

Recent developments in housing law



Nic Madge and Jan Luba QC continue their monthly series. They would like to hear of any cases in the higher or lower courts relevant to housing. In addition, comments from readers are warmly welcomed.

POLITICS AND LEGISLATION

Localism Bill

The majority of the coalition government's proposed reforms to social housing in England will be implemented through enactment of the Localism Bill (Part 6). The House of Commons second reading of the bill took place in January 2011 and the bill is now being considered in a public bill committee which has issued a call for evidence about the bill's provisions.¹ The House of Commons Library has produced a comprehensive report on the housing and planning aspects of the bill: *Localism Bill: planning and housing bill 126 of 2010–11. Research paper 11/03* (11 January 2011).² See also page 6 of this issue.

Affordable rent housing association tenancy

The Tenant Services Authority (TSA) has published a series of presentations on the nature and regulation of these new tenancies.³

Housing and anti-social behaviour

In January 2011, the housing minister (Grant Shapps MP) announced new measures to address anti-social behaviour (ASB) in housing: Communities and Local Government (CLG) news release, 11 January 2011.⁴

They include:

- a new mandatory ground for possession (to be introduced by amendment into the Localism Bill – see above);
- improved court procedures for handling ASB cases; and
- a facility to extend housing association starter tenancies by six months.

These proposals were announced ahead of the publication on 7 February 2011 of the outcome of the coalition government's review of measures to tackle ASB: *More effective responses to anti-social behaviour* (Home Office, February 2011). Consultation on the government's proposals closes on 3 May 2011.⁵

The Chartered Institute of Housing has

announced that its ASB Action Team will 'refresh and update' the Respect Standard for Housing Management and it has encouraged social landlords to access the free services provided by the team.⁶

In January 2011, the Home Office announced that eight police forces will take part in trials of a new approach to dealing with complaints of ASB: Home Office news release, 4 January 2011.⁷ The trials, which are running between January and July 2011, will test a new approach based on five key principles, which will be tailored to each area. The five principles are:

- creating an effective call handling system where each individual has a log of complaints created from the very first call;
- introducing risk assessment tools to identify quickly the most vulnerable victims;
- installing off-the-shelf IT systems to share information on cases between agencies, removing the need for meetings;
- agreeing a protocol across all local agencies setting out how they will manage cases; and
- engaging with the community to set out clearly the issues which are causing the most harm to individuals and neighbourhoods, and setting out how the police, other local agencies and the public can work together to address them.

The eight pilot police forces are: Avon and Somerset, Cambridgeshire, Leicestershire, Lincolnshire, Metropolitan Police, South Wales, Sussex and West Mercia.

Empty homes

In January 2011 the Communities Minister (Andrew Stunell MP) announced that the coalition government would be offering new homes bonus payments to local councils in England for each private sector empty home brought back into use: CLG news release, 10 January 2011.⁸ The bonus requires the government to match the council tax received by the council from restoring the home to use. The minister urged members of the public

to report long-term empty homes to their local councils.

Earlier in the same month, the Secretary of State for Communities and Local Government announced an intention to use regulation-making powers to change and restrict the circumstances in which empty dwelling management orders (EDMOs) can be made by local authorities under the Housing Act (HA) 2004 in respect of privately owned empty housing: CLG news release, 7 January 2011.⁹ Use of EDMOs will be limited to empty properties that have become magnets for vandalism, squatters and other forms of ASB. The property will have to be empty for at least two years before an EDMO can be obtained (the present period is six months). Property owners will have to be given at least three months' notice before the order can be made.

Housing and the Equality Act 2010

Although the Equality and Human Rights Commission (EHRC) has yet to publish any guidance under the Equality Act 2010 specifically dealing with housing, it has published a series of guides on the new public sector equality duty which comes into force on 6 April 2011 and which will be of importance for all social landlords. See, for example, *The essential guide to the public sector equality duty* (EHRC, 2011).¹⁰

Mortgage Rescue Scheme

The coalition government's arrangements for the Mortgage Rescue Scheme (MRS) in England will change in April 2011. For the next few weeks applications can still be made under the existing scheme. Details about how applications are made and handled are given in the Homes and Communities Agency (HCA) *Mortgage rescue toolkit*.¹¹ That must be read with the updates about the MRS posted on the dedicated pages of the HCA website.¹² Local authorities can now refer any homeowner at risk of mortgage repossession to Shelter for specialist money and housing advice. Shelter can assist households in need of specialist mortgage debt advice when mortgage rescue under the MRS is not possible.¹³

Homelessness

A recent survey of 99 local housing authorities in England conducted by *Inside Housing* magazine revealed that less than a third of teenage applicants for homelessness assistance are being referred by housing staff to childrens services departments for full needs assessments under the Children Act 1989 Part III.¹⁴ They are thereby missing out on the full package of assessment, accommodation, care and support to which most are entitled.

In December 2010, the charity Crisis

published research which it had commissioned from the Centre for Housing Policy at the University of York: *A review of single homelessness in the UK 2000–2010*.¹⁵ The research report contains a review of single homelessness in the UK over the past ten years. It provides an overview of the recent history, causes and policy responses to single homelessness, and reviews how successful policies have been in tackling single homelessness.

In the same month a consortium of housing charities published a useful factsheet on the extent, causes and prevention of homelessness: *Homelessness – trends and projections* (Homeless Link, December 2010).¹⁶

Allocating social housing

In December 2010, the latest figures were released on lettings of homes by social landlords in England: *Social lettings tables – adjusted for missing local authority landlord data: 2009–10* (CLG, December 2010).¹⁷ They provide the most up-to-date estimates of the number of social housing tenancies which were let to particular groups of applicants.

Service charges

Some long leases granted by social landlords, typically in older 'leasehold schemes for the elderly', contain a clause that limits the amount that the landlord may charge in respect of the management element of the service charges. In December 2010, the TSA published a memorandum on the limit for 2011/2012: *Advice note: LSE management fee limit for 2011/12* (TSA, December 2010).¹⁸

POSSESSION CLAIMS

Setting aside possession orders

■ Hackney LBC v Findlay

[2011] EWCA Civ 8,
20 January 2011

Mr Findlay was a secure tenant receiving housing benefit. When this was stopped for a period, his rent account went into arrears. Hackney took possession proceedings.

Although Hackney wrote to Mr Findlay stating that there would be a hearing on 7 May 2009, he claimed that he did not receive any formal document from the court summoning him to a hearing. Accordingly, he did not consider that he was bound to attend. DJ Manners found that there were arrears of £1,221 and made an outright possession order. Mr Findlay was subsequently evicted. He applied to set aside the possession order. DJ Armon-Jones allowed that application on the basis that DJ Manners had not been told that by the time of the hearing on 7 May 2009 housing benefit had been reinstated. Hackney appealed. HHJ

Birtles dismissed that appeal. Hackney appealed to the Court of Appeal.

The Court of Appeal allowed Hackney's further appeal. It rejected a submission that *Forcelux Ltd v Binnie* [2009] EWCA Civ 854 was wrongly decided. However, Arden LJ said:

That is not to say ... that, in the normal case where a party fails to attend a hearing at which a possession order is made, the discretion vested in the court is wide and unstructured ... there is a clear indication in [HA 1985 s85(2)] that parliament contemplated that save in unusual circumstances the execution of a possession order should bring to an end the tenant's rights, including his right to apply for an order under that subsection ... Secondly, the finality of litigation has long been a principle of public policy ... As a corollary of that principle, challenges to orders should be by way of appeals. In the interests of the proper administration of justice and the system of appeals, judges should not sit in judgment on their own orders ... Thirdly, [Civil Procedure Rule (CPR) 39.3] makes it clear that, where a final order is made the defendant should have to produce a good explanation for not attending the hearing, that he acted promptly on learning of the order which he seeks to set aside, and that he should show that he has a real prospect of success in his defence ...

[I]n the absence of some unusual and highly compelling factor as in Forcelux, a court that is asked to set aside a possession order under CPR 3.1 should in general apply the requirements of CPR 39.3(5) by analogy ... [I]n the absence of the unusual and compelling circumstances ... [the] court should give precedence to the provisions of CPR 39.3(5) above those enumerated in CPR 3.9 ... [I]n deciding whether the tenant has a good reason for non-attendance the court can in my judgment have regard to the provisions of the Rent Arrears Pre-Action Protocol and to best practice among social landlords (paras 23–24).

HHJ Birtles had erred in not concluding that DJ Armon-Jones' order should be set aside. The case was remitted to the county court.

Protected parties

■ Carmarthenshire CC v Lewis

[2010] EWCA Civ 1567,
16 December 2010

Carmarthenshire began a possession claim against Mr Lewis who was a secure tenant. Mr Lewis was diagnosed in 2005 as suffering from Asperger's Syndrome. At an interlocutory hearing in March 2010, DJ Thomas expressed

concern about Mr Lewis's capacity to deal with the proceedings and made an order that unless Mr Lewis allowed an examination of himself by a particular specialist by a specified date, he was to be debarred from defending the claim. Mr Lewis did not comply with that order or attend the trial. HHJ Vosper made a possession order. She did not however consider whether Mr Lewis was a 'protected party' for the purposes of CPR Part 21 such that the proceedings against him could not be continued without a litigation friend being appointed for him.

Rimer LJ granted a renewed application for permission to appeal. He said:

... the problem raised by this case is as to how, once the court is possessed of information raising a question as to the capacity of a litigant to conduct the litigation, it should satisfy itself as to whether the litigant does in fact have sufficient capacity. I cannot think that the court can ordinarily, by its own impression of the litigant, safely form its own view on that. Nor am I impressed that the solution is the making of an 'unless' order of the type that Judge Thomas made. The concern that I have about this case is that an order may have been made against a party who was in fact a 'protected party' without a litigation friend having been appointed for him. The potential importance of the case is as to the procedure that, in cases such as this, the court ought to follow with a view to ascertaining the capacity of the litigant (para 8).

He ordered an expedited hearing of the appeal.

PRIVATE SECTOR

Tenancy deposits

■ Soens-Hughes v Lewis

West London County Court,
21 December 2010

On 30 May 2008, Ms Lewis granted an assured shorthold tenancy to Mr Soens-Hughes for a fixed term of one year commencing on 31 May 2008. Mr Soens-Hughes paid a deposit of £1,680 in May 2008. Ms Lewis believed that her letting agent had protected the deposit in accordance with the provisions of the HA 2004, but she subsequently discovered that this had not been done. At no time was the deposit protected in accordance with the Act. On 30 May 2009, Mr Soens-Hughes vacated the property and the tenancy ended. In July 2009, Ms Lewis returned £1,550 of the deposit to Mr Soens-Hughes, retaining £130 in respect of a check-out inspection fee and

some cleaning and repair costs. On 13 January 2010, Mr Soens-Hughes issued a claim for £5,040, being a sum three times the original deposit, under HA 2004 s214(3) and (4). On 6 December 2010, the day before the final hearing of the claim, Ms Lewis's solicitors transferred £130 to the bank account of Mr Soens-Hughes's solicitors. By this payment, Ms Lewis had repaid all of the deposit to Mr Soens-Hughes.

DJ Nicholson dismissed the claim. It was not possible for the court to make an order in accordance with s214(3)(a) or (b), because at the date of the hearing no one was holding the deposit, and therefore there was no deposit that could be paid back or paid into the custodial scheme. Furthermore, there was no extant tenancy between the parties in respect of which a tenancy deposit could be paid and which would require protection. He said 'late compliance is compliance' (see *Tiensia v Vision Enterprises Ltd (t/a Universal Estates)* [2010] EWCA Civ 1224 and *Draycott and Draycott v Hannells Letting Ltd* [2010] EWHC 217 (QB); [2010] HLR 27). DJ Nicholson endorsed the reasoning of DJ Manners in *Green v Sinclair Investments Ltd*, Clerkenwell and Shoreditch County Court, 11 June 2010; September 2010 *Legal Action* 37.

Damages for unlawful eviction

■ Boyle v Musso

Bristol County Court,
25 October 2010¹⁹

Mr Boyle was an assured shorthold tenant. On 9 October 2008, after a dispute about withholding rent due to flooding, the landlord attended at the premises with another man and punched Mr Boyle to the ground. Both men then stamped on him. In June 2009, the landlord was convicted in Bristol Magistrates' Court of assault occasioning actual bodily harm. He received a 24-week suspended sentence order. He initially disputed Mr Boyle's civil claim for damages for unlawful eviction, but he did not respond to the claim form and default judgment was entered.

DJ Watson noted that the physical injuries, namely cuts to the head, had healed relatively quickly. However, Mr Boyle suffered from depression and panic attacks. The judge found that he was left with serious and debilitating continuing anxiety as a result of the attack. General damages for trespass to the person were awarded in the sum of £15,000, to include aggravated damages due to injury to feelings. Exemplary damages were awarded in the sum of £2,000 on a finding that part of the reason for the eviction was the dispute over withholding rent. The judge found that Mr Boyle had been entirely justified in doing this. A separate award of £4,000 was made for breach of covenant for quiet

enjoyment as a result of 22 days spent either sofa-surfing or staying in unsuitable bed and breakfast/hostel accommodation. £750 was awarded for loss of belongings. The judge ordered return of the deposit (£485) and three times that amount as damages for failure to comply with the deposit scheme requirements.

ANTI-SOCIAL BEHAVIOUR

Closure orders

■ R (Siddique) v Newcastle Magistrates' Court

[2010] EWCA Civ 1576,
2 December 2010

Moore-Bick LJ has refused a renewed application for permission to appeal against the rejection by HHJ Langan QC of a claim for the costs of judicial review proceedings relating to a closure order made under Anti-social Behaviour Act 2003 s2 (see [2010] EWHC 1096 (Admin), 10 March 2010; July 2010 *Legal Action* 29).

HOMELESSNESS

Interim accommodation

Local Government Ombudsman Complaint

■ Birmingham City Council

10 010 323,
20 December 2010²⁰

The complainant had been an asylum-seeker accommodated by the National Asylum Support Service (NASS). When he was granted leave to remain, the NASS accommodation was withdrawn and on 24 December 2009 he applied to the council for homelessness assistance. The notes taken by the council on that date recorded that the complainant had a heart problem which could be 'very bad – mild to severe' and that he 'feels tired – cannot walk for long and heart beats uncontrollably'. The council declined to provide interim accommodation on the basis that it did not have reason to believe that he 'may ... have a priority need': HA 1996 s188(1). The complainant slept rough until 4 January 2010 when he was able to see solicitors. On receipt of a judicial review pre-action protocol letter sent that day, the council agreed to provide interim accommodation.

The Ombudsman found 'it difficult to understand how' the council had reached its initial decision in the light of the file notes. There had been maladministration in the handling of the homelessness application and in the delay in responding to a complaint about it. The council accepted recommendations that it apologise to the complainant and his solicitors and pay £600 compensation.

Domestic violence

■ Yemshaw v Hounslow LBC

[2011] UKSC 3,
26 January 2011

The appellant left her matrimonial home with her two young children and applied for homelessness assistance from the council. She said that she had left because of her husband's behaviour. Although he had not assaulted her physically, or threatened to do so, he had shouted at her in front of the children to such extent that she had had to retreat to a bedroom with the children and she had not been given housekeeping money. She was worried that if she returned home she would be hit or that he would take the children away.

Hounslow decided that this was not enough to amount to 'violence' or 'threats of violence' sufficient to deem her to be homeless under HA 1996 s177(1) and that it was reasonable for her to remain in the matrimonial home: s175(3). This decision was upheld on a review and on appeal in the county court and in the Court of Appeal (see [2009] EWCA Civ 1543; [2010] HLR 23). The reviewing officer and the courts had been following and applying the judgment in *Danesh v Kensington and Chelsea RLBC* [2006] EWCA Civ 1404; in which the Court of Appeal had held that 'violence' referred only to physical contact.

The Supreme Court allowed a further appeal and expressly overruled *Danesh*. It held that the word 'violence' was not a term of art and its meaning could change and develop over time. Whatever 'violence' had meant in 1977, when it was first used in homelessness legislation, it should now be taken to embrace physical violence, threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may give rise to the risk of harm. In short, it covered deliberate conduct that may cause psychological harm. The word bore the same meaning when used in HA 1996 s198 (dealing with local connection referral).

The modern guidance contained in the English *Homelessness code of guidance for local authorities* (CLG, 2006) para 8. accordingly represented the correct legal position.²¹

The review decision was quashed and remitted to Hounslow to reconsider and to decide, as Lady Hale put it:

Was this, in reality, simply a case of marriage breakdown in which the appellant was not genuinely in fear of her husband; or was it a classic case of domestic abuse, in which one spouse puts the other in fear through the constant denial of freedom and of money for essentials, through the denigration of her personality, such that she

genuinely fears that he may take her children away from her however unrealistic this may appear to an objective outsider? (para 36).

Securing accommodation

■ Javed v Solihull MBC

[2010] EWCA Civ 1511,

1 December 2010

The claimant was a victim of domestic violence who had fled the family home with her children. She applied for homelessness assistance. The council accepted that it owed the claimant the main housing duty in HA 1996 Part 7 s193. To release it from that duty it made her an offer of accommodation under its allocation scheme: HA 1996 s193(7). The claimant rejected the offer as unsuitable and as unreasonable for her to accept. She said that the property offered was in an area where she had been subjected to racial abuse; she would be isolated from other members of her religious and ethnic minority community; and her children would be forced to move schools. A review conducted under a contracting-out arrangement upheld the council's decision. HHJ Oliver Jones QC dismissed an appeal. The claimant appealed to the Court of Appeal on the ground that there had been a failure to apply the *Slater* test: 'The test is whether a right-thinking local housing authority would conclude that it was reasonable that *this applicant* should have accepted the offer of *this* accommodation' (original emphasis, *Slater v Lewisham LBC* [2006] EWCA Civ 394; [2006] HLR 37, para 34).

The Court of Appeal refused an application for permission to bring a second appeal. The review had been conducted applying the right test although *Slater* had not been expressly referred to. The case raised no important issue of law or practice and there was no other compelling reason to grant permission.

Comment: This is the second recent case to reach the Court of Appeal raising indirectly the issue of how to deal with questions of 'suitability' and 'reasonableness' where the applicant has genuine and serious subjective concerns about a property – or the area in which it is located – which are difficult (if not impossible) to verify objectively: see also *Watson v Wandsworth LBC* [2010] EWCA Civ 1558; December 2010 *Legal Action* 37.

Local Government Ombudsman

Complaint

■ Birmingham City Council

10000145,

13 September 2010²²

The complainant (Ms D) had two incidents of homelessness in 2008 and 2009 respectively. Each time the council performed its statutory duty to provide accommodation

but in circumstances such that a liability to pay for temporary accommodation overlapped with a liability to pay other rent. Housing benefit was only paid for one unit of accommodation at a time, leading to rent arrears of over £1,000. Her complaint to the Local Government Ombudsman was settled by agreement to write off the arrears but the Ombudsman found:

There was maladministration in that the council failed to provide substantial tenancy support to Ms D. Given Ms D's circumstances and her vulnerability she should have had significant support. Although the council says it offered and provided a degree of support, there apparently is no evidence to support substantial support and clear advice to Ms D. The absence of such support has contributed to the arrears she currently has (para 17).

Local connection

Local Government Ombudsman Complaint

■ Kingston upon Thames RLBC

09016302,

26 October 2010²³

The complainant applied to the council for homelessness assistance in January 2008. In June 2008 it decided that although she was unintentionally homeless and in priority need, she had no local connection with its area but did have a local connection with Southwark to which it made a referral under HA 1996 s198. That decision was upheld on a review conducted by the council under HA 1996 s202(1)(c).

Southwark refused the referral on 16 July 2008 on the ground that the conditions for referral in s198(2) were not satisfied. The council made repeated attempts to persuade Southwark to review and reverse the rejection but it was declined and in May 2009 Southwark again notified a rejection of the referral giving reasons in writing. In July 2009 the council wrote to Southwark inviting it to agree an arbitrator to resolve the dispute but Southwark replied that the council had missed the 21-day time limit referred to in the local authorities associations' agreement on referrals (set out at Annex 18 of the *Homelessness code of guidance* – see above). The council did not approach the Local Government Association to appoint an arbitrator under the Homelessness (Decisions on Referrals) Order 1998 SI No 1578 until August 2009. There had been no progress on the arbitration by March 2010 when the council agreed to review its decision and accommodate the applicant under HA 1996 s193.

The Ombudsman found that from January 2009 to March 2010 delay had been caused

by the council's own inactivity and failure to press the matter. The complainant had remained in hostel accommodation for 12 months longer than necessary with consequent inconvenience and uncertainty. Payment of £500 compensation was recommended.

- 1 Available at: www.parliament.uk/business/news/2011/january/localism-bill-second-reading/.
- 2 Available at: www.parliament.uk/briefingpapers/commons/lib/research/rp2011/RP11-003.pdf.
- 3 Available at: www.tenantservicesauthority.org/server/show/ConWebDoc.20992/changeNav/14567.
- 4 Available at: www.communities.gov.uk/news/housing/1814083.
- 5 Available at: www.homeoffice.gov.uk/publications/consultations/cons-2010-antisocial-behaviour/asb-consultation-document?view=Binary.
- 6 Available at: www.cih.org/respectstandard/.
- 7 Available at: www.homeoffice.gov.uk/media-centre/press-releases/new-help-asb.
- 8 Available at: www.communities.gov.uk/news/housing/1813451.
- 9 Available at: www.communities.gov.uk/news/housing/1812642.
- 10 Available at: www.equalityhumanrights.com/uploaded_files/EqualityAct/PSED/essential_guide_guidance.pdf.
- 11 Available at: www.homesandcommunities.co.uk/public/documents/Mortgage%20Rescue%20Toolkit%2030%2003%2010.pdf.
- 12 Available at: www.homesandcommunities.co.uk/mortgage_rescue_guidance.
- 13 For more information about the service, local authorities can contact Shelter's HMS Mortgage Support Team on: 0344 515 1125 or at: mrs@shelter.org.uk.
- 14 Available at: www.insidehousing.co.uk/analysis/in-depth/who-cares/?6513139.article.
- 15 Available at: www.york.ac.uk/inst/chp/publications/PDF/1012SingleHomelessnessExecSummaryFinal.pdf.
- 16 Available at: www.homeless.org.uk/news/ending-homelessness/briefing-launched-homelessness-trends-and-projections.
- 17 Available at: www.communities.gov.uk/publications/corporate/statistics/sociallettings200910.
- 18 Available at: www.tenantservicesauthority.org/server/show/ConWebDoc.20997/changeNav/14567.
- 19 Mick O'Sullivan, Avon and Bristol Law Centre®; Edward Fitzpatrick, barrister, London.
- 20 Holly Sherratt, Community Law Partnership, Birmingham.
- 21 Available at: www.communities.gov.uk/documents/housing/pdf/152056.pdf.
- 22 Rosaleen Kilbane, solicitor, Community Law Partnership, Birmingham.
- 23 Sam Waritay, barrister, London.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. The authors are grateful to the colleagues at notes 19, 20, 22 and 23 for transcripts or notes of judgments.