What do we do with a problem like Ground 8?

Thu, 28 Dec 2006 20:47:52 +0000

NL

To those not acquainted with housing law, Ground 8 is one of the mandatory grounds for possession of an assured tenancy listed in Housing Act 1988 Schedule 2. It forms one of the major differences between an assured tenancy (typically Housing Association/Registered Social Landlord) and a secure tenancy (typically Local Authority). As the wholesale transfers of local authority housing stock and tenancies to Housing Associations continue, not wholly uncontested, these differences become increasingly significant.

Ground 8 works quite simply. For the average weekly tenancy, it goes like this: 8 weeks rent arrears at the the time of the service of the Notice Seeking Possession and 8 weeks rent arrears at the date of the hearing of the claim and outright possession *must* be granted. Note those two dates. It does not mean a continuous period of arrears of 8 weeks or more. One can have entirely paid off arrears and then accrued a furhter 8 weeks, it doesn't matter.

In dealing with secure tenants facing a possession claim for rent arrears, the Court has an extensive discretion as to whether possession is granted and if so, whether it is postponed. The Court will typically consider the arrears history and any reasons for the arrears, such as difficulties with housing benefit (which are frequent). None of this can be considered in a claim for possession on Ground 8. If the conditions are met, outright possession is mandatory and eviction usually follows promptly.

Some Housing Associations claim that they rarely use Ground 8, relying instead on discretionary Grounds, others claim that they use Ground 8 only 'in extremis'. All point out that they have a duty to recover rent (although only rarely is any rent actually recovered this way). However, there are still many claims being made, in my anecdotal experience.

Nobody, except the Housing Associations, likes Ground 8. The Courts tend to dislike the restriction on their discretion, particularly when they are very familiar with housing benefit screw-ups. I have heard tales of the Court, where there is any doubt at all that the Notice Seeking Possession was received by the tenant, insisting that the HA witness to service is produced, which they often can't do and this will, in any case, adjourn matters unless by some miracle, the housing officer is present.

Housing lawyers don't like it for obvious reasons. So what, if anything can be done in the face of a Ground 8 claim?

Where the Order has been made, are there any grounds to set it aside? The usual ones of non-attendance for good reason and a defence usually won't work, (but just might for disrepair?). However, I have successfully obtained set asides on the basis of oppression and on the basis that the defendant was a patient in terms of CPR 21.2 so that a litigation friend should have been appointed by the Claimant.

If there is the basis for a disrepair counterclaim, this might work. I haven't personally run one, but it ought to mean that the amount of the arrears is disputed.

Also check whether the amount of arrears can be disputed, post *Riverside Housing Association Ltd v White* [2005] EWCA. Have rent increases been correctly levied? [Edit 05/07. The House of Lords has overturned the Court of Appeal judgment. Although the matter turns on the facts of Riverside, this downgrades a challenge on these grounds].

The other challenges are purely procedural. Have the technicalities, such as service, been complied with?

On these lines, a new and interesting prospect is presented by the introduction of the Pre-Action Protocol for rent arrears possession claims. A failure to comply with the protocol, where the claim is brought on anything other than *solely* mandatory grounds, means the Court can adjourn, strike out or dismiss claims. Claims on Ground 8 typically, though not always, are also made on Ground 10 and 11, which are discretionary grounds, thus opening up the argument that the Claimant has failed to comply with the Pre-Action Protocol and the claim should be dismissed or struck out. This won't work on a solely Ground 8 Claim, but these are rarely made because of the arrears are reduced below 8 weeks (for a weekly rent), then the whole claim fails.

In my anecdotal experience, Housing Associations have been very poor at following the Protocol since it was introduced at the beginning of October 2006. This one could well be worth considering.

The fact remains that Ground 8 claims are difficult to defend (and for that reason it can be tricky to get funding for a defence). As the use of the ground is often deeply unfair to a tenant who has been trying to get their housing benefit sorted out (and this can take months), it makes an assured tenancy considerably less safe than a secure one.

Human Rights and possession claims after Kay v Lambeth

Sun, 28 Jan 2007 21:56:03 +0000

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The House of Lords decision in Kay v Lambeth [2006] UKHL 10 addressed Human Rights defences to possession claims, attempting to unify Harrow v Qazi [2004] 1 AC and the subsequent European Court judgement in Connors v United Kingdom [2004] 40 EHRR 189.

Qazi effectively ruled out a human rights defence to possession based upon Article 8 where domestic law had been complied with.

Article 8 of the European Convention on Human Rights provides that

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Qazi effectively said that any possession claim made in accordance with domestic law satisfied 8.2.

Connors concerned an eviction of a gipsy family under a statutory procedure that required no reasons to be given by the local authority and no examination by the Court. The European Court held that the power to evict without giving reasons to be examined by a tribunal had, in this case, not been shown to satisfy 8.2. Moreover the legislation that enabled this did not give the requise procedural safeguards (there have since been amendments to change this). There was a positive obligation to consider the needs and lifestyle of gipsy families, both in legislation and in particular cases.

So, *Connors* apparently re-opened possible Article 8 challenges via two routes, a failure by a public body to consider the particular circumstances of the occupier where that should have been considered, and the incompatibility of legislation with Art. 8.

Kay v Lambeth, by a 4 to 3 majority, appeared to decide that the issue in *Connors* was solely that of the law itself, such that the only possible Art. 8 challenge was to whether the law under which possession was claimed met the Art. 8 requirements in terms of interference with the right to respect for the home. The assumption that the County Court should make was that if the interference was permitted under domestic law, it met those requirements. In some exceptional cases, such as *Connors*, it may be that the statutory procedure should ensure that special consideration is given to Art. 8 rights and this is a matter of statute. The minority considered that there may be exceptional cases where the particular personal circumstances of the occupier may give rise to an Art. 8 defence.

The upshot of *Kay* therefore appeared to be that any Art. 8 defence had to be that the law was incompatible with the ECHR. Either the County Court would attempt to give effect to the law as best it could in accordance with Art. 8 or the matter would be sent to the High Court for consideration. At best the result would be a declaration of incompatibility, which, as the statute would still stand, still wouldn't help the occupier who would still have possession granted against them.

This view has now been tested in the Court of Appeal in Doherty v Birmingham CC [2006] EWCA Civ 1739, which concerned a summary order for possession. The Court of Appeal take a lengthy and considered comparison of the six reasoned judgments in Kay v Lambeth and settled on the 'majority' view as set out by Lord Hope.

Both *Kay* and *Doherty* though, do confirm that public law defences are available in County Court possession hearings, at least against public bodies. So anything that might be a ground for judicial review of the decision to take proceedings can be raised as a defence to a possession claim by a public body. It seems this is now the only way in which individual circumstances could be raised where possession procedures don't alow them to be addressed by the County Court.

What does that leave for Human Rights challenges? Not a lot, I think.

Possibly in *Connor* style termination of licences for Gipsy/Traveller cases, where there are strong merits. But the specific law in *Connor* has been amended to give some discretion to the Courts, so a duplicate challenge may now fail.

In an article in the May 2006 LAG, after the decision in *Kay*, it was suggested that a challenge to Ground 8 1988 Housing Act claims may be possible, at least where arrears are solely due to housing benefit errors. I'm not sure about this, for two reasons. Firstly, this looks like considering specific personal circumstances in relation to housing benefit, and secondly, because the challenge would surely have to be against Ground 8 as incompatible with Art. 8 *tout court*, against an absolutely express intention of parliament. Plus, of course, it wouldn't benefit the occupier who would still have possession given against them. (It may be that a putative public law defence would be an option here: Housing Association as a functional public authority and making an unreasonable decision to pursue a mandatory ground in view of housing benefit issues. The Housing Corporation guidance on ground 8 could help here. But this is also untested).

Whilst on the Housing Act 1988, the other big ground of non-discretionary possession, this one against private tenants - s.21 Notice and the accelerated possession procedure, might similarly lack procedural consideration of circumstances, but this one has already been tackled and dismissed by the Court of Appeal in *Donoghue v Poplar Housing* [2001] EWCA Civ 595.

No doubt there will be further challenges, but given *Doherty*'s confirmation of the majority view in *Kay*, these are likely to be in quite exceptional areas. Mainstream possession claims, where in accordance with statute and the law, are beyond human rights defences.

Permanent trespassers and enforceable possession orders.

Thu, 19 Apr 2007 22:15:04 +0000

NL

I was scanning the Court of Appeal judgments, waiting for White v Knowsley, when this came up:

London & Quadrant Housing Trust v Ansell [2007] EWCA Civ 326

Now that is interesting. Not so much for the conclusion - although the argument is imaginative - but for unappealed County Court findings and *obiter* by the Court of Appeal.

Briefly, the facts were that the Defendant/Appellant had a secure tenancy with London & Quadrant. A suspended Possession Order was made in Feb 2001 on grounds of rent arrears, £1169 arrears and £120 costs to be paid in instalments, and the terms of the Order were breached shortly afterwards. Ansell became a tolerated trespasser.

Following a payment of housing benefit, Ansell's account went into credit by some £300 in 2004.

Then L&Q issued a claim for possession in Feb 2006 on grounds of nuisance to neighbours. Clerkenwell County Court granted outright possession.

The appeal was on the basis that, as Ansell was a tolerated trespasser, L&Q in bringing the new possession claim, rather than seeking to enforce the 2001 order, were seeking to bring an action on the judgment of the earlier proceedings; that this was not open to L&Q; and that enforcement of the earlier order was the only route open to L&Q.

The Court of Appeal said that, if the Court's powers under s.85 Housing Act 1985 had remained exerciseable, this would been the case. However, the County Court had found (and crucially this was not appealed - why not? Why ever Not? Even as an alternative?) that both the arrears and costs had been paid off, even though there was no evidence that costs had been rolled into the arrears or paid separately. Thus the 2001 possession Order was no longer enforceable and, via *Marshall v Bradford MC*, the Court had no powers under s.85 to enforce or vary the order.

The prospect was thusly of the intriguing proposition that a tolerated trespasser who had paid off arrears and costs was effectively immune from both any enforcement of the original possession order and, crucially, any further possession proceedings. Thusly unevictable.

Unsurprisingly the Court of Appeal was not having this. It held that L&Q were not seeking to enforce the order of 2001 nor was possession being sought on historic rent arrears. Rather the tenancy had ended in 2001, there was no possibility of reviving the tenancy via s.85 (debateable - but not argued here) and no fresh tenancy had arisen by conduct. L&Q was simply relying on the end of the tenancy via the 2001 order and this was not a way of seeking to enforce it otherwise than by in those proceedings.

The Court of Appeal upheld the possession order made by the County Court.

The significant bit here is the unappealed issue of when the Suspended Possession Order ceases to be enforceable or variable by the Court under s.85. The 2001 Order stated:

> You must also pay to the claimant £1,049.15 for unpaid rent, use and occupation of the property and £120.00 for the claimant's costs of making the application of possession.
>
> You must pay the claimant the total amount of £1,169.15 by instalments of £2.65 per week in addition to the current rent. The current rent is £84.00 per week. The first payment of both these amounts must be made on or before 5 March 2001. When you have paid the total amount mentioned the claimant will not be able to take any steps to evict you as a result of this order.

So both arrears and costs must be paid off. In this case, the County Court, despite the Defendant's evidence that she had not paid or made payments towards the costs of £120, decided that:

> . . . it is quite clear to me that the payments made by the defendant were both for arrears of rent/mesne profits and costs. There is simply no basis for asserting that the payments for costs only occurred at the end of the payments for the arrears of rent/mesne profits.

This strikes me as iffy, to say the least. It was apparently vaguely based on the idea that the Defendant's rent account had gone into credit in an amount exceeding the costs, but with no examination if any payment or payments could be set against the costs.

This was just a first level decision (I have seen a number of County Court decision go the other way), but it now has the recognition of a Court of Appeal judgment. However, as the point was not appealed, the Court of Appeal had to go along with the finding and decide on that basis. The Court of Appeal was clearly not happy with that. In *obiter* - the 'some points to note' of Lord Justice Chadwick's judgment (para 51):

> I confess to some unease in finding that the Court is driven to the conclusion that Ms Ansell has lost the protection afforded by the provisions of section 85(2) of the Housing Act 1985 in circumstances in which -without her concurrence and, perhaps, without her knowledge at the time - the whole of the monies to be paid under the order of 19 February 2001 were paid by an unanticipated change in the pattern of housing benefit payments. Although I am satisfied that the Court is driven to that conclusion by Ms Ansell's decision (no doubt on advice) not to appeal the finding of the judge as to the effect of the housing benefit payments - and by the decision in *Swindon Borough Council v Aston* (which is binding upon us) - I cannot avoid thinking that it would have been more satisfactory if the question whether Ms Ansell should be required to give up possession of her dwelling-house could have been addressed in the context of an application to stay or suspend the execution of the possession order of 19 February 2001.

And the subsequent points made by Lord Justice Lloyd, also show a clear unhappiness with the County Court finding.

Also worth noting is the unease with the ludicrous and counter-intuitive situation in which a tolerated trespasser should avoid paying off arrears and costs until making an application under s.85(2) to postpone the date of possession. Lord Chadwick says, again *obiter*:

> On a more general basis, as it seems to me, the decision in *Swindon Borough Council v Aston* - that the powers under section 85(2) of the 1985 Act are not exercisable once a possession order ceases to be enforceable on payment of all the monies which are to be paid thereunder - provides a trap for former tenants and their advisers who do pay what the order requires them to pay without first making an application to vary the order by postponing the date of possession. The problem is compounded if - as will frequently be the case - the former tenant has not complied strictly with the conditions imposed by the order; and so cannot seek discharge or rescission of the possession order under section 85(4) of the Act.

Well quite.

So, it looks like the issue of when the SPO becomes unenforceable, and with it the possibility of applications under s.85, will rumble on with varying County Court judgments until the Court of Appeal does get to deal with it.

More on London & Quadrant v Ansell

Fri, 20 Apr 2007 21:32:20 +0000

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Musing over the Court of Appeal judgment (*[2007] EWCA Civ 236*) today, it struck me that the case does something rather dramatic to the issue of tolerated trespassers, extending the thrust of *Swindon v Aston [2003] HLR 610*.

What we knew from *Swindon v Aston* was that a tolerated trespasser could not apply to the Court under s.85 to vary the Possession Order when all the arrears (and the other requirements of the possession order) had been discharged. But the presumption was that the occupier remained as a tolerated trespasser. There was no revival of tenancy nor was a new tenancy spontaneously generated (*Marshall v Bradford*). The status of the occupier was then dependant on the landlord granting a new tenancy (explicitly or implicitly by treatment).

Not a happy situation at all. But it may have just got worse. *L&Q -v- Ansell* appears to state that, once the arrears and costs set out in the Possession Order have been paid, the occupier ceases to be a 'tolerated trespasser' in the sense of *Burrows* because their occupation is no longer subject to s.85 Housing Act 1985 - either in terms of execution of the order or possible application for variation of the order.

The conclusion offered is that the occupier becomes a bare trespasser, subject to a claim for possession without defence, as was made in Ansell.

If the terms of the Suspended Possession Order have not been complied with, (and they rarely are as all it takes is one missed housing benefit payment, or one missed payment by the occupant), then an application to discharge or rescind the Order under s.85(4) is not available.

So, if an application to postpone (if the order has not been complied with) the date of possession is not made before the arrears and Court costs are paid off, the erstwhile tenant come tolerated trespasser is screwed and is now just a bare trespasser.

So the possible upshot is, if the ex-tenant has not fully complied with the Suspended Possession Order, but has fully discharged the arrears and court costs, and if they have not made an application to vary the Order, s/he not only doesn't get a new tenancy but loses the protection of s.85 in terms of staying eviction. S/he could face a possession claim for which they would, as a bare trespasser, have no defence.

This one had really better go to the House of Lords, but hopefully not with the same legal team for the appellant, who seem to have made something of a unnecessary balls-up in not appealing the County Court finding on the unavailability of s.85 powers at least as an alternative.

Of course, none of this applies (as yet) to Postponed Possession Orders in the form N28A.

White v Knowsley - Court of Appeal Judgment

Wed, 02 May 2007 18:44:47 +0000

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Given today and no surprises.

The upshot is that assured tenants and secure tenants are in exactly the same position in regard to suspended possession orders and that s.9 Housing Act 1989 and s.82 Housing Act 1985 have the same effect despite the difference in wording.

So, any assured tenant in breach of an old suspended possession order, or who received an SPO in form N28 between 2001 and mid 2006, (prior to the introduction of the N28A), regardless of whether it was breached or not, is a tolerated trespasser.

There are now definitely a lot more tolerated trespassers, whereas it was previously just presumed that they probably were.

The judgment is worth reading as it sets out the history and current position clearly. (*White v Knowsley Housing Trust [2007] EWCA Civ 404*)

The result is that same practical concerns apply with assured tolerated trespassers as with secure tenancies:

- An application will be necessary to revive the tenancy, but under s.9 HA 1989, not s.85 HA 1985 .
- The application must be made while the possession order is enforceable, so prior to the arrears and costs being paid off in most cases.
- The tenancy does not automatically revive, nor a fresh tenancy begin once the order is unenforceable.
- In the interim, the covenants of the tenancy are unenforceable. This includes repairing covenants, any right to buy rights and succession rights.
- However, while the possession order is enforceable, the ex-tenant also has the protection of the possession order in applying for stay of eviction when a warrant is issued.

This part of the saga is over. Next?

Riverside Housing v White, House of Lords

Sun, 13 May 2007 13:05:06 +0000

NL

The Court of Appeal judgment in Riverside suggested that if rent increases hadn't been levied pretty much exactly as per any provision in the tenancy agreement, those increases were invalid. Riverside had levied rent increases later than the date specified in the tenancy agreement. This was a rent arrears possession case and the arrears were reduced considerably by this.

It wasn't something that came up very often - I've not seen a case - but was always worth checking, particularly in ground 8 cases.

Now the House of Lords has allowed Riverside's appeal and largely overturned the Court of Appeal. (Riverside HA v White and another [2007] UKHL 20) .

Although the case turns very much on the specific detail of Riverside's tenancy agreement, and so it may be possible to make a similar argument on a different tenancy agreement, it is worth noting that Lord Neuberger's judgment does suggest that social housing landlords, or at least housing charities as in this case, would not be held to the strict construction of the rent review clauses, unlike a commercial lease (See paras 28 and 29).

The discussion of costs at 41 suggests it can be worth thinking about agreeing key questions to be heard as preliminary issues.

Trouble with tenses

Wed, 06 Jun 2007 18:53:28 +0000

NL

I'm drafting an application and order for the variation of a suspended possession order and revival of secure tenancy under s.85 Housing Act. If the application is successful, the resulting order will immediately cease to have effect because someone else entirely will have been the tenant for the last couple of years.

My head hurts.

Waxed Moustaches

Wed, 13 Jun 2007 19:23:41 +0000

NL

I caught someone from the National Citizens Advice Bureau on BBC Breakfast this morning, commenting on a CAB report on the large number of people in private rented properties in bad condition who are promptly evicted if they complain or do anything about the disrepair.

Anecdotally, I'd certainly support this. We do hear from quite a few private tenants who have received notice or possession orders after raising repairs, or getting an inspection by the local authority environmental health. Often these people have been living in deadful conditions with only silence or worse from the landlord.

As the CAB spokeswoman pointed out, there is little or nothing to stop this happening once the fixed period of an assured shorthold has elapsed. Apparently, Australia has some form of protection from eviction while disrepair issues are underway. I'll try to find out about this - could be interesting.

As it is, English tenants can only hope that their landlord is dim or greedy, because if the landlord goes the s.21/accelerated possession route, there is nothing they can do to prevent or delay possession if they are out of the fixed period. A separate claim for disrepair is possible, but always tricky when the ex-tenant is out of the property.

If the landlord is greedy, and if there are rent arrears, the tenant may be luckier. A possession claim on the basis of section 8 and/or 11 and 12 - all rent arrears of some form - presents the possibility of a disrepair counterclaim. This will certainly delay possession and, if the damages are enough to wipe out the arrears, put paid to the possession claim. The landlord will have to start afresh with a s.21 procedure, as one can't run two possession claims side by side or amend the claim to insert grounds that weren't in the Notice.

We had a case like this some months ago. Greedy or ill-advised landlord (because they were represented) made a s.8 claim for possession, after being served with a works order by the council once the client/tenant got Environmental Health in. The client, luckily, came to us. The rent arrears were substantial, but the disrepair significant. An immediate disrepair counterclaim was served. Of course, the matter then took many months to get to final hearing, and the result was that the damages more than cleared the arrears, possession claim dismissed, and the client had a grand or two over coming in damages and an enforceable order for repairs. We got costs...

But these are the very lucky exceptions. The CAB are calling for tenancy safeguards in these situations. It is, of course, a good idea, but frankly I can't see any legislation happening soon. Everything will likely be put on hold pending the final report of the Law Commission review of housing law, which will be along in...a bit.

The horse's mouth

Thu, 12 Jul 2007 22:13:20 +0000

NL

I was delighted to see some comments from members of the Community Law Partnership on this blog today, adding to my notes on some of their Court of Appeal cases.

The comments are detailed and very helpful, adding a lot to my scanty commentary, so, for the housing lawyers amongst us, it is well worth reading their comments on my posts on

Shala v Birmingham

Aweys v Birmingham

Omar v Birmingham

and now

Doherty v Birmingham (House of Lords bound, apparently)

And to the CLP people, lovely to see you here, what took you so long? And where is your website?

Public funding and rent payable

Sat, 18 Aug 2007 16:05:49 +0000

NL

I meant to post about this one a month ago but got sidetracked. A case for any civil legal aid people to note.

Funding Certificates are means-tested. Funding issued by practioners under devloved powers can be and is yanked by the Legal Services Commission if they later calculate the client as outside the eligible range. Unsurprisingly, this gives rise to quite a few disputes.

Rent is taken into account in the means test. Relatively recently, the LSC, in its wisdom, decided that the rent figure was *rent actually paid*, not *rent payable*. This produced the glorious result of people facing possession proceedings for rent arrears not getting funding to defend the claim because, err, they hadn't been paying the rent. It also means that the LSC was concluding that the client would continue to not pay the rent so that their disposable income would remain over the eligibility threshold. We had a number of these decisions, which were under appeal at the LSC, now reversed - too late in a couple of cases.

Southwark Law Centre judicially reviewed the LSC on just this point and won, R(Southwark Law Centre) v Legal Services Commission *[2007] EWHC 1715 (Admin)*. The judgment points out that the funding regulations refer to 'rent payable', not rent actually paid and that the LSC's wriggling about on this point wasn't good enough.

The judgment also, albeit obiter, suggests that a tolerated tresspasser can't be considered as paying 'rent', so couldn't be assessed on rent payable, but that this situation would fall under Regulation 24(6) Community Legal Service (Financial) Regulations 2000 as 'cost of living accommodation' for the mesne profits.

Thanks, Southwark Law Centre. That issue was a particularly egregious bit of penny pinching by the LSC, which always looked like a breach of the Regulations.

Catching up - Disability Discrimination and possession

Tue, 04 Sep 2007 18:21:05 +0000

NL

Time for some substantive law at last. I missed this one while I was on holiday and have just had it brought to my attention.

LB Lewisham -v- Malcolm & Disability Rights Commission (Intervener) [2007] EWCA Civ 763. A very interesting case on the application of the Disability Discrimination Act 1995 to a possession case, well

worth reading in full.

Of note:

i) Where a secure tenancy has been determined by a tenant's action related to their disability, that determination persists as the DDA cannot rewrite the HA 1985.

ii) Where the action determining the secure tenancy is related to the disability, subsequent service of a Notice to Quit (majority decision) or alternatively pursuit of a possession claim by the landlord is unlawful. (Unless discrimination can be justified)

iii) The Court cannot make a possession order where the eviction would be unlawful under the DDA (majority) or in reliance on an unlawfully served Notice (minority)

iv) This is so regardless of actual knowledge of the disability by the landlord (a 2:1 majority decision)

v) Whether the determining action relates to the disability is a lesser test than causation

vi) Noted that the landlord's advocate has a duty to the Court in possession proceedings against a disabled tenant to draw the Court's attention to the fact that the act relied upon by the landlord is unlawful. This is so where the tenant has a defence under the DDA even where the tenant is not present/represented in Court.

vii) DDA s22(3)(c) does not only apply where the tenant has security of tenure. It applies to an occupier facing evcition regardless of status.

Lots to think about here.

Possession claims dropping? Not all.

Tue, 11 Sep 2007 22:35:22 +0000

NL

The latest figures, up to Quarter 2 2007 are available on the Ministry of Justice site, link to the PDF.

The figures show quite a drop in the Q2 figures for non-accelerated possession claims issued (including claims by Councils and Housing Associations) compared to Q2 2006:

Q2 2006 32,465 Q2 2007 28,661

The figures for possession orders made also show a drop, although smaller both absolutely and proportionately:

Q2 2006 21,807 Q2 2007 19,542

This may show the effect of the Rent Arrears Pre-Action Protocol. Hopefully compliance with the protocol means less need for claims to be issued and/or stops claims being issued merely as 'enforcement' for agreed arrears repayments, or to poke housing benefit into action. On the other hand, it may just be that the protocol has made issuing a claim trickier.

Certainly, we have been getting fewer inquiries from social housing tenants facing arrears possession claims. Which is slightly annoying, as for various reasons, an arrears possession claim with a decent disrepair counter-claim would be very useful at the moment.

Meanwhile, private sector s.21 accelerated possession procedure claims and possession orders are rising. Claims issued:

Q2 2006 5,800 Q2 2007 6,493

Possession orders made:

Q2 2006 4,203 Q2 2007 4,628

Notably, for a no fault, mandatory order process, a lot of claims are unsuccessful (an increasing number 06-07). One can only presume that a lot of private landlords are making a horlicks of the process, as I doubt many s.21 claims are settled or withdrawn.

Disability and tenancy - More on Malcolm

Sat, 15 Sep 2007 18:52:02 +0000

NL

I posted on *Lewisham v Malcolm* ten days ago. Since then a couple of commentors have raised issues and Tessa has posted on the implications of the case at Landlord Law. So it seemed worth a further look. The caveat is that what follows is my understanding of the Judgment and so is entirely capable of being wrong.

Tessa's post makes some suggestions that I don't think I agree with in terms of the Judgment. Tessa says:

> The Judge refers in paragraph 52 to two County Court decisions, one of being a case where a Judge refused to make an order under s21 where the tenant was disabled, as examples of courts happily adapting to the DDA 95 without difficulty.
>
> The thought of landlords being unable to evict tenants under section 21 because of the DDA will send a shiver down the spine of all private landlords, and may well result in a private determination not to knowingly let to any disabled tenant in future. This will do nothing to help the prospects of the disabled (particularly those suffering from mental illness) obtaining accommodation in the private sector.

Firstly, the reference at para 52 is to two examples put forward by Counsel for Mr Malcolm as examples of the Court's adopting the DDA "without insuperable difficulty". Lady Justice Harman does not criticise this assertion, but does not adopt it either.

Secondly, and more importantly, we are not given details of the s.21 case, *Community Housing Association v Wye*. However, I can only conceive of such a verdict being reached in a particular way.

I think that *Malcolm* is clear that the operation of the DDA is distinct and does not amend Housing Act 1985. By extension, neither will it amend Housing Act 1988. So it is not the case that there is suddenly a defence to a s.21 Possession claim within the terms of HA 1988. It is not the case that the Courts suddenly have the power to consider reasonableness, or to require additional grounds for possession to be met.

However, where an eviction is sought 'for reasons related to the tenant's disability', then the DDA is engaged and a defence not to the possession claim, but to the lawfulness of bringing the claim is possible. S.21 Possession claims do not require grounds, so I can only imagine that the tenant was able to adduce sufficient evidence that the landlord was seeking his/her eviction for reasons related to his/her disability, without justification. This is independent of the kind of possession proceedings brought (s.21, s.8 or whatever). Thus the s.21 claim would be unlawful. Granted, this is applying the logic of *Malcolm* to a prior case, but even so it seems likely.

In my opinion, this is not an unwarranted interference with the private landlord's freedom to gain possession under s.21. This is exactly the kind of discriminatory behaviour the DDA was aimed at.

As far as I can see, this is NOT a general prohibition on possession claims against and eviction of disabled tenants. It is not an interference with s.21. It is a defence of unlawfulness where the s.21 claim has been made for reasons related to the tenant's disability.

Having said that, I completely agree with Tessa that if landlords do get the wrong idea and stop letting to disabled people, that would be a Bad Thing. This is also the kind of thing that myths quickly grow up about, so clarity about the effect of the DDA is vital.

A commentor on my previous posted asked simply, either in hope or fear, whether this meant disabled tenants with rent arrears couldn't be evicted. The above contains the answer, which is no, depending.

William Flack commented on the previous post about the position that Mr Malcolm was left in by the Judgment, as his tenancy was not revived. LJ Arden addresses this at para 121 and 122. As the DDA defence does not override HA 1985, it remains the case that Mr Malcolm's secure tenancy ended with the illegal sublet. As LJ Arden notes, whether he then has a contractual tenancy depends on whether the Notice to Quit was unlawful as well as the Claim for Possession. If it was unlawful, he likely has a contractual periodic tenancy, if it was not, he is likely to be a tolerated trespasser.

But I can't quite see how an application for revival of tenancy could be made. There is no possession order to vary, no proceedings within which a s.85 application can be made.

As the DDA s.22(3)(C) refers solely to eviction, not the determination of tenancy, and as the Court of Appeal was divided over the lawfulness of the Notice to Quit (on grounds of whether knowledge of disability was required by the landlord for the act to be unlawful), Mr Malcolm's status is unclear and likely to remain so. If the possession case had been about breach of the tenancy agreement or any other ground other than statutory determination of the secure tenancy under HA 1985, the position would be much clearer and simpler.

That turned out to be longer than I thought it would be. I'd better be right, after all that.

Mortgages, sale of property and human rights

Sun, 12 Oct 2008 12:55:45 +0000

J

Horsham Properties Group Ltd v (1) Paul Clark (2) Carol Beech and GMAC RFC Ltd (Third Party) and The Secretary of State for Justice (Intervener) [2008] EWHC 2327 (Ch)

Now this is a complicated little case which, I suspect, will give rise to more questions (and litigation) than

it answered.

Mortgages: a very short introduction

Prior to 1970, if A granted B a mortgage over A's land then, unless the mortgage contract provides otherwise, B was entitled to recover possession of it at any time. There is no need for A to default under the terms of the contract or do anything like that. B's right to possession arose immediately and the court had no power to refuse B's claim for possession, save for a very limited discretion to adjourn to allow A to sell the property or otherwise raise the money to pay off the mortgage - see, for example, *Citizens Permanent Building Society v Caunt* [1962] Ch 883.

This, as will be immediately apparent, is not a good thing. Unless borrowers could negotiate some contractual protection, it left them at the mercy of (unscrupulous) lenders and it made a mortgage a very unattractive method of financing the purchase of property. The Payne Committee of 1968 recommended giving the court powers to adjourn or suspend possession proceedings on terms relating to the repayment of the mortgage by installments.

This report gave rise to the *Administration of Justice Act* 1970 (and, indirectly, the *Administration of Justice Act* 1973.) The effect of those Acts is that, in respect of residential property, where possession is sought by a lender, then the court has the power to suspend the possession order on terms that the defendant pay the mortgage plus a sum off the arrears. The court has a very wide discretion at this stage and should ask itself whether the arrears can be repaid over the remaining term of the mortgage (see *Cheltenham & Gloucester Building Society v Norgan* [1995] EWCA Civ 11). In practice, this is the most significant right available to borrowers who find themselves in financial difficulties and, in most cases, is sufficient to keep a borrower in their home.

The facts

Mr Clark and Ms Beech had purchased a property with the benefit of a loan from GMAC, which was secured on the property as a mortgage in the usual way. During the course of the mortgage, Mr Clark and Ms Beech fell into arrears.

The mortgage provided that, if the mortgage fell into arrears, GMAC could appoint a receiver, which they duly did. Then, again pursuant to the mortgage contract, the receiver sold the property at auction. (Although GMAC appeared to be relying on their contractual powers, it should be noted that s.101 *Law of Property Act 1925* would have provided another way of achieving a similar result. This becomes important later on.)

The property was purchased by Horsham Properties Group Ltd ("Horsham").

At this stage (a) the sale of the property had raised sufficient monies to discharge the mortgage and (b) Mr Clark and Ms Beech were still in occupation of the property.

Having purchased the property, Horsham then issued trespasser proceedings against Mr Clark and Ms Beech, seeking to recover possession of the property. The effect of this was to bypass all the protections contained in the *Administration of Justice Acts*, something which had been found to be perfectly lawful by the Court of Appeal in *Ropaigealach v Barclays Bank* [2000] QB 263.

The arguments

Ms Beech argued that the *Ropaigealach* decision had to be re-examined in light of the *Human Rights Act 1998*. In particular, she argued that:

(a) the power to appoint a receiver and / or sell the property should be interpreted as arising only once the court had sanctioned such a step; or

(b) the protection of the *Administration of Justice Acts* should continue to apply even where the claim for possession is brought by someone who has purchased the property from a mortgage company.

She framed these arguments in the light of Article 1 of the First Protocol ("A1P1") to the European Convention on Human Rights (right to peaceful enjoyment of possessions) and argued that, if they were rejected, there should be a declaration of incompatibility.

The decision

The Court (Briggs J) had no difficulty in accepting that, in losing the right to pay off the mortgage, one had lost a "possession" within the meaning of A1P1. However, he did not find that there had been any deprivation of that possession by the State. He gave two reasons for this:

(a) the current situation had arisen because of the contractual provisions (and an admitted default by Mr Clark and Ms Beech) and not because of any State action; however

(b) the position would have been no different if GMAC had relied on its various statutory powers (s.101 *Law of Property Act 1925*) since those statutory powers did not interfere with any right, but merely created a 'default' position which the parties were free to alter as they saw fit.

In case he was wrong about this, Briggs J went on to consider whether the ability of GMAC to sell the property without a court order was in the public interest. He found that it was - the power to sell without a court order was an integral part of the economic basis for mortgage lending, without which, the mortgage market would not exist. There was no need for an individual assessment of the proportionality of exercising this power in any given case because the appropriate bargain had already been struck and relied, by analogy, on Lord Scott in *Quazi v LB Harrow* [2004] 1 AC 983.

The suggestion that the protection of the *Administration of Justice Acts* should apply, regardless of who was bringing the possession claim, was dismissed in very short order. Those powers could only apply so long as a mortgage remained in force. The sale of the property at auction had raised sufficient monies to discharge the mortgage. If there was no mortgage then there was no scope for the Acts to apply.

A possession order was made.

The good, the bad and the ugly

There is some (but not much) good news in this case. It is very encouraging that no-one seemed the slightest bit surprised to be dealing with a *Human Rights Act 1998* argument in the context of a dispute between private parties under a private contract. If this case encourages practitioners to raise more *HRA* arguments in such cases then it can only be a good thing.

Briggs J was also heavily influenced by the fact that it was common ground that Mr Clark and Ms Beech had been in arrears and had broken the terms of their mortgage agreement. He expressly left open the possibility that he would come to a very different conclusion if the powers of receivership and sale had been used without such default having occurred.

The bad news is more obvious. This is quite a loophole for any lender who wants to get around the protections of the *Administration of Justice Acts* and in the current market, the temptation to do so will, one suspects, lead many more lenders to use this route. The importance of scrutinising your mortgage terms and conditions is plain.

As to the ugly nature of this case. Sadly, the discussion of the law of proportionality was some 4 years out of date. The idea that proportionality simply cannot arise on the facts of an individual case because it is presumed that all questions of proportionality have been dealt with at a higher level (whether in statute or in the market place) is, to put it mildly, one of hot topics in current human rights thinking.

The European Court of Human Rights has made clear in *Connors v UK* (2005) 40 EHRR 9 and *McCann v UK* (19009/04), that each person faced with eviction proceedings should be able to have a court assess the proportionality of the proposed eviction and, whilst the House of Lords haven't quite gone as far as this yet, in both *Kay v LB Lambeth* [2006] UKHL 10; [2006] 2 AC 465 and *Doherty v Birmingham CC* [2008] UKHL 57, they made clear that the approach of Lord Scott in *Quazi* could not stand.

Second time around

Thu, 23 Oct 2008 15:45:49 +0000

J

Truro Diocesan Board of Finance Ltd v Foley [2008] EWCA Civ 1162

In March 1987 Mr Foley became the tenant of a property owned by the predecessor in title of the Board. In 2000, the Board sought possession of the property. They contended that Mr Foley was a protected shorthold tenant (within the meaning of s.52 *Housing Act 1980*). Mr Foley resisted the proceedings and contended that he was in fact a Rent Act tenant.

The proceedings were settled on 20 September 2001. It was agreed that Mr Foley was a protected shorthold tenant. It was further agreed that Mr Foley would give up possession of the property within 6 days, spend a minimum of 24 hours out of possession and, on 27 September 2001, that he would be granted an assured shorthold tenancy of the same property. That assured shorthold tenancy would be for a fixed term of 5 years. This agreement was contained in a deed. Mr Foley duly gave up possession.

In April 2006, the Board served a notice under s.21 *Housing Act 1988*, seeking possession on the last day of the five year term. Mr Foley again defended the proceedings and, again, claimed that he was a Rent Act tenant. His defence failed in the county court and he appealed to the Court of Appeal.

Mr Foley argued that in general terms, it has not been possible to create new Rent Act tenancies since 15 Jan 1989, when the assured tenancy provisions of the *Housing Act 1988* came into effect. However, this general rule is subject to exceptions. One of those exceptions is found in s.34(1)(b) *Housing Act 1988*. That provides that:

> *(1) A tenancy which is entered into on or after the commencement of this Act cannot be a protected tenancy unless...*
>
> *...*
>
> *(b) it is granted to a person... who, immediately before the tenancy was granted, was a protected tenant or a statutory tenant and is so granted by the person who at the time was the landlord... under the protected or statutory tenancy*

Mr Foley relied on s.45 *Housing Act 1988*. This provides that, except where the context otherwise requires, a tenancy includes an agreement for a tenancy. Hence, the settlement order of 20 September 2001 was, actually a grant of a new tenancy and, by virtue of s.34(1)(b), it was a protected tenancy.

The Court of Appeal, with some reluctance, did not accept this argument. They took the view that the "context otherwise require[d]" that, in s.34, a tenancy could not include an agreement for a tenancy. The language of s.34 as a whole suggested that it was dealing with tenancies which had actually been granted and not merely agreed.

Mr Foley had a second string to his bow though. He argued that the settlement of 20 September 2001 was itself a tenancy, following *Walsh v Lonsdale* (1882) 21 Ch D 9. At this time, he satisfied the requirements of s.34(1)(b).

The Court of Appeal was similarly reluctant to reject this argument, but reject it they did. One had to consider the actual intentions of the parties at the time that they entered into the settlement on 20 September 2001. They intended that the new tenancy arise on 27 September 2001, not 20 September 2001. Hence this point failed as well.

Mr Foley then sought to argue that the 24 hours between the surrender of his old tenancy and the grant of his new tenancy were irrelevant when considering whether or not "immediately before the [new] tenancy was granted" he was a protected tenant. The Board relied on *Dibbs v Campbell* (1988) 20 HLR 374 and *Bolnore Properties Lrd v Cobb* (1996) 29 HLR 2002, as authority for the proposition that the 24 hr break between the tenancies was sufficient to mean that the new one did not follow immediately after the old one. Again, the Court of Appeal rejected Mr Foley's argument (albeit by 2 to 1 - Sir John Chadwick dissented on this point).

The *Human RIghts Act 1998* did not help him either. *Kay v Lambeth LBC* [2006] 2 AC 465 made clear that it was only an exceptional case where domestic law would not provide sufficient protection for Art. 8 purposes. Although *Kay* was about social housing, the logic applied equally to the private sector. *McCann v UK* (App. No. 19009/04) took matters no further and, in light of the criticism of that case by Lords Scott and Hope in *Doherty v Birmingham CC* [2008] UKHL 57, it added nothing to the general law as set out in *Kay*.

So - a clean sweep for the Board. There probably isn't much of lasting value in this case - the facts are so unusual and there are so few protected tenants left. However, the discussion of *Kay, Doherty* and *McCann* might have some wider impact. This was the first time that the Court of Appeal grappled with *Doherty* and they've clearly decided that it adds nothing to *Kay*. Landlord lawyers will no-doubt seize on paras 33 and 34 to do down human rights arguments but I don't think anyone would seriously contend that this is the end of the road for *McCann* based arguments.

Andrew Arden QC and Iain Colville, instructed by Michelmores LLP for the Board

David Watkinson, instructed by Cartidges for Mr Foley

Housing and Human Rights: Kay in the ECtHR

Wed, 05 Nov 2008 09:40:07 +0000

J

From the Garden Court bulletin:

The ECtHR has invited the observations of the UK government on the application made by Mr Kay to the ECtHR, following his defeat in the House of Lords in *Kay v LB Lambeth* [2006] UKHL 10. The Court has asked for observations on the question of whether or not Mr Kay had "the opportunity to have the proportionality of [his] eviction... determined by an independent tribunal in light of the relevant principles under Article 8."

We'll all need to keep an eye on this one!

Pour encourager les autres

Fri, 14 Nov 2008 14:04:45 +0000

J

Webb v Wandsworth LBC (Court of Appeal, November 12, 2008, extempore judgment and only noted in Arden Chambers Eflash 328)

Ms Webb was the secure tenant of LB Wandsworth. Between 2005 and 2006 her son was involved in a number of serious criminal and anti-social acts in the local area. In response, Wandsworth issued possession proceedings relying on Grounds 1 and 2, Sch. 2 *Housing Act 1985*. Shortly thereafter, an ASBO was made against the son. The son subsequently left the family home, although he would regularly return to visit his mother.

The possession trial came on in October 2007. There had been no ASB for a year and the son had been living elsewhere for 8 months. The Judge made a postponed possession order, apparently taking into account the fact that the son had been charged (but acquitted) of three breaches of the ASBO.

Ms Webb appealed to the Court of Appeal and contended that the three acquittals were irrelevant considerations. The Court unanimously upheld her appeal and quashed the possession proceedings. It was wrong in principle to take those matters into account.

Sedley LJ has, apparently, gone further and in his judgment, has stated that it is not permissible to use a possession order as a means of trying to force a tenant to exercise control over a third party.

It is, as you might imagine, the comments of Sedley LJ that appear to be the most interesting. I defend a fair few ASB cases and one of the things which most frustrates me is seeing my clients being demonised for the actions of their children/(drunken) partners. At a personal level, I hope the transcript of this judgment is as promising as the Eflash suggests it will be.

Enforcing Postponed Possession Orders

Fri, 14 Nov 2008 14:48:51 +0000

J

LB Wandsworth v Whibley [2008] EWCA Civ 1259.

If a postponed possession order is made and the landlord takes the view that the conditions of postponement have been broken, the application for a date for possession should be conducted on a summary basis and only on the basis of evidence submitted by the landlord... or so argued LB Wandsworth in this case. Unsurprisingly, they lost.

Mr Whibley is the secure tenant of LB Wandsworth. He was a man who cultivated and used cannabis and who had been convicted of the same. LB Wandsworth sought possesson of his property on the basis of his

drug convictions and some minor rent arrears. In due course, after trial, a postponed possession order was made. For some reason (likely an administrative error on the part of the court) the PPO only referred to payment of rent and not to any conditions to do with the nuisance.

A few months after the possession order was made, Wandsworth received further complaints about the behaviour of Mr Whibley. The solicitor for Wandsworth wrote to him giving details of the complaints and asking for a response within 7 days, in particular, detailing whether or not he disputed the right of the council to seek to fix a date for possession.

Mr Whibley did not respond himself but, very sensibly, engaged Flack and Co, who informed Wandsworth that the allegations were disputed (in the interests of full disclosure, William Flack is a regular commentator on this blog and is a friend of NL).

Wandsworth then applied to the county court to fix a date for possession. They included a witness statement in support of their application but did not provide the court with a copy of the letter from Flack and Co. (Although nothing ultimately turned on that point, that strikes me as particularly sharp practice). They later added rent arrears as a second reason for seeking to fix a date.

Mr Whibley cross-applied, seeking to adjourn the hearing with directions or, alternatively, for any warrant to be suspended. It was made clear that he denied responsibility for any nuisance and that, on his case, the nuisance was caused by unwanted and uninvited 'guests' who had taken over his flat.

The DJ who heard the applications did not give possession as Wandsworth sought, but instead varied the original possession order so as to record the condition of postponement as regards nuisance and then gave directions. He did, however, give Wandsworth permission to appeal. Wandsworth accepted that invitation and appealed to the Circuit Judge. Their stated intention (both before the CJ and the CA) was to:

> Secure a ruling that, save in quite exceptional cases... county courts should give summary judgment without hearing evidence on applications to set a date on a postponed possession order [10]

The Court of Appeal had no difficulty in disposing of this argument. Whilst it is possible to deal with rent arrears cases in this way, that is only because rent arrears are (usually) a matter of record. This was not (usually) the case in nuisance cases, where the conduct was often disputed. That being so:

> It is not permissible for a tenant who has a possible answer to lose his or her home unheard [12]

The nature of any such hearing (the necessary directions etc) would vary from case to case, and courts would be alive to ensuring that nuisance tenants did not abuse this process, but the process still had to be fair to both sides. A summary procedure could not possibly be fair if there was any room for dispute about the factual allegations made by the landlord.

Wandsworth had relied on *Southwark v St Brice* [2001] EWCA Civ 1138 for the proposition that a landlord should not have to prove matters twice. However, as the Court of Appeal pointed out, that was not what would happen in a PPO. The landlord was alleging fresh breaches of the terms of the postponement. It should have to prove them in the usual way.

Of course, if a tenant did not dispute the allegations (whether to do with rent, nuisance or anything else) then a court could properly consider the matters on the papers and proceed in a summary fashion, but that was not the case here. Appeal dismissed.

Sometimes, you just feel like weeping. Social landlords do, in my view, have a very important role to play in progressing the law and in advancing the best arguments that they can. They can and should push the law where they see fit. But this argument was nothing of that sort. This just seems petty and vindictive.

The powers of the appellate court

Fri, 28 Nov 2008 08:34:29 +0000

J

Admiral Taverns (Cygnet) Ltd v Daniel and another [2008] EWHC 1688 (QB), and [2008] EWCA Civ 1501.

We seem to have missed this important case when it was at High Court level. Sorry about that. An appeal against the High Court judgment has just been dismissed by the Court of Appeal and is now available online here.

The defendants were occupiers of residential property owned by the claimant. The defendants occupied under a "caretaking" agreement with the claimant. The claimant subsequently sought to bring that agreement to an end and issued possession proceedings. The defendants appears to have defended the case (or indicated an intention to defend) on the basis that they had or had been promised a lease of the property.

An order for possession was made by HHJ Gibson, sitting at the Lambeth county court. The second defendant then lodged an appellants notice at the High Court, together with a request that the warrant be stayed pending determination of the application for permission to appeal.

Mr Justice Teare granted the stay on the papers. The claimant sought to set aside that order. They contended that s.89, Housing Act 1980 precluded all courts, including the appellate court, from delaying the date for possession by more than six weeks. Teare J initially accepted this argument (apparently at an *ex parte* hearing) and the defendant applied to set aside that decision and reinstate the stay.

Section 89, Housing Act 1980 provides that:

> (1) Where a court makes an order for possession of any land in a case not falling within subsection (2) below, the giving up of possession shall not be postponed (whether by order or any variation, suspension or stay of execution) to a date later than fourteen days after the making of the order, unless it appears to the court that exceptional hardship would be caused by requiring possession to be given up by that date; and shall not in any event be postponed to a date later than six weeks after the making of the order.
>
> (2) The restrictions in subsection (1) above do not apply [to mortgage possession cases, forfeiture, possession orders where there is any reasonableness test etc...]

In effect, s.89 is aimed at cases where there is no security of tenure.

The defendant argued that s.89 had no application to an appellate court, which could postpone, suspend or stay any possession order for as long as was appropriate. The restrictions were only on the powers of the first instance court.

Teare J accepted the argument for the defendant and restored the original stay. He was heavily influenced by the risk of an "odd and unjust" result if there was no power in the appellate court to stay a warrant or otherwise prevent execution of a possession order. If an appellate court formed the view that there was merit in an appeal, it would be required to hear and determine the appeal within 14 days (or, perhaps, 6 weeks in a case of exceptional hardship). This was wholly unrealisitic, given the demands on appellate

courts.

The claimant then appealed to the Court of Appeal. That appeal was dismissed on November 25, 2008. It appears that the Court of Appeal was not persuaded by the arguments that had impressed Teare J. However, the result was unaffected. This was because the appellate court retained an inherent jurisdiction to stay, postpone or suspend execution of a possession order pending an apparently meritorious appeal. It would take very clear words before a statute would be presumed to have ousted that inherent jurisdiction.

So, there we have it. In every NTQ case (which, I suspect, is likely to be the most common factual situation facing housing lawyers in which s.89 comes into play), the appellate court has jurisdiction to suspend a warrant pending an appeal. Whether or not this inherent jurisdiction applies to the trial court when faced with an application for permission to appeal was left open.

Risky business

Tue, 16 Dec 2008 23:02:35 +0000

Dave

In *CDS Housing v Bellis* [2008] EWCA Civ 1315, the Court of Appeal in a short judgment upheld a possession order made in favour of the Claimant housing association against Mr Bellis, a secure tenant, who suffered from serious delusions. Mr Bellis appears to have believed that "there was electro-magnetic radiation or something similar emanating from either the central heating or some other part of the electrical system of the flat" which lead him to damage the electric and gas installations in the property. The property was, therefore, in a dangerous situation and Mr Bellis had not removed his stuff from the flat to enable CDS to do the necessary work. CDS obtained an injunction requiring Mr Bellis to remove his belongings. He, in turn, does not appear to have lived in the property for some time.

In these circumstances, CDS sought possession of the property. The transcript is frustrating because it does not contain detail about the relevant ground for possession relied on by CDS. But, in any event, the question addressed by the Court was whether an order less that immediate possession would have been appropriate, the Judge having made this order at first instance. In response, the question Jacobs LJ asked is significant:

> That boils down, as I see it, to a simple question: could the court be satisfied that there was no longer any real risk that the appellant would not do to the property that which he had done before? I put it that way rather than a more generous way, which might be 'was he likely to do it again?', because I do not think that would be the right test. The reason the real risk test in the circumstances of this case is the appropriate test is the enormity of the consequences of getting that judgment wrong; great danger to the appellant and to the other tenants. So as it seems to me, the matter, when it came before the judge, boiled down to one simple question: could the judge be satisfied that there was no real risk that the appellant would do no further damage if the property were repaired? (para 5)

This phrasing of the appropriate test is significant - as any person skilled in risk assessment/management tells me, most future events can be constructed as a real risk. Framing the question in this way then, effectively provides the answer. In some respects, this was not a great case for getting to grips with this risk-based test (and what is a "real risk") because, on the evidence, whichever test was adopted, it would be unlikely that the Court would have disturbed the judge's order. That was because of the evidence given by Mr Bellis as well as his consultant psychiatrist: "[Mr Bellis] failed to understand that actually there

was nothing wrong with the property, and his immediate idea of what would happen if he thought the property was causing him ill-health was not to go to the medical team but his solicitor" (para 12). But the interesting thing going on here was the equation of "real risk" with "reasonableness", the Court of Appeal seeming to suggest that a real risk would make it reasonable to order possession (they say that this case does not involve questions of principle at para 4, but I kind of disagree on that and it does provide ammunition to landlords). Again, on the facts of this case, the outcome is hardly surprising given the potential for the whole block of flats to have blown up, Ronan point like. Another interesting thing, of course, is the post-*Malcolm* total lack of discussion of the DDA - not that it would have been helpful to Mr Bellis in any event but because it was a useful tool in the box and it just demonstrates the pace of change in housing law at the moment.

Busy, Busy, Busy

Sun, 21 Oct 2007 18:03:28 +0000

NL

I'm flat out at the moment. Even my usual posting windows of a Saturday or Sunday have seen me either too tired or working to manage a post. So all I can manage is to point to two cases for Housing people's attention, to which I will return when I have time.

In the Admin Court *Gilboy, R (on the application of) v Liverpool City Council & Anor* [2007] EWHC 2335 (Admin) Article 6 Human Rights and demoted tenancy possession decision reviews.

In the Court of Appeal *Harouki v Royal Borough of Kensington & Chelsea* [2007] EWCA Civ 1000 Overcrowding, homelessness and Part VII applications.

Convicted - Evicted

Thu, 01 Nov 2007 23:08:09 +0000

NL

Raglan Housing Association Ltd v Fairclough [2007] EWCA Civ 1087.

Basically, Housing Act 1988 Schedule 2 Ground 14 (b) means that if if you have been convicted of

> an indictable offence committed in, or in the locality of, the dwelling-house

the discretionary ground for possession is made out, regardless of whether you were a tenant, or indeed lived in the specific property at the time the offence was committed.

LJ Chadwick goes further in *obiter*, suggesting that it isn't even necessary to be a tenant at the time of the conviction for Ground 14(b) to bite. Eh? So a conviction prior to the grant of tenancy could be ground for possession? Ouch.

Housing case flood

Wed, 07 Nov 2007 22:16:38 +0000

NL

Just a note. Comments to follow, asap.

Court of Appeal:

Wandsworth v Randall [2007] EWCA Civ 1126 Succession and possession for under-occupation.

London Borough of Southwark v Dennett [2007] EWCA Civ 1091 Right to Buy, Delay and Misfeasance in Public Office

Administrative Court:

Casey, R (on the application of) v Restormel Borough Council [2007] EWHC 2554 Homelessness, Judicial Review applications, ex-parte injunctions and delay in the Admin Court.

Extending security by tenancy agreement?

Thu, 22 Nov 2007 22:42:30 +0000

NL

[Edit, time slightly later on. In the comments to her post Tessa suggests that the case discussed below was not a judgment at all but merely adjourned from the undefended list for a hearing of the issues. So none of what follows is of much significance.]

A very interesting post over on Landlord Law by Tessa Shepperson.

Apparently a Deputy District Judge of her acquaintance, faced with a Notice to Quit served on a (ex) secure tenant who had moved out of the rented property, discovered that the Council tenancy agreement specified that the

> tenant could only be evicted after service of a notice of possession as provided under the provisions of the Housing Act 1985

As no NSP had been served, the DDJ concluded he could not make a possession order, there being no reason why the landlord could not enlarge security of tenure under the tenancy agreement in a binding manner, following the model of *Welsh -v- Greenwich London Borough Council* on extending repairing liability.

No doubt the 'tenant' was suitably, if temporarily, relieved by this judgment, but I have my doubts.

Firstly I have to presume that the landlord had pleaded the end of secure tenancy by way of s.81 Housing

Act 1985 (the only and principal home condition). That ends the secure tenancy, regards of anything in the tenancy agreement. No tenancy agreement can trump the statutory provisions.

We aren't given the precise wording of the clause in the tenancy agreement, but any provision in the tenancy agreement concerning notice that stated it was 'as provided under the provisions of the HA 1985' is surely strongly arguable as restricted to a tenancy under the Act. If so, it is not applicable to any tenancy outside of the Act, as was the non-secure tenancy that this Defendant had left.

While it may well be possible for a landlord to specify that a tenancy contains notice provisions above and beyond those specified in statute, if the notice provisions are expressly described as 'as provided' in statute, it is hard to see how that can be considered as extending the security over the statutory provision.

I would guess that this term was contained in the secure tenancy agreement, which had, I would imagine, ended by operation of statute. If so, surely the secure tenancy agreement no longer governed the tenancy at the time of the hearing and its terms were by-the-by. Can a term of a tenancy agreement survive the end of that agreement?

I would have thought the DDJ's judgment thoroughly appealable, unless the Council just wants to take the line of least resistance and serve an NSP (but on what grounds..? Would they be restricted to those of the HA 1985?).

I don't think the equation to repairing liability goes very far. S.11 Landlord and Tenant Act 1985 specifies the repairing liabilities that a landlord cannot avoid by terms of the tenancy agreement, but it in no way sets limits on extension of that liability. However, no-one can create a secure tenancy outside of the provisions of HA 1985, whatever extra rights might be added to that tenancy on top.

I may well have gone off on the wrong track here - it has been a long, intense, but successful day for me, but the adrenaline has now worn off, and with it most higher brain functions - but this judgment looks rather messy to me, and quite possibly unsustainable. If the tenant was represented, does the solicitor want to write it up? Perhaps there is more than I've grasped.

Human Rights and Possession Claims - looking for the exception

Thu, 13 Dec 2007 22:13:59 +0000

NL

The latest case to test the *Connors, Kay* and *Doherty* formulations on human rights defences to possession cases (see here for previous post, including the comments) has just had its Court of Appeal judgment released. I would assume that *Smith (On Behalf of the Gypsy Council) v Buckland* [2007] EWCA Civ 1318 is a way-station on the path to the House of Lords. This is also something of a test case for the situation on gypsy site licence possessions after the Housing Act 2004 amendments, which were introduced as a result of the ECtHR judgment in *Connors*.

So, where are we now?

First, the key human rights point - the possibility of reliance on Art 8 in a defence - is shelved. Jan Luba QC for the appellant perforce recognises that the CoA held in Doherty that Kay v Lambeth meant that such that an Art 8 defence is only possible where there are no statutory protections available against a

simple assertion of title. The issue is raised, here as an argument that the first order Judge was wrong to rule out an Art 8 defence where possession was based on common law, not statute, but the CoA declines to consider it and effectively leaves it up to the House of Lords.

Second, the key issue, at this stage, is that the first order Judge ruled out a public law defence, without hearing any evidence.

Third, other grounds of appeal are a) that this case is factually distinguishable from Connors in terms of the appellant's situation, and b) that is is arguable that the amendment to the Caravan Sites Act 1968 by the Housing Act 2004 does not cure the incompatibility with Art 8 of the Convention, found in Connors.

The basis of the Connors decision The Court of Appeal is satisfied that the lack of procedural safeguard was the predominant issue in the ECtHR decision in Connors.

The public law defence This is discussed solely in terms that a decision to bring a possession claim by a public authority is, in the circumstances, something no reasonable person could consider justifiable, following Wandsworth BC v Winder [1985] AC 461.

The CoA adopts Lord Brown's view in Kay (at paras 208-211) that to bring a public law defence is to acknowledge that the claimant authority is entitled to possession under domestic property law and is therefore an argument that the authority could not reasonably invoke that right. This is a more stringent test than that usually applied when the court considers the justifiability (or reasonableness) of a possession order. It is only in an exceptional case. Lord Brown suggests, that he public law defence will succeed. Connors may have been such a case.

The CoA considers that the 2004 amendment has changed the landscape, affording the court the opportunity to consider the justification of the case for possession at hearing. This makes it even less likely that a public law defence will succeed and in the present case, the first order Judge was right to hold that it was not seriously arguable.

The factual distinction The CoA points out that this is of no relevance to the court. Nevertheless, while agreeing that the first order Judge was wrong to consider the varying length of periods in occupation as a basis for distinguishing Connors, the Court is not persuaded that it would necessary to decide of the facts of this case and Connors are distinguishable for any future appeal to the House of Lords, but leaves it to the Lords to decide.

The 2004 Amendment The argument by the appellant is that, firstly, despite the amendment, there is no judicial control of the termination of the right to occupy. Secondly, no special consideration is given to the gypsy lifestyle, as required by Connors - the burden is on the defendant to show why enforcement shouldn't happen. Thirdly, the court is required to have regard to 'whether the occupier has failed to make reasonable efforts to obtain elesewhere other suitable accommodation', which assumes that the occupant may be evicted regardless of substantive grounds. Fourthly, enforcement can only be suspended for 12 months, requiring re-application for further stay. Lastly, the amendment does not satisfy the non-discriminatory requirement in Connors.

The Court of Appeal holds that the margin of appreciation in Connors was narrowed by the procedural safeguard issue. To the appellant's arrgument the Court replies that firstly, the Art 8 issue is eviction, not possession and the procedural safeguard satisfies this. The Government intends to remove the difference between local authority gypsy sites and private caravan sites in the Mobile Homes Act 1983, to further narrow any discriminatory distinction. The second point falls under the court's obligation to exercise its discretion. The third point would in any case fall under Art 8. The fourth point has weight - and is left at that.

In regard to the non-discrimination point, the ECtHR was primarily concerned with procedural safeguards, but even so, the discrimination has been lessened by the amendment. Removing the

discrimination will require further amendment of the 1983 Act. However, mitigating but failing to completely remove the discrimination falls within the margin of appreciation. The likely forthcoming amendment to the 1983 Act is mentioned as the reason why the Appellant did not seek a declaration of incompatibility in regard to the amendment.

And that is pretty much it. So it appears that not only a human rights defence but a public law defence is viewed as being of vanishing exceptionality. And, it is suggested, the 2004 amendment to the 1968 Act has settled any remaining Art 8 objections to the gypsy site licence issue.

The appeal was brought by the Community Law Partnership in Birmingham. Haven't seen you around this blog for a while, CLP people. There is no mention of leave to appeal in the Judgment. Is this one House of Lords bound?

Of orthopaedic footwear and possession orders

Sun, 16 Dec 2007 00:32:00 +0000

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Not a particularly significant case, but not one you see every day either. Nuisance by adverts for wigs, orthopaedic footwear, and dating agencies.

Accent Peerless Ltd v Kingsdon & Anor [2007] EWCA Civ 1314 was an appeal of an outright possession order on an assured tenancy. The possession order was made on the basis of Ground 14 Nuisance. The tenants, mother and daughter, both suffered from mental health disorders:

> The main symptoms of their disorder were a hypersensitivity to noise, a propensity to exaggerate the effect of noise and other disturbances, agoraphobic tendencies, a tendency to misunderstand and chronic complaining.

So when their new neighbours undertook some apparently fairly extensive but reasonably conducted DIY work, the Kingsdons took action. From para 5:

> i) Between November 2001 and September 2005 they made 36 complaints to the Environmental Health Department. There were also two complaints to the local authority ombudsman.
>
> ii) They made 90 complaints to the Housing Association between September and November 2001. These complaints seem to have been communicated to the Dixons.
>
> iii) They made a number of complaints to the police, prompting several visits by the police to the Dixons. The police seem to have concluded that the Dixons were taking all reasonable steps to be considerate neighbours. In the course of these complaints, the defendants made allegations that Mrs Dixon had been in Brookwood Mental Hospital and that they had been evicted from a previous property for dangerous DIY activities and noise harassment. These allegations were false. Over a period of 12 to 18 months the beat officer for the area, who at one point issued a warning under the Harassment Act, received almost daily faxes from the defendants, though they had dropped off dramatically a short while before the trial.
>
> iv) The defendants procured the sending of unwanted mail shots and other advertising material by apparently filling in coupons with the victim's address. The material which

thereby arrived on the Dixons' doormat included advertising for erotic material, an introductory agency, a wigmakers, cosmetic surgery and orthopaedic footwear. The Dixons found this upsetting and depressive.

v) What was described as the "last straw" happened in 2005. One of the defendants made an anonymous telephone call to Mr Dixon's employers saying that he was not off ill because they had seen him working in his garden. At the time Mr Dixon was indeed off work and working in the garden, but it was pursuant to leave which had been agreed with his employer.

vi) One of the defendants wrote to the local MP, in Mrs Dixon's name, about some European food supplement.

The Circuit Judge found that this constituted nuisance for the purposes of Ground 14 and that it was reasonable to make an outright order in view of the likelihood of the nuisance continuing.

The appeal was dismissed on the basis that it was proportionate to make an outright order and the Judge was within his discretion, having heard and considered evidence on a supposed abatement of incidents. The Court of Appeal found that the Judge's decision

> falls into the category of decisions with which this court will not interfere absent a manifest error of principle, a failure to take a relevant consideration into account or the taking into account of an irrelevant consideration.

Given the evidence of the appellants' mental health issues, one wonders how strongly a Disability Discrimination defence was run - reason for eviction being related to the disability. However, the County Court Judgment says that in making the order, the Judge was satisfied that

> these defendants will not be discriminated against under the Disability Discrimination Act.

I would imagine that there could have been a strong counter of justification to a DDA argument. But none of this is raised in the appeal.

Hey, you asked...

Sat, 12 Jan 2008 21:12:10 +0000

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For some of us internet old timers, who were on usenet before the WWW existed and were hand coding websites in the mid 1990s, it is still a surprise how people treat search engines as something to put a fully fledged question into. January has been a bumper month for searches arriving at this site that involved what, when, who, how, why and where questions that had something to do with housing law, albeit all apparently coming from e.e. cummings.

In a karma appeasing reverse of my occasional sniping at strange search terms, I decided to be helpful. In order to avoid having to return as a cockroach yet again, here are Nearly Legal's brief answers to your civil litigation and housing questions. Naturally, nothing of what follows should be taken as legal advice and no action should be taken without obtaining full legal advice.

> *defence and counterclaim struck out what happens now?*

Depends on whether you are the claimant or defendant. I'd expect the Claimant to have applied for judgment, sought directions and the case to proceed to trial. The Defendant is stuffed, except on the issue of quantum.

how long before a possession order is unenforceable

After 6 years the claimant has to get the court's permission to enforce, but assuming that the conditions still continue (e.g. rent arrears and costs not paid off), the order is potentially enforceable for another 6 years.

can landlord evict without a warrant

Depends - but if it is a tenancy and falls under the protection from eviction act (as most do), no.

should homelessness appeals move from county court to tribunal

Ohh, an abstract point of principal type question. My short answer is that, as issues of public law are often engaged, no.

how many months notice do i need to be evicted

The usual answer is the minimum notice in tenancy agreement or statutory minimum notice if longer - these vary depending on the current status of the tenancy. Then, before eviction, there is the issue of possession proceedings, plus hearing and possession order, plus expiry of any time limit in the possession order, plus time taken for landlord to apply for warrant of possession, plus time for availability of bailiffs for settting date of eviction in Notice of Eviction, which depends on how busy the court is. Depending, I'd say roughly 4-6 months, could be more, could be less. Of course, if there is already a possession order, it is just down to how busy the court/bailiffs are - maybe a few weeks or less.

what happens when a tolerated trespasser clears arrears and court cost

Nothing. That is the problem. No new tenancy and no ability to apply to revive the tenancy. Changes may be afoot. Watch this space.

how many times has the section 11 landlord and tenant act of 1985 been in the uk?

Once. But it has been used in claims a lot. I'm running something like 25 cases at present.

are contingency fees illegal?

Yes. Conditional fee Agreements (AKA No win No fee) are not contingency fees and are legal.

what differences does it make if my ex partner give up tenancy to my property i own

Eh?

can i evict an illegal subtenant

Assuming that this is a private tenancy, if the tenancy has been ended, the subtenant has no continued right of occupation and a possession claim against a trespasser can be brought. If the tenancy hasn't been ended (by Notice to Quit or Possession order), but the tenancy is a assured periodic, the landlord can bring possession proceedings against the illegal subtenant under Ground 12 Breach of tenancy. But get advice, pronto. If this isn't a private tenancy, then any RSL or Council housing officer should know about this, really.

what is the impact of the disability discrimination act 1995 on possession claims brought under the

accelerated procedure?

My view, in the absence of significant case law, is that Malcolm applies. See this post.

can you appeal a house possession claim

Yes, but for heaven's sake get advice. You can't just get the claim re-heard.

case law on joint to sole tenancies

The only legal mechanisms are i) on the death of one joint tenant for assured shorthold (private), secure (Council) tenancies and Assured (Housing Association) tenancies, (which - if it happened post 1980 - counts as a succession for secure tenants) or ii), if it is a relationship breakdown or children are involved, the Court may in some circumstances order the re-assignment of the tenancy under the Family Law Act 1996, Children Act 1989 or as part of a divorce - see this post. For cases try Gay v Sheeran & Anor [1999] EWCA Civ 1621 or Newlon Housing Trust v. Alsulaimen and Another [1998] UKHL 35; [1999]. Local Authorities and some Housing Associations have relationship breakdown policies, where a new sole tenancy may be created, but basically, this issue is very, very messy.

how to get an ex partner s name off of a tenancy

If they are a joint tenant, see above. if not, and you are the sole tenant, it doesn't matter at all, the landlord should remove their name.

typical billable hours to defend landlord against mold

Ah, mold is a tough claimant. But assuming this is defending a disrepair claim, an indeterminate piece of string comes to mind. How far does the case go? Settlement? Trial? Disclosure issues? Interim applications? And so on and so forth. I'd expect multiples of tens of hours to be quite possible.

will i be evicted if my rent arrears have gone back to court

If you have breached the terms of a suspended or postponed possession order for rent arrears, you could well be. Get advice now.

what does only or principal home mean?

Basically, where you live all or most of the time. This doesn't mean that you can't be living elsewhere for some periods of time, but there must be clear indications of the intention to return. Occupation by a spouse will count as occupation by the tenant.

the preaction protocal has failed to get a reply

Then surely it is time to consider issuing the claim, assuming you have the evidence. Otherwise - pre-action disclosure application?

how to break a shorthold assured joint tenancy

As landlord or tenant? Has there been a significant breach of tenancy agreement by the other party? Or misrepresentation prior to signing the agreement? That may or may not help, depending. If not, you are probably stuck - this is a contract after all.

the appellants had been defendants to an application for possession of their flat. there had been several court hearings and opportunities made for them to present their counterclaim as regards the state of the financial account and in order to make a counterclaim themselves for damages.

Don't stop there, I was just getting interested.

And lastly,

> *lpc is it worth it for mature*

I'd have to say yes, for me it certainly was. but it isn't going to be easy at all to get a traineeship. Do a lot of research and thinking.

There, that should be enough karmic balance for at least a few more weeks of sneering at small children and general misanthropy.

On impotent landlords and disability.

Thu, 17 Jan 2008 22:07:57 +0000

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There are a couple of articles in the latest Journal of Housing Law (Vol 11, issue 1 2008) on *Malcolm v London Borough of Lewisham* and the effect of the Disability Discrimination Act 1995 on possession orders. I'd say the articles are of varying interest. (My previous posts on *Malcolm v Lewisham* are here and here)

At the lesser end of the spectrum, Simon Braun contributes a cry of anguish over the supposed impotence of landlords in the face of *Malcolm*. The article repeats the idees recu that 'the consequences of the DDA are to give total immunity to the tenant' and that the link between disability and breach of tenancy 'need only be very casual'. I've said this before and, until proven wrong, I may well say it again, but neither the immunity nor the casualness of the link are the case. Granted, 'related' is a lesser hurdle than 'causal', but it is not a negligible requirement either. A wheelchair user facing a possession claim for rent arrears? A visually impaired person illegally sub-letting? A person suffering from schizophrenia facing possession for under-occupation? Why would the DDA prevent possession orders in these cases? Further, we have yet to see whether *Manchester CC v Romano [2004] EWCA Civ 834* or *Malcolm* is favoured in possession claims where the Court has discretion.

Breach of DDA as a factor in reasonableness is quite different to simple unlawfulness of a possession order, as Justin Bates points out in the considerably more interesting second article.

Justin Bates of Arden Chambers gives an overview of *Manchester CC v Romano* and *Malcolm* with which I largely agree (not least because I had come to some similar conclusions at the time of the judgment in *Malcolm*) and then turns to the consistency between *Romano* and *Malcolm* and the odd effects of *Malcolm*, for instance that the outcome might have been different had Lewisham proceeded via Notice Seeking Possession for breach of Ground 1 HA 1985, rather than relying on end of secure tenancy by operation of law and Notice to Quit, as this would likely have followed *Romano*.

Neither *Romano* nor *Malcolm* fully addressed justification under the DDA 1995, Justin suggests. S 24(3)(b) provides that discrimination may be justified if the disabled person is 'incapable of entering into an enforceable agreement' and arguably that was the case for both *Romano* and *Malcolm* as by their own cases they were incapable of being bound by their tenancy agreements. This is quite seductive, but I'm not sure it works.

The full s.24(3)(b) reads

> "in any case, the disabled person is incapable of entering into an enforceable agreement, or of giving an informed consent, and for that reason the treatment is reasonable in that case;"

The issue is why incapacity to enter an enforceable agreement is the criterea. For an eviction, there is no entry into a contract at issue, as the tenancy agreement was entered into at some time in the past and capacity to enter that contract is not at stake.

It is at least strongly arguable that 24(3)(b) is limited in its reference to s.22(1)(2) and (4) - the sections that deal with disposal of premises to disabled people, i.e. entering an enforceable contract. The requirement is that the treatment be reasonable in that case, for this reason (lack of capacity), which must mean that the entry into a contract is the crux of the treatment. If this is not the case, s 24(3)(b) would mean that it would be justified to discriminate in a whole range of ways against those lacking capacity at this time, because it is reasonable in some undefined way to do so, offering a potential blanket justification for discrimination against the mentally ill (or otherwise incapable). As s 24(3)(a) is quite specific by comparison, this seems unlikely.

In any case, if this were entered as a justification, one would expect the claimant to have complied with CPR Rule 21 on litigation friends.

Justin Bates then turns to establishing discrimination. He cites *Richmond Court (Swansea) v Williams [2006] EWCA Civ 1719*, which held that, because the freeholder would have refused any tenant permission to install a stair lift regardless of disability, there was no discrimination against the disabled appellant leaseholder in refusing her permission. Justin suggests that the Court overlooked the significance of *Richmond*. If *Richmond* had been followed, because an NTQ would have been served by Lewisham on any tenant who parted with possession, there was arguably no discrimination against Mr Malcolm.

I can't follow this line of argument. I don't think it is that the Court overlooks the significance of *Richmond*. It is rather that this is no longer the means of establishing discrimination. I say this despite *Richmond* post-dating the Court of Appeal judgment in *Clark v Novacold Limited* that is key here.

It is not simply a matter of comparing the treatment of a disabled person to the treatment of an able bodied person. Indeed the *Richmond* example shows something of why. It is unlikely that an able bodied person would seek to install a stair lift, such that a blanket refusal is not non-discrimination but rather indirect discrimination.

The judgment in *Malcolm* deals with this at some length at paras 96-104. At para 100 in Malcolm, Lady Justice Arden adopts the approach of *Clark v Novacold Limited* in employment law, by which the Court considers itself bound, and states:

> It follows from the example of the guide dog that it does not matter that Lewisham would have treated every tenant who sublet in the same way, even if the tenant had no disability.

The example of the guide dog being, in my view, exactly comparable to the approach in *Richmond* as Justin sets it out. (Granted, I have trouble imagining how the *Novacold* approach would have worked in *Richmond*.)

There certainly are many issues left over from *Malcolm*, not least concerning its compatibility with *Romano* and which should now be preferred in the case of a secure tenancy. I do wonder though, whether the primary issue is between perceived practicality and a strict interpretation of statute through the lens of established employment case law. For instance, in terms of statute, I think that unlawfulness of a possession order makes much more sense that a fudged incorporation of discrimination into a HA 1985 or 1988 consideration of reasonableness. The latter somehow smuggles in an amendment of the Housing Acts, which cannot be the case.

Malcolm is headed to the Lords and frankly, I don't think anyone expects the Lords to leave it alone, so there is no doubt more to come. As *Romano/Malcolm* is key to a case I'm currently running, I'm watching with bated (sorry) breath.

Disability discrimination - the comparator

Sun, 20 Jan 2008 19:32:46 +0000

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Following on from the previous post, and the detailed discussions that took place in the comments to that post, I wanted to try to clarify for myself the key element of establishing discrimination, which hopefully may be of use for others. In particular, I want to address who is the comparator against whom the treatment is seen to be less favourable. Bear in mind that this is a housing lawyer interpreting an employment law case, so clarification or endorsement from any passing employment lawyers is welcome.

In *Malcolm*, the Court of Appeal held it was bound by its own judgment in *Clark v TDG Ltd (t/a Novacold)* [1999] EWCA Civ 1091.

The judgment in *Novacold* points out that the definition of discrimination in the DDA 1995 is different to previous acts, in that it does not draw a distinction between direct and indirect discrimination, contains a defence of jusitifcation and, crucially:

> it does not replicate the express requirement of the 1975 Act (section 5(3)) and the 1976 Act (section 3(4)) that, when a comparison of the cases of persons of different sex or persons of different racial groups falls to be made, the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

The crux is the interpretation of DDA 1995 s.5, which then read:

> (1) For the purposes of this Part, an employer discriminates against a disabled person if - (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply;

Unless the treatment is justified, of course.

The phrasing of s.5(1)(a) is effectively the same as s.24(1) as addressed in *Malcolm*. The comparator for establishing less favourable treatment is 'others to whom that reason does not or would not apply'. The question is the meaning of 'that reason'.

The Respondents in *Novacold* argued that 'that reason' included the relation to the disability, such that the comparator would be a person who was, say, equally incapable of performing their job, but for a reason that did not relate to disability.

The appellant argued that 'that reason' referred specifically to the reason for the treatment (the first three words of s.5(1)(a)), the inclusion of 'which relates to the...disability' being simply in order to specify the link which enables the complaint. On this basis, the comparator would be a person who was capable of performing the job.

The Court's interpretation of the, admittedly ambiguous, wording of the statute takes in the different provisions in the 1975 and the 1976 Acts, and the express requirement of comparison with the treatment

of other persons "whose circumstances are the same" stipulated in victimisation cases by section 55(1) (a) of the 1995 Act. This leads it to agree with the latter view.

'That reason' refers to the reason for the treatment, not the link to the disability. The proper comparator is someone for whom the reason for the treatment does not apply, not someone who is the same situation but without a link to a disability.

The same phrasing as s.5(1) is found in s.24(1), so that the same interpretation arguably must be followed, as the same phrasing cannot be interpreted in different ways in the same statute, or at least not without causing huge problems.

In the case of *Malcolm*, this works as follows. The reason for Lewisham's claim for possession was Mr Malcolm's illegal sub-let, thereby ending his secure tenancy. That reason was related to Mr Malcolm's disability. To establish whether this was less favourable treatment, the proper comparison is with someone to whom the reason for the treatment does not apply - i.e someone who has not illegally sub-let and ended their secure tenancy. These comparators exist. Mr Malcolm was undoubtedly treated less favourably than them, so discrimination is established. Lewisham didn't argue justification.

There are times when this comparator will not exist, as was the case in *Richmond Court v Williams* (see previous post). In *Richmond*, it appears that the 'reason for the treatment' was of general application, i.e. that a blanket ban on additions to the common parts meant that there was no occupant/leaseholder of the building to whom 'that reason' did not apply, no occupant who wasn't refused adaptations. There was therefore no possible comparator to whom 'that reason' did not apply. As a result, there was no less favourable treatment with the comparator and therefore no discrimination.

Having thought about it, this is not a departure from the *Novacold* approach, as Justin Bates suggested in the article discussed in my last post, and as I first thought. It is not a departure because the *Novacold* approach to comparators is deployed, with the result that there is no appropriate comparator to be found. Understood in this way, *Richmond* is not an alternative to *Malcolm*, or the *Novacold* based reasoning, but rather an example of *Novacold* reasoning in operation.

In this light, and contra Justin's suggestion, the reasoning in *Richmond* is not the same as saying that, because Lewisham would treat any tenant who illegally sublet the same way as Mr Malcolm, there is no discrimination. As mentioned above, the illegal sublet is the reason for the treatment, and there are plenty of comparators for whom that reason does not apply - Lewisham tenants who have not illegally sublet.

Novacold might be an employment case, but the interpretation of statute in the analysis of 'that reason' is not specifically employment related. If the House of Lords is going to change *Malcolm* in this aspect, it will be making a major change for absolutely all disability discrimination cases.

Time limitation on disability discrimination defence?

Tue, 19 Feb 2008 22:38:45 +0000

NL

This is definitely a specialist question, for which I seek housing people's opinions.

A semi-hypothetical situation:

A suspended possession order made against the client, a secure tenant, two years ago on grounds of rent arrears. Client didn't attend hearing. Client had contact with mental health services at the time, but it is now clear, on expert's report, that the client has for some time, including the relevant period, suffered from serious mental health problems and that these are, at the least, related to the the accrual of rent arrears (benefit problems).

Post *Malcolm*, or even post *Romano*, there is a *prima facie* case for an application to set aside the SPO either as unlawful as Disability Discrimination, or as client has a defence and didn't attend hearing for a good reason.

But.. Schedule 43 Part 2 para 6(1) DDA 1995 says:

> 6 (1) A county court or a sheriff court shall not consider a claim under section 25 unless proceedings in respect of the claim are instituted before the end of the period of six months beginning when the act complained of was done.

Section 25 states that

> (1) A claim by any person that another person—
>
> (a) has discriminated against him in a way which is unlawful under this Part; or
>
> (b)...
>
> may be made the subject of civil proceedings in the same way as any other claim in tort or (in Scotland) in reparation for breach of statutory duty.
>
> (2) For the avoidance of doubt it is hereby declared that damages in respect of discrimination in a way which is unlawful under this Part may include compensation for injury to feelings whether or not they include compensation under any other head.

So, the question is:

Does an application to set aside in extant possession proceedings where the client is a tolerated trespasser amount to a claim for the purposes of s.25 DAA, such that Sch 3 Part 2 6(1) limitation would apply?

My sense is no - there is no free-standing claim or claim for damages involved. It is a defence to a possession claim, not a even a counterclaim. But I am not at all sure. So, opinions very welcome, particularly if they go beyond 'yes' or 'no'.

Suddenly...

Fri, 29 Feb 2008 20:41:35 +0000

NL

there are quite a few cases to cover.

Ahmad, R (on the application of) v London Borough of Newham [2008] EWCA Civ 140 on determining

priority in allocation schemes.

G, R (on the application of) v London Borough of Southwark [2007] EWCA Civ 1506 on accommodation under s.20 Children Act 1989.

London Borough of Lambeth v Debrah [2007] EWCA Civ 1503 on refusal to stay or suspend an ASB possession order.

I also want to do a note on a case reported in the Gazette, but not on Bailii yet, Mansfield DC v Langridge (2008) CA (Civ Div).

But it has been a very intense week and my brain stopped working at about 6.45 this evening, so I'll try to get notes up tomorrow.

Considering suspension of possession for ASB

Sun, 02 Mar 2008 20:24:57 +0000

NL

London Borough of Lambeth v Debrah [2007] EWCA Civ 1503 was an application for permission to appeal a Circuit Judge judgment giving an order for possession, which was not suspended or stayed. The appeal was not against the order, but the refusal to suspend. The case was an ASB possession order. There had been serious problems with permitting drugs to be taken at the premises, and a closure order had been made but said aside on appeal. A manslaughter had been committed by someone in the area using drugs, and there was some evidence that culprit may have used drugs at the premises. There were many complaints by neighbours. The appellant had given an undertaking on no possession or allowing possession of drugs on the premises in April 2007, which had not been breached.

The first order judge did not suspend the possession order on finding that there had been serious breaches about which the Defendant had not been frank, and there was not sufficient - in the way of a keyworker's statement or the like - to be confident of future behaviour.

The first order judge noted the requirement of s.85A Housing Act 1985 that he had to consider the effect of the nuisance on others and the continuing effect the nuisance is likely to have. In doing this he addressed the stabbing that had occurred in the area of the flat, in the context of neighbours fears about future incidents.

Ground 1 of the appeal was that the judge had relied improperly on the manslaughter, without evidence to a connection. The Court held:

> The judge makes it clear that it is the repetition of events to which he is drawing attention, those being events which can reasonably cause great anxiety and concern and put at risk residents. That was the only linkage that he was making.

Ground 2 was that a) the judge had failed to give due weight to there being no further allegations since April 2007, and b) that the judge had taken s.85A into account when considering a stay, where s.85A applies to the making of the possession order.

The Court held that, while s.85A applies to the making of the order, in considering a stay, the judge's discretion under s.85(2) is unfettered. However, the Court of Appeal held in Manchester City Council v

Higgins [2005] EWCA Civ 1423 that it should be exercised with particular reference to the future. Additionally, because s.85A considerations only apply to the making of the possession order under statute, does not mean that the same considerations are thereby ruled out of considering a stay.

As for the issues of weight, the decision was not one that the judge could not reasonably come to in the proper exercise of his discretion and the applicant was not submitting that the decision was perverse.

Permission refused.

Housing Associations and public function to be tested?

Fri, 07 Mar 2008 22:09:57 +0000

NL

[Edit 30 June 08. The judgment in the following case is now out. For a detailed comment, see this post.]

According to Inside Housing, London & Quadrant are fighting an application for Judicial Review in Susan Weaver v London & Quadrant Housing Trust. It appears that the applicant is making the full-on challenge - that Housing Associations are public bodies - as a defence to a ground 8 possession.

This will be very interesting. Clearly, housing associations can be capable of being public bodies where fulfilling the function of a public body. But the circumstances in which that might be said to be the case have been highly arguable, and in any case appeared to be quite severely limited by the implications of the care home decision in YL v Birmingham in the House of Lords. What isn't clear from the Inside Housing note is the circumstances in this case. Is it transferred local authority housing stock, for example?

I would have thought that YL v Birmingham would have put a strict limit on any attempt to have housing associations be taken as public bodies tout court, so more details would be good.

Needless to say, L&Q are apparently aiming to fight this tooth and claw. As one of the largest housing associations to use ground 8 in possession claims frequently, I'm not surprised that they are. The reasons for bringing ground 8 possession claims would all too often be susceptible to judicial review.

Much more, of course, when this one reaches a public result.

Inside Housing's news feed is currently broken on my feeds page and the feed fails to validate, all because of the Q in L&Q. I smell a conspiracy...

Right to Buy and suitable alternative accommodation

Thu, 13 Mar 2008 22:37:42 +0000

NL

Where a possession order is sought under Ground 16 Schedule 2 Housing Act 1985 (under-occupation on succession), what happens to the tenant's right to buy? And is this a factor in weighing the suitability of alternative accommodation and the reasonableness of making an order?

Manchester City Council v Benjamin [2008] EWCA Civ 189, a Court of Appeal judgment out today, has some answers, but far from all of them.

The situation was, briefly, that the Defendant had succeeded to her mother's secure tenancy of a six bed house. The only occupants, post succession, were the Defendant and her one child, although evidence was heard that she intended to foster. The Claimantserved an NSP on grounds that the property was more extensive than the tenant reasonably required, the Claimant applied under the right to buy shortly afterwards.

At first instance, there was no dispute that the property was more extensive than required. Alternative 2 and 3 bed accommodation was offered (but this was due to be transferred to a housing association under a stock transfer some months later).

The Defendant maintained that the alternative property was neither suitable nor reasonable and counterclaimed for an order compelling the Council to convey the property to her.

Proceedings were under s. 85 HA 1985:

> "(1) The court shall not make an order for the possession of a dwelling house let under a secure tenancy except on one or more of the grounds set out in Schedule 2.
>
> (2) The court shall not make an order for possession–
>
> …
>
> (c) on the grounds set out in Part III of that Schedule (grounds 12 to 16) unless it both considers it reasonable to make the order and is satisfied that suitable accommodation will be available for the tenant when the order takes effect;

The Defendant held that if her tenancy of the property was ended by possession order, she would not be entitled to the right to buy at the new property until a fresh qualification period had expired (5 years) or, if the new tenancy was an assured tenancy, under more limited and less advantageous terms.

S.121(1) HA 1985 provides:

> "The right to buy cannot be exercised if the tenant is obliged to give up possession of the dwelling-house in pursuance of an order of the court or will be so obliged at a date specified in the order."

The first instance Judge held that this meant that the Defendant would have to start afresh and the 5 year period would not have expired by the time of the transfer to the HA. This in itself was enough to render the alternative accommodation unsuitable.

On reasonableness, the Judge found that the Council had not provided sufficient evidence to make clear that possession was required for the better managment of its housing stock, or the length of the waiting list for such properties. Instead it looked like the Council was simply seeking to avoid the loss of the property under the RTB provisions and, following the statement of Neuberger J in Basildon District Council v Wahlen [2006] 1 WLR 2744, held this was an impermissible jsutification.

At first instance the claim was dismissed and an order for conveyance made. INitial permission to appeal

by the Council was refused, and again on the papers, but a renewed application to Arden J suceeded.

The Court of Appeal, in three separate judgments, found that it was both reasonable to make a possesion order and the alternative accommodation was suitable.

S.121(1) did not mean that the right to buy was extinguished by a possession order under Ground 16. Apparent findings to the opposite in Basildon v Whelan and in Kensington & Chelsea RLBC v Hislop [2004] HLR 434 were not part of the ratio of the decisions in those cases. LJ Dyson found that:

> 56. The use of the definite article in the phrase "give up possession of *the* dwelling-house" is significant. It is in respect of *that* dwelling-house that the right to buy cannot be exercised. If it had been intended that an order to give up possession should be a bar to the exercise of the right to buy *any* dwelling-house, then the subsection would have been drafted rather differently. It would have provided that, where a tenant is obliged to give up possession of *a* dwelling-house in pursuance of an order of the court, the right to buy cannot be exercised in respect of *any* dwelling-house.

Sir Peter Gibson gave the lead judgment, finding that the right to buy was not extinguished and the the first instance Judge had not performed the balancing exercise of 'reasonableness' properly. In particular, it was not right to set out a stark distinction between the better managment of the housing stock and the wish to avoid a reduction in that stock, particularly in the circumstances of a single person and child occupying a six bedroom property (para 37)

Sir Robin Auld agreed with the conclusions of the others, but considered that there was an issue that had not been addressed, at first instance or in the appeal, which is whether the loss of the right to buy would, per se, render alternative accommodation unsuitable. The circumstances, he considered, may well arise where alternative accommodation is offered that does not carry the right to buy (para 47).

I must confess myself puzzled here, as para 1 of Part IV of Schedule 2 requires that any alternative accommodation proposed must be consist of premises to be let as a separate dwelling under a secure tenancy. Surely, it would also therefore carry the right to buy?

So, as far as I can see, loss of right to buy is gone as a defence to Ground 16 possession claims, but, on the plus side, the right to buy already established is preserved into the new tenancy.

Follow-ups

Thu, 13 Mar 2008 23:57:11 +0000

NL

There have been some very interesting comments on posts from the last week, and further news on the stories, making a catch up post worthwhile.

In no particular order...

I am delighted that Tony Fearnley commented on the Helena Housing v Molyneaux & Mower post. Tony, whom a quick google reveals is from Stephensons Solicitors, acted for Molyneaux and Mower (good work there) and also brings news that Knowsley v White has been joined with L&Q v Ansell for hearing in the House of Lords, listed for 3 days in October 2008. Helena Housing and Payne v Young is getting a lot of attention at the moment (Garden Court North have an article out -PDF). I have been told that the

presiding Judge at one of my local county courts has said at a hearing (regrettably not a trial on the point) that he found Payne v Young very interesting indeed, that he would be bringing it to the attention of the other Judges at the Court and hoped it would feature in Ansell in the Lords. I also know a few solicitors who have pounced on the case and are actively using it already. I really want the time to have a proper look at Payne v Young, but it won't be for a few days, at least.

Colin Yeo comments on Not for Profits in trouble, post fixed fee, mentioning the difficult circumstances of the South West London Law Centre. (Guardian story). The Gazette today has an article giving more detail, with a survey suggesting 20% of Law Centres are in major trouble and a further 49% in serious debt (article not available online yet). Discussions about amending transitional provisions are apparently taking place, but are late and may not be enough. This is very, very serious indeed. The LSC's helpful comment was that they 'had seen no evidence that law centres take on more complex work than other providers' and 'fixed fees were an important part of achieving value for money'. Yeah yeah, whatever.

Starting from my post on an unclear mention in Inside Housing, it quickly became clear via the comments that R (Weaver) v London & Quadrant has been a full-on JR application on grounds that Housing Associations (or L&Q at least) are public authorities exercising a public function as landlord, and that a policy of using Ground 8 is unlawful (Thanks to J). The substantive hearing took place in late February. I wait with trembling anticipation.

Lastly and considerably less seriously, I hear there is some speculation being bandied as to my secret identity. Heavens above, how immensely flattering. I blush with pleasure. But I am a creature of mystery and shadow, at least in my Fritz Lang-addled imagination, and must perforce remain in the misty darkness...

While waiting for Weaver...

Mon, 17 Mar 2008 23:21:37 +0000

NL

I'm eagerly awaiting the judgment in R(Weaver) v London & Quadrant, but, in one of those quirks of synchronicity, Bailii has just put the Court of Appeal Judgment in Donoghue v Poplar Housing & Regeneration Community Association Ltd & Anor [2001] EWCA Civ 595 up online. It made an interesting re-read, thinking about the issues in Weaver.

I don't want to rehearse the Donoghue arguments in their entirety. We know the basis of an intertwined history and provision of temporary accommodation post homeless application that the Court held up as the reason for finding public function, and I doubt the HRA arguments are of much use to Weaver, despite (or rather because) concerning mandatory possession (see below). But while browsing through, a few paras caught my eye. For example, para 46:

> Many local authorities have transferred some or all of their housing stock to one or more RSLs. This has happened so far as Poplar is concerned. Poplar was created for the purpose of taking over part of the housing stock of the borough of Tower Hamlets [...] Mr Brockway states that as a matter of policy the Corporation has always asked RSLs to grant the most secure form of tenure available to its tenants. This will usually be achieved by granting periodic tenancies of which possession can only be achieved on discretionary grounds. Such

> tenancies are accepted by Mr Luba as providing the necessary protection which he submits is necessary to comply with Article 8. The Corporation requires that if a tenant has an assured tenancy, then an order for possession can only be sought if it is reasonable to seek the order.

So, the use of Ground 8 against previously secure tenants who had been part of a stock transfer is...? Here Tower Hamlets 'asked the RSL to give the most secure tenancies', but could this be seen as a requirement on stock transfer tenancies as in Jan Luba's point? Donoghue doesn't say so, but apparently because the Court was prepared to accept that an assured tenancy meant a reasonableness criterea for possession was inevitable. But this crops up in the consideration of public function, not of Art 8.

On the other hand, as we now know, the Corporation doesn't 'require' that it is reasonable to seek the order, it merely recommends it, which devalues this point somewhat.

On Public Function, the Court of Appeal said at para 66:

> [...] We emphasise that this does not mean that all Poplar's functions are public. We do not even decide that the position would be the same if the defendant was a secure tenant. The activities of housing associations can be ambiguous. For example, their activities in raising private or public finance could be very different from those that are under consideration here. The raising of finance by Poplar could well be a private function.

Some things have changed since Donoghue, for example, the classification of HAs as public bodies by the Housing Corporation for VAT and EU procurement law perhaps makes the 'raising finance' example in Donoghue look a little different, and recasts the balancing of private and public carried out in that case.

I don't know if Weaver involved an HRA challenge to Ground 8. If it did, frankly I would expect it to go the same way as the challenge to s.21 in Donoghue.

However, if Weaver establishes public function sufficient for JR, I would personally have thought that a challenge to a policy of using Ground 8 would have a better shot, on the basis of, say,

i) unreasonableness (failure to address circumstances, failure to meet the stated aims of the policy - recouping of rent, etc.) and

ii) fettering of discretion (a policy to use ground 8 on arrears over 8 weeks fetters the available discretion to use ground 11 & 12 or not to bring a possession claim),

with the Housing Corp Guidance to the fore in both.

And, perhaps, with an eye to Donoghue, a citing of Lord Woolf in para 46 on the expectation of reasonableness in a possession claim for an assured tenancy. After all, Ground 8, if pleaded as the sole ground of possession, not only avoids the Court's consideration of reasonableness, but also of whether the landlord has followed the pre-action protocol on rent arrears.

We'll see. Better minds than mine have spent considerably longer on it than I have.

Payne-less

Wed, 19 Mar 2008 22:10:54 +0000

NL

Porter v Shepherds Bush Housing Association [2008] EWCA Civ 196 is a Court of Appeal judgment on an appeal of an application for revival of tenancy where all the arrears were paid off on a breached suspended possession order.

The Court of Appeal was presented with the opportunity to follow its own 1958 decision of Payne v Cooper rather than the recent string of cases, (Burrows, Marshall, Aston, Ansell). The Court of Appeal declined the offer.

In the lead Judgment, Lord Justice Pill's main reason for the choice is that Payne concerned an unconditional possession order (and whether it could be turned into a conditional order), rather than than the post HA 1985 rent arrears SPO where conditions are obligatory. The recent cases are, by contrast, exactly on point. The second reason is that Lord Evershed's reference to non-jurisdictional matters in Payne may have influenced the decision.

The Court also considered a submission that a 'paid-off' SPO could be amended by the Court under the powers given in CPR 3.1(2)(a), so as to retrospectively give an extension of time for payment and removal of the instalment condition. This would then mean the Order could be discharged under s.85(4).

CPR 3.1(2)(a) provides:

> "Except where these Rules provide otherwise, the court may – (a) Extend or shorten the time for compliance with any rule, practice, direction or court order (even if an application for extension is made after the time for compliance has expired;"

Lord Justice Pill said no. There was no reason why the CPR should override the statutory provisions. There were no unforeseen facts or change in circumstances to make the order misconceived or inappropriate. The emergence of the 'permanent trespasser' condition in case law, after the SPO was made in this case, did not amount to a change of circumstances that would enable the court to rewrite its earlier order.

The same went for the Court's power to amend the order retrospectively. Statute provided for amendment on application. No application was made and nothing else had arisen to permit the rewriting under CPR 3.1

The Appellant's submission that Marshall, Aston and Ansell were per incuriam because CPR 3.1 had not been considered in them - as a rule which would have affected the decisions - fell on this finding. In any case per incuriam only applies to a decision made without knowledge of binding precedent or statute on the matter.

Article 8, raised as an issue for construing s.85 and CPR 3.1, may be engaged by an order denying revival, but doesn't go anywhere because "the Marshall and Aston constructions are compatible with Convention rights" (para 55)

Lord Justice Sedley was rather more open, both to Payne and to the Art 8 argument. The HRA wasn't in force when the appellant became a tolerated trespasser, so was of no avail to him, but the Art 8 issues could mean that a Payne approach was to be preferred and the statute so construed, to avoid the Aston trap.(paras 59-61)

Lord Justice Longmore rejects Payne. If it had been raised in Marshall v Bradford, it would have likely been distinguished for the reasons (para 65):

> i) that the word "discharge" was used in the order in Payne's case; ii) that there was no equivalent of section 82(2) in the 1923 Act; the regime introduced by the 1980 and 1985 Housing Acts is not the same as that utilised by the old Rent Acts; iii) that the earlier court did not consider the problems set out in the second and third reasons of Chadwick LJ in

rejecting the argument.

In any case, Chadwick LJ's first reason for dismissing the 'discharge' argument was based on the terms of s.82(2) HA 1985, which had no comparator in the earlier acts in Payne.

Even if all that was wrong, LJ Longmore would still prefer to follow the recent cases, to avoid a 'divided voice' in the Court of Appeal(!)(para 66).

So that, for the time being, is that. A divided judgment, to be sure, but one that puts the quietus to any lower court following in the footsteps of Helena Housing .

Payne may yet surface again in the House of Lords in the Ansell and White, but until then, it is sadly a dead issue.

DDA and mandatory possession

Thu, 20 Mar 2008 07:36:15 +0000

NL

S v Floyd [2008] EWCA Civ 201 is a Court of Appeal case in which the Disability Discrimination Act 1995 is considered in relation to a mandatory Ground 8 possession claim by a private landlord.

In some ways, there is nothing particularly surprising in the case - the Court found that the DDA was not engaged as there was no relation between the appellant's disability (OCD in this case) and the rent arrears. No DDA defence had been raised at first instance, nor should it have been 'obvious' to the Judge that there may be one. In fact the appellant had given specific reasons for withholding rent to the first instance Court that were not connected to the disability.

On that basis, there was no need to inquire further into discrimination (including comparator) or justification.

So far, nothing out of step with Lewisham v Malcolm. As I have always maintained, against some scaremongers, Malcolm did not mean that a possession claim against a tenant with a disability was discriminatory per se. 'Relation' of disability to reason for eviction is a real test. As I also suggested in discussing Malcolm, appeals raising a DDA defence for the first time would get a tough hearing.

However, there is an issue raised by the Court that is of significance, but to my mind not adequately considered or argued. Does a DDA defence - (presumably 'defence' in the terms of Romano, rather than a DDA claim) apply to mandatory possession proceedings.

The sole judgment distinguishes Malcolm as follows:

68. As for **Malcolm,** although neither judge had the benefit of its guidance, as it was decided subsequent to their decisions, a number of points may be made showing that it does not govern this case.
69. First, the mandatory provisions of section 7(3) of the 1988 Act, which give the tenant a statutory right to a possession order against the tenant who is more than 8 weeks in arrears with the rent, did not apply in **Malcolm**. The local authority relied on its contractual right to possession.

Nothing further is said on this point, as the Court concludes that no disability discrimination arose in this

case. But at 71 the Court asks the House of Lords to answer the urgent need for clarification on the scope of the 1995 Act.

I don't see how Malcolm can be so simply distinguished, certainly without any further reasoning. I suspect that the Court is complicating issues for itself by casting disability discrimination as a 'Defence' to a possession claim, particularly in relation to circumstances where there can be no defence by statute (mandatory grounds).

Romano said that an argument of discrimination could be raised as a defence, under resonableness, in discretionary possession claims (at least against secure tenants), but this has led to it being conceived of as a defence per se, where Romano actually said that this was a matter of practical efficiency, rather than having to mount a counterclaim of unlawfulness.

Malcolm thoroughly confused matters by discussing disability discrimination as a 'defence' of unlawfulness against a non-discretionary possession order. In some ways, it would have been clearer if Malcolm had said that in such circumstances it should be conceived of as a counterclaim of unlawfulness, although, in practice, formally making the counterclaim would surely be unneccessary.

So when, as here, the Court is troubled by the idea of the DDA adding a defence to a 'lawful' mandatory claim, where statute actively rules out a defence, one answer is that the DDA doesn't add a defence. It adds a counterclaim that the mandatory claim isn't lawful, which, for reasons of practical utility is treated as a defence in hearing the claim.

There were some other issues on the District Judge not adjourning the hearing - principally on the basis that an issue of the appellant's capacity was raised. The Court of Appeal found that:

> There was nothing before the District Judge to suggest that S did not or might not understand the comparatively simple and straightforward issues raised in the proceedings on which his input was likely to be necessary.

And there was nothing before the Court of Appeal to suggest lack of capacity, either.

The Court's 'Exceptional Circumstances' power to adjourn even a mandatory possession claim was not considered or exercised by the DJ. The Court of Appeal said

i) Non-receipt of housing benefit was not an exceptional circumstance, North British Housing Association v Matthews [2004] EWCA Civ 1736,;

ii) No application was made to the DJ for an adjournment on exceptional circumstances.

And that was pretty much it. There may be a further case, Bernstein v Tate, on s.21 possessions soon. Malcolm is to be heard in the week of 28 April by the House of Lords.

S v Floyd and a disability defence

Thu, 27 Mar 2008 00:12:16 +0000

NL

This post started as a response to a detailed comment by David Giles, Counsel for Floyd in S V Floyd, on my case report. But his comment and the report by Michael Paget mentioned in my last post - to the effect

that Floyd contained a clear rejection of the very idea of a DDA 'defence' rather than compensation claim - have sent me back to have another look at S v Floyd. I recommend a look at David Giles' comment, then reading this post (which is rather hurried and may well be edited over the next day or two)...

David, I agree that Malcolm was distinguishable from Floyd on the non-relation of disability to non-payment of rent point. That by itself would not mark a breach with Malcolm.

I think the distinction made between a statutory mandatory claim and the 'contractual' (*actually common law - thanks J*) claim in Malcolm doesn't stand up, because if the suggestions in the Floyd judgment were carried through, it would make no difference - both would be lawful possession claims with no DDA 'defence'.

I noted the scepticism to the idea of a DDA 'defence' at 48. and meant to comment on it in my original post. But as I did say in that post, I think that the Court has got rather confused about the very idea of a 'defence'.

The judgment in Floyd does not put forward an argument that gets around s.22(3)(c) DDA 1995. If the eviction is unlawful by reason of being unjustified discrimination, what does the Court suggest? The implication of 48. would be a claim for compensation. So, the County Court is to aid an unlawful act by making the possession order, but it is OK because the ex-tenant then has a claim for compensation? This makes no sense.

The objection appears to be that an otherwise lawful possession claim cannot become unlawful by operation of the DDA. But that is the point of the DDA in general - otherwise lawful acts are unlawful if they constitute disability discrimination.

It is hard to escape the logic of Malcolm, once it is acknowledged that an otherwise lawful possession claim can constitute 'less favourable treatment for a reason related to disability' in comparison to 'others to whom the reason would not apply', to paraphrase s.24(1)(a).

The Floyd judgment does approach this in 57 and 58, as you say, by reference to Taylor v OCS Group Ltd [2006] EWCA Civ 702. Taylor v OCS at 72 says:

> "In the context of the DDA, an employer cannot discriminate against the employee unless he treats the disabled employee differently for a reason (present in his, the employer's mind) which is related to the employee's disability."

This is a major difference to the interpretation of 'for a reason' set out by the Court of Appeal in Novacold. The judgment in OCS distinguishes Novacold by saying that the treatment in Novacold was clearly for a reason related to disability, so the judgment offers no aid on 'reason related to...'. But this dismissal doesn't actually stand up. If it did then the whole logic of the comparator set out in Novacold would make no sense at all, as it is based on an analyis of what the term 'reason' actually means, and it is **not** the meaning that is set out in OCS.

The stakes become clear at this point. It is not, in the end, about whether the DDA applies to mandatory possession claims. As far as I can see Floyd gives no reason at all why it would not - while not actually having to decide the issue in this case. The argument - or significant difference of position - is about the interpretation of 'for a reason related to his disability' *tout court*, pitting OCS against the line of Novacold judgments, including Malcolm and Romano, and affecting the entire application of the DDA.

But even if the OCS approach was right, and I'm sure the House of Lords will hear it in Malcolm shortly, that would not stop the DDA having potential application in mandatory possession claims. For example, what of a s.21 possession that could be shown to have been undertaken because the landlord did not want a disabled person to remain in the property? Is the only recourse of the ex-tenant to be to a claim for compensation, while the County Court aids an unlawful act?

Friday News round-up

Fri, 04 Apr 2008 21:35:41 +0000

NL

The debate on the Housing and Regeneration Bill on 31 March saw clauses on both Ground 8 Possession and tolerated trespassers put forward by the Government.

Clause 9 appears to stop RSLs using ground 8 at all and to introduce a reasonableness defence in general for ground 8 where housing benefit delay or failures have meant that some rent is in arrears, providing that the delay or failure is 'not referable to any wilful act or omission of the tenant'. I can see a lot of cases on 'wilful', right off.

In moving the new clause on tolerated trespassers, The Junior Housing Minister Iain Wright said:

> The new clauses and amendments deal with the tolerated trespasser doctrine. They will resolve the problem for existing tolerated trespassers, and will ensure that no tolerated trespassers are created in future. The changes will apply to secure, assured, introductory and demoted tenancies.

The full 'replacement tenancy' clauses are on this page of Hansard.

Both clauses were passed on this reading. All good stuff so far.

Iain Wright also announced a working group on current RSL use of Ground 8, in the context of it being against Housing Corporation guidance:

> I have therefore asked my officials to convene a working group meeting with the key stakeholders, including Shelter, Citizens Advice, the National Housing Federation, the Council of Mortgage Lenders and the Housing Corporation to examine those concerns and report back to me by summer, recommending options for a way forward. In light of the regulatory framework that we are putting in place, I am particularly interested in the role that Oftenant could play in addressing the problem for the registered social landlord sector. The reformed system of regulation, which will give a stronger voice to tenants to bring issues of concern to the regulator and a more targeted system of regulatory action, seems a good approach to dealing with the matter.

London & Quadrant, we are looking at you now...

Elsewhere, the Housing Minister, has announced that the 'debate' is over (concerning her idiotic ideas on re-introducing workhouses/setting employment-seeking conditions on council tenancies) and it is time to implement them. It wasn't much of a debate, really. She came up with the idea and everyone else, apart from David Blunkett, said it was stupid.

Flint appears to have adopted the face-saving means of back-tracking, by appointing a working group to come up with implementation ideas. The chair of the working group, Jane Slowley has made abundantly clear that sanctions and punishments attached to tenancy do not form part of her thinking. So, there will be some kind of proposals for employment support and training linked to social tenancies, but no lunatic sanctions. Flint will say she has moved matters on, the rest of us will breathe a sigh of relief.

And in the bears and woodland based sanitary facilities category, Councils are found to ignore their housing duties once they have flogged off their housing stock to Housing Associations.

Hey, you asked 2

Sun, 13 Apr 2008 21:41:10 +0000

NL

More brief but hopefully helpful replies to the civil litigation and housing questions that brought searchers to Nearly Legal. As ever, nothing of what follows should be taken as legal advice and no action should be taken without obtaining full legal advice.

> what does mandatory possession mean

It means that if the ground is successfully made out, the court has no option but to grant an outright possession order, no matter what the circumstances.

> possible defences for a tenant of rent arrears the mandatory ground housing law

Presumably ground 8. There aren't many defences. The list is:

- technical defences (Notice not served or technically inadequate, claim doesn't contain required details etc.), no guarantee of success at all with this one;
- defences that affect the level of rent arrears, e.g. there may be a dispute as to the correct level of arrears;
- most useful is a counterclaim for disrepair, as it will affect the level of arrears outstanding by the end of the hearing of the claim.
- Rarely, and depending on the conduct of the landlord, the claim may be defended as oppressive, but this would require clear evidence that the landlord had, for example, significantly misled the tenant on the claim and its consequences.
- If the reason for the rent arrears is related to a disability there may be a 'defence' under the Disability Discrimination Act, but this is very complex and the possibility of the defence may change at any moment over the next couple of months. This one seriously needs qualified advice and representation.

All these defences are potentially complex and getting advice and representation is a very good idea.

> disrepair and accelerated route for possession

Then there is a counterclaim for disrepair. It won't stop the landlord getting possession, although it will likely slow the process up more than somewhat, but could lead to an award of damages.

> renting can we break a shorthold contract

Without owing the rent on the remainder of the tenancy (or at least until the property is re-let) you mean? The answer is no, not if you just want to go. There may be a break clause in the tenancy agreement (e.g. after 6 months on a 12 month contract) or there may not be. It may be possible to leave if there is something catastrophically wrong, but that needs detailed advice.

> assured tenancy assignment

It may be possible, if it is not expressly ruled out in the tenancy agreement. However, even then, the landlord has to give permission. Unless the tenancy agreement expressly says so, there is no presumption that the permission will not be unreasonably withheld, meaning the landlord can refuse permission no matter how reasonable the request is.

> can i stay in rented property once my notice requiring possesion has expired

Yes. Assuming you don't fall under one of the exceptions, your landlord has to make a claim for possession, get a possession order from the court and then a warrant of possession. If your landlord tries to evict you without a court order and warrant, it is very likely to be an illegal eviction.

> are there legal grounds for withholding rent with a secure tenancy?

With one very complicated exception to do with having to carry out repairs that are the landlord's responsibility, no. I'll say it again, you cannot and should not withhold rent. It puts you at risk of a claim for possession and will not resolve whatever the problem is. If the problem is something like undone repairs, you have another path in a claim for disrepair.

> what rights do tolerated tresspassers have

The ability to apply to the court to stay or suspend an eviction and, if the arrears haven't been paid off, the right to apply to the court to revive the tenancy. That is about it. No Right to Buy, no repairing duty on the landlord, no transfer, no succession or assignment rights. A tolerated trespasser can still bring a prosecution against the landlord under the Environmental Protection Act for nuisance, though.

> tenants rights bed bugs wandsworth housing authority

Ouch. Unless it can be shown that the infestation came from an area that is under your landlord's control (communal stairs, vents etc., but not gardens or other flats) you are pretty much on your own. If it did come from the communal area, it could be a nuisance prosecution, but this would need expert evidence.

> legal aid for housing law

Yes, but get it while it lasts.

And lastly and very worryingly

> trainee solicitor forging signature

The trainee has forged, or someone has forged the trainee's signature?. Presuming the former, the trainee is in a whole heap of trouble and has quite possibly ended their career. If this is from a trainee thinking about forging a signature, it would be a cretinously stupid thing to do and just deeply, fundamentally wrong.

Possession orders and RTB

Tue, 22 Apr 2008 20:58:10 +0000

NL

Honeygan-Green v London Borough of Islington [2008] EWCA Civ 363 (22 April 2008)

A quick note on this Court of Appeal case. What happens when a secure tenant who has begun the right to buy process subsequently has a suspended possession order made against them, and then later has the SPO discharged?

The Court of Appeal's answer, following *Enfield London Borough Council v. McKeon* [1986] 1 WLR 1007 and *Lambeth London Borough Council v. Rogers* [1999] 32 HLR 361 and indeed *Burrows v. Brent London Borough Council* [1996] 1 WLR 1448, was that a revived tenancy brought with it retrospectively all of the rights of the tenant as if the tenancy had never ended. So s.121(1) HA 1985 is of temporary application, while the SPO is in effect.

The upshot is that a right to buy procedure begun before the possession order is merely suspended and revives with the tenancy - so that the original market price valuation still applies.

However, there are some oddities in this case. Firstly, Ms Honeygan was very lucky to have her possession order discharged before Swindon v Aston [2003] happened, as she had breached the terms of her SPO, and under Aston, would not have been able to have the possession order discharged.

Secondly, the Court of Appeal judgment expressly approves the broad discretion of the Court under s.85 HA 1985 in *Rogers*

> Simon Brown LJ made the point that the court's order reviving the secure tenancy could have been made subject to a condition that the tenant's damages claim should not be pursued

Hmm. I haven't got access to the details now, but I seem to recall a recent appeal from a County Court decision at Lambeth County Court that said that conditions set on a s.85 revival/postponement of possession could only be related to the grounds of the original possession order - e.g. rent arrears, where the DJ had set a 'no disrepair' condition. It was in Legal Action, I'll try to find it tomorrow.

Plus, as far as I can tell, this will only apply to discharged SPOs and - presumably - paid off PPOs.

'simply wrong-headed'

Thu, 24 Apr 2008 23:02:47 +0000

NL

Apparently Wandsworth are very very unhappy with the Court of Appeal judgment in Wandsworth v Randall on underoccupation possessions via ground 16 HA 1985. So unhappy that they are lobbying Caroline Flint to change the law via the Housing and Regeneration bill.

There are, of course, extremely good policy reasons for underoccupation possessions. Multiple bedroom council properties are in extremely short supply and demand is high.

Wandsworth, however, are putting more than a little spin on this. Martin Johnson, Cabinet member for housing said:

> Our concern is the Court of Appeal judgement provides an incentive for underoccupying successor tenants to artificially increase their household as a way to defeat such a possession application.

The judgment expressly said that artificial inflation of numbers of people living in the property would be

an issue for reasonableness at the hearing. It is fully open to the landlord to present evidence on the issue. So to say

> the case left landlords with 'very little power' to pursue ground 16 repossessions.

is nonsense.

But Mr Johnson is trumped by Brian Reilly, deputy director of housing, who fumes that this is

> clearly a case where there has been an interpretation of the law that is simply wrong-headed.

Call me an old stick-in-the-mud, but that would be for the House of Lords rather the deputy director of housing of the frustrated claimant to decide.

I take it that this sound and fury means an application for permission to appeal to the Lords will not be forthcoming, but why ever not, Mr Reilly?

Mortgage possessions - Gordon feels your pain

Sat, 10 May 2008 20:54:18 +0000

NL

Mortgage repossessions are rising at the fastest rate since 1991. According to the MoJ quarterly figures [pdf]:

- Possession claims in the first quarter of 2008 were 38,688, 7% more than in the last quarter of 2007. The rise over the last year was 16%.
- 27,530 mortgage possession orders were made on a seasonally adjusted basis, 17% higher than in the first quarter of 2007 and 9% higher than in the fourth quarter of 2007.
- 47% of mortgage possession orders were suspended compared to 47% in the first quarter of 2007 and 46% in the fourth quarter of 2007.

Caroline Flint and the Chancellor announced a £10 million package of measure to 'support homeowners facing difficulties with their mortgage'.

> This package includes measures to ensure that financial advice and support is available for borrowers who may need it and includes an additional £9 million extra funding for face-to-face debt advice provided by third sector partners including Citizens Advice Bureau.

Let us unpick this a little. That is £9 million over three years, so £3 million a year to 'third sector partners'. Citizens Advice claims advice is provided at 3000 locations, so, if equally distributed, that is £1000 per location. Of course, it won't be equally distributed - some will be used centrally or for training and I would be surprised if certain bureaux weren't targeted, particularly those that run Court advice, but it doesn't actually look like much.

The other £1 million (over three years!) is presumably to fund the other promises:

- expanded access to free legal representation at county courts throughout England for households at risk of repossession;
- strengthened National Housing Advice Service to provide a new comprehensive debt

advice service

I take this to mean a bit more support for duty scheme possession solicitors. Does anybody know about the 'National Housing Advice Service'? It has slipped beneath my radar, or do they mean Community Legal Advice?
The press release adds that this £10 million

> builds on the services already in place, backed by £560 million Government investment, such as face to face debt and financial advice, a national debt helpline, homelessness prevention work by every council, legal aid, and financial support for low income households who may face short-term difficulties in repaying their mortgage.

Uh huh. Few mortgage repossession cases are eligible for legal aid. Council 'homelessness prevention' is hardly of use and 'financial support' amounts to limited payments of interest only, after six months of eligibility.
The government is also talking to the main banks on avoiding repossessions. However, my anecdotal experience, also reported by Shelter, is that it is sub prime mortgagees, second mortgagees and secured loan holders who are pushing for repossessions, often with relatively low amounts at stake. Given the great frenzy of cashing in equity over the last few years, this could present a very large ongoing problem.
Meanwhile, the Civil Justice Council are consulting on proposals for a mortgage possessions pre-action protocol. The consultation paper is here [pdf] and the consultation ends on 23 May 2008.

Letting repossessed property

Mon, 12 May 2008 21:40:45 +0000

NL

As a follow-up to the mortgage repossession post below, I've just spotted a sad story on Landlord Law blog. Tessa had a case in which private tenants discovered, when the bailiffs turned up, that the property they had just rented was subject to a mortgage repossession order which had expired before they even moved in. I suspect this is not going to be that unusual.

Tessa wonders whether there should be a duty on managing agents to ensure that the properties they let on the landlord's behalf are actually available to let. An interesting thought. Tessa asks for comments...

Possession and human rights - blimey!

Tue, 13 May 2008 20:19:23 +0000

NL

Just when, post *Kay v Lambeth* in the Lords, it looked like the issue of human rights defences to possession claims was pretty much settled (i.e. there pretty much weren't any), the ECtHR has decided to put a large stick in the spokes.

As many people have already emailed me to tell me (alright, four people, all of them lovely), *McCann v United Kingdom 19009/04* was handed down today. This is a first hurried look, but this one is going to be big. I can't link to the case directly. It is on the ECtHR site as a recent case. A word copy of the judgment is downloadable here case-of-mc-cann-v2-the-united-kingdom.

The facts can be dealt with quickly, as they are not, in the end, that important. The applicant and his then wife were joint tenants of Birmingham. The wife made accusations of domestic violence and the applicant was removed by ouster order. The wife and children were rehoused by Birmingham. The applicant moved back into the property. When Birmingham found out, they got the wife to sign a Notice to Quit, ending the joint tenancy. The wife claimed she was not told that this would mean ending the applicant's tenancy as well. Birmingham then brought a claim for possession against the applicant. The County Court held that there was a breach of Art.8 ECHR in that the applicant's Art.8 rights had not been properly considered and that Birmingham had apparently induced Mrs McCann to sign the NTQ. Brimingham appealed. The Court of Appeal held - after the decision on *Qazi v Harrow [2003] UKHL 43* - that there was no Art 8 defence to the lawful possession proceedings. An attempt at a Judicial Review of the decision to procure an NTQ from Mrs McCann failed as there was no unlawfulness and the decision was properly open to Birmingham. The rest of the issue had already been decided by the Court of Appeal. Permission to appeal refused. The applicant was evicted and brought an application to the ECtHR.

The applicant raised Art 6 - the LA was not an independent tribunal when it brought about the termination of the tenancy. Rejected on the obvious ground that the County Court was the determining tribunal.

The applicant also raised Art 14 discrimination, comparing the LA's relationship breakdown policy with the policy on domestic violence. Rejected on the obvious ground that DV and relationship breakdown are not the same thing, so different treatment cannot be discriminatory.

But the Art 8 issue went very differently.

It was common ground between the applicant and the Government that:

1. the property was the applicant's home (home takes a wide definition, not reliant on lawful tenancy).
2. the applicant's Art 8 rights were engaged.

The Government argued that any interference with Art 8.1 rights was justified under Art 8.2. The LA was pursuing legitimate aims, the absolute right to possession was legitimate in a democratic society. The case was distinguishable from *Connors v UK (66746/01)* as the key features of *Connors* were i) the vulnerable position of gypsies; ii) the absence of procedural protection - no scrutiny by the courts; and iii) discrimination of domestic law between those residing in private and in LA sites. The LA had merely been seking to regularise the situation in asking Mrs McCann to sign the NTQ. If this was improper behaviour, then Judicial Review was the appropriate course. And, post Kay, public law issues could be raised in the County Court possession proceedings.

The applicant argued that the manner in which the NTQ was obtained was a violation of his Art 8 rights, effectively ending his tenancy with no possibility of challenge.

The ECtHR found something completely different from both. Having reviewed the House of Lords decisions in *Qazi* and in *Kay* (and quoting Lord Bingham's minority judgments in both with evident approval), the Court found that:

1. the interference with the applicant's Art. 8 rights was lawful
2. the interference was in pursuit of a legitimate aim
3. but the issue was whether the interference was proportionate.

Proportionality is both a factual issue and an issue of procedure. The Court quotes *Connors* at 81-83 on proportionality and procedural safeguards. It states that it does not accept the limitation of *Connors* to

cases concerning the eviction of gypsies, or to cases where there was a challenge to the law itself. Any person facing the loss of his/her home should, in principle be able to have the proptionality of the measure determined by an independent tribunal, regardless of whether there is a continued right of occupation.

HA 1985 s.84 provides this under reasonableness, but here the NTQ allowed the LA to bypass the HA 1985 procedure, and bring summary possession proceedings under common law. Apparently the LA did this without consideration of the applicant's Art 8 rights.

The decisions in *Qazi* and *Kay* meant that it was not open to the County Court to consider proportionality, save in the exceptional case where 'something has happened since the service of the NTQ, which has fundamentally altered the rights and wrongs of the proposed eviction' (Court of Appeal decision in *Birmingham v McCann*).

Judicial review, and by extension public law defences in the County Court did not permit of a consideration of proportionality as JR can only address issues of lawfulness and reasonableness of the LA's decision. This is not the same as the balancing act of proportionality. There was, in any case, no doubt that the LA had acted lawfully.

There was therefore a procedural breach of Art 8 in that there was no procedural mechanism for the issue of whether possession was proportionate to be considered in the summary possession hearing.

The Court did not accept that a consideration of proportionality under Art 8.2 would be a hardship for the functioning of the system. It would be exceptional for an arguable case to be raised that would require the issue to be considered.

Whether Mrs McCann had understood the import of the NTQ was immaterial. The issue was the lack of any possible consideration of proportionality under summary possession where one joint tenant has served NTQ.

In the Applicant's case, the Court felt it was doubtful that he would have been any more successful, even if he had had an Art 8 defence. But there was a violation of Art 8 in its procedural aspect.

Well, blimey.

As far as I can see this amounts to a statement that common law summary possession proceedings (at least brought by public bodies) require that a defence of lack of proportionality under Art 8.2 be available.

Clearly this extends beyond the specific facts of this case (end of joint tenancy by NTQ to summary possession claim) to include any common law possession claim brought by a body subject to the Human Rights Act.

Does it go any further?

For the common law, the courts have an obligation as public bodies to behave in accordance with the ECHR, so there is now arguably a duty on them to consider proportionality in common law possessions where the issue is arguably raised. This might include, for instance: possession claims against those in occupation after the death of a tolerated trespasser, who would otherwise have succeeded to the tenancy; or those whose secure tenancy has ended by operation of law (e.g. Malcolm in *Lewisham v Malcolm*). It would presumably also include possession claims brought against entrenched tolerated trespassers as trespassers (so under common law).

What about other forms of possession against limited or no security tenancies? Possession claims for introductory or demoted tenancies? Temporary accommodation after discharge of duty under Part VII? The effectively summary nature of the possession claims in these cases is given in statute to some degree.

Arguing for the duty to hear an Art 8.2 proportionality defence where there is no provision for a defence at all in statute is going to be a strain on the Court's HRA duty to interpret statute as in accordance with the ECHR wherever possible. I can see a lot of argument about this. But the direction of the judgment does seem clear - any possession hearing should include the possibility of a proportionality defence being raised, if arguable, at least against a public body landlord.

It is worth noting the the ECtHR takes the s.84 HA 1985 as affording sufficient procedural safeguard for secure possession claims.

But I really need to think about this for longer. Anybody else's thoughts welcome.

By the way, Garden Court North have a briefing paper on this case now out at their news page - the May bulletin. And Garden Court (south) sent out a press release a day later (14 May) on the 'decade altering decision' and pointing out it was their Stephen Cottle who acted for Mr McCann.

Snippets

Sat, 17 May 2008 21:10:57 +0000

NL

A few bits and pieces...

Gilboy v Liverpool CC has a hearing at the Court of Appeal on 19 or 20 May (thanks J and GCN).

Doherty v Birmingham is at the House of Lords later this year, which should be a big test for the legacy, if any, of McCann (thanks J, again)

Rumour is that Southwark are appealing R(Faarah) v Southwark. Not sure I see what the basis of appeal would be, but we'll see.

The world of housing blogs expands still further and intriguingly, the latest addition is by a homeless officer. The nothing if not literally named A Homelessness Officers Point of View promises to 'cause comment'.

And a happy birthday to Charon QC. Long may the Rioja flow.

Wondering about McCann

Sun, 18 May 2008 22:35:20 +0000

NL

Well, *McCann v UK* certainly seems to have stirred things up. Naturally, most of the speculation is on the effect and extent of the judgment.

I'm still trying to work out for myself what the likely or even possible effects are, so this is a work in

progress.

In descending order of certainty...

Common law summary possession by a local authority/public body landlord after Notice to Quit (e.g Ex joint tenants; temporary accommodation under s.183 and possibly s.192 HA 1996; 'successors' to deceased tolerated trespassers; non-successor occupants; etc.)

Possession proceedings will need to include the potential to consider whether the eviction is proportionate under Art 8.2 ECHR.

Does an assertion that the eviction is not proportionate constitute a defence? I think it is likely to be so. Although alternatives might include compensation, if the eviction is disproportionate, the court would be aiding a breach of Art 8.2 in making a possession order. (The similarity to the 'unlawful act' element in *Malcolm v Lewisham* might mean that the House of Lords judgment in *Malcolm* has an impact, but *Malcolm* concerns interpretation of statute, not ECHR).

Where will this leave the tenant? Most likely as an ex-tenant still in occupation. I can't see much in *McCann* to suggest that the ending of the secure tenancy per se was taken to be disproportionate, the issue being purely that the possession proceedings could not consider proportionality of eviction.

Mandatory possession proceedings brought by a public body landlord under statute - for instance introductory and demoted tenancies.

Trickier, as to some extent the summary nature of the possession hearing is given in statute. While in common law proceedings, the Court can introduce 'proportionality' under its own duty under the Human Rights Act, it is surely different where the process is statutorily limited. Would the best the Court could do be a declaration of incompatibility?

Possession proceedings by non-public bodies, private landlords or RSLs, where summary or mandatory.

There have been suggestions that *McCann* might hold other than for a public body landlord. Given that private and RSL landlords have no duty to comply with the ECHR under the HRA, there is no duty on them to behave proportionately in evictions and therefore no basis for the court to hold them to proportionality as being their duty.

So, the only way that I can see that *McCann* would extend beyond public body landlords is if the Courts, as public bodies, are taken as being required to consider proportionality in their decisions to make an possession order - the duty of behaving proportionately being the court's, not the landlords. Thus there would be a general duty to consider proportionality in all possession claims, whether brought by private landlord, RSL, public landlord, and whether summary, mandatory, or discretionary.

I very much doubt that this can be the case. It is not, after all, the court that is evicting the (ex)tenant/occupier, it is the landlord.

McCann focussed on the procedural 'defect' of the summary possession procedure against a local authority (ex)tenant. The LA's ability to 'sidestep' the requirements of HA 1985 via the NTQ was specifically raised as an issue by the ECtHR in the judgment. The ECtHR acknowledges that the existing summary procedure, and the availability of JR, provides safeguards to ensure the possession claim is lawful and for a legitimate purpose. If the ECtHR had been concerned with possession claims in general, then the lack of availability of JR against private or RSL landlords could have been mentioned as an even greater defect. But it wasn't.

The 'procedural defect' is therefore a lack of ability to scrutinise whether the landlord's interference with

Art 8 rights is proportionate. This can only be the case where the landlord has a human rights duty to act proportionately.

I would be keen to be shown I was wrong, obviously, but I can't see how *McCann* can extend beyond public sector landlords. Even if it does, we are back to the issue of statutorily given processes (s.21, mandatory grounds, etc.) and declarations of incompatibility.

Doherty v Birmingham in the Lords will give some clarification, but it is going to be fun in the County Courts for a while.

Repossession - tips from a District Judge

Mon, 02 Jun 2008 22:40:13 +0000

NL

On the back of tonight's Panorama on the BBC about the impact of the mortgage/price housing market problems (available for the next week on iplayer), the Beeb has an interview with and tips from DJ Stephen Gould of Kingston-upon-Thames County Court. All sensible stuff for someone facing a repossession claim.

Adjourning pending Malcolm in the Lords

Tue, 03 Jun 2008 18:53:20 +0000

NL

One of the three cases mentioned in S v Floyd as forthcoming test of the application of Lewisham v Malcolm on the application of the DDA to possession orders has been heard and adjourned by the Court of Appeal.

LB Croydon v Wright [2008] EWCA Civ 607 (not on Bailii) was adjourned until the Lords have heard Malcolm despite Croydon wishing to press ahead. Croydon were apparently concerned that the Lords judgment might not cover the broader issues of the Malcolm judgment, in particular concerning the mind of the alleged dicriminator. The Court of Appeal found that improbable, but suggested Croydon might intervene in Malcolm if they wished.

Croydon v Wright concerns eviction from temporary accommodation (non-secure tenancy) awarded after

successful homeless application, s.193(2) HA 1996. The tenant built up rent arrears. A possession order was made - which was outright, but Croydon didn't pursue eviction while mesne profits were paid regularly. The (ex)tenant applied for a suspension and claimed that her diabetes and dyslexia were disabilities which were connected to the accrual of arrears. This then went to appeal, Eady J ordering a remittance back to County Court to determine the factual evidence on disability and causation. This, I think, Croydon appealed to the Court of Appeal.

It is worth noting that LJ Jacob, LJ Tuckey and LJ Hughes all sound a clear concern over Malcolm's apparent statement that the mind of the alleged discriminator was irrelevant to the fact of discrimination. LJ Tuckey notes that Novacold, which was taken as the authority for the proposition, was a judgment of LJ Mummery, who then took a very sceptical view of the Malcolm formulation in S v Floyd.

Clearly one portion of the Court of Appeal is distinctly concerned about the judgment of another portion, and messages are being sent to the Lords .

(Many thanks to J for the pointer and accidentally rescuing my day).

Third party costs against Councils?

Tue, 03 Jun 2008 19:28:55 +0000

NL

Very interesting post on Housed this evening on the possibilities of seeking a costs order against a local authority for a possession order obtained by a private landlord where the LA has refused to take a homeless application from the tenant until they are evicted. The post contains an advice by Tony Ross of 1 Pump court on the matter.

Hmm. I need to have a think. What about funding for the application?

L&Q v Weaver flash

Tue, 24 Jun 2008 13:30:09 +0000

NL

Judgment just out

Weaver (R) v London & Quadrant Housing Trust [2008] EWHC 1377 (Admin)

Full notes tomorrow, but the headline is:

L&Q is a public authority in its housing function for the purposes of Judicial Review.

Use of ground 8 possession claims is not a breach of legitimate expectation.

And now Malcolm!

Wed, 25 Jun 2008 11:34:03 +0000

NL

Before I even have time to get to grips with Weaver, the House of Lords judgment in Malcolm v Lewisham is out. No time even for a quick look now. Hopefully I'll get to post something later on.

Malcolm in brief

Wed, 25 Jun 2008 12:40:57 +0000

NL

LB Lewisham v Malcolm [2008] UKHL 43

Court of Appeal thoroughly and unanimously overturned.

The reason for the treatment is the reason in the mind of the landlord, or one which can be imputed to them. So the landlord must be aware or be imputed to be aware of the disability, and the reason for the treatment in the landlord's mind must be related to the disability.

Clark v Novacold mostly disapproved. The Court has some problems with the comparator issue, but mostly settles for the comparator for less favourable treatment being someone who has done the same thing but is not disabled (Thus, in Malcolm, someone who has illegally sub-let). Marvellous passage on the blind man and guide dog hypothetical at 35.

Baroness Hale alone disagrees, holding that the Novacold interpretation was what Parliament intended and approves Novacold for that reason. But she also finds that the landlord must or ought to have known of the disability and that knowledge to be a reason for the treatment.

Baroness Hale also argues for the introduction of a discretion on granting possession orders where there is apparent unlawful discrimination, balancing occupier and landlord interests.

Mandatory/unanswerable possession procedures can still have a DDA 'defence', it appears, but discrimination must be established as above.

Comments on Weaver

Sun, 29 Jun 2008 14:48:35 +0000

NL

Belated, I know, but this is the first chance I have had to really look at the judgment in *Weaver (R) v London & Quadrant Housing Trust* [2008] EWHC 1377 (Admin).

Ground 8 and Legitimate Expectation

First the substantive ground of challenge - that the use of Ground 8 mandatory possession claims by L&Q Housing Trust amounted to breach of the claimant's legitimate expectation and/or convention rights.

This was based upon LQHT's terms and conditions, which said that they would comply with the Housing Corporations regulations and guidance. Housing Corp guidance says that 'before using Ground 8, associations should first pursue all other reasonable alternatives to recover the debt'. The Claimant argued that reasonable alternatives included agreement on paying arrears, money judgment, or discretionary possession claim on grounds 11 or 12. Seeking to avoid Postponed Possession Orders was, in effect, saying that the judicial discretion would not be properly exercised. LQHT's practice, it was claimed, was solely to use Ground 8.

L&Q denied that they had a policy to only use Ground 8. That use of Ground 8 resulted in a high level of payment of arrears prior to hearing and was thus an effective tool. L&Q denied that the contractual term involved could give rise to legitimate expectation - it was a statement of intent or target duty. It was not specific enough to give rise to an expectation - the specific guidance was not prescriptive and the language vague. In any case, there was no evidence of reliance.

L&Q said they had pursued all reasonable alternatives in this case, and use of grounds 11 or 12 prior to the use of ground 8 could not be considered to be a required reasonable alternative.

On the facts of this case, where there was a history of substantial and repeated defaults on agreements, the Court found that L&Q was entitled not to consider using ground 11 or 12.

Moreover, the Court found that the wording of the guidance was too broad to allow solely the claimant's interpretation and, as the passage in the terms and conditions was not contended to be contractually binding, it could not be treated as having the qualities that would justify enforcing it as a legitimate expectation, particularly as there was no evidence that the Claimant was even aware of the term.

The claim failed.

Comment

I think L&Q were, to some extent fortunate in the challenge they faced. Legitimate expectation was always going to be difficult to establish on the back of Housing Corp guidance. I was rather surprised to see it as the sole ground of challenge. I suspect that L&Q also managed to obfuscate their actual practice somewhat in evidence. Certainly what was put forward in evidence differs from what tenant-side advisors encounter. But there we are.

There may be enough in the specifics of this case to distinguish it in future, as LQHT's behaviour in regard to this specific tenant clealry shaped the Court's attitude to the overall challenge - there had been repeated attempts to recover arrears and come to agreements, as well as repeated NSPs, sufficient to bolster LQHT's claim that this was a weapon of last resort.

There may also be further evidence on L&Q's use of ground 8 that may support challenges on other bases. I don't think that this one ends the JR and ground 8 possibilities.

Subject to Judicial Review

More significant in the broader scheme of things, of course, is that L&Q were found to be a Public Authority amenable to judicial review in its housing function.

L&Q's argument was that they were not a public authority. While certain functions were certainly public, such as its statutory function in relation to anti-social behaviour orders, or specific statutory delegations by local housing authorities, the main function of managing and allocating its own housing stock was not public.

Public funding grants were received but this was not determinative of public function. Provision of housing is not a public function like provision of education or social care. Moreover, the relationship between Claimant and LQHT was contractual, which was at the core of *R v Servite Houses, ex p Goldsmith* [2001] LGR 55, as approved in *YL v Birmingham City Council* [2007] 3 WLR 112. RSLs have private law status and being subject to detailed regulation does not point to them being public authorities, as found in *YL v Birmingham*.

LQHT argued that even if allocation was a public function, the termination of tenancy was not. it was a management decision governed by contract. Since the decision in *Peabody Housing Association Ltd v Green* (1978) 38 P&CR 644, only *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 had suggested that termination of a tenancy by an RSL could be a public function, and *Poplar Housing* turned very much on its specific facts.

The Claimant argued that Peabody was prior to the explainsion of Judicial Review and Servite was decided prior to the introduction of the HRA. The Claimant applied YL v Birmingham and argued that LQHT was carrying out a overnmental function, the management and allocation of stste-subsidised housing (cf *Novoseletskiy v Ukraine* (2006) 46 EHRR 53). LQHT received substantial capital grants from public funds. RSLs were established under the Housing Act 1996 in order to deliver affordable housing and funded by Government to that purpose. Management of housing, including the setting of rents, is subject to the Housing Corp guidance.

The Claimant also pointed out the LQHT irself allocates and manages public housing resources in the public interest, albeit not strictly by delegation of functions, but Strasbourg case law on delegation of powers (e.g. *Wos v Poland*) was relevant. LQHT was entrusted with public funds and required to use them in the public interest. Unlike Southern Cross in YL, it is non-profit-making and not acting out of private, commercial motivations.

Deciding to grant or terminate tenancies are therefore decisions concerning the allocation of public housing resources.

The Claimant also argued that providing housing to priority applicants under the LA allocation scheme was pursuant to s.8 Housing Act 1996 and a duty under s.170 HA 1996. The Court found this misconceived, a duty to co-operate under s.170 is not a statutory duty to grant a tenancy.

Likewise, the Court ignored arguments on the government accepting that RSLs were 'bodies governed by public law' for the purposes of EU directives on procurement. The government's view did not determine the position and EU law was not Convention or human rights law.

The Court found that LQHT was a public authority in its housing function, citing the following reasons:

- LQHT is different to an ordinary commercial business by the nature of its activities and the contexts in which it operates.
- LQHT is non-profit-making charity acting for the benefit of the community, so lacks the private and commercial features that feated in YL v Birmingham.
- LQHT operates in the social rented sector which is not merely subject to detailed regulation (pace Southern Cross in YL) but is permeated by state control and influence with a view to meeting the Government's aims for affordable housing and in which RSLs work beside local authorities and can

be said in a real sense to take their place,

- Control and influence is exerted through the Housing Corporation. While stautory guidance is non-binding, there is clear indirect pressure on RSLs to comply. The extent of control and influence being exampled by the approach towards implementation of policy on rent setting and the general statements in the Code of Guidance.
- Particularly important - the nature and extent of public subsidy of LQHT, in common with other RSLs. In particular, the receipt of capital grants, esepcially social housing grants under s.18 HA 1996. Very large sums are involved. That they are for particular developments, rather than block grants, makes no odds. The funds are directed towards increasing social housing stock and are one means by which the state accomplishes this. While private funding is also important and RSLs aren't the only receipient of funds, LQHTs business as a whole is heavily subsidised by the state due to the role played in implementing policy. A clear case of "the injection of capital or subsidy into an organisation in return for undertaking a non-commercial role or activity of general public interest (YL v Birmingham at 105)."
- Also relevant is that a 'significant' proportion - 10% - of LHQT's housing stock was ex-local authority following voluntary transfer. While clearly not the same as Poplar Housing, which was formed for the specific purpose of stock transfer, this still reflected the fact that RSLs are performing functions of the same type as local authorities.
- The duty of co-operation with Local Authorities under s.170 HA 1996 means that RSLs don't have a purely commercial relation with local authorities, but operate under a statutory framework. Over half LQHT's new lettings were nominations from LAs.
- That serving a notice to quit was not a statutory power but a private law right did not prevent an RSL being a public authority. If allocation is a public function, it would be wrong to separate out 'management' including termination as private. Allocation and management are part of a single function.

For these reasons LQHT is a public authority in the meaning of s.6(3)(b) Human Rights Act 1998.

If it is a public authority for the purposes of the HRA, then it should be equally amenable to judicial review on conventional public law grounds.

Comment

I don't think that this list should be taken as a set of necessary conditions for public authority status. Clearly some elements were more persuasive to the Court than others. For instance - the ex-local authority housing stock point. This is clearly a different point to that made in *Poplar Housing*, as here it is, in effect, simply further support for the idea that RSLs are performing the same type of housing function as local authorities. So, I can't see how much, or indeed whether, ex-local authority housing stock is in possession of an RSL being a crucial determinant for their status as public authority. The main point is surely the level of public funding/subsidy and the level of state guidance/direction involved.

It would be difficult, I suspect, for any RSL to argue that its position is so significantly different to that of LQHT as to not be a public authority. But no doubt some will try.

While the headline is susceptibility to Judicial Review, it is also worth noting that, at almost the same moment that an amendment to the Housing and Regeneration bill to make RSLs subject to the HRA failed, this judgment states clearly that, in their housing functions, RSLs are indeed subject to the HRA.

A few months ago, this might not have been a big deal, but post McCann, it may turn out to be significant. Proportionality in the mandatory possession process anyone?

I know that a number of RSLs have been quietly settling prospective JR claims, precisely to avoid a full hearing on their status as public authorities. I suspect L&Q are not very popular at the moment with their fellow RSLs. There will no doubt be an appeal of that finding, which also opens the prospect of a cross appeal by the Claimant. Interesting times.

Comments on Malcolm in the Lords

Sun, 29 Jun 2008 21:29:22 +0000

NL

Oh dear, oh dear. That could have gone better.

I'm not going to go into great detail on the five separate judgments from the House of Lords in *LB Lewisham v Malcolm* [2008] UKHL 43, but I do want to look at where it leaves us and what the problems are with the judgments.

The headline result is that:

- For an eviction to be unlawful due to disability discrimination under s.22(3)(c), the eviction must be for a reason that, in the mind of the landlord, is related to the disability.
- To be discriminatory the treatment must be less favourable for a reason related to the disability. The comparator against whom the treatment is measured is someone who has acted, or not acted, in the same way but is not disabled. So, for example, someone who has rent arrears, or has illegally sub-let, if that is the position of the disabled person.
- It is still possible (by a majority) to raise disability discrimination as a 'defence' against mandatory or 'undefendable' possession claims, but the circumstances in which this will be possible will be extraordinary.

This is a reversal of all the key points of the Court of Appeal judgment (see previous discussions listed below). What is worrying is the way in which the Lords approached the appeal and with it the impact of their decision, which will extend way beyond housing law.

Their Lordships are very concerned about the practical results of the Court of Appeal judgment. On a number of occasions, for example, it is said that X 'is difficult to accept' (para 14), or 'very difficult to accept' (para 28), or even 'the unacceptability of these logical conclusions[...] suggests, or perhaps shows, that the conclusions must be based on an erroneous premise' (para 29). This latter phrase indicates the problem with the approach taken by the majority, reasoning *a posteriori* to what the Disability Discrimination Act 'must mean'. In doing so, they do considerable violence to the Act and to settled case law.

The issue is s.24(1) which defines discrimination for the purposes of s.22(3) - the eviction clause. S.24(1) reads:

> For the purposes of section 22, a person ('A') discriminates against a disabled person if -
>
> (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and
>
> (b) he cannot show that the treatment is justified.

However, exactly the same formulation appears at s.5(1) - employment; and s20(1) - Goods and services. Their Lordships' view of the meaning of s.24(1) therefore impacts on every other part of the act. Some of the judgments appear to be completely oblivious to this. Nine years of settled employment case law has just gone down the pan.

Baroness Hale's judgment alone takes note of the broader issues of the drafting and intent of the Disability Discrimination Act. As she points out, unlike race and sex discrimination statutes, there is no indirect discrimination in the DDA, although it was undoubted intended to cover indirect discrimination. Baroness Hale suggests that this was because indirect discrimination would not extend far enough to cover 'reasonable adjustment' (see paras 73-75). She points out the history of the bill where the specific phrase at issue, 'to whom that reason does not apply' was introduced by amendment (para 79) and specifically to make the comparator a person who was not in the same position as the disabled person.

For this reason, Baroness Hale finds the Novacold interpretation was exactly what Parliament intended. There was no indication that the three instances of the same wording in the act should be treated differently.

The specific problem for services and premises - which was the provision facing the Lords here - is the very narrow range of possible justification for the alleged discriminator. Where employment related discrimination is open to a range of justifications for the treatment, the section on eviction only has the specific justifications set out at s.24(3). This means that s.22(3) has a more draconian impact than the same formulation of discrimination at s.5(1). This is bad drafting on amendment, certainly.

Baroness Hale points out that subsequent legislation, 2003 Amendment Regulations, left s.5(1) terms intact in the new s.3A(1), but added a new s.3A(5) which provides for direct discrimination where the disable person and the comparator are of the same ability. There is no possibility of justification for this.

What the Lords have done is effectively render s.3A(1) and s.3A(5) identical, giving the option of justification where Parliament had intended there to be no justification possible. [Edit. I have been rightly and firmly corrected by a large posse of employment and disability lawyers in the comments below. No it doesn't, because anything that is arguably direct discrimination will almost certainly be caught by s.3A(4) with s.3A(5) - no justification for unfavourable treatment on the ground of disability. Meaning that, until further cases or legislation that s.3A(1) is possibly absolutely pointless.]

The Court of Appeal held by a majority that no knowledge of the disability was required by the landlord for the eviction to be unlawful. On a strict construction of s.21(1) via Novacold, this seems right. However, a broad range of justification would mitigate the effects. Baroness Hale would rather see a close connection between the disability and the reason for the landlord's behaviour. She suggests that an awareness, at least, of effect of a policy or action on a disabled person would be required (paras 84 - 85). She points out that showing a justification requires a knowledge of the disability. Baroness Hale's eventual suggestion is in accord with the EHRC view - the Court should have discretion whether ot not to grant a possession order, having weighed up the facts and interests. The easiest way to achieve this would be an amendment under regulations to expand the list of available justifications to the landlord.

The cases would then turn on the closeness of the connection betwene the disability and the landlord's reasons for acting as they did - the more obvious the connection between the disability and, say, rent arrears, the more difficult it would be to recover possession or rent.

Although not a wonderful solution, Baroness Hale's is by far the least damaging and most sane. It would also have the merit of keeping discrimination 'defences' to possession alive in a broader, but not ridiculous, range of circumstances than the majority view. Unfortunately, she was in a minority of one in her reasoning, even if she came to the same result.

The Lords have quite obviously gone against the intent of Parliament and left a hell of a mess. The effects of bad drafting are for Parliament, or the Government via regulations to put right. Quite what happens now is anyone's guess. One would hope for a prompt response by Parliament to sort out the problem, but one might hope in vain.

[I should point out that in all of this, I agree with Francis Davey's comments on my 'Malcolm in brief' post. Link below]

Possession and evidence

Tue, 22 Jul 2008 22:45:21 +0000

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North Devon Homes Ltd. v Batchelor [2008] EWCA Civ 840 concerned a claim for possession of an assured tenancy. At County Court, the claim was brought on grounds 10, 12 and 14 HA 1988. While the claim resulted in a postponed possession order for ground 10 rent arrears, the claims on ground 12 (non-performance of obligation) and 14 (nuisance/arrestable offence). The Circuit Judge had refused to make a possession order on grounds 12 and 14 on the basis that it was not reasonable to do so.

North Devon appealed that decision, arguing that the Judge took into an account an irrelevant matter, had failed to consider a relevant matter and failed to consider a relevant matter raised in the respondent's evidence.

Briefly, the evidence that North Devon had put forward at the first hearing was of Ms B's

> conviction before Exeter Crown Court on May 2007 of possession of 7.5 grammes within 76 wraps or thereabouts of cocaine, a controlled drug of Class A with the intent to supply it, and also of money laundering. She pleaded guilty to possession of the cocaine with intent to supply, upon the specific basis that she had been asked to hold the drugs for her son and had agreed to do so intending to hand them back to him. However, she was prevented from doing so by the arrival of the police on 22nd September 2005 to execute a search warrant at the flat. Conversely, the jury convicted her of having laundered about £1600 on two specific occasions. The £1600 was part of a larger sum of £27,000 which had been laundered, not necessarily by her, over about a three month period. She had also pleaded guilty to a specific offence of possession of cannabis. She was sentenced to eighteen months imprisonment to run concurrently on the offences of possessing cocaine with intent to supply and on money laundering, with no separate penalty being imposed for the possession of the cannabis.

By the time of the substantive hearing, Ms B was released from prison and back at the property. Ms B gave oral evidence. North Devon apparently did not put forward witnesses at the hearing. In evidence Ms B admitted that she 'may' continue to use cannabis for pain relief (Ms B was 61 and in sheltered accommodation). The Judge found that there was not sufficient evidence to establish nuisance under Ground 14(a) or 14(b)(i) immoral or illegal purposes. However, the conviction clearly fell under 14(b)(ii). In deciding that it was not sufficient to make possession reasonable, the Judge said

> Mr James (counsel for the respondent) argued that once the Court puts on one side, as it has to do, and as I have done, the complete absence of satisfactory evidence produced to establish nuisance or annoyance and looks at the defendant's conviction for possession of 7.5 grammes of cocaine with intent to supply, this court must, as the Crown Court had to do so, accept the defendant's basis of plea, namely looking after it for her son, intending to hand it back to him on one occasion only in September 2005. Whilst I would not necessarily agree with Mr James that this was merely a technical offence, I would nonetheless agree that in gradation of seriousness it is at the lower end of the scale of possession with intent to supply a Class A controlled drug. Insofar as the possession of cannabis is concerned, whilst of course this remains a criminal offence now of Class C, if every tenant of a dwelling house within the public sector was to be visited by a possession order because it was reasonable to make one, the courts would inevitably be swamped with such claims. The facts of this case as presented

> are wholly different from those in the Musah case [*City Council of Bristol v Martin Mousah* (1998) 30 HLR 32] and those in the Stonebridge Housing case. Having considered the available evidence and the arguments I do not therefore consider that it would be reasonable to make an order for possession under either Grounds 12 or 14 in this case.

North Devon's grounds of appeal were that:

The Judge's comments in the passage above were irrelevant to the extent that they addressed the likelihood of Ms B being rehoused. In addition, inasmuch as smoking cannabis was a criminal offence, it was for the courts to uphold the law not to be perceived as condoning illegal activities.

The Court of Appeal did not agree with that interpretation of the passage. All the Judge was addressing was the seriousness of the conviction for possession of cannabis. The Judge was not clearly wrong to reach the conclusion he did.

Secondly, North Devon argued that the Judge had failed to consider 'previous warnings' to Ms B, relying on a letter to her of Sept 2005 - not in evidence at the Court of Appeal but quoted in a skeleton argument.

> You will remember that I visited you on 5 Auust 2005 following several complaints that had been made by those living around you. You will remember that one of the complaints was that you were having a steady stream of visitors to your home and it was alleged that you were involved in drug dealing or using. I am continuing to receive complaints about the number of visitors you have visiting you during the day.

The Court of Appeal found that this went to 14(a) - which had not been raised on appeal - but that in any event the Judge had dealt with the issue of visitors and rejected North Devon's case, which decision was also not appealed.

Thirdly, North Devon's evidence that Ms B would continue to use cannabis was no stronger than the 'maybe' that the Judge had addressed. There was no reason for the Court of Appeal to find that Ms B would continue to smoke cannabis.

In response to a submission from North Devon that 'the wrong message would be given out', Lord Justice Wall said:

> In my judgment, there are two short answers to that submission, although neither is strictly necessary for the determination of this appeal. The first is that if there is a message in this case (and speaking for myself the case seems to me to turn on its particular facts and to raise no point of principle) it is that actions for possession are serious and regard must be had to the facts of the particular case. As I see it, the judge paid careful attention to the particular facts and weighed them up meticulously. The second follows from the first, namely that, on the particular facts of this case and as the case was presented to him, the judge was entitled to deal with the respondent's convictions as he did, and he was thus entitled to hold, as he did, that the respondent's breaches of her tenancy agreement did not bring her within the scope of this court's decision in Bristol City Council v. Mousah: or, to put the matter another way, that they were not such as to make it unreasonable for the judge, to decline to make a possession order.

Incoming

Tue, 29 Jul 2008 18:32:00 +0000

NL

The House of Lords is due to hand down judgment in *Doherty v Birmingham* tomorrow (30/7). This will include their Lordships' first take on *McCann v UK*.

I'm aiming to have some sort of case note up by tomorrow night. It will be the start of a busy patch for judgments.

Doherty handed down - more later

Wed, 30 Jul 2008 11:50:58 +0000

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Doherty (FC) (Appellant) and others v Birmingham City Council (Respondent) [2008] UK HL 57

That's 79 pages of reading to do...

Aaargh

Wed, 30 Jul 2008 18:19:33 +0000

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Started on Doherty, but on closer inspection, the Lords have also given me R *(On The Application of M) (Fc) V Slough Borough Council* and *R (On The Application of Heffernan) (Fc) V The Rent Service* to deal with, and possibly also *Yeoman's Row Management Limited and Another V Cobbe*. All here.

Damn them, damn, damn, damn. Thankfully, the Court of Appeal held off handing down anything of interest - for here at least.

Catching up - s.21 and tenants' deposits

Tue, 04 Sep 2007 18:53:05 +0000

NL

A very interesting article by Francis Davey in September's Legal Action about the Housing Act 2004. The whole piece rewards a read, but two bits caught my eye. We don't do that many private tenancy possession defences, relatively speaking, so these were new to me.

Where a shorthold assured tenancy started after 6 April 2007, i) the deposit must be held by the landlord in one of the approved tenancy deposit schemes, within 14 days of receiving it and ii) the landlord is to give prescribed information about this to the tenant.

Now, where the landlord fails to do either or both of these, the landlord may not give a HA 1988 s.21 Notice. Any putative notice served is invalid, even if the landlord then later complies with the scheme. The landlord will have to serve a fresh s.21 after complying. Moreover, any s.21 Notice signed at the beginning of the tenancy, or with the tenancy agreement (as very many are) is invalid, as the deposit is not (yet) held in compliance with the scheme and the requisite information not (yet) provided to the tenant.

Sadly this only applies to deposits paid after 6 April, so older tenancies, even where renewed after that date, will not fall under it unless a fresh deposit is paid. [Edit. This is now open to question. It is probable that a new tenancy with a 'roll-over' deposit will require the deposit to be placed in a scheme, with the above consequences. A shorthold assured that has become a periodic tenancy - with no new tenancy agreement - won't be caught.]

Also, where the landlord has failed to comply, the tenant has a claim or counterclaim, with a mandatory award to the tenant of three times the deposit if the landlord has not complied by the hearing. Potentially very useful in a rent arrears possession.

Two things to be added to the list to check with private tenant cases. There is much more in the article...

[For all tenancy deposit case posts click here]

Notes on Doherty v Birmingham CC

Wed, 30 Jul 2008 21:55:59 +0000

NL

So, *Doherty (FC) (Appellant) and others v Birmingham City Council (Respondent)* [2008] UK HL 57

Well, well, and once more for effect, well. This is a very interesting result indeed, although I use the word result in a non-definite kind of way.

The headline is simple enough, the case was remitted to the High Court for determination of the domestic judicial review issues raised as defence to possession. Court of Appeal overturned. The majority would also have made a declaration of incompatibility in regard to the Mobile Homes Act 1998, if the incompatibility had not already been removed by the passing of the Housing and Regeneration Act. Their Lordships declined to vary or amend *Kay v Lambeth* in the light of this appeal or the last minute submissions on *McCann v UK*.

Behind the headlines though, there is a hell of a lot of devil in the details. In particular, I think it is safe to say that there has been some movement on Kay v Lambeth, enough to make the situation not quite so bleak as it then appeared.

I'll start with the majority and the judgments of Lords Hope and Walker, agreed by Lord Rodger

For those with attention spans of less than a year, the majority in *Kay v Lambeth* held to a formulation on Human Rights challenges to possession claims where the landlord's right to recover possession is unqualified that was set out by Lord Hope in para 110 of *Kay*. To wit, the only situations in which it

would be open to the Court to refrain from proceeding to summary judgment are:

> (a) if a seriously arguable point is raised that the law which enables the court to make the possession order is incompatible with article 8, the county court in the exercise of its jurisdiction under the Human Rights Act 1998 should deal with the argument in one or other of two ways: (i) by giving effect to the law, so far as it is possible for it to do so under section 3, in a way that is compatible with article 8, or (ii) by adjourning the proceedings to enable the compatibility issue to be dealt with in the High Court; (b) if the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable, he should be permitted to do this provided again that the point is seriously arguable: *Wandsworth London Borough Council v Winder* [1985] AC 461.

These will be called gateway (a) and gateway (b) below. In *Kay* the majority view was clearly that gateway (b) would mean a challenge on the basis of domestic public law grounds, not broader Convention grounds. The minority in *Kay* considered that there may be exceptional cases where the particular personal circumstances of the occupier may give rise to an Art. 8 defence.

In his judgment, Lords Hope held that the facts of *Doherty* - a gipsy family faced with summary possession after a Notice to Quit from a site that they had occupied for many years - were distinct from those of *Connors v UK*, *Kay* and indeed *McCann*, although most similar to *Connors*.

Here too was a unqualified right to possession by the local authority, where the decision to exercise that right was unchallengable under s.6(1) HRA 1998 as it was acting to give effect to the provisions of statute - s.6(2)(b). (Both Jan Luba QC for Doherty and Philip Sales QC for the Secretary of State challenged this point and it was not uniformly accepted - see below).

This was not a common law possession issue, but, because of the specific exception of local authority caravan sites from the Caravan Sites Act 1968 and the Mobile Homes Act 1998, an exercise of a specific right to common law possession given by statutary enactment - such that common law rights are effectively permitted by statute. (Again, not uniformly accepted).

Given this, and the Dohertys' position as gypsies, the Connors issue of gateway (a) incompatibility applies - unjustifiably discriminatory statute. Because s.6(2)(b) applied, there was no possibility for the Courts to interpret the statute in accordance with the HRA (s.3(1)), leaving a declaration of incompatibility as the gateway (a) resort. As a result of the passing of the Housing and Regeneration Act, which corrects the issue, a declaration is not neccessary.

But gateway (b) could also apply. In *Kay*, the defence on public law grounds was limited to whether the decision to claim possession was 'one that no reasonable person would consider justifiable'. Lord Hope points to his own comment at para 114 of *Kay* that the grounds of challenge to a decision to bring a claim were whether it was 'arbitrary, unreasonable or disproportionate'. So gateway (a) and (b) work together to address the incompatibility of lack of procedural safeguard. If the statutes can be effected by the court in accordance with article 8 under gateway (a), fine. if not then it is open to the defendant to argue that that court must be satisfied that, on the basis of the grounds the claimant gives for its decision to seek possession, the decision is not Wednesbury unreasonable [para 53] (What grounds given for the decision? - this is summary possession!)

On the facts of this case, gateway (b) might have give an effective defence to the appellant. Gateway (b) provides an effective procedural protection. But, at para 55. Lord Hope says:

> I think that in this situation it would be unduly formalistic to confine the review strictly to traditional Wednesbury grounds. The considerations that can be brought into account in this case are wider. An examination of the question whether the respondent’s decision was reasonable, having regard to the aim which it was pursuing and to the length of time that the

> appellant and his family have resided on the site, would be appropriate. But the requisite scrutiny would not involve the judge substituting his own judgment for that of the local authority. In my opinion the test of reasonableness should be, as I said in para 110 of Kay, whether the decision to recover possession was one which no reasonable person would consider justifiable.

Lord Hope's address to *McCann*, at paras 15-21, is solely in terms of the issue of incompatibility and 'objective standards' of an arguable case. There is no address to the issue of whether domestic judicial review grounds and a consideration or proportionality are commensurate, despite *McCann*'s express view on this. But Lord Hope's suggestion that judicial review grounds could address disproportionate decisions [para 52] and the hints at para 55 may indicate a broader set of grounds for public law defence to unqualified possession claims than just Wednesbury unreasonableness.

Lord Walker's judgment broadly ends up at the same point. However, Lord Walker spends some time to point out that the statute/common law distinction was not at issue in *Kay*, in order to support the view that s.6(2)(b) applies in the present case - implementation of statute not common law is at issue. Accordingly, Lord Walker agrees on a declaration of incompatibility via gateway (a) and also that it is not now required.

On gateway (b) Lord Walker, who was in the minority in *Kay*, is not happy about the distinction between HRA grounds and 'traditional public law grounds' [paras 108 -110]. He remains unsure that s.6(2)(b) applies to what are common law possessions. In view of *McCann*, he is even more concerned about the separation of HRA and JR grounds [para 116]. In fact, the circumstances where a viable defence appears may not be as exceptional as he thought in *Kay*, in view of Local Authorities looking to avoid contested possession claims via 'relinquishing notices' as in McCann (Birmingham and others should rethink their policy).[para 121-122]. The Court's consideration of any gateway (b) defence should be focussed on the Local Authorities' decision making process.

Lord Rodger agrees with Lords Hope and Walker, with nothing further.

Lord Scott's judgment suggests that traditional judicial review procedure should be amended to allow considerations of disputed fact [para 68] as a part of gateway (b), and also that the defendant's personal circumstances might well be a factor to which the local authority should have regard in making the decision on a possession claim, and therefore open to an examination by the court of whether the decision was unreasonable and disproportionate.[para 70]

Lord Scott did not see the need for a declaration of incompatibility in the present case, *Kay* having removed any Art 8 incompatibility found in *Connors* [para 80]. There is also a spectacularly ill-humoured and, in my immensely humble opinion mistaken attack on *McCann* at paras 82 - 88.

Lord Mance agrees on remitting the case to the High Court for gateway (b) consideration, but does not agree on an (abortive) declaration of incompatibility. Although the possession claim was a statutory matter [para 132], the availability of gateway (b) means that the statute is not incompatible with Art 8, although the statute may well have been incompatible per se. In any case, the challenge in *Doherty* was that if Art 8 was not available to him to rely on in one form or another, this was incompatible with convention rights. No incompatibility of specific statute was raised [para 154].

On gateway (b) *Kay* excluded convention grounds [para 136] but this case was not the same as *Kay*. In *Kay*, the challenge was to the local authority's decision to enforce its undoubted right to possession. In *Doherty*, the challenge was to the validity of the decision to give a notice to quit, which is a pre-condition to any right to possession [para 157].

In *Qazi, Connors, Kay* and *McCann* situations, a Local Authority has discretion as to whether it undertakes the steps necessary to resume possession, or whether to bring proceedings. It arguably cannot be described as action 'to give effect to' or 'enforce' a statutory provision which may be considered

incompatible with Convention rights. The Council is giving effect to its own evaluation of the position and in doing so is obliged to respect Convention values. Non-compliant decisions should therefore be challengeable under the *Wandsworth LBC v Winder* principle [para 158]

In the present case, the decision to bring possession proceedings could not be considered as 'giving effect' to statute, so s.6(2)(b) did not apply and would not hinder a challenge on Art 8 grounds to the validity of the notice to quit and thus a defence to the possession claim [para 159].

Kay is distinguishable on the basis that this case was a challenge to the validity of the notice to quit [para 160-161]. This case should be remitted to the High Court to consider an Art 8 challenge to the validity of the notice to quit - a challenge on Convention as well as conventional judicial review grounds. Thus any incompatibility with statute is removed [para 161]. Lord Mance regrets that it was not possible to vary Lord Hope's 'para 110' (above) to enable Convention grounds for challenge.

And there we are. A majority which isn't, as Lords Hope and Walker have significant differences in their views, with Lord Rodger agreeing with both. Judgments which suggest that the Kay formulation of judicial review grounds for defence have been extended, or not, or maybe should be taken with a bit more latitude than Kay apparently decided, but not so far as full Convention grounds, unless they should be considered.

I've no time for a properly considered, critical view, but at the very least, a defence on grounds of unreasonableness of the decision to bring proceedings on a summary possession claim has been acknowledged to be available, to supposedly address proportionality and that it is more likely to be raised and indeed justified than Kay apparently permitted.

A few quick points.

Their Lordships generally regretted that they hadn't been constituted as a 7 strong panel, in the light of the late arrival of *McCann*. A 5 strong panel simply could not change the decision of the panel of 7 in *Kay*.

The gateway (b) defence only applies to summary possession proceedings brought by public bodies (now potentially including RSLs after Weaver).

The proportionality issue is seen as a matter of the decision brought by the landlord - so only applies to public landlords and their decisions - not to the decisions of the court.

Where statute provides specifically for a mandatory procedure, it is likely that a full challenge to compatibility is the only option - and extremely unlikely to be successful.

There is much else to digest, whether *obiter* or not part of the *ratio decendi*. I may well return to this shortly. For the moment, I going to start work on the public law defence for a summary possession case that has just dropped into my lap, and I'm grateful that *Doherty* at least gave some wriggle room on that.

Any CLP people care to contribute views?

ASB corner

Sat, 09 Aug 2008 17:03:38 +0000

NL

The August 2008 Legal Action contains a couple of cases concerning anti-social behaviour possession claims that weren't recorded elsewhere.

Ealing LBC v Jama B5/08/0104 was a Court of Appeal matter. Mrs Jama was Ealing's secure tenant of a two bed property. The household included her husband and six children. Ealing sought possession on allegations of ASB including noise nuisance, ten instances of flooding into the flat below, problems with rubbish disposal and urination in the lift. At the County Court, the judge accepted Mrs Jama had faced some harassment, but did not accept her evidence on the flooding. The judge accepted the evidence of a plumber that the flooding was not due to defective water system. The judge held it was reasonable to make a possession order because there had been two substantial breaches of the tenancy - the flooding and serious and persistent noise nuisance. Mrs Jama appealed.

The Court of Appeal found it was impossible to hold that the noise was 'domestic noise'. Reasonableness was a matter for the judge at first instance and the Court of Appeal would not interfere unless the judge had erred in law. For that reason the judge's decision could not be attacked. But in any case the decision not to suspend the order was clearly right.

High Peak BC v Purser Buxton County Court 26/11/2007, like *North Devon Homes v Batchelor*, concerned a conviction for posession of drugs. Ms Purser was a secure tenant with two children. In Jnauary 2006 she was convicted of possession of cannabis resin. In October 2007, she pleaded guilty to supply of ecstasy, possession and supply of amphetamine and possession and supply of cannabis resin, all at the property. She received a nine month sentence, suspended and a 12 month supervision order. She was engaged with professional drug support and family support services and drug test were negative.

In the possession proceedings, DJ Jolly found it was reasonable to make a possession order, but in view of the evidence that suggested there was a 'real hope' for the future, the order was postponed for two years on condition Ms Purser comply with the tenancy agreement.

Also in Legal Action, *R v Edwards* [2008] EWCA Crim 1172 (not on Bailii) did not concern possession proceedings, but rather an ASBO excluding Ms Edwards from the home she owned for ten years. The ASBO was made on the basis of 'extreme harassment' of a neighbour, including damage to their car, throwing rubbish and excrement at their house, loud singing and banging. She had breached an injunction, a restraining order and had been sentenced to imprisonment three times.

The Court of Appeal upheld the ASBO. An order excluding someone from their home that they own is very much a last resort, but that point had been reached. The order was necessary and proportionate, considering Art 8.

Pre-emptive possession orders

Mon, 25 Aug 2008 23:04:18 +0000

NL

Secretary of State for the Environment Food & Rural Affairs v Meier & Ors [2008] EWCA Civ 903 was a case concerning travellers encamped on Forestry Commission land. Some of the travellers had previously camped on a nearby patch of Forestry Commission land until a possession order was obtained. The Forestry Commission (or rather the Sec of State, the owner of the land) applied for:

1. A possession order in respect of the patch of land occupied.

2. A possession order for other nearby areas of Forestry Commission land that the travellers might move to.
3. An injunction preventing the travellers from entering upon the land they currently occupied and the other nearby areas.

At the County Court, possession order 1 was granted. But the 'prospective' possession order and injunction were refused, on the grounds that the recorder had discretion and exercised it against the orders because a prospective possession order and injunction clashed with the recommendations made to local authorities and others, including, inter alia, the Forestry Commission in the then ODPM's *Guidance on Managing Unauthorised Camping*, 2004, which suggests that, while there are insufficient authorised sites, and there would be locations where encampment would not be acceptable under any circumstances, each location has to be considered on its merits against criteria such as health and safety and serious environmental damage and land use (para 11-12). A prospective possession order, which would subject anyone who entered on the parcels of land to eviction, was, the recorder found, not in accordance with the guidance, and was for that reason, Wednesbury unreasonable.

The Secretary of State appealed on basis that:

> the recorder had no discretion to refuse the order and injunction once he had concluded that the *Drury* criterion was fulfilled. Alternatively, he erred in the exercise of his discretion by declining to grant the order and injunction. In the further alternative, he was wrong to hold that the Secretary of State was perverse in seeking the order and injunction. Finally, the recorder was wrong to conclude that the grant of the injunction was disproportionate.

Drury v the Secretary of State[2004] 1 WLR 1906 set out the criterion for prospective possession orders where further acts of trespass are threatened. A prospective order would be granted:

> if, but only if, the claimant would have been entitled to an injunction *quia timet* against the occupants in relation to the separate area. [Drury 20]

and where there

> is convincing evidence (not merely belief) to establish that there is a real danger of actual violation of all the areas in question by those actually trespassing on at least one of the areas when the proceedings are instituted. [Drury 20]

The test for a *quia timet* injunction, as set out in Snell's Equity is:

> Although the claimant must establish his right, he may be entitled to an injunction even though an infringement has not taken place but is merely feared or threatened; for "preventing justice excelleth punishing justice". This class of action, known as *quia timet*, has long been established, but the claimant must establish a strong case; "no one can obtain a *quia timet* order by merely saying '*timeo*.' He must prove that there is an imminent danger of very substantial damage…

The *Drury* criterion itself is taken from Wilson J at para 21:

> Although it would be foolish to be prescriptive about the nature of the necessary evidence, it seems safe to say that it will usually take the form either of an expression of intention to decamp to the other area or of a history of movement between the two areas, from which a real danger of repetition can be inferred or, as in the MAFF case itself, of such propinquity and similarity between the two areas as to command the inference of a real danger of decampment from one to the other.

In *Drury*, there was no injunction application, on the basis that, as it could only be made and enforced

against named individuals, it would not have been of much practical use.

In the appeal, the Sec of State argued that once the *Drury* criterion had been met, then there was no discretion on the making of a prospective possession order. The considerations of the Guidance should take place at the enforcement stage, not at the point of considering the claim. As the hurdle for the prospective possession order and an injunction were effectively the same, the recorder should also have granted the *quia timet* injunction, the practicality of enforcement being an issue for the Sec of State, not the court. In any case, the finding of unreasonableness should be set aside because the Forestry Commission were not going to enforce the possession order granted until the end of the school term.

The Respondents argued that

> it would have been inconsistent with the government guidance set out above for a possession order in the wider form to be made. That guidance enjoins public authorities to consider whether eviction is really necessary. It requires public authorities to consider the specific characteristics of the site and of the incursion before they make a decision to evict. [...] the Forestry Commission should look at the site occupied, and on the basis of the guidance they should accept that, in view of the shortage of suitable accommodation for travellers, the presence of the respondents should be tolerated. [...] if the Forestry Commission wants a possession order in the wider form it should have to identify the areas where it accepts that the respondents could encamp.

On the injunction, the Respondents argued that the point of *Drury* was the creation of a practical remedy, and that the prospective possession order incorporated elements of an injunction to that end. or that reason an injunction in addition was inappropriate. In any case, grant of injunction was discretionary. As the recorder was plainly exercising his discretion within its proper bounds and he was entitled to reach his conclusions, the Court of Appeal had no basis to review the decision.

Lady Justice Arden, in the lead judgment, held that while the making of a prospective possession order was discretionary, once the *Drury* criterion were made out, it would only be in 'exceptional circumstances' that the order would be refused. Exceptional circumstances would include a failure to carry out a public law obligation.

However, the highest the obligation imposed by the Guidance could be said to be was 'to consider the acceptability of an encampment once the encampment has occurred', and it did not concern possible future sites. The Recorder was therefore wrong to apply it to future encampments. Consideration of the Guidance should occur at the time of enforcement. Moreover, while:

> Mr Hobson [for the Respondent] urged on us the point that those factors did not need to be considered at all if the occupiers had previously been found on the land of the same landowner and a Drury order had been made. That order would identify the land to which it related. I do not consider that the court can fetter itself in relation to some future application to enforce a possession order. The occupation had not yet taken place. There will inevitably be an interval of time between the occupation and the order for eviction. In that time, the defendants may assert that there are matters which the Secretary of State ought to have considered but did not do so. There may be some people affected who are within the order yet unnamed. They may not know about the order for eviction from Hethfelton Wood. But, in so far as the occupiers were served with an order for possession of Hethfelton Wood, I would expect the court to be less willing to give them further time. If there is any such matter which the court needs to consider, it can be considered at the stage of enforcement.

On the injunction, there is enough distinction between an injunction served on individuals and a prospective possession order against any and all (putative) occupiers to mean that an injunction is also available as a complementary remedy. And there is no reason it can't be granted on the same facts. The grant of an injunction is discretionary, but the Recorder erred in exercising his for the same reason his

discretion on the prospective order was wrongly exercised. Nothing in the Guidance prevents the Sec of State obtaining an injunction. While actually exercising the injunction, on the facts of this case, might seem heavy handed, there was nothing to suggest that the Sec of State would not exercise his discretion in whether to enforce the injunction in accordance with public law obligations.

Lord Justice Pill agreed.

Lord Justice Wilson agreed on the possession order, but suggests that where there are two potential discretionary remedies available, the presumption should be that only one is granted, the most practically effective. he therefore disagrees on the grant of the injunction and approves the part of the recorder's judgment that finds that "the quasi-criminal sanction of committal for contempt added nothing of value for the Secretary of State to his ability to secure clearance of the land pursuant to the extended order". [paras 72-76]

This judgment clearly has significant repercussions for travellers on unauthorised sites and threatens to make prospective orders and injunctions considerably more likely where the *Drury* criterion are met. While local authorities have more extensive roles under the Guidance than the Forestry Commission, to be sure, this combination of prospective possession order and injunction could well be used against roadside or verge encampments, with the local authority seeking a prospective order covering great swathes of land. That the Guidance only requires consideration at the point of enforcement, while leaving injunction enforcement hanging over the heads of the travellers, makes for a very difficult situation, both for the travellers and their advisors.

And the 23rd Claim...

Mon, 01 Sep 2008 22:18:56 +0000

NL

As a tale of vexatious litigants, *HM Attorney General v Ford & Anor* [2008] EWHC 2066 (Admin) has it all. Mysterious changes of identity, admitted perjury, repeated applications for judicial review of refusals to give permission to appeal, and appeals of refusals, all resulting from a claim for leasehold enfranchisement by three leasehold tenants.

Two years after the leasehold enfranchisement vesting order against an absentee landlord, David Sayers, in 2001, a Mr (sometimes Captain) Daniel Ford and Mrs Liubov Ford appeared from abroad and applied to have the order set aside, claiming to have obtained the title by adverse possession some years before and had built a garage (the 'coach house') on the property. The application was dismissed, permission to appeal on paper refused, then refused again in oral application. In this hearing Mr Ford stated that his previous statement was knowingly false and that he was, in fact, David Sayers.

After a series of failed appeals on the costs order resulting from this proceeding, the Fords then applied to have the LVT proceedings on valuing the property discontinued on the basis that he was now shown to be the legal owner. In this Mr Ford claimed he hadn't said he was David Sayers before because he didn't think he could prove that he was using that name. This application was refused, after a three day hearing.

A possession claim was brought against the Fords for part of the wider property that they were occupying, but not the Coach House parcel, which remained registered to David Sayers. The Ford's application to strike out was refused, they sought to appeal, with permission refused by the High Court and Court of Appeal. The interim injunction orders against them also faced failed appeal applications to High Court

and Court of Appeal. At a eight day possession hearing, where the Fords claimed over 12 years adverse possession, a possession order was made, with Mr Ford's evidence described as untruthful in many parts. The Fords were refused permission to appeal to the Court of Appeal.

Committal proceedings for non-compliance followed. 28 days in prison were followed by a further 42 days, after an unsuccessful appeal to the full Court of Appeal. The Fords had simply returned to the property and told the Court of Appeal they had no intention of relinquishing it.

There followed a small success for the Fords in judicial review of the LVT valuation of the property, which included the specific Coach House lane, which was actually under a separate title number and still owned by 'David Sayers'. The Fords then attempted to stay the LVT proceedings for a further flurry of applications, appeals and JR applications, including struck out attempts to reopen the intial case, JR applications against the County Court for dismissing yet another application to set aside the possession order and so forth, just about all of which were taken to application for permission to the Court of Appeal (all refused). The Fords' other limited success was against the police for the conduct of the execution of the warrant of possession.

Not even bankruptcy, brought about by Lambeth, stopped the Fords. A flurry of attempts to overturn the order, with allegations of conspiracy between Lambeth, the tenants and the Attorney General, followed.

The Official Receiver discontinued all the outstanding proceedings. The Fords either sought Judicial Review of those decisions to discontinue or attempted to pursue proceedings independently. All the claims were dismissed or struck out, permissions to appeal refused.

Meanwhile the tenants waited, and still wait on for the seven year old vesting order to finally bear fruit.

The Fords resisted the Attorney General's application to have them declared vexatious litigants, arguing that where they had lost their cases this was:

> due to judicial bias or disfavour against litigants in person, who are seen as a nuisance to the court system, and who are not given proper attention by the courts, and therefore do not receive proper justice.

The Court of Appeal saluted Mrs Ford, the principal advocate for the Fords, for her 'courage and persistence', noted their two limited successes and declared them vexatious litigants under section 42 of the Supreme Court Act 1981, requiring permission of a High Court judge to bring any further proceedings.

Alternative sites - the burden of proof

Wed, 10 Sep 2008 18:50:01 +0000

NL

South Cambridgeshire District Council v Secretary of State for Communities and Local Government & Ors [2008] EWCA Civ 1010 was an appeal of a High Court decision on Judicial Review of the decision of an Inspector in the appeal of a planning decision not to allow residential caravan siting for a family on a property in South Cambridgeshire.

The family involved had srong personal reasons involving the medical condition of a child for remaining in the area. Planning permission was refused on the basis that it was against the regional development

plan. The inspector allowed the appeal with strict conditions on the basis of the exceptional conditions. South Cambs challenged on the basis, amongst others, that the Inspector had failed to seek evidence on the availibility of alternative sites. At JR, South Cambs lost on all counts, but an appeal was eventually allowed on the limited point:

> In seeking to determine the availability of alternative sites for residential gypsy use, there is no requirement in planning policy or case law for an applicant to prove that no other sites are available or that particular needs could not be met from another site.

South Cambs relied on a number of Green Belt cases, and then suggested Judge Gilbart QC's comments in *McCarthy v Secretary of State for Communities and Local Government* [2006] EWCA (Admin) 3287 set a precedent. The Court of Appeal held otherwise, noting that the passage at issue was if anything, a restatement of the balancing of issues, not a setting of a necessary hurdle. The Green Belt cases involved other priorities so were not on point.

Lord Justice Scott Baker at para 36, states

> In my judgment the law is clear. The position is governed by s38(6) of the 2004 Act. The Development Plan is determinative unless material considerations indicate otherwise. There is no burden of proof on anyone. It is a matter for the planning authority, or in this case the inspector, to decide what are the material considerations and, having done so, to give each of them such weight as she considered appropriate. That, so it seems to me, is a matter of planning judgment.

South Cambs sought to broaden the appeal, arguing the Inspector's reasons for her decision were inadequate. This was dismissed in view of the High Court judgment, which dealt with the point fully.

Weaver un-appealed?

Thu, 11 Sep 2008 18:59:59 +0000

NL

[Edit 16/09: We now have contrary information, also 'authoritative' in source, also unconfirmed, that the appeal is going ahead. So, until we have further info, your guess is as good as ours.]

Thanks to Ethan at 'That Snail..' for passing on unconfirmed news (aka a rumour) that London & Quadrant have decided not to appeal *R(Weaver) v L&Q*, which, lest anyone forget, was the landmark decision on RSLs being public bodies in their housing function for the purposes of judicial review.

If true, this is a surprise, to put it mildly. Does anyone have confirmation?

Lack of ownership in shared ownership

Fri, 12 Sep 2008 22:11:57 +0000

NL

[Edit 15/09/08. It now looks like the following judgment is a) being appealed shortly and b) may only have been a County Court judgment, not High Court - this latter point is not clear but reliable sources say County Court]

[Edit 18/09/08. In the comments to this post, a few people, mostly being me, were wondering why any lender would touch shared ownership if their security could vanish this way. I've had a look at a few shared ownership leases now. They typically carry a clause requiring the landlord to notify the lender of any forthcoming possession/forfeiture proceedings for rent arrears. So the lender has the opportunity to pay off the arrears, protecting its security, and then take possession proceedings against the tenant/leaseholder themselves for breach of mortgage conditions. So there is a measure of security for the mortgagee written in, which is presumably why lending still takes place.]

[Edit 23/09/08. Updating post, with benefit of transcript here.]

I may well be a little late to the party on this one, having only picked up on it via a report in September's Legal Action, but this is a very significant case for the increasing number of shared ownership occupiers - a number that may well sky rocket as the result of policy on rescuing people from mortgage arrears.

Richardson v Midland Heart Limited High Court (Chancery) 12/11/2007, unreported, concerned a shared ownership lease taken out in 1995. Accounts of the case can be found here and, a more detailed report from Forbes Solicitors here. There is also apparently a detailed report in [2008] NLJ 327, which I will look up on Monday.

The facts were as follows.

Ms Richardson acquired a 99 year shared ownership lease from Focus Two HA (later Midland Heart). She paid £29,500 - 50% of the then market value - with a rent of £1,456 pa. Following personal difficulties that meant she could not live in the property for over a year, housing benefit stopped and the rent wasn't paid. Ms Richardson tried to sell the property, now worth £151,000. Midland Heart sought possession under HA 1988 Sch 2 Ground 8 on the basis on 16 months rent arrears.

At County Court, a request for an adjournment was refused and an outright possession order made.

Ms Richardson made an application to the High Court for a declaration of her interest in the property and either an order for sale or an accounting for 50% of the proceeds.

Ms Richardson argued that a) there were two tenancies - an assured tenancy under HA 1988 and a long lease subject to forfeiture. The possession order had only ended the assured tenancy. b) The freehold of the property was held by Midland Heart on trust for itself and her on 50% beneficial interest. Even if the lease had been terminated, she was entitled to return of the capital payment in respect of her beneficial interest.

The High Court held that:

The capital payment did not purchase a half share of the property. The relationship was that of landlord and tenant not trustee and beneficiary. Ms Richardson had a right to lay claim to the freehold, but only if she had followed the staircasing process to 'purchase' increased shares of the property. She had not done so. Her interest was restricted to that of the lease.

The lease was a 99 year term certain. There were not two tenancies but rather one. The tenancy created fell under s.1 HA 1988 as it was a tenancy of a dwelling house let as a separate dwelling to an individual who occupied it as her only or principal home. It did not fall within any of the exclusions. It was therefore a fixed term assured tenancy. As such, the provisions of Ground 8 applied. the possession order was

validly made, the lease determined, and her interest in the property was extinguished.

Apparently Midland Trust did repay Ms Richardson the initial premium, but this was entirely voluntary. There was no increase to match the increase in the value of the property, but there was no requirement to pay anything.

There is no news of any appeal.

So, just to be clear, a shared ownership lease, at least if it doesn't fall outside the HA 1988 limits which many won't, is functionally nothing more than an assured tenancy with an option to eventually purchase the freehold, or, I suppose, at least a 100% interest in the lease if a leasehold property. The premium for the percentage of the lease does not bring about any greater or other interest in the property.

Practically, the only difference between this and the dodgy sell and rent back schemes floating around is the difference between an assured and shorthold assured tenancy, if you don't count the possibility of freehold/100% purchase eventually.

After some rapid education (thanks Francis), not having actually dealt with shared ownership lease possession proceedings, this makes a certain sense.

A residential lease which meets the requirements of Sch 1 Part 1 HA 1988 on rateable value (below £1500 in London, below £750 elsewhere) and rent level (more than two thirds of the rateable value) will be an assured tenancy.

This means that s.5(1) HA 1988 prevents the lease being ended by forfeiture proceedings, it has to be via HA 1988 grounds. HA 1988 s.7(6)(b) says that there has to be provision in the tenancy agreement for the tenancy to be ended on that ground (but a provision for forfeiture for non-payment of rent suffices to enable a ground 8 possession).

This means that the forfeiture for arrears provisions in shared ownership leases are unenforceable, because forfeiture is excluded as a valid means of ending the tenancy, but the provision is sufficient to enable a ground 8 possession claim under HA 1988. *Artesian Residential Investments ltd v Beck* [2000] QB 541

Standard shared ownership leases do contain forfeiture on non-payment of rent provisions, but assuming the rateable value/rent conditions are met, which they may well be, those provisions are unenforceable by the forfeiture proceedings route, and s.138 County Courts Act 1984 provisions on relief from forfeiture are unavailable to the tenant.

Oddly, on registration of the shared ownership lease at the Land Registry in the name of the tenant, there is a 'no disposition by sole proprietor' restriction, which normally indicates a trust - typically a trust for tenants-in-common who are also title holders. Here its purpose is to ensure no sale without the landlord's consent, but it would indicate that there are split definite beneficial interests in the property, which accords with the (say) 50% tenant interest of a shared ownership scheme. But what is being held in trust - perhaps the leasehold interest, rather than freehold - could be a messy point to take on appeal.

Shared Ownership - Midland Heart with benefit of transcript

Tue, 23 Sep 2008 23:36:31 +0000

NL

The earlier post on this shared ownership possession case, *Richardson v Midland Heart Ltd*, (November 2007 Birmingham) attracted a lot of comment, some of it excitable and ill-informed (and much of that from me). Nearly Legal now has a copy of the judgment, and the benefit of time and reflection to go on.

Before we start, this was a County Court case, and apparently the appeal in this case is due to be heard on 5 & 6 November 2008. Also, apparently Midland Heart has not made the 'voluntary payment' of initial premium less arrears and costs (so not a lot) that was touted in previous press reports. (Thanks Michael Paget.)

The facts are largely as previously mentioned. Ms Richardson paid a premium of £29,500 for a 50% shared ownership lease in 1995. The freeholder was Focus Two, later Midland Heart Ltd The lease gave a rent of £1,456 per annum (with indexed increases). There were staircasing provisions to enable Ms Richardson to acquire further shares up to 100%, each time with a reduction in rent. Once she had acquired 100% of the shares, she could acquire the freehold. Ms Richardson did not exercise the staircasing provisions.

In 2003, Ms Richardson had to leave the property, following threats to her family. For a while housing benefit paid the rent on the property and her refuge place, but after a year this ended in Feb 2005. Arrears built up. At the end of Aug 2005, Ms Richardson decided to sell the property. Evidently Midland Heart, who would most likely have had the right of first refusal or to refuse, agreed to a sale and valued the property at £151,000. The property did not sell. In October 2005 (some two months later!) the HA issued possession proceedings, having served Notice on 15 Sept 2005 (a fortnight after agreeing to the sale!).

The Claim was under ground 8 Sch 2 HA 1988 and in Jan 2006 an outright order made on the basis that Ms Richardson was an assured tenant. In Dec 2006, Ms Richardson brought proceedings for a declaration as to the extent of her interest in the property and an order for sale or account for 50% of the proceeds of sale.

Ms Richardson, via Counsel Michael Paget argued that:

She had two tenancies, a long leasehold, subject to forfeiture, and an assured tenancy, protected by (and subject to) Housing Act 1988. The possession proceedings had terminated the assured tenancy, but not the lease. No notice under s.166 Commonhold & Leasehold Reform Act 2002 had been served and 'forfeiture' was not ticked on the claim form, so there was no proper procedural termination of the lease.

The Court did not accept the 'two tenancies' argument. There was one - of term certain - which fall under HA 1988 as an assured tenancy. No exceptions applied. As an assured tenancy, possession via forfeiture is ruled out - possession can only be under one of the grounds of the act. However, for possession for rent arrears, the HA 1988 provides that it is sufficient for the lease/tenancy to include provision for forfeiture for arrears, which Ms Richardson's lease did.

S.166 & 167 CLRA 2002, on the requirement of a prescribed sum for arrears before forfeiture was possible did not apply as the definition of a 'long lease' in s.76 required a 'total share' of 100% for shared ownership leases. Ms Richardson's was only 50%. In any case, the arrears were too large for s.167 to halt forfeiture. Additionally, there was no need to tick the forfeiture box on the claim form , as this was, strictly, a claim for possession.

There was no mortgage at the time of the possession hearing, so the requirements of Practice Direction 55.2.4 on identifying mortgagees, etc. did not apply.

Secondly Ms Richardson argued that there was a trust. She conceded it was not a trust of the leasehold, but argued that the freehold was held on trust by the Housing Association for itself and Ms Richardson.

The Court did not pay much attention to this, stating simply that there was no foundation for the argument. The relation was simply that of landlord and tenant, with an option to obtain the freehold via staircasing, which was not exercised.

The Court said it was troubled by its own finding, particularly given the windfall that resulted for the Housing Association, and in view of the Housing Association's actions at a time when they knew Ms Richardson was attempting to sell and were supposedly pursuing that sale on her behalf (and look again at the time scale above, two weeks after agreeing to sell there is service of Notice and a possession claim brought at the earliest opportunity after that. Some might consider that cynical behaviour, given that the HA ended up with a property worth £151,000). But that was the law.

I have noted in comments before that the apparent threat to a mortgagee's security raied by this case is mitigated by the usual form of these leases which requires a lender to be notified by the landlord prior to any possession/forfeiture proceedings being brought for rent arrears. Thus the lender can pay off the arrears, secure the interest and either add the arrears to the loan or bring repossession proceedings against the tenant themselves. So that is cleared up. But this does still mean that the tenant's interest, and the significant premium paid for it, can simply disappear with no remedy or recourse in the face of Ground 8 proceedings.

On reflection, I am not wholly convinced by the Court's dismissal of a trust argument. I have no strong counter argument as yet, but there are a number of factors that go against the 'simple relationship' of landlord and tenant that the Court found. For instance, the Land Registry registers the lease with a 'no sole disposition' restriction, typically entered for 'tenants-in-common' trusts. If a shared ownership property is sold, then the division of equity is in accordance with the 'share' (I believe), and so on. It will be very interesting to see what the appeal brings up.

Hey, you asked...

Sun, 28 Sep 2008 20:18:12 +0000

NL

Another in Nearly Legal's sporadic attempts at being helpful to passing internet searchers. All the questions are genuine searches from the logs, including the rather puzzling 'crinoline flint', which perhaps gives more insight into the searcher than one might want. As ever, none of what follows constitutes legal advice and you should always consult a specialist solicitor before taking any steps.

So, by theme: 1. Disrepair *disrepair protocol costs* ...are part of a claim. May I direct you to our post on Birmingham v Lee on recoverability of protocol costs where works are done pre-issue.

living in unihabitable property and the consequences for landlords I would imagine a pretty substantial disrepair claim against them, depending on why the property is supposedly uninhabitable.

appeal housing flood Appeal? Why appeal? Was there a claim? Floods are tricky things, though. Liability depends on the source and the cause. Landlords will usually be liable for the water supply and fittings in the property, but not where another tenant has caused the flood. The other tenant is then liable. But it is worth considering that even if the flood was caused by an upstairs tenant, if it has done damage to the structure of your property, the landlord is liable for that disrepair.

mice infestation qualifies as disrepair By and large, no. An infestation of mice may count as nuisance, if

they can be shown to be accessing the property from an area under the landlord's control (common areas, service ducts etc.), which effectively rules out houses, or ground floor flats. An infestation might be part of a disrepair claim as a consequence of disrepair - if entry is gained through disrepair. Otherwise, nuisance is the best bet.

can i withhold rent disrepair Only in very limited circumstances: where the landlord has been notified of the works required for which the landlord is responsible; failed to do them in a reasonable time; has been notified by the tenant that unless the works are done by a specified date, the tenant will do them, the landlord has been provided with an estimate of the costs and the tenant has notified the landlord that the costs will be deducted from the rent. The tenant can then deduct those costs and only those costs from the rent. Was that what you had in mind? I thought not. Otherwise, you cannot withhold rent and may face possession proceedings if you do. Compensation for disrepair is virtually always less than the rent in any event.

bed bugs tenancy agreement london One of many, many searches on bed bugs. The trouble is that it is very unlikely that the landlord will be liable, or responsible for stopping the infestation. It is hard to claim nuisance, as it is very difficult to establish that the source of the infestation is an area under the landlord's control. It will be a very rare tenancy agreement that would make the landlord responsible for stopping an infestation. For these reasons, it is also not a justification for breaking a tenancy agreement.

2. Possession *can the council in ealing evict me from my secured tenancy 3 bedroom house if my last son moves out* Probably not. Possession claims for under occupation can only be brought in very limited circumstances, where the tenant is a successor (but not to their spouse or civil partner) and notice was served between 6 and 12 months after the succession. Suitable alternative accommodation has to be available and it has to be reasonable for the Court to make the order. Note that this applies to secure tenancies only. Those with assured tenancies (eg, most housing association tenancies) can face possession proceedings if they refuse suitable alternative accommodation and suitable accommodation is available at the possession hearing.

staying a warrant mandatory ground No. Can't do it.

what happens when a tolerated trespasser clears arrears and court cost At the moment, nothing, except , by and large, they lose the ability to apply to the court to revive the tenancy [Edit Feb 09 - the House of Lords Judgment in White v Knowsley has now changed this. A tolerated trespasser who has paid off all the arrears can apply to Court to revive their tenancy, or rarely and depending on the wording of the original order, may already have their tenancy automatically revive]. Equally, the landlord can't enforce the possession order. There is no new tenancy unless the landlord decides to give one. These are what has become known as entrenched trespassers. This should change when some sections of the Housing & Regeneration Act 2008 come into force. Trespassers should get a 'replacement' tenancy automatically. Much more on this when it happens, which should be in April 2009. The whole thing remains messy - get specialist advice and bring your possession order with you (see the comments below).

3. Homelessness issues *caselaw ending interim accommodation with reasonable notice* You'll be wanting Conville v London Borough of Richmond-Upon-Thames [2006] EWCA Civ 718.

legal rights when 1 party wants out of a mortgage leaving 1 person homeless A joint mortgage? The other person can't just get out of the mortgage. They can stop paying, which, although it would leave a claim against them, obviously makes the situation practically difficult. In a joint mortgage you are each liable for any and all of the mortgage payments. Can you end up losing the property? Yes - so you should get advice on your position as soon as possible, as it can be complex.

powerpoint on homelessness law uk A bit lazy, no?

4. Funding *small claims defence southwark public funding* Very doubtful. Public funding is not available for small claims, with very limited exceptions.

how much legal aid is released to solicitors dealing with housing issues Err. Do you mean for a case - then it depends. Or do you mean what part of the civil legal aid budget this year goes to housing matters? That I don't know, off hand. In any case, legal aid is not 'released' to solicitors - they don't get the money ahead of doing the work (in fact usually not for quite some time afterwards), and the LSC sets strict limits on the amount of work that can be done. The solicitor has to apply for and justify each increase in the limit. Then their bill is assessed at the end.

public funding cost of works disrepair In order to be a potential fast track matter and so get public funding, the rule is that where there are works required *either* the cost of works *or* the likely damages must be over £1000. So if the damages are over £1000, the only requirement is that there are works outstanding, the works do not have to be over £1000 in cost.

On the Naughty Step

Wed, 08 Oct 2008 18:29:31 +0000

NL

Very firmly esconsed on the step are Sutton Estates, managing agents on Merseyside. These charmers came up with the idea of putting notice boards outside the homes of tenants in rent arrears, proclaiming it to be the home of a 'rent dodger'. Sutton Estates believe this to be an effective and reasonable way of getting people to pay their arrears. Perhaps sensing that some people might be a little, how can I put it, 'unhappy' about this approach, one landlord, Pat Slattery, whose property is managed by Sutton said "It's not a medieval witch-hunt. The signs will not apply to hardship cases, but there are people who take the rent paid to them by the Government and do not pass it on".

Sutton's managing director, Mr Heffey, took a rather more robust view, saying "They can avoid us, but not their neighbours. Now, every time they walk in and out of their door, the

neighbours will be laughing at them". And, in fact, it turns out that people suffering genuine hardship would end up with a sign attached to their home, as Mr Heffey said "For someone who calls us, explains that they are having problems, we would not persevere with this if they are suffering difficulties." So they get the sign put up, then have to call the managing agents, begging them to take it down.

Now comes the fun bit. Just how many offences are Sutton Estates/the landlord committing here?

Libel and/or harassment have been raised, as have incitement to assault and breach of Art 8 privacy. I'd add breach of covenant of quiet enjoyment and possible breach of data protection rules. Any other suggestions?

Any readers in the north west fancy bringing this nonsense to an end? I reckon it could be done on a CFA, if not legal aid.

A cautionary tale

Wed, 22 Oct 2008 22:45:24 +0000

NL

Or the story of the warrant request that wasn't there.

Hallam-Peel & Co v London Borough of Southwark [2008] EWCA Civ 1120 is a second appeal from a wasted costs order against Hallam-Peel, a legal aid housing firm, made during stay of warrant proceedings at Lambeth County Court.

Hallam-Peel were acting for the applicant. Before and at the first hearing, an question was raised about whether the warrant had been applied for within 6 years of the date of the possession order (hence not needing permission). Counsel for the applicant was apparently told or shown (not clear) that the request for the warrant was made within time. The hearing was adjourned due to lack of time. Hallam-Peel amended the application, with no issues about the validity of the request for the warrant raised. They also requested disclosure of a number of documents from Southwark, including any Southwark intended to rely on. Southwark provided disclosure, which didn't include the request for the warrant, which had not been specifically requested.

At the adjourned hearing Counsel for the applicant (the same counsel) apparently had a rush of blood to the head and, for unexplained reasons, demanded to see the request for issue of the warrant (which he may or may not have seen at the first hearing). On seeing it, Counsel decided that the fact that it showed a wrong (lesser) figure for the outstanding arrears meant that he wished to include an additional point in the application - that the request was defective for this reason. He therefore requested a further adjournment to allow the application to be amended again. Counsel for Southwark raised the point that at any adjourned hearing, Hallam Peel should attend to show cause why they should not pay the costs of the adjourned hearing. This appears to have been purely on the basis that the applicant was legally aided and so protected from costs in person. DJ Eastman took this point and, apparently blind to any conflict of interest raised, told Counsel for the applicant to seek instruction on whether to pursue the validity of the request for the warrant and with it a show cause to Hallam Peel as to why they should not pay the wasted costs of the hearing if it were to be adjourned. Credit to Hallam-Peel, the instructions were to go ahead. (Although frankly, I don't think Counsel had hit on a particularly good point - a wrong figure lower than the actual one is not going to attract the wrath of a DJ, let us be honest).

The matter was settled in the meantime, leaving the hearing of the show cause on the wasted costs. At the hearing in front of DJ Jacey, Southwark argued that Hallam-Peel, by failing to request the disclosure of the request for a warrant at the same time as the other disclosure, had acted unreasonably by then demanding a further adjournment to amend the application on the basis of that request. Hallam-Peel argued, perhaps not wonderfully, that evidence reagrding th warrant has been raised at the first hearing abd Southwark had been told to disclose relevant documents. They admitted they had not specifically requested the document in the interim.

DJ Jacey found they had acted unreasonably and made the wasted costs order, on the basis that the issue of the details on the request should reasonably have been taken up at an earlier stage. it was a breach of duty to the Court not to ensure that "all matters are properly raised before the court and in good time so that everybody can deal with the matter and the court itself has sufficient time to deal with them."

On appeal HHJ Welchman found DJ Jacey's decision to be reasonable with no error of law.

If by this point, your jaw has hit the floor, hurray for the Court of Appeal. Hallam-Peel were granted permission for a second appeal and made a somewhat different argument via Counsel (not the same counsel!), resisted by Southwark on the basis that it had not been raised before. This time H-P argued that

> The only charge against Hallam-Peel was that they could and should have asked for the production of the request for the warrant earlier than 14 July 2005 but had failed to do so. The answer is that they did not ask for it before then because they had no reason to do so. It is not suggested that there was anything in the material they had seen to suggest that the request was irregular. They therefore had no reason to assume or even suspect that it was or might have been [...] There was therefore strictly no basis upon which Hallam-Peel could properly have sought its production; or at least it could not be said that it was unreasonable for them not to have done so. In unexplained circumstances – and the evidence suggests that not even Hallam-Peel know them – counsel for Mr Dubois asked at the hearing of 14 July 2005 for the production of either the request or Southwark's file. Having seen the request, he then raised the new point based on the irregularity in it, which resulted in the adjournment. No-one has suggested that counsel acted unreasonably by doing what he did. The sole villains of the piece are Hallam-Peel, who have been held vicariously liable for its costs consequences. They have been punished for not anticipating counsel's thought process. Since, for reasons submitted, there was strictly no basis on which they might reasonably have earlier pressed for the production of the request, there was no basis for a charge of unreasonableness sufficient to sustain a wasted costs order.

Thankfully, the Court of Appeal agreed. While noting this was a new argument, not raised in the courts below (where H-P had actually dug themselves into a bit of a hole), they could not fail to find that DJ Jacey and HHJ Welchman were in error. Neither judge below had actually asked why it was said that H-P had acted unreasonably. They simply found that, in view of the adjournment and amended application, it was unreasonable not to have requested the document earlier. However, if the why was examined, there was no unreasonable behaviour (and thus no breach of duty to the court) because before Counsel had a lightning flash at court, there was no issue on the validity of the warrant and no reason to suppose there was one. So:

> The point about the present case is that it does not appear to have occurred to Hallam-Peel that a sight of the request might open up a new avenue of argument. Even if that is to be regarded as a shortcoming on their part, and I do not decide that it was, I refuse to accept that such a shortcoming can or should fairly be castigated as "unreasonable" conduct on their part, involving a breach of duty to the court, such as to justify a wasted costs order against them.

There are a few observations to be made here (not least that there is one counsel that I doubt receives many instructions from H-P anymore, having dropped them in this mess in order to pursue what looks like a pretty iffy point on the spur of the moment). But perhaps the main one is that if this had been upheld,

litigation in these matters would have become ridiculous. Defendant solicitors would demand disclosure of absolutely everything from the local authority, just to avoid the prospect of a wasted costs order if something turned up in an unrequested document later on, with an inevitable adjournment request. Local Authorities, already pretty bad at disclosure in a timely manner, would stagger under the demands and end up adjourning even more hearings for time to disclose.

Southwark, or counsel for Southwark, rather short-sightedly chose to pursue a wasted costs order and this was clearly, as the Court of Appeal found, simply because the applicant was legally aided and this was the only way to retrieve costs. But a precedent for a wasted costs order simply because counsel on the spur of the moment spotted something in a previously unrequested document, (let alone a superhuman standard of perfection in the conduct of the solicitors) would undoubtedly have bitten the local authority side badly all too often as well.

Harassment by possession claim

Thu, 13 Nov 2008 20:08:49 +0000

NL

In what appears to be a good week for somewhat bizarre cases, may I present *Carlos Allen v London Borough of Southwark* [2008] EWCA Civ 1478. This was an appeal by Mr Allen to the Court of Appeal of the striking out of his claim for harassment against LB Southwark.

Mr Allen was a Southwark tenant. Since 1996, Southwark had issued five possession proceedings against him for rent arrears. Southwark had insisted that Mr Allen pay his rent at a Post Office rather than his local housing office, which apparently couldn't deal with cash. Mr Allen defended the first claim on the basis that his tenancy agreement specified payment at a housing office and it had never effectively been varied to permit or authorise payment otherwise. The first possession claim was struck out as Southwark could not show the tenancy agreement had been varied. And so were the next four possession claims. Each time, Southwark failed to show the tenancy agreement had been varied to permit or include payment at a Post Office.

Mr Allen brought a claim for harassment contrary to the Protection from Harassment Act 1997 in respect of the last three possession claims. At County Court, his claim was struck out as having no reasonable prospect of success.

Mr Allen appealed, in person. The issue was whether separate proceedings founded on the same alleged cause of action could constitute harassment under the Act. Southwark argued that its behaviour might have been careless, negligent, perhaps even vexatious, but it wasn't harassment.

The Court of Appeal found:

The Act did not define the meaning of "harassment", but subsequent case law found it to comprise conduct that was oppressive, unreasonable or unacceptable, Thomas v News Group Newspapers Ltd (2001) EWCA Civ 1233, (2002) EMLR 4 and Majrowski v Guy's and St Thomas's NHS Trust (2006) UKHL 34, (2007) 1 AC 224 applied.

The local authority only asserted that it was careless or negligent, giving nothing further, but a reasonable person might consider that the authority's conduct did indeed amount to harassment. The judge was wrong to find that Mr Allen's claim had no reasonable prospect of success. The case was to continue to

trial in the County Court.

I wish a full judgment was available. I'd love to read the details. Of course, this is going to be somewhat limited application, but I think one has to take one's hat off to Mr Allen.

Darling's Keynesian splurge

Mon, 24 Nov 2008 20:10:37 +0000

NL

And what is promised for housing?

According to this DCLG press release, the following (with my comments in brackets):

* Agreement with major lenders to wait at least three months before initiating repossession proceedings, in order to explore all other alternatives. The Government has also welcomed the commitment by lenders to look at all possible options to prevent repossession, such as reducing payments and mortgage rescue schemes.

(My impression is that most of the major lenders already waited 3 months or so. it is the sub-prime brigade packing out the Courts. As with the protocol, no form of penalty or means of enforcement.)

* Bringing forward the Government's £200 million Mortgage Rescue scheme to start early in a number of local authority areas. More than 60 councils throughout England will be 'fast tracking' the set up of the Mortgage Rescue scheme and will start taking applications from the beginning of December. The scheme will help up to 6,000 of the most vulnerable households avoid the trauma of repossession over the next two years. * Enhancing the Mortgage Rescue scheme to cover vulnerable families at risk of repossession because of additional loans secured on their home. Often families are more likely to default on these loans because of higher interest rates.

(The details of the Mortgage Rescue are here. Note it is only £200 million, will not help those in negative equity and is set to help '6000 homeowners' who meet the eligibility criteria. In any case what does 'start early' mean? When? No dates anywhere.)

* Announcing a further £15.85 million to extend free debt advice to be made available to all consumers across the country.

(Hang on. Debt advice, which we have previously been told was available to all and adequately funded, suddenly gets an extra £16 million? Looks like a confession of substantial underfunding to date to me. And see this downright odd press release from the LSC, which suggests that there is no new money, just a re-allocation of existing funds. Thanks Housed.)

* Increasing the support available for those eligible households paying the interest on their mortgages. Under new changes to the Support for Mortgage Interest scheme, the capital limit on which eligibility for assistance is calculated will be doubled to £200,000 and the standard interest rate for this support will be frozen at the current rate of 6.08 per cent - ensuring those with higher value loans and on fixed rate mortgages don't miss out.

(Helpful up to a point. But the introduction of the new 13 week limit, rather than 36 weeks, has not been brought forward from January 2009, apparently.)

* New action on second charge lending. The Office of Fair Trading will bring forward new sector guidance early next year to help ensure borrowers are treated sympathetically and second charge lenders do everything possible to avoid repossessions.

(Guidance? I chortle. In what way is this 'Action'? And this in the main territory of the sub-prime or non-mortgage lender. No enforcement and no binding requirements make this of little use.)

So there we are. A mix of some genuinely helpful elements, catch-up funding for services that have been underfunded for years and pure 'sounds good' guidance. It will make a difference for a proportion of those in trouble with their mortgages, although probably a small proportion. But I wish that the issuing of toothless guidance would not be announced as 'action'. It really isn't going to persuade anyone.

Request for info - Ground 8

Tue, 25 Nov 2008 13:24:26 +0000

NL

Ah, Ground 8. How we love it.

We have been asked by some researchers, who are investigating housing association rent arrears management as well as their use of Ground 8, if readers would get in touch with them if they have experience of RSLs using Ground 8 and in what circumstances it is used. The independent researchers have been asked by the Housing Corporation/Tenants Services Authority to find out particularly about the use of Ground 8 by RSLs as opposed to the use of other grounds for possession, as well as other rent arrears management strategies which might be adopted by RSLs. They would be particularly interested in any anecdotal evidence, which would assist them in drafting a national questionnaire to RSLs and follow-up detailed case study work with RSLs.

They can be contacted c/o d.s.cowan@bris.ac.uk They have promised to let us have a free copy of the final report in return for this plug, which could well make interesting reading in view of existing guidance on the (non) use of ground 8.

Equality bill to tackle Malcolm judgment

Mon, 01 Dec 2008 10:12:35 +0000

NL

From Usefully Employed (hat-tip) comes the news that the consultation on the Equality Bill proposes the introduction of indirect discrimination as a category, which would help with the horlicks that the Lords made of the 1995 Act in Malcolm v Lewisham:

> [the Bill shall] adopt the concept of indirect discrimination for the purposes of the disability discrimination provisions in the Equality Bill, rather than carry forward to the Equality Bill the existing provisions in the Disability Discrimination Act 1995 that apply to disability-

related discrimination. Once a prima facie case of indirect discrimination has been made, it will be possible for the person who imposed the provision, criterion or practice to show that it was objectively justified to defeat the claim; and

introduce a requirement that those people and organisations that are under a duty to make reasonable adjustments for disabled people must make any reasonable adjustment that the Equality Bill will require them to make before they can seek to justify indirect discrimination.

Consultation here. Let us hope that this provision will extend to eviction as the 1995 Act did, but without the little difficulties.

Tolerated trespassers in the House of Lords

Wed, 10 Dec 2008 20:24:45 +0000

NL

For once we were well and truly beaten to the line in publicly announcing a judgment, and in this instance most deservedly so. At about 11 am at the Housing Law Conference Jan Luba QC announced the result of *Knowsley HT v White, Honeyghan-Green v LB Islington & Porter v Shepherds Bush Housing Association* [2008] UKHL 70 and Garden Court had copies of the judgment available for the assembled multitudes of housing lawyers. I'm very grateful. I couldn't get online to get a copy during the day.

So, after scanning the judgment during coffee breaks, and being defeated by my mobile dongle and lack of time in a very full day, here we finally are.

And what a result it is. Headlines tonight, arguments tomorrow:

1. *Knowsley HT v White* Assured tenancies persist until enforcement of the order for possession - i.e. until eviction. Assured tenants under any form of suspended or outright possession order are not tolerated trespassers and never have been. (Obviously this doesn't include summary possession where security of tenure has been lost).

2. *Porter v Shepherds Bush HA* There is no such thing as an (ex-secure) entrenched trespasser anymore. Paying off the arrears and costs on a possession order does not mean that the tenant cannot apply to vary the possession order under s.85. Swindon v Aston was wrongly decided.

3.*Honeygan-Green v LB Islington* was rightly decided at the Court of Appeal. A tenant who served notice of right to buy before a suspended possession order was made has that original right to buy revive when the possession order is discharged.

There is a lot that is of interest in the judgment, including an intriguing apparently obiter suggestion of repairing duties to tolerated trespassers and a partial vindication of James Stark on Payne v Cooper (Hi James!). Expect a detailed post tomorrow evening.

Good conference, by the way, very good indeed, although I'm delighted to say there didn't seem to be anything much raised that we haven't at least mentioned here. But the thought and detail, my dears, the thought and detail.

A Post-Doherty Appeal?

Wed, 17 Dec 2008 00:13:52 +0000

NL

Doherty v Birmingham CC [2008] 3 WLR 636 left us all wondering about the form and limits of a challenge to summary possession proceedings. My attempt at smuggling proportionality into a public law defence settled, for instance -good for the client, rather frustrating for me.

But now we have *Bedfordshire CC v Taylor & Ors* [2008] EWCA 1316 to look foward to. This was an application for permission to appeal to the CoA that started as a defence in the County Court, on Article 8 grounds, to a claim for possession by the LA freeholder against trespassers (apparently on similar, but not identical, facts to Kay v Lambeth). The defence was initially based on, as the Court of Appeal puts it, 'the hope' that *Doherty* in the Lords would adopt *McCann v UK*.

Post *Doherty*, the appeal was pursued on the grounds that

> it is said by the appellants that the decision in Doherty adds a material gloss to Kay; in particular, it is said that, contrary to the majority decision in Kay, it now enables the personal circumstances of the defendants to be taken into account in assessing the proportionality of a decision by a public authority to recover possession of property.

Permission to appeal given, with no suggestion that the appellants should expect success. An Art 8 appeal per se refused under *Kay v Lambeth*.

As this is one, but far from the only, post *Doherty* boundary to test, this will be an appeal to watch. Pierce Glynn and David Watkinson for the appellants.

Expanding the Public Law defence, a bit

Sun, 21 Dec 2008 17:56:12 +0000

NL

What *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2008] UKHL 57 actually means for a public law defence to possession claims, particularly summary possession, was the subject of *London Borough of Hillingdon v Collins & Another* [2008] EWHC 3016 (Admin). This is what was to have been a CMC in the Administrative Court, but turned, by the nature of circumstances, into a consideration of the scope and boundaries of the post *Doherty* defence. As we've previously noted, the House of Lords in *Doherty* did little to actually make things clear, so *Hillingdon v Collins* is an important judgment.

The case involved possession of caravan sites occupied by travellers on the basis of (minor) rent arrears and allegations of harassment and ASB, following service of Notices to Quit. The defendants filed defences, giving as grounds a mix of reasonableness issues for eviction, Art 8 rights being engaged, the Court to assess LBH's reasons for seeking eviction under Art 8, disproportionality, denial of accusations of ASB, and incompatibility of summary proceedings.

The proceedings were transferred to the Administrative Court and stayed pending the appeal in *Smith (On Behalf of the Gypsy Council) v Buckland* [2007] EWCA Civ 1318. Following Doherty, the Defendants sought to amemd the Defence and Counterclaim to the following grounds, dropping the incompatibility point:

> (a) Smith v Buckland is not binding with regard to Article 1 of the First Protocol
>
> (b) Those rights were engaged when the Notices to Quit were issued and in these proceedings
>
> (c) LBH , as a public authority, was required to act proportionately and the Court had to consider if a fair balance was struck;
>
> (d) Notwithstanding the decision in Smith v Buckland the lack of an ability on the part of the Defendants to challenge the factual basis for a possession order is incompatible with Article 1 of the First Protocol
>
> (e) The difference in treatment between dwellers on sites for gypsies and dwellers on other sites was discriminatory
>
> (f) It was for LBH to evaluate the effects of the taking of proceedings, and the lack of alternative provision, and the Court should consider whether it had done so.

Judge Gilbert QC notes that these proceedings post-date the introduction of a consideration of reasonableness in making a decision whether to suspend a possession order made under the Caravan Sites Act 1968 (as amended by Housing Act 2004 in response to *Connors*). However, there is no option but to make the Order, until the HRA 2008 provisions come into force. Factual considerations can be addressed in the context of reasonableness in a decision to suspend or not, but not otherwise. And so, to *Doherty*...

Judge Gilbert then embarks on a consideration of *Kay*, *Buckland* and *Doherty*, quoting at length. From *Doherty*, he quotes extensively from the speeches of Lord Hope and Lord Walker. In Lord Hope's speech, para 57 in particular is noted as introducing an additional element to the post *Kay* 'gateway b' public law challenge:

> It will be for the judge to resolve any dispute that he needs to resolve about the facts and, having done so, to determine whether the decision to terminate the appellant's licence on the grounds stated in its particulars of claim, and having regard to the length of time that the appellant and his family have resided on the site, was reasonable [Doherty para 57].

Lord Walker's speech, cited at length, is taken to show:

> (a) His speech, and the reasons for his sense of unease, bears out the point that the effect of Kay and of Lord Hope's application of it in Doherty is not to enable scrutiny of LBH's decision to obtain possession in the context of ECHR/Article 8;
>
> (b) He confirms that the Kay gateway (b) test has broadened so that it narrows (without closing) the gap between HRA grounds and traditional judicial review grounds.
>
> (c) He draws attention to the wisdom of having such a case heard in the County Court.

Judge Gilbert QC's conclusions are that:

> 54 I consider that the effect of the speeches in Doherty is to widen the scope of the enquiry that may be made into decision making by an authority. I do not consider that the effect of the amendment of section 4 in 2005 undercuts the points of principle which are established in Doherty but I do consider that , as per Smith v Buckland, the fact that Article 8 can operate at

the stage of considering whether or not to evict, still gives it effect within the domestic law framework when taken as a whole, as per Smith v Buckland. However I also consider that in the light of Doherty the observations in Smith v Buckland that the circumstances where such a defence can be made out as wholly exceptional have been overtaken by subsequent authority. They were justified on the basis of the previous Kay test, but not on the wider one which now encompasses a broader consideration of reasonableness.

55 I also consider that the test is no longer whether the claim on public law grounds is " seriously arguable." It is now , as per Doherty at paragraph 55, whether the decision was reasonable, in the sense of whether no reasonable person would think that recovering possession was justifiable.

56 I also consider in the light of Lord Hope's speech that a judge, while he must eschew simply substituting his own judgement for that of the local authority, must grapple with whether it had material before it, and whether the decision was reasonable. He is not bound to consider the matter on paper, but has a discretion as to how he should conduct the hearing, within the limits set by Lord Hope's speech. I draw attention also to paragraph 54 of Lord Hope's speech, and the importance of the claimant authority justifying its decision to seek possession, and to his reference to Lord Brown's concerns..

57. That approach has other practical effects:

(a) it will help the judge when he gets to the stage of considering whether or not to suspend possession. As already noted, at that stage he will have to weigh the case in favour of suspension against the case for it. Of course the fact that LBH will have a right to possession is a matter which must attract weight, but the degree of weight depends on many other factors, and since that is the relevant stage at which to address Article 8 issues, then proportionality will be of significance. An order for possession sought because an occupier is one month behind with the rent is a far less powerful one than one where the arrears have amassed over six months. An occupier who has been engaged in one drunken act of disorder during a row with his neighbour may be regarded as much less culpable than one who has inflicted serious physical harm and engaged in numerous threats. I do not intend to set out a prescriptive list, as there is a wide variation of relevant circumstances, and a wide variation of potential weight that can be ascribed.

(b) I regard it as artificial to have one judge address whether the authority acted reasonably when considering the wider Kay approach, and another one then addressing that issue again, or at least a closely related issue, at the suspension stage. I follow Lord Walker's reluctance to see an Administrative Court judge having to hear oral evidence in a forum unsuited to it. There is no better tribunal, nor one more experienced in dealing with disputes of this kind in housing cases, than an experienced circuit judge sitting in the county court. I express the view that this matter should be heard by a circuit judge with experience of possession disputes.

The matter was remitted to the County Court, to be heard by a CJ with possession experience and directions were given for disclosure and witness evidence.

So Judge Gibert QC takes *Doherty* as confirming that a public law defence (on JR grounds) and a human rights defence have not been fused, so that consideration of the LA's decision is not a scrutiny in the context of Art 8 (or other Article). The defence has clearly been taken here as extending to issues of fact in assessing whether the decision to bring proceedings was reasonable (in the sense that no reasonable person would consider it justified, not Wednesbury grounds). The proper venue is the County Court, but we knew that - although the direction for a CJ to hear it is interesting.

This is not a surprising version of *Doherty*, but it is, I think, quite a conservative one. Even in Lord Hope's speech, here taken as the lead one, there are suggestions that proportionality is at least akin to a JR

ground. But Judge Gilbert QC keeps a consideration of proportionality firmly out of a 'gateway b' public law defence, in favour of a quasi new ground of reasonableness defined as 'a decision that no reasonable person would consider justified'.