substantive law and how the courts can be given meaningful discretion to protect borrowers from, frankly, often arbitrary claims for possession where alternative options are still realistic possibilities.

1 Available at: www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_mha.htm.
2 Available at www.justice.gov.uk/civil/procrules_fin/ contents/protocols/prot_rent.htm.
3 *Consultation paper: mortgage arrears protocol* is available at: www.civiljusticecouncil.gov.uk/files/mortgage-pre-action-protocol-final 290208.pdf.
4 Available at: www.fsa handbook.info/FSA/html/handbook.
5 Available at: www.cml.org.uk/cml/media/press/1999.
6 See *Mortgage effectiveness review: arrears findings. Research report*, available at: www.fsa.gov.uk/pubs/other/mer_report.pdf.
7 The *Guardian*, 22 November 2008, available at: www.guardian.co.uk/business/2008/nov/22/repossession-property-mortgage-lenders-repayments.
8 *Industry guidance on arrears and possessions to help lenders comply with MCOB 13 and TCF principles* is available at: www.cml.org.uk/cml/media/press/1965.

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Recent developments in housing law

Nic Madge and **Jan Luba QC** continue their monthly series. They would like to hear of any cases in the higher or lower courts relevant to housing. Comments from readers are warmly welcomed.

POLITICS AND LEGISLATION

Housing and Regeneration Act 2008

The second commencement order to be made for the 2008 Act brought a substantial tranche of the provisions into force on 1 December 2008: Housing and Regeneration Act 2008 (Commencement No 2 and Transitional, Saving and Transitory Provisions) Order 2008 SI No 3068. These include:

- creation of two new housing bodies: the Homes and Communities Agency (HCA) (to support and finance the development of more housing) and the Tenant Services Authority (TSA) (to regulate social housing providers), replacing the Housing Corporation which ceased operations on 30 November 2008;
- amendment of the 'local connection' rules by s315 of the 2008 Act in respect of applications for housing or homelessness assistance made on or after 1 December 2008; and
- an array of new regulation-making powers – including those necessary to preface the introduction of changes to the law relating to tolerated trespassers.

Article 4(11) of the commencement order brought the family intervention tenancy provisions of the 2008 Act (see below) into force on 1 January 2009.

The new regulator

The Housing and Regeneration Act 2008 (Consequential Provisions) Order 2008 SI No 3002 makes the necessary amendments to a whole range of housing statutes consequent on the establishment of the TSA as the new social housing regulator. The TSA's executive directors include Phil Morgan (previously of the Tenant Participation Advisory Service) and lawyer Claer Lloyd Jones (who has worked both in Law Centres® and local authority legal services).[1]

In evidence given to a parliamentary select committee on 21 October 2008 the chief executive of the TSA, Peter Marsh, said that it exists 'to champion what consumers want'.[2]

On 5 November 2008, he wrote to all local housing authorities and registered social landlords (RSLs) setting out precisely how the transition to full regulation of social housing would be handled from 1 December 2008.[3]

In a speech delivered on 12 November 2008, the TSA chairperson, Anthony Mayer, stressed that the new regulator would look to boards of management of RSLs to account for the activities of their associations, not simply housing officers.[4] On 19 November 2008, Mr Marsh said that the TSA would 'raise the standard of services for tenants': TSA press release 06/08.

The New Local Government Network has published *Tenant empowerment* setting out its views on what the new regulatory regime must deliver.[5]

On the TSA's opening day, the housing minister, Margaret Beckett, said that it would 'give millions of social tenants more say in the provision of their housing, ensuring they get a fairer deal, and making sure action is taken to improve homes and estates': Communities and Local Government (CLG) press release, 1 December 2008.

The (late) Housing Corporation

The Housing Corporation's website is bristling with the publications and reports that were rushed out ahead of its demise at the end of November 2008. Examples include:

- *Headlines from the 2008 performance indicators*: a report indicating the extent to which housing associations were meeting performance targets.[6] See the related paper: *Developing & monitoring local performance measures: a guide for landlords and tenants*.[7]
- *Low cost home ownership: affordability, risks and issues*: a paper assessing the prospects for low-cost home-ownership schemes in the context of the credit crunch and market changes.[8]
- *Housing Corporation Circular 04/08* (October 2008): updating the corporation's guidance to housing associations on rent levels, rent differentials and service charges.[9]

■ *Analysing key trends in the supply and distribution of social housing*: a report (No 62) in the Sector Study series.

Help for mortgage defaulters

The new pre-action protocol for mortgage possession cases came into force on 19 November 2008.[10] See also page 19 of this issue.

The latest statistics from the Courts Service show that mortgage possession orders are now being made at an average rate of almost 10,000 per month. This is slightly higher than the rate for possession orders made in favour of landlords: *Statistics on mortgage and landlord possession actions in the county courts – third quarter 2008* (Ministry of Justice (MoJ), 21 November 2008).[11] The position in relation to the number facing repossession is particularly bad in Northern Ireland (NI) as indicated by reports from the NI Housing Rights Service.[12]

On 20 November 2008, the junior housing minister, Iain Wright, said that mortgage defaulters 'on low income with more fundamental problems will be able to rent their homes back from the government'![13] An outline of the government measures that have been introduced to help those at risk of losing their mortgaged homes was given in a MoJ news release on 21 November 2008.[14]

Also on 21 November 2008, the Council of Mortgage Lenders (CML) published its latest figures on mortgage default. The CML expected the total number of repossessions in 2008 to be around 45,000.[15]

The pre-budget report on 24 November 2008 contained a restatement of the measures the government is taking, or proposing to take, to prevent eviction of many more mortgage-defaulting homeowners.[16]

On 27 November 2008, the Financial Services Authority wrote to the chief executives of all mortgage lenders and all mortgage administrators to remind them of their responsibilities under the mortgage conduct of business (MCOB) rules for ensuring the fair treatment of customers in arrears.[17]

On 3 December 2008, the government announced the outline of the 'homeowners support mortgage scheme', which is another new measure devised to assist those having difficulties in repaying their mortgages: HM Treasury press notice 132/08.[18]

The housing charity Shelter is promoting amendments to the Banking Bill, presently before parliament, to assist the tenants of mortgage borrowers.

Legal aid for housing cases

In November 2008, the Legal Services Commission (LSC) announced that it would award additional housing matter starts to some current providers of legal services who were reporting increased demand.[19] Applications for these additional housing matter starts had to be made by 31 December 2008.

The LSC also announced that 19 further courts would be operating with LSC-funded possession day court desks from the end of 2008. *LSC Focus*, November 2008.[20]

In its consultation document *Civil bid rounds for 2010 contracts: a consultation*, the LSC has offered a blueprint for provision of publicly-funded housing law services after April 2010.[21] The LSC proposes to grant no further housing-only contracts. Future contracts will provide either for housing plus family or housing plus debt and welfare benefits. The paper also stipulates that any future such social welfare law contracts will only be let to agencies (or consortia) with an employed solicitor. Responses should be submitted before 23 January 2009.

In view of the recent escalation of demand for legal advice in relation to housing and debt, the government has commissioned a study into four topics:

■ the impact of the recession and the demand for civil legal advice;

■ the impact of civil legal advice fixed fees on local providers: financially and in terms of the type of work they are taking on;

■ the initial experience of community legal advice centres, including the impact on other providers in the area; and

■ trends in funding from sources other than the Community Legal Service, including local authority funding, national lottery funding, charities, central government departments and others.

The study group is expected to report in March 2009: MoJ News Release, 4 December 2008.[22] See also page 29 of this issue.

Housing and anti-social behaviour

The premises closure order provisions of the Criminal Justice and Immigration Act 2008 came into force on 1 December 2008: Criminal Justice and Immigration Act Commencement (No 4 and Saving Provision) Order 2008 SI No 2993.[23] The provisions enable the making of orders for closure of any premises which are the source of anti-social behaviour and persistent nuisance. They go well beyond previous arrangements to tackle 'crack houses' set out in Anti-social Behaviour Act 2003 ss1–4. The Home Office has issued guidance on use of the new powers: *Part 1A Anti-social Behaviour Act 2003: notes of guidance – closure orders: premises associated with persistent disorder or nuisance*.[24]

The new family intervention tenancies (FITs) introduced by the Housing and Regeneration Act 2008 will be available from 1 January 2009 (see above). In preparation for their introduction, regulations have been made to exempt the rehousing of tenants who were in FITs from the normal housing allocation rules: Allocation of Housing (England) (Amendment) (Family Intervention Tenancies) Regulations 2008 SI No 3015.[25]

The Home Office's Anti-social Behaviour and Crime Prevention Unit has published two issues of its *ASB Focus* magazine (Home Office, November and December 2008).[26]

Housing for migrant workers

Home from home is a new report from the Building and Social Housing Foundation addressing the issues of housing for migrant workers.[27]

The House of Commons Library has produced a helpful briefing paper: *EU migrants: entitlement to housing assistance (England)*, dealing with access to housing and homelessness assistance in England for non-UK EU nationals.[28]

Homelessness

On 18 November 2008, the government announced a new initiative to eliminate rough sleeping. The initiative is said to be backed by funding of £200 million. The detailed plan, *No one left out – communities ending rough sleeping*, includes an undertaking that the government will consider amending homelessness legislation to accord priority need status to all rough sleepers.[29] The new programme of work follows a consultation exercise initiated in April 2008. A summary of the responses has been published.[30]

The Welsh Assembly government has launched a consultation exercise on its new draft ten-year plan to tackle homelessness in Wales. Responses should be made by 25 February 2009.[31]

The October 2008 update, from the Homelessness Action Team that was previously based at the Housing Corporation, reviews developments on choice-based letting and on domestic violence.[32]

Housing help from local authorities

Local Government Act 2000 s2 provides a primary financial and practical support power available to local authorities (known as the 'well-being' power). The local government minister, John Healey, has written to all authorities urging them to consider greater use of the power in the new financial climate: CLG news release, 17 November 2008.[33] The

latest report on the scope of s2 contains examples of the imaginative use of the powers (including by one authority to address issues on an estate beset with problems of anti-social behaviour and drug abuse): *Practical use of the well-being power* (CLG, November 2008).[34]

The government has announced the funding of another 20 projects to bring advice about housing options and job opportunities together. Each will receive up to £260,000. An additional ten projects will receive 'kick-start' funding to help them develop such services. The CLG news release for 20 November 2008 contains the full list of the local authority areas involved.[35]

Home loss payments

Tenants and owners in Wales who are displaced by public authorities after 25 November 2008 will receive higher home loss compensation. The Home Loss Payments (Prescribed Amounts) (Wales) Regulations 2008 SI No 2845 increase the minimum payment to £4,700 and the maximum to £47,000.[36]

Gypsies and other Travellers

In two speeches delivered on 19 and 20 November 2008, Iain Wright set out the government's present approach to issues relating to the accommodation needs of these communities.[37]

The housing stock

The *Annual report of the English House Condition Survey (2006)* was published by CLG in November 2008.[38] It sets out the present characteristics of the housing stock in England by tenure, age, condition and facilities.

Housing and planning key facts (England) issued by CLG in November 2008 is a handy quarterly online publication containing a collection of key statistics relating to housing and providing links to tables of more detailed information.[39]

Safer housing

Electrical installations and their impact on the fire performance of buildings: part 1 domestic premises (Electrical Safety Council, 2008) is a new best practice guide on electrical installations in domestic premises containing advice on safety and fire prevention in houses and flats.[40]

Access to information about housing

On 7 November 2008, the Information Commissioner issued a practice recommendation to CLG about delays by that government department in its handling of information requests made under the Freedom of Information Act.[41] The commissioner has already issued a guidance note to local authorities dealing with requests for information about council housing.[42] In two recent cases, he has treated housing associations as 'public authorities' for the purposes of the Environmental Information Regulations.[43]

Housing Ombudsman

The 2008 annual report of the Housing Ombudsman Service sets out the details of the ombudsman's work over the last year and contains useful digests of concluded cases.[44]

Housing and discrimination

Following the House of Lords' decision in *Lewisham LBC v Malcolm* [2008] UKHL 43, the government is undertaking a consultation exercise about the best way of improving protection for the disabled in the proposed Equality Bill (see page 30 of this issue). In particular, it is considering the extension to the disability field of the concept of 'indirect discrimination' deployed in sex and race legislation.[45] The closing date is 6 January 2009.

HUMAN RIGHTS

Article 8

■ Kay v UK

App No 37341/06, 17 October 2008

Mr Kay and other 'short life occupants' whose defences to possession claims based on article 8 of the European Convention on Human Rights were struck out (see *Lambeth LBC v Kay* [2006] UKHL 10; [2006] 2 AC 465) have complained to the European Court of Human Rights (ECtHR).

The President of the Chamber of the Fourth Section has invited the UK government to submit written observations on the admissibility and merits of the case. He considers that 'the application lends itself to having its admissibility and merits examined at the same time'. Government observations have been requested by 9 February 2009. A statement of facts prepared by the Fourth Section poses the following question to the parties: 'Did the applicants have the opportunity to have the proportionality of their evictions determined by an independent tribunal in the light of the relevant principles under article 8 (*McCann v UK* App No 19009/04, 13 May 2008)?'

Comment: It appears that this case will give the ECtHR the opportunity to consider the decision of the House of Lords in *Birmingham City Council v Doherty* [2008] UKHL 57; [2008] 3 WLR 636.

Lease or licence

■ Brightlingsea Haven Ltd v Morris

[2008] EWHC 1928 (QB), 30 October 2008

Brightlingsea Haven Ltd leased a caravan park from the local authority freeholder for a term of 30 years. There were conditions both in the site licence (issued under Caravan Sites and Control of Development Act (CSCDA) 1960 s3) and planning permission that only approved caravans, as defined in CSCDA s29(1), were permitted on site, and that caravans might be occupied only between 1 March and 30 November, over any weekend, and over ten days at Christmas (the closed period). The defendants claimed that they had bought lodges (often called mobile homes) from another company, which had the same managing director as Brightlingsea Haven, after receiving promises that they would be granted leases for their sites. They accepted that they could not sleep in the lodges during the closed period, but claimed that they had been promised that they could use them during the day. Brightlingsea Haven argued that the defendants only had periodic tenancies, terminable on notice, with a term that they could not use them for occupation during the closed period either by day or night.

Jack J held that the lodges were 'caravans' within the meaning of the CSCDA and the Caravan Sites Act 1968. He also found that the defendants had bought their lodges on the basis of promises made on behalf of Brightlingsea Haven that they would become tenants of their lodges under leases. They had security of tenure until the termination of Brightlingsea Haven's lease. The defendants could occupy their lodges during the day in the closed period but not overnight.

LOCAL AUTHORITY TENANCIES

Possession claims; anti-social behaviour; reasonableness

■ Wandsworth LBC v Webb

B5/08/0797(A); B5/08/0797, 12 November 2008

Ms Webb was a secure tenant. Between February 2005 and September 2006, her son was involved in a number of incidents of serious anti-social behaviour and criminal activity in the locality of the property. In December 2006, Wandsworth, her landlord, began a possession claim under Housing Act (HA) 1985 Sch 2, Grounds 1 and 2, relying on the son's anti-social behaviour. Shortly afterwards, an anti-social behaviour order (ASBO) was made against the son. In February 2007, he moved out of the property and went to live with his father in another part

of London. He continued to visit his mother and his child, whose mother lived on the same estate. He was later prosecuted three times for allegedly breaching the ASBO, but was acquitted on each occasion. The trial of the possession claim took place in October 2007. Ms Webb argued that it was not reasonable to make a possession order because:

- more than a year had elapsed since the last allegation of anti-social behaviour;
- by the time of the hearing, her son had not been living with her for eight months; and
- he had been made the subject of an ASBO, in respect of which there had been no proven breaches.

HHJ Knowles found that it was reasonable to make an order for possession but postponed it on terms. In reaching her decision, she referred to the fact that the son had been prosecuted three times for breach of the ASBO. Ms Webb appealed to the Court of Appeal.

The Court of Appeal allowed the appeal and set aside the order for possession. The unsuccessful prosecutions had formed a material part of the judgment, and the judge had erred in taking such matters into account. Sedley LJ observed that it was not permissible to use a possession order as a means to bring pressure to bear on a tenant to modify the behaviour of an individual over whom s/he had no control.

Postponed possession orders

■ Wandsworth LBC v Whibley

[2008] EWCA Civ 1259,
14 November 2008,
(2008) Times 25 November

Mr Whibley was a secure tenant. In 2005, he was convicted of cultivating cannabis in his flat. In January 2006, Wandsworth initiated possession proceedings, relying on arrears of £615 and the conviction for growing cannabis. While this claim was pending, Mr Whibley was again convicted of cultivating cannabis. On both occasions, he admitted having a drug problem and was given community sentences directed to his rehabilitation.

In November 2006, District Judge Tilbury found the grounds for possession made out and made a postponed possession order, with conditions of postponement relating both to payment of rent and arrears and to observing the terms of the tenancy. Within a few months, complaints were received from neighbours of anti-social conduct in the flat and common parts, albeit mostly not on the part of Mr Whibley himself.

In July 2007, Wandsworth made an application referring to 'a number of serious further incidents of anti-social behaviour' and asked the court to fix a date for possession. The council requested that the application be determined without a hearing, but noted that Mr Whibley opposed it. Mr Whibley's solicitors wrote promptly to the court asking for a hearing of the council's application. A district judge directed a 30-minute hearing which, if the making of a final order was opposed, was to be a directions hearing. By the time of that hearing, Mr Whibley's solicitor had prepared a witness statement which indicated that his defence was 'cuckooing', ie, he had been dispossessed by undesirables, who were responsible for the nuisance. At the hearing, Wandsworth sought to rely on the nuisance claim 'provided it could be determined without live evidence'. District Judge Gittens declined to do this and gave directions for a hearing on the first open day after six weeks with a time allocation of a day. Wandsworth appealed. HHJ Hallon dismissed Wandsworth's appeal.

Wandsworth's second appeal to the Court of Appeal was also dismissed. The Court of Appeal rejected the council's attempt to establish a general rule that applications to fix a date for possession following the making and breach of a postponed possession order should be dealt with summarily. In this case, Wandsworth had not yet proved that Mr Whibley was in breach of one or more of the conditions of the postponed possession order. The district judge was 'manifestly in no position to resolve [that issue] summarily … An adjournment was unavoidable.' Courts have an obligation to consider whether or not it is right to make an order and to examine the circumstances. Sedley LJ said:

> *if, on being notified of the impending application [to fix a date for possession] and invited to respond, the defendant remains silent or puts in a plainly spurious or irrelevant response, an order may properly be made summarily. But if, as is more probable in nuisance cases, an issue is raised which is capable of affecting the court's decision, justice will require the defendant to be given an opportunity to put his or her case. The court will of course be astute not to let merely factitious* [sic] *or obstructive responses impede a summary disposal; but, inconvenient though it will be for the lessor and for a time nightmarish for the neighbours, it is not permissible for a tenant who has a possible tenable answer to lose his or her home unheard* (para 12).

He continued:

> *What will not suffice to procure a hearing is an unsupported assertion that the tenant has an answer. Nor will a bare denial amount to an answer: save in exceptional cases the court will expect details, since a tenant who has already, by definition, breached the terms of the agreement has to have a cogent answer once there is prima facie evidence of repetition* (para 18).

At hearings to decide whether or not the terms of a postponed possession order have been breached, the law permits the use of hearsay evidence and enables most hearings to be conducted expeditiously. 'Everything depends … on a judicial appraisal of how the issues can be fairly and economically determined.'

Revival of secure tenancies: conditions

■ Lambeth LBC v Grazette

Lambeth County Court,
7 November 2008

In June 2003, Lambeth obtained a suspended possession order against Ms Grazette. She breached the order. Ms Grazette was adjudicated bankrupt in January 2005 and, as a result of insolvency legislation, she was automatically discharged from the bankruptcy in June 2006. In 2008, she applied to vary the suspended possession order so as to convert it into a postponed possession order, thereby reviving the secure tenancy. Lambeth sought the imposition of conditions under HA 1985 s85(3) precluding Ms Grazette from pursuing a historical claim for disrepair. On 16 July 2008, District Judge Worthington granted Ms Grazette's application to vary the order, but adjourned Lambeth's request for the imposition of conditions to be considered on a different day, following written submissions.

After considering such submissions, District Judge Worthington held that he had a very wide discretion under s85(3)(b) in deciding whether or not to impose 'other conditions'. Much depended on the individual circumstances of the case. One such factor was the relative prejudicial effect of the imposition of a condition or lack of it on each of the parties. The judge found that conditions should not be imposed merely because of previous failures to comply with court orders and previous arrears of rent.

After considering Insolvency Act 1986 s278 (on bankruptcy, a bankrupt's estate crystallises) and ss283(1) and 436 (the definition of 'property' encompassed the prospective cause of action for disrepair), District Judge Worthington held that the carriage and benefit of the potential claim for damages for disrepair vested in Ms Grazette's trustee in bankruptcy in January 2005. The automatic discharge from bankruptcy had the effect of releasing Ms Grazette from her debts, but the estate (at crystallisation) remained vested in the trustee for the purpose of satisfying the creditors

whose debts were provable within the bankrupt's estate. Accordingly, Ms Grazette would have no locus standi to pursue any such claim for damages for disrepair before January 2005. This lay solely with the trustee. There would be no personal benefit to Ms Grazette in allowing her to pursue a claim for damages for disrepair for the period before her discharge from bankruptcy. District Judge Worthington imposed a condition to the order postponing the date of possession, debarring Ms Grazette from pursuing a claim for damages for disrepair. There was, however, no reason why she could not pursue a claim for specific performance.[46]

Protection from Harassment Act

■ Allen v Southwark LBC

B5/08/0121

12 November 2008

Mr Allen was a secure tenant. His tenancy agreement provided that he was to pay his rent at the local housing office. In 1996, Southwark asked its tenants to pay their rent at the local post office rather than at the housing office, which no longer had cash office facilities. Between 1996 and 2008, Southwark began five different possession claims on the ground of rent arrears. Mr Allen defended each set of proceedings successfully, arguing that his tenancy agreement had not been varied to require him to make payments at the post office and that he could not make payments to the housing office as it did not have capacity to allow him to do so. Following the dismissal of the possession claims, Mr Allen began a claim against Southwark, seeking damages under the Protection from Harassment Act (PfHA) 1997. He argued that beginning the last three sets of possession proceedings constituted harassment because they were founded on the same cause of action as had been dismissed by the court on the first two occasions. A county court judge struck out the claim on the ground that it disclosed no reasonable prospect of success.

The Court of Appeal allowed Mr Allen's appeal. For the purposes of the PfHA, 'harassment' can include conduct that is oppressive, unreasonable or unacceptable. Southwark's assertion that its conduct was only negligent or incompetent was just that: an assertion. A reasonable person might consider that the conduct did amount to harassment. It was a matter that should be decided at trial. The judge was wrong to find that the claim had no real prospect of success.

ANTI-SOCIAL BEHAVIOUR

Anti-social behaviour orders

■ R (B) v Greenwich Magistrates' Court

[2008] EWHC 2882 (Admin),

10 November 2008

B was a member of a gang. The police applied for an ASBO under Crime and Disorder Act 1998 s1. They adduced evidence that B and the gang of which he was a member wore hooded tops to help conceal their identities when committing acts of anti-social behaviour. A district judge sitting in the magistrates' court granted an ASBO which included a term prohibiting B from wearing any item of clothing with an attached hood.

B's application for judicial review was dismissed. The prohibition was imposed to reduce the swagger, menace and fear caused by intimidating group activity, by prohibiting the wearing of a gang uniform and by diminishing the confidence of gang members that they might escape identification. It was clear, necessary and proportionate.

Breach of anti-social behaviour injunction

■ Wear Valley DC v Robson

B2/08/2612,

14 November 2008

Mr Robson was a 59-year-old alcoholic. In June 2008, Wear Valley granted him an introductory tenancy of a flat in a block of sheltered accommodation for tenants who were vulnerable because of their age and mental health. Allegations were made that Mr Robson was involved in incidents of anti-social behaviour between July and September 2008. He was served with a notice of proceedings seeking possession of his flat. The council's appeal committee dismissed his appeal against that decision. The council began a possession claim and, in October 2008, applied, without notice, for an anti-social behaviour injunction (ASBI) under HA 1996 s153D. An ASBI with a power of arrest was granted. It prohibited Mr Robson from engaging or threatening to engage in conduct causing nuisance or annoyance in the block of flats. He was also prohibited from entering a particular area of the block. Within a week, the council alleged that Mr Robson had breached the ASBI on five separate occasions by playing loud music, banging on residents' doors, using foul language, behaving in a drunken and abusive manner, allowing other alcoholics to visit his flat and threatening to smash up the flat if he was evicted. The breaches were admitted or proved. The judge sentenced Mr Robson to six months' imprisonment. He appealed against that decision. He argued that the judge had been wrong to consider hearsay evidence and that the sentence was excessive.

The Court of Appeal dismissed the appeal. It was common ground that hearsay evidence was often received in hearings concerning breach of an order or injunction. In this case, all the relevant events had happened in a very short time. While it was true that the three particular breaches that Mr Rowe complained of depended on hearsay evidence in large measure, the council's tenancy officer, who swore an affidavit, had been very close to what had happened, including the fact that the residents had been terrorised by Mr Rowe. Looking at the evidence as a whole, it was clear that Mr Rowe had engaged in conduct which terrorised other residents. Accordingly, the judge had been entitled to rely on the hearsay evidence. With regard to sentence, it was important that under Criminal Justice Act 2003 s258, a defendant could expect to serve one-half of the period of imprisonment imposed. Moreover, the breaches had been serious and repeated and had been aggravated by Mr Rowe's attitude towards the tenancy officer. In all the circumstances, although six months was a severe sentence for breach of such an injunction, it was wholly appropriate in this case.

ASSURED AND ASSURED SHORTHOLD TENANCIES

Deposits

■ Ferguson v Jones

Birmingham County Court,

5 November 2008[47]

Ms Jones was an assured shorthold tenant. She paid a deposit of £500, but her landlord failed to put it into an authorised tenancy deposit scheme within 14 days of receiving it, as required by HA 2004 s213(3) and (4). The deposit was only placed into an appropriate scheme after the landlord had commenced possession proceedings and after Ms Jones had counterclaimed for disrepair. She claimed for three times the value of her £500 deposit under s214(2) and (3).

District Judge Sheldrake held that the court had no discretion under s214(4) and had to order the landlord to pay three times the deposit. The statutory provisions would be otiose if the landlord could escape the penalty in s214(4) by placing the deposit in an authorised scheme after the 14-day period. To have interpreted s214(4) in any other way would have been contrary to parliament's intention.

Implied surrender

■ Chohan v McManus

B5/08/0643,
24 November 2008

Mr McManus was granted an assured tenancy in 1993. Sometimes, he worked away from the premises and his rent was then paid either in cash or by way of housing benefit. In 2001, he left the premises and stopped paying rent. However, in April 2002, he asked Mr Chohan if he could return to the premises. Mr Chohan granted Mr McManus an assured shorthold tenancy. Later, after rent arrears had accrued, Mr Chohan served a HA 1988 s21 notice and sought possession. The issue at trial was whether, at the time when the assured shorthold tenancy was granted, Mr McManus's earlier tenancy had come to an end because he no longer occupied the premises as his only or principal home (HA 1988 s1). At the trial, the judge found the claimant's evidence inconsistent and vague in places. However, he rejected the defendant's evidence that he had continued to occupy the premises. He concluded that the first tenancy had come to an end with the result that the claimant had been entitled to possession of the premises under s21. The defendant appealed.

The Court of Appeal dismissed the appeal. The fact that Mr McManus had been away from the premises was not conclusive. However, in the light of the fact that on previous occasions, when Mr McManus had been away, he had paid rent, it was not possible for the judge to make any finding other than that the defendant had not been living at the premises. The defendant's intention had to be inferred from the fact that:

- he had been away from the premises for many months;
- he had not paid rent; and
- he had had to ask the claimant if he could return to the premises.

Those factors justified the finding that Mr McManus had no intention of occupying the premises as his principal or only home. Accordingly, the judge's findings could not be interfered with.

Service charges

■ Chand v Calmore Area Housing Association Ltd

Lands Tribunal,
LRX 170/2007,
25 July 2008

Mr Chand was an assured tenant. His tenancy agreement gave figures for rent and service charge. Both were marked by an asterisk, which referred to a statement 'Please note that these amounts may change'. A note stated 'The service charge is part of the rent and will change at the same time'. There was also a statement that 'The service charge you pay is for (see attached schedule)'. The Schedule set out a list of items under separate headings 'Expenditure (eg, communal lighting and door entry system maintenance)' and 'Other costs (eg, communal carpets)'. The tenancy provided for annual rent increases each April, following service of a notice of increase and mentioned the tenant's right to have the notice referred to the Rent Assessment Committee for determination of a market rent. The landlord fixed the service charge element of the rent by taking the actual expenditure during the previous year as the basis for calculating the cost of providing services in the forthcoming year. If the actual expenditure exceeded the amount tenants paid, the landlord absorbed the shortfall. If the actual expenditure was less, it retained the difference. There was no year end accounting and no payment of a balancing charge. No service charge accounts were provided to tenants.

Mr Chand applied to the Leasehold Valuation Tribunal (LVT) for the Midland Rent Assessment Panel, purportedly under Landlord and Tenant Act (LTA) 1985 s27A, for a decision concerning his liability for service charges. The LVT held that it did not have jurisdiction because the lack of any mechanism for the collection of under provision and repayment of any surplus meant that the service charge was not 'variable' within the meaning of LTA s18. Mr Chand appealed.

HHJ Reid QC sitting in the Lands Tribunal dismissed the appeal. He adopted the 'convincing' reasoning of HHJ Huskinson sitting in the Lands Tribunal in *Home Group Ltd v Lewis* LRX/176/2006, 3 January 2008; March 2008 *Legal Action* 19. The tenancy agreement contemplated that the landlord could alter the rent on a yearly basis. It informed Mr Chand of his right to refer the matter to the Rent Assessment Committee. There was nothing to suggest that the altered rent was to be calculated in any particular manner or linking the alteration to the cost of providing relevant services. The ability of the landlord to serve notice increasing rent and to calculate the rent taking into account the cost of providing services did not enable it to be said that the rent (including service charge) was a payment 'the whole or part of which varies or may vary according to the relevant costs' within the meaning of s18. There was no direct relationship between the amount of costs as a cause and the total of the service charge as a consequence.

OCCUPANTS WITH NO SECURITY OF TENURE

Possession orders

■ Admiral Taverns (Cygnet) Ltd v Daniel and Daly

B5/08/2154,
25 November 2008

The claimant was the head lessee of a public house. It entered into a caretaking agreement with Mr Daniel. Ms Daly was his partner. In February 2008, the claimant gave notice terminating the agreement with effect from 4 April 2008. A possession claim was issued in Lambeth County Court. Ms Daly notified the court that she would be late for the hearing. Notwithstanding this, HHJ Gibson heard the case in the absence of the defendants and made a forthwith possession order. When she attended, Ms Daly handed the judge a defence and a lease purportedly granted by the claimant. The judge declined to vary his order. A warrant was issued the same day; it was due to be executed on 18 June. Ms Daly lodged an appellant's notice and requested a stay. Teare J granted a stay. The claimant applied to discharge the stay. It argued that HA 1980 s89 restricted the power to grant a stay to 14 days or to six weeks if exceptional hardship would be caused. Initially, Teare J set aside his order granting a stay, but then granted the defendants' application to set aside that order, thus restoring the stay ([2008] EWHC 1688 (QB); September 2008 *Legal Action* 24. He stated that parliament could not have intended appellants 'to be denied the fruits of a (potentially) successful appeal'. The claimant appealed.

The Court of Appeal dismissed the appeal. The claimant's suggested construction of s89(1) would prevent an appeal court from preserving the position until the matter could be dealt with. Very clear wording would be required to interfere with the court's jurisdiction. There was no such clear wording in s89(1). Section 89(1) could properly be read as restricting jurisdiction, not as restricting an appellate court from exercising its inherent jurisdiction. The title of the Housing Act was consistent with the restriction on the right of the court to make an order not restricting its inherent jurisdiction. If the courts were prevented from exercising their inherent jurisdiction it would lead to injustice. Accordingly, an appellate court had jurisdiction to suspend a possession order pending an appeal. There was a need to ensure that applications for possession came before the court speedily. To prevent the encouragement of self-help, it was in the public interest that appeals were expedited.

HOMELESSNESS

Definition of 'homeless'

■ Manchester City Council v Moran

(2008) 27 October, HL

An appeal committee of the House of Lords has granted Mrs Moran permission to appeal against the decision of the Court of Appeal (see [2008] EWCA Civ 378; [2008] 4 All ER 304) to the effect that victims of domestic violence can cease to be 'homeless' for the purposes of HA 1996 s175 on being given shelter by a women's refuge. The Women's Aid Federation has submitted a petition for leave to intervene in the appeal.

Suitability of offers

■ Boreh v Ealing LBC

[2008] EWCA Civ 1176, 29 October 2008

The claimant was aged 66 and confined to a wheelchair by her disabilities. She was owed a full housing duty under the homelessness provisions by Ealing: HA 1996 s193. It made her an offer of accommodation under that duty: s193(5). She refused it on the ground that the house was not adapted to deal with her disabilities. Most of the rooms were on the upper floors and there was no disabled ramp over the step to the front door. The council decided on review that the offer was suitable because the property could be adapted. On an appeal to the county court, the question arose whether or not suitability was to be assessed at the time when the offer fell to be accepted or at the later date when proposed alterations and adaptations may be carried out. Recorder Gore QC dismissed the appeal.

The Court of Appeal allowed Mrs Boreh's second appeal. An offer of accommodation which was not suitable for occupation at the date it fell to be accepted could operate as a performance of the housing duty if accompanied with certain, binding and enforceable assurances about what work would be carried out to it after acceptance. In the instant case, at the date the offer fell to be accepted (or refused) insufficient such assurances had been given. The recorder had been wrong to consider the way in which the plans for adaptation had evolved after the date of offer and pending the review of the refusal. The only relevant proposals concerning adaptation were those that had been made before the offer had to be accepted. They had not even addressed the fundamental matter of the absence of an access ramp.

■ Sevine v Enfield LBC

Central London County Court, 6 November 2008[48]

The claimant was an asylum-seeker from Turkey who was granted indefinite leave to remain. From November 2002 to January 2008, he lived with relatives in overcrowded accommodation in the Enfield area. He then made an application for homelessness assistance. Even before that had been decided, Enfield told him that he met the criteria for their 'out-of-borough' policy. Within a week of acceptance of the full housing duty, Enfield offered him accommodation in Luton, Bedfordshire, which was refused. The property was reoffered orally in April 2008 and again rejected. The council decided on review that its duty had been discharged.

HHJ Knight QC allowed an appeal. Notwithstanding the duty imposed by HA 1996 s208 to secure accommodation in its own area 'so far as reasonably practicable', the evidence showed that the council had been determined throughout to deal with the claimant under the 'out-of-borough' policy. There was no evidence in the council's files that the availability of housing in-borough had been established in April 2008 before reoffering the Luton property. The council had also failed to give the claimant notice in writing, when making the offer, that he had a right to a review of the decision on suitability: HA 1996 s193(5).

Reviews and appeals

■ Ali and others v Birmingham City Council

[2008] EWCA Civ 1228, 7 November 2008

The claimants were applicants for homelessness assistance. The council made decisions on review under HA 1996 s202 concerning factual aspects of their homelessness applications. They claimed that their rights under Human Rights Act (HRA) 1998 Sch 1 article 6 (to a fair and independent determination of their civil rights) had been infringed because appeal to a county court in homelessness cases lies only on a point of law: HA 1996 s204. The county court judge cannot re-examine the factual findings of a reviewing officer and the reviewing officer is not 'independent'. The claimants relied on the ECtHR decision in *Tsfayo v UK* App No 60860/00, 14 November 2006; [2007] LGR 1.

The Court of Appeal held that, applying *Begum v Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 AC 430, the combination of internal administrative review and access to the county courts to correct legal error satisfied the article 6 obligation. The decision in *Tsfayo* did not compel a different result. Permission to appeal to the House of Lords was refused.

■ Burr v Hastings BC

[2008] EWCA 1217, 15 October 2008

This appeal by Hastings to the Court of Appeal raised the question whether or not there was an obligation on a local housing authority, when considering a review under HA 1996 s202, to offer the applicant an opportunity of an interview, at least if the applicant was a juvenile.

Before the appeal was heard, the parties agreed that if the judge had intended to hold that there was an obligation to offer an interview on a review in every case he had been in error of law. Insofar as the judge had intended to hold that there was an obligation in respect of this particular applicant, the council was prepared to withdraw its review decision and conduct a further review. On that basis, the Court of Appeal approved dismissal of the appeal by consent.

■ Mangion v Lewisham LBC

[2008] EWCA Civ 1353, 28 August 2008

The claimant applied to Lewisham for homelessness assistance. It decided, on review, that she did not have a priority need because she was not vulnerable: HA 1996 s189(1)(c). The central point pursued on appeal was that the reviewing officer had recorded three times in his decision letter that the medical report submitted for the claimant had said that medical problems caused her severe disability but did not say that she had a severe disability. This was said to reveal a misdirection that vulnerability could only be established by severe disability. HHJ Knight QC dismissed the appeal without dealing with that point. An application for permission to appeal to the Court of Appeal was rejected on the basis that the appeal raised no 'important question of principle or practice': CPR 52.13.

On a renewed application, Rimer LJ granted permission under the second limb of CPR 52.13 (other 'compelling reason'). He said:

I am sensitive to the consideration that, if permission to appeal is refused, Ms Mangion will probably, and with justification, feel that her case has never been adequately considered. The review officer's letter is, on its face, an unsatisfactory one, at least in the particular respect to which I have referred; and the judge did not in his judgment deal squarely with the central head of criticism that was directed at the decision letter. These circumstances satisfy me that there is a compelling reason for this appeal to be allowed to proceed and I will give permission for it to do so.

ACCOMMODATION FOR CHILDREN

■ R (Clue) v Birmingham City Council

[2008] EWHC 3036 (Admin), 18 November 2008

The claimant and her children were not lawfully resident in the UK. She was an overstayer and her applications for leave to remain as a student had been refused. She had been in the UK for over seven years. She was not eligible for social housing or for homelessness assistance, so when the family became homeless she applied to the children's services department of the council for accommodation under Children Act (CA) 1989 ss17 and 20. It decided to provide only limited assistance on the basis that the claimant was unlawfully in the UK. The council offered to fund the cost of the family's return to Jamaica.

On an application for judicial review, Charles J set that decision aside. The council had failed to have regard to Home Office policy that no enforcement action would be taken against those with irregular immigration status who had been in the UK for more than seven years. In the light of the fact that the claimant would be potentially remaining in the UK, the council would need to reconsider its decision having regard to the claimant's rights under HRA Sch 1 article 8 (right to respect for private and family life).

■ G v Southwark LBC

(2008) 4 November, HL

An Appeal Committee has granted leave to appeal in this important case (see [2008] EWCA Civ 877) concerning the accommodation of young people under CA 1989 ss17 and 20.

■ A v Croydon LBC

[2008] EWHC 2921 (Admin), 28 November 2008

The claimant was a young Iraqi asylum-seeker. He arrived in the UK in February 2008 and applied to Croydon for assistance with accommodation under the CA 1989. An issue arose concerning his age: he claimed to have been born in November 1992. The council decided that his estimated date of birth was November 1990.

On a review, the claimant relied on the reports of two paediatricians: Drs Michie and Birch. The findings of the latter's report were more favourable to him than the former's. However, after considering both reports, the council confirmed its earlier decision.

On a claim for judicial review, Mr Stephen Morris QC, sitting as a Deputy High Court Judge, quashed the reviewing officer's decision. Following and applying four decisions of the Administrative Court which specifically consider age assessments under the CA 1989: (*R (B) v Merton LBC* [2003] 4 All ER 280; *R (I and O) v Secretary of State for the Home Department* [2005] EWHC 1025 (Admin); *R (C) v Merton LBC* [2005] EWHC 1753 (Admin); and *R (M) v Lambeth LBC* [2008] EWHC 1364 (Admin)), he held that the reasons the council had given for rejecting Dr Birch's report were unsound and/or not material to the decision and/or irrational. If the council had (as it contended) not actually rejected Dr Birch's report but only considered that other factors outweighed her conclusions, the reviewing officer's decision failed to give reasons explaining the preference for those other factors. The council would need to reconsider the claimant's age assessment.

1 Available at: www.housingcorp.gov.uk/server/show/ConWebDoc.15677/changeNav/431.
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3 Available at: www.housingcorp.gov.uk/CFG/upload/pdf/pm_letter_to_rsls_and_las.pdf.
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46 Marina Sergides, barrister, London.
47 Saeed Ashiq, CLP Solicitors, Birmingham.
48 Kevin Gannon, barrister, London.

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