Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47; [2015] 1 WLR 3250.

But the judge held that the statutory references to care homes showed that the rules were concerned with 'the nature or function of the establishment not the services which are actually provided to any particular individual' and that reg 9 applied 'if the claimant is in an establishment which has the characteristics of a care home' (para 16). She distinguished the present case from *Mathieson*. In that case, a 'structural' problem was identified, namely that the evidence showed that due to the continuing care provided by parents and others in hospital, NHS provision in hospital did not overlap with the care component of DLA. By contrast, that structural problem did not apply in the present case, where the evidence about poor-quality care was only about a small minority of cases, and in any case did not mean that care needs were not being met. It followed that in the majority of cases payment of the care component to care home residents would result in double provision. At most, the evidence showed that the claimant's case was a 'hard case' (para 44) which did not invalidate a rule that, on the whole, was beneficial.

Simon Osborne is a welfare rights worker at Child Poverty Action Group. This is the first of a two-part article, the second of which will be published in April 2017 and will review case law in means-tested and non-means tested benefits (including right to reside) as well as tax credits.

Housing: recent developments

Nic Madge and Jan Luba QC present the latest political and legislative developments, and cases on human rights, possession, a decision to demolish and redevelop an estate, unlawful eviction, long leases, committal, housing allocation and homelessness.

Nic Madge

Jan Luba QC

Politics and legislation

Housing policy

On 7 February 2017, the UK government set out its housing policies for England in a new white paper: *Fixing our broken housing market* (Cm 9352, Department for Communities and Local Government (DCLG)). The paper commits the government to:

- implement the necessary deregulatory measures to allow housing associations to be classified as private sector bodies (page 51, para 3.26);
- consult early this year, ahead of bringing forward legislation as soon as parliamentary time allows, to ban letting agent fees to tenants (page 61, para 4.32);
- implement measures in the Housing and Planning Act 2016 that will introduce banning orders, to remove the worst landlords or agents from operating, and enable local councils to issue fines as well as prosecute (page 62, para 4.33);
- make the private rented sector more family-friendly by taking steps to promote longer tenancies on new-build rental homes (page 62, para 4.35); and
- consult on a range of measures to tackle all unfair and unreasonable abuses of leasehold (page 62, para 4.37).

In relation to letting fees, parliament has additionally been told that: 'We will consult in March/April on the detail of the ban and will consider the views of property agencies, landlords, tenants and other stakeholders before introducing legislation. Impact assessments will follow the consultation and support the detail of banning fees to tenants' (Lord Bourne, *Hansard* HL Debates Vol 778 col 330, 19 January 2017).

Homelessness Reduction Bill

The bill has now completed all its House of Commons stages. The House of Commons Library has produced a helpful summary of what occurred during detailed consideration at the Public Bill Committee stage: *Homelessness Reduction Bill 2016-17: report and committee stages* (Briefing Paper No CBP-7854, 10 February 2017). The bill has now moved to the House of Lords, where the second reading was, at the time of writing, scheduled for 24 February 2017.

Crown Tenancies Bill

This is a bill to provide that Crown tenancies may be assured tenancies for the purposes of the Housing Act (HA) 1988. The bill had its House of Commons second reading (without debate) on 3 February 2017. It has now been committed to a Public Bill Committee. A House of Commons Library note provides background information on the bill: *Crown Tenancies Bill [Bill 32 of 2016-17]* (Briefing Paper No CBP-7831, 16 February 2017).

Renters' Rights Bill

This is a bill to improve the rights of tenants. The bill completed its House of Lords committee stage on 18 November 2016. Report stage is to be scheduled. A House of Lords Library briefing note provides background information on the bill: *Renters' Rights Bill [HL]: Briefing for Lords stages* (Lords In Focus paper LIF-2016-0032, 6 June 2016).

Homelessness

Each local housing authority in England provides the DCLG with statistical returns recording its decisions on applications for homelessness assistance made under HA 1996 Pt 7. Historically, it has sometimes been difficult to turn up specific information relating to an individual council. The House of Commons Library has produced a new online facility in the form of a spreadsheet that enables advisers to find the statistics on homelessness and rough sleeping for individual local authorities in England: *Local authority homelessness statistics (England)* (Briefing Paper No CBP-7586, 26 January 2017).

Legal aid: duty schemes on possession days and face-to-face advice

The Ministry of Justice (MoJ) proposes to consolidate the current possession-day duty schemes, which it funds through the Legal Aid Agency (LAA), by allowing providers to bid for larger contracts covering multiple courts: *Housing Possession Court Duty Scheme: commissioning sustainable services* (MoJ, 20 January 2017). Consultation on the proposals closes on 17 March 2017. The Law Society (LS) president, Robert Bourns, said: 'We

see considerable problems in price-competitive tendering – the cheapest offering will not necessarily be the best. This could result in a race to the bottom which may impact on professional standards' ('Caution at competitive tendering for housing duty contracts', LS press release, 23 January 2017; see also page 9 of this issue and February 2017 *Legal Action* 4). Contracts under the new arrangements will begin from April 2018.

From the same date, the LAA will change its arrangements for commissioning face-to-face and other legal advice services: *Headline intentions for civil legal aid contracts from April 2018* (LAA, 20 January 2017). The LAA currently anticipates that the procurement process for 2018 contracts is likely to begin in April 2017 with new services starting on 1 April 2018.

Accommodation for asylum-seekers

The House of Commons Home Affairs Select Committee has published a report following an inquiry into the provision of accommodation for asylum-seekers: *Asylum accommodation. Twelfth report of session 2016–17* (HC 637, 31 January 2017). The report concludes that the current contract system of accommodation provision for asylum-seekers is not working and that major reforms are needed. The state of some accommodation provided by contractors is described as a 'disgrace'. The committee considers it 'shameful' that vulnerable people have been placed in such conditions.

Private rented housing and migrants

Landlords and agents letting to migrants who are not entitled to rent accommodation may be subject to civil penalties imposed by the secretary of state. There have been 106 penalties imposed (and no appeals): HC Written Answer 57105, 31 January 2017. The total amount of penalties collected up to 13 December 2016 is £29,575.31. Phase 1 of the scheme ran in the West Midlands from 1 December 2014 to 31 January 2016. Phase 2 started across England from 1 February 2016. During phase 1, 15 landlords were issued with civil penalties. In phase 2, 91 landlords have been issued with civil penalties. All were first-time penalties; 55 related to lodgers in private households and 51 related to occupiers in rented accommodation.

Rents in Social Housing

The Social Housing Rents (Exceptions and Miscellaneous Provisions) (Amendment) Regulations 2017 SI No 91 amend certain of the exceptions made by the principal regulations. Primarily, those apply to maximum rents for intermediate accommodation, almshouse accommodation, accommodation provided by co-operative housing associations or fully mutual housing associations or community land trusts, and for supported housing.

Human rights

Articles 6 and 8

- **Sagvolden v Norway**
  App No 21682/11,
  20 December 2016

In 2004, Ms Sagvolden acquired an apartment in a housing co-operative. Before she moved in, the board of the co-operative became aware that her son had caused serious problems in another housing co-operative, where she had previously been part owner and where her son had cohabited with her. He had been convicted of repeated offences of assault and frightening and disturbing behaviour committed against neighbours there. As a result, the co-operative informed her that it contemplated withdrawing its approval of her as a part owner. It asked her to give a written undertaking to the effect that her son would not move to the apartment. Her attorney gave such an assurance and approval was given. Contrary to the assurance, it appeared that her son did move into the property.

In 2009, the co-operative instituted court proceedings in the Oslo City Court against Ms Sagvolden to obtain an order of compulsory sale of her apartment. She argued that the case ought to be examined under an ordinary procedure, which, in principle, included an oral hearing. The court upheld the co-operative's request for an order of compulsory sale of the apartment, to be carried out by an official assistant. The High Court and the Supreme Court rejected her appeals. She complained to the European Court of Human Rights (ECtHR), under articles 6 (due to the absence of an oral hearing) and 8 of the European Convention on Human Rights (ECHR).

The ECtHR dismissed both complaints. As regards article 6, the court referred to *Jussila v Finland* App No 73053/01, 23 November 2006; ECHR 2006-XIV, which stated that '[a]n oral, and public, hearing constitutes a fundamental principle enshrined in Article 6' (*Jussila*, para 40) but that 'the obligation to hold a hearing is not absolute … There may be proceedings in which an oral hearing may not be required: for example where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials' (*Jussila*, para 41). '[N]ational authorities may have regard to the demands of efficiency and economy … the systematic holding of hearings [can] be an obstacle to the particular diligence required in social security cases and ultimately prevent compliance with the reasonable-time requirement of article 6(1) … [T]he character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court, not to the frequency of such situations … The overarching principle of fairness embodied in article 6 is, as always, the key consideration' (*Jussila*, para 42). '[T]he fact that proceedings are of considerable personal significance to the applicant, as in certain social insurance or benefit cases, is not decisive for the necessity of a hearing' (*Jussila*, para 44).

In this case, there was nothing to indicate that the admissibility of the housing co-operative's suit could not be adequately dealt with on the basis of the written case-file. The facts relating to the son's behaviour had been judicially established in the previous criminal proceedings. The domestic courts did not need to determine any issue of fact raised by Ms Sagvolden in the proceedings concerning the order of compulsory sale. The national courts had regard to the interests at stake for Ms Sagvolden on account of her old age in maintaining her ownership in the flat in question. They were entitled to consider that their personal significance for her were not decisive for the necessity of a hearing. The claim was not capable of giving rise to any issue of fact or of law that was of such a nature as to require an oral hearing. The absence of an oral hearing did not render the proceedings unfair for the purposes of article 6.

As regards article 8, the order of compulsory sale gave rise to an interference with Ms Sagvolden's right to respect for her home. The measure was in accordance with law and pursued the legitimate aim of protecting the rights and freedoms of others. In considering whether it was necessary, and after referring to *Connors v UK* App No 66746/01, 27 May 2004, paras 81–84, the court reiterated that a margin of appreciation must, inevitably, be left to the national authorities. The lawfulness of the decision to order compulsory sale of the flat was examined in detail by both the City Court and the High Court. Those courts had particular regard to other neighbours and users and Ms Sagvolden's interest in being able to stay with her son in the dwelling. She had the possibility of the reasonableness and the proportionality of the measure being reviewed in the light of the principles under article 8. The court was satisfied that Ms Sagvolden's article 8 interests were adequately safeguarded in the national decision-making process and that, in reaching the decision which they did, the competent national authorities acted within their margin of appreciation.

Article 8

- **Akerman v Richmond LBC**
  [2017] EWHC 84 (Admin),
  27 January 2017

Mr Akerman was convicted in the magistrates' court of four offences of mooring his boat, Longwood Lady, to land owned by Richmond LBC for more than one hour in any 24 consecutive hours, contrary to byelaws made under Local Government Act 1972 s235. He accepted that there was neither an emergency nor any other unavoidable cause for overstaying, but said that he had lived in the boat for nine years and could not move it because the engine was broken and he could not afford to fix it. He appealed by way of case stated, contending that the byelaw was unlawful at common law because it was made for an improper purpose, was irrational and breached his article 8 rights.

The appeal was dismissed. Beatson LJ stated that the district judge (magistrates' court) did not err in deciding that the byelaws were 'good' law and were neither irrational nor illegal. They were not made for an improper purpose. It was legitimate for the council to regulate the way in which Mr Akerman and others occupied the river bank, which was land held for the benefit of the whole community. Secondly, although he 'incline[d] to the view' that the district judge erred in finding that article 8 was not engaged, she did not err in concluding that the byelaws were a proportionate and necessary step to ensure 'good rule and government and the suppression of nuisance in the borough' (para 44). He observed that the fact that Mr Akerman had lived on the boat for nine years meant that it was not possible simply to state that article 8 was not engaged because he could move the boat and because he was a trespasser. However, the interference with the position of boat users was proportionate. He continued: '[I]t is

clear from the authorities that only in very exceptional cases can a person succeed in raising an arguable case that an interference with a right under article 8 is disproportionate where the individual has no right under domestic law to remain in possession of property: see Lord Hodge in *R (N) v Lewisham LBC* [[2014] UKSC 62] at [65] and the cases he cited, in particular *Manchester City Council v Pinnock* [2010] UKSC 45 … The authorities show that a trespasser will only be able to trump the rights of an owner or property by invoking article 8 in an exceptional case' (paras 41 and 43).

Article 1 of Protocol No 1

- **Tomina v Russia**
  App No 20578/08,
  1 December 2016

In 1993, a state-owned enterprise was privatised and reorganised into a joint-stock limited liability company. Separate rooms in a dormitory building that it owned were resold to third parties. Later, a court found that the privatisation was null and void. The district prosecutor brought an action against the company and the owners of the rooms. The court recognised that the owners of the rooms were bona fide purchasers, but ordered that the title to the building be transferred to the municipality. The municipality, the true owner of the building, had not authorised the purchase of the rooms. The municipality had lost possession against its will and could recover its property from bona fide purchasers. The owners of the rooms complained that they had been deprived of their property in violation of article 1 of Protocol No 1.

In the ECtHR, it was common ground that the rooms constituted the applicants' possessions and that the revocation of their title amounted to an interference with their rights set out in article 1 of Protocol No 1. The court considered that the repossession of the rooms by the municipal authorities constituted a disproportionate burden on the applicants. The applicants were deprived of ownership without compensation or provision of replacement premises from the state. The conditions under which the property was recovered from them imposed an individual and excessive burden on them. The authorities had failed to strike a fair balance between the demands of the public interest on the one hand and the applicants' right to peaceful enjoyment of their possessions on the other. There was, accordingly, a violation of article 1 of Protocol No 1. The court considered that the most appropriate form of redress would be the restoration of the applicants' title to the rooms.

- **Riedel and others v Slovakia**
  App Nos 44218/07, 54831/07, 33176/08 and 47150/08,
  10 January 2017

A number of landlords alleged that a Slovakian rent-control scheme had imposed restrictions on their right to the peaceful enjoyment of their possessions, in breach of article 1 of Protocol No 1.

After referring to *Bittó and others v Slovakia* App No 30255/09, 28 January 2014; April 2014 *Legal Action* 24 (merits) and 7 July 2015 (just satisfaction), the ECtHR found that: (i) the rent-control scheme had amounted to an interference with their property; (ii) that interference had constituted a means of state control of the use of property to be examined under the second paragraph of article 1 of Protocol No 1; (iii) it had been 'lawful'; (iv) it had pursued a legitimate social policy aim; and (v) it had been 'in accordance with the general interest'; but (vi) in its implementation, the authorities had failed to strike the requisite fair balance between the general interests of the community and the protection of the applicants' right of property, as a result of which there was a violation of article 1 of Protocol No 1. There was no reason to distinguish these cases from *Bittó*. The court made awards of pecuniary and non-pecuniary damage ranging from €1,100 to €221,700.

- **Kołpaczewska v Poland**
  App No 10872/11,
  12 January 2017

In 2006, in proceedings concerning division of marital assets, the Warsaw District Court granted Ms Kołpaczewska the right to the marital flat. It ordered her to pay her ex-husband the equivalent of approximately €9,835, corresponding to half of the value of the flat. It also held that her ex-husband had a right to social accommodation and suspended his obligation to leave the flat until the municipality provided him with social accommodation. Ms Kołpaczewska claimed compensation for the municipality's failure to provide social accommodation to her ex-husband. Her claim was dismissed. Her ex-husband did not move out of the flat until 2014. She complained to the ECtHR under article 1 of Protocol No 1 that she had been unable to use her flat for a long time owing to the state authorities' failure to enforce an eviction order against her former husband.

The ECtHR found the application was inadmissible for failure to exhaust domestic remedies in accordance with article 35. Ms Kołpaczewska should have brought an action against the municipality before lodging her application with the court.

- **Maempel v Malta**
  App No 3356/15,
  5 December 2016

The Director of Social Housing requisitioned property owned by Mr and Mrs Maempel. The property was allocated to Mr and Ms A. They offered an annual rent of €279.52. Mr and Mrs Maempel did not accept this rent because it was too insignificant when compared with the rental value. They complained to the ECtHR, alleging a breach of article 1 of Protocol No 1.

The ECtHR has asked the parties:

1. Was there a violation of article 1 of Protocol No 1, in connection with the requisition order?
2. Did Mr and Mrs Maempel have at their disposal an effective domestic remedy for their complaint as required by article 13?

- **Dubovets v Russia**
  App No 30423/16,
  14 December 2016

A court ordered the eviction of Mr Dubovets from a flat that he had bought because the vendor had obtained title to the flat fraudulently. Mr Dubovets complained to the ECtHR of breaches of article 8 and article 1 of Protocol No 1.

The ECtHR has asked the parties:

1. Was Mr Dubovets deprived of his possessions in the public interest, in accordance with the conditions provided for by law and in accordance with the principles of international law? If so, was that deprivation necessary to control the use of property in the general interest?
2. Has there been an interference with his right to respect for his home, within the meaning of article 8? If so, was that interference in accordance with the law and necessary in terms of article 8?
3. Did he bring a civil action seeking damages resulting from the annulment of the sale of the flat? If so, what was the outcome of the proceedings?

Possession claims

Suspended possession orders

- **City West Housing Trust v Massey**
  UKSC 2016/0160,
  2 November 2016

The Supreme Court has refused permission to appeal against the Court of Appeal's decision ([2016] EWCA Civ 704; September 2016 *Legal Action* 34) dismissing the landlords' appeals against the making of suspended possession orders, because the application did not raise an arguable point of law.

Ground 15A

- **Newham LBC v Berhane***
  County Court at Bow,
  5 January 2017

In 1993, Mr Berhane's mother was granted a secure tenancy of a three-bedroom house. He and his two brothers were named as occupiers of the property on the tenancy agreement. When his mother died in 2014, he succeeded to the tenancy. Newham sought possession on the basis of rent arrears and HA 1985 Sch 2 Ground 15A (dwelling-house more extensive than reasonably required). Newham offered alternative accommodation for Mr Berhane and one brother in a two-bedroom flat.

Deputy District Judge Root found that although the alternative accommodation was physically suitable, the fact that it was offered on a flexible tenancy made it unsuitable. Further, it was not reasonable to make an order for possession as Mr Berhane had lived in the property for 23 out of his 29 years. It was his family home and he had a strong emotional attachment to it. Also, his brother had significant mental health problems. The claim for possession was dismissed.

Decision to demolish and redevelop estate

- **R (Plant) v Lambeth LBC**
  [2016] EWHC 3324 (Admin),
  21 December 2016

Mr Plant was the secure tenant of a flat on the Cressingham Gardens Estate, which comprised 360 dwellings. Lambeth consulted tenants and owner-occupiers about the redevelopment of the estate. A successful claim for judicial review was brought in respect of its decision to change the basis of the consultation exercise before it had been completed. Elisabeth Laing J quashed that decision (*R (Bokrosova) v Lambeth LBC* [2015] EWHC 3386 (Admin); [2016] PTSR 355). After further consultation, Lambeth's cabinet decided to authorise the redevelopment of the entire estate. That involved the displacement of all existing tenants and owners and the demolition of their homes prior to redevelopment. Mr Plant challenged both the further consultation process and the decision by judicial review on a number of grounds.

Holgate J rejected all the grounds of challenge. After considering HA 1985 s105, he concluded that

the consultation exercise and the evaluation and weighing of the pros and cons of the proposed options were not unlawful. The decisions challenged were taken by members of the cabinet, who would be familiar with the council's circumstances, including its financial structure, the council's housing estates and their condition and the issues faced by the council and its residents, including the crisis caused by a serious and longstanding shortage of housing. The cabinet members also drew upon the specialist expertise of the officers advising them. A wide margin of discretion should be accorded to Lambeth in its management of the borough's housing estates.

As regards ECHR article 1 of Protocol No 1, Holgate J noted that 'it is an intrinsic feature of a secure tenancy that it is granted subject to statutory termination on a number of grounds (and not merely redevelopment) which, by definition, will cause the secure tenant to lose the *potentiality* of choosing to rely upon a right to buy his home at some point in the future' (para 184, emphasis in original). '[T]he "possession" which is held by a secure tenant does not include an absolute right to exercise a right to buy, irrespective of whether he or she continues to have a secure tenancy of that dwelling. Instead, the potential exercise of that statutory right to buy is conditional upon the tenant continuing to hold the secure tenancy of his or her property. That tenancy may be brought to an end by the operation of the 1985 Act, which includes the redevelopment ground' (para 185).

After referring to *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40; [2004] 1 AC 816, he continued: 'The order for possession made under ground 10 is not analogous to either a compulsory purchase order or an order for division of property in divorce proceedings. There the property rights in question already exist. Here the secure tenants have not yet exercised the statutory provisions which enable them to own their properties. These statutory provisions, which insist upon the continuing subsistence of the secure tenancy if they are to be relied upon, subjected the tenant's rights *from the outset of the secure tenancy* to restrictions or qualifications which might subsequently be enforced against him. Accordingly, A1P1 is not engaged. For these reasons the present case is indistinguishable from authorities such as *Kay v Lambeth LBC* [2005] QB 352 ... and *Austin v Southwark LBC* [2010] HLR 1' (para 187, emphasis in original).

Unlawful eviction

- **O'Tudor v Okonkwo**
  [2016] EWHC 3434 (QB),
  26 August 2016

In a claim for damages arising out of a wrongful eviction, judgment on liability was given in default of compliance with court orders. A disposal hearing was listed to assess damages. The defendant asked for it to be postponed as she had hospital appointments either side of the date, although not on the actual date itself. The court refused that application. HHJ Collender QC awarded damages totalling £35,000 to the family of five persons who had been evicted. The defendant applied to set aside judgment. HHJ Collender QC refused that application. The defendant sought permission to appeal.

May J refused a renewed application. Having regard to Civil Procedure Rules (CPR) Pt 39 and *TBO Investments Ltd v Mohun-Smith* [2016] EWCA Civ 403, there was no justification for interfering with the judge's discretion. He was entitled to conclude that the defendant did not have a good reason for not attending. She did not have an appointment on the actual day of the hearing. She could have attended with reasonable adjustments, or could have attended by a friend or by counsel. It was not a hearing that absolutely required her to be there in person.

Long leases

Service charges

- **Hounslow LBC v Waaler**
  [2017] EWCA Civ 45,
  2 February 2017

Hounslow was the freehold owner of a block of flats. The residents comprised a mixture of secure tenants and long leaseholders who had exercised the right to buy. Miss Waaler was a long leaseholder. Her lease required her to make a contribution towards the cost of repairs and improvements made by Hounslow. Hounslow decided to carry out major works, including the wholesale replacement of windows. The First-tier Tribunal (FTT) and the Upper Tribunal held that such works were improvements and as such Hounslow had a discretion as to whether or not it carried out the works. The Upper Tribunal held that where a landlord has a discretion as to whether to undertake works, it must have regard to the financial impact of the works on the tenants and because Hounslow had not done so the full costs of the works were not recoverable. Hounslow appealed to the Court of Appeal.

The Court of Appeal dismissed the appeal. The exercise of a contractual discretion is constrained by an implied term that the decision-making process be lawful and rational in the public law sense that: the decision is made rationally (as well as in good faith) and consistently with its contractual purpose; and the result is not so outrageous that no reasonable decision-maker could have reached it. In the context of a lease that gives a landlord the right to carry out, and charge for, an improvement, the rationality test applies to both the decision to carry out works and the method of doing so. It follows that a decision by a landlord to incur costs that is not rational means such costs are not recoverable under a service charge recovery clause.

However, the fact that a decision is rational does not of itself mean that the costs of works of repair or improvement have been reasonably incurred within the meaning of Landlord and Tenant Act 1985 s19. Whether costs have been reasonably incurred is not simply a question of process: it is also a question of outcome. Accordingly, even if the landlord's decision to carry out the works was reasonable, the costs of the works may be unreasonably incurred if they are unreasonable in amount, ie, greater than the market cost. That said, where the landlord is faced with a choice between different methods of resolving a defect within the building, there may be many outcomes, each of which is reasonable. In such circumstances, the landlord may recover the costs of the works even if it does not adopt the cheapest option.

Whether a decision to carry out the works is reasonable will depend on a number of factors that include, in every case where there is an obligation to consult, the views of the tenants that have to pay for them. The landlord must conscientiously consider the tenants' observations and give them due weight, depending on the nature and cogency of the observations, before making the final decision. That does not mean the landlord's decision must always be in accordance with the tenants' views, provided that such views are taken into account and the final decision is a reasonable one. This test is the same regardless of whether the cost relates to an improvement or repair. However, different considerations as to reasonableness will be relevant depending on the type of work that the cost relates to. In some cases, the views and interest of the tenants and the financial impact upon them will be highly material to whether a cost is reasonable (eg, a purely aesthetic improvement), while in others they will be less important (eg, an improvement to eradicate an existing design defect that hampers the use of the building). However, a landlord is not required to investigate the means of each tenant; rather, it must make itself aware of the types of people who are tenants in a particular block or on a particular estate.

- **Southwark LBC v Various Lessees of St Saviours Estate**
  [2017] UKUT 10 (LC),
  12 January 2017

The 80 respondents were long leaseholders of flats situated within 10 blocks of flats on the St Saviours Estate in Southwark. The council owned the freehold of each block. Each lease obliged the authority, among other things, to keep the 10 blocks of flats in repair. This included the front entrance doors and all other parts of the building retained by the authority, eg, communal entrance doors, refuse chutes and cupboard doors. Between March 2013 and April 2014, the authority carried out major works to each block, which included the replacement of the lessees' front entrance doors, most of the communal doors and other works to improve the fire resistance of the blocks such as replacing cupboard doors and refuse hatches.

In advance of the works, the authority carried out fire risk assessments of each block. Those assessments recommended the replacement of a small number of front entrance and communal doors that no longer complied with fire safety requirements. Generally, those assessments recommended that further assessments of each door should be undertaken before any major works programme was carried out. The authority's contractors did not, in advance of carrying out the works, undertake a survey of the condition of each door; instead, a surveyor took a photograph of each front entrance door. The authority subsequently sought to recover the costs of those works from each of the respondent lessees as a service charge and the lessees sought a determination that the sums were not payable.

The FTT rejected the evidence of the authority's surveyor as he was not an expert in fire resistance. As such, other than where the fire risk assessments had recommended replacement, there was no evidence of the front entrance doors being in disrepair. The FTT therefore decided that the cost of replacing each front entrance door was not recoverable other than where the authority's own fire risk assessments had recommended a door's replacement. The FTT also decided that the authority was limited to recovering 50 per cent of the costs of the works

in respect of the other fire resistance measures, as while it was not disputed that some of the doors, cupboards and refuse chutes had been in a poor condition, some of the works may not have been needed if a full survey had been undertaken.

HHJ Gerald, sitting in the Upper Tribunal, dismissed an appeal. The FTT had accepted that a door which had deteriorated from its original condition and was no longer able to provide fire resistance for a period of 20 minutes was in disrepair. It had therefore identified the correct test. The FTT had then correctly asked itself whether there was any evidence that the condition of the front entrance doors was such that they were no longer able to provide equivalent fire resistance. It had been entitled to reject the evidence of the authority's surveyor and find that, other than that set out in the fire risk assessments, there was not. The evidence of the authority's surveyor that the doors were in disrepair was inadequate as he had not assessed the fire resistance of any of the doors and did not have the expertise, knowledge or experience to do so. The fact that the respondents had not adduced any evidence of the condition of the doors was immaterial; the FTT was entitled to decide the question on the evidence, whatever its source, before it. This was not a case where it was necessary to resort to the burden of proof, but had there been no evidence of disrepair the consequence would have been that the cost of replacing all of the doors would not have been recoverable.

As to the fire resistance measures, the FTT had been entitled to adopt a broad brush approach; the figure of 50 per cent had not been plucked out of thin air but based on an assessment of the evidence that was before the FTT.

- **Tedworth North Management Limited v Miller**
  [2016] UKUT 522 (LC),
  25 November 2016

Landlords incurred costs in supplying and fitting metal sub-frames as part of a programme of replacement of windows in 28 of the 49 flats in a building. The FTT found that the leaseholders were not obliged to contribute towards those costs because the former timber sub-frames that surrounded the original metal windows, and those windows themselves, had not been in a state which justified their replacement at all. The FTT found that no part of the cost of the work fell within the scope of the landlords' repairing covenant or the leaseholders' obligation to contribute to it through the service charge. The landlords appealed.

Martin Rodger QC, Deputy Chamber President, dismissed the principal grounds of appeal. He noted the principles that: (i) whether it was appropriate to look at the windows as a whole, or to consider how the covenant applied to individual windows, was a question of common sense having regard to the facts of each individual case; and (ii) where there is an obligation to repair but a choice between different methods of repair, provided it behaves reasonably, the covenanting party may choose which method to adopt and the paying party is not entitled to insist on the more limited or cheaper works being preferred.

However, he did not accept the landlords' central submission that the presence of any amount of disrepair, including simply a need for routine periodic redecoration and maintenance, was enough to bring a programme of wholesale window and sub-frame replacement within the repairing covenant. That approach paid little attention to the physical condition of the building components under consideration and relied on 'too legalistic an analysis of what should be a practical assessment' (para 32). He continued: 'A common-sense approach is required when considering what remedial work is appropriate to remedy a state of disrepair. If the greater part of a roof is in a deteriorated condition, the fact that some areas are undamaged would not of itself prevent complete replacement from being repair; on the other hand, if the only deterioration was localised to a small area and can adequately be dealt with by a localised repair, the whole roof could not be said to be in disrepair such as to require or justify its complete replacement' (para 33). 'The general principle is that the work which the landlord is obliged or entitled to carry out is limited to that which is reasonably required to remedy the defect' (para 36). However, the judge allowed one ground of appeal, which turned on the question of whether or not the managing agents' fees were incurred under a qualifying long-term agreement.

Anti-social behaviour

Committal

- **Christie v Birmingham City Council**
  [2016] EWCA Civ 1339,
  14 December 2016

Contrary to the terms of an interim gang injunction, made under Policing and Crime Act 2009 s34 with a power of arrest (s40), Mr Christie was found in possession of a small quantity of cannabis and within a prohibited area. For those breaches, HHJ McKenna imposed concurrent sentences of 28 days' and 56 days' imprisonment suspended for the remainder of the period of the injunction ([2016] EW Misc B9 (CC); May 2016 *Legal Action* 41). Mr Christie appealed, arguing that any period of suspension should be for a fixed period not exceeding two years.

The Court of Appeal dismissed the appeal. After referring to CPR 81.29 and *Griffin v Griffin* [2000] 2 FLR 44, Hallett LJ stated that 'there is a power to suspend a committal order for an indefinite period, albeit in many circumstances it may be considered inappropriate to do so' (para 26). The order as made by the trial judge was not unlawful. The term of suspension did not have to be fixed with any greater degree of certainty. Further, the judge had not misdirected himself with regards identification evidence and a total of 56 days for repeated breaches could not be described as excessive.

- **Birmingham City Council v Robinson**
  County Court at Birmingham,
  [2016] EW Misc B24 (CC),
  26 September 2016

The defendant admitted two breaches of an injunction not to enter a particular area. He was aged 23 and had never been to prison before.

HHJ Worster stated that the sentence for the two breaches would have been three months' immediate imprisonment, but for the defendant's plea. He reduced that to two months to take account of his plea and added 14 days in respect of a suspended sentence passed in June 2016, but deducted two days for nights spent in custody following his arrest.

- **Bristol City Council v Cubb**
  County Court at Bristol,
  [2016] EW Misc B33 (CC),
  14 October 2016

Ms Cubb gave an undertaking not to enter the internal communal areas of a block of flats or the grassed areas of the block. She breached the undertaking on over a dozen occasions, and caused alarm and distress to a number of elderly and vulnerable residents.

On an application to commit for contempt, Deputy District Judge Hatvany stated that, given previous warnings which had been given and ignored, it was not appropriate to suspend. The defendant was 'a lady who seems to regard herself as beyond the reach of the court and, given the distress and alarm, needs to be brought to account' (para 6). Looking at the sentencing guidelines, there was a 'lesser degree of harassment, alarm or distress' (para 7). Matters had improved since the earlier hearings. He imprisoned the defendant for six weeks, the sentence being concurrent in respect of each breach.

Housing allocation

- **R (Aslamie) v London & Quadrant Housing Trust**
  [2016] EWHC 2396 (Admin),
  27 July 2016

The claimant was the tenant of a one-bedroom flat. He applied to the trust for permission to enter into a mutual exchange with another tenant of the trust who had a two-bedroom property. The claimant and his partner indicated that they wished to adopt a child in the future but they had no dependants at the date of application. The trust refused the application on the basis that the claimant's current household would be under-occupying the two-bedroom property.

HHJ McKenna, sitting as a High Court judge, refused permission to apply for a judicial review of that decision. The trust had applied its written policies and had not been 'obliged to grant consent by reference to the future intentions of the claimant' (para 1.5). Its decision had been a rational one. As the proposed exchange partner had indicated that, in any event, he did not propose to proceed with the exchange, the claim was certified as wholly without merit. The claimant was ordered to pay costs of £13,454.50.

- **R (Edward) v Greenwich LBC**
  [2016] EWHC 3410 (Admin),
  9 November 2016

Mr Edward applied to the council for an allocation of social housing. He had two criminal convictions relating to drugs that had resulted in lengthy custodial sentences. On 23 August 2016, the council wrote to him to indicate that a past conviction would not be taken into account in its decision-making. However, on 18 October 2016 he was notified that he had been excluded from the housing register because of his convictions. He brought a claim for judicial review based on a failure to take account of a legitimate expectation.

HHJ Wall QC, sitting as a High Court judge, dismissed the claim. He stated that:

As far as the claim of legitimate expectation is concerned, it is arguable whether that was a clear representation or not as it referred to [one] conviction, whereas in fact there were two significant convictions. But when one looks at whether there is a public law remedy for a legitimate expectation when it arises, one must look at the way in which the claimant acted in reliance upon that expectation. There was nothing that

he did in this case that was in reliance upon it and indeed it is difficult, if not impossible, to think of anything that he could have done in reliance upon the expectation that he claims was created by the letter of 23 August (para 20).

Homelessness

Applications

- **R (Kensington and Chelsea RLBC) v Ealing LBC**
  [2017] EWHC 24 (Admin),
  13 January 2017

Ms Hacene-Blidi was a private sector tenant. When her landlord began a possession claim against her, she applied to Ealing for homelessness assistance. It accepted that she was owed the main housing duty (HA 1996 s193) and made her an offer of suitable accommodation. On her refusal of that offer, it treated its duty as discharged.

The landlord obtained an order for possession. Ms Hacene-Blidi applied to Kensington and Chelsea. It decided that she was homeless, in priority need and had not become intentionally homeless. It made a referral to Ealing. That council accepted that all the conditions for a referral were satisfied but declined to provide accommodation or accept any further duty on the basis that the duty had already been discharged.

HHJ Walden-Smith, sitting as a High Court judge, quashed Ealing's decision. The eviction of the tenant represented a change of relevant facts between the first and second applications. The second application triggered new duties. The fact that the second application had been made to Kensington rather than Ealing was immaterial. A fresh duty arose and, since Ealing accepted that the conditions for referral were made out, it was bound to accept the referral and to discharge the new duty that Kensington had found was owed.

Suitable accommodation

- **Haque v Hackney LBC**
  [2017] EWCA Civ 4,
  17 January 2017

The council accepted that Mr Haque was homeless and had a priority need on account of his physical and mental ill health. Pursuant to the main housing duty, the council provided him with a room in a hostel (Room 315). A reviewing officer decided that the accommodation was suitable.

A circuit judge allowed an appeal on the single ground that the reviewing officer's decision failed to demonstrate a robust engagement with the public sector equality duty (PSED: Equality Act (EA) 2010 s149) or give sufficient reasons to indicate how the reviewing officer had applied it to the particular case.

The Court of Appeal allowed an appeal and gave the following guidance as to what the PSED would require in the context of a 'suitability' dispute. Briggs LJ stated:

In my judgment, it required the following:

i) A recognition that Mr Haque suffered from a physical or mental impairment having a substantial and long term adverse effect on his ability to carry out normal day to day activities; ie that he was disabled within the meaning of EA s6, and therefore had a protected characteristic.

ii) A focus upon the specific aspects of his impairments, to the extent relevant to the suitability of Room 315 as accommodation for him.

iii) A focus upon the consequences of his impairments, both in terms of the disadvantages which he might suffer in using Room 315 as his accommodation, by comparison with persons without those impairments (see s149(3)(a)).

iv) A focus upon his particular needs in relation to accommodation arising from those impairments, by comparison with the needs of persons without such impairments, and the extent to which Room 315 met those particular needs: see s149(3)(b) and (4).

v) A recognition that Mr Haque's particular needs arising from those impairments might require him to be treated more favourably in terms of the provision of accommodation than other persons not suffering from disability or other protected characteristics: see s149(6).

vi) A review of the suitability of Room 315 as accommodation for Mr Haque which paid due regard to those matters (para 43).

It was not even necessary for a reviewing officer to refer to the PSED expressly because:

In a case such as the present, where all the applicant's criticisms of the adequacy of his accommodation derive from precisely identified aspects of his disabilities, and from their alleged consequences, it seems to me that, adapting Lord Neuberger's words in paragraph 79 of Hotak [v Southwark LBC *[2015] UKSC 30], a conscientious reviewing officer considering those objections in good faith and in a focussed manner would be likely to comply with the PSED even if unaware of its existence as a separate duty, or of the terms of s149* (para 47).

McCombe LJ added that:

... the six points raised in paragraph 43 above may well be of help in cases of this type in enabling a decision-maker to demonstrate transparently what consideration that he/she has given to the particular features of the PSED arising in any individual case. It is reassuring to a court to see that a decision-maker has looked at specific aspects of the duty and can say what his/her response to it is. I am far from suggesting a 'tick box' approach to these matters, but some particularity in the written decision, demonstrating due regard to the relevant aspects of the duty, can avoid litigation of the present character (para 63).

Powers to assist the homeless

- **R (Edward) v Greenwich LBC**
  [2016] EWHC 3410 (Admin),
  9 November 2016

Mr Edward sought homelessness assistance. He claimed that even if he did not have a priority need, he had not become homeless intentionally. As a result, the council had a power but not a duty to secure accommodation for him: HA 1996 s192(3). He complained that the council had no published policy as to when and in what circumstances it would or would not exercise its powers.

HHJ Wall QC, sitting as a High Court judge, dismissed a claim for judicial review. He stated that:

In my judgment, there is no legal requirement for the defendant to have such a policy. The statute does not place upon the local authority the need to provide one and there is no other basis for that assertion in public law of which I am aware. Of course, when considering whether to exercise the power, the local authority must exercise their discretion in line with normal public law principles of fairness. But there is no basis in this case for thinking that they have not done so (para 13).

Appeals

- **Lopes v Croydon LBC**
  [2017] EWHC 33 (QB),
  18 January 2017

Ms Lopes, her partner and her two children lived in Portugal, in her mother-in-law's property. She came to the UK to look for work and applied for homelessness assistance. The council decided that she was not homeless because she had accommodation available to her at the property in Portugal. In the course of two interviews, she did not say that her mother-in-law had asked her to leave. The council's decision was upheld on review and Ms Lopes appealed.

In the course of the appeal, Ms Lopes relied on a witness statement which attached a recent letter from her mother-in-law indicating that she could no longer occupy that property. The council accepted that, on those new facts, it would inevitably have had to accept a fresh application for assistance, whatever the outcome of the appeal. It withdrew the review decision and agreed to reopen the review process.

The appeal was compromised, save as to costs. On considering written submissions, HHJ Bailey ordered the council to pay 85 per cent of Ms Lopes's costs.

Lewis J allowed an appeal and substituted an order that Ms Lopes should pay the council's costs (subject to legal aid protection). The judge had been wrong to hold that Ms Lopes would have succeeded on the appeal because the council had not made further inquiries. It had been entitled to rely on her own statements in interview. The council would have succeeded in resisting the appeal had it gone to a hearing. The appeal had only been halted because Ms Lopes had herself put forward new material that had only come into existence after the conclusion of the review and had only been disclosed by her after the review had been launched.

* Richard Harmer, solicitor, Shelter, Stratford, and Kevin Gannon, barrister, London.

Nic Madge and Jan Luba QC are circuit judges. They would like to hear of relevant housing cases in the higher or lower courts. They are grateful to the colleagues above for providing details of the judgment.