(para 155). In the context of deciding whether or not the further representations amounted to a fresh claim he went on to say that the point of involving the OCC in such decisions was 'to enable decisions to be taken in the light of informed advice by a semi independent unit whose remit is to consider the best interests of affected children' (para 157).

■ **Omotunde (best interests – Zambrano applied – Razgar) Nigeria**
[2011] UKUT 00247 (IAC), 25 May 2011

O was a Nigerian national who had lived in the UK for almost 20 years and was the carer of his child, born in 2005, who had become a British citizen. O was convicted of benefit fraud. The First-tier Tribunal upheld the UKBA's decision to deport him on the basis that he was a foreign national criminal within the meaning of UK Borders Act 2007 s32.

The Upper Tribunal found that this was an error of law because the Supreme Court's decision in *ZH (Tanzania)* (see above) had not been taken into account; the Supreme Court had decided that a child's welfare was the primary consideration and had stressed the importance attached to nationality as an indicator of where the child's best interests lay. The Upper Tribunal also recognised that O might have a right to reside in the UK under EU and national law by virtue of *Ruiz Zambrano v Office national de l'emploi* (ONEm) C-34/09, 8 March 2011; October 2011 *Legal Action* 24.

1 Platt Halpern, solicitors, Manchester and Ranjiv Khubber, barrister, London.
2 See 'Rule 39 – interim measures', available at: www.echr.coe.int/ECHR/EN/Header/Press/Links/Archived+news/ArchivesNews_2010.htm.
3 Asylum Support Appeals Project, London.
4 See note 3.
5 See note 3.
6 See note 3.
7 See note 3.
8 Joanna Thomson, solicitor, Pierce Glynn, London and Stephen Knafler QC and Jonathan Aubern, barristers, London.
9 Ben Hoare Bell, solicitors, Newcastle and Stephen Broach, barrister, London.
10 Karen Ashton, solicitor, Public Law Solicitors, Birmingham and Adrian Berry, barrister, London.
11 Richard Drabble QC and Declan O'Callaghan, barristers, London and Solange Valdez, solicitor, Sutovic and Hartigan, London.

Sue Willman is a partner and Sasha Rozansky is a trainee solicitor at Pierce Glynn Solicitors. Readers are encouraged to e-mail relevant cases to: SRozansky@pierceglynn.co.uk. The authors are grateful to the colleagues at note 1 and notes 3–11 for transcripts or notes of judgments.

Housing repairs update 2011 – Part 2

In this annual review, **Beatrice Prevatt** details policy, legislation and case-law concerning housing disrepair from January 2011 to date. Part 1 of this article appeared in December 2011 *Legal Action* 11.

POLICY AND LEGISLATION

Housing conditions in the private sector

In June 2011 a study was published on the extent of local authority enforcement of the Housing Act (HA) 2004 housing health and safety rating system in England.[1] It was prepared by Dr Stephen Battersby for Alison Seabeck MP, the then Shadow Housing Minister, and Karen Buck MP, the then Shadow Welfare Reform Minister. This study records that 'informal' action was the most common enforcement action taken by local authorities, despite the existence of the hazard awareness notice, which does not have any consequences for non-compliance and can be viewed as purely advisory. This makes it difficult to hold local authorities to account for their activities as it is unclear what form this informal action takes. The research indicated a general reluctance to use the powers available under the HA 2004, with more than 80 per cent of local authorities never having taken a prosecution. It also found that, in practice, most local authorities intervene on the basis of 'complaint or service requests, rather than as the result of ... any coherent strategic approach' (page 7).

CASE-LAW

Damages

■ **Eaton Square Properties Ltd v Shaw**
[2011] EWHC 2115 (QB), 29 July 2011, [2011] All ER (D) 9 (Aug)

Ms Shaw was a Rent Act 1977 protected tenant. Considerable work was needed at the premises, and Ms Shaw moved out having agreed with the landlord that she would relocate permanently to other accommodation to be let by the company on a Rent Act tenancy. Complex arrangements were made, including provisions for certain works to be undertaken at the new premises. Ms Shaw moved into the new home, but over a number of years disputes arose about whether or not works had been carried out in keeping with the agreement and what rent was payable. The landlord brought a possession claim for rent arrears. Ms Shaw counterclaimed for damages; she sought to add a claim for £14m, said to represent her lost income from a business that she would have pursued had she not had to spend so much time dealing with the need to get the landlord to comply with the agreement.

The High Court ruled that the amendment should not be permitted. The purpose of the move was to make the premises fit for her occupation, not to further or assist her business. The landlord owed the tenant a duty to do the works properly and in keeping with the specification. However, any economic loss which the tenant might be able to prove was unconnected to the relationship between them. The claimed loss could not be said to have arisen from any breach of the landlord and tenant relationship.

Quantum

■ **Grand v Gill**
[2011] EWCA Civ 554, 19 May 2011

(See also 'Housing repairs update 2011 – Part 1', December 2011 *Legal Action* 13 under 'Liability'.) The tenant rented a two-bedroom flat from her landlord from November 2004 at a rent of £850 per month. The flat suffered from a defective boiler which provided a wholly inadequate level of heat, namely, 15 degrees centigrade, and did not work at all for 207 days, give or take a day or so, between November 2004 and November 2007, when it was replaced. The flat was also affected by extensive dampness and mould growth which were so bad that the tenant's daughter had to move from the second bedroom into the living room. Largely, this was due to condensation dampness because of a design defect. There was also some damaged plaster because of water penetration for which the landlord was not

liable. The tenant sought damages for disrepair. The trial judge awarded damages of £5,600 on the basis of an award of the following:

- £1,750 for the 207 days when there was no heating;
- £2,900 for the remainder of the three years when there was inadequate heating (on the basis of an award of £1,200 per annum (less approximately £700 for the period covered by the award of damages for there being no heating at all), having regard to *Islington LBC v Spence* (2000) 6 September, Clerkenwell County Court; July 2001 *Legal Action* 26, in which the court awarded £1,100 per annum for defective heating);
- £600 for the contribution the defective heating had made to the damp and mould (the judge having found that if the landlord had been liable for all the damp and mould he would have awarded £2,000 per annum making a total award of £6,000 in this regard); and
- £350 for breach of the covenant of quiet enjoyment.

The tenant appealed on the basis that the judge was wrong to apply a 90 per cent discount to the damage caused by the damp as the landlord was 100 per cent liable for the damaged plaster.

The Court of Appeal found that the landlord was liable for the damaged plasterwork and was liable to compensate the tenant for this damage. The court assessed the plaster damage as representing £750 of the £6,000 that the judge would have awarded for the dampness; therefore, it substituted the figure of £1,275 (which was made up of £750 + £525 (ie, (£6,000 – £750) x 10%)) for the judge's award of £600, so that the overall damages award increased from £5,600 to £6,275.

Comment: The damages award made by the trial judge, particularly in relation to the defective heating, is low, especially when compared with more recent awards which have been made on the basis of diminution in value, see, for example, *Fakhari v Newman* January 2011 *Legal Action* 19, where 75 per cent of the rent was awarded for a lack of heating and 43 per cent of the rent was awarded for defective heating. In this case, the award amounts to less than 20 per cent of the rent over the three years when the heating was defective. This low award may have been because the tenant was unrepresented at first instance and did not rely on more recent authorities than the one produced by the landlord's counsel. The award in respect of defective heating was not at issue in the appeal to the Court of Appeal.

Equally, it might be thought that a higher percentage of the dampness may have been attributable to the lack of heating, but it is unclear what evidence was produced in this regard. Expert evidence may be available to enable a higher claim to be made.

■ Saleh v Rageh, Mohamed Mosa, Mohamed, Abdullah and Rahman Mohamed

Birmingham County Court, 22 February 2011[2]

The defendant tenants all lived in a three-storey building with rooms let out as a house in multiple occupation (HMO). The fifth defendant had not had access to his room since March 2008 and, from May 2009, the second defendant was excluded from his room. These defendants then shared with the third defendant. The landlord was held liable in damages from June 2008 to December 2010 when there was a change in ownership. All the defendants' rooms suffered from water penetration, with the fifth defendant's room also suffering from defective double glazing. In addition, there were defects to the common parts:

- The water supply to the toilet and wash-hand basin was inoperable as the taps were faulty.
- There were cracked tiles in the bathroom.
- The extractor fan was not working in the kitchen, and there were chronic leaks to the taps.
- The shower room suffered from damaged and uneven flooring, the window could not be closed and there was an ill-fitting door.
- The external door could only be opened and closed with difficultly.
- For two months when the gas supply was changed over to a pre-payment card meter system, the defendants were left without any heating or hot water.

Each defendant was awarded £500 for the boiler problem. In addition:

- The first defendant was awarded £1,000 per annum. The total award was £3,000, which equates to a 46 per cent rent reduction of £50 per week rent.
- The second defendant was awarded £1,250 per annum to May 2009 and £2,000 per annum after this date. The total award was £4,750, which equates to a 56 per cent rent reduction of £65 per week rent.
- The third defendant was awarded £1,600 per annum. The total award was £4,500, which equates to a 58 per cent rent reduction of £65 per week rent.
- The fourth defendant was awarded £1,000 per annum. The total award was £3,000, which equates to 58 per cent rent reduction of £40 per week rent.
- The fifth defendant was awarded £1,600 per annum. The total award was £4,500, which equates to a 69 per rent reduction of rent of £50 per week rent.

The total award was £19,750, which equated to a global rent reduction of 55 per cent.

■ Frederick and Simpson v Frame

Willesden County Court, 11 July 2011[3]

In a possession claim for rent arrears, the assured shorthold tenant of one room in a shared house, which was let at a rent of £130 per week, counterclaimed in respect of the disrepair she suffered throughout the tenancy (which began in November 2009) and continued until the date of trial in June 2011. District Judge Dabezies found the landlords liable. He awarded damages on the basis of a diminution in the value of the rent throughout the tenancy as follows:

- 15 per cent for a mouse infestation largely to the common parts;
- 30 per cent for a lack of hot water;
- 15 per cent for the lack of heating to the common parts; and
- 5 per cent for other miscellaneous defects.

He awarded a total of 65 per cent of the rent throughout the tenancy, which amounted to £7,417 and £131 in interest. After offsetting the arrears of £5,752 that were found to be due, the landlords had to pay the tenant the balance of £1,796 and were ordered to carry out remedial works within three months. The landlords were ordered to pay 80 per cent of the tenant's costs as she had not succeeded in her claim that the rent due was only £89 per week.

■ Harwood Properties Ltd v Remuinan

Brighton County Court, 18 October 2011[4]

In a possession claim for rent arrears, the tenant of a one-bedroom flat, which was let at a rent of £640 per month, counterclaimed in respect of disrepair suffered throughout the tenancy, which began at the end of May 2010. Deputy District Judge Bradly found the landlords liable for the following:

- A failure adequately to clean the carpets and decorate the walls in breach of an express agreement that this would be done for the whole period of the tenancy, ie, for a period of about 16 months.
- Sewage on the patio for a period of about two months with continuing leakage of waste water and smell for a further 14 months.
- A rat infestation from February to August 2011.
- A leaking toilet from February to April 2011.
- Cracked bath sealant which resulted in water leaking onto the bathroom floor between November 2010 and May 2011.
- A leaking bathroom tap throughout the tenancy.
- A defective patio door from July to October 2011.

Awarding damages on the basis of a diminution in value of rent, the judge awarded the following:

■ 20 per cent of the rent throughout the tenancy, which amounted to an award of £2,048 general damages; plus

■ an additional 20 per cent for the six-month rat infestation of £768 (which the judge considered to be more distressing than the other problems).

This made a total award of general damages of £2,816. After offsetting the agreed arrears of £940.78, the judge also awarded two per cent interest per annum on the balance from the date of the counterclaim.

The possession claim was dismissed. The landlord was ordered to pay all the tenant's costs of the action. The judge also made an order for remedial works to be carried out within six weeks of the order.

Ombudsman's reports

Local Government Ombudsman

Complaint

■ Lambeth LBC

09 014 729, 10 000 151 and 10 000 417, 11 July 2011

■ Ms Z complained that the council had failed to rectify serious disrepair in her flat, in particular, a leak through her bedroom ceiling because of defective guttering from April 2009 to August 2010. She said that she was kept awake when it rained or snowed because water dripped into her bedroom. She complained that she had taken time off work to sort out the problem and had been prescribed anti-depressant medication.

■ Mr Y complained that there had been excessive delay in repairing the windows in his home from May 2009 to May 2011, misleading information had been given and there had been a series of missed appointments and several failures to call him back or take follow-up action. Mr Y complained that he had suffered from lung infections and that living in an unsecured, draughty house with rotting windows and dealing with the stress had impacted on his health.

■ Ms X complained of a number of leaks that had affected her property, in particular, a leak into her toilet from 2007, which appeared to be coming from the leasehold flat above and another leak affecting the shed on her balcony from April 2009. The various leaks caused damage to the shed and the belongings stored inside it, and, internally, the toilet wall became saturated: the wallpaper and, eventually, the plaster crumbled away. Ms X was frustrated at the council's failure to keep her up to date.

The Ombudsman found maladministration. She recommended that the council should send a written apology to all three tenants, and in addition:

■ confirm to Ms X and Mr Y, and to her office, when the outstanding work was to be completed;

■ pay £1,000 compensation to Ms X to include redecoration costs;

■ pay £500 compensation to Mr Y; and

■ pay £1,000 compensation to Ms Z in addition to completing her kitchen and bathroom upgrade and other repairs that were originally ordered in February 2011.

Public Services Ombudsman for Wales

Complaint

■ Charter Housing Association

201001520, 18 October 2011

The applicants complained that their landlords had failed to keep in working order the underfloor heating system at their home, which had been installed at the recommendation of an occupational therapist to meet the needs of their disabled son, in working order over a two-year period. The housing association had made repeated, abortive repair attempts, sending engineers who had no specialist knowledge of the system despite the fact that the applicants asked for the heating system's manufacturer to be called. The applicants also complained that they had been without heating and hot water at times and that the abortive attempts to repair the heating system meant that they incurred higher energy bills.

The Ombudsman found that a prudent landlord would have involved the heating system's manufacturer at an earlier stage, particularly given the applicants' son's disability, and in this regard upheld the complaint. Undoubtedly there had been costs incurred during engineers' testing and the family had been inconvenienced greatly; however, a number of factors made it impossible to ascertain with certainty the level of energy costs for the family had there been no problems.

The Ombudsman recommended that the housing association should:

■ issue an apology to the applicants;

■ pay £1,300 compensation to the applicants;

■ engage the manufacturer to meet the applicants to provide full advice and guidance about operating the heating system; and

■ audit and review its complaint-handling process.

Local Government Ombudsman

Complaint

■ Northampton BC

10 009 338, 19 October 2011

This Ombudsman complaint does not involve disrepair, but gives an indication of compensation awarded for unsatisfactory housing conditions. The council received an application for a mandatory disabled facilities grant (DFG) to provide an extension to enable one of the applicants to be cared for, washed and bathed. The applicants lived in privately rented accommodation with no statutory long-term security of tenure. Although the conditions for the DFG were met, the council did not want to see £30,000 of grant monies expended on insecure private accommodation and suggested that the applicants move to adapted social housing. Two years later, the DFG had still not been paid, although the council had installed a stair lift, and a wet room on the first floor of the family home.

The Ombudsman found that the failure to pay the DFG to which the applicants had been entitled was maladministration. Recommendations made included £5,000 compensation for living in unsuitable housing conditions for two years longer than necessary.

Comment: It appears from these reports that the Ombudsman continues to make global awards for compensation without any consideration of the rent payable for the property. This appears to result in lower awards than would be obtained in legal proceedings, where a complaint is made of a failure to comply with repairing obligations.

Housing standards

■ Bristol City Council v Aldford Two LLP

[2011] UKUT 130 (LC), 30 March 2011

The council decided that a flat let by the respondent company constituted a category 1 hazard and it served an improvement notice. The council had decided that the heating arrangements (convector heaters) were inadequate and that a central or night storage heating system was required although the tenants were satisfied with the system. The landlord appealed. A Residential Property Tribunal (RPT) quashed the notice. The council appealed to the Upper Tribunal (Lands Chamber). The tribunal dismissed the appeal. The tribunal decided that the RPT had not been bound by the council's hazard assessment and should have made its own assessment, and that even if it had been satisfied that a category 1 hazard existed, the appropriate course of action on the facts was the service of a hazard awareness notice rather than an improvement notice.

■ R v Okumo

Reading Magistrates' Court, 3 November 2010

The defendant landlord was prosecuted for offences contrary to the HA 2004 and the Management of Houses in Multiple Occupation (England) Regulations (MHMO(E) Regs) 2006 SI No 372.

■ There was one offence under HA 2004 s11 (improvement notices relating to category 1 hazards), ie:

– failure to comply with an improvement notice requiring fire safety works to be done.

■ There were two offences under MHMO(E) Regs reg 4 (failure to take safety measures), including:

– the fire alarm system was not maintained in good working order.

■ There were six offences under MHMO(E) Regs reg 7 (failure to maintain the common parts, fixtures, fittings and appliances), which included:

– a missing window pane to the dining room;
– a broken toilet;
– a missing kitchen cabinet door; and
– dirty and poorly maintained common parts.

■ There were three offences under MHMO(E) Regs reg 8 (failure to maintain living accommodation), ie:

– poor repair of a bedroom window;
– a leaking ceiling; and
– a collapsed ceiling.

The 12 separate offences were proved and the maximum £5,000 fine imposed for each offence. Therefore, the total fine was £60,000. The magistrates also awarded the prosecuting authority, Reading Borough Council, its costs of £2,667.

■ Epsom & Ewell BC v Ciesco and Ciesco

Redhill Magistrates' Court, 6 June 2011

Joint landlords Mr Ciesco and his sister Ms Ciesco pleaded guilty to two offences under the HA 2004 of failure to licence an HMO (section 72) and failure to comply with a prohibition order (section 32) against using a loft room as sleeping accommodation which, in case of fire, lacked suitable fire protection and a safe means of escape. On 5 December 2010, a fire broke out at the property. The tenant staying in the loft room had to escape by exiting the property via the loft bedroom windows. The tenant suffered concussion and muscular skeletal injury and was taken to hospital for treatment. Six tenants were occupying the property at the time of the fire.

Mr Ciesco was fined £3,300 for breach of HA 2004 s32 and a further £10,000 for breach of HA 2004 s72. Ms Ciesco was fined £3,300 for breach of HA 2004 s32 and £5,000 for breach of HA 2004 s72. They were both also ordered to pay £1,121 towards the cost of the prosecution and £15 each towards a victim surcharge.

■ Bristol City Council v Digs (Bristol) Ltd

Bristol Magistrates' Court, 22 June 2011

On a prosecution brought by the council, Digs (Bristol) Ltd pleaded guilty to breaching HA 2004 s72(1) for not licensing a property. Digs (Bristol) Ltd was one of the largest property letting agents operating in Bristol and specialised in student accommodation. It managed over 100 properties across the city.

Digs (Bristol) Ltd was fined £4,000 and ordered to pay costs of £1,549.78 plus a £15 victim surcharge. The council has said that the implications of the conviction were that the company and its directors would no longer be considered to be 'fit and proper persons' under the HA 2004 and that the tenants could now make an application to the RPT for a rent repayment order.

■ R v Gentoo Group Ltd

Newcastle Crown Court, 30 June 2011

On a prosecution brought by the Health and Safety Executive arising from the death of a tenant in his home, the defendant social landlords pleaded guilty to breaching regulation 5(1) of the Management of Health and Safety at Work Regulations 1999 SI No 3242 by failing to make effective maintenance arrangements for solid fuel heaters in the homes they rented. The tenant had died as a result of carbon monoxide poisoning after the coal fire at his home became blocked, sending smoke back into his room. The landlords (formerly Sunderland Housing Company) were fined £40,000 with £25,000 costs.

■ Manchester City Council v Javaid

Manchester Magistrates' Court, 6 July 2011

On a prosecution brought by Manchester City Council and Greater Manchester Fire and Rescue Service, Mr Javaid pleaded guilty to 20 offences relating to defective private rented property. Local authority environmental health inspectors had discovered a serious fire risk, dangerous wiring, missing spindles on banisters resulting in gaps large enough for a person to fall through, broken windows and no working heating system in the premises. Conditions were so bad that an emergency prohibition order was served after the first inspection. Mr Javaid should, therefore, have closed the premises immediately and arranged new accommodation for his tenants; however, it was discovered later that not only had he kept the flats open, but moved in more tenants. The landlord was fined £33,750 and ordered to pay costs of £8,500.

1 *Are private sector tenants being protected adequately? A study of the Housing Act 2004, housing health and safety rating system and local authority interventions in England*, available at: www.sabattersby.co.uk/documents/HHSRS_Are%20tenants%20protected.pdf.
2 Michael Paget, barrister, London, instructed by Simon Foster, Tyndallwoods Solicitors, London.
3 Beatrice Prevatt, barrister, London, instructed by Ronald Daley, solicitor at Brent Private Tenants Rights Group, London.
4 Beatrice Prevatt, barrister, London, instructed by Rachel Cooper, solicitor at Brighton Housing Trust, Brighton.

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