. In judicial review proceedings, Collins J declared that the council was in breach of its s193(2) duty towards the 'homeless at home' and that the treatment of them in the allocation scheme was irrational (see [2007] EWHC 52 (Admin)).

Dismissing an appeal by Birmingham, the Court of Appeal held that:

■ the s193(2) duty arose immediately the council decided that an applicant was unintentionally homeless and in priority need;
■ 'suitable' accommodation had to be secured for an applicant owed that duty: s206(1);
■ the duty could not be performed by the homeless at home applicants remaining in accommodation which it was not 'reasonable' for them to continue to occupy because s175(3) prevented that amounting to 'accommodation' at all;
■ the street homeless and the homeless at home were owed the same duty and, in respect of the latter category, the council had been in breach of that duty;
■ the allocation scheme had been based on a flawed approach to the duty owed to the homeless at home and produced the result that those temporarily housed by the council in suitable accommodation had higher priority than those still homeless at home – it was, accordingly, irrational.

Local connection

■ Berhane v Lambeth LBC

[2007] EWHC 2702 (QB),
25 July 2007

Ms Berhane arrived in the UK in January 2005 and sought asylum. She was accommodated by the National Asylum Support Service (NASS) in the district of Croydon LBC. When she was granted refugee status, that accommodation was withdrawn and she applied to Lambeth for homelessness assistance. Lambeth accepted that it owed the main homelessness duty (HA 1996 s193) but because it considered that Ms Berhane had no local connection with Lambeth and a connection with Croydon, it referred her application to that authority in August 2005 for it to perform the duty: HA 1996 s198(1). Croydon refused to accept the referral on the ground that the s198 conditions for referral were not satisfied.

Lambeth had failed to give Ms Berhane immediate notice of the referral it had made as required by HA 1996 s184(4). When such notice was given, in March 2006, Ms Berhane sought a review. When the original decision was upheld, she lodged an appeal to the county court in July 2006: HA 1996 s204.

HHJ Birtles adjourned the appeal in November 2006 anticipating that the dispute between the authorities would be promptly resolved by agreement or arbitration. Ms Berhane appealed to the High Court against that order. In July 2007, a few weeks before that appeal was to be heard, Lambeth abandoned the dispute with Croydon and accepted that it would perform the s193 duty.

In the High Court, Eady J gave a judgment indicating that an adjournment of a HA 1996 s204 appeal might inhibit an appellant's statutory right of appeal to the county court. Ms Berhane had been entitled to have her own challenge – to Lambeth's decision to refer her to Croydon – heard. Although the decision to adjourn had been explicable, its premise had been a prompt resolution of the dispute between the two councils. In the event, that dispute had not been actively pursued, the appellant herself had had no control over its progress (not having been a party to it) and by February 2007 the two councils had not even agreed an arbitrator. That delay had inhibited Ms Berhane's access to justice. She was awarded her costs against Lambeth up to July 2007.

Priority need

■ Payne v Kingston RLBC

Central London Civil Justice Centre,
3 January 2008[21]

The appellant, a single woman aged 43, lived in the USA from the age of eight. She was a victim of abuse and domestic violence in the USA and had developed a history of mental health problems and drug misuse. She lived in supported accommodation in the USA and was treated regularly at the accident and emergency units of hospitals there. Following her conviction for criminal offences, she was deported to the UK after spending six months on remand in custody and one month in prison.

Kingston rejected her application for homelessness assistance on the basis that she had no priority need: HA 1996 s189(1). On review, it decided that she was not 'vulnerable' for the purposes of s189(1)(c).

HHJ Collins allowed an appeal and quashed that decision. It might well have been that the medical records from the USA had not shown clearly that the appellant had a 'mental illness or disability', but the council's medical adviser had indicated that the position might need to be reviewed if a local psychiatric assessment was made. That might have indicated to the council that the American medical records did not provide enough information to decide on illness or disability. However, in any event, the reviewing officer had failed to consider whether the appellant might be vulnerable because of some 'other special reason': s189(1)(c). Although the reviewer noted that the appellant would not be vulnerable if she avoided drugs, it failed to consider her prospects of doing so. The failure to give a reasoned assessment of the impact of drug abuse on the appellant's vulnerability required that the decision be quashed.

■ Al-Kabi v Southwark LBC

Lambeth County Court,
7 January 2008[22]

The appellant, a former asylum-seeker, was granted humanitarian protection. On his application for homelessness assistance, he submitted medical evidence stating that he suffered from a severe mental illness and that deterioration in his mental health was linked to his being without accommodation. Southwark decided that he did not have a priority need and confirmed that decision on review: HA 1996 s189(1)(c).

HHJ Welchman allowed an appeal on four grounds:

■ The initial decision letter had not mentioned the medical evidence. That was a plain deficiency triggering an obligation on the reviewing officer to invite representations: Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI No 71 reg 8(2). No such invitation had been made in a situation that 'cried out' for one.
■ The review decision failed to give adequate reasons for effectively rejecting the undisputed medical evidence.
■ The reviewing officer had written that it

could not be accepted that a deterioration of the appellant's mental health, if faced with homelessness, was 'inevitable'. That was too high a test of vulnerability.

■ Although the decision gave a generalised reference to the code of guidance, the tenor suggested that it had not been applied – particularly given the code's highlighting of the sensitivity required in cases of former asylum-seekers.

■ Richmond upon Thames LBC v Holmes-Moorhouse

House of Lords,
31 January 2008

An appellate committee has granted leave to appeal from the Court of Appeal's decision concerning priority need and the residence of dependent children ([2007] EWCA Civ 970).

Intentional homelessness

■ Blackstock v Birmingham City Council

Birmingham County Court,
14 January 2008[23]

The appellant's matrimonial home was a Birmingham council property which she occupied with her husband and their children. The marriage broke down and the husband left in 2003. He bought property elsewhere. In 2006, the couple were reconciled and the appellant and the children moved into the husband's home. The appellant later surrendered her tenancy.

After the subsequent failure of the reconciliation, the appellant was asked to leave. On her application for homelessness assistance, Birmingham found on review that she had become intentionally homeless by surrender of her council tenancy.

Recorder Hunjan QC allowed her appeal. In both the original and review decisions, the council had failed to consider:

■ whether the failure of the reconciliation had amounted to a supervening event breaking the chain of causation between the surrender and the eventual homelessness (see *R v Basingstoke and Deane BC ex p Bassett* (1983) 10 HLR 125, QBD and *R v Harrow LBC ex p Fahia* [1998] 1 WLR 1396, HL); and

■ whether the surrender could be treated as 'deliberate' if the appellant had acted in good faith in ignorance of a relevant fact (that her marriage would break down again and on failure of the reconciliation her husband would exclude her): HA 1996 s191(2).

HOUSING AND COMMUNITY CARE

■ R (AG and MD) v Leeds City Council

[2007] EWHC 3275 (Admin),
11 December 2007

The claimants were failed asylum-seekers and were expectant and (later) nursing mothers. They claimed that the council was required to assist them under National Assistance Act (NAA) 1948 s21 – as they had no accommodation or support – or it had power to do so under NAA s21(1)(aa). The secretary of state was willing to provide assistance under Immigration and Asylum Act (IAA) 1999 s4. She and Leeds submitted that that was the only duty or power under which accommodation could be provided.

Mitting J dismissed claims for judicial review. The claimants were excluded from assistance under s21(1)(a) because their needs had arisen solely from destitution: s21(1A). The power to assist under s21(1)(aa) could not be exercised because support was to be provided by, and was available from, the secretary of state under IAA s4 and under the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 SI No 930 reg 3(2): NAA s21(8).

1 Visit: www.publications.parliament.uk/pa/cm/cmpbhousing.htm.
2 Visit: www.publications.parliament.uk/pa/cm200708/cmbills/054/2008054.pdf.
3 Available at: www.insidehousing.co.uk/news/article/?id=1449759.
4 Available at: www.noms.homeoffice.gov.uk/news-publications-events/publications/guidance HHS_Resource_Pack_2008?view=Standard&pubID=520391.
5 Visit: http://new.wales.gov.uk/news/presreleasearchive/1920941/?lang=en.
6 Available at: www.communities.gov.uk/news/corporate/670940.
7 Available at: www.communities.gov.uk/documents/housing/doc/672051.
8 Available at: http://karenbuckmp.wordpress.com/2008/01/22/karen-leads-parliamentary-motion-to-stop-private-landlords-evicting-tenants-who-complain-about-repairs/.
9 Available at: www.communities.gov.uk/news/housing/646795.
10 Available at: www.communities.gov.uk/news/housing/573257.
11 Available at: www.housingcorp.gov.uk/server/show/ConWebDoc.12907.
12 Available at: www.communities.gov.uk/documents/housing/pdf/spprogramme.
13 Available at: www.communities.gov.uk/documents/housing/pdf/headlinereport2006 and also see: www.communities.gov.uk/news/ housing/678835.
14 Available at: www.communities.gov.uk/documents/housing/pdf/janissuetwo.
15 Available at: www.communities.gov.uk/documents/housing/pdf/housingresearchsummary240.
16 Available at: www.communities.gov.uk/publications/housing/regularstatementresponse.
17 Helen Dent, Keoghs and Nicholls, Lindsell and Harris, solicitors, Altrincham.
18 Des Smith, Community Law Partnership, solicitors, Birmingham and Zia Nabi, barrister, London.
19 Maya Sikand, barrister, London.
20 Zia Nabi, barrister, London and Community Law Partnership, solicitors, Birmingham.
21 Maya Naidoo, barrister, London and Lorna Rimmell, Fisher Meredith, solicitors, London.
22 Zia Nabi, barrister, London and Stuart Hearne, Cambridge House Law Centre®, London.
23 Zia Nabi, barrister, London and Mike McIlvaney, Community Law Partnership, Birmingham.

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