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. In addition, comments from readers are warmly welcomed.

POLITICS AND LEGISLATION

New housing legislation

The Housing (Wales) Act 2014 received royal assent on 17 September 2014. Its provisions, to be brought into force in stages, will:

- reform homelessness law (including placing a stronger duty on local authorities to prevent homelessness and allowing them to use suitable accommodation in the private sector);
- introduce a compulsory registration and licensing scheme for private rented sector landlords and letting and management agents;
- place a duty on local authorities to provide sites for Gypsies and Travellers where a need has been identified; and
- give local authorities the power to charge 50 per cent more than the standard rate of council tax on homes that have been empty for a year or more.

The Housing (Scotland) Act (H(S)A) 2014 received royal assent on 1 August 2014. The provisions of the Act will:

- end the right to buy in Scotland;
- give social landlords more flexibility in the allocation and management of their housing stock;
- introduce a First-tier Tribunal to deal with disputes in the private rented sector;
- give local authorities new discretionary powers to tackle disrepair in the private rented sector;
- introduce a new regulatory framework for letting agents in Scotland;
- modernise the site licensing regime for mobile home sites with permanent residents; and
- place new requirements on private sector landlords to fit carbon monoxide detectors and carry out electrical safety checks every five years.

The first commencement order was to be laid in parliament during September 2014 with the first provisions coming into force in November 2014.

The Affordable Homes Bill passed to its committee stage following a House of Commons second reading debate on 5 September 2014. This private members' bill would make significant changes to the housing benefit (HB) rules relating to unoccupied bedrooms in social housing ('the bedroom tax'). On 3 September 2014, the UK government updated its online toolkit for councils and advice workers about the current arrangements: *Local authorities and advisers: removal of the spare room subsidy* (Department for Work and Pensions (DWP), September 2014).[1]

Homelessness

The latest official figures on applications made to local housing authorities in England for homelessness assistance were published in July 2014: *Statutory homelessness: January to March quarter 2014 England (revised)* (Department for Communities and Local Government (DCLG), 31 July 2014).[2] They show that 58,440 homeless households were in temporary accommodation on 31 March 2014. Of those, 12,910 were housed in other local housing authority districts, an increase of 41 per cent in one year in the number placed out of district. Of the 58,440 households, 4,370 were in bed and breakfast (B&B) style accommodation.

Among rough sleepers, those under immigration conditions requiring that they have no recourse to public funds face particular difficulties. A new report seeks to address the issues for those rough sleepers in London: *Accommodation in London for rough sleepers with no recourse to public funds and the potential for developing a referral pathway* (Housing Justice, July 2014).[3]

Housing and anti-social behaviour

Most of the new legal tools and powers to control anti-social behaviour contained in the Anti-social Behaviour, Crime and Policing Act 2014 were brought into force in England on 1 October 2014: the Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No 6) Order 2014. They include new mandatory grounds for possession against secure and assured tenants and new provisions for closure orders and injunctions. The Home Office has published statutory guidance on the new provisions: *Reform of anti-social behaviour powers: statutory guidance for frontline professionals* (Home Office, July 2014).[4]

Possession claims by landlords

Landlord possession claims in county courts fell from 194,645 in 2002 to 134,961 in 2010. But the number has since increased by 26 per cent to 170,451 in 2013. This increase has been in stark contrast to the 29 per cent decline in the number of mortgage possession claims over the same period. The second quarter of 2014 recorded 38,509 landlord possession claims, the second highest second quarter figure since 2009: *Mortgage and landlord possession statistics quarterly: April to June 2014* (Ministry of Justice statistics bulletin, August 2014).[5] There were 10,000 landlord repossessions by county court bailiffs in April to June 2014.

Letting and managing agents

The Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc) (England) Order 2014 SI No 2359 requires all letting and property management agents to become members of an approved redress scheme to which actual and prospective landlords and tenants can complain and seek compensation. The provisions came into force on 1 October 2014. The sanction for failure to join a redress scheme is a penalty of up to £5,000. Enforcement is to be undertaken by local trading standards officers with a right of appeal to a First-tier Tribunal. On 5 September 2014, the housing minister, Brandon Lewis MP, issued a call to all letting and managing agents to join a scheme before the deadline: *Letting agents need to move quickly to sign up to redress schemes* (DCLG press release, 5 September 2014).[6]

The Consumer Rights Bill Part 3 Chapter 3 contains provisions designed to ensure that letting agents' fees are transparent. Once in force, the requirements will be backed by a penalty of up to £5,000 for non-compliance. The bill has already passed through the House of Commons and starts its committee stage in the House of Lords on 13 October 2014.

Tenancy deposits

Clause 31 of the Deregulation Bill contains proposed new sections 215A–215D for the tenancy deposit provisions of the Housing Act (HA) 2004. The new sections will address pre-April 2007 deposits and the effect on deposits of renewal of tenancies. The changes are considered necessary following the Court of Appeal decision in *Superstrike Ltd v Rodrigues* [2013] EWCA Civ 669, 14 June 2013; [2013]

HLR 42, CA. The bill has already passed through the House of Commons and starts its committee stage in the House of Lords on 21 October 2014.

Lettings to migrants

The provisions of Immigration Act 2014 ss20–37 are designed to prevent landlords from letting to certain migrants. There is to be a phased implementation of those provisions. On 1 December 2014, they will be brought into force in Birmingham, Wolverhampton, Dudley, Walsall and Sandwell: the Immigration Act 2014 (Commencement No 3) Order 2014.

To help landlords prepare for the changes, the UK government has produced a free factsheet, *Tackling illegal immigration in privately rented accommodation* (Home Office, August 2014);[7] an information leaflet, *Right to rent* (Home Office, September 2014);[8] and a draft code of practice: *Code of practice on illegal immigrants and private rented accommodation* (Home Office, September 2014).[9] For further advice landlords can also access an online checking system called the 'Right to rent tool'[10] or call a Home Office helpline: 0300 069 9799.

Social housing

The UK government has published a new guide about the ways that council and housing association tenants in England can get involved in making their neighbourhoods a better place to live: *Tenants leading change* (DCLG, July 2014).[11] A new report has made a case for targeted intervention to tackle the worst council housing estates: *The estate we're in: lessons from the front line* (Policy Exchange, 2014).[12]

Those tenants seeking to move away from council ownership of their homes will need to initiate a stock transfer process. The detailed rules about such transfers have been published in a new transfer manual: *Housing transfer manual: period to 31 March 2016* (DCLG, July 2014).[13] As an incentive to transfer, local authorities and tenant groups can apply for funding towards writing off housing debt. Up to £100 million is available: DCLG press release, 14 July 2014.[14]

The social housing regulator for England, the Homes & Communities Agency (HCA), has produced new guidance on how tenants of social housing can pursue complaints against their landlords.[15] The housing minister has also written to the National Housing Federation, the Chartered Institute of Housing and the Local Government Association, urging them and their members to ensure that tenants know how to complain if they need to: DCLG press release, 7 July 2014.[16] The results of the *Big Tenant Survey 2014* (Housing Partners, September 2014) suggest high levels of tenant dissatisfaction with social landlords.[17]

The Welsh government is consulting on proposals to require social landlords in Wales to self-report issues to regulators: *Consultation document: guidance on notifiable events for registered social landlords* (Welsh government, August 2014).[18]

Right to buy

There has been a significant increase in the number of right to buy applications in England. In the first quarter of 2014/15, councils sold an estimated 2,845 dwellings under the right to buy scheme: 31 per cent higher than the 2,171 sold in the same quarter of 2013/14: *Right to buy sales: April to June 2014, England* (DCLG, August 2014).[19]

Clause 29 of the Deregulation Bill (see above) would reduce the qualifying period to acquire the right to buy in England from five to three years in order to stimulate further sales, and is likely to come into force shortly after the bill is passed.

The Housing (Right to Buy) (Maximum Percentage Discount) (England) Order 2014 SI No 1915 provides that the maximum percentage discount when exercising the right to buy in respect of a house is 70 per cent (the same percentage discount as flats). Subject to transitional provisions, the Order took effect on 21 July 2014.

A new prescribed form RTB1, for claiming the right to buy, came into effect on 4 August 2014: the Housing (Right to Buy) (Prescribed Forms) (Amendment) (England) Regulations 2014 SI No 1797. The new form is available online.[20] Tenants wanting to buy their own homes can now ring a dedicated local rate helpline to speak to a member of the new Right to Buy Agent Service: 0300 123 0913.

Leaseholders and service charges

In 2012/13, there were 4.1 million homes in England owned on long leases, of which 2.4 million were occupied by their owners and 1.7 million were rented out to tenants: *Residential leasehold dwellings in England: technical paper* (DCLG, August 2014).[21]

In October 2013, the UK government consulted on proposals to cap the service charges for major works payable by local authority leaseholders in England: *Consultation on protecting local authority leaseholders from unreasonable charges* (DCLG, October 2013).[22] In August 2014, it published a summary of responses to that consultation: *Protecting local authority leaseholders from unreasonable charges: analysis of consultation responses and next steps* (DCLG, August 2014).[23]

In the light of those consultation responses, the government issued revised service charge directions to social landlords to cap the charges to leaseholders for future major works funded by government. The Social Landlords Mandatory Reduction of Service Charges (England) Directions 2014 provide that:[24]

- where repair, maintenance and improvement works to leaseholders' properties relate to programmes of work on tenanted stock wholly or partly funded by a secretary of state or the HCA, the service charge payable by a resident leaseholder over any five-year period is capped at £15,000 in London and £10,000 in the rest of England;
- the cap applies to councils and private registered providers in England; and
- the cap does not cover any leaseholders who, at the time the work commences, are not occupying their leasehold property as their only or principal home.

The separate Social Landlords Discretionary Reduction of Service Charges (England) Directions 2014 permit social landlords to reduce service charges for the costs of repair, maintenance or improvement to below the level of the mandatory cap where they consider it appropriate and reasonable to do so, subject only to certain specified criteria to which the landlord must have regard when making a decision.[25]

The Competition and Markets Authority (CMA) is conducting a market study into residential property management. In August 2014, it announced that it had found some leaseholders appear to suffer from a lack of control over aspects of property management, and may experience excessive or unnecessary charging for services arranged by property managers, poor service quality, insufficient transparency, poor communication and ineffective redress. It conducted a short consultation in August and September on a range of possible remedies: *Residential property management services: an update paper on the market study* (CMA, August 2014).[26] Its report is expected in November 2014.

HUMAN RIGHTS

Article 8

■ Lemo and others v Croatia

App Nos 3925/10, 3955/10, 3974/10, 4009/10, 4054/10, 4128/10, 4132/10 and 4133/10,
10 July 2014,
[2014] ECHR 755

In the 1970s, the applicants moved into flats in Mlini, Dubrovnik, as employees of a publicly-owned enterprise, Mlini Hotels. In 1991, the Protected Tenancies (Sale to Occupier) Act gave the holders of such tenancies of publicly-owned flats the right to purchase under favourable conditions. Later, Mlini Hotels was privatised. The applicants sought to purchase

their flats from Mlini Hotels but their requests were refused. Some time after 2000, Mlini Hotels brought separate civil actions in the Dubrovnik Municipal Court seeking the eviction of all the applicants, on the ground that they had no legal basis to occupy the flats. They counterclaimed, seeking recognition of their protected tenancies and judgments in lieu of the contracts of sale. They argued that they had been occupying the flats for lengthy periods and had paid the rent and all utility bills. They claimed the right to occupy the flats permanently. The court accepted the plaintiff's claims and dismissed the applicants' counterclaims. They were all forcefully evicted from the flats in 2010. They complained to the European Court of Human Rights (ECtHR), alleging that there had been a breach of article 8 of the European Convention on Human Rights ('the convention').

The court stated that whether a property is to be classified as a 'home' is a question of fact and does not depend on the lawfulness of the occupation under domestic law. In this case, the applicants had sufficient and continuous links with the flats for them to be considered their 'homes' for the purposes of article 8. The eviction orders amounted to an interference with their right to respect for their homes. The national courts' decisions were in accordance with domestic law and the interference therefore pursued the legitimate aim of the protection of the rights of the owner of the flats. The central question was, therefore, whether the interference was proportionate and 'necessary in a democratic society'. Although article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by article 8. Any person at risk of an interference with his/her right to a home should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under article 8, notwithstanding that, under domestic law, s/he has no right to occupy the property concerned. Such an issue does not arise automatically in every case concerning an eviction dispute. If an applicant wishes to mount an article 8 defence to prevent eviction, it is for him/her to do so and for a court to uphold or dismiss the claim.

In this case, the national courts had confined themselves to finding that occupation by the applicants was without legal basis, and made no further analysis as to the proportionality of the measure to be applied against them. By failing to examine these arguments, the national courts did not afford the applicants adequate procedural safeguards and the decision-making process was not fair and did not afford due respect to the interests safeguarded to the applicants. There was, therefore, a violation of article 8. The court awarded non-pecuniary damage and noted that under the Croatian Civil Procedure Act an applicant may file a petition for the reopening of civil proceedings in respect of which the ECtHR has found a violation of the convention.

Comment: It is interesting to note that the ECtHR appeared to make no distinction between the way in which article 8 proportionality has to be considered in a claim by a private landlord in comparison with one brought by a public sector landlord.

POSSESSION CLAIMS

Counterclaims and old possession orders

■ Midland Heart Ltd v Idawah

[2014] EW Misc (B48),
11 July 2014

The claimant landlord began a claim for possession based on rent arrears in August 2002. No defence was filed and in November 2002 an order for possession was made. Over the years, there were seven orders suspending warrants for possession. In October 2013, the claimant was again given permission to request the reissue of a warrant of possession. The defendant tenant applied again to suspend the warrant of eviction and for permission to bring a counterclaim for disrepair. District Judge Williams granted that application. The claimant appealed.

HHJ Grant dismissed the appeal. After referring to *Rahman v Sterling Credit Limited* [2001] 1 WLR 496, CA, he concluded that the district judge did not make an error in law in permitting the tenant to raise a counterclaim which included either in fact or in effect a claim to set off. He had not exercised his discretion outwith the ambit of discretion that was available to him. It was clear from the transcript that the district judge did have regard to the issue of delay. The ground of appeal that the district judge had not had regard to the fact that the claimant had been deprived of a limitation defence had not been raised below.

Permission to appeal: new evidence

■ Crawley BC v Irvine

Queen's Bench Division,
21 July 2014

A judge made an order for possession, based on the availability of suitable alternative accommodation. The tenant applied for permission to appeal against that decision and for permission to adduce fresh evidence, which allegedly demonstrated that there were anti-social behaviour problems in the area where the alternative accommodation was situated. The local authority attended the permission proceedings but did not participate in them. The judge made no determination on the permission to appeal application but ordered the case to be remitted for reconsideration in the light of the fresh evidence. The local authority appealed.

Patterson J allowed the appeal. The fresh material the tenant had sought to adduce was easily accessible and available at the time of the original trial. He had given no reason for not seeking to adduce that evidence then. It was clear from the decision to grant possession that a firm conclusion had been reached that there was no real risk of anti-social behaviour in the area where the alternative accommodation was located. Furthermore, it was evident from the transcript of the permission proceedings that anti-social behaviour had not been a major issue before the judge and that, in allowing the evidence to be adduced, he had not considered the *Ladd v Marshall* principles as he was required to do under the Civil Procedure Rules (CPR). Taking all of those factors together, including the fact that the local authority had had no opportunity to address the judge on whether the evidence should be adduced, the decision to adduce had been wrong and unfair. The judge had not been entitled to order remittal. Patterson J set aside the judge's order and substituted one refusing both permission to appeal and permission to adduce the fresh evidence.

Scottish assured tenancies

■ AP and MP v DO and SO

[2014] ScotSC 79,
Sheriffdom of South Strathclyde Dumfries and Galloway at Dumfries,
6 August 2014

In 1980, Mr AP and Mrs MP bought a house, with an adjacent cottage which they intended to let out as a holiday cottage. From December 2004, Mr DO and Mrs SO stayed in the holiday cottage on various occasions. They developed a close relationship with Mr AP and Mrs MP. In 2007, Mr AP and Mrs MP built a second house in their vegetable garden, with the intention of residing in it. While the second house was being built, Mr AP had a heart attack and he and his wife abandoned their plans to move into the second house as his health would not permit it. However, they arranged for Mr DO and Mrs SO to occupy the second house on the understanding that they would assist them with collecting firewood and gardening. Mr DO and Mrs SO agreed to this arrangement and gave up their council tenancy in England. After moving in, Mr DO and Mrs SO did help to collect firewood and garden. Mrs SO also helped run Mr AP and Mrs MP's B&B business at the holiday cottage. She was paid £40 per week for this. Initially, no rent was charged for

the second house, but after discussions about the availability of HB, the parties agreed a rent of £300 per month as this was the maximum amount that would be paid by the local authority as HB. The parties did not enter into any form of written lease. In 2010, the parties' personal relationship began seriously to deteriorate. An altercation took place and by the date of judgment, they were no longer on speaking terms. Mr AP and Mrs MP claimed possession.

Sheriff George Jamieson found that there was a relationship of landlord and tenant between the parties. The tenancy was originally a contractual assured tenancy (H(S)A 1988 s12) and after termination by notice to quit became a statutory assured tenancy. Mr AP and Mrs MP were not entitled to recover possession under H(S)A 1988 Sch 5 Ground 1(b) ('at least one of them requires the house as his or his spouse's only or principal home') because the original intention to move into the second house altered when Mr AP had his heart attack. Sheriff Jamieson also rejected a claim for possession based on arrears of rent because the alleged arrears had not been quantified.

■ Eastmoor LLP v Bulman

[2014] ScotSC 85,
Sheriffdom of South Strathclyde Dumfries and Galloway at Dumfries,
5 June 2014

Mr Bulman had a short assured tenancy (H(S)A 1988). The tenancy agreement provided: 'If any of the events referred to in Grounds 8, 11, 12, 13, 14, 15 or 16 of Schedule 5 of the Housing (Scotland) Act 1988 occur, the landlord shall be entitled not only to recover from the tennant [sic] all loss or damage caused by the tenant which they may thereby sustain and all rents due and which may become due in addition may forthwith put an end to this lease and may commence proceedings for possession.' His landlord sought possession on the ground that he was more than three months in arrears of rent.

Sheriff George Jamieson formed the opinion that the action was incompetent and accordingly dismissed it. H(S)A 1988 s18(6)(b) provides that: 'The sheriff shall not make an order for possession of a house which is for the time being let on an assured tenancy … unless - (b) the terms of the tenancy make provision for it to be brought to an end on the ground in question' (judge's emphasis, para 7). He found that the clause in the agreement was poorly drafted and failed to comply with section 18 because it mentioned, but did not specify, what the grounds were and wrongly assigned to the landlord the right to 'forthwith' put the lease to an end if the grounds occurred. In any event, the lease could only be brought to an end within the contractual period on an order for possession granted by the sheriff under section 18.

ASSURED SHORTHOLD TENANCIES

Signature of agreement

■ Begum v Khan

[2014] EWCA Civ 752,
1 April 2014

The claimants sought repayment of a £1,000 deposit paid in respect of an assured shorthold tenancy allegedly signed by the parties in March 2010. The defendant argued that she had never granted an assured shorthold tenancy to the claimants and had never seen the tenancy agreement annexed to the claim form. An expert, who was jointly instructed, concluded that there was 'very strong evidence to support the proposition that [the defendant] signed the assured shorthold tenancy agreement' (para 5). HHJ Simon Brown QC held that, on the balance of probability, the defendant had indeed signed the tenancy agreement and had received £1,000 paid by the claimants pursuant to it.

Lewison LJ refused permission to appeal on the papers. The judge did not rely solely on the evidence of the handwriting expert, but on his own view of the defendant, having seen and heard her give evidence. The criticisms of the judge made in the skeleton argument had no real prospect of success. Laws LJ 'entirely agree[d] with Lewison LJ' and refused a renewed application for permission to appeal (para 16).

False assurances by agent

■ Kalganova v Matumorya and Mandazi

St Albans County Court,
7 July 2014[27]

The claimant entered into two agreements with a person purporting to be a lettings agent. The first was a 'Residential Lettings Service Agreement'. The second gave the agent a lease of the relevant property. The agent then entered into an agreement with the defendants under which they were given an assured shorthold tenancy of the property. The claimant discovered that various assurances made by the agent were (as she asserted) false. She sought to obtain possession of the property on the ground that the defendants were trespassers.

District Judge Cross dismissed the possession claim. He found that the claimant had been induced to enter into the lease agreement with the agent by fraud, but the agreement was effective to transfer to the agent an estate in the property giving rise to exclusive possession as a tenant and the right to have the place occupied by his clients. The claimant was not, therefore, entitled to possession of the property immediately. Although she was entitled to avoid the contract, it had not been avoided when the agent granted the sublease or when proceedings were issued and therefore the basis of the claim had not been made out. Even if the head lease had been determined, the defendants would have a valid assured shorthold tenancy, held from the claimant, by virtue of HA 1988 s18.

Harassment and eviction

Damages

■ Webb v Singh and Liberty Estate Agents Limited

Birmingham County Court,
18 July 2014[28]

Ms Webb was an assured shorthold tenant who lived with her four-year-old son. She visited a relative for three weeks and was away from the premises during this time. When she returned, late one evening, the locks had been changed and she was unable to gain access. She and her son had to spend four and a half months between relatives' houses until she was re-housed. She had eight months remaining under her tenancy agreement. When she contacted the agent to gain access to her belongings, he refused to give it unless she paid a 'storage fee'. She was therefore deprived of all her belongings, including furniture, clothes and children's items.

District Judge Mian concluded that both the landlord and the landlord's agent had worked together to unlawfully evict the tenant. They had done so in order to re-let the premises. The judge also found that the eviction caused great disruption to Ms Webb and her family. Her son lost his place at the local school and was without a school placement for some time. If it were not for her family, she would have been homeless. She was without any access to her belongings and had to re-build her life.

The judge awarded a total of £27,975 in damages, comprising:

- general damages of £16,875;
- special damages of £5,000;
- aggravated and exemplary damages of £4,000;
- damages under HA 2004 s214 of £1,575; and
- the return of the deposit: £525.

■ Whittingham v Uddin

Clerkenwell and Shoreditch County Court,
14 August 2014[29]

Mr Whittingham brought a claim for damages for breach of quiet enjoyment, harassment and disrepair against his landlord. For a period of up to three years, the premises suffered from defective windows throughout, water penetration in the bedroom, some internal leaks in the kitchen and WC and some external

disrepair. The landlord failed to carry out any repairs despite repeated complaints. In respect of the harassment, Mr Uddin took 'all the steps he could think of to make the tenant's life uncomfortable and as difficult as he could'. He did so in order to force the tenant to leave without having to go through the court process. Over a period of three years, he:

- inflated the rent (something that he was not entitled to do);
- made threats of violence;
- turned off the gas and electricity supply by damaging the pipes;
- frequently attended the premises (on occasions with others) and let himself in; and
- changed the locks to the front of the premises. The tenant was only let back in after other tenants gave him a key.

The police were called on a number of occasions but no action was taken. The landlord also sent a series of e-mails, some of which amounted to harassment.

District Judge Sterlini awarded a total of £26,650 plus interest. This included the following:

- £10,650 for disrepair. This comprised:
  – £1,800, being a 100 per cent reduction in the rent for a six-week period in November and December 2013 when the claimant had to move out because the premises were uninhabitable; and
  – a global award of £7,500 to reflect other items of disrepair over a period of three years (including a 17 per cent reduction in rent over this period);
- £1,000 for defective chattels that were provided under the terms of the tenancy agreement and that were broken but not repaired/replaced;
- £350 for the cost of plumbing repairs paid by the tenant;
- £10,000 general damages for harassment;
- £3,000 aggravated damages; and
- £3,000 exemplary damages.

FRAUD

Sentence for fraudulent right to buy applications

■ R v Hamza

Court of Appeal (Criminal Division), 21 August 2014

The defendants made applications to exercise the right to buy, which contained false representations that:

- the property was one applicant's sole or principal residence;
- the other applicant had resided at the property for the previous 12 months; and
- the applicants were sisters.

If the applications had been successful, the discount on the property would have been just under £50,000. However, the applications were refused because the local authority discovered that one defendant had been occupying a number of other addresses where she had been in receipt of benefits, and information from the passport service showed that the defendants were not related. They were both charged and pleaded guilty to fraud. The judge held that the fraud did not fit neatly into the Sentencing Council's definitive guideline on fraud but referred to the second category of confidence fraud, involving a degree of planning, in the range of £20,000 to £100,000, which gave a starting point of three years' custody for a £60,000 fraud and a range of two to five years' custody. He considered that after a trial the appropriate sentence would have been 30 months, and reduced that to 20 months for the guilty pleas.

The defendants' appeals were dismissed. The fraud was a serious one involving cheating the right to buy scheme. There was dishonesty from the outset, and planning. The offending easily passed the custody threshold. There was a significant aggravating feature of persistence in making two applications. Both defendants knew what they were doing and suspension of the sentences could not be justified, even considering the defendants' individual circumstances. The judge had found both defendants equally culpable and was right to do so. His sentencing adequately reflected their individual mitigation. It was correct that the fraud did not fit neatly within the sentencing guidelines. Looking at the matter overall the judge's starting point and the sentences were not manifestly excessive.

Deposits and director disqualification

■ Secretary of State for Business, Innovation and Skills v Weston and Williams

[2014] EWHC 2933 (Ch), 5 September 2014

Premier Places (Letting) Ltd and Premier Places (Redditch Lettings) Ltd were letting agents for residential properties. Mr Weston was the controlling director of both companies. Mr Williams was a director of a company that provided accountancy services to both companies. Mr Weston made applications for both companies to be registered with The Dispute Service (TDS) in accordance with the tenancy deposit provisions of HA 2004 Chapter 4. Those applications in turn required that the companies must (a) be regulated by an approved body; and (b) hold tenants' deposits in a ring-fenced client account. Mr Weston accordingly made applications for both companies to register with the National Approved Lettings Scheme (NALS). The statements made by Mr Weston in the applications to TDS and NALS, as to the way deposits were held, were false because deposits were mostly paid into the ordinary bank accounts of the companies and in effect used as working capital. Mr Williams procured the issue of the accountant's reports required for the two companies to be registered with NALS. He was not himself a chartered or certified accountant, and so falsified the signature of a suitably qualified member of his staff on those documents.

When the police investigated, they found that of a total of £521,550 received by way of tenants' deposits, only £74,351 was held in appropriate client accounts. The companies became insolvent and there was a shortfall due to depositors of at least £63,000. That was paid by insurers so that the loss fell on them and not the tenants. Both Mr Weston and Mr Williams pleaded guilty to fraud. Mr Weston accepted that his actions were deliberate and dishonest and that he knew they were in breach of the legislative requirements. Both men received suspended sentence orders. The sentencing judge decided not to impose a directors' disqualification order. Later, the secretary of state brought a claim in the High Court seeking disqualification orders against both men under Company Directors Disqualification Act 1986 s2.

HHJ David Cooke found that the jurisdiction of the civil court expressly given by section 2 must necessarily arise after a conviction. However, the question of whether a subsequent application to the civil court amounted to an abuse of process was a separate matter. In this case, the claim was no more than an attempt by the secretary of state to obtain a different decision from the civil court than was given on identical issues by the criminal court. The Crown Court had the issues placed before it and had made a positive decision to refuse an order. It was unfair that the defendants should be exposed to the same claim on two occasions. That unfairness was not relieved by the argument that the claim was being pursued by a different entity. An important consideration was the period that had elapsed since the offences without any evidence of further unfit conduct and the fact that risk to the public was reduced by both defendants' acceptance of their dishonesty. HHJ Cooke refused to make the orders sought.

DEFAMATION

■ Cooke v MGN Limited

[2014] EWHC 2831 (QB), 13 August 2014

Following the *Benefits Street* series of television programmes broadcast on Channel 4, the *Sunday Mirror* published an article with

the front page headline, 'MILLIONAIRE TORY CASHES IN ON TV BENEFITS STREET'. It also referred to Midland Heart Housing Association and its chief executive, Ruth Cooke. In a subsequent defamation action, Bean J determined the natural and ordinary meaning of words contained in the article.

HOUSING ALLOCATION

Local Government Ombudsman
Complaints
■ **Enfield LBC**
13 016 900,
12 May 2014
In April 2013, the complainant applied to join the council's housing register. It took the council until July 2013 to send him an assessment form, which he completed and returned. On 16 August 2013, the council decided that he was not eligible to join the register but it did not send out notice of that decision until 21 September. He asked for reasons, which were not sent until mid-October. He then applied for a review. That was not determined until January 2014 when the council agreed he was eligible to join the register.

On a complaint to the Local Government Ombudsman (LGO), the council accepted that the application had not been properly assessed and that its communications had not been as clear as they should have been. The ombudsman considered that there had also been delays. The council agreed to pay £250 compensation.

■ **Newham LBC**
13 016 745,
14 May 2014
In January 2013, the complainant bid for a property under the council's choice-based lettings scheme. She was the second highest bidder but was not invited to view because the council discovered that she had previously been a homeowner. It suspended her application for housing allocation pending further checks. It did not ask for information about the previous home until May 2013 and it took until July 2013 to make a decision to lift the suspension.

The LGO accepted that enquiries into eligibility had to be undertaken but decided that six months had been too long. However, no injustice requiring compensation had occurred because no appropriate properties were let in the period of suspension to applicants with lower priority than the complainant.

Scottish Public Services Ombudsman
Complaint
■ **Angus Council**
201304223,
June 2014
The council operated a scheme under which it made incentive payments to council tenants who were willing to transfer to smaller accommodation. The complainants successfully registered under that scheme at its inception. Much later, in June 2013, they moved to a smaller property and claimed a payment. The council declined payment on the basis that funding for the scheme had ended on 31 March 2013 and that the scheme did not re-start until new funding was secured in September 2013.

The Scottish Public Services Ombudsman found that while the decision made was strictly correct, the council had failed to inform directly those registered under the scheme that funding had ended. Recommendations made included:

■ a review of procedures to keep tenants informed; and
■ a review of the decision to decline payment in this case.

HOMELESSNESS

Applications
Local Government Ombudsman
Complaints
■ **Plymouth City Council**
13 014 046,
7 April 2014
The complainant (Mrs X) visited the council's offices to discuss her housing needs. She had no permanent accommodation and was staying temporarily with her daughter. She said her situation was very stressful as her son-in-law was not happy with her staying at his home. During the meeting, the council became concerned about Mrs X's benefit situation. It was aware she had previously been living abroad, knew she was not working, but was unsure if she was entitled to benefits. The council officer told Mrs X to go to the DWP to sort out her benefit issues and then come back to discuss her housing. Mrs X wrote to the council a few days later to complain about the meeting. She was dissatisfied with the way the council had handled her housing needs and she also complained about the rudeness of the officer. The council closed the case file, without contacting Mrs X or responding to her complaint, as she had not returned to discuss her housing situation further.

The LGO found that the council was at fault in not having treated Mrs X as seeking homelessness assistance and in failing to conduct enquiries into her application: HA 1996 s183. It was also at fault in not responding to the complaint. The council agreed to apologise and to pay Mrs X £1,150.

■ **Birmingham City Council**
13 017 548,
7 May 2014
The applicant first attended the council's offices on 5 February 2013 and gave the council reason to believe she was homeless: HA 1996 s183. She was not interviewed by a homeless officer for nearly a month. She provided the required documentation on the day after her interview with a homeless officer in March 2013 but a decision on her homelessness application was not reached until 13 May. There was no evidence that the council made further enquiries into the application after the March 2013 interview. Between March and May the applicant missed opportunities to bid for properties that she would have been allocated had her application been processed more quickly.

The LGO could see no reason why it had taken longer than the 33 working days mentioned in the Homelessness Code of Guidance para 6.16 to reach a decision. The delay caused the applicant to be in temporary accommodation for five months longer than she should have been.

The council agreed to pay £400 (£50 a month for the five months' delay and £150 for the applicant's time and trouble).

Interim accommodation
Local Government Ombudsman
Complaint
■ **Brent LBC**
13 008 940,
9 May 2014
In February 2013, the applicant, a vulnerable adult with mobility needs, approached the council saying he could not return to his parent's home. The council was satisfied that he may be homeless, eligible for assistance and in priority need. It secured interim accommodation: HA 1996 s188. The Care and Support Team referred him to floating support services but housing staff did not act on this referral. The council did not inspect the interim accommodation, which proved unsuitable for the applicant's needs given his disabilities. It took the council until May 2013 to make a decision on the application for homelessness assistance. The applicant lodged a complaint under the council's complaints procedure.

The council upheld his complaint because it recognised that it had not inspected the interim property offered, and agreed to change its policy so that it now inspects interim property offered to vulnerable applicants. It also upheld a complaint that it had failed to act quickly on the referral to Start Plus delaying his support

service. To remedy the injustice the council paid £350 and apologised. Although the ombudsman found further fault in the delay in making a decision on the application for homelessness assistance, no further recompense was recommended.

Priority need

Intentional homelessness

■ Haile v Waltham Forest LBC

UKSC 2014/0185,
30 July 2014

An appeal panel of the Supreme Court has granted the applicant permission to appeal from the decision of the Court of Appeal upholding a finding that she had become homeless intentionally: see [2014] EWCA Civ 792; July/August 2014 *Legal Action* 55. The appeal is currently listed to be heard on 29 January 2015.

■ Rodger v South Cambridgeshire DC

[2014] EWCA Civ 916,
2 May 2014

Mr Rodger was an assured shorthold tenant of a housing society flat. The tenancy agreement contained a service charges covenant. His HB only covered the core rent and he accrued arrears of the weekly charge for heating and lighting. Although he agreed to clear the arrears, he failed to do so. The society served a HA 1988 s21 notice and obtained a possession order. Mr Rodger applied to the council for homelessness assistance. A reviewing officer decided that he had become homeless intentionally. HHJ O'Brien dismissed an appeal from that decision.

Mr Rodger made a renewed application for permission to bring a second appeal, contending that the heating charge was higher than was justified; it had been unreasonably increased; it was based on estimated rather than actual consumption; and, accordingly, he had not been liable to pay it.

Aikens LJ refused permission to appeal. The points Mr Rodger wanted to pursue had not been taken in the possession claim or on an appeal from the possession order. There was 'no answer' to the findings of the reviewing officer that the failure to pay had led to the making of the possession order (para 16). The proposed appeal did not meet the threshold in CPR 52.13 for a second appeal.

■ Alasadi v Oxford City Council

Oxford County Court,
1 August 2014[30]

Mr Alasadi was a refugee from Syria and the tenant of a privately rented flat. The rent was paid from his HB. To obtain entry to the UK for his children and his wife, he had to sponsor them under immigration rules, which required him to show he had resources to accommodate them without use of public funds. He gave up the tenancy and moved in with his brother. That enabled him to increase his uncommitted income and stop his benefit claim. Later, when his family joined him, his brother asked him to leave.

The council decided that he had become homeless intentionally by giving up the flat. His case was that he had done the only thing open to him to get his family out of Syria. Although the council accepted his account of the facts, it considered that they were not relevant because the definition of intentional homelessness required a 'deliberate' act (HA 1996 s191) and Mr Alasadi had chosen to give up his flat.

Recorder Morgan held that the council erred in law in that it did not consider it was appropriate to engage with Mr Alasadi's arguments and it did not consider that Mr Alasadi's arguments were relevant to its decision. There was no express engagement with the important and relevant question of whether Mr Alasadi could, in reality, be said to have had a 'choice' or whether he acted out of necessity when leaving his home. Accordingly, the council did not properly consider whether he 'deliberately' left the flat.

Suitable accommodation

Local Government Ombudsman

Complaints

■ Croydon LBC

13 008 594,
17 March 2014

■ Croydon LBC

13 006 148,
9 April 2014

These two complaints were among several arising from the council's practice of placing homeless families in B&B or other non-self-contained accommodation for periods in excess of the statutory absolute maximum of six weeks: Homelessness (Suitability of Accommodation) (England) Order 2003 SI No 3326 articles 3 and 4. The council assured the LGO that the practice had since ceased – in May 2013.

In the first case, the ombudsman recommended payment of £200 per month for the period beyond the six-week maximum. In the second case, where the complainant was in shared accommodation for 14 weeks in all, the council agreed to make a payment of £250.

Comment: Westminster City Council had agreed with the LGO to pay £500 compensation for each family kept in B&B accommodation for longer than six weeks in 2011, with a further £83.33 payment for every subsequent week spent in such accommodation: 12 009 140; November 2013 *Legal Action* 33. However, contrary to assurances given to the ombudsman, the council was reported to have failed to pay the agreed amounts to all of the more than 400 entitled families: 'Delay in B&B compensation for homeless families', *Inside Housing*, 29 May 2014. The level of awards in these London cases contrasts with the recommendation of £2,000 for a Birmingham family which stayed in B&B accommodation for 17 weeks in all: see 12 001 546; July/August 2013 *Legal Action* 23.

■ Newham LBC

13 017 531,
3 June 2014

The council accepted that it owed the complainant the main housing duty under HA 1996 s193. In 2012, it provided him with temporary accommodation pursuant to that duty. He became seriously ill, was paralysed from the waist down, and confined to a wheelchair. His accommodation was on the second floor, with no lift, and so was inaccessible. He asked the council to move him to other suitable temporary accommodation. In August 2013, his solicitors activated the council's complaints procedure. The council failed to provide other temporary accommodation and the complainant remained in the same flat until he secured permanent accommodation in February 2014.

The LGO decided that the council was at fault. It was unable to show that its officers had done any work to find alternative temporary accommodation except for one instance triggered when the complaint finally reached Stage 3 of the council's procedures. An award of £2,100 compensation was recommended.

1 Available at: www.gov.uk/government/collections/local-authorities-removal-of-the-spare-room-subsidy.
2 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/339003/Statutory_Homelessness_1st_Quarter__Jan_-_March__2014_England_20140729.pdf.
3 Available at: www.housingjustice.org.uk/data/__resources/620/GLA-report-draft-2.pdf.
4 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/332839/StatutoryGuidanceFrontline.pdf.
5 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/341560/mortgage-landlord-possession-statistics-April-June-2014.pdf.
6 Available at: www.gov.uk/government/news/letting-agents-need-to-move-quickly-to-sign-up-to-redress-schemes.
7 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/341876/Factsheet_Landlords_Aug_14.pdf.
8 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/350662/Landlords_infographic_client_visual_v4.pdf.
9 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/350211/Landlords_scheme_-_draft_Code_of_Practice.pdf.
10 See: https://eforms.homeoffice.gov.uk/outreach/lcs-application.ofml.
11 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/331663/140

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14 Available at: www.gov.uk/government/news/100-million-fund-will-put-power-in-the-hands-of-tenants.
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26 Available at: www.gov.uk/cma-cases/residential-property-management-services.
27 Nichola Neophytou, solicitor, Foster & Foster and Tessa Buchanan, barrister, London.
28 Community Law Partnership, solicitors, Birmingham and Marina Sergides, barrister, London.
29 Hodge, Jones & Allen, solicitors and Marina Sergides, barrister, London.
30 Turpin & Miller, solicitors, Oxford and Marina Sergides, barrister, London.


Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. **The authors are grateful to the colleagues at notes 27–30 for transcripts or notes of judgments.**

review

The Children Act
Ian McEwan

A teacher at my secondary school used to re-read one Jane Austen book a year as a treat. Ian McEwan's new books (or novellas?) are my treat. There are only a few authors whose next book I eagerly await, and Ian McEwan is one of them. Incidentally, I am not worried about terminology: is this a book or a novella? Who cares: this book is one I read in a day. It is just over 220 pages in hardback. I was completely absorbed in the world portrayed.

Lengthy reviews have been written in most newspapers and magazines. Now I am not a family lawyer and, indeed, am not a practising solicitor any more, but I did carry out family work years ago and I know a fair bit about family law procedures. So, will family lawyers, or any lawyers, have to grit their teeth to read *The Children Act*? No, I don't think so.

The story is straightforward: a family judge, Fiona Maye, has to deal with a case where a teenage boy needs a blood transfusion which will probably save his life. His parents and the boy (he is almost 18) are refusing to allow the transfusion. In her private life, the judge has been told by her husband that he is either about to embark on (or has possibly started) an affair.

The judge decides to visit the boy to find out his true wishes before giving judgment and from her personal involvement a chain of events is set off. Fiona Maye is suffering emotionally from a decision she made a few weeks earlier about conjoined twins and if one should live. ('Blind luck, to arrive in the world with your properly formed parts in the right place, to be born to parents who were loving, not cruel, or to escape, by geographical or social accident, war or poverty. And therefore to find it so much easier to be virtuous'.

The book explores a number of difficult legal scenarios. Should a 'westernised' mum keep her children at a mixed-sex school when her estranged partner wants them schooled within a strict faith? There is a haunting reference to the case of a professional woman, who was convicted of causing the deaths of her two babies based on statistics quoted by a pathologist who turned out to be wrong, and her subsequent jailing, release and death. A case of alleged satanic abuse where children are removed from their families turns out to be untrue. No names are mentioned, so all are treated as fictional cases. But all lawyers, and most readers, will know which cases these scenarios are based on.

So, there are beautifully written summaries of some of the very difficult decisions that are made in the family courts. If you have ever tried to summarise a case to make it of interest, you will appreciate how well these are written. And how cleverly the author portrays the difficult decisions facing family judges, particularly when balancing parents' sincerely held beliefs about how children should be brought up against societal expectations.

The issues in this book are many, but all written so well. What do you say to your partner, who wants the excitement of an affair before his sixties, but wants the marriage to survive? Other reviews have commented on the childlessness of the couple, but that seemed to be very sensitively portrayed and of some importance, although not over played. I loved the minor characters: the judge's clerk, the nurses and the social worker, who is outwardly chaotic but perceptive.

It is a long time since Ian McEwan's 1978 novel, *The Cement Garden*, about how children manage when left without parents or any adult influence. I remember finding that book profoundly shocking on many levels. This book makes me want to re-read *The Cement Garden* because it seems that *The Children Act* is a more sophisticated exploration of how society treats children and how children's welfare can be considered in the complex world in which we live, where issues about how children should be raised are not subject to consensus.

Lawyers may argue that their client does have his/her child's welfare at heart, but the more you think about it the more you realise how complex section 1 the Children Act 1989 is. As set out at the start of the book: 'When a court determines any question with respect to … the upbringing of a child … the child's welfare shall be the court's paramount consideration'.

Carol Storer, director, Legal Aid Practitioners Group.

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