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

Tenancy deposits

The amendments made by the Localism Act (LA) 2011 to the tenancy deposit protection regime in England came into effect on 6 April 2012. The changes to the Housing Act (HA) 2004 ss212–215 are described in a range of new publications and webpages including:

- *Changes to the tenancy deposit protection legislation – frequently asked questions* (Department for Communities and Local Government (DCLG));[1]
- *Tenancy deposit protection factsheet* (DCLG);[2]
- Michael Paget and Jan Luba QC, 'The Localism Act 2011: deposits, repairs and the rest', April 2012 *Legal Action* 27; and
- the new book by David Smith, *A guide to the tenancy deposit scheme* (The Dispute Service Ltd, March 2012).

The Localism Act 2011 (Commencement No 4 and Transitional, Transitory and Saving Provisions) Order ('the Commencement No 4 Order') 2012 SI No 628 article 16 contains transitional provisions for the tenancy deposit protection amendments.

Right to buy

Significant changes to the right to buy scheme for social housing tenants in England came into effect on 2 April 2012. Up to a 70 per cent discount is available on the market price of flats and up to a 60 per cent discount for houses. The maximum amount of discount for which a purchaser is eligible has been raised to £75,000: the Housing (Right to Buy) (Limit on Discount) (England) Order ('the Limit on Discount Order') 2012 SI No 734. A series of new leaflets and factsheets have been published by DCLG describing these changes and the other adjustments made to the scheme. They include the following:

- *Right to buy – at a glance*;[3]
- *Your right to buy your home: a guide for tenants of councils, new towns and registered social landlords including housing associations* (April 2012);[4]
- *Your right to buy your home. There's a new window of opportunity* (March 2012);[5]
- *Reinvigorating right to buy and one for one replacement. Information for local authorities* (March 2012);[6]
- *Reinvigorating right to buy and one for one replacement. Fact sheet for lenders* (March 2012);[7]
- *Reinvigorating right to buy and one for one replacement: consultation. Summary of responses, and government response to consultation* (March 2012);[8] and
- *Reinvigorating right to buy and one for one replacement. Impact assessment* (March 2012).[9]

The policy background to the changes is summarised in the *Explanatory memorandum* to the Limit on Discount Order.[10]

New tenancies in social housing

Major reforms to tenure and succession rights for new tenants of social housing came into force from 1 April 2012 on the commencement of LA ss154–166: Commencement No 4 Order article 6. Councils can now grant new style 'flexible' secure fixed-term tenancies and the succession rights for all new social housing tenants have changed. Article 14 of the commencement order contains transitional provisions. Regulations have been made for the procedure to be followed on reviews of flexible tenancy decisions: the Flexible Tenancies (Review Procedures) Regulations 2012 SI No 695.

The provisions of LA Sch 14, containing rules about the circumstances in which social landlords can decline applications from flexible and affordable rent tenants to swap their homes with other tenants of social housing, came into force on 4 April 2012: Localism Act 2011 (Commencement No 5 and Transitional, Savings and Transitory Provisions) Order ('the Commencement No 5 Order') 2012 SI No 1008 article 2.

As soon as a local housing authority has published a tenancy strategy for its area under LA s150, dealing with flexible and affordable rent tenancies, it must have regard to that strategy in exercising its housing management functions: Commencement No 5 Order article 12. Article 3 of the same Order brought into force LA s188 relating to the London housing strategy on 3 May 2012.

For tenants of other social landlords, regulations have been made limiting the statutory rights of assured shorthold tenants granted affordable rent tenancies: the Transfer of Tenancies and Right to Acquire (Exclusion) Regulations 2012 SI No 696.

Housing and anti-social behaviour

When possession is sought from a tenant on a discretionary ground relating to anti-social behaviour, the court is required to take into account the effect the nuisance has had on other residents, for example, under HA 1985 s85A(2). There is no prescribed form by which evidence of such effects must be given. The Chartered Institute of Housing (CIH) has published a simple template document which social landlords could use to put that information before the court: *Community harm statement* (CIH, March 2012).[11]

Local authorities in England have been invited to join a payment-by-results scheme enabling them to receive £4,000 per family for work with the most serious anti-social behaviour cases in their areas: *The Troubled Families programme. Financial framework for the Troubled Families programme's payment-by-results scheme for local authorities* (DCLG, March 2012).[12]

The report *Focus on the victim: summary report on the ASB call handling trials* (Home Office, April 2012) summarises the findings of eight police forces which tested new approaches to handling anti-social behaviour calls from the public.[13]

Social housing fraud

The new guide *Tenancy fraud and data sharing. A guide for housing associations* (CIH, March 2012) is designed to enable councils and other social landlords to share data on tackling unlawful subletting and other tenancy frauds.[14]

The *Annual fraud indicator* (National Fraud Authority (NFA), March 2012) estimates that housing tenancy fraud costs local authorities in England around £900m a year.[15] *Fighting fraud locally: the local government fraud strategy* (NFA, April 2012) sets out a strategic approach addressing the need for greater prevention and better enforcement by local authorities to tackle such fraud.[16]

Homelessness

The latest homelessness statistics for England show a 14 per cent increase from 2010 to 2011 in local authority acceptances of the main housing duty under HA 1996 s193:

Statutory homelessness: October to December quarter 2011 England (DCLG, March 2012).[17]

Gypsies and Travellers

Planning policy for Traveller sites (DCLG, March 2012) replaces Circular 01/2006 (*Planning for Gypsy and Traveller caravan sites*) and Circular 04/2007 (*Planning for Travelling showpeople*).[18] It contains the official new planning approach to provision of sites for the Gypsy and Traveller communities in England.

The *Progress report by the ministerial working group on tackling inequalities experienced by Gypsies and Travellers* (DCLG, April 2012) contains 28 measures designed to improve outcomes for Gypsies and Travellers. In respect of accommodation, it contains a commitment to work to build on support for authorised sites through £60m of Traveller Pitch Funding and through the New Homes Bonus which supplies grant funding to match monies raised through council tax.[19]

Specialist advice on housing law

In response to the issue of judicial review proceedings, the Legal Services Commission (LSC) has agreed to keep the free Specialist Support Service schemes, which help advisers with housing law queries, open until 30 June 2012 while it consults on their future. The consultation deadline for responses is 11 May 2012: *Consultation on the future of the Specialist Support Service* (LSC, March 2012).[20]

Tenant involvement and control in social housing

A consultation exercise is taking place in England on proposals to extend the powers of council tenants to take over management of their own housing estates and/or to transfer to new landlords. The consultation closes on 23 May 2012: *Giving tenants control: right to transfer and right to manage regulations. Consultation* (DCLG, March 2012).[21]

Tenant panels. Options for accountability (The National Tenant Organisations, April 2012) is a new report designed to help social landlords and their tenants make the most of the new initiatives for establishing tenant panels to represent the interests of tenants of social housing.[22]

Mental capacity and tenancy agreements

The Court of Protection has published a February 2012 update to its guidance note, *Applications to the Court of Protection in relation to tenancy agreements*.[23] (See also page 10 of this issue.)

HUMAN RIGHTS

Article 8

■ Dixon v UK

App No 3468/10,
21 February 2012,
[2012] ECHR 424

Mr Dixon and his sister were joint secure tenants of Wandsworth. The sister gave notice to quit, which brought the tenancy to an end. In 2006, the council obtained a possession order on the basis that Mr Dixon had become a trespasser. Later, the High Court ([2007] EWHC 3075 (Admin)) refused to set aside the possession order because, on the law as it then stood (before *Manchester City Council v Pinnock* [2010] UKSC 45), Mr Dixon could not raise an article 8 defence to the claim. He applied to the European Court of Human Rights (ECtHR). The UK government accepted that there had been a procedural breach of article 8 because the proportionality of the eviction had not been considered, and paid the applicant €3,000.

The ECtHR struck out the application. It had regard to the nature of the government's admissions and the amount of compensation proposed, which it considered to be consistent with the amounts awarded in similar cases. It also referred to 'the clear and extensive case-law on the topic'. The court was satisfied that respect for human rights did not require it to continue the examination of the application.

■ Corby BC v Scott; West Kent Housing Association Ltd v Haycraft

[2012] EWCA Civ 276,
13 March 2012

The defendants were, respectively, an introductory tenant of a council and an assured shorthold ('starter') tenant of a housing association. In each case the social landlord claimed possession on the basis that the legal requirements for notice had been satisfied and that, as a matter of property law, they were entitled to possession. In each case the tenant raised a defence based on article 8. Ms Scott said that she had been subjected to a murderous attack in July 2010. HHJ Hampton refused to make a possession order. Mr Haycraft denied the allegation made against him and relied on ill-health. HHJ Simpkiss dismissed an appeal against a possession order granted to West Kent.

On appeal, Lord Neuberger MR said:

> *The effect of the reasoning in* Pinnock *[2011] 2 AC 104 … at least in relation to demoted and introductory tenancies, [is that] 'it will only be in "very highly exceptional cases" that it will be appropriate for the court to consider a proportionality argument', although 'exceptionality is an outcome and not a guide'* (para 18).

The facts in *Scott* 'get nowhere near justifying the contention that it would be disproportionate for the council to obtain possession'. The 'murderous attack' was 'simply irrelevant to the issue of article 8 proportionality' (para 24). It was a case 'which should not have gone to trial' (para 26).

In relation to *Haycraft*, the initial allegation was investigated properly by the reviewing panel. Its conclusion was clearly articulated and well reasoned. Mr Haycraft had not come up with any new points which called the finding into question, or any challenge to the procedure or reasoning involved in the review. There was no good evidence that his health problems would be exacerbated by eviction. HHJ Simpkiss was entitled to conclude that Mr Haycraft's pleaded case was not strong enough to justify a hearing on the issue of proportionality.

Lord Neuberger said: '… a judge (i) should be rigorous in ensuring that only relevant matters are taken into account on the proportionality issue, and (ii) should not let understandable sympathy for a particular tenant have the effect of lowering the threshold identified by Lord Hope in [*Hounslow LBC v Powell* [2011] UKSC 8]' (para 35).

He emphasised:

> *… the desirability of a judge considering at an early stage (normally on the basis of the tenant's pleaded case on the issue) whether the tenant has an arguable case on article 8 proportionality, before the issue is ordered to be heard. If it is a case which cannot succeed, then it should not be allowed to take up further court time and expense to the parties, and should not be allowed to delay the landlord's right to possession* (para 39).

The court allowed Corby's appeal and dismissed Mr Haycraft's appeal.

■ Riverside Group Ltd v Thomas

[2012] EWHC 169 (QB),
2 March 2012

The landlord granted the defendant an assured shorthold ('starter') tenancy. Following complaints about her anti-social behaviour, the landlord served a notice under HA 1988 s21 and claimed possession. The claim was transferred to the High Court. While waiting for trial of that claim, the landlord was granted an anti-social behaviour injunction. The defendant, acting in person, sought a full trial of the issue of whether possession would be proportionate under article 8 and whether the section 21 mandatory possession scheme was compatible with the Human Rights Act (HRA) 1998.

Ryder J held that her defence did not meet the threshold for a full trial on the merits. There was no substance to the incompatibility claim, either in relation to section 21 or HA 1980

s89. The judge stated that 'this possession claim is plainly one in which a possession order ought to be granted summarily since there is no proper basis to conclude that the threshold for more detailed consideration is justified' (para 41). He made an immediate possession order.

■ **Rooney v Secretary of State for Communities and Local Government**

[2011] EWCA Civ 1556, 16 November 2011

The claimant applied for planning permission to station caravans for four Gypsy families on his land. The council refused permission. This decision was upheld on appeal by a planning inspector. The claimant appealed to the High Court taking the point that in a different case, decided a month earlier, the same inspector had granted such permission on broadly similar facts bearing in mind the article 8 rights of the Gypsy families. HHJ Kay QC dismissed the appeal and the claimant brought a second appeal.

The Court of Appeal held that:

■ there was material justifying the inspector in reaching different decisions in the two cases; and

■ the High Court judge on an appeal was not required to conduct a fresh examination of any interference with the article 8 rights of occupiers.

The Court of Appeal dismissed the appeal.

■ **Dobson and others v Thames Water Utilities Ltd**

[2011] EWHC 3253 (TCC), 8 December 2011

The claimants were 1,350 residents living in the vicinity of a sewage treatment works operated by the defendant. They sought compensation for the nuisance caused by unpleasant odours and by mosquitoes. Those claimants who were tenants or owners succeeded in their claims brought on the ground of nuisance and were awarded damages. The other claimants, mainly the children and partners of the tenants and owners, brought claims under HRA s6 on the basis that there had been a breach of their rights under article 8.

Ramsey J extended the limitation period for those claims from one year to six years and held that there had been a breach of article 8. However, he decided that, on the facts, it was not just to award damages. The passages dealing with the HRA claims start at paragraph 1036 of the judgment.

■ **R (Gresty) v Knowsley MBC**

[2012] EWHC 39 (Admin), 19 January 2012

Mr and Mrs Gresty were owner-occupiers. They commissioned extensive building works which, while in progress, were inspected by the council for building regulations compliance. The works resulted in the premises becoming dangerous for them to occupy. The claimants successfully sued the builders but could not enforce their judgment. They had no private law claim against the council and could not finance remedial work themselves. They sought a judicial review on the basis that the council owed a positive obligation under article 8 to help them achieve reasonable living conditions by financing the remedial work.

HHJ Stephen Davies (sitting as a judge of the High Court) accepted that a positive obligation under article 8 may arise in some circumstances, but refused permission to bring the judicial review claim. It was both out of time and unarguable on the facts.

SECURE TENANCIES

Ground 16

■ **Greenwich LBC v McMullan**

Woolwich County Court, 6 December 2011[24]

Mr McMullan's mother was the secure tenant of a four-bedroom property. She died in October 2008 at the age of 90. Mr McMullan who, in 2011, was aged 65, had lived with her in what had been the family home since 1980. A psychologist stated that he had a moderate to severe learning disability, a physical disability manifesting itself in clumsiness, jerky movements and a tendency to trip and bump into things, and epilepsy. He was not literate or numerate. He had never lived independently. The psychologist advised that if he had to move to alternative accommodation, his mental health would deteriorate and he would be unable to adjust. He did not have capacity to conduct the proceedings and was represented by one of his sisters as his litigation friend. After his mother's death, another sister moved in to live with him as his primary carer. She was the secure tenant of a one-bedroom ground floor flat which she was willing to surrender. Later, a brother returned to live in the property. He also assisted with Mr McMullan's care needs.

Greenwich sought possession under HA 1985 Sch 2 Ground 16 (succession to secure tenancy where accommodation is more extensive than is reasonably required by the tenant and suitable alternative accommodation is available). The council contended that the brother was not a member of Mr McMullan's family when assessing the suitability of alternative accommodation because he was only living in the property as a matter of convenience. At trial, Greenwich relied on an offer of a two-bedroom flat as suitable alternative accommodation.

District Judge Backhouse dismissed the claim. The brother was a member of the defendant's family. The composition of his household was to be determined at the date of the hearing. There was no additional test of whether or not it was reasonable for him to live with the defendant. In any event, she was satisfied that it was useful for him to live in the household. The offer of a two-bedroom property could not be suitable for the defendant and his brother and sister. Furthermore, it would not have been reasonable to make a possession order. She took into account the very severe shortage of larger properties and the real demand for them from large extended families. However, medical evidence indicated that moving would result in Mr McMullan's mental health deteriorating. He would be unable to adjust and would be permanently destabilised. These were very serious consequences which the court could not countenance.

■ **Bristol City Council v Hammond**

Bristol County Court, 25 October 2011[25]

Mr Hammond's mother, Ms Bent, was granted a tenancy of a five-bedroom house in 1977. The tenancy became secure on the coming into force of the HA 1980. Mr Hammond lived in the house from the outset. Ms Bent died in November 2010 and Mr Hammond succeeded to the tenancy in keeping with HA 1985 s89(2). In December 2010, Bristol wrote stating that it would seek possession. Mr Hammond began to enforce the right to buy. After all the statutory steps relating to the right to buy had been completed, Bristol served notice seeking possession and then issued a possession claim relying on HA 1985 Sch 2 Ground 16. Mr Hammond defended on the basis that the offer of alternative accommodation was not suitable and counterclaimed for an injunction compelling Bristol to sell him the house. He also argued that it would not be reasonable to make a possession order because he had been diagnosed with multiple sclerosis.

At the time of the trial, the offer of alternative accommodation was a two-bedroom bungalow in the same street as Mr Hammond's house. He admitted that the property was big enough for him, but he averred that it was not suitable because it was damp, the fence at the back was broken making it insecure, the drain by the back door was not fitted properly, the side garden wall was cracking as a result of tree growth and the path and both gardens were uneven and contained the stumps of trees which recently had been cut down. Bristol accepted that the accommodation offered was not suitable in its current condition, but undertook to carry out any modifications and improvements that an occupational therapist deemed to be necessary, given Mr Hammond's disability.

After considering *Bristol City Council v Lovell* [1998] 1 WLR 446, *Tandridge DC v Bickers* (1999) 31 HLR 432 and *Basildon DC v Wahlen* [2006] EWCA Civ 326; [2006] 1 WLR 2744, District Judge Howell decided to hear the possession claim first. He found that there was no offer of suitable accommodation at the date of trial and there was no plan for improvements in place which would allow him to be sure that the accommodation would be suitable on any date which he could order as the date for possession. He expressed surprise at the lack of a plan given the defendant's vulnerability. Furthermore, after considering *Enfield LBC v French* (1985) 17 HLR 211 and *Bracknell Forest BC v Green* [2009] EWCA Civ 238; [2009] HLR 38, he found that it would not in any event have been reasonable to make a possession order. He took into account the shortage of large houses within Bristol's housing stock and the very high demand for such houses. He recognised the reasonable need and duty for Bristol to manage its housing stock. However, taking into account Mr Hammond's age, the length of time he had lived in his house, the care he had provided to his mother and, in particular, his vulnerability and the effect that moving would have on his confidence to cope with his disability, he found those matters outweighed the needs of Bristol to manage its stock. The possession claim was dismissed and an injunction compelling the sale of the house was granted.

■ Hackney LBC v Sheehan

Clerkenwell and Shoreditch County Court, 12 January 2012[26]

Mrs Sheehan was granted a tenancy of a three-bedroom flat in 1963. The tenancy became a secure tenancy on the coming into force of the HA 1980. Her son, Mr Sheehan, lived in the flat from the commencement of his mother's tenancy. Mrs Sheehan died in April 2009 and Mr Sheehan became the secure tenant of the flat, under HA 1985 s89(2). In March 2010, Hackney served a notice seeking possession, relying on HA 1985 Sch 2 Ground 16. It later issued a possession claim. The first trial was adjourned to enable Hackney to replace an offer of alternative accommodation comprising a one-bedroom flat with a new offer of a two-bedroom flat. Mr Sheehan continued to contend that the offer was not suitable because he would lose the use of his garden, there appeared to be some damp and there was a large fenced ball-game area and children's playground directly outside the bedroom windows.

District Judge Sterlini found that the offer of the two-bedroom flat was an offer of suitable alternative accommodation. Although Mr Sheehan would lose the use of his garden, only around ten per cent of Hackney's housing stock had access to gardens and Mr Sheehan had no medical need for one. The damp was only in one small part of the flat and Hackney was likely to have a duty to repair it. There was insufficient evidence to show that there would be nuisance from noise from the ball park. However, the judge found that it would not be reasonable to make an order for possession. Although there were thousands of families with young children who would jump at the chance of being offered a flat with three bedrooms and a garden, he had to balance that against Mr Sheehan's needs. He also had to take into account the three factors set out in Ground 16:

- the defendant's age;
- the fact that he had been there almost all his life; and
- the financial and personal care he had provided to his mother for a number of years.

Those grounds alone would be sufficient to dismiss the claim for possession, but the balance was tipped further by Mr Sheehan's specific medical history. He had chronic depression and diabetes and he was assisted by the evidence of his GP. The claim for possession was dismissed.

INTRODUCTORY TENANCIES

■ Southwark LBC v Hyacienth

Lambeth County Court, 22 December 2011[27]

The defendant was an introductory tenant. The council gave notice of intention to recover possession for rent arrears. This notice was upheld on a review and possession proceedings were issued. At the hearing of the claim, there were arrears of over £1,300. The defendant was unrepresented. A possession order was made by a district judge, who said she had no alternative but to make the order. The defendant was then referred to the Homeless Persons Unit, and then to the Citizens Advice Bureaux, and then to a solicitor who lodged notice of appeal.

The appeal was allowed and the proceedings were dismissed. HHJ Welchman was satisfied that the council had unlawfully failed to follow and apply its *Rent income and arrears management procedure guide*. The review panel had not identified this failing and, in upholding the decision to evict, had reached a decision no reasonable panel could have reached.

HARASSMENT AND EVICTION

Protected intending occupiers

■ Wakolo v Director of Public Prosecutions

[2012] EWHC 611 (Admin), 1 February 2012

The defendant and his wife were the joint freehold owners of a house which was the matrimonial home. Their marriage broke down and the wife moved out. In an attempt at reconciliation, the defendant moved out and invited his wife to move back in. Later, he went back to the house and demanded to be let in. He shouted abuse at his wife through the door and threatened to smash down the door. He was taken away by the police. He returned the next night and battered the door with a metal weight, causing damage. He was arrested and convicted of an offence of using violence to secure entry contrary to Criminal Law Act (CLA) 1977 s6. He appealed by way of case stated to the Divisional Court. He argued that he was a 'protected intending occupier' (PIO) because, for the purposes of CLA s12A(2)(a), he held a freehold interest and that in order to qualify as a PIO, it was sufficient to satisfy any one of the elements in section 12A.

The Administrative Court dismissed the appeal. In order to be a PIO the defendant also had to satisfy all the other conditions of section 12A(2), which he could not meet. He had not been excluded from occupation by a trespasser, and had not produced a written statement containing the prescribed information.

Damages claims

■ R (Sharing) v Preston County Court

[2012] EWHC 515 (Admin), 22 February 2012

A private tenant brought a claim for damages for harassment and unlawful eviction against her former landlord. A police officer had attended at the scene. At trial of the claim, the landlord told the district judge that he had issued a witness summons requiring the attendance of the police officer, but that she had been unavailable to attend. The judge proceeded with the trial, but did not accept that either the landlord or tenant were credible witnesses and made findings only where their accounts were corroborated independently. The claim was dismissed. The claimant applied for permission to appeal and permission to adduce fresh evidence in the form of a witness statement from the police officer. The statement said that the officer had not been summonsed, had been available, and had seen evidence consistent with forced entry by the landlord. The circuit judge refused both applications.

The High Court granted an application for judicial review and remitted the applications to

another circuit judge. This highly exceptional course was justified because the circuit judge's conduct and statements in court would have indicated to a fair-minded observer that he had been biased, in that he had made up his mind to refuse the applications before the hearing started.

■ **R v Spudnic Ltd**

Kingston Crown Court,
10 November 2011[28]

The defendant company was a property agent for a five-bedroom house in Roehampton which was let to tenants. It engaged in a campaign of harassment and unlawful eviction against the tenants which included the following:

■ turning off the water and electricity supplies;
■ damaging the toilet so that it could not be used;
■ sealing up the letterboxes so the occupants could not receive any mail;
■ sending in builders without any prior notice. They left the property full of rubble, rubbish and dust, rendering it virtually uninhabitable;
■ sending quasi-legal documents to the tenants telling them they had to leave, even though the company did not have a possession order; and
■ sending threatening letters warning them not to co-operate with council officials and to refuse them entry.

One of the tenants returned home after work to find the front door locks changed and all their belongings packed up and removed from the house. On another occasion, the tenants returned to find a notice on the front door stating that the electricity supply was dangerous and that they had to move out. While they were standing on the doorstep discussing what to do next, two new tenants arrived. They had been told by Spudnic that they could move in.

The company was convicted by a jury of two counts of harassment and one count of unlawful eviction. HHJ Southwell imposed fines and prosecution costs of over £20,500.

COURT PROCEDURE

■ **Sim v Latymer Court**

[2011] EWCA Civ 1492,
7 November 2011

Ms Sim was the long leaseholder of her flat. Her front door was broken down by the police when seeking to trace a leak into the flat below. She applied in the High Court for a mandatory injunction requiring the block's management company to reinstate the door. The claim was resisted on the basis that there was a triable issue about whether the company or the police were liable. The judge decided that any claim should proceed in the ordinary way in the county court and refused the injunction sought. He ordered Ms Sim to pay costs assessed at £500.

The Court of Appeal refused permission to appeal against the costs order, as it had no prospects of success.

■ **Dacorum BC v Southcott**

[2012] EWCA Civ 271,
21 February 2012

In 2000, Dacorum granted Ms Southcott a secure tenancy. A possession order was made in December 2003. It was not enforced. Several years later the council brought new possession proceedings. They were struck out by a district judge as being an 'abuse of process' (para 5). A circuit judge allowed the council's appeal and directed a trial of the further claim. The defendant sought permission to bring a second appeal. She argued that the case raised an important issue of principle and practice about whether new possession proceedings could be brought where there was already an order in earlier possession proceedings.

The Court of Appeal refused permission. The tenant could take the point at trial that a second order ought not to be made in view of the existence of an earlier one.

■ **Poplar Housing and Regeneration Community Association Ltd v Byrne**

B5/11/1165,
16 March 2012

The Byrnes were joint assured tenants. Following complaints of anti-social behaviour, courts made a premises closure order (Anti-social Behaviour Act 2003 Part 1A) and granted an anti-social behaviour injunction (HA 1996 s153A). Poplar then sought possession under HA 1988 Sch 2 Grounds 12 and 14. The defendants failed to comply with court orders requiring them to file witness statements and disclose evidence. They were debarred from defending the possession claim. A judge refused to lift the debarring order and made an outright order for possession.

The Court of Appeal dismissed an appeal. The failure to comply with directions was undeniable and lamentable. The judge had considered all relevant matters and had reached a decision which was within his discretion. There was no basis for suggesting that the judge's exercise of discretion had been wrong, especially in the absence of any assurance that there would be any modification of the tenants' behaviour.

DISABILITY DISCRIMINATION ACT 1995

■ **R (Tiller) v East Sussex CC**

[2011] EWCA Civ 1577,
20 December 2011

Mr Tiller was a disabled person. Relying on Disability Discrimination Act 1995 s49A, he sought judicial review of a decision by the council that the 24/7 warden service at a 35-unit sheltered housing site where he lived should be discontinued and replaced with an on-site manager during office hours from Monday to Friday, but not overnight or at weekends. Any problems arising when there was no manager on site would be met by a 'telecare' system by which occupants could operate an alarm to call off-site system operators, who would then respond accordingly, if necessary by arranging for the attendance of emergency services. Thirlwall J dismissed the claim.

The Court of Appeal dismissed an appeal. Rimer LJ considered that the judge was entitled to conclude that the council's section 49A(1) 'due regard' duty, in particular, with regard to the section 49A(1)(d) 'need', had been discharged (para 41). (See now Equality Act 2010 s149.)

LONG LEASES

Option to extend lease

■ **Souglides v Tweedie and Tweedie**

[2012] EWHC 561 (Ch),
12 March 2012

Mr Souglides bought the underlease of a flat from a mortgage lender that had repossessed the property on default of mortgage payments by the previous tenant. The head lease was held by a management company. The freehold was held by the defendants. The claimant applied to the court for a declaration that he was entitled to enforce an option to acquire a further term of 60 years on the lease.

Newey J granted the declaration. Neither the fact that the title to the lease had been transferred from the previous tenant via the mortgage lender, nor the rule against perpetuities, nor an earlier variation of the lease to extend the premises it covered could debar the exercise of the option.

Restrictive covenants

■ **Parsons v Thatchers Wood Residents Co Ltd**

TLC 52/11,
20 October 2011

The claimant owned one of 33 houses on a private housing development. Restrictive covenants in relation to all of the properties required that the plots were to be used to provide a private dwelling of 'single family occupation'. The claimant wanted to build another dwelling on his plot. He sought a declaration that the covenant only restricted the use and occupation of the original houses.

The High Court refused a declaration. The covenant clearly restricted use of the whole property to a single dwelling for a single family.

HOUSING BENEFIT

■ R v Muia

[2012] EWCA Crim 332,
9 February 2012

The defendant was paid income support, council tax benefit and housing benefit (HB) for the period 2000–2006 on the basis that she was an unemployed single parent. She failed to declare that she was, in fact, in full-time work. She had been paid more than £78,000 in benefits that she had not been entitled to receive. In 2002 she had bought a property in London and in 2000 she had bought another property in Luton. She was the council tenant of a flat in London and rented out the Luton property. The Crown Court was satisfied that the rental income from the Luton property had only been made possible because of her offending and it made an order for confiscation of £67,000 representing the net equity in the Luton property. The defendant appealed.

The Court of Appeal dismissed the appeal. The Crown Court was fully entitled to make the order.

■ Wychavon DC v EM (HB)

[2012] UKUT 12 (AAC),
6 January 2012

The claimant was a severely disabled woman who claimed HB in respect of rent that was said to be payable under a tenancy agreement. The council decided that she was not entitled. On a second appeal, the Upper Tribunal judge found that she had no liability to pay the rent because she had never actually entered into the tenancy agreement. She had no knowledge or means of knowledge of it and had not had the mental capacity to enter into such a tenancy. Following that decision, the claimant's representatives raised the point that, under Mental Capacity Act 2005 s7, a person who lacked capacity but to whom necessary goods and services were supplied had to pay a reasonable price for them.

The judge agreed to review his decision and then allowed the appeal. The accommodation was a 'necessary' service for the claimant and she was obliged to pay an amount equivalent to the rent because it was a reasonable charge.

HOUSING ALLOCATION

■ R (Tout a Tout and Heff) v Haringey LBC

[2012] EWHC 873 (Admin),
3 April 2012

The council's housing allocation scheme, adopted under HA 1996 Part 6, provided for a choice-based lettings system using points. Homeless households placed in temporary accommodation under HA 1996 s193 were encouraged to bid for properties advertised under the scheme. If they had not bid successfully by the time they reached a designated 'points threshold' (at which a bid was likely to be successful for less popular properties of the appropriate size) they were given two months' further opportunity to bid freely, and then the system would auto-bid for them for any available properties. If they were the highest ranked bidder on an auto-bid, the accommodation would be offered (if suitable) in order to bring the homelessness duty to an end. The claimants, who were owed section 193 duties, sought judicial review of the auto-bid scheme contending that it represented an unlawful departure from the statutory guidance on choice-based allocations: *Allocation of accommodation: choice based lettings*, paras 3.13–3.14 and 4.50–4.55.

Underhill J dismissed the claim. The allocation scheme afforded a measure of 'choice' to homeless applicants in keeping with the guidance and was not irrational. Even during the two-month, pre-auto-bid warning period applicants had a realistic degree of 'choice' because an average of 16 properties were advertised each week.

HOMELESSNESS

Interim accommodation

Local Government Ombudsman Complaint

■ Newham LBC

11 000 383,
8 March 2012[29]

The complainant applied to the council for homelessness assistance. He provided a letter from his mother indicating that he and his family had been given two weeks' notice to leave her home. Instead of treating the complainant as threatened with homelessness (HA 1996 s175(4)), the council told him to start looking for alternative accommodation in the private rented sector and gave him details about local landlords and HB. When the mother's notice expired, he and his family presented themselves at the council's offices. He waited six hours and was seen by at least three council officers. He was told that no interim accommodation would be provided under HA 1996 s188 and to go with his family to the police station. The police could not help so the family slept in a car. No decision was made on the homelessness application until two months later when the council accepted that it owed a duty under HA 1996 s193.

The council's reviews manager told the Ombudsman that 'verification of homelessness is [a] prerequisite to providing interim accommodation' (para 33) but other staff later told the Ombudsman that that was not in fact council policy and that they applied the legal test of whether or not there was reason to believe an applicant 'may' be homeless: HA 1996 s188.

The Ombudsman found extensive maladministration in the council's handling of almost every aspect of the homelessness application. In particular:

- no attempts were made by the Prevention Team to arrange an urgent visit to seek to prevent or delay homelessness when the initial letter was provided. Failure to act on the information in good time amounted to maladministration;
- there were no case notes recording the advice officers gave and it was unclear which officer made the decision not to provide interim accommodation. The failure to keep any records of the lengthy visit to the Housing Options Centre was maladministration; and
- the lack of clarity and consistency regarding the council's policy and how it should operate amounted to maladministration.

Suitability

■ Sheridan v Basildon BC

[2012] EWCA Civ 335,
21 March 2012

The claimants were Travellers and had been evicted from the unauthorised encampment at Dale Farm. On their homelessness applications, the council accepted that it owed the main homelessness duty as they were in priority need and not intentionally homeless: HA 1996 s193. It made offers of council housing. The claimants challenged the suitability of those offers on the basis that they had cultural aversions to living in conventional housing. Both an internal review and a county court appeal were unsuccessful.

The Court of Appeal dismissed a further appeal. The council did not have sites available for the claimants' mobile homes. It could not be required to acquire them in order to perform the homelessness duties. Nor was the reviewing panel required on the review to consider whether the failure to have sites available was because of inadequate provision made for Travellers in the council's area. The court applied its earlier decisions in *Lee v Rhondda Cynon Taf CBC* [2008] EWCA Civ 1013 and *Codona v Mid-Bedfordshire DC* [2004] EWCA Civ 925.

Appeals

■ Harripaul v Lewisham LBC

[2012] EWCA Civ 266,
14 March 2012

The claimant appealed against a reviewing officer's decision on her homelessness application. HHJ Bailey dismissed this appeal. The claimant sought and obtained permission for a second appeal from the Court of Appeal.

On learning of the grant of permission to appeal, the council agreed to withdraw the review decision and carry out a fresh review. On this basis, the appeal was withdrawn but the parties could not agree who should pay the costs. The Court of Appeal agreed to receive written submissions about what order for costs should be made.

Rimer LJ delivered a full judgment explaining the applicable principles (see *R (Boxall) v Waltham Forest LBC* (2001) 4 CCLR 258, *R (Scott) v Hackney LBC* [2009] EWCA Civ 217 and *R (Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895) and why, in this case, the council should be ordered to pay the costs. He said:

Overall, I have decided that this is a case in which the appellant should be regarded as the successful party. The starting point is that she is entitled to her costs. I have not been satisfied that, in the circumstances of the case, there are any factors justifying a departure from that general rule. I will order the respondent to pay the appellant's costs of the appeal … (para 12).

HOUSING AND CHILDREN

■ R (U) v Newham LBC

[2012] EWHC 610 (Admin), 23 February 2012

A child applied for assistance under the Children Act (CA) 1989 in the form of accommodation for herself and her mother. She was a British citizen but her mother was a non-EU third country national with no right to remain in the UK under the immigration rules. When the council declined to assist, judicial review proceedings were issued. Permission to apply for judicial review was granted on 21 June 2011 and a trial was fixed for 23 February 2012. The council failed to play any part in the proceedings until two days before the full hearing, when it agreed to concede. Wyn Williams J made a declaration that:

(i) The claimant is a British citizen with EU rights. By virtue of the claimant being entirely dependent on her mother, her mother has derivate rights to reside as the claimant's primary carer under EU law as such a right of residence is necessary to render effective the claimant's EU rights arising under article 20, TFEU [the Treaty on the functioning of the European Union].

(ii) Local authorities when considering eligibility for support of a British child with a third country national parent under the Children Act 1989 must consider the nature of the family's composition and the dependency between the child and parent and the family's right to reside in the UK under EU law to determine the family's eligibility for mainstream support. This is not dependent on the third country national parent's domestic immigration status (para 42).

The council was ordered to pay the claimant's costs on an indemnity basis.

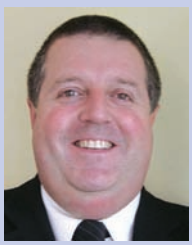
■ R (AS) v Ealing LBC

[2012] EWHC 356 (QB), 6 March 2012

The claimant was an asylum-seeker who applied to the council for accommodation under the CA 1989 on the basis that he was aged under 18. He challenged the council's age assessment decision that he was an adult (and a Home Office decision to the same effect) in judicial review proceedings.

Lang J conducted an age assessment hearing and concluded that the date of birth was 24 August 1993. The judgment contains a useful discussion of the relevant authorities on judicial review of age assessment decisions.

1 Available at: www.communities.gov.uk/housing/privaterentedhousing/tenancydepositprotection/tenancydepositprotectionfaq/.
2 Available at: www.communities.gov.uk/documents/housing/pdf/2124898.pdf.
3 Available at: www.communities.gov.uk/housing/homeownership/righttobuy/righttobuyglance/.
4 Available at: www.communities.gov.uk/documents/housing/pdf/2122728.pdf.
5 Available at: www.communities.gov.uk/documents/housing/pdf/2122846.pdf.
6 Available at: www.communities.gov.uk/documents/housing/pdf/2102589.pdf.
7 Available at: www.communities.gov.uk/documents/housing/pdf/2102605.pdf.
8 Available at: www.communities.gov.uk/documents/housing/pdf/2102921.pdf.
9 Available at: www.communities.gov.uk/documents/housing/pdf/2102753.pdf.
10 Available at: www.legislation.gov.uk/uksi/2012/734/pdfs/uksiem_20120734_en.pdf.
11 Available at: www.cih.org/resources/PDF/Policy%20free%20download%20pdfs/Community%20Harm%20Statement%20form%20no%20guidance.pdf.
12 Available at: www.communities.gov.uk/documents/communities/pdf/2117840.pdf.
13 Available at: www.homeoffice.gov.uk/publications/crime/asb-focus-on-the-victim?view=Binary.
14 Available at: www.cih.org/resources/PDF/Marketing%20PDFs/Tenancy%20fraud%20and%20data%20sharing.pdf.
15 Available at: www.homeoffice.gov.uk/publications/agencies-public-bodies/nfa/annual-fraud-indicator/annual-fraud-indicator-2012?view=Binary.
16 Available at: www.homeoffice.gov.uk/publications/agencies-public-bodies/nfa/fighting-fraud-locally-strategy/strategy-document?view=Binary.
17 Available at: www.communities.gov.uk/documents/statistics/pdf/2102020.pdf.
18 Available at: www.communities.gov.uk/documents/planningandbuilding/pdf/2113371.pdf.
19 Available at: www.communities.gov.uk/documents/planningandbuilding/pdf/2124046.pdf.
20 Available at: www.legalservices.gov.uk/docs/cls_main/Specialist_Support_Consultation_Paper_300312.pdf.
21 Available at: www.communities.gov.uk/documents/housing/pdf/2106007.pdf.
22 Available at: http://nationaltenants.files.wordpress.com/2012/03/tenant-panels-options-for-accountability.pdf.
23 Available at: www.housinglin.org.uk/_library/Resources/Housing/Housing_advice/Guidance_on_tenancy_agreements_v2.0__.pdf.
24 Jo Knorpel, solicitor, Shelter Legal Services and Liz Davies, barrister, London.
25 Kate O'Brien, solicitor, South West Law, Bristol and John Beckley, barrister, London.
26 Paul Gilbert, solicitor, London and John Beckley, barrister, London.
27 See: http://nearlylegal.co.uk/blog/2012/02/successful-gateway-b-defence/.
28 See: www.wandsworth.gov.uk/news/article/10897/landlord_guilty_of_harassing_tenants.
29 Available at: www.lgo.org.uk/news/2012/mar/homeless-family-let-down-newham-council/.



Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder.