Recent developments in housing law

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

POLITICS AND LEGISLATION

Due to the volume of case-law covered in this issue of 'Recent developments in housing law', material that would normally appear in this section will be held over until the October 2014 issue.

HUMAN RIGHTS

Article 8

■ McDonald v McDonald

[2014] EWCA Civ 1049,
24 July 2014

Ms McDonald had a mental disorder, which made her particularly upset by changes in her environment. Her parents raised money from a third party lender, Capital Homes Ltd, to buy a small property so that she could have a place to live for the foreseeable future. The money was secured by a mortgage over the property. The conditions of the mortgage prohibited the grant of a tenancy to a tenant who was assisted by social security. Mr and Mrs McDonald granted their daughter an assured shorthold tenancy. Ms McDonald paid the rent with housing benefit (HB) and Mr and Mrs McDonald used that money to pay the sums payable to Capital Homes Ltd. In time, due to a change in circumstances, they became unable to pay the instalments needed to meet their obligations under the mortgage. As a result, the mortgagee appointed receivers, who, as agents of Mr and Mrs McDonald, served a Housing Act (HA) 1988 s21(4) notice seeking possession. Ms McDonald defended the subsequent possession claim, contending that a possession order would infringe the right to respect for her home guaranteed by article 8 of the European Convention on Human Rights ('the convention') and that the notice to terminate her tenancy was served on her without the appropriate authority from her landlords. HHJ Corrie made a possession order. Ms McDonald appealed.

The Court of Appeal dismissed her appeal. First, there was no doubt that article 8(1) was engaged. There was nothing in article 8 to exclude a home that was let by a private landlord. Nor was there any doubt that the court was a public authority. However:

- there was no 'clear and constant' jurisprudence of the European Court of Human Rights (ECtHR) that the proportionality test implied into article 8(2) applied where there was a private landlord (para 19(i));
- even if the proportionality test had applied in this case, the court would still have made a possession order. 'Where the right of a former tenant to respect for his home has to be balanced against the rights of a landlord, the balance is almost always going to be struck in the landlord's favour because the landlord is enforcing his property right to return of the property' (para 50). The Court of Appeal also noted that there was £200,000 owing to the mortgagee;
- in any event, the court was bound by *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595; [2002] QB 48, CA to hold that section 21 was compatible with the convention. That precluded the court from holding that the proportionality test applied; and so
- the question of interpreting section 21 to conform to convention rights did not arise.

Tomlinson LJ added that: 'The suggestion that the making of an order which by reason of s21(4) … is mandatory can nonetheless be castigated as disproportionate in terms of article 8(2) … is … somewhat far-fetched' (para 67).

Second, the receivers did have authority to terminate Ms McDonald's tenancy. The mortgage conditions had to be interpreted purposively. The clear purpose of the mortgage conditions was to enable the receivers to proceed to realise the charged property in an orderly and efficient way. The powers conferred on them must therefore include power to do anything that was necessarily incidental to the exercise of the specified powers. The specified powers included the power to sell the property and to take possession of it.

■ R (O'Brien) v Bristol City Council

[2014] EWHC 2423 (Admin),
1 July 2014

Michael O'Brien and his sister Winifred were Travellers. For many years, they lived in separate bricks and mortar houses in Cardiff. In 2013, they moved to Bristol with Winifred's son Patrick and were allowed to station their caravan for three months on a transit site provided by Bristol. They applied for a permanent pitch but were unsuccessful. The council offered bricks and mortar accommodation, but that was refused. However, Mr O'Brien and his sister were allowed to remain on the transit site for a further period, owing to their poor health. They then left the transit site and parked their caravan on council land under a motorway bridge. The council issued a possession claim. Mr O'Brien and his sister sought judicial review of the decision to issue the possession claim arguing that the council had failed to take into account their welfare needs and that eviction would be a violation of article 8.

Burnett J dismissed the claim. The council was aware of their personal circumstances and had considered them fully. The matters relied on were evidentially weak and would not vitiate the decision to seek possession. The land under the motorway was not the claimants' home for the purposes of article 8. Their home was the caravan itself and the possession claim did not interfere with its use or enjoyment. In any event, Burnett J was 'unable to accept that the eviction of the claimants from the M5 site comes even close to being disproportionate in article 8 terms' (para 60).

Article 1 of Protocol No 1

■ R and L, SRO and others v Czech Republic

App Nos 37926/05, 25784/09, 36002/09, 44410/09 and 65546/09,
3 July 2014,
[2014] ECHR 703

The applicants were landlords of tenement houses. Under Czech law, the rents payable by their tenants were regulated and much lower than market rents. The applicants sued the Czech government for damages corresponding to the difference between the regulated rent and the usual rent in the given locality. Domestic courts dismissed their actions. Although the Constitutional Court found the Czech rent control scheme was unconstitutional because it violated the owners' rights under article 1 of Protocol No 1, it did not repeal the regulations, but gave the government 18 months to change the law. The government and parliament then failed to comply with the judgment of the Constitutional Court for over four years. The applicants complained to the ECtHR that the rent control

scheme breached article 1 of Protocol No 1.

The court found that the inability of landlords to raise the rents originated from state regulations. The determination of the conditions on which another person can use someone's property is an aspect of property rights. Accordingly, the rent control regulations did constitute an interference with the landlords' right to use their property. The interference was not lawful because there was a 'legal vacuum' after the decision of the Constitutional Court (para 123). The general provisions of the Civil Code were not sufficient to constitute a legal basis, which could govern the rights of the landlords in an efficient and smooth way and which would comply with the requirement of lawfulness within the meaning of article 1 of Protocol No 1. There was, accordingly, a violation of that article. The court decided that the claim for pecuniary damage was not ready for decision.

■ Statileo v Croatia

App No 12027/10,
10 July 2014,
[2014] ECHR 743

Mr Statileo owned a flat in Split. In 1955, Ms PA became his tenant. She lived in the flat with her mother and her cousin, IT. Under Croatian law, the tenant and any member of his/her household had a lifelong and unrestricted right to use the flat. Rent was capped. Ms PA left the flat in 1973, but IT continued to occupy it. Mr Statileo sought possession. IT issued separate proceedings contending that she was a member of Ms PA's household. The proceedings were joined. The Split Municipal Court found in favour of IT. It ordered Mr Statileo to conclude a lease contract stipulating a protected rent of 102.14 Croatian kunas (approximately €14 per month). That decision was upheld on appeal. Mr Statileo complained to the ECtHR that his inability to charge adequate rent for the lease of his flat had been in violation of his property rights under article 1 of Protocol No 1.

The court found that there was indisputably an interference with Mr Statileo's property rights as the protected lease entailed a number of restrictions that prevented landlords from exercising their right to use their property. The interference in question constituted a measure amounting to the control of use of property within the meaning of the second paragraph of article 1 of Protocol No 1. The interference was provided for by law and pursued an aim in the general interest, namely, the social protection of tenants. However, the protected lease scheme lacked adequate procedural safeguards aimed at achieving a balance between the interests of protected lessees and those of landlords. There was little or no possibility for landlords to regain possession of their flats. Furthermore, no statutory time limit was applied to the protected lease scheme or any of the restrictions on the rights of landlords it entailed. Those restrictions could in many cases last for two, or sometimes even three, generations. Although, in spheres such as housing, states necessarily enjoy a wide margin of appreciation, not only in regard to the existence of a problem of public concern warranting measures for control of individual property, but also to the choice of the measures and their implementation, that margin is not unlimited and its exercise cannot entail consequences which are at variance with the convention standards. In this case, the Croatian authorities failed to strike the requisite fair balance between the general interests of the community and the protection of Mr Statileo's property rights. There was accordingly a violation of article 1 of Protocol No 1. The court awarded €8,200 in respect of pecuniary damage and €1,500 in respect of non-pecuniary damage.

■ Berger-Krall and others v Slovenia

App No 14717/04,
12 June 2014,
[2014] ECHR 603

In 1991, after the collapse of the Socialist Republic of Slovenia, the government privatised the social housing stock. It gave existing tenants the right to buy their properties at a discount but, if that right was not exercised, required them to sign new tenancy agreements with reduced security of tenure and increased rents. Also, former owners were entitled to be registered as the owners of previously expropriated properties, subject to any prior tenancies. Members of the Association of Tenants, who were all original former holders of specially protected tenancies or their legal successors, complained that there had been a breach of article 1 of Protocol No 1 in that:

- the HA 1991 and the Denationalisation Act 1991 deprived them of their specially protected tenancy rights in a manner incompatible with the Constitution of the Socialist Republic of Slovenia;
- they were not given all the rights and benefits of other former specially protected tenancy holders, for example, the right to purchase their dwellings or to have permanent leases with non-profit rents;
- the restitution of the dwellings to 'previous owners' deprived them of the right to purchase them and resulted in differential treatment between the two groups of tenants on no reasonable ground;
- the legislation failed to provide for proper compensation for money which tenants had invested in the maintenance and improvement of their dwellings; and
- there were constant increases in the non-profit rents.

The ECtHR dismissed the complaint. It held that the housing reforms did interfere with the applicants' rights to the peaceful enjoyment of their possessions. They were no longer able to enjoy the protection that the previous legislation had afforded. That interference had a legal basis in domestic law and was 'lawful' within the meaning of article 1 of Protocol No 1. It was for national authorities to make initial assessments as to the existence of problems of public concern in the sphere of the exercise of property rights and the margin of appreciation available to the legislature in implementing social and economic policies, especially in the context of changes of political and economic regime, should be a wide one. The court saw no reason to depart from the national authorities' assessment that the interference pursued legitimate aims, namely, the promotion of social, political and economic reforms, the removal of relics of the country's communist past and the protection of the rights of 'previous owners'. It also found that the reforms managed to strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individuals' fundamental rights. '[I]n balancing the exceptionally difficult and socially sensitive issues involved in reconciling the conflicting interests of "previous owners" and tenants, the … state has ensured a distribution of the social and financial burden involved in the housing reform which has not exceeded its margin of appreciation' (para 211). The court also dismissed claims under articles 6, 8 and 14.

■ Buciaş v Romania

App No 32185/04,
1 July 2014,
[2014] ECHR 683

In 1994, the father of Mr Ioan Buciaş and Mr Alexandru Buciaş (the applicants) entered into a loan agreement secured by way of mortgage against a building and some land. The mortgage was registered with the land registry. The father did not pay the mortgage and in May 1996 the property was sold at auction. In July 1996, he challenged the forced sale, seeking the annulment of the order for the sale. That claim was registered with the land registry. Despite that, in 1998, the land was sold again. In 2000, it was held that the 1996 sale had been at an undervalue and should be annulled but that the land could not be restored to the father because the 1998 sale had been to a third party acting in good faith. After the father had died, the applicants complained to the ECtHR, arguing that the inability to recover the land violated article 1 of Protocol No 1.

The claim was allowed. On the basis of the retroactive effect of the annulment, the applicants became the owners of the immovable property. They were entitled to the return of their property as a direct consequence

of the annulment of the subsequent sale or to the value of their property. They therefore had a possession within the meaning of article 1 of Protocol No 1. Their inability to recover it was an interference with their rights. As the evidence showed that the 1998 purchaser had been aware of the dispute, the domestic courts had been wrong to find that the 1998 sale was in good faith. The decision of the domestic court of last resort was unconvincingly reasoned. It followed that the domestic courts should also have annulled the 1998 sale.

POSSESSION CLAIMS

Notices to quit

■ Birmingham City Council v Beech (aka Howell)

[2014] EWCA Civ 830,
17 June 2014

In 1967, Birmingham let a house to Mr and Mrs Warren. In 1980, their joint tenancy became secure. Mr Warren died in 1994. Mrs Warren succeeded to the tenancy in accordance with HA 1985 s88(1)(b). Janet Beech, the first defendant, was one of Mr and Mrs Warren's daughters. She lived at the property when her parents were first granted the tenancy, but moved out in 1970 when she married her first husband. After her marriage ended, she went back to live with her mother for a few months in 2005 before moving to Worthing. However, she returned to Birmingham with her second husband in 2007. They lived with her mother, but were looking for their own accommodation. Birmingham made her five offers of accommodation, all of which were declined. In October 2009, Mrs Warren went into hospital. She did not return home but moved into a residential care home. On 19 February 2010, a housing officer visited Mrs Warren at the care home where she signed a notice to quit by which she gave up her tenancy of the property with effect from 22 March 2010. Mrs Warren died in June 2010. Birmingham sought possession. Keith J made a possession order ([2013] EWHC 518 (QB); May 2013 *Legal Action* 34). He rejected the defendants' contention that Mrs Warren's willingness to sign the notice to quit was procured in circumstances amounting to undue influence or unconscionable behaviour on the part of the housing officer. He also rejected a human rights challenge advanced by Mrs Beech and her husband.

The Court of Appeal dismissed an appeal. The relationship of housing officer and tenant was not one that gave rise to a presumption of undue influence. There was no relationship of trust and confidence and nothing in the personal relationships that suggested anything close to that. Mrs Warren had capacity to give the notice to quit and had understood its nature and effect.

■ Camden LBC v Burley

[2014] EWCA Civ 784,
22 May 2014

Ms Belcher was a Camden council tenant. She served a notice to quit. In a subsequent possession claim, she contended that service of the notice was the result of pressure by Camden, which amounted to oppression. She said that the notice was not the result of a voluntary act on her part. HHJ Saggerson rejected that argument and made a possession order. He concluded that the relevant official had not acted oppressively but instead had imparted a few 'plain home truths' and pointed out a few 'brutal realities that any litigant needs to know if they are to make informed decisions'.

Fulford LJ rejected an application for permission to appeal. This was a factual issue for the judge to determine. The issues advanced in the appeal did not reveal proper grounds for granting permission to appeal.

Equality Act 2010 defences

■ Aster Communities Ltd v Akerman-Livingstone

[2014] EWCA Civ 1081,
30 July 2014

Mr Akerman-Livingstone had severe prolonged duress stress disorder (PDSD). In 2010, he was homeless. Mendip District Council (MDC) agreed that it owed him the main housing duty to secure that housing was available (HA 1996 s193(2)). The council ensured that he was given temporary accommodation with what later became Aster Communities Ltd, a housing association. Subsequently, MDC wanted Mr Akerman-Livingstone to choose another property as his permanent accommodation. He could not cope with what was involved. Eventually, MDC informed him that it had discharged its duty and required Aster to take proceedings to evict Mr Akerman-Livingstone from the temporary accommodation. Mr Akerman-Livingstone defended the claim, arguing that the bringing of the proceedings amounted to discrimination against him by reason of his disability in breach of Equality Act (EqA) 2010 s15.

HHJ Denyer QC held that, in the light of Aster's aims in getting back possession of the property to comply with MDC's direction, Mr Akerman-Livingstone did not have a seriously arguable case that Aster had breached the EqA 2010. He held that there was no need for a trial and that Aster should have an immediate possession order. Cranston J dismissed Mr Akerman-Livingstone's appeal. He brought a second appeal.

The Court of Appeal dismissed that appeal. HHJ Denyer QC was correct to hold that he should consider whether Mr Akerman-Livingstone's defence was seriously arguable, in the same way that he would have done if the defence had been based on article 8, and he was correct to conclude that it was not seriously arguable for the following reasons:

- there were differences between article 8 defences and EqA defences, but in each of them the court is concerned with the proportionality exercise;
- the countervailing interest of the social landlord in obtaining possession will outweigh that of the defendant who relies on disability discrimination in most, but not all, cases. For tenants to succeed in disability discrimination cases, they will have to show some considerable hardship, which they cannot fairly be asked to bear;
- Civil Procedure Rule (CPR) 55.8 enables the court to dispose of the matter without a full trial. At the initial hearing, the court can perform the same role as it would do if it was hearing an application for summary judgment under CPR 24;
- no distinction can be drawn between a possession claim brought by a local authority and one brought by a housing association, which is a social landlord;
- the circumstances of Mr Akerman-Livingstone's case, if proved in all respects, would not outweigh the strength of the countervailing interest of Aster, and so the trial judge was right to dismiss the defence summarily.

On 31 July, the Supreme Court granted permission to appeal and stayed execution of the possession order. The appeal is due to be heard on 11 December 2014.

Intervention in claims

■ Zulu and 389 others v eThekwini Municipality

[2014] ZACC 17,
6 June 2014

A number of residents in Madlala Village, an informal settlement, alleged that there had been at least 24 incidents of demolition of their shacks carried out by the Municipal Land Invasion Control Unit with the assistance of the South African Police Service. In March 2013, Koen J granted an interim order authorising the eThekwini Municipality and the Minister of Police to take all reasonable and necessary steps to dismantle or demolish any structures constructed on the land. Ms Zulu and other residents were not cited in the claim even though the authorities were aware that they had built their homes or other structures on the land. They made an application for leave to intervene in the proceedings, contending that they had a direct and substantial interest in the interim order and that, in effect, Koen J's order authorised their eviction without compliance

with the requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998. Kruger J dismissed the intervention application. They appealed.

The South African Constitutional Court allowed their appeal. Koen J's order affected them because they lived on the property. The order authorised the demolition of their homes and their eviction even though they were not cited in the proceedings. They had standing in those proceedings and the High Court should have allowed them to intervene.

Outright orders

■ Aster Communities v Richardson

[2014] EWCA Civ 731,
1 May 2014

Mrs Richardson was an assured tenant. The claimant sought possession relying on alleged rent arrears, breach of terms of the tenancy and nuisance to neighbours. Recorder Anthony De Freitas found the grounds proved. He refused to suspend the order and made an immediate order for possession.

Briggs LJ granted permission to appeal. Mrs Richardson had a real prospect of success on the question of whether an immediate rather than suspended order was reasonable or, in particular, proportionate. He granted a stay of the execution of the order for possession pending the hearing of the appeal.

Reasonableness

■ Peabody Trust v Evison

Wandsworth County Court,
*17 July 2014**

From 1981, Mr Evison lived with members of his family in a house owned by the Peabody Trust. He succeeded to an assured tenancy in 2000. In 2013, a combination of events caused him to lose his ability to cope with his rent account and arrears accrued. Peabody issued a claim for possession relying on HA 1988 Sch 2 Grounds 10 and 11. Mr Evison did not attend the hearing and an outright possession order was made. A consultant psychiatrist reported that he lacked capacity to conduct litigation and had multiple disabilities. As a result, the possession order was set aside. Peabody sought a further possession order, despite the fact that 'the only assistance that the defendant has received (apart from two fleeting contacts by the claimant's welfare benefits team) is that given by his hard pressed sister … who has suffered her own bereavement' (para 8). The arrears at the date of trial were agreed to be £7,870.80. Current rent was £147.43 per week and net rent was £31.59 per week, due to the 'bedroom tax' and a HB overpayment being clawed back.

District Judge Swan found that it should have been clear to Peabody that something far more was needed than a simple repeat reference to the welfare benefits team. It was clear that Mr Evison fitted the definition of a vulnerable resident in many regards. He had learning difficulties; he had mental health needs; he had significant problems with financing and budget; he was at risk of losing his home; and he was illiterate. In the circumstances, District Judge Swan found it was not reasonable for the housing officer to have failed to do anything other than refer the defendant to the welfare benefits team. After considering the level of the arrears and the defendant's ability to pay his rent, the judge concluded that it was not reasonable to make a possession order. He then considered whether to dismiss the claim, or adjourn it generally, or adjourn it on terms with a 'stop gap' date. He decided 'that litigation should be finite' (para 17) and, having made that decision, dismissed the claim and ordered Peabody to pay costs.

CONTEMPT OF COURT

■ Wokingham BC v Dunn

[2014] EWCA Civ 633,
2 April 2014

As a result of breaches of planning law, the court granted an injunction ordering the defendants:

■ to clear a site of skips and vehicle parts;
■ to restore the land by top soiling and seeding it; and
■ not to permit any further occupation of caravans and mobile homes that were on site other than by their then existing occupants.

The defendants did not comply with the injunction. HHJ Seymour QC, sitting as a deputy High Court judge, committed them to prison for four months for contempt of court. They appealed.

By the time the appeal was heard, they had complied with the injunction. The Court of Appeal held that, although the judge 'was fully justified in imposing the penalty that he did, it would, in the circumstances that now exist, be an excessive penalty to impose a custodial sentence' (para 19). Sullivan LJ continued:

There is undoubtedly here a very grave planning history and the [defendants] must understand, to put it bluntly, that while it is one thing to put two fingers up to the planning system, it is quite another thing to put two fingers up to the court. People who do that tend to get put inside unless there is a very good reason not to do so (para 19).

A fine of £20,000 was substituted for the prison sentences.

TRESPASSERS

■ Gayadeen v Attorney General of Trinidad and Tobago

[2014] UKPC 16,
22 May 2014

On a claim for the acquisition of title to a car park through adverse possession under the law of Trinidad and Tobago, the Privy Council held that, on the evidence, the only reasonable conclusion was that it had been established on a balance of probabilities that the appellants, and the first appellant's parents before them, had possessed the land. They had had the necessary intention, the animus possidendi, as demonstrated by their construction, maintenance and cleaning of the car park and the steps that they had taken to exclude persons other than their customers from parking there. They would have wished members of the public to have access to the car park in order to provide custom to their business. There could have been no question of fencing off the car park, if they were to attract customers.

NUISANCE

■ Coventry v Lawrence (No 2)

[2014] UKSC 46,
23 July 2014,
(2014) Times 29 July

Ms Lawrence and Mr Shields were the owners and occupiers of a residential bungalow. Mr Coventry, trading as RDC Promotions, and Moto-Land UK Limited occupied a stadium and track some 850 yards away, which they used for speedway racing, motorcar racing and motorcycle racing. Ms Lawrence and Mr Shields brought a claim for nuisance against both of them and their landlords.

The majority of the Supreme Court dismissed the claim in nuisance against the landlords. In order to be liable for a nuisance, landlords must either have authorised it by letting the property or they must participate directly in the commission of the nuisance. In this case, there was no question of the landlords having authorised the nuisance on the ground that it was an inevitable, or nearly certain, consequence of the letting of the stadium and the track. The intended uses of the stadium and the track were known to the landlords at the time of the lettings and those uses had in fact resulted in nuisance, but that was not enough to render the landlords liable in nuisance as a result of the letting. Those uses could be carried out without causing a nuisance. Accordingly, if the claim in nuisance against the landlords was to succeed, it had to be based on their 'active' or 'direct' participation (para 18). The question of

whether a landlord has directly participated in a nuisance must be largely one of fact for the trial judge, rather than law. None of the factors on which Ms Lawrence and Mr Shields relied established that the landlords had authorised or participated in the nuisance.

LONG LEASES

Service charges

■ Qdime Ltd v Bath Building (Swindon) Management Co Ltd

[2014] UKUT 261 (LC), 11 June 2014

Under the terms of a lease, the freehold owner of a four-storey block of flats was obliged to '… keep the building including the demised premises insured to its full reinstatement value against loss or damage by fire and the usual comprehensive risks in accordance with the [Council of Mortgage Lenders (CML)] recommendations in that respect from time to time and such other risks as the landlord may in its reasonable discretion think fit to insure against …'. The lessee-owned management company and the leaseholders of the flats were then required to reimburse these costs as a service charge. The freehold owner obtained an insurance policy, which included cover against damage caused by acts of terrorism. This added a small amount to the premium. The management company and the leaseholders issued proceedings in the leasehold valuation tribunal (LVT) disputing the costs of the terrorism element, which they considered to be unreasonable. The LVT found that there was no contractual obligation to obtain terrorism insurance and that the decision to obtain it was unreasonable.

Judge Cousins, sitting in the Upper Tribunal (Lands Chamber), allowed the freeholder's appeal. On a true construction of the provisions contained in the lease, the freeholder was obliged to obtain insurance against the 'usual comprehensive risks in accordance with the CML recommendations'. Those recommendations included 'explosions'. Terrorism was capable of giving rise to an explosion. Alternatively, the freeholder's decision was a reasonable one. The LVT apparently gave no, or no apparent, weight to the Royal Institution of Chartered Surveyors' Code, which provides that serious consideration should be directed to the taking out of terrorism insurance. It is settled law that such guidance is to be afforded great respect.

■ Windermere Marina Village Limited v Wild

[2014] UKUT 163 (LC), 28 April 2014

Tenants of a 'boathouse apartment' that comprised living accommodation at first floor level, which overhung the water of a marina and enclosed a mooring for a small boat, covenanted: 'To pay a fair proportion (to be determined by the surveyor for the time being of the lessors whose determination shall be final and binding) of the expense of all communal services including the re-constructing, repairing, maintaining, re-building, cleansing and dredging of all estate walls, fences, sewers, drains, roads, car parks, waterways and piers and other things the use or enjoyment of which is or shall be common to the demised premises and other premises'. In 2007, a surveyor appointed by the lessors apportioned the costs of communal services between the various users of the marina. He produced a 'thorough and impressive report' explaining his methodology (para 10).

Some of the tenants began proceedings before the LVT under Landlord and Tenant Act (LTA) 1985 s27A, seeking a determination of their liability to pay service charges for grounds maintenance and security. The LVT concluded that the tenants were liable to contribute towards the cost of services provided to areas of the marina that had been developed since the grant of their leases but were not required to contribute towards the costs incurred in engaging the surveyor to carry out the apportionment of expenditure. The lessors appealed.

Martin Rodger QC, Deputy President of the Upper Tribunal (Lands Chamber), found that the LVT was entitled to consider what was the fair proportion of the expenses payable by the tenants, because the contractual mechanism for identifying that fair proportion was rendered void by section 27A(6). Section 27A deprived the landlord's surveyor of his role in determining the apportionment. It was for the LVT to decide what was a fair proportion of the expense of communal services. As it was not suggested that the method it preferred was unfair, the appeal was dismissed. Furthermore, the LVT had provided sufficient reasons of its own to explain its decision.

■ Daejan Properties Ltd v Griffin

[2014] UKUT 206 (LC), 14 May 2014

Eighteen flats on the upper floors of a building, which also contained nine shops on the ground floor, were let on long leases. Access to the flats was by a walkway with a parapet wall supported by concealed steel beams. For very many years the steel beams corroded, unobserved and unrepaired, until in 2008 one of them failed and threatened to tip the parapet into the road. Emergency repairs were carried out to remove the most dangerous section of the parapet and to replace the failed beam. After further investigation, the rest of the parapet was removed and the remaining beams required replacement. The lessors claimed that all the cost of works, in the anticipated total sum of £333,632, was recoverable as service charges.

The LVT found that some of the steel beams ought to have been replaced in 1960 and that, if the beams had been replaced when they ought to have been, the cost of the work (in particular the emergency work) would have been less than it would now be. The LVT determined that, while in principle the cost of replacing the beams was recoverable through the service charge, the cost was irrecoverable to the extent that it had been increased by being carried out as an emergency response to the imminent collapse of the parapet. It reduced the amount recoverable through the service charge by £44,665. The landlords appealed. The appeal was conducted as a rehearing.

The Upper Tribunal allowed the appeal. It noted that it was decided in *Continental Property Ventures Inc v White* [2006] 1 EGLR 85 that an allegation of historic neglect did not touch on the question posed by LTA 1985 s19(1)(a), namely, whether the costs of remedial work have been reasonably incurred and so are capable of forming part of the relevant costs to be included in a service charge. The question of what the cost of repair is does not depend on whether the repairs ought to have been allowed to accrue. The reasonableness of incurring the cost of remedial work cannot depend on how the need for a remedy arose. After hearing witnesses of fact and expert evidence, the tribunal found that the contention that savings could have been made was not made out.

HMO LICENCES

Appeals

■ Gill v Nottingham City Council

[2014] UKUT 195 (LC), 8 May 2014

In October 2011, Mr Gill applied to Nottingham for houses in multiple occupation (HMO) licences in respect of a number of his houses. On 6 March 2012, Nottingham notified him of its decision under HA 2004 s64 to grant the licences for a period of two years. Mr Gill was notified that any appeal against the decision to grant the licence should be made to the residential property tribunal (RPT) within 28 days beginning with the date on which the decision was made. On 30 March 2012, four days before the expiry of the 28 days, Mr Gill wrote to the RPT stating: 'I wish to appeal … with regards to the duration of time that I have been awarded licences for by Nottingham City Council, namely for a period of two years rather than the usual five years' (para 16). The RPT replied enclosing 'the

relevant forms requested' (para 17).

Mr Gill waited until 30 April 2012 before completing one of the forms he had received. The RPT never received it. It rejected Mr Gill's submission that his letter of 30 March 2012 had itself been a sufficient appeal. It found that it was impossible to treat the letter as an appeal because of its very significant non-compliance with the requirements of Residential Property Tribunal Procedures and Fees (England) Regulations 2011 SI No 1007 reg 6(1). It made no reference to the power to relax or dispense with those requirements conferred by regulation 6(4).

Martin Rodger QC, Deputy President of the Upper Tribunal (Lands Chamber), allowed the appeal. The letter was deficient in that it did not state the respondent's address; did not state the name and address of 'any interested person'; did not contain a statement that Mr Gill believed the facts stated in the application were true; and did not include a copy of the licence or the other supporting documents (para 31). However, the RPT should have considered whether to exercise its power under regulation 6(4) to dispense with or relax those requirements. Considering afresh whether the requirements of regulation 6(4) were met, Martin Rodger QC held that the letter 'did just enough' (para 36). The information provided was sufficient in practice to communicate to the case officer the nature of the appeal he wished to pursue, and so to establish that it was a matter over which the RPT had jurisdiction. Furthermore, no prejudice would be caused to any party if the deficiencies in the letter of 30 March 2012 were overlooked.

Rent repayment orders

■ Fallon v Wilson

[2014] UKUT 0300 (LC),
1 July 2014

Mr Fallon, the owner of an HMO in Bath, was informed by his managing agents that he needed to apply for an HMO licence (HA 2004 Part 2) if he wanted to let the property, but '[f]or one reason and another … did not get round to dealing with the necessary application' (para 6). The house was let to five tenants in September or October 2011 without complying with the statutory provisions. Mr Fallon submitted an application for a licence in February 2012, and was granted a temporary licence in March 2012, apparently following a pre-licence inspection. He was prosecuted for non-compliance and pleaded guilty to an offence contrary to HA 2004 s72. He was fined £585, with a victim surcharge of £15, and costs of £200. Three of the tenants applied to the RPT for separate rent repayment orders (RROs) under section 73. The tribunal made orders for the repayment of 100 per cent of the rent that each of them had paid in the 12 months preceding the date of the applications. That totalled £7,119.18. Mr Fallon appealed. The appeal was unopposed.

After referring to *Parker v Waller* [2012] UKUT 301 (LC), Judge Cousins allowed the appeal and set aside the RROs. First, the tribunal failed to exercise its discretion properly, or at all. In particular, it did not have regard to section 74(6)(d) as to the conduct and financial circumstances of Mr Fallon, but instead had proceeded on the basis that a repayment of the maximum amount of rent paid should be made unless there were reasons for not doing so. That was the wrong test. Mr Fallon was not a 'professional landlord' in that the property was the only one operated by him as an HMO and he had no intention of deliberately flouting the law (para 22(6)). Second, in the exercise of its purported discretion, the tribunal failed to determine what payment was reasonable in the circumstances. Furthermore, Mr Fallon had suffered two penalties, the fine and the RROs. Regard should be had to the total amount that a landlord has to pay by way of fine and RRO.

HOUSING ALLOCATION

■ R (Jakimaviciute) v Hammersmith and Fulham LBC

C1/2014/012512,
31 March 2014

The council's social housing allocation scheme designated certain classes of applicant as non-qualifying (HA 1996 s160ZA(7)). They included a class comprising homeless applicants whom the council had provided with suitable temporary accommodation under its homelessness functions (HA 1996 Part 7). The claimant fell into that class. As a result she would normally be entitled to a statutory 'reasonable preference' in any allocation scheme (HA 1996 s166A(3)) but the council notified her that she did not qualify for its scheme at all.

She brought a claim for judicial review contending that it was unlawful to exclude from an allocation scheme a person who would otherwise be entitled to a reasonable preference. D Gill, sitting as a deputy judge of the High Court, refused permission to apply for judicial review (see [2013] EWHC 4372 (Admin); March 2014 *Legal Action* 23).

The Court of Appeal granted permission to appeal and retained the judicial review claim to determine for itself. The hearing is listed for 20 or 21 October 2014.

■ R (Hillsden) v Epping Forest DC

CO/977/2014,
10 June 2014

The council's social housing allocation scheme designated certain classes of applicant as non-qualifying if they failed to meet specified residence requirements (HA 1996 s160ZA(7)). The applicant fell within such a class but applied for individual consideration on the basis that her circumstances were exceptional. The council asserted that it had made carefully defined classes and had not included in its scheme any power to depart from them.

In judicial review proceedings, HHJ Anthony Thornton QC granted permission to bring the claim, following a contested renewal application. The trial is fixed for 25 September 2014.

HOMELESSNESS

Priority need

■ Kanu v Southwark LBC

[2014] EWCA Civ 1085,
29 July 2014,
(2014) Times 1 August

The claimant lived with his wife and their adult son. When they became homeless, he applied to the council for assistance under HA 1996 Part 7. He had mental and physical disabilities. A reviewing officer decided that he did not have a priority need. She concluded that even if he, on his own, would have been less able to fend for himself than an ordinary homeless person, he was not 'vulnerable' within the meaning of HA 1996 s189(1)(c) because of the assistance he would continue to receive from his wife and son if they remained homeless. Recorder Matthews allowed an appeal and quashed that decision. The council brought a second appeal. The Court of Appeal granted permission to appeal and declined to adjourn the hearing of it to await the outcome of the appeal to the Supreme Court in *Hotak v Southwark LBC* UKSC 2013/0234 (on appeal from [2013] EWCA Civ 515).

The Court of Appeal allowed the appeal. The recorder's particular criticisms of the reviewing officer's decision could not be sustained and he had been wrong to consider that the public sector equality duty under EqA 2010 s149 added anything more than HA 1996 to the way in which a council had to decide a question of vulnerability in relation to a disabled applicant. The claimant is seeking permission to appeal to the Supreme Court and a joint listing with the appeal in *Hotak*.

Out-of-district placements

■ Nzolameso v Westminster City Council

[2014] EWCA Civ 1051,
26 June 2014

The claimant was a single mother living with several children. The council accepted that it owed her the main housing duty: HA 1996 s193(2). In performance of that duty it secured

temporary accommodation in the form of a private rented sector tenancy in Milton Keynes. The claimant did not wish to move to Milton Keynes, with which she had no connections, and refused the offer. The council decided that the accommodation had been suitable and that its duty had ended with the refusal of it: HA 1996 s193(5). HHJ Hornby dismissed an appeal from that decision.

On a second appeal, the claimant contended that the reviewing officer had failed to address the prior question of whether she was satisfied that it had not been reasonably practicable to accommodate the claimant in Westminster or in a nearer area than Milton Keynes: HA 1996 s208(1). On a renewed application, Arden LJ granted permission to appeal. She said:

… I am persuaded that it is arguable that there were two questions to be answered by the local housing authority: first, whether it was reasonably practicable to accommodate in the area; and secondly, whether Milton Keynes was suitable. It is arguable that the decision letter ran both those questions together. I am content for the grounds of appeal to raise that question and also the question whether the judge erred in not concluding that the grounds relied on as justification were insufficient and should have addressed certain specific matters (para 1).

The appeal will be heard, together with another out-of-borough placement case (*Hegab v Westminster City Council* B5/2014/1528), in the Court of Appeal on 29 September 2014.

Reviews and discharge of duty

■ R (Miah) v Tower Hamlets LBC

[2014] EWCA Civ 1029, 23 June 2014

The claimant applied to the council for homelessness assistance. It decided that its duty towards her under HA 1996 s193 could be discharged by providing her with advice and assistance to secure her own accommodation pursuant to HA 1996 s206(1)(c). It intended that, with its assistance, the claimant could recover possession of premises she owned and then occupy them. The claimant sought a review of that decision as to the method by which the council would perform its duty. The council decided that its decision was not one amenable to review under HA 1996 s202. The claimant sought a judicial review.

Michael Kent QC, sitting as a deputy High Court judge, refused permission to apply for judicial review. He held that if the claimant had material to demonstrate that the proposed course would be impracticable she should put that material to the council. The council had accepted that if the material demonstrated that she could not regain possession, the section 193 duty would revive.

Tomlinson LJ dismissed a renewed application for permission to appeal. Given that the council was prepared to consider any material advanced by the claimant and was willing to change its position if that material demonstrated that proceeding under section 206(1)(c) was inappropriate, the continuance of the litigation served no purpose.

Charges for accommodation

■ R (Yekini) v Southwark LBC

[2014] EWHC 2096 (Admin), 28 March 2014

The claimant had a four-year-old son. She was his '*Zambrano* carer' (ie, an individual who is the primary carer of a British citizen resident in the UK in circumstances where the British citizen would be unable to reside in the UK or another EEA state if that carer were required to leave). She applied to the council for homelessness assistance before November 2012 when the law was changed to exclude Zambrano carers from eligibility. The council accepted that it owed her the main housing duty under HA 1996 s193 and provided temporary accommodation.

In November 2012 *Zambrano* carers became ineligible for HB and from that date the claimant had no means of paying rent for the temporary accommodation. In March 2013 she was evicted, owing arrears of almost £2,000. Children's services then provided bed and breakfast accommodation under Children Act 1989 s17 for a year before they found her accommodation in Rochdale.

The claimant sought a judicial review, contending that the section 193 duty owed to her had not ended. The council said it had ended when she ceased to be able to pay for any temporary accommodation.

Michael Fordham QC, sitting as a deputy High Court judge, held that the HA 1996 duty had not ended. The council had erred in law in believing that HA 1996 s206(2) required it to levy at least some charge as a condition of the provision of accommodation. He held that, in circumstances where a homeless person is unable to pay, a housing authority has three options:

The first option is the discretion which I have described, as to a nil or nominal rent or charge for the purposes of section 206(2). The second is that the housing assistance secured for the purposes of the 1996 Act could continue to be housing provided by the local housing authority, but with the relevant rental met by assistance in cash made available by social services in the context of a 1989 Act section 17 assessment. In those circumstances, were that the approach taken, the rent would continue to be charged, the means would be made available for the protection of the children, and the local authority would in that sense be able to balance its books. That could have clear implications for questions as to eviction. The third option is that the 1989 Act duty, being a duty not to house but to secure that accommodation is available, could be discharged through securing and being satisfied that provision is being made available through accommodation under section 17(6) of the 1989 Act (para 69).

Comment: Note that this was a case in which the housing authority and children's services were part of the same local authority. The ramifications of the decision, if they are different local authorities, are significant.

HOUSING AND COMMUNITY CARE

■ R (Whapples) v Birmingham Crosscity Clinical Commissioning Group

[2014] EWHC 2647 (Admin), 30 July 2014

The claimant was a tenant of Midland Heart (a housing association) in Birmingham. She was severely disabled. Her flat was no longer suitable for her needs. She wished to move to more suitable and larger accommodation (sufficient to accommodate a carer) in a different part of the country. The NHS was willing to co-operate with her landlord and with local housing authorities to facilitate a move to alternative rented accommodation but the claimant contended that it was for the NHS to provide her with free accommodation under National Health Service Act 2006 s3(1)(b), which provides that:

A clinical commissioning group must arrange for the provision of the following to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility…

(b) other accommodation for the purpose of any service provided under this Act,

It was common ground that 'other accommodation' could include ordinary private residential accommodation for which the NHS would have the power to pay but the defendant denied that, on the facts, it was under a duty to provide such accommodation itself.

Sales J dismissed an application for a judicial review of that decision. He held that the relevant statutory guidance required simply that 'there should be a careful exploration of the various ways in which aspects of an

individual's needs with respect to accommodation could be met, before the conclusion is drawn that the NHS should itself be funding accommodation' (para 14). The defendant had explored the options and was not acting unlawfully. It had offered to make good any shortfall between the rent and any HB that might be payable for larger accommodation. When the claimant failed to engage with Midland Heart about a transfer, the defendant had quite properly applied to the Court of Protection for directions about her mental capacity to deal with her accommodation needs. The judge added that: 'Absent special circumstances, it will usually be difficult to say that a body like the [clinical commissioning group] has acted unlawfully or irrationally in deciding that accommodation needs of an individual can and ought to be met through other avenues involving means-tested state provision, and not out of its own NHS budget' (para 17).

* Faisel Sadiq, barrister, London.

Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. Nic Madge is a circuit judge. The authors are grateful to the colleague at note * for the transcript of the judgment.

Update on the Court of Protection – Part 2

The resumption of this series of articles on developing trends within the Court of Protection's jurisdiction and procedural matters of significance for practitioners coincides with the publication of LAG's *Court of Protection Handbook: a user's guide*. Sophy Miles considers developments in Court of Protectionn practice during the first half of 2014. See July/August 2014 *Legal Action* 15 for Part 1 of this article. Part 3 will appear in October 2014 *Legal Action*.

CASE-LAW

Deprivation of liberty following *Cheshire West* continued

Part 1 of this article referred to the increase, since the judgment in *P (by his litigation friend the Official Solicitor v Cheshire West and Chester Council and another*; *P and Q (by their litigation friend the Official Solicitor) v Surrey CC* [2014] UKSC 19, 19 March 2014, in applications for standard authorisations under the deprivation of liberty safeguards (DOLS) (under Mental Capacity Act 2005 Sch A1) and in applications under Mental Capacity Act (MCA) 2005 s16 for authorisations to deprive of their liberty adults who lack capacity to decide where to live in settings where DOLS cannot be used (ie, in any setting other than a hospital or registered care home) (see July/August 2014 *Legal Action* 20). The article explained that a consolidated hearing took place before Sir James Munby, President of the Court of Protection, on 5 and 6 June 2014 to consider the procedural requirements for a 'streamlined' process which was also compliant with article 5 of the European Convention on Human Rights ('the convention') for MCA s16 applications for judicial detention (para 5). The President of the Court of Protection identified 25 questions covering areas such as the nature of the evidence required, and the role of the relevant person ('P') and P's litigation friends and reviews.

The President of the Court of Protection released a preliminary judgment in **Re X and others (Deprivation of Liberty)** [2014] EWCOP 25, 7 August 2014 setting out briefly his answers to some of the 25 identified questions. The judgment concentrates on the issues that are relevant to the 'streamlined' process. The detailed work of putting this into effect will have to be carried out by the Court of Protection working in conjunction with the ad hoc Rules Committee, which currently is reviewing the Court of Protection Rules (COP Rules) 2007 SI No 1744 and will next meet on 10 September 2014. The President of the Court of Protection will in due course provide a judgment explaining his reasoning and dealing with the questions he has yet to answer, which are related to the possibility of the court extending urgent authorisations made under DOLS.

The President of the Court of Protection identified, as a key issue, the need to distinguish between those cases which can 'properly be dealt with on the papers' and those that require an oral hearing (para 5). The President held that P does not need to be a party; however, he has made very clear that P must be able to present his/her case properly and satisfactorily and to participate; he has delegated how this should happen to the Rules Committee.

The Law Society intervened in *Re X* (above) and expressed particular concern about how P's rights under article 5 could be protected in a meaningful way. At present, rule 73(4) provides that P should only be named as a respondent if ordered by the court. The President of the Court of Protection said in this context:

> *What the convention requires is that P be able to participate in the proceedings in such a way as to enable P to present their case 'properly and satisfactorily': see* Airey v Ireland *[App No 6289/73, 9 October 1979]; (1979) 2 EHRR 305, para 24. More specifically, 'it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty".':*