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POSSESSION

TENANCIES WITHOUT SECURITY

Barber v Croydon LBC – Court of Appeal holds possession proceedings against mentally ill non-secure tenant unlawful because a housing department failed to make inquiries into the tenant's vulnerability

Mentally ill tenants were helped by the Court of Appeal in this case. The decision lessens the impact of a recent decision of the Law Lords which deprived the Disability Discrimination Act 1995 of much of its effect in terms of protecting disabled householders from eviction. Here, the Court of Appeal held that a council's decision to seek possession against a mentally ill tenant was unlawful because it failed properly to take into account the tenant's vulnerability. This was particularly significant in the circumstances of this case because it involved a tenant without any security of tenure.

What happened?

The background to this case was as follows:

- A tenant of Croydon LBC was unfortunate in that he had a non-secure tenancy. His tenancy was granted to him in order to discharge a duty owed to him under the homelessness legislation and had not been converted into a secure tenancy. This meant that, as a matter of landlord and tenant law, the council were entitled to terminate the tenancy without having to show any statutory 'grounds' and without having to convince a court to whom an application for a possession order was made to enforce their right to possession that it would be reasonable to grant possession.
- The tenant had a history of severe mental illness. In fact, during an earlier period of homelessness (which ended when he was granted the tenancy referred to above), the tenant had a psychotic breakdown which appeared related to the stress of being street homeless. That breakdown was so serious that the tenant was compulsorily admitted to hospital ('sectioned') under the Mental Health Act 1983.
- Until the event described below, the tenant had not posed any management difficulties for his council landlord.
- The key event occurred in 2007. Apparently, the tenant was annoyed that some broken glass near his flat had not been removed. He approached a caretaker and swore at him for having failed to clean up the glass. A short time later, the tenant confronted the caretaker again, who alleged that the tenant spat at him and kicked him in the knee causing a soft tissue injury. The tenant denied that he had spat at or kicked the caretaker, but he did subsequently accept a police caution for causing the caretaker harassment, alarm or distress by using abusive or threatening language.
- The council decided, without speaking to the tenant, to serve him with a notice to quit. Following expiry of the notice to quit, the council issued a possession claim. For the purposes of those proceedings, a psychiatric opinion was sought. The psychiatrist's report said that any social interaction was stressful for the tenant and results in panic and even incontinence. The report concluded that the tenant was exceedingly vulnerable to another psychotic episode were he to become homeless and that, if that happened, his "life would descend into chaos" and "his life would be placed at considerable risk".
- The council considered the report, but they proceeded with their possession claim. Essentially, this was because the council were applying their policy of 'zero tolerance' of abuse against their staff.
- The county court granted the council a possession order.

What was the key legal issue?

As mentioned above, because the tenant had a non-secure tenancy the court hearing the possession claim did not have to be satisfied that it was reasonable to grant possession before making a possession order. That did not mean, however, that the tenant's council landlord had an entirely free hand to secure his eviction as and when they saw fit. A recent decision of the House of Lords has reminded social landlords that are public bodies that, in making possession decisions, they are subject to the principles of public law (*Kay v Lambeth LBC* [2006] 2 AC 465). For example, they should take into account obviously relevant factors when making possession decisions and should not take decisions that are what is known as '*Wednesbury*' 'irrational' (outside the range of decisions that a reasonable council could take). If a possession claim is based on a decision that is flawed in public law, the court hearing the resultant possession claim should refuse to grant the authority the possession order sought.

The tenant argued that Croydon council's decision to bring possession proceedings or, alternatively, to continue to pursue the proceedings once they had received the psychiatrist's report was flawed as a matter of public law.

Keeping possession claims under review as a claim proceeds through the court system

The Court of Appeal first looked at whether the law operated so that, while a possession claim might be lawful when instituted, subsequent developments might render continuance of the proceedings of the unlawful. The Court held that this was indeed the position:

> "It seems to me that a local authority is bound to keep the position under review and to take into account any relevant facts which come to its notice at any stage in the proceedings".

This meant that in the present case Croydon council were obliged to consider whether they should proceed with their possession claim once they had received the psychiatric report detailing the potentially devastating consequences of eviction for the tenant.

On this general topic, it should be noted that the Court of Appeal in the present case followed its earlier decision in *Taylor v Central Bedfordshire Council* [2009] EWCA Civ 613 and cast doubt on the correctness of the decision in *Doran v Liverpool CC* [2009] EWCA Civ 146. In *Doran*, it appeared to be suggested that, provided a possession claim was lawful when instituted, continued prosecution of the claim remained lawful regardless of whatever subsequent developments there might be. As *Taylor* also questioned the correctness of *Doran*, it now seems clear that the better view is that a possession claim which was lawfully instituted may become unlawful in the light of the appearance of new relevant facts.

The relevance of anti-social behaviour policies

The next general issue addressed by the Court of Appeal was whether a local authority's anti-social behaviour policies (which they are required to have by virtue of s.218A of the Housing Act 1996) might have a bearing on the legality of an authority's decision to seek a possession order against a tenant. The Court found that they were legally relevant and that a failure to follow such policies could render unlawful a decision to bring a possession claim on the basis that it was a decision that no reasonable public body could have taken.

In other words, Croydon's anti-social behaviour policy was highly relevant when considering whether they had acted reasonably. Two aspects of that policy should have influenced their response:

(i) the first was that tenant vulnerability should be taken into account when considering the appropriate response to anti-social behaviour. The policy said "our staff are trained to work with other statutory and voluntary agencies in order to ensure the needs of our vulnerable complainants and perpetrators (alleged or proven) are considered" but that "vulnerability in itself will not prevent Officers from taking action to bring an end to complaints of anti-social behaviour". Importantly, however, the policy also said that "The Tenancy Team will always refer ASB cases to the IMHS [integrated mental health service] to ensure that vulnerability is considered when action is taken". On this topic, it is important to note that the Court of Appeal said that, even if the policy had been silent on tenant vulnerability, this is something that a reasonable public authority would be bound to consider when taking possession decisions;

(ii) the second highly relevant aspect of Croydon's policy was its graduated response framework. The policy created three categories of behaviour, according to seriousness. The behaviour of the tenant in the present case fell within the most serious category, category 3 which actually contained a multitude of sins and was defined as: "one-off serious incidents or crime, physical assault or threats of violence and gun and knife related crime". The policy said that, where ASB is in category 3, it "will almost always result in legal action either in the form of an application for an ASB injunction (or ASBO) or for an outright possession order".

The Court of Appeal also made the important point that the contents of a council's anti-social behaviour policy cannot be the only criteria by reference to which the lawfulness of possession decisions are to be judged. The Court identified other criteria that were obviously relevant in this case and ought to be, it is suggested, relevant in other similar cases:

(i) "there must inevitably be an analysis of the cause of the ASB before the correct response can be decided upon";

(ii) the need to prevent similar conduct in the future should be a relevant factor for a council when deciding how to respond. The implication is that if a tenant appears unlikely to 're-offend' or is susceptible to changing his/her behaviour if support services are provided then the response should take account of those factors.

The outcome – the council acted unlawfully in seeking to evict their mentally ill tenant

In this case, the council did not follow their own policy. They did not refer this tenant's case to the integrated mental health service as part of their decision on how to respond to the tenant's behaviour. This failure was described by the Court of Appeal as follows:

> "it was unreasonable for [the council's tenancy enforcement officer] to proceed without applying the Council's policy on vulnerable people set out earlier. This would have involved him or his department liaising with IMHS and social services to see whether or not an alternative strategy to seeking possession could be followed in order to prevent any repetition of the ASB by [the tenant]. A supervised ABC [anti-social behaviour contract] is one obvious alternative".

This failure was even more serious given that it persisted after the psychiatrist's report became available. As the Court of Appeal said, "there was also no apparent consideration of the possible consequences for [the tenant] of losing his flat which [the psychiatrist] considered would cause his life to descend into chaos". Even after receipt of the psychiatric report on the likely consequences of eviction for the tenant, the housing official in charge of the case failed to consult local mental health services. This was wrong:

> "it was, I think, incumbent upon [the official] to consult the other agencies and to take advice as to whether some alternative remedy such as an ABC would solve the problem. As I read it, the Council's policy is not (and certainly ought not to be) that incidents of ASB involving persons with mental disabilities should be handled without regard to the existence of those disabilities and their responsibility for the conduct in question".

The housing official, on behalf of Croydon, also failed to recognise that 'category 3' covered a wide range of violent conduct, ranging from a single kick with threats, as in this case, to organised gun crime. The official should have appreciated that the tenant's behaviour, while serious, was towards the lower end of the scale and so did not call for as drastic a response as persistent and serious violent behaviour. The official should also have taken into account the fact that the present incident appeared isolated, not having been preceded or followed by any similar incidents.

Accordingly, the council's decision to pursue possession proceedings following receipt of the psychiatrist's report was legally flawed. It removed the possession claim's legal basis and so the county court should not have granted Croydon their possession order. That order was set aside and so the tenant remains a non-secure tenant of Croydon council. This, however, does not that the tenant is immune from further possession proceedings arising out of the same incident, as the Court of Appeal judge explained:

> "It was suggested by [the tenant's counsel] that this might have the consequence that the Council would either be issue-estopped or prevented on *Henderson v Henderson* principles from seeking a possession order in a second action were it to carry out the consultation process I have identified but nevertheless ultimately conclude that the recovery of possession was, in all the circumstances, the appropriate remedy. I do not accept that. If *Wednesbury*-type public law defences are to be permitted to be run in private law proceedings for possession then an exception to the private law rules against re-litigating previously decided issues has to be recognised. In such cases, the court will not treat the second action as an abuse of process when it has been necessitated by the Council having to take further administrative steps (including re-consideration) in order to satisfy its public law obligations. In such cases, the second action will fall to be considered on its merits alone".

Was the Disability Discrimination Act 1995 of any assistance to the tenant?

The parties in this case agreed that the tenant was "disabled" for the purposes of the Disability Discrimination Act 1995 (DDA). However, that provided him with no real assistance in his attempt to prevent his landlord from evicting him. Following the decision of the House of Lords in *Lewisham LBC v Malcolm* [2008] UKHL 43, the DDA only really protects disabled occupiers who have been the victims of direct discrimination. In this case, the county court decided that Croydon would have taken the same action as they took against this tenant against a non-disabled tenant who had abused the caretaker. Accordingly, Croydon's pursuit of possession proceedings against this tenant did not amount to disability discrimination contrary to the DDA. The Court of Appeal held that that finding of the county court was "not open to serious challenge".

The Court of Appeal gave its decision in Barber v Croydon LBC on 11 February 2010: [2010] EWCA Civ 51. The Court was comprised of Rix, Richards & Patten LJJ.

Thomas-Ashley v Drum Housing Association – landlord entitled to terminate AST in response to a mentally ill tenant refusing to live apart from her pet dog

This case has been reported in the trade press in a way which suggests that the housing association concerned was being callous and unreasonable by evicting a mentally ill tenant who did not want to part company with her pet dog. The reality, however, is that the association had little choice but to take the action which it took in order to avoid itself facing legal action from a head leaseholder.

The background

A woman with a history of serious mental illness (bipolar disorder) was a tenant of a Housing Association. Her tenancy was an assured shorthold tenancy and so she had no security of tenure under landlord and tenant legislation – under that legislation her landlord would have to be granted a possession order if a possession claim were brought following service of the correct statutory notices.

Despite the tenancy agreement prohibiting the keeping of dogs without permission, the woman kept a dog in her flat without permission. The evidence convincingly showed that the dog was of great therapeutic benefit to the woman as a companion. In fact psychiatric evidence said that he was "essential in her rehabilitation" and that loss of the dog "could well precipitate" a "severe depressive or manic episode". Nevertheless the landlord served a notice of seeking possession on the tenant under s.21 of the Housing Act 1988.

Mention should also be made of the landlord's interest in the flat because that was of legal relevance. The Housing Association were not the head leaseholders. They held the flat on a 99 year lease entered into in 1999 and so they were themselves under various obligations imposed by the head leaseholder one of which was to ensure that tenants did not keep pets without the "consent of the managing agent". So, if the Housing Association had permitted the tenant to keep her dog, without obtaining managing agent permission, they would themselves have run the risk of the head leaseholder forfeiting their 99 year lease. In fact, the managing agents had written to the Housing Association expressing their concerns about the presence of the dog and it appears that it was this that prompted the Association to serve a notice of seeking possession.

The claim under the Disability Discrimination Act 1995

As the Court of Appeal put it in this case, "ordinarily a tenant of an assured short-hold tenancy has no answer to a claim for possession if the requisite period has passed and the relevant notice has been served". For this reason, this tenant's lawyers argued that the Disability Discrimination Act 1995 rendered the Housing Association's attempt to recover possession unlawful. This was on the basis that the tenancy contained provisions which were unlawfully discriminatory under the DDA 1995 and the court should not enforce such unlawful provisions by granting the Association the possession order they sought.

The DDA claim was made by reference to s.24C of that Act. So far as relevant to this case, s.24C operates as follows:

(i) it applies where two conditions are met;

(ii) the first condition is that a "controller of let premises" (such as the Housing Association landlord in the present case) has a letting term which makes it impossible or unreasonably difficult for a disabled person (such as the tenant in this case) to enjoy the premises;

(iii) the second condition is that: (a) the letting term would not make it impossible or unreasonably difficult for a non-disabled person to enjoy

the premises; and (b) the disabled person requests that the controller of the premises changes the term so that it no longer has the effect of making it impossible or unreasonably difficult for the disabled person to enjoy the premises. The parties in the present case agreed that the tenant had made such a request;

(iv) where those two conditions are met, a duty is triggered. This duty requires the controller of the premises to "take such steps as it is reasonable, in all the circumstances of the case, for him to have to take" in order for the term to stop having the effect of making it impossible or unreasonably difficult for the disabled person to enjoy the premises;

(v) however, that is not quite the end of the story. A failure to comply with that duty is not unlawful if the failure can be justified under s.24K of the DDA (s.24A of the DDA). For example, a landlord does not act unlawfully where it is reasonable to conclude that the landlord needs to refrain from complying with the duty in order not to endanger the health or safety of any person. However, in the present case the Association did not need to rely on this disapplication of the duty in order to defeat the possession claim.

When the claim came on before the County Court it decided that the tenant could not take advantage of the above duty. The Court of Appeal reconsidered the matter for itself.

Why could the DDA not save the tenant from a possession order?

The tenant's claim fell at the first hurdle. In order for the first condition mentioned above to be met, the 'no dogs' provision of the tenancy had to make it impossible or unreasonably difficult for this disabled tenant to enjoy the premises. However, the evidence showed that she had lived there for some 12 months before acquiring the dog. This showed that the dog was not something that she required in order to enjoy the premises. It was not for example to be equated with a guide dog and the Court of Appeal agreed with the court below that:

> "in reality it is the enjoyment of companionship of the dog rather than the enjoyment of the premises which, on the evidence, is primary."

In any event, even if the conditions which give rise to the s.24D duty were triggered, it should be noted that the duty itself was to take "such steps as are reasonable" to stop the letting term from having the effect of making it impossible or unreasonably difficult for the tenant to enjoy the premises. In the present case, the Housing Association landlord was in a fix. It could not of its own volition change the terms of the tenant's Assured Shorthold Tenancy so as to permit dogs because, if it did, it would have been liable to having its 99 year lease, a valuable asset, forfeited. In those circumstances, the Court of Appeal judge was clear that the Housing Association could not be considered in breach of the s.24D duty:

> "It was critical for the [Housing Association] to avoid forfeiture of their lease which is a valuable asset and it would in my judgment not be reasonable to expect them to take any step that might bring that about".

The Court of Appeal gave its decision in Thomas-Ashley v Drum Housing Association Ltd. on 17 March 2010: [2010] EWCA Civ 265. The Court was comprised of the Chancellor of the High Court, Thomas LJ and Sir Scott Baker.

Joseph v Nettleton Road Housing Co-Operative Ltd – Court of Appeal declines to consider whether the law regarding conditional notices to quit requires alteration to render it Convention-compliant

The lack of security of tenure possessed by housing co-operative tenants means that they are particularly vulnerable. In this case, the Court of Appeal declined, given the particular circumstances of this case, to consider whether or not that vulnerability is acceptable under the European Convention on Human Rights. Accordingly, that important matter remains, for the time being, unresolved.

Why did the tenant's dog lead to a possession order being made against him?

As the tenant was the tenant of a fully mutual housing association (or co-operative) he had no statutory security of tenure. Unlike the case of an assured or secure tenancy, this tenant's landlord did not have to prove any statutory 'ground' or convince a court of the reasonableness of making a possession order (s.1(2) and paragraph 12(h) of Schedule 1 Part 1 to the Housing Act 1988).

The tenant in the present case had been a member, and tenant, of the co-operative since 1983. His tenancy contained two provisions of particular relevance to this case:

(i) it said that he could not keep a pet without the permission of the co-operative and that permission would not be granted without the agreement of "all other tenants affected";

(ii) clause 12 of the tenancy said that the co-operative could bring the tenancy to an end by giving a tenant 4 weeks' notice to quit, but that such a notice would only be given in specified circumstances one of which was that a tenant had committed a breach of the tenancy agreement. It also said that a tenant would be given the opportunity to remedy any breach before a notice to quit were given.

In 2007, the tenant started keeping a bull terrier in his home. He did not obtain permission for this, seeming to think that because he had kept a dog some years previously that he did not need permission to keep this one. A number of meetings of the co-operative were held to discuss the tenant's dog and letters were written to him reminding him of the need to seek permission for a pet. Ultimately, the co-operative refused to grant permission and gave the tenant notice to quit. Upon the notice expiring, the co-operative applied to the County Court for a possession order so that they could evict the tenant.

Part of the tenant's defence before the County Court was that the housing co-operative had not followed the requirements of clause 12 of the tenancy because he had not been given a sufficient opportunity to remedy his breach of tenancy before he was served with a notice to quit. The County Court rejected this argument. The Court accepted the co-operative's argument that the imposition of any conditions on the service of a notice to quit in relation to a periodic tenancy, such as those imposed by clause 12 of the tenancy, were ineffective as a matter of law (this finding

relied on the decision in *Prudential Assurance Company Limited v London Residuary Body* [1992] 2 AC 386). On this approach, the requirement in clause 12 for the tenant to be given the opportunity to remedy a breach before any notice to quit could be given was of no effect. Accordingly, the County Court concluded that the notice to quit was valid and granted the co-operative their possession order. The tenant appealed to the Court of Appeal.

Why did the Court of Appeal uphold the possession order?

Before the Court of Appeal, the tenant argued that the 'rule' in the *Prudential* case should be modified for the protection of tenants of fully mutual housing co-operatives. This was a sophisticated argument based on Article 8 of the European Convention on Human Rights and the right to respect for a home which it guarantees. The Court of Appeal was clearly concerned about the costs that might be incurred by the housing co-operative were the Court to rule on the tenant's argument and there was a further appeal against its ruling. The Court of Appeal instead concluded that, even if the tenant's argument were correct and the law required clause 12 of the tenancy to be given effect, the requirements of clause 12 had been complied with. The tenant had been given an adequate opportunity to cure the breach of tenancy by ceasing to have a dog, but he had chosen not to do so. On that basis, the appeal was dismissed and so the possession order stands.

It should be noted that the tenant in this case conceded that his housing co-operative could not be treated as a public authority under the recent *Weaver* ruling. This meant that the tenant could not argue that the decision to seek possession was unlawful due to irrationality. However, this does not amount to a ruling that all housing co-operatives fall outside the *Weaver* ruling. An analysis of their funding arrangements, historic and current, will often be crucial, in accordance with *Weaver*, in deciding whether or not they are public authorities when making possession decisions: for further details, see issue 59.

The Court of Appeal gave its decision in Joseph v Nettleton Road Housing Co-Operative Ltd. on 16 March 2010: [2010] EWCA Civ 228.

DISREPAIR

Henley v Bloom – Court of Appeal holds that a tenant was not obliged to raise the question of disrepair when settling possession proceedings with his landlord

The legal relationship between a landlord and a tenant may have a number of aspects. In this case, the Court of Appeal rejected the argument that disputes about each of those aspects had to be resolved when the parties were settling a claim for possession. This left the tenant free to bring a disrepair claim after he had vacated the property in question.

What led to this case?

Mr H became the tenant of a basement flat in Brighton in 1986. In recent years, he had been in dispute with his landlord about disrepair, in particular dampness caused by the flat's poor state of external repair. Separately, the landlord brought a possession claim against Mr H.

The possession claim was settled by way of a consent order under the terms of which (a) Mr H agreed to vacate the flat, and (b) the landlord agreed to pay Mr H £16,000 in recognition, so it seems, of improvements that Mr H had made to the flat.

Just before he vacated the flat, Mr H arranged for a housing disrepair expert to prepare a report on the flat's condition. Mr H did not tell the landlord that he was doing this. The expert's report identified a number of items of disrepair and dampness. Six months after he had given up possession of the flat, Mr H brought a disrepair claim against his landlord in which he claimed damages not exceeding £15,000. The landlord's defence to that claim included the assertion that the claim was an abuse of the process of the court because any complaints Mr H had about disrepair should have been raised during the negotiations on the possession proceedings which led to the consent order.

The disrepair claim came on before the Brighton County Court. Accepting the landlord's argument, the judge struck out the claim on the basis that it was an abuse of process. The tenant appealed and the case came before the Court of Appeal.

What did the Court of Appeal decide?

The leading case on abuse of process in connection with civil proceedings is probably *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1. In that case the Law Lords held that the fact that an issue could have been raised in earlier proceedings does not mean it is an abuse of the process to raise it in subsequent proceedings. The question is whether the issue should have been raised in the earlier proceedings and the answer to that question is fact sensitive and not susceptible to exhaustive definition.

The Court of Appeal went on to hold that the tenant in the present case could easily have raised the disrepair issue in the possession proceedings. His failure to do so did not, however, amount to an abuse of process. Having first noted that it is a serious matter to bar a claimant from bringing a claim in an attempt to vindicate his/her legal rights, the Court of Appeal held that for two reasons the tenant's disrepair claim was not an abuse of process:

(i) it raised different issues to those raised on the earlier possession proceedings, those earlier proceedings not involving any argument as to whether the flat was in a satisfactory state of repair;

(ii) the later disrepair proceedings could not be said to undermine the "integrity" of the compromise reflected in the terms of the consent order. That order said it constituted a full and final settlement in respect of any claim for improvements to the flat which the tenant had made. It did not mention any possible disrepair claim. Accordingly, it was not open to the landlord to argue that she was misled into believing that the consent order was a complete settlement.

The Court did acknowledge that the tenant's conduct, in keeping the disrepair claim effectively 'up his sleeve' during the negotiations in

connection with the possession proceedings, might be described as unreasonable or "rather unattractive". Reasonableness of conduct, however, is not the test because unreasonableness does not necessarily equate with abuse of process. It may, however, have a costs consequence for the tenant upon the resolution of the disrepair claim. In other words, even if the tenant is successful on his disrepair claim he may receive a lower award of costs than might normally be expected.

The Court of Appeal also rejected the landlord's contention that it would be impossible for there to be a fair trial of the disrepair claim because the flat in question has now been refurbished which, the landlord argued, deprived her of the opportunity to inspect the alleged disrepair. The landlord was well aware that for many years the tenant had been complaining about the state of the flat and she must have access to some information about its state during those years. The fact that the tenant might have better quality information of particular relevance to the disrepair claim did not mean that a fair trial was impossible. Also, the key evidence will be provided by the expert witness instructed by the tenant just before he vacated the flat. As an expert witness, his first duty will be to tell the truth and assist the court. The landlord's experts will also be able to cross-examine him.

The Court of Appeal gave its decision in Henley v Bloom on 9 March 2010: [2010] EWCA Civ 202. The Court was comprised of the Master of the Rolls and Smith and Longmore LJJ.

HOMELESSNESS & ALLOCATIONS

REVIEWS & APPEALS

Tomlinson v Birmingham CC – Law Lords hold that restricting appeals against homelessness decision to points of law is compatible with the Human Rights Convention

The message from this decision of the Law Lords is that it is no change when it comes to the mechanisms for challenging homelessness decisions. This is because the current system is compatible with the European Convention on Human Rights.

Homelessness decision-making: the domestic legal framework

The operation of the homelessness legislation contained in Part VII of the Housing Act 1996 requires various decisions to be taken by councils/their staff, e.g. as to whether accommodation is suitable for an applicant or whether an applicant has been informed of various matters about which s/he must be informed in order for duties under the legislation to be discharged.

Where a person is dissatisfied with various key original (i.e. caseworker) decisions, s/he has two opportunities to try and have the decision altered:

(i) by exercising the right to have the decision reviewed internally, under a which a more senior officer than the caseworker will reconsider the matter; and

(ii) thereafter, by exercising the right to appeal to the county court on a point of law.

It can be seen that the right to appeal to the county court is limited to questions of law. This limitation lay behind the current legal challenge and so, to put it in context, we should set out what sort of challenges may be made where a person is given a right to appeal against a decision on a point of law. The Court of Appeal, in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982, recently gave the following description of what amounts to an error of law

"(i) making perverse or irrational findings on a matter or matters that were material to the outcome ('material matters');

(ii) failing to give reasons or any adequate reasons for findings on material matters;

(iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;

(iv) giving weight to immaterial matters;

(v) making a material misdirection of law on any material matter;

(vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome".

It can be seen that a number of challenges of a type that many applicants would like to make fall outside this list. For example, a challenge which asserts that the factual findings made as part of a homelessness decision were simply wrong is not permitted. As Lord Hope said in the present case, "the county court judge [who hears the appeal on a point of law] may not make fresh findings of fact. He must accept the conclusions on credibility that have been reached by the reviewing officer".

Article 6 of the European Human Rights Convention and homelessness decision making

One of the purposes of Article 6(1) of the European Convention on Human Rights is to ensure that civil legal disputes are determined by courts rather than governments. It provides that "civil rights" are to be determined by an independent and impartial tribunal. The question in the present case, therefore, was whether decisions about a person's entitlement under the homelessness legislation amount to the determination of a person's civil rights.

If the answer to that question were – yes, decisions about entitlement under the homelessness legislation do determine civil rights – another question would arise. That question is whether the current system, with its limited grounds for challenging homelessness decisions before a court, complies with the requirements of Article 6. This topic has actually been before the UK's highest judicial body before, in the case of *Tower Hamlets LBC v Begum* [2003] UKHL 5. In that case, the Law Lords did not rule on whether making decisions about entitlement under the homelessness legislation amounts to the determination of a civil right. But they did hold that, even if that were the case, the current decision-making structure, involving an internal review with due process elements plus a right of appeal on points of law, was sufficient to comply with the requirements of Article 6. In making this finding, the Law Lords pointed out that, where a civil right is derived from a social welfare scheme, less is required by way of court oversight than in the case of some other categories of civil rights, such as a person's rights under a contract.

The issues in the present case therefore were as follows:

(i) whether in legal fact homelessness decision making amounts to the determination of a civil right; and

(ii) if it does, whether the current decision-making structure complies with the requirements of Article 6.

The key finding – Article 6 can be ignored in the operation of the homelessness legislation

A majority of the members of the Supreme Court held that decisions about entitlement under the homelessness legislation do not amount to determinations of civil rights. The members of the Court noted that some systems for conferring benefits by the State, such as mainstream welfare benefits, do determine civil rights. The homelessness legislation, however, does not. Certain features of the scheme for homelessness assistance lift it out of the ambit of "civil right", in particular that it does not confer cash benefits and the criteria to be applied in deciding whether someone is to receive a benefit under the scheme are imprecisely expressed and require the application of judgement. In the words of Lord Hope (with whom Lady Hale and Lord Brown agreed):

> "I would be prepared now to hold that cases where the award of services or benefits in kind is not an individual right of which the applicant can consider himself the holder, but is dependent upon a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and how the need for it ought to be met, do not engage article 6(1). In my opinion they do not give rise to "civil rights" within the autonomous meaning that is given to that expression for the purposes of that article. The appellants' right to accommodation under section 193 of the 1996 Act falls into that category. I would hold that article 6 was not engaged by the decisions that were taken in the appellants' cases by the reviewing officer".

Lord Hope went on to point out that this finding applies to all aspects of homelessness decision making, even those involving pure questions of fact for example whether a particular statutory notice has been received. Accordingly, review officer determinations of fact may not be re-argued before the county court.

Application of this decision in other spheres

This Supreme Court decision can be read across to other non-cash social welfare schemes, for example decisions about the Supporting People services that an individual is to receive or the community care services to which a person is entitled. In fact, the High Court has already expressed the opinion that the finding also applies to community care decision making. This was in the case of *R (Savva) v Royal Borough of Kensington & Chelsea* [2010] EWHC 414 (Admin), decided on 11 March 2010, where HHJ Pearl said:

> "The creation of a personal budget [to be used to purchase community care services] and the manner in which a personal budget is utilised are matters that fall squarely within social welfare provision. Applying the judicial reservations advanced by…Lord Hope in *Tomlinson,* it is my view that this is not an area of law which engages Article 6".

The Supreme Court gave its decision in Tomlinson & Others v Birmingham City Council on 17 February 2010: [2010] UKSC 8. The Court was comprised of Lords Hope, Brown, Collins and Kerr and Lady Hale.

EUROPEAN LAW RIGHTS TO RESIDE

Harrow LBC v Ibrahim – Somali citizen had a right to reside in the UK under European law while her children, whose father was a Danish citizen, completed their education

This is the first of two recent decisions of the European Court of Justice which are highly significant for economically inactive parents whose children are entitled to education in the UK under European law. The Court held that, in order to make the child's right effective, the parent must have the right to reside in the UK, a legal status which opens up the possibility of entitlement to accommodation under the homelessness legislation.

What lay behind this case?

In order to establish a right to assistance under the homelessness legislation, Ms I had to have a 'right to reside' in the UK under European law. She was a Somali citizen who had previously been living in Denmark and so hers was not a clear-cut case. The relevant sequence of events needs to be set out:

(i) Ms I was a Somali citizen, married to a Danish national who was of course a European citizen;

(ii) the husband came to the UK to work in 2003. It was accepted by all the parties that he was a "worker" for the purposes of European law;

(iii) shortly after this, Ms I and her three children joined her husband in the UK. They had permission to enter the UK granted by the UK immigration authorities. Soon after arriving in the UK, Ms I gave birth to another child;

(iv) while the husband was still a "worker", two of the children commenced State education in the UK;

(v) in 2004, the husband left Ms I in the UK and went to live abroad. Their relationship broke down;

(vi) in 2007, Ms I, who was not economically self-sufficient, sought accommodation under the homelessness legislation from Harrow LBC;

(vii) Harrow LBC decided that Ms I was not eligible for assistance under the homelessness legislation because she did not have the right to reside in the UK under European law. The matter came before the Court of Appeal which referred the question to the European Court of Justice (ECJ).

The decision of the European Court of Justice

The ECJ held that Ms I did have the right to reside in the UK, a right which was derived from that of her children and so it seems inevitable that Harrow will have to decide that she is eligible for assistance under the homelessness legislation. The Court reasoned as follows:

(i) in 2003, Ms I and her children, as family members of an European national who was working in the UK, had the right to "install" themselves in the UK under Article 10 of EC Reg. No. 1612/68, a right which they duly exercised. The ECJ pointed out that this right (now found in Directive 2004/38) is conferred regardless of nationality. Accordingly, Ms I had the right to install herself in the UK even though she was not a European citizen;

(ii) once the children were "residing" in the UK, they had the right under Article 12 of EC Reg. No. 1612/68 to be admitted to the UK education system, a right which their parents exercised on their behalf;

(iii) Article 12 has already been interpreted by the ECJ as conferring, in connection with its right of access to education, an independent right of residence upon a child (*Bambaust & R* [2002] ECR I-7091). This means that a child does not need to show that s/he also has some kind of citizenship-based right to reside;

(iv) the children's right of residence under Article 12, being independent, was not affected by changes in parental residence such as their father ceasing to reside in the UK;

(v) so, the children had a right to reside in the UK in order to complete their education. This meant that Ms I, their primary carer, had to be given a linked right to reside. Otherwise, the children's right would be ineffective;

(vi) the remaining question for the ECJ was whether it made any difference that Ms I, having no means to support herself financially, was entirely reliant on the State for subsistence. The ECJ held that this made no difference. Article 12 of EC Reg. No. 1621/68, unlike some other European legislation, does not operate so as only to confer entitlements upon persons who are economically self-sufficient.

The European Court of Justice gave its decision in Harrow LBC v Ibrahim on 23 February 2010: Case C-310/08.

Teixeira v Lambeth LBC – economically inactive Portugese national had the right to reside for so long as her presence was needed by her daughter in order to complete her education

On the same day as the decision in the *Ibrahim* case was given by the European Court of Justice, the Court also gave judgment in this similar case. The relevant facts of this case were as follows:

(i) Ms T, a Portugese national, arrived in the UK with her husband in 1989. She worked until 1991 when she had a child who entered UK State education;

(ii) over subsequent years, Ms T worked intermittently. She last worked in 2005;

(iii) in 2007, Ms T applied to Lambeth LBC for assistance under the homelessness legislation, including as part of her household for the purposes of the application her dependent daughter (by this time she had separated from her husband);

(iv) Ms T's application was rejected by Lambeth LBC on the basis that she was ineligible for assistance because she did not have the right to reside in the UK.

The question of whether Ms T had the right to reside in the UK came before the European Court of Justice, which decided as follows:

(i) as in the previous case, Ms T's daughter had the right under Article 12 of EC Reg. No. 1612/68 to be admitted to the UK education system. The ECJ also held that, for this purpose, it did not matter whether or not a child's primary carer was a "worker" on the date on which the child began education:

> "it is enough that the child who is in education in the host Member State became installed there when one of his or her parents was exercising rights of residence there as a migrant worker. The child's right of residence in that State in order to attend educational courses there, in accordance with Article 12 of Regulation No 1612/68, and consequently the right of residence of the parent who is the child's primary carer, cannot therefore be subject to the condition that one of the child's parents worked as a migrant worker in the host Member State on the date on which the child started in education";

(ii) the daughter's right of residence was independent. Accordingly, it was unaffected by the fact that her primary carer had ceased to be a "worker" for the purposes of European law;

(iii) as in the previous case, in order to make the daughter's right to reside effective, her mother, as her primary carer, also had to be given the right to reside in the UK. For this purpose, it did not matter that the mother was not economically self-sufficient;

(iv) the final question for the ECJ was to determine the duration of the daughter's right of residence (and therefore her mother's). Did it only last until the child attained 18? This was relevant because, while the daughter was only 15 when Lambeth rejected her mother's request for assistance under the homelessness legislation, she is now 18 and so an adult under the law of England and Wales. The ECJ's answer was as follows:

> "the right of residence in the host Member State of the parent who is the primary carer for a child of a migrant worker, where that child is in education in that State, ends when the child reaches the age of majority, unless the child continues to need the presence and care of that parent in order to be able to pursue and complete his or her education";

(v) the question of whether the daughter in the present case "needs" the presence of her mother in order to pursue and complete her education is one to be answered by the domestic courts.

The European Court of Justice gave its decision in Teixeira v Lambeth LBC & the Secretary of State for the Home Department on 23 February 2010: Case C-480/08.

Lekpo-Bozua v Hackney LBC – Court of Appeal intends to consider the implications of the Ibrahim & Teixeira rulings

In issue 58, we considered the complex new provisions of the homelessness legislation (Part VII of the Housing Act 1996) about "restricted persons". These are members of an applicant's family who, while they may be relied on to secure an entitlement to accommodation, result, due to their immigration status, in a downgrading of that entitlement.

This case involved an applicant whose dependent child was her niece. It was argued that the niece, who had resided with the applicant for nine years, had a right to reside under European law and for that reason was not a restricted person under the homelessness legislation. This argument was rejected by the local authority concerned and, on appeal, the County Court. The Court of Appeal has granted permission for a further appeal to be made to it. In so doing it is relevant to note that the Court said it would provide an opportunity for the domestic courts to consider the consequences of the above decisions of the European Court of Justice's decisions in *Ibrahim* and *Texeira*.

The Court of Appeal gave its decision in Lekpo-Bozua v Hackney LBC on 24 February 2010: [2010] EWCA Civ 222.

APPLICATIONS

R (Raw) v Lambeth LBC – a warning to councils that referral to a rent deposit scheme does not discharge a duty to investigate an application under the homelessness legislation

An applicant for homelessness assistance alleged that Lambeth LBC had a policy of abandoning their inquiries into an application if a person was referred to a local rent deposit scheme. The applicant's lawyers said that this was "outrageous gate keeping" and meant that the council were failing to comply with their duty under s.184 of the Housing Act 1996, a section which operates as follows:

(i) the section applies where a local authority have "reason to believe" that a person is homeless or threatened with homelessness. The case law recognises that this is a low threshold because it takes little by way of background facts to generate a "reason to believe" that a person is homeless or threatened with homelessness (see the last issue for further details of the case law);

(ii) where that threshold is crossed, an investigative duty is triggered and must be complied with. The duty is to inquire into whether an applicant is eligible for assistance and, if so, whether any duty, such as a duty to secure accommodation, is owed to the applicant.

Following institution of a claim for judicial review, Lambeth resumed inquiries into the applicant's entitlement under the homelessness legislation. As a result, the High Court declined to determine the claim for judicial review on the basis that it had become academic. However, it did go on to make some comments about what it had seen of Lambeth's policy which the High Court judge said caused him "serious concern". The Court pointed out that the duty under s.184 is absolute and once the trigger threshold has been reached the duty must be performed:

> "The effect of section 184, as it seems to me, is that once an application has been made under Part VII, if the local housing authority have reason to believe that the applicant may be homeless or threatened with homelessness they have an absolute obligation to make such inquiries as are necessary to satisfy themselves whether he is eligible for assistance and if so whether any duty and if so what duty is owed to him under the remaining provisions of Part VII. There may be cases where the circumstances of an applicant change in such a way that the local housing authority no longer have reason to believe that he may be homeless or threatened with homelessness. In such a case it may be entirely proper for the application to be withdrawn or discontinued and for the duty to make inquiries to cease. If however, once an application has been made, the local authority still have reason to believe that the applicant may be homeless or threatened with homelessness, the local authority cannot in my view unilaterally avoid its obligation to continue to make inquiries…
>
> …it might well be that a blanket policy of ceasing inquiries in all cases where a Part VII applicant has been referred to the rent deposit scheme could be construed as such an avoidance of statutory obligation".

The High Court (Stadlen J) gave its decision in R (Raw) v Lambeth LBC on 12 March 2010: [2010] EWHC 507 (Admin).

GENERAL HOUSING ISSUES

HUMAN RIGHTS

Kozak v Poland – difference of treatment as regards succession rights based on sexual orientation could not be justified

In this case the European Court of Human Rights held that Poland's failure to confer the same succession rights upon same-sex couples as those conferred upon different-sex cohabiting couples was a violation of Article 14 of the European Convention on Human Rights (the anti-discrimination article of the Convention). In England and Wales this is not an issue as the succession rules do not differentiate between individuals on the basis of sexual orientation. The main general point of interest in this case was the Court's insistence that differences of treatment which operate by reference to sexual orientation are very difficult to justify under the Convention. The Court said:

> "Sexual orientation is a concept covered by Article 14. Furthermore, when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention."

The European Court of Human Rights gave its decision in Kozak v Poland on 2 March 2010 (app'n no. 13102/02)

UNLAWFUL CONTRACTS

Kays Estate Services (UK Ltd) v Paddington Churches Housing Association – Housing Association attempts to deny validity of maintenance contract said to have been entered into for the benefit of a former employee

Paddington Churches Housing Association are attempting to extract themselves from a maintenance contract which they say was unlawfully entered into with a previous employee of theirs or his close relative. They have recently succeeded in on an initial point, namely they have secured an order requiring the maintenance company to pay security for costs in the sum of £80,000.

The impugned maintenance contracts

In October 2007, the Housing Association entered into 47 separate maintenance and gardening contracts with a firm called Kays Estate Services Ltd. In 2008, the Association suspended the contracts and refused to pay any further sums to the company. The Association claimed that the contracts were unlawfully entered into on the following basis:

(i) the Association was a registered social landlord and a company;

(ii) paragraph 2 of Schedule 1 to the Housing Act 1996 provides that "a registered social landlord which is...a company shall not make a payment or grant a benefit to...(b) a person who at any time in the previous 12 months has been [an employee of the company] or (c) a close relative of [such a person]";

(iii) The Association said that the maintenance contracts had the effect of conferring benefits on either a former employee of theirs or the employee's close relative. The Association had a former employee called Kenny Kanu. The individual involved with Kay Estates called himself Kingsley Kanu and the Association thought he was either their former employee masquerading under a false name or a close relative of that former employee.

Following suspension of the contracts, Kay Estates brought a claim against the Association for £202,000. The Association's defence was that the maintenance contracts were entered into outside their powers and so were unlawful under Schedule 1 to the Housing Act 1996. The Association also counter-claimed for return of the contract sums already paid, some £116,000. The Association were concerned that Kay Estates would not be able to pay their costs in the event that Kay Estates lost their claim. The Association sought an order for costs.

A High Court judge granted the Association the order they sought and ordered Kays Estates to pay £80,000 into court as security for the Association's costs in the event that Kays' claim was unsuccessful. Kays Estates sought to appeal against that decision, on the basis that they had fresh evidence which showed that an order for security for costs was not required (rather than on the basis that the High Court judge's decision was flawed on the evidence before him). That evidence was (a) company accounts showed that Kays had the resources to meet any order for costs if their claim was unsuccessful (thus removing the need for an order for security); (b) a statement from Mr Kanu that he had property in Nigeria valued at around £100,000 which could be used to pay costs; (c) a witness statement from a doctor which claimed that the Kays' Kanu was not related to the Association's Kanu.

The Court of Appeal's decision

The Court of Appeal refused to grant permission to appeal against the order for costs. There are strict rules about the admissability of fresh evidence following a court decision (the *Ladd v Marshall* principles). The Court of Appeal held that there was no prospect of the fresh evidence passing the *Ladd v Marshall* test because there was no good reason for Kays' having failed to adduce it before the High Court. As the challenge

to the High Court's decision rested solely on the argument that the fresh evidence would have led to the High Court refusing to order security for costs, it was obvious that once that evidence was ruled inadmissible Kays had no ground for challenging the order for security for costs. Their application for permission to appeal was refused.

The Court of Appeal (the Chancellor of the High Court) gave its decision in Kays Estate Services (UK Ltd) v Paddington Churches Housing Association & Genesis Housing Group on 16 February 2010: [2010] EWCA Civ 253.

ALMOs

Leeds CC v Woodhouse – employment relationship between a council and staff employed by an ALMO

This was an interesting employment case which concerned the responsibilities of a council towards the employees of an Arms Length Management Organisation (ALMO) which the council had established. The relevant facts were as follows:

(i) the complainant, Mr W, was an employee of West North West Homes Leeds Ltd, an ALMO established by Leeds City Council;

(ii) the ALMO used the council's Property Services Division to maintain its housing stock. Mr W's job was to check the quality of that work;

(iii) Mr W claimed that an employee of the Property Services Division had racially abused him;

(iv) amongst other claims, Mr W brought a claim against Leeds Council. This claim argued that Mr W was a contract worker of the council for the purposes of s.7 of the Race Relations Act 1976. S.7 prohibits a 'principal' (which is what Mr W claimed the council were) from racially discriminating against a 'contract worker'. Mr W said that s.7 applied because he was required by his employer, the ALMO, to do work for the benefit of the council;

(v) Leeds council applied to strike out the claim against them on the basis that Mr W was not supplied to do work for the benefit of them at all and so could not be a contract worker for the purposes of the Race Relations Act 1976. Their application was rejected by an Employment Tribunal. That rejection was upheld by the Employment Appeal Tribunal.

Leeds council applied to the Court of Appeal for permission to bring a further appeal. They were granted permission and so the Court of Appeal should soon consider the important issue of the relationship between a council and employees of an ALMO it has established.

The Court of Appeal (Rimer LJ) gave its decision in Leeds City Council v Woodhouse & Others on 23 November 2009: [2009] EWCA Civ 1537.

RIGHT TO BUY

Haringey LBC v Hines – right to buy and the 'sole or principal home' requirement

A 'secure tenant' exercised her right to buy. Subsequently, the local authority came to the conclusion that at the relevant time (the date on which she was granted a long lease under the right to buy legislation) she was not in fact a secure tenant because she had ceased to use the dwelling concerned as her sole or principal home. The authority's argument was that she was not living at the dwelling in Tottenham but was in fact living in Essex. The dispute came before a County Court judge who held that by the relevant time the 'tenant' had left the Tottenham property and had no intention of returning there so that she ceased to be a secure tenant. The judge proceeded to declare that in granting the long lease to the 'tenant' under the right to buy legislation the local authority had acted outside their powers.

The Court of Appeal has agreed to hear an appeal against the finding that, in granting a long lease under the right to buy legislation, the authority acted unlawfully. Separately, the tenant tried to persuade the Court of Appeal to hear an appeal against the County Court's finding that she had ceased to be a secure tenant by virtue of her having ceased to use the dwelling as her sole or principal home. The Court of Appeal refused to give her permission to appeal that aspect of the County Court's decision, on the basis that there was an adequate evidential basis for that finding.

The Court of Appeal (Stanley Burnton LJ) gave its decision in Haringey LBC v Hines on 11 February 2010: [2010] EWCA Civ 171.

ANTI-SOCIAL BEHAVIOUR

ASBOs

James v Birmingham City Council – ASBO may be varied even if no further acts of anti-social behaviour proven

The terms of an ASBO may be varied. In this case, the High Court confirmed that the power to vary is not dependent on fresh acts of anti-social behaviour.

Why did the council want to vary the term of the ASBO?

In July 2006, J was made the subject of an ASBO having been found by Birmingham Magistrates' Court to have engaged in various anti-social acts connected to gang membership. The ASBO prevented J for 3 years from entering specified parts of Birmingham or associating with specified individuals.

In 2008, Birmingham Council applied under s.1(8) of the Crime and Disorder Act 1998 to the Magistrates' Court (that application being by way of 'complaint', to use the technical legal term) for the ASBO to be varied in three respects:

(i) to extend the exclusion zone;

(ii) to expand the list of persons with whom J was not to associate;

(iii) to extend the life of the ASBO by two years.

Birmingham's application was prompted by (a) J's convictions for drug offences and for breaching the ASBO and (b) because Birmingham were of the opinion that he had been associating with an intimidating gang in an area outside the original exclusion zone. The Magistrates' Court varied the ASBO in accordance with Birmingham's suggestions. In so doing, the Court held that there was no requirement for the applicant, Birmingham council, to prove that J had committed further anti-social acts in the six months preceding the making of the application. The matter came before the High Court under the 'case stated' procedure.

The High Court's decision: ASBO variation not dependent on fresh anti-social acts

The High Court upheld the Magistrates' Court's decision, ruling as follows:

(i) the Magistrates' Court's power to vary an ASBO is not dependent on there having been further acts of anti-social behaviour committed in the six months preceding the application;

(ii) there must, however, be some event within those six months which justifies a variation of the ASBO. This is required by s.127 of the Magistrates' Courts Act 1980, explained as follows by the High Court:

> "Section 127 does not in my view assist with respect to this question. It simply requires that a complaint must be made within six months from the date when the matter of complaint arose but it says nothing as to what should constitute such a matter of complaint. In my judgment it is simply an event or circumstance which it is alleged renders the original order inappropriate for one reason or another. There is no basis for saying that it has to be conduct which would justify the making of a fresh order";

(iii) the Court agreed with the decision in *Leeds City Council v RG* [2007] EWHC 1612 (Admin) that the Magistrates' Court's power to vary includes power to extend the duration of an ASBO. The key issue is whether a variation is required in order to make the ASBO fit a change of circumstances:

> "the original anti-social act justifies the making of an order and changes in circumstance may then justify a variation of that order. The only question is whether the change in those circumstances is such as to justify the court in concluding that it is necessary to vary the order in the way proposed so as to secure adequate protection for the public. If the original ASBO ceases to be sufficient to achieve the objective of protecting the public or that section of the public which the order is designed to protect, then a further or modified protection will in principle be necessary";

(iv) however, it is likely that normally only further anti-social acts will justify extending the duration of an ASBO. On this point, the High Court said:

> "there will have to be cogent evidence adduced before the court before it is willing to conclude that it is necessary to extend the terms of the order. No doubt that is likely in most cases to involve some additional anti-social acts. However, this is not necessarily so and it is ultimately a question for the judge hearing the case to determine whether the variation is necessary";

(v) the High Court rejected the argument that in this case the Magistrates' Court should have required the council to seek a fresh ASBO, rather than seeking to vary an existing one for two years. J had argued that this should have been required because there is no statutory right of appeal against a variation of an ASBO whereas there is such a right of appeal against the imposition of a fresh ASBO. The Court went on:

> "I would accept that if the purpose was simply to defeat the right of appeal, it would be quite inappropriate to vary the original order. But there is no evidence of that here".

(vi) the Court went on to give guidance about when it was more appropriate to proceed by way of variation, as opposed to proceeding by way of an application for a fresh ASBO:

> "where any fresh anti-social behaviour or other unacceptable conduct (such as breaches of that order) is closely interlinked with the original order, it may be desirable that the limitations imposed by the original order should stand, and it may be more sensible to vary rather than impose a fresh order. This is so even where the period of the order is varied by an extension of two years or more".

The High Court gave its decision in James v Birmingham City Council on 19 February 2010: [2010] EWHC 282 (Admin). The Court was comprised of Elias LJ and Calvert-Smith J.

HOUSING BENEFIT

RENTAL LIABILITIES

SN v Hounslow LBC – rental liability genuine despite landlord having taken no action in response to non-payment of rent for two years

A claimant must be genuinely liable to make payments to a landlord, in order to be entitled to housing benefit. However, as this case shows, there are no hard and fast rules about the cases in which there is and is not such a liability. Here, a First-tier Tribunal erred by assuming that, because a landlord was very relaxed about non-payment of rent, there could not be a genuine liability to pay rent.

Facts

For some two years, a housing benefit claimant was unaware that her housing benefit had stopped. When she tried to re-claim, her claim was refused on the basis that she could not have a genuine liability to pay rent to her landlord. If there was a real liability, said the council which refused the claim, the landlord would have been pressing for his rent. That decision was upheld on appeal by the First-tier Tribunal (FtT). The claimant brought a further appeal to the Upper Tribunal.

The Upper Tribunal's decision

The Upper Tribunal identified that the key entitlement issue in this case was whether Ms H was liable to pay rent in respect of the property for which benefit was claimed. If she were not so liable she could not be entitled to housing benefit (s.130 Social Security Contributions and Benefits Act 1992).

When this case was before the FtT it held that, because Ms H had lived in her home for at least two years without paying rent, she could not have had a genuine legal liability to pay rent. The Upper Tribunal held that the FtT had erred in law by assuming that the one fact necessarily followed from the other:

> "simply because a tenant lives in a property without paying rent for a period, even an extensive period, does not of itself mean that there is no legal liability to pay rent."

The Upper Tribunal went on to hold that the landlord's inactivity did not, in the circumstances of this case, mean there was no genuine legal liability to pay rent. The Upper Tribunal noted that this case had been marked by delay throughout and the landlord may simply have been resigned to having to wait a long time for housing benefit payments to come through. The Upper Tribunal also accepted Ms H's explanation that the landlord knew that she was a single mother with a number of children and as a result had shown her some latitude. The Upper Tribunal judge awarded housing benefit.

Other points

The Upper Tribunal took the opportunity to criticise two additional aspects of the performance of the council with which this case was concerned.

(i) The Upper Tribunal was critical of the council concerned for apparently refusing to award benefit whenever a claimant did not provide the full name and address of his/her landlord:

> "there is no specific requirement in housing benefit law that the claimant must provide the details of the full name and address of the landlord. Furthermore, the City Council had previously been criticized by the Local Government Ombudsman for adopting a policy of not paying housing benefit claims unless the landlord's full details were provided (Reports 02/C/15217 & 03/C/11787)".

(ii) It took nine months for the council concerned to submit the claimant's appeal to the First-tier Tribunal. The Upper Tribunal hinted that such a delay might constitute a violation of Article 6 of the European Convention on Human Rights. On this point, the Upper Tribunal said:

> "This sort of delay is highly unsatisfactory, especially in a case which had already dragged on for a long time. A claimant has a right under Article 6 of the European Convention on Human Rights to have their appeal heard within a reasonable time by a tribunal. There is, however, no statutory time limit within which appeals should be referred by local authorities to the Tribunals Service. I can only echo and endorse the comments...in unreported decision CH/3497/2005...that "it is wholly unacceptable to the proper operation of the system of appeals in housing benefit and council tax benefit appeals that delays of this sort should occur"...
>
> The delay in the present case was just over 9 months, rather than the 19 months in CH/3497/2005, but this was still plainly far too long. I have not asked for an explanation for this delay, not least as I did not wish to prolong matters still further, but on the face of it the City Council needs to reconsider carefully its process for handling of appeals. As Mr Deputy Commissioner Mark observed in CH/3497/2005, "It is of crucial importance to many benefits claimants to have their appeals heard very promptly. This is clearly liable to be the case in housing benefit disputes, where delay could cost them their homes"."

The Upper Tribunal (Judge Wikeley) gave its decision in SN v London Borough of Hounslow on 18 February 2010: [2010] UKUT 57 (AAC).

REGULATION OF SOCIAL HOUSING: THE NEW SYSTEM

KEY STRUCTURES

The Housing and Regeneration Act 2008 created a new regulator for social housing in England, known as the Tenant Services Authority (TSA) (although the 2008 Act refers to it as the Regulator of Social Housing). Its real effect, however, is yet to be felt. This is because, to date, the TSA has simply been exercising the regulatory functions of its predecessor organisation, the Housing Corporation. On 1 April 2010, however, that changed and the TSA became fully empowered with its new responsibilities under the 2008 Act. The rest of this issue is devoted to analysing those new regulatory responsibilities.

The different categories of housing provider, including local authorities

Under the 2008 Act as originally drafted, local authorities were not eligible for registration as social housing providers, nor were companies controlled by local authorities such as Arms Length Management Organisations (ALMOs). However, the 2008 Act conferred power upon the Secretary State to make secondary legislation to bring local authorities that provide housing within the scheme. This has been done by the Housing & Regeneration Act 2008 (Registration of Local Authorities) Order 2010 and, as a result, local authorities that directly-manage housing stock or have their stock managed through an ALMO are within the registration scheme from the outset. The Order is available at http://www.opsi.gov.uk/si/si2010/uksi_20100844_en_1. In *Changing Powers – a Guide to How Regulation is Changing*, the TSA explain the registration requirements related to ALMOs (and Tenant Management Organisations) as follows:

> "ALMOs that do not own stock will not be registered under the 2008 Act and hence will not be the legal entity responsible for meeting the standards (it will apply to the sponsoring local authority). The same principle applies to Tenant Management Organisations (TMOs)".

The Department for Communities say that 180 of the 326 local authorities in England will become registered. These are the authorities which have retained housing stock which is either managed in-house or via a management body such as an Arms Length Management Organisation (ALMO). There is no need for these authorities to apply to become registered. This has happened automatically by virtue of Article 2 of the Order referred to above.

Taking account of local authorities within the regulatory scheme

Levering local authorities into the regulatory system has required some modification to that system. Briefly, this is as follows:

(i) there have been terminology changes. In order to distinguish local authorities from other providers, the Act has been amended so that the other providers are now known as "private registered providers". For certain regulatory purposes (identified below in the detailed guide to the new system), these providers are divided into not-for-profit and for-profit providers, reflecting one of the main changes to the regulatory scheme which is that in England profit-making housing providers will be able to become registered. The decision to select the term "private registered providers" to describe bodies including those that used to be registered social landlords is somewhat surprising given the Court of Appeal's recent decision in *R (Weaver) v L & Q Housing Trust* [2009] EWCA Civ 587, that some of these landlords are to be treated for some purposes as public bodies (see issue 59)];

(ii) there has been some modification to the regulatory scheme to take account of the different nature of local authorities as compared to independent social housing providers. For example, there is no need for the insolvency aspects of the 2008 Act to apply to local authorities because it is technically impossible for a local authority to be insolvent. The modification has been achieved by amendment of the 2008 Act by the 2010 Order referred to above. The alterations are identified below in our detailed guide to the new regulatory framework.

A change in regulatory emphasis?

It is difficult, at this early stage, to make predictions about whether and how the TSA's use of its 2008 Act powers will differ from that of the Housing Corporation before it. However, certain aspects of the 2008 Act can be used to make predictions about how the TSA will work, such as its statutory obligations in relation to tenants' rights and proportionate regulation and the new 'micro' enforcement powers, such as the power to issue penalty notices. As a result of those factors and the tenants' rights emphasis in the Cave review into social housing regulation, which was the impetus behind the creation of the TSA, we may well see:

(i) a more formal relationship between registered providers of social housing and the TSA than we have seen previously;

(ii) enforcement resources being targeted on at risk providers so that other providers may have less engagement with the TSA than they did with the Housing Corporation;

(iii) where a provider is causing concern, more detailed engagement with its business than at present.

The TSA's 10 fundamental objectives

Part 2 of the Act provides a new scheme for the regulation of social housing in England. It is a large Part comprised of over 200 sections (59 to 278). Before looking at the detail of the provisions, we shall start by explaining the TSA's 10 statutory fundamental objectives.

Section 86 sets out the TSA's fundamental objectives. It must exercise its functions with a view to achieving its objectives "so far as possible". Accordingly, everything that the Regulator does must be designed with a view to seeking to achieve these objectives. Objective 10, therefore, will be of particular interest to social housing providers because it gives them a tool with which to negotiate with the Regulator over the most appropriate regulatory response (if any) to a perceived failure.

The ten objectives are as follows:

- **Objective 1 –** to encourage and support a supply of well-managed social housing of appropriate quality and sufficient to meet reasonable need;
- **Objective 2 –** to ensure that actual and potential tenants of social housing have an appropriate degree of choice and protection;
- **Objective 3 –** to ensure that tenants have the opportunity to be involved in the management of their social housing;
- **Objective 4 –** to ensure that registered providers of social housing perform their functions efficiently, effectively and economically;
- **Objective 5 –** to ensure that registered providers are financially viable and properly managed;
- **Objective 6 –** to encourage registered providers of social housing to contribute to the environmental, social and economic well-being of the areas in which their property is situated;
- **Objective 7 –** to encourage investment in social housing (new and existing);
- **Objective 8 –** to avoid creating either as a direct or indirect consequence of its actions an unreasonable burden on public funds;
- **Objective 9 –** to guard against the misuse of public funds;
- **Objective 10 –** to regulate in a manner which (a) minimises interference, and (b) is proportionate, consistent, transparent and accountable.

What is social housing?

The TSA's functions are exercisable in relation to "social housing", e.g. it will register and control certain of the activities of providers of "social housing". It is convenient at this stage, therefore, to identify the meaning of social housing. For existing providers, however, these terms are of only indirect interest. They are of most interest to new providers who are seeking to become registered because these providers will need to persuade the TSA that they are providing "social housing". Providers who were registered with the TSA during the interim period when it was exercising Housing Corporation powers automatically remain registered under the 2008 Act.

The TSA is to have functions in relation to low cost home ownership as well as well as low cost rentals. Accordingly, the definition of "social housing" in s.68 of the Act is comprised of "low cost rental accommodation" as well as "low cost home ownership accommodation".

"Low cost rental accommodation" is defined by s.69 of the Act as accommodation which possesses all three of the following characteristics:

(i) "it is made available for rent"; and

(ii) "the rent is below the market rate"; and

(iii) "the accommodation is made available in accordance with rules for eligibility designed to ensure that it is made available to people whose needs are not adequately served by the commercial housing market". This includes people who need special types of accommodation, as well as those who cannot afford to rent general housing at market rates.

It is possible that certain accommodation provided by former registered social landlords would fall outside this definition, e.g. if it were not made available, perhaps for historic reasons, to persons who cannot afford to rent at market rate. A savings provision, s.77 of the 2008 Act, addresses such instances. It provides that (subject to certain exceptions) all accommodation provided by a Registered Social Landlord in England at the date when the new arrangements under the Act become operational is deemed to be social housing and thus within the jurisdiction of the Regulator.

"Low cost home ownership accommodation" is defined by s.70 of the 2008 Act. The definition aims to capture social housing over which an occupier has only partial ownership (clearly, once the occupier has complete ownership of, for example, the freehold there is no need for the regulator to remain involved). The definition works by creating two conditions. Both conditions must be satisfied if accommodation is to be low cost home ownership accommodation:

(a) condition 1 is that accommodation is made available on the basis of a shared ownership arrangement, an equity percentage arrangement or shared ownership trust;

(b) condition 2 is that the accommodation is aimed at people whose needs may not be adequately served by the commercial market. This could, for example, be for reasons of affordability, need for specialised/adapted housing, security of tenure or vulnerability.

It is possible that some accommodation might meet both the definition of "low cost rental accommodation" and the definition of "low cost home ownership accommodation". This is because shared ownership arrangements typically require the payment of (sub-market) rent on the share retained by the registered provider. To prevent overlap, s.71 of the Act provides that accommodation which satisfies both the definitions of low cost rental accommodation and low cost shared ownership accommodation is to be treated as low cost shared ownership accommodation.

Transitional Arrangements

Whenever regulatory systems change, complicated transitional issues arise. For example, ongoing enforcement action under the old regime needs to be knitted in to the new regime, to ensure that the process does not have to begin again. Transitional and savings arrangements connected with the commencement of the 2008 Act regime are contained in the Schedule to the Housing & Regeneration Act 2008 (Commencement No.7

and Transitional and Saving Provisions) Order 2010 (S.I. 2010/862). The Order is available at www.opsi.gov.uk/si/si2010/uksi_20100862_en_1. In addition, the TSA have published a guide to the transitional arrangements, entitled *Changing Powers – a Guide to How Regulation is Changing*. This is available at www.tenantservicesauthority.org/upload/pdf/Changing_powers.pdf.

REGISTRATION WITH THE REGULATOR

The Regulator is required to maintain a register of providers of social housing (s.111 of the 2008 Act). Once a provider is on the register, it is subject to regulation by the Regulator and also potentially able to access funds which are only available to registered providers. An important initial question, therefore, is which private (non-local authority) providers are eligible for registration, although, as mentioned above, for the time being this is of only indirect interest to currently registered providers because they are automatically registered under the new regime. The issue is not, however, an irrelevant one for these providers because the criteria for eligibility are also the criteria for de-registration.

KEY POINTS

- A provider which provides social housing in Wales is not barred from being registered with the Regulator.
- All Registered Social Landlords currently registered with the TSA will remain registered upon the change to 2008 Act regulatory powers
- Registration is not mandatory for private registered providers, but social housing funding will not be made available to unregistered providers
- Profit-making bodies will be eligible for registration but only the social housing element of their business will be regulated by the TSA
- There is a right of appeal to the High Court against a decision of the Regulator to de-register a provider

What are the eligibility criteria?

Section 112 of the 2008 Act sets out which private providers of social housing are eligible for registration. However, the eligibility rules do not apply to local authorities. If local authorities provide social housing the TSA must register them: see Article 2 of the Housing & Regeneration Act 2008 (Registration of Local Authorities) Order 2010.

There are both geographic (England-based) criteria and management/governance related criteria:

(i) **England-based criteria.** Under the general rules, a provider must have a registered office in England in order to be registered with the Regulator. In addition, the Regulator must be of the opinion that the provider's social housing is wholly or mainly in England. So the provider may provide some housing in, say, Wales as well and still be registered with the English Regulator provided that its social housing is mainly provided in England.

(ii) **Management and governance criteria.** The other (management/ governance) criteria are to be fixed by the Regulator itself. Section 112 of the Act provides that, in order to become registered, a provider must satisfy any criteria set by the Regulator as regards: (a) its financial situation; (b) its constitution; and (c) other arrangements for its management. Before setting such criteria, the Regulator must consult the Homes and Communities Agency (HCA), tenant representative groups and landlord representative groups.

(iii) **Fees**. Registration fees are dealt with by s.117 of the Act. There will be a registration fee as well as annual fees and the Regulator "may make continued registration [of private registered providers] conditional on payment of a fee". Smaller fees are expected for smaller providers and, broadly, revenue from fees must meet the Regulator's running costs.

Is registration mandatory?

It is not mandatory for a private provider of social housing to be registered in the sense that a failure to become registered is not a criminal offence. However, the conditions of social housing funding assistance will require a provider to be registered in order to be eligible for funding.

Profit-making bodies

Under the 2008 Act, and in contrast to the current legislation the Housing Act 1996, there is no requirement that a provider must be non-profit making in order to be eligible for registration with the TSA. This is intentional. It means that profit-making providers of social housing will be able to operate and access social housing funding. Generally, however, the regulatory regime is modified in relation to profit-making private providers in that the Regulator only has powers in relation to the social housing activities of the provider. For this reason, the Register itself must clearly show which private providers are profit-making and which are not (section 115). Clearly, for the time being most private registered providers will be non profit-making.

De-registration: local authorities

A new provision, s.118(4) of the 2008 Act (inserted by the Order which brought local authorities within the regulatory scheme), deals with de-registration of local authorities. Under s.118(4), the TSA must remove a local authority from the register of providers if the authority "is no longer a provider of social housing", for example if it transferred all its stock to a private registered provider.

De-registration: private registered providers of social housing

For a private registered provider, de-registration (removal from the register) may be either compulsory (s.118 of the 2008 Act) or voluntary on the application of a provider (s.119 of the 2008 Act).

So far as compulsory de-registration is concerned, there are three grounds the existence of which empowers the TSA under s.118 compulsorily to remove a provider from the register:

(i) where the provider is no longer eligible for registration, e.g. it no longer meets the criteria as to management and governance specified by the Regulator under s.112. Accordingly, de-registration can be seen as the ultimate form of enforcement action although a failure to meet one of the social housing standards (see below) is not in itself a ground for de-registration;

(ii) where the provider has ceased to exist;

(iii) where the provider has ceased to carry out activities.

The Regulator is required to give 14 days' notice before removing a provider from the register. It must consider any representations made by the provider during that period before making its final decision.

Section 118(3) requires the regulator to take all reasonable steps to inform a body that it has been deregistered on the grounds that it is no longer eligible for registration or has ceased to carry out activities. This will ensure that the body knows it no longer has to comply with regulation, though will still be required by section 172 of the 2008 Act to seek disposal consent (see section 186 of the 2008 Act).

There is a right of appeal to the High Court against: a decision of the Regulator to de-register a provider; a decision not to agree to a voluntary de-registration; and a decision to refuse registration. However, the Secretary of State has the power under s.121 of the 2008 Act to alter the destination of appeals so that they are heard instead by the First-tier tribunal established by the Courts, Tribunals and Enforcement Act 2007. This power does not appear to have been exercised.

OBLIGATIONS OF REGISTERED PROVIDERS

Obligations of registered providers under the 2008 Act can be grouped into two categories. First, those provided for on the face of the Act. Second, those imposed upon providers by the Regulator (in the form of 'standards') and which are enforced through the Regulator's new and extended enforcement armoury.

KEY POINTS

- Many of the previous general obligations of RSLs are replicated in the Act
- Registered providers may also be required to participate in the preparation of local authorities' community strategies
- Statutory housing and management standards will shape the work of social housing providers
- Non-compliance with standards will mean that the Regulator has the power to take enforcement action
- The Regulator has the power to issue a Code of Practice about how standards may be complied with

Obligations set out on the face of the 2008 Act

To a large extent, the obligations of private registered providers set out on the face of the 2008 Act mirror those previously imposed upon RSLs by the Housing Act 1996. For example, the following sections of the 2008 Act impose upon registered providers similar obligations to those imposed upon RSLs by the 1996 Act:

- s.122 (payments and gifts to board members), although this section only applies to non-profit registered providers;
- s.127 to 143 (accounts). For the most part, these sections apply only to private registered providers although new subsections (4) and (5) of s.126 (inserted by the Registration of Local Authorities Order) require various Audit Commission publications and reports relevant to a local authority's social housing to be sent to the TSA;
- s.144 to 159 (insolvency). These sections only apply to private registered providers. They do not apply to local authority registered providers;
- s.160 to 169 (restructuring and dissolution). These sections only apply to private registered providers. They do not apply to local authority registered providers;
- s.170 to 178 (disposal of property by registered provider). These sections only apply to private registered providers. They do not apply to local authority registered providers;
- s.211 to 214 (management and constitution, e.g. restrictions on the change of rules of industrial and provident societies, the change of a charity's objects and the change of a company's articles of association). These sections only apply to private registered providers. They do not apply to local authority registered providers.

In addition, s.126 of the 2008 Act amends s.4 of the Local Government Act 2000 so that a private registered provider must co-operate with a local authority if invited to participate in the preparation or modification of a sustainable community strategy under section 4 of the 2000 Act.

Housing standards

Section 193 of the 2008 Act permits the Regulator to set standards for registered providers in connection with their provision of social housing. It is clear that the standards will become the most important influence shaping the activities of registered providers and the housing arm of local government.

As we will see below, the standards do not have a free-standing legal effect. They are given legal teeth by virtue of the fact that non-compliance with them is a trigger for the exercise of the TSA's enforcement powers. Accordingly, it is not quite correct for the TSA to assert, as they have, that providers "must meet" the standards because this implies that a failure will always be visited with a regulatory consequence. The TSA always has a discretion as to how to respond whenever it considers that a standard has not been met and, as a matter of public law, it must not negate that discretion by adopting a blanket policy always to take enforcement action if it considers that a standard has not been met.

Six sets of standards were published by the TSA in March 2010. They are contained with a document entitled *The Regulatory Framework for Social Housing in England from April 2010*. That document can be found at http://www.tenantservicesauthority.org/upload/pdf/Regulatory_framework_from_2010.pdf. The standards are grouped under the following themes:

- **Tenant involvement and empowerment.** This deals with: customer service and complaints; involvement and empowerment; and understanding and responding to the diverse needs of tenants.
- **Home.** This deals with quality of accommodation and repairs and maintenance.
- **Tenancy.** This deals with allocations, rents and tenure. However, the 'rents' element does not apply to local authority registered providers.
- **Neighbourhood and community.** This deals with neighbourhood management, local area co-operation and anti-social behaviour.
- **Value for money.**
- **Governance and financial viability.** However, this standard does not apply to local authorities. In the case of for-profit registered providers, these standards will only relate to their management of social housing: see s.194 of the 2008 Act.

Importantly, the standards document also sets out the TSA's criteria for considering complaints against registered providers, taking account of the existence of local complaints procedures and other bodies which consider complaints such as the Housing Ombudsman.

Influences upon the content of and application of the housing standards

To some extent, the TSA has a relatively free hand to decide on the content of the standards. The only principle to which the Act expressly requires the TSA to have regard in setting standards is "the desirability of registered providers being free to choose how to provide services and conduct business" (s.193(3)) and so the standards should not be overly prescriptive and, in fact, they focus strongly on outcomes rather than processes. However, it should be borne in mind that the TSA's 10 fundamental objectives (see above) will have influenced the content of the standards and will influence their application as part of the regulatory interaction between TSA and individual registered providers.

Under s.195 of the 2008 Act, the TSA has the power to issue Codes of Practice which "amplify" the standards and may be taken into account by the Regulator when deciding (e.g. as part of enforcement procedures) whether a standard has been complied with (s.195).

REGULATORY ENFORCEMENT: GENERAL MATTERS

The 2008 Act has significantly extended the regulatory enforcement armoury of the TSA (as compared with the powers of the Housing Corporation). It is in the public interest for those powers to be exercised coherently. Below, we consider those provisions of the 2008 Act which aim to achieve this.

KEY POINTS

- The Act confers a wider range of enforcement powers upon the TSA than were conferred upon the Housing Corporation
- The Act requires the TSA to take proportionate and tailored enforcement action.
- Warning notices should precede formal enforcement activity
- Often, providers will be invited to enter into 'voluntary undertakings' as an alternative to enforcement action
- Different enforcement powers can be exercised at the same time
- The Regulator is required to issue statutory guidance about the approach it intends to take to the exercise of its enforcement powers

General provisions

Chapter 7 of Part 2 of the 2008 Act confers a number of enforcement powers upon the Regulator ("the Chapter 7 enforcement powers"). All of the Chapter 7 enforcement powers may be exercised on the ground that a standard has not been complied with. In addition, there are further grounds specified in relation to specific enforcement powers.

The Chapter 7 enforcement powers represent an expansion of powers as compared with those of the Housing Corporation. This is particularly the case as regards what can be called micro-enforcement powers. In other words, many of the Housing Corporation's drastic powers of intervention, such as a forced transfer of housing, are repeated but, in addition, the new regulator has new formal powers of enforcement in relation to the detailed operation of a registered provider's, for example the power to impose financial penalties on a private registered provider for breach of standards.

Choice of enforcement power

It will be seen below that there are an extensive range of Chapter 7 enforcement powers at the disposal of the TSA. Which power should it choose in any particular case? At this point, two general obligations of the TSA take on particular significance:

(i) first there are the TSA's fundamental objectives, in particular objective 10 which is to regulate in a manner which (a) minimises interference, and (b) is proportionate, consistent, transparent and accountable;

(ii) the second obligation is found in s.218 of the Act, a provision which applies to, and therefore regulates, the exercise of all the enforcement powers (including the most appropriate choice of enforcement power in a particular case). This section requires the Regulator to consider the following matters in exercising its enforcement powers:

(a) the desirability of registered providers being free to choose how to provide services and conduct business;

(b) whether the failure or other problem concerned is serious or trivial;

(c) whether the failure or other problem is a recurrent or isolated incident;

(d) the speed with which the failure or other problem needs to be addressed.

As a result of objective 10 and s.218, the TSA should choose the least intrusive enforcement power that is reasonably likely to remedy the deficiency in question. And, as a general rule, less draconian powers should be used before more drastic powers. Generally, the TSA should not turn to the more draconian powers, such as a forced transfer of housing, without trying less drastic enforcement action such as an enforcement notice. However, it should be noted that there is no rule that prevents one enforcement activity proceeding alongside another, e.g. it may be appropriate for a tenants' compensation award to be imposed alongside an enforcement notice.

Warning notices and voluntary undertakings

In fact, there will nearly always be some less formal action taken as a prelude to formal enforcement action. As well as the obligation implicit in objective 10 to seek wherever possible informal resolutions to problems, before exercising a Chapter 7 enforcement power the TSA must issue what is effectively a 'warning' notice which gives the provider an opportunity to remedy the alleged deficiency.

Another important feature of the new scheme is the 'voluntary undertaking' provided for by s.125 of the 2008 Act. This is an undertaking given by a provider "in respect of any matter concerning social housing". The undertaking (or breach of it) has no legal consequence of itself but s.125 of the 2008 Act provides that "the Regulator may found a decision about whether to exercise [an enforcement power] wholly or partly on the extent to which an undertaking has been honoured".

A 'typical' enforcement episode

A 'warning' notice will invite a provider to enter into a voluntary undertaking and so, in the normal run of events, providers are likely to:

(i) first of all, be asked informally to change practice to meet the requirements of a particular standard;

(ii) if that does not work, receive a 'warning notice' which includes an invitation to enter into a voluntary undertaking;

(iii) if they refuse to do so, or a previous undertaking has not been honoured, be the subject of formal enforcement action tailored according to the principles in objective 10 and the matters described in s.218.

However, there are no hard and fast rules and particular circumstances may call for different approaches. Section 215 of the 2008 also requires the TSA to issue guidance about how it intends to use its enforcement powers. This guidance will be important. As a matter of public law, the TSA will be expected generally to abide by the terms of its guidance. The guidance can be found in Chapter 6 of, and the annexes to, *The Regulatory Framework for Social Housing in England from April 2010*. That document can be found at http://www.tenantservicesauthority.org/upload/pdf/Regulatory_framework_from_2010.pdf.

REGULATORY ENFORCEMENT: POWERS OF THE TSA

There are eight enforcement powers conferred upon the Regulator by Chapter 7 of Part 2 of the 2008 Act, although not all of these apply to local authorities as explained in further detail below. The eight powers are:

1 - enforcement notices;

2 - imposition of financial penalty;

3 - tenant compensation requirement;

4 - compulsory management tender;

5 - compulsory management transfer;

6 - compulsory appointment of manager;

7 - compulsory removal of officers;

8 - compulsory appointment of officers.

Common procedural and appeal provisions

At the outset, it is convenient to identify some generic provisions which apply across the full (or almost the full) range of regulatory powers:

(i) **Warning notices.** With the exception of powers 7 & 8 (removal and appointment of officers), a procedural condition precedent is attached to each of the powers. Before the power may be exercised, the TSA must serve a warning notice on the registered provider. The notice must inform the provider of the TSA's reasons for taking the proposed enforcement action and inform it of its right to make, within 28 days, representations to the TSA (following which the TSA will decide whether to proceed with the proposed enforcement action).

(ii) **Homes and Communities Agency.** A warning notice given to a private registered provider must also be sent to the Homes and Communities Agency which will presumably take it into account if it has to make any funding decision in relation to the provider.

(iii) **Voluntary undertakings.** With one exception, the warning notice must inform the registered provider whether the TSA would discontinue enforcement action if the provider were to agree to enter into a "voluntary undertaking" under s.125 of the Act. [The exception to this concerns power 3, tenant compensation requirement, presumably because a voluntary undertaking is no replacement for a cash award.] The voluntary undertaking is likely to become an important feature of the new enforcement regime and, accordingly, the TSA is given powers to set out a formal procedure for the giving of voluntary undertakings. The Explanatory Notes to the 2008 Act elaborate on the purpose of an undertaking:

> "one of the purposes of this provision is to enable registered providers to formally notify the regulator of actions that they propose to take, and believe are necessary to ensure that their affairs are managed in accordance with the standards set by the regulator under sections 193 and 194. It provides a mechanism by which such commitments can be brought to the attention of the regulator, and require the regulator to take account of those undertakings when determining whether to investigate the performance of providers, and to take enforcement action where providers have not complied with regulatory requirements."

Notice to the HCA

Whenever any formal enforcement action is taken in respect of a private registered provider, the Homes and Communities Agency must be given notice of that fact. In the case of local authorities, notice will be given to the Secretary of State instead (i.e. Department for Communities).

Rights of appeal

There is also a right of appeal to the High Court against the exercise of powers 1 to 6. Note that, for compensation notices, this includes an appeal against the amount of compensation (as well as the decision to award compensation to a tenant).

Power 1 – the enforcement notice (sections 219 to 225 of the 2008 Act)

When will the enforcement notice be used?

The enforcement notice is the new regulatory action most likely to be encountered by a registered provider, including a local authority. Its purpose, according to s.219 of the 2008 Act, is to require a registered provider to do (or not do, or to stop doing) certain things in order to resolve specified failures or other problems. Accordingly, the notice must set out what, in the opinion of the TSA, has not been done properly and what should be done to remedy it (s.221).

The structure of the Act shows that, where the TSA thinks that enforcement action is called for, an enforcement notice will usually be the first response. This is because, while there is no direct sanction flowing from breach of an enforcement notice, a failure to comply with an enforcement notice is a ground for imposing a 'penalty' (which shows a general legislative assumption that a penalty is intended to be used for more serious regulatory breaches such as where an enforcement notice has been ignored).

Which conditions must be met before a notice may be issued?

In order to have the power to issue an enforcement notice, the TSA must: (a) be satisfied that a notice is "appropriate" and (b) be satisfied that any of the cases described below are met. It should be noted that the list of cases more or less doubled as the Bill which became the 2008 Act was amended during its passage through Parliament.

The cases are as follows:

Case 1 - the provider has failed to meet a social housing or management standard applicable to the registered provider;

Case 2 - the affairs of the provider have been mismanaged;

Case 3 - an earlier enforcement notice has not been complied with;

Case 4 - the provider has not published the information about penalty notices required under s.228 of the 2008 Act or information about compensation awards required to be published under s.240. This shows that the Act attaches importance to the policy of 'naming and shaming' providers who have had to use social housing funds to pay for poor performance;

Case 5 - the interests of tenants require protection;

Case 6 - the assets of the provider require protection, but this only applies in the case of a private registered provider;

Case 7 - the provider has failed to comply with a voluntary undertaking;

Case 8 - the annual registration fee has not been paid;

Case 9 - the registered provider has committed an offence under Part 2 of the Act (e.g. obstructed an inspector or failed to provide performance information to the TSA);

Case 10 - the provider has failed to comply with an order of the Social Housing Ombudsman. It is noted that failure to comply with a recommendation of the Local Government Ombudsman is not mentioned in case 10.

What is the consequence of a provider failing to comply with an enforcement notice?

If a provider does not comply with an enforcement notice, the consequence is that the TSA must consider whether to exercise another of its enforcement powers or one of the powers of intervention described below under "other powers of the regulator", e.g. the power to arrange for a compulsory survey of housing provided by the provider.

Can employees of social housing providers be given enforcement notices?

In some cases, yes. This is possible under case 9 (enforcement notice issued on ground that an offence committed under Part 2 of the Act). If the actions constituting the offence were carried out by an individual (e.g. a housing officer blocked access to an inspector), the individual may be given an enforcement notice.

What would this mean for the employee? It would mean that certain subsequent enforcement action, such as the imposition of a financial penalty, could be taken against the employee personally.

Power 2 – imposition of financial penalty (sections 226 to 235)

This second power is essentially a power to fine a private registered provider for poor performance. It should be noted that this power is not available in respect of local authority providers.

The grounds for a penalty

The same two-stage approach is taken to the Regulator's powers to impose penalties as is taken with its powers to issue enforcement notices. The Regulator must be (a) satisfied that a financial penalty is "appropriate"; and (b) satisfied that one of the cases set out below must also be met.

The cases are as follows:

Case 1 – provider has failed to meet a social housing or management standard;

Case 2 – provider's affairs have been mismanaged;

Case 3 – failure to comply with enforcement notice;

Case 4 – failure to keep to the terms of a voluntary undertaking;

Case 5 – failure to pay annual registration fee;

Case 6 – commission of regulatory offence, such as obstruction of an inspector.

Is there any significance in the difference between grounds for enforcement notice and grounds for financial penalty?

It will be seen that all the above cases (except for failure to comply with enforcement notice) are also cases in which an enforcement notice may be given. What does this tell us about the regulatory scheme? It tells us this:

(i) some enforcement notice grounds are not available as grounds for a financial penalty, i.e. failure to publish information about financial penalties, interests of tenant require protection, assets of provider require protection. Accordingly, if the TSA wants to take enforcement action on that ground, it must begin with an enforcement notice and cannot proceed straight to a penalty. If the enforcement notice is not complied with, a penalty may follow (on the ground that the enforcement notice was not complied with);

(ii) the duplication of cases is an acknowledgement that not all regulatory breaches are of equivalent significance. The less serious of these cases, or 'first offences', should generally be dealt with by way of enforcement notice rather than financial penalty.

Process and penalties

Penalties will not come out of the blue. This is because a penalty notice can only be given to a provider if it has already been given under s.230 a pre-penalty warning. The warning must indicate whether, and to what extent, the TSA would accept a voluntary undertaking rather than proceed with the penalty. The HCA will be given notice of any pre-penalty warning. The provider will have at least 28 days within which to make representations to the TSA. The representations must be taken into account by the TSA before it makes its final decision as to whether to issue a penalty notice.

The penalty is imposed by a penalty notice which must explain the grounds for its imposition. Further provision about penalty notices is expected to be made by regulations, e.g. the period of time which a provider has to pay a penalty.

The maximum amount of a penalty is £5,000 (and there is the possibility of regulations being made to allow interest to be levied upon late payers: s.234 of the 2008 Act). The Secretary of State also has the power to increase the maximum penalty (subject to Parliamentary approval). Section 234 provides that a penalty is a debt owed to the TSA, so it will have to take ordinary civil legal proceedings to recover an unpaid penalty.

Destination of penalty receipts

Section 233 of the 2008 Act prevents the TSA from being able to profit from penalty notices. After it has deducted its administrative costs, any remaining sums must be paid to the Homes and Communities Agency for re-investment in social housing.

Power 3 – tenant compensation awards (sections 236 to 245)

As with the penalty notice, a tenant compensation award may only be made against a private registered provider.

The grounds for compensation

Under s.237 of the 2008 Act, there are only two grounds upon which a compensation requirement may be imposed (in addition, that is, to the requirement that the regulator is satisfied that compensation is "appropriate"). These are:

(i) that one of the standards has not been met;

(ii) that a voluntary undertaking has not been complied with.

Compensation may only be awarded to tenants who have "suffered" as a result of a registered provider's failure (s.238).

The amount of compensation

There is no upper limit to the compensation that may be awarded. However, any compensation already awarded by the Social Housing Ombudsman (and received by the tenant) must be discounted to prevent double payment (s.239 of the 2008 Act).

Additionally, the TSA is required to take into account the provider's financial situation and the likely impact of a particular compensation award on its ability to provide services (s.241 of the 2008 Act).

Section 244 of the 2008 Act provides that the sum specified in a compensation notice is a debt owed to the tenant in question, so s/he will have to take ordinary civil legal proceedings to recover unpaid compensation. The Act also provides for regulations to be made which will empower the TSA to levy interest if compensation is paid late.

Process

The formal legal event by which compensation is awarded is the service of a compensation notice upon the provider. This will specify the amount of compensation and why it has been awarded. However, the compensation will not come as a surprise. This is because once again the 2008 Act requires a preliminary stage, the pre-compensation warning (s.242).

The provider will have 28 days within which to make representations following receipt of the warning. Once again, the pre-compensation warning will be copied to the Homes and Communities Agency. Also, the Social Housing Ombudsman must be consulted before a pre-compensation warning is given. This will allow the Regulator and the Ombudsman to ensure that they do not duplicate each other's work. The warning must indicate whether, and to what extent, the TSA would accept a voluntary undertaking rather than proceed with the penalty.

Power 4 – compulsory management tender (sections 247 & 248)

This power is available to the TSA in the case of both private registered providers and local authorities. However, a new section 250A of the 2008 Act (inserted by the Registration of Local Authorities Order 2010) modifies its application in relation to local authorities.

The grounds upon which this power is available

Under s.247, there are two separate grounds upon which this power may be exercised:

(i) where the TSA is satisfied that a provider has failed to meet a social housing or management standard applicable to the provider; and

(ii) where the TSA is satisfied that the affairs of the provider in relation to social housing have been mismanaged.

Note that there is no additional requirement for the TSA to be satisfied that a compulsory management tender is "appropriate".

The nature of the power

This power is a power to require the provider to tender out management functions in relation to its social housing, in whole or in part (e.g. just its repairs service could be the subject of the tender). The TSA will specify the process that the provider is to follow in putting the services out to tender and making an appointment as a result of that process. But there are certain requirements imposed by the Act, explained as follows by its explanatory notes:

- "The regulator must specify certain matters when it exercises this power, as follows:
- the constitution of the panel which has the responsibility for selection, which must include provision for ensuring tenants' interests will be represented on that panel,
- provision for ensuring that the procurement process follows best practice, and
- the terms and conditions on which the manager is to be appointed, that will include the setting of the required standards, how those standards will be monitored and enforced, and resources."

Again, there is a preliminary warning stage (s.248 of the 2008 Act).

Power 5 – compulsory management transfer (section 249 & 250)

This power is available to the TSA in the case of both private registered providers and local authorities. However, a new section 250A of the 2008 Act (inserted by the Registration of Local Authorities Order 2010) modifies its application in relation to local authorities.

This power is only available to the TSA where a formal inquiry has been held under s.206 of the 2008 Act (see below) or an extraordinary audit been carried out under s.210 (see below). This illustrates the exceptional nature of the power.

Under s.249 of the 2008 Act, the power is exercisable where, as a result of the inquiry or audit, the TSA is satisfied as to either of the following:

(i) the affairs of the provider in relation to social housing have been mismanaged; or

(ii) a transfer of certain of the provider's management functions would be likely to improve the management of some or all of its social housing.

The power itself is a power of the TSA to require the registered provider to transfer the management of some or all of its management functions to another specified person. However, the Secretary of State must give consent to the transfer.

Power 6 – compulsory appointment of manager (sections 251 & 252)

This power is only available to the TSA in the case of a private registered provider. Under s.251 of the 2008 Act, there are two grounds on which this power may be exercised:

(i) where the TSA is satisfied that a provider has failed to meet an applicable social housing standard;

(ii) where the TSA is satisfied that the affairs of the provider in relation to social housing have been mismanaged.

The TSA's power is either to appoint an individual as manager of the registered provider, or to require the registered provider to appoint an individual as manager. Again, there is a warning stage.

While the power to appoint a manager is not available to the TSA in respect of local authorities, it does have the power to appoint advisers for local authorities. This power is contained in new section 252A of the 2008 Act (inserted by the Registration of Local Authorities Order 2010) and is available where:

(i) the TSA thinks it is necessary to appoint an adviser for the "proper management" of the authority's social housing affairs; or

(ii) the TSA thinks it is desirable to appoint an adviser "in the interests of securing better services for the authority's tenants".

Where an adviser is appointed, the authority must co-operate with the adviser (section 252A[6]).

Power 7 – transfer of land (sections 253 & 254)

This power is only available in the case of private registered providers and only if a formal inquiry has been held under s.206 of the 2008 Act (see below) or an extraordinary audit been carried out under s.210 (see below). This illustrates the exceptional nature of the power. This is not really a new power, however, as the Housing Corporation had similar powers.

Under s.253 of the 2008 Act, the power is exercisable where, as a result of the inquiry or audit, the TSA is satisfied as to either of the following:

(i) the affairs of the provider in relation to social housing have been mismanaged; or

(ii) a transfer of land by a registered provider would be likely to improve the management of the land.

The power is a power to require the land (including housing on the land) to be transferred to the TSA or another private registered provider. However, the power is either not available or restricted in relation to certain categories of provider and certain types of transfer. For example, no requirement to transfer land may be imposed upon a registered charity and a not-for-profit provider cannot be required to transfer land to a profit-making provider. In addition, the Secretary of State has to consent to any transfer.

S.254 of the Act requires a price to be paid for the transferred land in accordance with the district valuer's valuation.

Power 8 – forced amalgamation: section 255 (industrial and provident societies)

This is another power which is only available to the TSA following a formal inquiry or extraordinary audit. Under s.255 of the 2008 Act, amalgamation may be required where the TSA is satisfied that, as a result of the inquiry or audit, the affairs of a registered provider which is an industrial and provident society have been mismanaged in relation to social housing, or the amalgamation of an industrial and provident society with another industrial and provident society would be likely to improve the management of its social housing.

The power under this section is a power to bring about the amalgamation of the society with another industrial and provident society. The Secretary of State must also consent to the amalgamation.

Other powers and duties of the TSA

The TSA has a range of other powers and duties in support of its main responsibility of ensuring that social housing in England is properly managed and provided. The key powers and duties are as follows:

(i) **Tenant involvement.** Section 98 of the 2008 Act requires the TSA to promote awareness of its functions among tenants of social housing. It also requires the TSA, where "the [TSA] thinks it appropriate", to consult tenants about the exercise of its functions and involve them in the exercise of its functions. It also requires the TSA to publish from time to time a statement about how it will meet this duty, following consultation.

(ii) **Tenants' complaints.** S.215 of the 2008 Act requires the TSA to publish guidance about the making of complaints to it about the performance of registered providers. The guidance must specify the procedure to be followed where a person makes a complaint, the criteria to be used by the regulator in deciding whether to investigate a complaint, and periods in which the regulator aims to inform complainants of the result of complaints.

(iii) **No investment direction.** Section 106 of the 2008 Act permits the TSA to control the investment activities of the Homes and Communities Agency. This section permits the TSA to direct the HCA not to give social housing financial assistance under s. 19 of the Act to a specified registered provider. The Act is structured so that this power of the Regulator may only be used in the most serious cases of mismanagement. As the Explanatory Notes to the Act state:

> "The purpose of this power is to prevent financial assistance from being given to a registered provider where there are serious concerns about mismanagement or about the viability of the organisation. This power may be used in the most serious interventions by the regulator, as described in *subsection (2):*
>
> - the regulator has decided to hold an inquiry into affairs of the registered provider under section 206 (and the inquiry is not concluded),
> - the regulator has received notice in respect of the registered provider under section 145 (moratorium), or
> - the regulator has appointed an officer of the registered provider under section 269 (and the person appointed has not vacated office)."

(iii) **Powers to require information.** Registered providers (including profit-making providers and local authorities) should take note of the TSA's powers under s.107 of the 2008 Act. This gives the TSA the power to require documents or information from any person it believes may possess them, concerning the financial or other affairs of registered providers or the activities or proposed activities of a registered provider or a person who has applied to become a registered provider. The Explanatory Notes to the 2008 Act set out how these powers are likely to be used:

> "The regulator is likely to use this power to follow up concerns raised by tenants, local authorities or others by asking for specific information from the provider in addition to standard performance information obtained under section 204."
>
> It is a criminal offence to fail without reasonable excuse to provide information required by the Regulator, the maximum penalty being a £5,000 fine. It is also an offence to destroy or alter such information. In this case, however, the maximum penalty is 2 years' imprisonment.

(iv) **Inspections.** Section 201 of the 2008 Act permits the TSA to cause an inspection to be carried out into a registered provider's, including a local authority's, compliance with the standards. Key points about inspections are:

- Inspections may be general or specific, say into the quality of a repairs service with a view to deciding if formal enforcement action is called for.
- The Act prohibits a member of the TSA's staff from carrying out an inspection. Normally, inspections will be carried out by the Audit Commission (s.201(3)).
- The person carrying out the inspection has various rights of entry and rights to seize documents (s.202).
- Following an inspection, a report must be prepared which may (but does not have to be) published. The Secretary of State may order that fees may be charged for inspections.

(v) **Providers' annual reports.** Section 204 of the 2008 Act gives the TSA a power to require registered providers, including local authorities, to prepare an annual report containing an assessment of its performance in relation to any standards and to send that report to the TSA within a specified period. It is a criminal offence for a provider to fail to comply (maximum penalty: £5,000).

(vi) **Publication of performance information.** Section 205 requires the Regulator to publish at least once a year information about the performance of registered providers. This must include information likely to be useful to tenants, potential tenants and local authorities.

(vii) **Inquiries.** Sections 206 to 210 of the 2008 Act permit the TSA to arrange for a formal inquiry to be held where it believes that there may have been mismanagement by a registered provider, including a local authority, of its affairs in relation to social housing. The persons holding the inquiry have the power to require persons to give evidence and produce documents for the purposes of the inquiry.

(viii) **Extraordinary Audit.** Under s.210 of the 2008 Act (entitled "extraordinary audit"), where the TSA has decided to hold an inquiry, the TSA may require a private registered provider to allow its accounts and balance sheet to be audited by a qualified auditor appointed by the regulator. A new section 210A provides for 'extraordinary audit' in relation to local authorities. Under this section, the TSA may require the Audit Commission, in connection with an inquiry into a local authority, to report to the TSA on the authority's accounts and balance sheet.

(ix) **Restricted dealings.** Sections 256 to 258 provide for the TSA to make an order to restrict the transactions which a non-profit private registered provider (so not including local authorities) may enter into or the payments it makes, and may order anyone holding money or securities on behalf of the provider not to part with them. The power is available where an inquiry is in progress and one of two Cases applies. Case 1 is that the TSA has reasonable grounds for believing that the provider's affairs have been mismanaged and that the interests of tenants or its assets require protection. Case 2 is that as a result of an interim report from an inquiry, the TSA is satisfied that its affairs have been mismanaged.

(x) **Removal from office.** Sections 259 to 261 give the TSA powers to suspend a person, such as an employee of a non-profit private registered provider, from office during an inquiry. After the inquiry, there are powers to remove from office, as well as suspend.

(xi) **Other powers to remove and appoint officers.** The TSA has further powers to remove officers (such as board members) of non-profit private registered providers under s.266, e.g. if the officer has been adjudged bankrupt or is incapable by reason of mental disorder. Section 269 gives the TSA the power to appoint officers, e.g. to replace one removed under s.266 or where the TSA "thinks an additional officer is necessary for the proper management of the body's affairs".

(xii) **local authority censure notices.** New sections 269A & 269B of the 2008 Act gives the TSA power to serve a censure notices on a local authority where a formal inquiry is ongoing. The censure notice "is a notice identifying an employee or agent of the authority who the [TSA] thinks has contributed [to failure or mismanagement". The authority must explain in writing what action it intends to take in response to such a notice.

(xiii) **Compulsory surveys.** Sections 199 and 200 of the 2008 Act permit the TSA to arrange for a registered provider's (including a local authority's) housing to be surveyed where the Regulator suspects that the provider "may be failing to maintain premises in accordance with" applicable standards. At least 28 days notice of survey must be given by the TSA and the householder whose home is to be surveyed must be given by the provider at least 7 days' notice of the survey. It is a criminal offence for a registered provider (or one if its officers) to obstruct the survey. It is also an offence for the provider to fail to give the householder 7 days' notice of the survey. In both cases, the maximum penalty is a £1,000 fine. The provider can also be required to pay the costs of the survey.

(xiv) **Management and constitution.** Sections 187 to 190 of the 2008 Act, which only apply to not-for-profit providers, repeat provision currently made in relation to RSLs by the Housing Act 1996. Under these sections, the regulator must be informed of, or consent to, various organisational changes, for example an alteration in the articles of association of a provider that is a registered company.

(xv) **Accreditation of housing managers.** Section 217 of the 2008 Act allows the TSA to operate a scheme for accrediting persons who provide services in connection with the management of social housing. This could be the beginning of formal job reservation in the housing sector because section 217(6) specifies that the social housing standards may refer to accreditation under s.217, i.e. they may impose requirements in the standards that operate by reference to accreditation. The TSA is permitted to withdraw accreditation, operate a scheme for complaints against accredited housing managers and require managers to pay annual fees.

What about Wales?

The Regulator of Social Housing is a regulator for England. Arrangements in Wales are largely unchanged by the Act. Accordingly, the Welsh Ministers (Welsh central government) will continue to act as the registration authority for Welsh "registered social landlords" under the Housing Act 1996. In other words, under the 2008 Act, the existing arrangements, including enforcement powers and the concept of the registered social landlord, will live on in Wales. As a result, Welsh registered providers will still have to be non profit-making.

There has always been some uncertainty as to regulatory responsibilities in relation to RSLs which operate in both England and Wales. This is tackled by the 2008 Act which amends the Housing Act 1996 to create a test for identifying what is a Welsh registered social landlord (and thus to be registered as such with the Welsh Ministers). This test reflects that which applies to the Regulator for England under section 109 – e.g. registered office must be in Wales and it must appear to the Welsh Ministers that the RSL provides housing mainly (but not necessarily exclusively) in Wales. In other words, there is nothing to prevent RSLs (and English registered providers) providing housing in both England and Wales.

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