



## General Editor

*Jon Holbrook*, barrister at 2-3 Gray's Inn Square, London, specialising in housing and public law. Instigated the formation of the Social Housing Law Association and chaired the Association between 2005 and 2008.

Consultant Editors – see back page

## Contents

### Residential Landlord & Tenant

- **Deposits** – *Tiensia v Vision Enterprises Ltd*: landlord's late compliance with tenancy deposit obligations avoids Housing Act 2004 sanctions ..... 2
- **Costs** – *Broomleigh Housing Association v Okonkwo*: suspended committal orders should not follow automatically in response to a failure to attend court for questioning as to means ..... 3
- **Policy Announcements** – mobile homes / squatting ..... 4

### Social Landlords

- **Human Rights** – *Manchester City Council v Pinnock*: Supreme Court holds that eviction of a person from a social landlord's property must be proportionate ..... 5
- **Right to Buy** – *Haringey LBC v Hines*: RTB beneficiary should not have been found deceitful as she was not given the opportunity to rebut allegations against her ..... 7
- **Employees** – *Threlfall v Hull City Council*: the need for heavy duty gloves for garden clearance work ..... 8
- **Anti-Social Behaviour** – new Judicial Studies Board guidance / extended availability of drinking banning orders ..... 8
- **Policy & Practice** – guidance on decanting residents ..... 9

### Homelessness

- **Disability Discrimination** – *Pieretti v Enfield LBC*: general disability equality duty applies to the carrying out of functions under the homelessness legislation ..... 10
- **Process** – *R (Khazai & Others) v Birmingham CC*: council acted unlawfully by deciding not to accept certain applications for homelessness assistance / *Makisi v Birmingham CC*: Court of Appeal to consider whether reviews may be conducted by telephone ..... 13

### Housing Benefit

- **Housing Benefit** – Maladministration due to council's incorrect advice about LHA rates (£1,150 compensation) / *Bradford MDC v MR*: claimant entitled to housing benefit on property that she recently owned / *Wirral MBC v AL*: little point in a landlord bringing a tribunal challenge to a local authority's decision to pay benefit direct to a claimant ..... 15

### Planning & Development

- **Planning Control** – *Barchester Healthcare Ltd v Secretary of State*: care home development was 'residential development' restricted under a Local Plan / *Taunton Deane BC v Packman*: injunction granted after 4 years of non-compliance with planning controls by Gypsy caravans / *JR Cussons & Son v Secretary of State*: flawed analysis of whether there was a functional need for an agricultural worker to live near cattle / *R (Munir) v Secretary of State*: challenge to planning inspector not a means of airing a grievance against allegedly flawed planning officer advice ..... 17
- **The Planning System** – *Cala Homes (South) Ltd v Secretary of State*: central government currently has no power to revoke all regional strategies for England ..... 19
- **Localism Bill** – recent announcements about the Bill's contents ..... 19
- **Development Disputes** – *Bewley Homes plc v CNM Estates*: courts will expect clear evidence that a party with a favourable adjudication award has agreed to less favourable terms ..... 20

Continued over page

# Contents continued

## Property Transactions & Ownership

- **Mortgages** – *Chelsea Building Society v Nash*: building society failed to reserve its right to pursue a mortgage co-debtor when reaching an agreement with her ex-husband / *English v English*: fraudulent property loan was ratified by the defrauded party deciding to redeem the linked charge on her property ..... 21
- **Co-ownership** – *Dibble v Pfluger*: court should have decided whether a financial contribution was either a loan or was merely intended to give a person an interest in a property ..... 22
- **Open Spaces** – reform of village green registration legislation ..... 24

## Commercial Property

- **Forfeiture** – *Patel v K & J Restaurants Ltd*: illegal use of premises as brothel did not prevent the court from granting relief from forfeiture ..... 25

## Property Taxes

- **Council Tax** – *Bolsover DC v Ashfield Nominees Ltd*: council tax liability orders do not expire once they are 6 years' old ..... 27

## Property Litigation

- **Human Rights** – *Niesen v Germany*: 5 years for court to determine property dispute violated Article 6 of the European Convention on Human Rights ..... 28

# RESIDENTIAL LANDLORD & TENANT

## DEPOSITS

### [Tiensia v Vision Enterprises Ltd](#) – a landlord's late compliance with tenancy deposit obligations avoids a sanction under the Housing Act 2004

Private landlords will be relieved by this decision. The Court of Appeal confirmed that the Housing Act 2004's tenancy deposit rules are not as draconian as some had thought. In particular, a landlord is able to avoid the Act's sanctions by late compliance with its requirements.

#### What was the issue?

S.213 of the Housing Act 2004 (HA 04) requires a private landlord to do two things within 14 days of the date on which a tenant of a dwelling let under an Assured Shorthold Tenancy (AST) provides a deposit. First, steps must be taken to protect the deposit by, for example, placing it in an authorised tenancy deposit scheme. Second, certain information about the deposit protection scheme must be provided to the tenant.

Under s.214 of the HA 04, there are significant County Court-imposed sanctions, of three times the deposit, for failure to comply with the above requirements. The issue in this case was whether a landlord became liable to a sanction as soon as the 14 day period expired without the deposit having been protected or the required information having been provided. The landlords argued that, so long as the requirements were met by the date of the relevant court hearing, no sanction can be imposed.

#### What did the Court of Appeal decide?

The Court of Appeal agreed with the landlords. If the deposit has been protected, or the information provided, by the date of the court hearing of the claim for a sanction, no sanction may be imposed. The Court rejected the tenants' argument that, as soon as the 14 day period expires, the landlord is "beyond redemption". It also rejected the alternative argument that the point of no return was the commencement of legal proceedings. The effect of the decision, therefore, is that a landlord can discharge its tenancy deposit obligations after legal proceedings have begun. This applies in the case of a direct claim by a tenant or the more common case of a tenant's counterclaim within a landlord's possession claim for rent arrears.

#### Other points

- (i) Tenancy deposit schemes tend to have their own time-limits for the protection of deposits. The Court of Appeal held that compliance with whose time-limits was not relevant under the HA 04. The only relevant time-limit under the HA 04 is its own 14 day time-limit. Scheme-imposed time-limits might be relevant in practice if they prevent a landlord from accessing any authorised tenancy deposit scheme after scheme time-limits have expired thus making it impossible for a landlord to comply with the HA 04. However, this does not seem to be a problem in practice. The landlords in this case were able to protect deposits some months after the expiry of the 14 day period set out in the HA 04.
- (ii) This decision deprives the HA 04 time-limits of much of their effect as tools to incentivise compliance with tenancy deposit legislation. They simply identify the point after which a tenant may apply to the court for a sanction but, as we have seen, that application may be defeated by the landlord simply discharging its tenancy deposit obligations prior to the hearing of the tenant's application.

#### KEY POINTS

- A landlord is not liable to tenancy deposit sanctions merely by failing to comply with the Housing Act 2004's 14 day time-limit for deposit protection and provision of information
- A landlord may avoid a sanction by late compliance (before the trial of a claim for a sanction)
- Late compliance does not prevent a landlord from serving a s.21 notice on an Assured Shorthold Tenant
- Tenants should write landlords a pre-action letter before commencing a tenancy deposit claim





- (iii) The other main sanction under the tenancy deposit legislation works by nullifying any 'section 21' notice to terminate an AST where the tenancy deposit legislation has not been complied with. The Court of Appeal said that a landlord's failure to comply with its tenancy deposit obligations within 14 days does not prevent the landlord from ever giving a section 21 notice. Once those obligations have been complied with, even if compliance is late, the landlord may serve a section 21 notice in the usual way.
- (iv) The Court of Appeal considered the costs implications of a landlord's late compliance with its obligations under the HA 04, e.g. where it protects the deposit only once legal proceedings have begun. The Court accepted that, where a tenant has made a claim which is defeated by a landlord in this manner, "the tenant would ordinarily recover his costs".
- (v) The Court said that, if a tenant wishes to make a free-standing claim for a sanction, s/he should write a pre-action letter to the landlord giving him an opportunity to comply with the HA 04. Otherwise, the tenant may face a costs penalty in the event that the landlord discharges its obligations prior to the hearing of the tenant's claim.

The Court of Appeal gave its decision in *Tiensia v Vision Enterprises Ltd; Honeysuckle Properties Ltd v Fletcher, McGrory and Whitworth* on 11 November 2010: [2010] EWCA Civ 1224. The Court was comprised of Thorpe, Sedley & Rimer LJ. The principal judgment was given by Rimer LJ, with whom Thorpe LJ agreed; Sedley LJ dissenting.

## COSTS

### [Broomleigh Housing Association v Okonkwo](#) – suspended committal orders should not follow automatically in response to a failure to attend court for questioning as to means

Received wisdom was undermined by the Court of Appeal in this case. It concerned a landlord who was trying to enforce costs orders made in its favour in possession proceedings by requiring the debtor to attend court for questioning about his means. He failed to do so and a judge automatically made a suspended order for his committal to prison. The Court of Appeal held that this was wrong. The judge should have considered whether a committal order was justified in the circumstances rather than imposing the order automatically. The ruling means that judges will need to find the time to give specific consideration to the circumstances of a failure to attend court for questioning about their means.

#### KEY POINTS

- Judges should always consider whether a suspended committal order is appropriate following a debtor's failure to attend court for questioning
- Other options include adjourning or making a further order to attend
- A person who let a court order deliberately fall from his hands was personally served with the order

#### The background

A Housing Association was trying to enforce costs orders in its favour made against one of its tenants. The orders were made following the withdrawal of three separate sets of possession proceedings on terms which required the tenant to pay the Association's costs. The Association took advantage of its right to obtain an order requiring the tenant to attend court to be questioned by a court officer about his means (Rule 71.2(2) of the Civil Procedure Rules). This case concerned two such orders which were granted to the Association and personally served on the tenant (as required by Rule 71.3(1)). The tenant either failed to attend court to answer questions about his means or did attend but refused to answer questions.

The tenants' failures were referred to a circuit judge, again in accordance with the Rules. The circuit judge took what seems to have become the standard response in such cases. He ordered the tenant's committal to prison but suspended on condition that he attend court on a specified date for questioning about his means. The tenant appealed to the Court of Appeal.

#### What did the Court of Appeal decide?

The Court of Appeal allowed the appeal. Rule 71.8(1) does require non-compliance with an order to attend for questioning to be referred to a circuit or High Court judge. Rule 71.8(2) provides that the judge "may" then make an order for the person's committal to prison. While Rule 71.8(4) provides that a committal order must be suspended on terms requiring attendance at court on a specified date this does not permit a judge to ignore the fact that s/he has a discretion as to whether or not to make a committal order in the first place. The failure to exercise that discretion in the light of the facts of a particular case is an error of law. The Court of Appeal was satisfied that there was such an error of law in the present case as there was no evidence to show a genuine exercise of judicial discretion before the committal orders were made.

The Court of Appeal also expressed concern that there appears to be a nationwide practice of routinely making committal orders when a person has failed to comply with an order to attend court for questioning. Indeed, the standard court forms are drafted on the assumption that a committal order is effectively automatic. The Court also pointed out that it had previously expressed similar concerns in *Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems N.V.* [2008] EWCA Civ 389 but that "its effect do appear to have been widely appreciated".

#### How should a court proceed when deciding how to respond to a failure to attend for questioning?

At paragraph 22 of its decision, the Court of Appeal identified the options that are open to a judge to whom non-compliance with an order to attend for questioning has been referred. All these options should be considered by the judge:





- (i) "If satisfied not only that the debtor was served with the order to attend but also that there is sufficient evidence before him to justify a finding to the criminal standard that the debtor's failure to attend (or refusal to take the oath and answer questions) was intentional and that in the circumstances it is appropriate to do so, he may proceed to make a suspended committal order...If he does make an order, however, he must provide written reasons, at any rate briefly, for recital in the order in Form N79A for service upon the debtor...in having regard to the circumstances, the judge will of course weigh all the evidence which suggests that there was – or was not – some extra obstinate or obstructive dimension to the debtor's intentional breach of the order".
- (ii) If not satisfied as to those matters, the judge has the power to adjourn. If the judge does, s/he should either "give directions, supported by a penal notice, for a hearing in court, including directions for the debtor (and perhaps also for the creditor) to attend" or "give directions, again supported by a penal notice, for the debtor (and perhaps also for the creditor) to depose to specified matters and to file and serve the affidavit or affirmation by a specified date".
- (iii) "Alternatively, the judge can decide there and then not to make a committal order and to proceed in a different way, probably by making a further order under Rule 71.2 for the debtor's attendance at court to provide information...The further order will contain a penal notice in any event (Rule 71.2(7)), but the judge may favour including a recital which, in the light of the background, stresses the possible consequences of further non-attendance even more clearly to the debtor".

### Other points of interest in this case

- (i) The case report reveals that a number of orders for the debtor to attend for questioning about his means were nullified because the Association failed to file an affidavit of service to prove personal service of the order. It should be remembered that this is always required because Rule 71 provides that personal service is required for an order to attend to be effective (unless the court authorises a different method of service).
- (ii) The debtor tried to avoid personal service of an order to attend for questioning by allowing it to be dropped at his feet rather than to be received into his hands. The Court of Appeal held that this attempt to evade service was ineffective and he was "validly served with it".

The Court of Appeal gave its decision in *Broomleigh Housing Association Ltd. v Okonkwo* on 13 October 2010: [2010] EWCA Civ 1113. The Court was comprised of Carnwath, Moore-Bick and Wilson LJ.

## POLICY ANNOUNCEMENTS

### Mobile Homes

In a Parliamentary written answer given on 8.11.10, the DCLG Minister, Grant Shapps, said that the Government have "no plans" to consult on whether local authorities should be able to levy fees in respect of their licensing functions under the Caravan Sites and Control of Development Act 1960.

On that date, the Minister also said that the Government is considering reform of the 1960 Act "to help improve the operation and management of those mobile home sites that are poorly managed so as to afford better protection to the residents and the properties they own".

The Government have also confirmed that they expect Residential Property Tribunals to take on their new role of hearing cases under the Mobile Homes Act 1983 in spring 2011 (oral Parliamentary answer given by DCLG Minister Andrew Stunell, 25.11.10). At the same time, the Minister again stated that the Government is considering imposing stricter legal controls on mobile home operators:

"The Minister for Housing and Local Government is looking at a range of measures that will help to combat the mismanagement and abuse that some residents face, and he will shortly make an announcement on his plans".

### Squatting

The Department for Communities and Local Government has issued guidance to homeowners about the legal options open to them if their home is being used by squatters. The guidance is available at [www.communities.gov.uk/publications/housing/advice/squatters](http://www.communities.gov.uk/publications/housing/advice/squatters).

The Government is also considering a change in the law to tackle squatting. On 8.11.10, the Ministry of Justice Minister, Mr Blunt said in a written Parliamentary answer that "I have asked my officials to look at the existing law on trespass and the way it is enforced to see if it can be strengthened".





# SOCIAL LANDLORDS

## HUMAN RIGHTS

### Manchester City Council v Pinnock – Supreme Court holds that eviction of a person from a social landlord's property must be proportionate

After many judicial twists and turns, the UK's Supreme Court has finally accepted that the Human Rights Act 1998 does provide additional protection from eviction for occupants of housing owned by social landlords. This benefits individuals in respect of whom a landlord has what is sometimes called an unqualified right of possession. They are now able to resist eviction by arguing that, in the circumstances, it would be disproportionate to evict them.

#### The background

This decision benefits occupants with no property law-based right to occupy a dwelling which is owned by a social landlord (where the social landlord in seeking to recover possession, is exercising a public function). These are cases in which it is sometimes said that the landlord has an "unqualified right" to possession.

The present decision concerned a relatively unusual occupant of this type, a person with a demoted tenancy which offered virtually no security of tenure. That lack of security arises because s.143D(2) of the Housing Act 1985 provides that a court must grant a landlord's claim for possession against a demoted tenant unless it thinks that the landlord has not followed the correct statutory procedure.

Some of the more commonly encountered cases of individuals in respect of whom a social landlord has an unqualified right to possession are as follows:

- (i) An individual who remains in occupation of a dwelling following the tenant's death but who does not have the right to succeed to the tenant's tenancy (see *Solihull MBC v Hickin* [2010] EWCA Civ 868 in issue 68).
- (ii) An individual who used to be a joint tenant but is no longer because the other joint tenant unilaterally determined the joint tenancy by notice to quit served on the landlord (see *Poplar HARCA v Howe* [2010] EWHC 1745 (QB) in issue 68). This is commonly encountered in cases of relationship breakdown.
- (iii) An individual who used to be an assured shorthold tenant but whose landlord has a right to possession following the expiry of the tenancy term because the correct notices under s.21 of the Housing Act 1988 have been given. In substance, this is what tends to happen in law when a social landlord such as a Housing Association decides not to renew a 'starter tenancy' (see *Eastlands Homes Partnership Ltd. v Whyte* [2010] EWHC 695 QB in issue 66).
- (iv) An individual who used to be a secure tenant but whose secure tenancy ceased to exist because s/he was no longer using the dwelling as his/her only or principal home, for example an unlawful sub-letting of the entire dwelling (see *Lambeth LBC v Emeter* [2010] EWCA Civ 527 in issue 66);
- (v) An individual who was granted a non-secure tenancy by a council in order to discharge its duties under the homelessness legislation but which has been terminated by notice to quit (see *Salford CC v Mullen & other cases* [2010] EWCA Civ 336 in issue 65).
- (vi) An individual who is subject to a mandatory claim to possession, such as an assured tenant facing a Ground 8 possession claim (8 weeks etc rent arrears)

As we saw in the previous issue, such occupants were already able to deploy public law arguments to defend possession proceedings. This is because public authority landlords are subject to legal restrictions on their decision-making freedom simply because they are public authorities. This was confirmed by the House of Lords in *Kay v Lambeth London Borough Council* [2006] UKHL 10 where it was held that an occupant may resist a decision to bring a possession claim on the basis that a decision to seek possession "was a decision that no reasonable person would consider justifiable".

#### What did the Supreme Court decide?

Previously, the UK's highest court has resisted attempts by occupants to use the Human Rights Act 1998 as an additional tool for resisting social landlords' possession claims in 'absolute right to possession' cases. That resistance has been criticised by the European Court of Human Rights which has stressed the need for the recovery of possession to be a proportionate act. This is necessary to secure compliance with Article 8 of the European Court of Human Rights (everyone's right to respect for their home). The latest criticism was given by the European Court in *Kay & Others v the UK* on 21 September 2010 (app'n no. 37341/06) which we considered in issue 69.

#### KEY POINTS

- A social landlord's unqualified right to possession does not permit eviction if that would in the circumstances be disproportionate
- Successful proportionality defences are likely to be encountered infrequently
- In demoted tenancy cases, they will be 'highly exceptional'
- The County Court has the power to consider proportionality and public law defences in possession claims brought against demoted and introductory tenants





The Supreme Court has now accepted that it should give effect to the European Court's views. It has held that in 'unqualified right to possession' cases, an occupant may resist a social landlord's possession claim where eviction would be disproportionate. If the court hearing the possession claim needs to resolve factual disputes in order to decide whether eviction would be disproportionate, then it must do so.

### What is proportionality?

The concept of proportionality is not written into the European Convention on Human Rights. Rather, it has been identified by the European Court of Rights as something that is inherent in the requirement in Article 8(2) for an interference with Article 8 rights to be 'necessary in a democratic society' in pursuit of certain specified legitimate aims such as the prevention of disorder or crime or the protection of the rights of others.

The term 'proportionality' is referred to more regularly than it is explained. An accessible explanation is given in the leading work *Human Rights Practice* (Sweet & Maxwell). At para. 8.060 this states:

"A measure will only be proportionate to the legitimate aim pursued if supported by sufficiently persuasive [or relevant and sufficient] reasons. In determining whether the reasons advanced are sufficient, regard must be had to the nature and degree of the particular interference with the individual's rights."

What this gets across is the case-specific nature of proportionality. A greater interference requires a greater justification than a lesser interference. For example, it is easier to justify evicting (i) a demoted tenant who has persisted in carrying out anti-social acts than (ii) a law-abiding person who has lived in a property for 40 years but cannot succeed to a secure tenancy because of the rule against second successions.

### What was the outcome of the case before the Supreme Court?

The Supreme Court decided for itself whether eviction of this demoted tenant was proportionate. It held that it was. The behaviour which justified the grant of the initial demotion order (which took away the tenant's status as a secure tenant during the currency of the order) was extremely serious, albeit it was committed by the tenant's children and partner rather than by him. The authority's decision to seek possession during the demotion period followed the correct statutory procedure. Its basis was further serious criminal acts by the tenant's children in the vicinity. In those circumstances, eviction was neither unreasonable nor disproportionate even though the tenant himself was a pensioner and was not directly responsible for any of the criminal acts. The fact that the post-demotion acts relied on did not involve a breach of the tenant's tenancy agreement was no bar to them being taken into account. The Supreme Court expressed its conclusion as follows:

"in the light of the history, the demotion order, the interests of their neighbours, and the Council's right and duty to manage and allocate its housing stock, the decision cannot be characterised as unreasonable or disproportionate."

### The Supreme Courts specific findings in relation to demoted tenants

When this case was in the Court of Appeal, it held that a County Court hearing a possession claim brought against a demoted tenant could not consider public law challenges to the decision to seek possession. In an appropriate case, the proceedings would instead have to be adjourned in order for a claim for judicial review to be brought in the High Court. The Supreme Court overruled this finding. The County Court has the power to determine such challenges, as well as proportionality challenges. The same applies to possession claims made against introductory tenants. These are the two cases in which it had previously been held by the Court of Appeal that the public law defences of the type referred to by the House of Lords in *Kay* could not be considered by the County Court hearing a possession claim.

The Supreme Court felt unable to agree with the general proposition that only in highly exceptional cases would proportionality defeat a claim for possession made by a social landlord with an unqualified right to possession. However, it found that demoted tenants were a special case given that a demoted tenancy only exists because, at an earlier stage, a court concluded that various statutory conditions related to anti-social behaviour were met and that it was reasonable to make a demotion order. This means that, in demoted tenancy cases, a proportionality argument will only succeed in highly exceptional cases.

### A step-by-step guide to the implications of this decision

- (i) The first step for a social landlord is to consider whether it is exercising a public function for the purposes of the Human Rights Act 1998 in seeking to evict a person. If it is not, it is not bound by the Supreme Court's ruling. Local authorities are clearly exercising public functions in such cases. The position as regards registered providers of social housing, such as housing associations, is less clear-cut. However, it is likely that most are exercising public functions when seeking to evict. For details of the relevant legal test, see the Court of Appeal's decision in *R (Weaver) v London and Quadrant Housing Trust* [2010] 1 WLR 363 (issue 59).
- (ii) The next step is to address whether a dwelling is a person's 'home' for the purposes of Article 8 of the European Convention on Human Rights. If it is not, Article 8 is irrelevant. The Convention applies its own test for this purpose and is not bound by any categorisation under domestic law. What is relevant under the Convention is the nature and degree of the ties between the individual and the dwelling (*Gillow v UK* (1986) 11 EHRR 335). In many cases, the test will be met because the cases often concern individuals who have lived in a particular dwelling for an appreciable period of time. But in others this test will not be met. For example, it is very difficult to see how a recently-arrived squatter could claim that a dwelling is his/her 'home' for Article 8 purposes





- (iii) If a dwelling is a person's 'home', then eviction will interfere with the person's right to respect for that home under Article 8(1). While the Supreme Court held that it is for an occupier to raise an Article 8 defence, a social landlord should be prepared to justify eviction by showing that it is proportionate.
- (iv) It would be good practice for a landlord to identify the aim which it is seeking to achieve by eviction. Commonly, it will have one of two aims, either to remove a 'problem tenant' or household, or to empty a dwelling so that it can be occupied by persons considered more needy than the existing occupant. Both of these are 'legitimate aims' for the purposes of Article 8(2) of the Convention. However, landlords will not routinely be expected to prove that they are pursuing a legitimate aim. The Supreme Court was receptive to the argument that "to require the local authority routinely, from the outset, to plead and prove that the possession order sought is justified would, in the overwhelming majority of cases, be burdensome and futile". This is because it can generally be assumed that in seeking possession the authority is acting responsibly. Under this approach, if Article 8 is raised the courts will focus on whether the personal circumstances of the occupant render eviction disproportionate. One would not expect, for example, a court to require a landlord to prove, by reference to waiting list data, that it has a stock of families ready to occupy an under-occupied family-sized house.
- (v) A landlord should turn its mind to whether, in the light of what it knows about an occupant's personal circumstances, a court would be likely to find that it has relevant and sufficient reasons for the proposed interference with a particular occupant's right to respect for his/her home. The Supreme Court said that "in virtually every case where a residential occupier has no contractual or statutory protection, and the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate". So, a landlord has an advantage from the outset. However, there is no harm in a landlord bolstering a case that might not appear clear-cut, especially if an occupant's advisers have intimated that they intend to rely on an Article 8 defence and the occupant is particularly vulnerable, by pleading a case that, in the circumstances, there are relevant and sufficient reasons for the degree of interference with Article 8 rights that will be caused by eviction. It may, for example, draw attention to offers of alternative accommodation that have been rejected, that an occupant was given chances to improve behaviour, that a reasonable period of time was given for an occupant to secure accommodation on the open market and that assistance to do so was given such as housing benefit advice or an offer of help under a rent deposit scheme.

The Supreme Court, sitting as a nine judge panel, gave its decision in *Manchester City Council v Pinnock* on 3 November 2010: [2010] UKSC 45.

## RIGHT TO BUY

### Haringey LBC v Hines – RTB beneficiary should not have been found deceitful as she was not given the opportunity to rebut the allegation

It is a serious matter to accuse someone of dishonesty. A claimant cannot expect a court to take it upon itself to infer dishonesty. This means that preparation of a legal case that includes an allegation of dishonesty should address the need clearly to prove the allegation. That was what the local authority in this case failed to do as part of its unsuccessful attempt to unwind a Right to Buy transaction from 8 years ago.

#### What happened?

The sequence of events in this case was as follows:

- (i) In 2002, Ms H exercised the Right to Buy (RTB) in respect of a flat which she let from Haringey LBC. Haringey granted Ms H a long lease of the flat at a substantial discount.
- (ii) S.118(1) of the Housing Act 1985 (HA 85) confers the RTB upon a "secure tenant". In 2008, Haringey decided that, when the long lease was granted in 2002, Ms H was no longer a "secure tenant" and so she did not have the RTB. In order to be a secure tenant of a dwelling, a person must occupy it as his/her "only or principal home" (see the 'tenant condition' in s.81 of the HA 85). Haringey argued that, in 2002, the flat had ceased to be Ms H's only or principal home.
- (iii) Haringey LBC brought proceedings against Ms H in the County Court. That Court held that the flat was not Ms H's only or principal home by the end of the RTB process. She was not, therefore, a secure tenant and should not have been granted her discounted long leasehold (*London Borough of Sutton v Swann* (1985) 18 HLR 140). Despite that finding, Ms H's long lease was held not to be *ultra vires* (outwith the council's powers to grant) and void.
- (iv) The County Court, however, did allow Haringey's claim for damages of an amount equivalent to the £38,000 RTB discount granted to Ms H, plus interest. This was because the Court concluded that Ms H had deceitfully misrepresented to Haringey that she was still living in the flat at the end of the RTB process. The deceitful misrepresentation was said to have been Ms H accepting the RTB offer notice at a time when she knew she had permanently moved out of the flat. Ms H appealed to the Court of Appeal.

#### Why did the council fail to prove their allegation of deceit?

The Court of Appeal allowed Ms H's appeal. Haringey's difficulties arose from Ms H's cross-examination in the County Court. In order to prove

#### KEY POINTS

- A tenant should not have been entitled to complete a RTB transaction as the dwelling was no longer her only or principal home
- The County Court had been wrong to require her to pay damages for deceitful misrepresentation
- There was no point in the council seeking a declaration that the individual's long lease was void as others with an interest in that lease were not parties to the proceedings





their "narrowly pleased case in deceit", Haringey had to identify evidence on which the County Court could rationally conclude that, when Ms H accepted the RTB offer notice, she "(i) knew, as a matter of law, that the flat had to remain her 'only or principal home' throughout the 'right to buy' process; (ii) knew that by then it was not; and (iii) dishonestly intended her acceptance of Haringey's terms of 1 March 2002 to mislead Haringey about the change of position so that she could acquire an interest in the flat to which she by then had no right". Haringey's counsel, however, failed to structure his cross-examination by reference to those essential elements of the deceit case against Ms H.

A "striking feature" was that counsel did not put a direct allegation of dishonesty to Ms H. As a result, the County Court did not have a satisfactory evidential basis for its "somewhat obscure judgment" that Haringey had proved deceitful misrepresentation. Its decision was set aside. The Court of Appeal also stressed the "basic principle of fairness that if a party is being accused of fraud, and is then called as a witness, the particular fraud alleged should be put specifically to that party so that he/she may answer it". Ms H was not given this opportunity.

### Haringey's failed attempts to render Ms H's long lease ineffective

Before the Court of Appeal, Haringey had a number of alternative arguments. All of these tried in various ways to persuade the Court that, due to Ms H not having met the relevant statutory conditions when the RTB transaction was completed, the disposal to her was legally ineffective. All of Haringey's arguments were rejected by the Court of Appeal, but there were interesting points because they illustrate the practical difficulties in trying to unwind a RTB disposal many years after the event:

- (i) Haringey argued that the County Court should have found the long lease void. The Court of Appeal said that a "declaration of voidness would be a worthless exercise". It could provide Haringey with no benefit unless the Court also rectified the registered leasehold title of the flat to extinguish Ms H's lease. That would affect the interests of two companies with registered charges in respect of Ms H's interest as well as a current tenant of the flat. None of these individuals had been joined as parties to the proceedings. Rectification of the registered title was not therefore open to the Court. This rendered pointless Haringey's arguments for a declaration of voidness.
- (ii) Haringey also argued that the Court of Appeal should make a declaration of voidness but leave the lease and registered charges intact. The Court said that this would be "most unjust" because it "would be quite likely to raise questions as to the soundness of the title to the lease and charges, which would be a likely recipe for unwarranted trouble in the future".
- (iii) The Court of Appeal also rejected criticisms of the County Court's refusal to rescind the long lease. It said that "there is no point in this court making an order to the effect that the lease must be regarded as rescinded if it is not going to make any consequential rectification orders".

The Court of Appeal gave its decision in *London Borough of Haringey v Hines* on 20 October 2010: [2010] EWCA Civ 1111. The Court was comprised of Pill and Rimer LJ and Peter Smith J.

## EMPLOYEES

### Threlfall v Hull City Council – the need for heavy duty gloves for garden clearance work

Cut-resistant gloves are likely to become standard issue for housing maintenance staff engaged on garden clearance work as a result of this decision.

An employee of Hull City Council was part of a team clearing council house gardens. The work included removing bin bags the contents of which were obviously hidden from view. The workers were provided with ordinary gardening gloves rather than more expensive cut-resistant gloves. The claimant picked up a bag with a sharp item inside. It penetrated his glove and severed an artery in his finger. He brought a claim for damages against the council but it was rejected before the County Court.

The claimant brought a successful appeal to the Court of Appeal. The Court held that the council had breached the Personal Protective Equipment at Work Regulations 1992 and, as a result, were liable to compensate the claimant for his injuries. The council carried out a risk assessment to determine whether suitable protective equipment had been provided but this was "manifestly defective" because it failed to identify a risk of laceration from hidden sharp objects. That assessment failure led to the council failing to comply with its substantive obligation under reg. 4 of the 1992 Regulations 'to ensure that "suitable personal protective equipment is provided to employees who may be exposed to a risk to their health or safety while at work". It had not appreciated the risk of hidden sharp objects so had not provided heavy duty gloves to meet that risk.

The Court of Appeal gave its decision in *Threlfall v Hull City Council* on 20 October 2010: [2010] EWCA Civ 1147. The Court was comprised of Ward, Smith and Jackson LJ.

## ANTI-SOCIAL BEHAVIOUR

### New Judicial Studies Board guidance on ASBO applications

The Judicial Studies Board have updated their ASBO guidance to reflect recent legislative and case law developments in relation to ASBOs. The JSB guidance is useful both for ASBO applicants and those advising defendants because it would take a bold Magistrates' Court to depart from its recommendation. The main new points in the updated guidance are:





- (i) analysis of the Magistrates' Courts new case management powers in relation to ASBO applications;
- (ii) recent case law that ASBO prohibitions should be "clear, unambiguous and reasonable". A prohibition which requires a person "not to behave in any way causing or likely to cause harassment, alarm or distress to any person" contravenes the ruling in *CPS -v- T [2006] EWHC 629 (Admin)* as it merely restates offences in the Public Order Act 1986;
- (iii) analysis of when an indefinite ASBO, or prohibitions of very long duration, may be called for. In *R v Ball [2010] EWCA Crim 1740* the Court of Appeal held that a 10 year prohibition on using trains was too long in response to drunken railway violence and reduced it to 3 years. By contrast, in *R v Avery and others [2009] EWCA (Crim) 2670* an indefinite prohibition on taking part in animal rights demonstrations was upheld. This case was in a "different category" because the individuals concerned had pursued a deliberate course of conduct and shown no remorse. This indicated a high risk of repeat offending.
- (iv) *R v Avery and others [2009] EWCA (Crim) 2670* may be in error. It concerned an 'on conviction' ASBO that said it came into force on the day of the defendant's release from prison. The JSB guidance, casting doubt on the correctness of this, states that "whilst under section 1C(5) of the [Crime and Disorder Act 1998] it is possible to delay the application of any or all of the prohibitions in the order until the offender's release, the term of the order must start on the day the order is made".
- (v) discussion of whether behaviour which occurs after the ASBO complaint (in effect, the ASBO application) is relevant when a Magistrates' Court is decided whether the statutory test for making an ASBO is met.
- (vi) discussion of the burden of proof in breach proceedings in the light of *R v Charles [2009] EWCA 1570*. The guidance says that "whereas a defendant who asserts that he has a reasonable excuse for failing to comply with the terms of an ASBO bears an evidential burden, the burden of proof rests on the prosecution. The issue as to whether a reasonable excuse exists is for the magistrates or for the jury but the prosecution must prove to the criminal standard that the defendant had no reasonable excuse."
- (vii) analysis of recent case law on a court's power to vary, including extend, an ASBO. It points out that under *James v Birmingham City Council [2010] EWHC 282 (Admin)* (see issue 64) proof of further anti-social acts is not a pre-condition to extending the term of an ASBO. It also discusses the law requiring presence of a defendant at a variation hearing in the light of *R (M) v Burnley, Pendle and Rossendale Magistrates' Court [2009] EWHC 2874 (Admin)* (see issue 62);
- (viii) the Crown Court has a "broad discretion" when faced with an application to extend the time for appealing against a Magistrates' Court's ASBO decision;
- (ix) discussion of the requirements for procedural fairness where a criminal court is considering of its own volition making an 'on conviction' ASBO (*R (McGarrett) v Kingston Crown Court [2009] EWHC 1776 (Admin)*).

[www.judiciary.gov.uk/publications-and-reports/jsb-publications/anti-social-behaviour-orders-ASBOs](http://www.judiciary.gov.uk/publications-and-reports/jsb-publications/anti-social-behaviour-orders-ASBOs) - the Judicial Studies Board's ASBO guidance is available here.

## Extended availability of drinking banning orders

A commencement order under the Violent Crime Reduction Act 2006 has extended the local justice areas in which 'on conviction' drinking banning orders may be made. These are the second group of areas in which drinking banning orders may be made on conviction. In this respect, on conviction orders are lagging behind the commencement of the 2006 Act provisions about the making of orders on application or in county court (such as possession) proceedings, the legislation for which came into force throughout England and Wales on 31 August 2009 (see Statutory Instrument 2009/1840).

The initial group of areas were specified in Statutory Instrument 2010/469 which came into force on 1 April 2010 and is available at [www.legislation.gov.uk/uksi/2010/469/made](http://www.legislation.gov.uk/uksi/2010/469/made). The recently specified additional areas are contained in Statutory Instrument 2010/2541 which came into force on 1 November 2010 and is available at [www.legislation.gov.uk/uksi/2010/2541/made](http://www.legislation.gov.uk/uksi/2010/2541/made).

## POLICY & PRACTICE

### Guidance on decanting residents

The Chartered Institute of Housing (CIH) have issued best practice guidance to social housing providers about 'decanting' residents, that is removing them from their homes in order for works to be carried out. The main points made by the guidance are:

- (i) a landlord should have a decanting policy in place;
- (ii) emphasizing the emotional effects of decanting, the guidance recommends effective consultation with residents about the decanting process and regular information updates while residents are decanted;
- (iii) circumstances in which decanting is called for (i.e. where, due to the nature of works or residents, or a combination of both, works should not be carried out with residents in-situ);





(iv) an explanation of providers' legal obligations to make home loss payments to decanted residents (although the guidance does not deal with compulsory decanting).

[www.cih.org/housingpractice/HousingPractice-issue11.pdf](http://www.cih.org/housingpractice/HousingPractice-issue11.pdf) - the guidance is available here.

## HOMELESSNESS

### DISABILITY DISCRIMINATION

#### **Pieretti v Enfield LBC – general disability equality duty applies to the carrying out of functions under the homelessness legislation**

This case reminds councils to take the needs of disabled persons seriously when they are carrying out their functions under the homelessness legislation (contained in Part 7 of the Housing Act 1996). The Court of Appeal's decision effectively imposes a new investigative obligation on councils where there is a real possibility that an applicant is disabled. It also stresses the need for councils to be sensitive to the nature of a person's disability when making the decisions that have to be made in order to determine whether the person is entitled to accommodation under the homelessness legislation.

#### **What happened in this case?**

The relevant events in this case were as follows:

- (i) A retired couple rented a private sector dwelling under an assured shorthold tenancy (AST).
- (ii) Their landlord evicted them using the no-fault method of recovering possession of a dwelling let under an AST. However, there was a background dispute. The couple had withheld rent (although ultimately they did pay) and the landlord said that this was why she evicted. For their part, the couple said that had been concerned about their deposit and that, once their concerns had been met, they paid their rent in full.
- (iii) The couple applied to Enfield LBC for assistance (accommodation) under the homelessness legislation. The key issue was whether the couple were "intentionally homeless". The council accepted that, if they were not, they would be owed the main housing duty under s.193 of the Housing Act 1996 (HA 96) and be entitled to permanent accommodation. This was because the council decided that, due to the couples' age and medical condition, they were in priority need.
- (iv) A caseworker decided initially that the couple were intentionally homeless under s.191 of the HA 96, and so were not entitled to permanent accommodation, because the couple had done something (withhold rent) which led to them ceasing to occupy accommodation which it had been reasonable for them to occupy. That act could not be ignored as non-deliberate. S.191(2) provides that an act is not to be considered deliberate if it is done in good faith and in ignorance of some relevant fact. However, the caseworker concluded that the couple could not take advantage of s.191(2).
- (v) It is relevant at this point to identify the information that the council had about the couple's medical condition. Their application forms stated that the man suffered from depression "on and off" and the woman had chronic arthritis. One form also stated that the couple considered themselves to be disabled. In response to standard enquiries, their GP said that both of them had a history of chronic depression.
- (vi) The initial caseworker decision was upheld on internal review. The couple appealed to the County Court on the ground that the council's decision involved an error of law, but the appeal failed. The couple brought a further appeal to the Court of Appeal. The key issue before that Court was whether the review decision involved an error of law due for its failure to comply with what is commonly referred to as the general disability equality duty under s.49A of the Disability Discrimination Act 1995 (DDA 95).

#### **KEY POINTS**

- The general disability equality duty requires a council to make further inquiries where the evidence discloses a real possibility that an applicant is disabled
- The duty also requires a council to take into account a person's disability when making decisions under the homelessness legislation
- On a homelessness appeal, it is not for the County Court to decide afresh whether a person is disabled
- A council is entitled, when deciding if a person is intentionally homeless, to consider why a landlord evicted a tenant using the 'no fault' Assured Shorthold Tenancy ground for possession

#### **The general disability equality duty – what does the legislation say?**

Many authorities have found compliance with the duty challenging, often because they have failed to recognise its far-reaching nature. The duty requires a public authority, in carrying out its functions, to have "due regard" to a range of "needs", which are as follows:

- (a) the need to eliminate discrimination that is unlawful under the DDA 95;
- (b) the need to eliminate harassment of disabled persons that is related to their disabilities;
- (c) the need to promote equality of opportunity between disabled persons and other persons;





- (d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons. The present case focussed on this element of the duty. In the present case, the Court of Appeal found it difficult to understand. For ease of comprehension, the Court said that it should be read as if it simply required a public body to take "due steps to take account of disabled persons' disabilities";
- (e) the need to promote positive attitudes towards disabled persons; and
- (f) the need to encourage participation by disabled persons in public life.

For the purposes of the general duty, the DDA's technical definition of 'disabled person' applies. Generally, this means that a person is disabled if s/he "has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities" (s.1 DDA 95).

### The general disability equality duty – the key case law

The general disability equality duty has been the subject of extensive litigation over recent years. The following propositions can be derived from the case law:

- (i) The duties apply to the carrying out of all of a public authority's functions: *R (Brown) v Secretary of State for Work & Pensions* [2008] EWHC 3158 (Admin). Therefore, the Court of Appeal in the present case held that the duty does apply where a housing authority is making decisions involving the exercise of judgment, such as whether a person is intentionally homeless, under the homelessness legislation.
- (ii) What does it mean for a public authority to have "due" regard to the needs set out in the general duties. The legislation requires *due* regard and, as was said in *R (Meany, Glynn & Saunders) v Harlow DC* [2009] EWHC 559, "the word 'due' must add something". It is not the same thing as simply having regard. So, what does it mean? In *Brown* the High Court said that 'due regard' means "the regard that is appropriate in all the particular circumstances in which the public authority concerned is carrying out its function as a public authority". So, where the exercise of a function has, or is likely to have, a significant impact on a disabled person, the courts will expect a more in-depth consideration to be given to its effect on the 'needs' or goals set out in the general equality duties.
- (iii) The same approach to the meaning of 'due' can be applied to the Court of Appeal's reformulation in the present case of the 'taking account of disabilities' element of the duty. In other words, the reformulated requirement for an authority to take due steps to take account of disabled persons' disabilities is a requirement to take such steps as are appropriate in the particular circumstances. It is suggested that this requires the decision maker to focus on the nature and consequences of a particular person's disability.
- (iv) Importantly, the general equality duties do not require public authorities to achieve the objectives (the 'needs') set out in s.49A of the DDA 95. In *R (Baker) v the Secretary of State for Communities and Local Government* [2008] EWCA Civ 141 (a race duty case) the Court of Appeal said that "it is important to emphasise that the...duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to *have due regard to the need* to achieve these goals. The distinction is vital".
- (v) It follows, therefore, that the general equality duties do not prevent a public authority from acting in a way which does, or might, impede fulfilment of the 'needs'. This is an important point to appreciate where discretionary powers, in particular, are being exercised. What is important is that the authority is transparent about the effect of its proposed decision, that it is aware of the potentially adverse impact and that it has a rational basis for deciding to proceed with the decision despite that impact.
- (vi) A public authority does not have to refer in terms to the general equality duties in the record it makes of its decisions: see *Baker*. However, it is clearly sensible, especially in the case of strategic decisions such as service reorganisation, expressly to refer to the duties. Otherwise, it will be difficult for a public authority to show that it has discharged the duties "in substance, with rigour and with an open mind" (see *Brown*).

### Issue 1 – Do the general disability equality duties apply when a council is making decisions under the homelessness legislation?

Turning now to the rulings of the Court of Appeal in the present case, the first issue was whether the general disability duties apply at all when a housing authority is making decisions about the application of the homelessness legislation to an individual's circumstances. As mentioned above, the Court of Appeal held that the duties do apply and rejected the proposition that the duties only apply to the "general formulation of policy".

### Issue 2 – how proactive should authorities be in identifying whether an applicant is disabled?

The context to this aspect of the case was the Court of Appeal's decision in *Cramp v. Hastings BC* [2005] EWCA Civ 1005. *Cramp* was about whether a homelessness review officer is required to investigate potentially relevant matters that have not been raised directly by an applicant. The Court said that, in such cases, the reviewer is only required to investigate if the need to do so is "obvious".

In the present case, the Court of Appeal decided that *Cramp* required modification to ensure compliance with the general disability equality duty, in particular that aspect of it which requires due steps to be taken to take account of disabled persons' disabilities. The Court held that an official (initial case worker or reviewer) must make further inquiries where the evidence discloses a real possibility that the applicant is disabled. This is how the Court of Appeal described the point in relation to the facts of this case:





"35...did [the review officer] fail to make further inquiry in relation to some such feature of the evidence presented to her as raised a real possibility that the appellant was disabled in a sense relevant to whether he acted "deliberately" within the meaning of subsection (1) of s.191 of the Act of 1996 and, in particular, to whether he acted "in good faith" within the meaning of subsection (2) thereof?"

The evidence in this case, in particular the GP evidence, did raise that real possibility. The review officer therefore acted unlawfully by failing to make further inquiries into whether the claimants' were 'disabled' for DDA 95 purposes and, if so, what effect that had on the question of whether their homelessness was intentional.

### Issue 3 – what effect do the disability equality duties have on the way that homelessness decisions are made?

It seems that the Court of Appeal considered that the disability equality duties impose two distinct requirements upon those operating the homelessness legislation. First, a heightened investigative obligation as just discussed and, second, a more substantive obligation which requires disability-related considerations to be factored into substantive homelessness decision making. This second requirement can be discerned from the following passage in the Court of Appeal's judgment:

"26...The part of it with which we are concerned is designed to secure the brighter illumination of a person's disability so that, to the extent that it bears upon his rights under other laws, it attracts a full appraisal."

Flowing from that, the Court noted odd features of the applicants' history of withholding rent. Those should have been explored in the light of a clearer understanding of the applicants' mental health. They were not. Accordingly, in deciding that the applicants were intentionally homeless, the council had not discharged its duty to take due steps to take account of their disability. It had therefore failed to discharge its obligations under s.49A of the DDA 95. The council's decision was quashed (but reconsideration not ordered because in the meantime the applicants had secured their own accommodation).

### Practical implications of the decision

Under the homelessness legislation, the journey from application to final decision involves the carrying out of a number of decision-making functions. If challenged, decision makers need to be able to show that they had regard to the needs set out in s.49A of the DDA 95 and that, in relation to the aspect of s.49A with which this case was concerned, they discharged their duty to take due steps to take account of a person's disability. As we saw above, this imposes a general heightened investigate obligation. It also operates when the decisions themselves are being taken but the role it plays will vary from case to case and decision to decision. For example:

- (i) Where the question is whether a person is homeless because his/her current accommodation is not accommodation in which it is reasonable to expect him/her to reside, the need to take due steps to take account of disability will often be relevant. It may suggest that a person's accommodation is unsuitable simply because of his/her disability.
- (ii) When considering if an act is deliberate for the purposes of the intentional homelessness test, the need to take due steps to take account of disability will often be relevant, particularly in mental health cases. It may prompt a decision maker to realise that an act should not be considered deliberate because of the effect of poor mental health on the mental processes that motivated the act. So, in the present case, it seems that the applicants' depressive illnesses may have led to them becoming over-anxious and confused about the return of their deposit. Assuming that they were in fact disabled for the purposes of the DDA 95, that factor should have been addressed in deciding whether the act of withholding rent was to be considered deliberate, i.e. whether it was to be ignored on the basis that it was done in good faith and in ignorance of some relevant fact.
- (iii) When considering what accommodation would be suitable for a person whom an authority is obliged to accommodate, the need to take due steps to take account of disability will always be relevant. Another relevant aspect of the duties will often be the need to encourage participation by disabled persons in public life. An authority should aim to show that its accommodation decisions take account of the increased risk of social isolation that is associated with disability.

This all appears complex and it is certainly not simple because decision makers need to be alive to the fact that each disabled person is different and so the affect of the general duties will vary from case to case. However, it should be noted that an identifiable theme of the case law is that the courts do not use the general equality duties to trip up public authorities. If an authority is conscientiously and genuinely trying to ensure that its decisions take into account the particular difficulties faced by disabled persons, the courts will be slow to find a breach of the general disability equality duties.

It should also be noted that there are some decisions in relation to which the general disability equality duty cannot possibly be relevant in the sense that the 'needs' set out in the general disability equality duty cannot possibly have any bearing on the decision in question. For example, if the question of whether or not an applicant is statutorily homeless depends solely on an analysis of the nature of his/her rights to occupy a dwelling, that is not a question on which the general disability duty is likely to have anything meaningful to say.

It follows from the Court of Appeal's decision that the general race and sex equality duties also apply when councils are taking decisions under the homelessness legislation. Similarly, when those duties are combined in a single equality duty upon the commencement of s.149 of the Equality Act 2010 that duty will also apply when decisions are being made under the homelessness legislation.

### Other points

- (i) The Court of Appeal confirmed that if a landlord of a dwelling let under an AST evicts tenants using the 'no fault' procedure, a local





authority is entitled to take into account the landlord's reasons for evicting, such as non-payment of rent, in deciding whether the ex-tenant is intentionally homeless.

- (ii) When this case was in the County Court, the judge decided for himself that neither the man nor the woman were disabled. The judge should not have done so. The County Court's statutory role on a homelessness appeal is to consider whether a council's decision involves an error of law. Accordingly, the County Court judge should have restricted his analysis to whether the council's decision involved an error of law. He should not have purported to make fresh findings of fact.
- (iii) In any event, the County Court judge's decision that the applicants were not disabled was itself flawed. The judge relied on the evidence as to the activities which the couple were able to perform. However, as the Court of Appeal pointed out, "it is dangerous to assess whether a person is disabled by reference to what he is *able* to do without consideration of what he may be *unable* to do". This is because the statutory definition considers the extent of a person's impairments.

The Court of Appeal gave its decision in *Pieretti v London Borough of Enfield* on 12 October 2010: [2010] EWCA Civ 1104. The Court was comprised of Mummery, Longmore and Wilson LJ.

## PROCESS

### **R (Khazai & Others) v Birmingham CC – council acted unlawfully by deciding not to accept certain applications for homelessness assistance**

This case concerned a topic which frequently generates litigation before the higher courts, Birmingham council's homelessness service. The High Court held that the council had acted unlawfully by instructing its caseworkers not to take applications from certain types of applicant.

#### The background

A senior housing official e-mailed housing officers saying that, if they received an application for homelessness assistance from a single person, the applicant was to be referred to "the appropriate funded support service" and "we should not be completing a homeless application". Applicants for homelessness assistance challenged the legality of this instruction before the High Court.

#### KEY POINTS

- A council cannot decide to refuse to take applications for assistance under the homelessness legislation
- But the council's actions did not give rise to a right to claim damages because they did not amount to misfeasance in a public office
- A blanket policy of making a final decision under the homelessness legislation on the day an application is made would be unlawful

#### Issue 1 – was the instruction not to take homelessness applications unlawful?

As the High Court held, this instruction was clearly unlawful. The law requires applications for homelessness assistance to be considered. Any system of social welfare rights the operation of which requires an application to be made is rendered pointless by a failure even to consider applications. In addition, a refusal to consider applications means that a council will not be in a position to comply with its obligation to provide interim accommodation for the most apparently needy individuals pending a final decision on their application (s.188 Housing Act 1996). These are the individuals whom an authority simply "have reason to believe" to be (i) homeless; and (ii) eligible for assistance (i.e. not ineligible on immigration grounds); and (iii) have a priority need for housing (under s.189 of the 1996 Act), for example due to vulnerability or being responsible for a dependent child.

In fact, once doubts had been expressed by housing lawyers, the council conceded that the e-mailed instruction was unlawful and it was retracted.

#### Issue 2 – was the instruction not to take applications misfeasance in public office?

The e-mail's retraction was not the end of the legal fall-out for the council. Some individuals who were wrongfully denied interim accommodation prior to withdrawal of the e-mail sought damages. They took a relatively unusual legal route, arguing that the sender of the e-mail was guilty of the civil wrong of misfeasance in public office. While the case report does not explain why this type of legal challenge was made, the reason is likely to have been as follows:

- (i) The homelessness legislation does not contain any right to claim damages for a council's failure to comply with the obligations imposed on it by the legislation.
- (ii) A standard negligence claim is also precluded. *O'Rourke v Camden LBC* [1998] AC 188 holds that a housing authority does not owe an applicant a legally-recognised duty of care when making decisions under the homelessness legislation. Without such a duty of care, a claim for damages in negligence is legally impossible.
- (iii) Further, a failure to secure accommodation in breach of the homelessness legislation does not give rise to any right to damages under the Human Rights Act 1998 (*Morris v London Borough of Newham* [2002] EWHC 1262 (Admin)).
- (iv) This leaves the possibility of a claim of misfeasance in public office. These claims are difficult to prove. As well as showing that a public





body acted unlawfully, it must be proven that the decision maker knew that they were acting unlawfully or had a "state of mind of reckless indifference to the illegality of his act" (*Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1).

In the present case, the High Court said that the circumstances in which a misfeasance claim might successfully be brought were likely to be "extremely limited". And so it proved in this case. The Court held that the claimants had not proven that the sender of the e-mail knew he was acting unlawfully or was recklessly indifferent as to whether or not it was illegal. The Court was unable to conclude that the official did not have an honest belief that he was acting lawfully and accepted his witness box testimony that (i) he acted on his own initiative without asking anyone such as a lawyer to check the legality of the instruction in the e-mail and (ii) his intention had always been for support service referrals to proceed in parallel with formal consideration of an application under the homelessness legislation. In effect, it was a case of incompetence rather than anything more sinister.

### Issue 3 – did the council adopt an unlawful 'same day' policy to making decisions on homelessness applications?

The claimants also argued that Birmingham council had a policy of determining homelessness applications (and thereby the question of whether someone was entitled to interim accommodation) on the same day that an application for help was made. The High Court said that, if true, this was clearly unlawful because "how long and how extensive the enquiries may be will, of course, depend on the circumstances of each case". However, the Court held that the council did not in fact have such a policy. Its 'Homeless on the Day' policy certainly urged rapid consideration of applications, an approach that might invite error, but it did not embed an inevitably unlawful method of determining homelessness applications.

### The outcome of the cases before the High Court

**Case 1 – Mirghani.** A man was granted indefinite leave to remain in the UK and so had to move out of his National Asylum Support Service-funded accommodation. He had post-traumatic stress disorder, depression, back and bowel problems. The man sought accommodation under the homelessness legislation. Having been rebuffed on a number of occasions (his application was not taken), a caseworker assessed and determined his application in a single day. The conclusion was that he was not owed the main housing duty because he did not have a priority need on account of vulnerability. As the application was determined in a single day, the person was not offered interim accommodation pending determination of the application.

**Case 2 – Azizi.** This was also a former asylum seeker who was granted indefinite leave to remain. He suffered from chronic back pain. Again, his application was determined (rejected) on the same day that it was accepted.

The High Court declared that both individuals; applications had not been considered in accordance with the law. Final decisions should not have been made 'on the day'. Further enquiries should have been made and, in the meantime, it seems that the Court considered that interim accommodation should have been provided on the basis of apparent priority need. However, the Court did stress that, normally, a decision that a person is not owed the main housing duty should be challenged using the Housing Act 1996's specific mechanisms for challenging homelessness decisions, rather than by way of a claim for judicial review before the High Court. What justified the claim, and the declaration of illegality, was that this case took place against a backdrop of other significant criticism by the High Court of Birmingham council's homelessness service.

The High Court (Foskett J) gave its decision in *R (Khazai, Ibrahim, Azizi and Mirghani) v Birmingham City Council* on 15 October 2010: [2010] EWHC 2576 (Admin).

### Makisi v Birmingham CC – Court of Appeal to consider whether reviews may be conducted by telephone

Birmingham council accepted that a woman with three young children was owed the main housing duty under the homelessness legislation. They offered her accommodation but she did not agree that it was suitable. The resultant dispute raised two issues for the Court of Appeal.

**Issue 1 – conducting homelessness reviews by telephone.** The first issue concerns the carrying out of statutory reviews of initial (or caseworker) decisions under the homelessness legislation. Under the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999, in certain cases the applicant is entitled to make oral representations to the reviewer. The issue in this case was whether it is sufficient to allow a person to make representations by telephone. The Court of Appeal has granted permission to the applicant to appeal so that the full Court may consider the point.

**Issue 2 – the distance from home to school.** One of the applicant's three children, aged 6, attended a special school. The 3 bedroom property offered to the applicant was located some miles from the school. For that reason, the applicant claimed that the property was unsuitable and so rejected it (that rejection meaning the council were no longer obliged to secure permanent accommodation for her). An internal review decided that the property was suitable and a further appeal to the County Court was rejected. The applicant tried to persuade the Court of Appeal to allow her to bring a further challenge. The Court refused to do so. It rejected the argument that the review officer had not taken into account the applicant's difficulty in transporting her autistic child, together with two younger children, to and from school on public transport. On a fair reading of the decision letter, these matters were taken into account.

The Court of Appeal (Maurice Kay LJ) gave its decision in *Makisi v Birmingham City Council* on 22 September 2010: [2010] EWCA Civ 1195.





## HOUSING & OTHER BENEFITS

### HOUSING BENEFIT

#### Maladministration due to council's incorrect advice about LHA rates (£1,150 compensation)

If a public authority takes it upon itself to provide specific advice upon which a person intends to act, it should take reasonable steps to ensure the correctness of that advice. That is the message from this case.

Newham LBC provided Mrs T with assistance under their bond guarantee scheme, although the private sector flat to which she wanted to move was in Redbridge, rather than Newham. Mrs T planned for her rent to be met by housing benefit. Mrs T sought and was given advice by Newham housing officials as to the relevant Local Housing Allowance (LHA) amounts for Redbridge. That amount was then written into Mrs T's 12 month tenancy agreement as her contractual rent.

Mrs T moved in and made a housing benefit claim to Redbridge LBC. It then became clear that Newham had quoted Mrs T LHA rates for the wrong area, Waltham Forest, rather than Redbridge. As a result, her housing benefit was about £17 per week less than her contractual rent. She got into rent arrears.

Newham council accepted their mistake. As recompense, Newham said that, if Mrs T wanted to move, she could again use their bond scheme. But they refused to make up the shortfall in Mrs T's housing benefit. Mrs T complained to the Local Government Ombudsman (LGO). Her complaint was upheld.

The LGO rejected the council's argument that their advice was 'information only'. Mrs T sought specific advice and it "was the Council's responsibility to give accurate advice". The LGO also decided that to expect Mrs T to move to alternative accommodation was unreasonable. Instead, the council should make up the housing benefit shortfall throughout her 12 month tenancy (around £900) and also pay her £250 compensation for time, trouble and anxiety. The LGO also offered the following advice, which can be considered as of general application:

"I recommend that the Council reminds all of its officers tasked with giving advice regarding LHA of the potential implications on people's lives of getting the advice wrong and to check the exact location of properties as well as the commensurate rates on the Valuation Office Agency's LHA Direct website regularly as they are subject to change".

One of the Local Government Ombudsmen for England (Tony Redmond) gave his decision on complaint no. 09 003 325) on 9 November 2010 (Newham London Borough Council).

#### Bradford MDC v MR – claimant entitled to housing benefit for property that she once owned because, at the sale date, she was occupying it despite not sleeping there

This decision will make it more difficult for local authorities to deny housing benefit to a person who is a tenant, under a 'sale and leaseback' arrangement, of a property that they used to own (i.e. a person who sold their home having found it difficult to meet mortgage repayment commitments). It concerns cases with a particular complication which is that they involve individuals who were not living at a property when the sale took place. Contrary to the practice of some authorities, that is not necessarily fatal to the housing benefit claim. What matters is whether a person was occupying the property at the time of sale and that test may be met by a person even if s/he was not living and sleeping at the property at that time.

##### What was the issue?

A homeowner rented out her home but the tenant failed to pay the rent. The homeowner got into mortgage arrears. The mortgage company secured an order for possession and the tenant moved out. The mortgage company was on the verge of obtaining a warrant to execute its possession order (i.e. take physical possession of the property) when the homeowner sold her home to a 'sale and leaseback' company that specialised in buying properties from homeowners in mortgage arrears.

2 weeks after the sale, the individual moved back in as a tenant of the company and started sleeping in the dwelling. She claimed housing benefit in respect of the rent. The key legal issue on the claim was whether it was barred by regulation 9(1)(h) of the Housing Benefit Regulations 2006. This contains a general rule that prohibits an individual from receiving housing benefit for a dwelling that s/he has owned within the 5 years preceding the date of claim. This claimant was clearly caught by the general rule. However, the general rule does not apply if a claimant satisfies a local authority or (on appeal) the First-tier Tribunal (FtT) that s/he could not have continued to occupy the property without relinquishing ownership.

##### Why was housing benefit awarded?

On appeal, the FtT held that the exception to the general rule applied so that the claimant was entitled to housing benefit. That decision was upheld by the Upper Tribunal.

There was a case law obstacle in the claimant's housing benefit path. This provides that, in order for the exception to apply, a claimant must





have been occupying a dwelling when ownership was relinquished (Upper Tribunal decision [2009] UKUT 60 (AAC)). In this case, however, the FtT was entitled to conclude that the claimant was occupying the property when she relinquished ownership. She might not have been sleeping there but she had moved all her belongings in. That was sufficient to show occupation. The claimant also met the other conditions of the exception because, according to the Upper Tribunal, "plainly she could not continue in occupation without relinquishing ownership, as the mortgagee were applying for a warrant for possession and she had no means of paying them sufficient to stave off its execution or saving her property from being sold by the mortgagee".

### Relevance of the decision for other 'sale and leaseback' tenants

Interestingly, the Upper Tribunal also commented that in more standard sale and leaseback arrangements, a person's relatively brief absence from the home while arrangements are being sorted out should not act as a bar to housing benefit. This is what the Upper Tribunal judge said on the point:

"For example, if a mortgagee with a warrant of possession had in fact evicted the claimant before the sale and leaseback could be arranged, so that she was not in occupation for a few days or weeks, I see no reason why the word "continued" in the proviso to regulation 9(1)(h) should not still apply to her.

The Upper Tribunal (Judge Mark) gave its decision in *Bradford MDC v MR* on 25 August 2010: [2010] UKUT 315 (AAC)

### Wirral MBC v AL – little point in a landlord bringing a tribunal challenge to a local authority's decision to pay benefit direct to a claimant

Many landlords are concerned about the limited opportunity for housing benefit, in the form of Local Housing Allowance (LHA), to be paid direct to them. Those concerns will be heightened by this decision. The Upper Tribunal found that, even if an authority mistakenly pays benefit to a tenant who absconds with the money, the landlord cannot require the authority to make a fresh payment of benefit.

#### Why did the landlord challenge the decision to pay benefit direct to the claimant?

A local authority paid housing benefit, in the form of LHA, direct to a claimant. The authority did this because they decided that, under regulation 96 of the Housing Benefit Regulations 2006, they could not pay the Allowance direct to the landlord. Regulation 96 provides that an authority may make payment direct to a landlord where it considers that a claimant is "likely to have difficulty in relation to the management of his financial affairs" or considers it "improbable that the claimant will pay his rent". But this authority decided that neither of those conditions were satisfied.

The tenant did not pass the Allowance on to his landlord. After 8 weeks' rent arrears accrued, the authority switched to paying the landlord direct. This was because regulation 95 then applied. This requires an authority to pay housing benefit direct to a landlord once a claimant has accrued 8 weeks' rent arrears.

The upshot was that the landlord lost 8 weeks' rent. The claimant had no funds so the landlord tried to recover the money from the local authority. To that end, the landlord appealed to the First-tier Tribunal (FtT) against the authority's decision to pay housing benefit direct to the claimant. The landlord was successful. The FtT decided that the local authority had the power to pay the Allowance direct to the landlord given the claimant's "chaotic and unsettled lifestyle". It went on to decide that the authority should have exercised that power. The FtT held that the landlord was entitled to be paid the housing benefit that had gone direct to the claimant and with which he had absconded. The authority appealed to the Upper Tribunal.

#### Why was the landlord's successful appeal of no benefit to him?

The Upper Tribunal allowed the appeal. Even if the FtT has jurisdiction to reconsider on appeal a local authority's decision to pay benefit direct to a claimant, such challenges are largely pointless. This is because of the offsetting rules in reg. 98 of the Housing Benefit Regulations 2006 which prevent an authority from effectively paying housing benefit twice for the same period (see Upper Tribunal case *R(H) 2/08*). In the Upper Tribunal's words:

"33... as the claimant's entitlement in this case remained the same amount throughout the period of nine weeks in issue and that has already been paid in full to the claimant himself, no more can (or could ever have) become payable to the landlord for those nine weeks by virtue of the first-tier decision revising that of the authority on appeal by holding that the same amount should have been paid to the landlord instead."

#### Is a change in the rules likely?

In this case, the Upper Tribunal judge questioned the wisdom of the current rules which restrict an authority's powers to pay housing benefit, in the form of a Local Housing Allowance, direct to a claimant. The judge suggested that "it would be a good idea if the Secretary of State were to review the current system and what the present provisions are seeking to achieve".

The Upper Tribunal (Judge Howell) gave its decision in *Wirral MBC v AL* on 20 July 2010: [2010] UKUT 254 (AAC).





## PLANNING & DEVELOPMENT

### PLANNING CONTROL

#### **Barchester Healthcare Ltd v Secretary of State – care home development amounted to residential development so as to be restricted under a Local Plan**

A Local Plan should not be interpreted in an overly technical manner. Instead, it should be construed in the light of its purpose. However, there is merit in framing Local Plans as specifically as possible rather than simply relying on a sensible interpretation at a later date. That can avoid the waste of resources involved, as in this case, in meeting arguments about the interpretation of vague Local Plans.

A landowner wanted to construct a 56-bed care home in a Kent village. But planning permission was refused. In so refusing, the planning authority had regard to Policy 10A of the Sevenoaks District Local Plan. Under the Plan, "residential development" in this village should be restricted to minor development, redevelopment and infilling. The Plan did not define "residential development".

The landowner appealed to a planning inspector. Before the inspector, argument revolved around definitions. The landowner argued that in the Local Plan "residential development" should mean the same thing as "dwelling houses" in the Town and Country Planning (Use Classes) Order 1987 (that Order identifies the classes of use within which a change of use does not require planning permission). This was because, under the Order, the proposed care home could not be a dwelling house. The inspector rejected this argument and decided that in the Local Plan "residential development" bore its normal meaning and that included constructing the care home. Accordingly, policy 10A of the Local Plan applied and was taken into account by the inspector in refusing planning permission.

The landowner applied to the High Court for a quashing order under s.288 of the Town and Country Planning Act 1990. The High Court dismissed the challenge. The landowner's case was based on an overly technical interpretation of the Local Plan's wording. On a "sensible analysis" it was clear that residential development included building a 56-bed care home. The inspector had therefore been right to apply policy 10A of the Local Plan.

The High Court (HHJ McKenna, sitting as a Deputy High Court judge) gave its decision in *Barchester Healthcare Limited v Secretary of State for Communities & Local Government and Sevenoaks District Council*: [2010] EWHC 2784 (Admin).

#### **Taunton Deane BC v Packman – injunction granted after 4 years of non-compliance with planning controls by Gypsy caravans**

A local planning authority applied for an injunction under s.187B of the Town & Country Planning Act 1990 to require Gypsy caravans to leave land in its area. The caravans had occupied the land without planning permission for at least four years. There was a long planning history. Previously, three planning inquiries had upheld various enforcement notices issued by the authority. A fresh application for planning permission was also submitted shortly before the injunction application was made.

The High Court considered the matter afresh, rather than simply decide whether the authority's decision to seek an injunction fell within the bounds of reasonableness (*South Bucks DC v Porter* [2003] UKHL 26, [2003] 2 AC 558). It decided to grant the injunction sought. This case contained many of the features which case law identifies as favouring the grant of an injunction, for example:

- (i) a history of flagrant and prolonged breach of planning controls involving a "continuous and persistent disobedience to the law";
- (ii) previous planning inquiries had given detailed consideration to the planning merits of the case, including whether temporary planning permission should be granted and the personal circumstances of the caravan dwellers and their children;
- (iii) the outstanding application for planning permission did not have a reasonable prospect of success. There did not appear to be any material change of circumstance;
- (iv) the caravan dwellers had been offered alternative pitches on a council-managed site;
- (v) nothing less than an injunction would lead to compliance with the planning controls applicable to the site.

The judge also added that "I would be prepared to contemplate committing the represented defendants to prison if required to do so" and commended the council for "endeavouring to secure compliance by means of these proceedings, rather than taking the step of forcible eviction".

The High Court (Sharp J) gave its decision in *Taunton Deane BC v Packman & Others* on 5 October 2010: [2010] EWHC 2437 (QB).





## **JR Cussons Et Son v Secretary of State – flawed analysis of the evidence about whether there was a functional need for an agricultural worker to live near cattle**

Elementary principles about the evidential support for decisions were not followed in this case. A planning inspector arrived at a finding on an area outside his expertise – cattle calving patterns – without there being any evidence to support the finding. In turn, this invalidated the inspector's planning judgements.

### **What were the issues?**

A farmer wanted to change the use of a building from an office/storage to a residential dwelling. It was intended to accommodate a stockman to oversee calving of a 50-head herd on the farmer's adjacent agricultural land.

The dwelling was in the area of the North York Moors National Park Authority. Their Local Development Framework provided that proposals for dwellings for agricultural workers in open countryside would be assessed against the criteria in Planning Policy Statement 7 on Sustainable Development in Rural Areas (PPS 7). The Authority decided that the farmer's proposal did not meet the requirements of PPS 7 and so refused planning permission. The farmer challenged the refusal before a planning inspector.

The inspector refused the appeal. By reference to the terms of PPS 7, there were two key issues:

- (i) First, whether there was a "functional need" for a stockman to live very close to the herd (in other words was this essential or could a stockman who lived in a nearby village do the job just as well). The inspector decided that there was not a functional need because a stockman would only have to stay overnight near the herd for a small proportion of the year, no more than 50 nights.
- (ii) The second issue only arose if there was a functional need as just described. It was whether the need could be met in some other way. The inspector held that there was another viable solution which was to use the office/storage as a temporary shelter.

### **Why was the inspector's decision quashed?**

The farmer applied under section 288 of the Town & Country Planning Act 1990 to quash the inspector's decision. The High Court granted the application and so a fresh planning inquiry will now be held. The Court held that the inspector's decision was flawed:

- (i) The decision relied on a finding that the cattle could be left unsupervised for most of the year. However, the farmer's expert evidence contradicted this. It was that calving normally took place over 7 months of the year but could extend to 9 months. As this evidence was unchallenged by the planning authority, the inspector had no evidential foundation for the crucial finding that the cattle could be unsupervised most of the year.
- (ii) The onset of calving is unpredictable in a non-artificially inseminated herd like this one. As a result, the Court held that the only rational conclusion open to the inspector was that there was a functional need for a stockman to be available at the site "most of the time".
- (iii) For similar reasons, the inspector's finding that the functional need could be met by using the office/storage as temporary shelter was also flawed. This solution may have been reasonable if a stockman was required to be present for only 50 nights a year. But, if overnight presence was required for a majority of the year, it was not a reasonable alternative method of meeting the functional need.
- (iv) A final point of note is that the High Court rejected the argument that the inspector's solution itself involved a change of use from office/storage to dwelling. The judge said "I do not think that the use of the appeal building for use by a stockman as a temporary shelter, including the cooking of a meal or the snatching of a few hours sleep, could arguably constitute use as a dwelling".

The High Court (HHJ Langan QC) gave its decision in *JR Cussons Et Son (a Firm) v Secretary of State for Communities and Local Government & North York Moors National Park Authority* on 15 October 2010: [2010] EWHC 2463 (Admin).

## **R (Munir) v Secretary of State – challenge to planning inspector should not be used as a means of airing a grievance against allegedly flawed planning officer advice**

A householder erected a building in his back garden. The local planning authority concluded that it was intended for use as a dwelling, rather than as an office/storage as the householder claimed. The authority issued an enforcement notice requiring the building's demolition. The householder appealed to a planning inspector but the appeal was rejected. He then sought permission from the High Court to challenge the Court's rejection.

The Court refused permission to appeal. The householder's real grievance was against a planning official whom he believed inaccurately advised him that he did not require planning permission. The challenge to the inspector's decision was therefore misconceived as it was only open to challenge if it involved an error of law (s.289 of the Town & Country Planning Act 1990). Any informal advice given by a planning officer could not possibly translate into an error of law in the inspector's decision. In the High Court's words:

"19...an appellant is not entitled by section 289 to bring before the court criticism and complaint relating to the observations of officers of a local planning authority in connection with the status of development which becomes, or has already become, the subject of enforcement action".





In any event, the High Court was satisfied that the inspector's conclusion on the key planning issue – whether the building was a separate dwelling-house – could not be criticised:

"21...The building, [the inspector] found, had the facilities required for day to day independent living. In finding that it did, the Inspector correctly applied the test recognised by the court in *Gravesham Borough Council v the Secretary of State for the Environment* [1982] 47 P&CR 142...The building was not, as the Inspector found, physically adapted to allow only workshop or office use."

The High Court (Lindblom J) gave its decision in *R (Munir) v Secretary of State for Communities and Local Government* on 7 October 2010: [2010] EWHC 2739 (Admin).

## THE PLANNING SYSTEM

### [Cala Homes \(South\) Ltd v Secretary of State](#) – central government currently have no power to revoke all regional strategies for England

New political administrations often act too hastily to give effect to their flagship policies, forgetting that speed of public action is often limited by the special legal framework that applies to public bodies. This is what happened in relation to the attempt to revoke all regional strategies for England. The Secretary of State failed to appreciate that a change in the law was required in order to permit him to revoke all regional strategies. He and his officials did not appreciate that the existing powers to revoke regional strategies could not be exercised to achieve the radical result of abolishing all regional strategies. In response, the Government have announced that they intend to include provision in the Localism Bill to abolish all regional strategies for England.

To turn to the facts, a developer owned 87 hectares of land in the Winchester area. The developer considered that, under that area's regional strategy, it had a good prospect of being granted planning permission for residential development. This is why it wanted to maintain the regional strategy. To that end, the developer claimed judicial review of the Secretary of State's decision to revoke all of England's regional strategies.

The High Court allowed the claim. The Secretary of State's decision to revoke all regional strategies was unlawful. This was despite the Secretary of State having an express power in section 79(6) of the Local Democracy, Economic Development and Construction Act 2009 to revoke a regional strategy. Given that, why did the Secretary of State act unlawfully?

A general principle of administrative law, the *Padfield* principle, requires a public body's discretionary powers to be exercised to promote the policy and objects of the legislation which created the powers (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997). The High Court concluded that revocation of all regional strategies conflicted with the policy of the 2009 Act that all regions of England (except London) should have a regional strategy. In the light of that policy, the power to revoke a strategy was only exercisable if linked to "setting in motion the procedures set out in the Act for putting in place a new Regional Strategy as soon as that is administratively practicable". The power could not therefore lawfully be exercised to abolish all regional strategies.

The Court also accepted the developer's alternative ground of challenge. The Secretary of State had acted unlawfully by deciding to revoke the relevant regional plan covering Winchester without reviewing whether that change in the planning regime was likely to have significant environmental effects so as to give rise to the obligation to conduct a detailed environmental assessment before introducing the change. The requirement to review the proposed change for this purpose was imposed by regulation 9 of the Environmental Assessment of Plans and Programmes Regulations 2004.

The High Court (Sales J) gave its decision in *Cala Homes (South) Limited v Secretary of State for Communities & Local Government* (interested party: Winchester City Council) on 10 November 2010: [2010] EWHC 2866 (Admin).

## LOCALISM BILL

### Parliamentary Announcements

The Localism Bill is likely to contain provisions which will radically reform the English planning system. Exact details of what will be contained in the Bill are sketchy but a number of Parliamentary answers reveal some of its likely contents:

- (i) The Bill will contain "a simple and consolidated national planning policy framework covering all forms of development and setting out national economic, environmental and social priorities" (written answer, 17.11.10, Robert Neill, Minister, DCLG).
- (ii) "We are not proposing to include any specific provisions in the Localism Bill on planning for wind farms" (written answer, 17.11.10, Robert Neill).
- (iii) The Bill will include "provisions to give local communities new right-to-build powers, enabling them to deliver small-scale development without the need for a separate planning application. By following a simplified neighbourhood planning process, these powers will enable communities to respond quickly to changing development needs" (written answer, 8.11.10, Grant Shapps, Minister DCLG).





- (iv) The Bill will "change processes for producing local development frameworks" (written answer, 8.11.10, Grant Shapps).
- (v) The Bill "will allow for applications which have been accepted by the Infrastructure Planning Commission, but not yet decided, to transfer seamlessly to the Secretary of State. Such applications will be taken forward by the new Major Infrastructure Planning Unit, which will be established within the Planning Inspectorate, without interruption to the process" (written answer, 19.10.10, Robert Neill).
- (vi) "The concern up and down the country that green belts could be deleted through those [regional special strategies] will be buried once and for good by the localism Bill" (oral answer, 25.11.10, Greg Clark).
- (vii) "The planning provisions in the localism Bill will allow every neighbourhood in the country, including parishes, to set its own local neighbourhood plan. That will mean that they can design the look and feel of their neighbourhoods going forward into the future and in so doing take away the bureaucracy that is involved in taking planning applications through the development control process" (oral answer, 25.11.10, Greg Clark).

## DEVELOPMENT DISPUTES

### Bewley Homes plc v CNM Estates – courts will expect clear evidence that a party with a favourable adjudication award has agreed to less favourable terms

This was a rather desperate attempt by a developer to avoid or delay meeting its clear obligations to its building contractor. The relationship between the contractor and its employing developer turned sour. They could not agree whether there were defects in a mixed retail and residential use development. The dispute was referred to an adjudicator who declared that the contractor was entitled to a payment of £475,000. The parties then entered into a Settlement Agreement that said it was "in full and final settlement" of the employer's liability to the building contractor under the adjudicator's decision. The Agreement provided that:

#### KEY POINTS

- There was no question of setting-off the amount payable under an Agreement which excluded set-off
- The mere fact that negotiations had taken place did not mean that an Agreement was varied
- A contractor's financial difficulties did not mean it should provide security against a failure to meet its obligations under an Agreement that was entered into while it was in difficulty

- (i) By a specified date, the employer would transfer to the contractor a long lease of a flat within the development. There was, however, a third party involved in this development, its financial backer Investec, which held charges over the whole development. As a result, the Agreement specified that the transfer of the flat was only good if it was free from incumbrances.
- (ii) Neither of the parties could dictate to Investec. Accordingly, the Settlement Agreement recognised that the employer might be unable to transfer Flat 26 to the contractor free from incumbrances. It provided that if transfer was not completed by the specified date, the employer was to pay the contractor £475,000.
- (iii) Within 6 months of the date on which either the flat was transferred or the monies paid, the contractor would make good a number of Agreed Defects on the development.

Investec could not be persuaded to allow the employer to transfer the flat to the contractor free of incumbrances. They were reluctant to do so without correction of the Agreed Defects. The specified date passed without the flat having been transferred. The employer, however, did not pay the £475,000 instead. It was reluctant to do so because it thought the contractor might not in fact correct the site defects. What the employer really wanted to do was set off the cost of the defects against the £475,000. The contractor applied for summary judgement against the employer on the basis that it had not complied with its obligation under the Settlement Agreement to pay it £475,000.

The application came before the High Court. In order to make good their claim for summary judgement, the contractor had to persuade the Court that the employer had no reasonable prospect of successfully defending the claim and that there was no other compelling reason why the claim should be disposed of by trial.

#### Issue 1 – was the employer entitled to a set off in relation to the costs of rectifying defects?

There could be no question of a set-off in relation to the cash sum payable under the Settlement Agreement. The Agreement clearly stated that the sum was to be paid without "set off, deduction, withholding or abatement whatsoever". As the High Court said, "the words are explicit and clear".

#### Issue 2 – was the Settlement Agreement varied?

The employer's main argument was that it and the contractor had agreed to vary the terms of the Settlement Agreement. The alleged variation was that the flat would be transferred to the contractor but subject to a charge in favour of Investec which Investec undertook to release once the defects were rectified. The High Court rejected this argument. While negotiations had taken place, the evidence provided no support for the argument that the Settlement Agreement had been varied. The Court noted that the contractor had the benefit of a very favourable Settlement Agreement under which defects did not have to be rectified until six months after it was paid £475,000. Clearly, it would be surprising, and require clear supporting evidence, if a party to such an agreement were to be found to have agreed to vary it. There was no sign of such evidence in this case.





### Issue 3 – fairness

The employer argued that fairness called for the matter to proceed to trial. They said it was unfair for the contractor to be paid £475,000 without giving security that the Agreed Defects would be corrected. The High Court was not impressed with these arguments in the context of a commercial agreement freely entered into by two companies. In any event, the earlier adjudicators' decision meant that the contractor had the upper hand from the outset. In the Court's words:

"26...but for the Settlement Agreement [the contractor] would on well-established authority have been able to secure by judgement enforcement of the adjudicator's decision and payment, without set-off, of the very sum which it then also agreed under the Settlement Agreement to be paid without set-off."

### Issue 4 – the relevance of the contractor's financial difficulties

The employer said that, due to financial difficulties, the contractor was unlikely to comply with its Settlement Agreement obligation to rectify the defects within 6 months of being paid the £475,000. So far as the parties' obligations were concerned, any such financial difficulties made no difference. If the contractor was in financial difficulties at the moment, it was in no lesser difficulty when the Settlement Agreement was entered into. Accordingly, the employer had taken on the risks associated with the contractor's financial difficulties.

The High Court (Akenhead J) gave its decision in *Bewley Homes plc v CNM Estates (Surbiton Ltd)* on 21 October 2010: [2010] EWHC 2619 (TCC).

## PROPERTY TRANSACTIONS & OWNERSHIP

### CO-OWNERSHIP

#### ***Dibble v Pfluger* – court should have decided whether a financial contribution was either a loan or was merely intended to give a person an interest in a property**

Cases like this are difficult for the courts to handle. Typically, they involve a mass of factual assertions which must be analysed in order to decide whether the parties had a shared intention as to property ownership. The court's task is difficult because cases necessarily involve parties who did not, at the relevant time, feel any need to record such an intention in writing. Here, the County Court did not adequately examine the evidence. One party contributed towards the construction of another's property. This raised a strong case of a shared intention as to co-ownership. The Court should therefore have made clear findings as to whether there was such a shared intention.

#### KEY POINTS

- County Court erred by failing to explain why a person's funding of roofing works did not give rise to a shared intention of co-ownership
- The Court also erred by failing to decide whether a financial contribution to construction costs was a loan or, alternatively, intended to generate co-ownership
- The Court failed to recognise that the special statutory co-ownership rules applied because the parties had previously been engaged to marry

#### The disputed Polish property

A man and woman were engaged but not married. Then they separated. Sensibly, they had ensured that interests in their UK home were clearly identified – they held that property on trust for themselves as tenants in common in equal shares. The key dispute in this case, did not involve that property.

The dispute concerned a property in Poland. It was built on land owned by the woman but the man claimed to have made a significant contribution towards construction costs. The parties' interests in this property were not the subject of any express declaration as to the beneficial/equitable shares of each party.

The dispute came before the County Court which held that the man had no beneficial or equitable interest in the Polish property. The man appealed to the Court of Appeal.

#### How did the County Court go wrong?

The County Court had to ascertain the parties' shared intention regarding ownership of the Polish property in the light of their whole course of conduct in relation to it (see the House of Lords' landmark co-ownership decision in *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432). The Court of Appeal held that the County Court's analysis of the evidence relevant to shared intention was flawed.

In 2004, £6,000 was transferred from the parties' joint bank account to the woman's parents. The man said it was used in constructing the Polish property. The County Court's findings on this point were unclear. It seemed to accept that the money was used as described by the man but went on to hold that there was no shared intention that, as a result, the man would obtain a beneficial interest in the property. The Court of Appeal said that this payment was "clearly capable" of supporting a finding of a shared intention of a beneficial interest for them man. Accordingly, the County Court should have explained why it decided that there was no "inferred or imputed common intention to create an interest in the land".





In 2006, £15,000 was transferred from the man's bank account to the woman's father and used to roof the Polish property. The dispute concerned the character of the payment, whether it was simply a loan or a contribution towards construction costs (giving rise to a shared intention that the man would obtain a beneficial interest). Again, the County Court failed to make a clear finding on this important issue. The Court of Appeal said:

"18...The Recorder [in the County Court] ought to have decided, but failed to decide, whether or not this advance was a loan because if it was a loan then the fact of lending would defeat any inference or imputation of a common intention to acquire an interest through the payment of that money."

### The legal relevance of the parties having been engaged

Everyone in this case failed to appreciate the legal relevance of the fact that the parties were once engaged (it was spotted by one of the judges in the Court of Appeal). This meant that, under section 2 of the Law Reform (Miscellaneous Provisions) Act 1970, section 37 of the Matrimonial Proceedings and Property Act 1970 applied. Section 37 is about the property of spouses. Briefly, and provided that various conditions are met, section 37 confers a statutory right to a share in the beneficial interest in a property where a spouse has contributed money to the improvement of the property(a). The effect of section 2 of the 1970 Act is that, upon the termination of an agreement to marry, a formerly engaged person is out in the same position as a spouse.

The above statutory provisions were clearly of relevance in this case but they were not drawn to the County Court's attention. Various questions arose under s.37 and these should have been addressed. The parties' dealings should have been analysed through the s.37 prism and not simply by reference to *Stack v Dowden* principles about property disputes between co-habitees. The failure to do so was an additional reason for allowing the man's appeal.

(a) The full wording of section 37 is as follows:

"It is hereby declared that where a husband or wife contributes in money or money's worth to the improvement of real or personal property in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary express or implied, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, in that beneficial interest of such an extent as may have been then agreed or, in default of such agreement, as may seem in all the circumstances just to any court before which the question of the existence or extent of the beneficial interest of the husband or wife arises (whether in proceedings between them or in any other proceedings)."

The Court of Appeal gave its decision in *Dibble v Pfluger* on 3 September 2010: [2010] EWCA Civ 1005. The Court was comprised of Ward, Lloyd and Pitchford LJ.

## MORTGAGES

### Chelsea Building Society v Nash – building society fails to prove that it reserved its right to pursue a mortgage co-debtor when reaching an agreement with her ex-husband

This case has important practice messages for both lenders and borrowers. For lenders, it makes clear the need for an approach which (a) reserves their rights against a remaining co-debtor when making an agreement with another co-debtor, and (b) ensures retention of a copy of such agreements. For borrowers who are co-debtors, it shows that it is always worth putting a lender to proof of its case where it asserts that, despite an agreement with one co-debtor, the other co-debtor(s) remains liable.

#### What happened?

The basic facts of this case were relatively straightforward. A married couple took out a joint mortgage. Following their separation, mortgage repayments were not made. In 1996, the dwelling was repossessed and sold. This left an outstanding debt jointly owed by the couple to the building society of £54,000.

The building society instructed a debt recovery firm to try and recover the debt. The firm agreed with the husband that, in return for a £5,000 payment, his liability at least would be discharged. Some years later, the wife was pursued for what was said to be her outstanding liability. The issue was whether the husband's payment had also discharged the wife's debt. Unsurprisingly, the building society argued that it had not and pursued the wife for half of the original total debt, £27,000.

#### Why did the man's payment discharge his ex-wife mortgage debt?

The dispute came before the County Court. It held that the wife remained liable to the building society. She successfully appealed to the Court of Appeal which held that the husband's payment discharged the full joint debt owed to the building society. The Court of Appeal reasoned as follows:

(i) If a creditor, such as this building society, wishes to reserve its rights against both co-debtors when making an agreement with one, the creditor should expressly reserve those rights (*Watts v Lord Aldington, Tolstoy v Aldington* [1999] LTR 578).

#### KEY POINTS

- A lender who reaches an agreement with a co-debtor, such as a person who took out a joint mortgage, should expressly reserve its rights against remaining co-debtors
- An implied reservation of rights is, however, possible
- A building society which failed to keep written records was unable to prove that its rights against one co-debtor were reserved when it reached an agreement with the other co-debtor





- (ii) No copy of the written agreement entered between the husband and the building society was retained. The only evidence about its contents was the husband's oral evidence before the County Court. He said that it was intended to wipe the slate entirely clean and discharge both his and his wife's liabilities. The County Court accepted this evidence.
  - (iii) The burden of proof was on the building society to show that the agreement with the husband expressly reserved their rights against the wife. As the County Court accepted the husband's oral evidence, it was bound to conclude that the building society had failed to prove an express reservation of rights against the wife.
  - (iv) Therefore, it had to be the case that the written agreement between husband and building society contained no term expressly reserving the society's rights against the wife. Accordingly, the society could only succeed if "a term is necessarily to be implied from the circumstances which existed at the time of the agreement".
  - (v) The available evidence in this respect was limited. All the building society produced was a 'screen dump', a basic list of contacts between debt recovery company and husband. The Court of Appeal held that this was an insufficient evidential basis for a finding of an implied reservation of the building society's rights against the wife. The Court of Appeal suspected that the County Court had lost sight of the fact that the building society, as the claimant in these proceedings, had to prove an implied reservation of rights against the wife. The reality was that the only conclusion open to the County Court was that the society had not proven its case.
- (iv) The appeal was allowed. The effect, so far as the wife is concerned, is that she is not liable to pay any sums to the building society.

### The fresh argument – does a settlement with a debtor always discharge the debt?

Before the Court of Appeal, the building society tried to mount a fresh legal argument to defeat the wife's case. It said that the husband's agreement with the society did not even discharge the debt that he owed to the society. If this was correct, the absence of any reservation of the society's rights against the wife in the agreement was irrelevant as the full joint debt remained in existence. The Court of Appeal would not permit the society to run this argument, given its late introduction. The argument did however raise an interesting legal point about the nature of compromise agreements between lenders and borrowers. As the Court of Appeal said that "the point is one of interest and is not necessarily straightforward", it is worth recording it.

The argument asserted that, as a creditor is not bound by part payment of an undisputed debt (*Pinnel's Case* (1602) 5 Co Rep 117a), no consideration moved from the husband to the building society when he paid them the £5,000. As a result, the element of 'accord and satisfaction' required to discharge a debt was not met. Therefore, the debt remained in existence. While any subsequent attempt by the building society to pursue the husband for further sums could be defeated by reference to principles of waiver or estoppel, there was nothing to prevent the wife from being pursued for her share of the outstanding debt. But, as we said, the Court of Appeal refused to rule on the validity of this argument.

The Court of Appeal gave its decision in *Chelsea Building Society v Nash* on 19 October 2010: [2010] EWCA Civ 1247. The Court was comprised of Sedley, Pitchford and Gross LJ.

### English v English – fraudulent property loan was ratified by the defrauded party deciding to redeem the linked charge on her property

A conscientious approach to a fairly routine property transaction meant that, in this case, a solicitor successfully resisted a professional negligence claim.

#### What happened?

A mother, now aged 75, claimed that she had been defrauded by her son. The circumstances were as follows:

- (i) In January 2002, her son forged her signature on (a) an application for a loan of £50,000 secured on her (mortgage-free) home, and (b) a form of Legal Charge to secure that loan. The High Court subsequently held that the mother's signature was forged.
- (ii) Prior to the loan being made, mother and son visited a solicitor to discuss what she thought was a proposed joint unsecured loan of £40,000. The mother accepted that she then she signed a form (a Solicitors Verification Certificate (SVF)) stating that she had been advised about the consequences of taking out a secured loan. But she claimed that no such advice was in fact given.
- (iii) The son told the mother that the loan was refused. In fact, the loan was completed and a Legal Charge registered against the mother's property. The son pocketed the £50,000. Two months later, the son successfully applied to extend the loan by £56,000. Again, he forged his mother's signature.
- (iv) The mother said that she first knew of the loans in January 2003 when possession proceedings were brought because the loan was not being repaid. Ultimately, the mother sold her home and redeemed the legal charges.

#### KEY POINTS

- A person failed to prove that her signed statement that she had been advised about a secured loan on her property did not reflect reality
- In the circumstances, a solicitor acted properly by advising on a secured loan without seeing the loan agreement itself
- Fraudulent acts were ratified by an individual redeeming fraudulently obtained Legal Charges
- Ratification meant that a fraudulently obtained loan and Legal Charge were binding against the defrauded party





- (v) The mother tried to recover the money. She brought a claim against her son and obtained default judgment. But the son had disappeared and so the mother also brought claims against (a) a solicitor who had been involved in the first loan, and (b) the loan company.

### Why was the claim against the solicitor rejected?

This was a professional negligence claim. The mother argued that the solicitor had not advised her in general terms about the nature of loan secured on her property. The mother said that, if she had been advised, she would never have agreed to the loan. The solicitor had no recollection of meeting the mother and his firm could not locate the mother's file. As a result, the solicitor's defence was simply that the mother could not prove that the signed SVF was an inaccurate description of the advice he gave to the mother.

The mother's claim was rejected by the High Court. She signed the SVF and that stated that she was advised about the nature of the secured loan. The burden was on the mother to prove, on a balance of probabilities, that the signed SVF was not an accurate record of events. The Court added that "her evidence must be all the more convincing given that she accepts that she signed the document herself at the time confirming its accuracy".

The mother failed to prove her case. The SVF was in a standard form but the solicitor made amendments to it to reflect the fact that the son and mother had not produced the actual loan agreement and form of Legal Charge. This showed him to be a conveyancing solicitor of "some care" who was unlikely incorrectly to certify that he had explained the effect of a secured loan. The mother, by contrast, was not a credible witness. She performed badly in cross-examination, for example saying that she was unaware of the legal charge until possession proceedings were brought although this was squarely contradicted by the 'phone records of the loan company.

The Court also rejected the suggestion that the solicitor had been professionally negligent by proceeding without having seen the proposed loan and Legal Charge. The Court said that a solicitor should refuse to proceed on the basis of a client's express instructions where "the circumstances were such that he was unable to give the client sufficient advice for the client to understand the nature of the risks inherent in proceeding with the transaction". This, however, was not such a case. For example, the circumstances did not arouse a suspicion of undue influence.

### Why was the claim against the loan company rejected?

The loan agreement and Legal Charge contained forgeries of the mother's signature. On the face of it, therefore, they imposed no obligations upon her. However, the Court went on to find that the mother had, in law, ratified her son's actions so that they were treated as her own actions. The Court reasoned as follows:

- (i) The son's actions were in law capable of ratification because (a) he had purported to enter into a transaction on behalf of his mother (as her agent), and (b) he in fact had no authority to do so, and (c) the transactions were of a type that the mother was herself capable of entering into.
- (ii) The key issue was therefore whether the son's acts had been ratified by the mother. The Court said that the legal test is whether "50...The principal [in this case, the mother] ratifies the transaction if at a later stage, with full knowledge of the relevant facts, by clear voluntary conduct (or in certain cases by acquiescence) he accepts the transaction as binding on him."
- (iii) This test was met. By her conduct, the mother accepted that "the loans and charge constituted transactions binding on her". In so concluding, the Court placed some reliance on the mother having made some loan repayments. But, on its own, that did not show ratification as she may have acted simply out of a sense of family obligation. The key point was that, when she subsequently came to sell her home, she told her solicitors that she considered the Legal Charge binding on her such that it had to be repaid from the proceeds of sale. This was "positive acceptance" of the loan and charge.
- (iv) The effect was that the son was retrospectively constituted as the mother's agent at the time when the loan agreements were entered into and the Legal Charge placed on the mother's home. In law, therefore, the son's acts were the acts of the mother and so fully binding on her. This meant that her claim against the loan company was a legal impossibility.

The High Court (HHJ Cooke, sitting as a Deputy High Court judge) gave its decision in *English v English & English, Hodge, Jones & Allen and Swift Advances plc* on 3 August 2010: [2010] EWHC 2058 (Ch).

## OPEN SPACES

### Government considers new legislation on registration of greens

The Government are actively considering whether to introduce changes to the legislation governing registration of village greens. A DEFRA Minister, Richard Benyon, made the following announcement in a written statement to Parliament on 16 November 2011:

"The Government are considering whether change to the greens registration system is required as part of their commitment to create a new designation to protect green areas, and as a response to the Penfold Review, which recommended making changes to the registration system to remove obstacles to development. I hope to make an announcement later this year".





# COMMERCIAL PROPERTY

## FORFEITURE

### Patel v K & J Restaurants Ltd – illegal use of premises as brothel did not prevent the court from granting relief from forfeiture

Tenants of commercial premises need to know what obligations their lease imposes upon them and take those obligations seriously. Even if a landlord's attempt to forfeit the lease in response to a breach of those obligations is thwarted, the tenant is likely to end up losing out financially. That is what happened in this case.

#### What was the background?

There were three parties involved in this case:

- (i) Mr & Mrs P, the owners of the freehold of a building on Tottenham Court Road, London. The building was used as a restaurant on the ground floor and the upper floors were flats;
- (ii) In 2004, a company called K & J Restaurants ("the restaurant company") were granted a 25 year lease of the building. Originally, they operated the ground floor restaurant;
- (iii) Subsequently, a company called MP Catering Ltd ("the restaurant managers") entered into an agreement with the restaurant company to run the restaurant. In return, the managers would pay a monthly sum to the restaurant company and keep any remaining profit.

The freehold owners considered that the restaurant company had breached two lease covenants and, as a result, set about trying to exercise their right of forfeiture under the lease. The alleged breaches were as follows:

- (i) breach of a commonly-encountered clause specifying that the premises "shall not be used for any illegal or immoral purpose". This allegation related to use of one of the flats as a brothel.
- (ii) breach of a clause which applied to the commercial part of the building. This prohibited the restaurant company from underletting, parting with or sharing possession of the commercial part. It was alleged that the restaurant company's agreement with the restaurant managers, while not described as a sub-lease, had involved it underletting or sharing possession of the ground floor of the restaurant managers.

The freehold owners served on the restaurant company pre-forfeiture notices under s.146(1) of the Law of Property Act 1925 and they also started possession proceedings. The restaurant owners applied to the County Court for relief from forfeiture under s.146(2) of the 1925 Act. The matter came before the County Court which held that the restaurant company had not breached its leasehold covenants and, accordingly, the freeholder owner's right of forfeiture had not arisen. Effectively, therefore, the restaurant company won. The freehold owners appealed to the Court of Appeal.

#### Issue 1 – did use of the premises as a brothel amount to a breach of covenant?

The restaurant company were not themselves running the brothel. Accordingly, they could not be liable for breaching the illegal or immoral use covenant on a 'direct use' basis. If they had, then the Court of Appeal had no doubt that the breach would have been incapable of remedy (i.e. the freehold owner's right of forfeiture would have arisen).

In the case of indirect illegal or immoral use, "the breach is remediable so long as the tenant acts promptly on discovering the relevant [illegal or immoral] use by the subtenant". The key question, therefore, was whether the restaurant company had acted promptly to stop that use upon becoming aware of it.

As soon as a leaseholder has "reasonable grounds for suspicion" of illegal or immoral use, it must investigate and "if he does not, he risks being found to have permitted the use, by not taking the action that he would have had to have taken if he had discovered the true position by making reasonable enquiries" (para. 28 of the Court's judgment). Once it is clear that there is an illegal or immoral use, then the tenant must take "immediate steps" to bring it to an end (*Glass v Kencares Ltd* [1966] 1 QB 611).

The Court of Appeal held that the restaurant company had not complied with those requirements. In November 2007, the police informed them by telephone of the suspected brothel. This gave the company reasonable grounds for suspicion and so it should have made reasonable inquiries into what was going on in the flat. However, the company took no action until it had written confirmation three months later when it set about evicting the tenant. It was therefore treated as if it had permitted the illegal use. As a result, the breach of covenant became irremediable (*Glass v Kencares Ltd* [1966] 1 QB 611). The freehold owner's s.146(1) pre-forfeiture notice was therefore valid (as the breach was not remediable, the notice did not have to set out steps to be taken to remedy the breach and so it could not be criticised on the ground that it

#### KEY POINTS

- A tenant must investigate as soon as it has reasonable grounds to suspect that premises are being used in a manner which breaches a covenant against illegal or immoral use
- If a tenant does not do so, the breach of covenant becomes irremediable
- Breach of a covenant against sharing possession was not remedied while the person sharing possession had not left the premises
- There is no rule preventing relief against forfeiture where an illegal or immoral use covenant has been breached
- Where relief against forfeiture is granted, a tenant will normally have to pay the landlord's costs on an indemnity basis





failed to do so). This meant that the freehold owner's right of forfeiture had arisen. The next issue therefore was whether the Court should grant relief from forfeiture. But, before addressing that point, we need to consider the other breach of covenant relied on by the freehold owners.

## Issue 2 – did the agreement with the restaurant managers amount to a breach of covenant?

To recap, the issue here was whether the restaurant company's agreement with the restaurant managers involved either (a) an under-letting or (b) parting with, or sharing possession of, the restaurant part of the premises. It was clear that the premises were not let to the managers as they did not have exclusive possession of them. However, the other element of the covenant, which prohibited sharing possession was breached. This was because the agreement between the company and the managers, in order to operate, had to confer upon the managers a right to use the premises.

In forfeiture terms, these findings meant that the freehold owner's s.146(1) 1925 Act notice was valid. This breach of covenant was remediable but the notice had correctly recognised that fact and stated that the restaurant company were required to remedy the breach. The question whether it was remedied was the next issue in this case.

## Issue 3 – was the 'sharing of possession' breach of covenant remedied?

The County Court held that this breach had been remedied but the Court of Appeal disagreed. The restaurant company had tried to exclude the restaurant managers by changing the locks but the managers obtained an interim injunction requiring the company to re-admit them. This meant that the breach had not been remedied. As the Court of Appeal said:

"67...If a tenant successfully excludes his subtenant or licensee without taking court proceedings...then the relevant breach may have been remedied.... However, if proceedings follow as a result of which the subtenant or licensee is let back in for a time, then it does not seem...that the tenant can be regarded as having remedied the breach".

As a result, this breach of covenant was unremedied both at the date of service of the s.146(1) notice and the date of the County Court hearing (at which point the interim injunction remained in force). According to the Court of Appeal, it seems that what the company should have done was (i) terminate their business agreement with the restaurant managers and (ii) sought an injunction excluding the restaurant managers from the premises.

The upshot was that, in relation to the second breach of covenant, the s.146(1) notice was also valid. So, as with the first breach, the focus turned to whether the restaurant company should be granted relief from forfeiture.

## Issue 4 – were the breaches of covenant to be considered cumulatively when it came to decide on relief from forfeiture?

Initially, the Court of Appeal considered whether the two separate breaches of lease covenant should be considered cumulatively in deciding whether to grant relief from forfeiture. The Court of Appeal held that they should not because "the two breaches are quite distinct from each other. There is no question of any cumulative effect, or of the whole being more than the sum of the parts, so to speak".

## Issue 5 – why was relief from forfeiture granted in relation to breach of the immoral use covenant?

As we saw above, the County Court held that this covenant was not breached. That was incorrect and overturned by the Court of Appeal. But the County Court also said that, even if there had been a breach, it would have granted relief from forfeiture. The Court of Appeal held that, despite the County Court not having been required to consider relief from forfeiture once it decided that there was no breach, its decision should be "respected unless it can be shown to be flawed on the normal grounds of error of law or misdirection". The Court of Appeal held that the decision was not so flawed as "the judge had regard to all relevant factors, and did not take into account any irrelevant factor, nor did he misdirect himself in law in any way, nor is his conclusion plainly wrong" (para. 82 of the Court's decision)

It is worth therefore recording the four main factors relied upon by the County Court when deciding to grant relief from forfeiture:

- (i) given the nature of Tottenham Court Road, no stigma was attached to this building from having been used for prostitution. Notably, the Court of Appeal said that the absence of stigma impairing the future profitability of the building was a "significant factor";
- (ii) given the importance of the asset to the restaurant company's business, forfeiture would cause them a loss out of all proportion to the damage suffered by the freehold owner;
- (iii) the freehold owner would obtain a very substantial windfall profit upon forfeiture;
- (iv) this was not a "wilful breach" of covenant.

The Court of Appeal also addressed the fact that the leading cases show an aversion to granting relief from forfeiture in cases of breach of illegal or immoral use covenants. For example, in *Ropemaker Properties Ltd v Noonhaven Ltd* [1989] 2 EGLR 50 Millett J said that "it will, however, be only in the rarest and most exceptional circumstances that the court will grant relief in such a case". In the present case, the Court of Appeal seemed to row back from that position. While there may be a strong inclination not to grant relief, that is not a rule and there will be cases, such as this case, where the facts justify granting relief. However, it remains the case that, where the illegal or improper conduct is "wilful and serious" (as it was put in *Ropemaker*), relief from forfeiture is unlikely to be granted especially where the illegal or immoral use has impaired a property's value.





## Issue 6 – why was relief from forfeiture granted in respect of the 'sharing possession' breach of covenant?

The Court of Appeal also granted relief from forfeiture in respect of this breach. This was for three reasons: (i) the breach was not wilful, (ii) the restaurant company had taken steps to remove the restaurant managers from the premises, and (iii) to forfeit the lease and give vacant possession to the freeholders would provide them with a financial benefit, and the company with a financial disadvantage, out of all proportion to the breach which had not caused the freeholders any damage at all.

By the time the case came before the Court of Appeal, the restaurant managers had left. At the date of the trial before the County Court, however, they had not. The County Court did not address relief from forfeiture because it incorrectly concluded that there was no breach of covenant. But the Court of Appeal said that, on the facts at the date of the County Court trial, it would not have been right to grant unconditional relief from forfeiture. This was because, at that date, the managers were still occupying the premises and therefore the breach was not remedied. The Court of Appeal considered that the best course would have been to defer a final decision until it became clear whether or not the company were able to remedy the breach by excluding the restaurant managers from the premises.

## Issue 7 – costs and conditions

Finally, the Court of Appeal considered costs. Following normal practice, the Court held that the grant of relief from forfeiture should be conditional on the restaurant company paying the freeholder's costs and giving undertakings not to commit any further breaches.

The Court of Appeal then went on to consider the conflicting case law about whether those costs should be payable on the indemnity basis or the standard basis. The indemnity basis would be a far more beneficial outcome for the freeholders because it would mean the company paying them a sum which would closely reflect the actual costs to them of pursuing this litigation. Significantly, the Court of Appeal held that in forfeiture cases "the indemnity basis should apply as a general principle" despite some other judicial observations to the contrary (*such as Billson v Residential Apartments Ltd (No 1)* [1992] 1 AC 494). There was nothing unusual about this case to displace that general principle and so the company were required to pay the freeholder's costs of bringing their claim in the County Court. Their appeal costs were also awarded on an indemnity basis but only 75% of those costs were required to be paid to reflect the fact that the freeholders lost on some of the points that they had argued before the Court of Appeal.

The Court of Appeal gave its decision in *Patel & Patel v K & J Restaurants Ltd and MP Catering Ltd* on 28 October 2010: [2010] EWCA Civ 1211. The Court was comprised of Lloyd, Elias and Black LJ.

# PROPERTY TAXES

## COUNCIL TAX

### [Bolsover DC v Ashfield Nominees Ltd](#) – council tax liability orders do not expire once they are 6 years' old

Does a local authority's right to enforce a council tax liability order by court process expire once the order is 6 years' old? The answer given by the Court of Appeal in this case was 'no'. The case concerned residential property companies. They failed to pay the council tax due on their properties and the local councils concerned obtained liability orders. More than 6 years' later, the authorities sought to enforce the orders, the chosen method of enforcement being to institute insolvency proceedings (present a winding-up petition) in respect of the companies.

At an earlier stage in the enforcement process, there clearly are time-limits. A council must make an application for a liability order within 6 years of the date on which the council tax in question became due (reg. 34(3) of the Council Tax (Administration and Enforcement) Regulations 1992). The companies argued that a similar 6 year limit applied to enforcement of liability orders by court process, such as institution of insolvency proceedings. Under this argument, enforcement action commenced more than 6 years after the orders were made was invalid.

### Council tax liability orders do not expire after 6 years

The matter came before the Court of Appeal. The Court agreed with the councils that a liability order does not effectively expire six years after it was made. It is true that there is a general six year time limit on actions for recovery of sums recoverable by virtue of an enactment: section 9 of the Limitation Act 1980. However, the Court of Appeal held that section 9 "does not apply as regards unpaid council tax". The local authorities in the present case had therefore acted lawfully when they instituted insolvency proceedings in respect of unsatisfied liability orders that were more than 6 years old.

### Taking insolvency action in the absence of a liability order

The Court of Appeal also found that unpaid council tax is a 'debt' for the purposes of insolvency legislation even if no liability order had been made. It went on to describe the practical implications of this:

"10...If a council taxpayer were to become bankrupt leaving council tax unpaid, the amount due by way of council tax would be a debt for which the relevant council could prove in the bankruptcy. It would follow that it could (if of sufficient amount) be the basis for a bankruptcy petition or, if the taxpayer is a company, a winding-up petition".



However, in such cases if the tax has been due and unpaid for more than 6 years it cannot form the basis for a bankruptcy or winding-up petition (by analogy with the case law concerning general rates: *Re Karnos Property Co Ltd* [1989] BCLC 340, following *China v Harrow UDC* [1954] 1 QB 178).

The Court of Appeal gave its decision in *Bolsover DC & Mansfield DC v Ashfield Nominees Ltd, Dennis Rye Ltd, East Midlands Developments Ltd & Hardwick Nominees Ltd*. on 19 October 2010: [2010] EWCA Civ 1129. The Court was comprised of Laws, Lloyd and Gross LJ.

## PROPERTY LITIGATION

### HUMAN RIGHTS

#### Niesen v Germany – 5 years for court to determine property dispute violated Article 6 of the European Convention on Human Rights

In this German property dispute, the purchaser of a development was informed by the vendor that all necessary planning permits were in place. That was not, however, the case and so the purchaser withheld part of the purchase price. The vendor carried out works thought necessary to secure the required permits but the purchaser was not satisfied and refused to pay the balance of the purchase price. In return, the purchaser refused to transfer legal title and, in 2004, the matter came to court.

The initial court proceedings were not resolved until 2009. The purchaser brought a case before the European Court of Human Rights to complain about the delay in determining the German proceedings. The purchaser argued that the delay violated his right under Article 6 of the European Convention on Human Rights to have his civil rights determined by a court or tribunal within a "reasonable time".

The Court upheld the complaint. The Court's consistent case law is that "the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute". Applying those criteria, the Court found a breach of Article 6. It relied on the following factors: on two occasions, the German Court adjourned the matter for 5 months for no obvious reason; the German court did not order an expert opinion until the proceedings were 2 and a half years' old; it was until some 18 months after that that the parties were permitted directly to question the expert witness in order to clarify his opinion.

The European Court awarded the complainant 2,800 Euros in non-pecuniary damages.

The European Court of Human Rights gave its decision in *Niesen v Germany* on 21 October 2010 (app'n no. 32513/08)

#### Consultant Editors

*Baljit Basra, Solicitor* Senior Associate in the Housing Management Team at Anthony Collins Solicitors, Birmingham.

*Ed Mitchell, Solicitor* Legal Adviser to "Community Care Magazine" (RBI) and General Editor of "Social Care Law Today" (Arden Davies Publishing)

All Arden Davies Journals are published ten times per annum by Arden Davies Ltd, who are registered as a company in England and Wales (Company No. 436 4132). An annual subscription to each publication is £165 for organisations and £75 for individuals and the voluntary sector (including postage and packing). Back issues cost £15.

To order:

- call the subscription line on **0800 783 3656**
- fax us on **0800 783 6871**
- subscribe on line at [www.ardendavies.com](http://www.ardendavies.com) (you may pay by credit/debit card in a totally secure environment). A recent issue is also displayed at the site.
- write to us at Arden Davies Publishing Ltd, 27 Old Gloucester Street, LONDON, WC1N 3XX

The contents of this publication are offered for information only. It does not constitute legal advice. Legal advice can only be given by a solicitor or barrister in light of the factual matrix applicable to a particular issue.

The contents of this publication are copyright Arden Davies 2010, all rights reserved. If you are reading a photocopy of this publication, please call 0800 783 3656 to check you have permission to do so.

