do so differently from someone with a physical health problem who also has capacity to consent to treatment and also refuses, however unwise a decision doctors might perceive this to be? We need to remove the requirement for a mental disorder from the criteria that allow involuntary treatment so that they apply to everyone equally, and seek to hinge treatment of mental health problems and care of people suffering from them on capacity principles. This is particularly so if the government really means what it has said about the importance of parity with physical health.

Mind hopes the Northern Irish legislation will be brought into force soon as we anticipate its application will have positive effects on the experience of coercive treatment for people with lived experience of mental health problems and it might encourage the Department of Health to look at whether this could be followed in England and Wales. We strongly support the Law Commission's recent recommendation to the government on this point (see *Mental capacity and deprivation of liberty*, Law Com No 372, HC 1079, 13 March 2017, para 13.18, page 151).

1 *Stanev v Bulgaria* App No 36760/06, 17 January 2012 (GC); (2012) 55 EHRR 22 at para 145; *DD v Lithuania* App No 13469/06, 14 February 2012; [2012] ECHR 254 at para 156; *Kallweit v Germany* App No 17792/07, 13 January 2011 at para 45; *Shtukaturov v Russia* App No 44009/05, 27 March 2008; (2012) 54 EHRR 27 at para 114; *Varbanov v Bulgaria* App No 31365/96, 5 October 2000; [2000] ECHR 457 at para 45.
2 The Council of Europe Committee of Ministers has also indicated a move to the social model: see Recommendation Rec(2006)5, section 2.2.

Felicity Auer and Joanna Dean are solicitors at Mind. They encourage readers to sign up to Mind's newsletter. They are also interested in hearing about cases in which Mind could be involved (intervening and/or providing wider evidence about the impact on people with mental health problems). Contact: legalunit@mind.org.uk.

Housing: recent developments

Nic Madge and Jan Luba QC highlight important political and legislative developments, together with cases on human rights, possession claims, assured shorthold tenancies, disability, adverse possession, long leases, houses in multiple occupation, anti-social behaviour, homelessness, and housing and community care.

Nic Madge

Jan Luba QC

Politics and legislation

Homelessness

The Homelessness Reduction Bill received royal assent on 27 April 2017. The Act will be brought into force by commencement orders, on dates to be appointed. It only applies to England. A summary of the new Act will be published in the June 2017 issue of *Legal Action*.

On 30 March 2017, the Department for Communities and Local Government (DCLG) published the *Government response to the Communities and Local Government Select Committee reports: Homelessness and Homelessness Reduction Bill* (Cm 9443). In addition to responding to the select committee's recommendations, the paper announced that the DCLG 'is establishing a team of homelessness advisers who will be responsible for supporting local housing authorities in their work to implement the Homelessness Reduction Bill and for providing support and challenge to help authorities improve their practice and performance' (page 26, para 89).

On 23 March 2017, the DCLG published the figures for homelessness activity in England over the final quarter of last year: *Statutory homelessness and prevention and relief, October to December 2016: England*. They show that between 1 October and 31 December 2016 local housing authorities:

- accepted 14,420 households as being statutorily homeless, down three per cent on the previous quarter and down 0.4 per cent on the same quarter of last year; and
- took action to prevent and relieve homelessness for 50,970 households, down three per cent on 52,520 in the same quarter of 2015.

They also show that the total number of households in temporary accommodation on 31 December 2016 was 75,740, up 10 per cent on a year earlier, and up 58 per cent on the low of 48,010 on 31 December 2010.

The latest homelessness statistics for Wales were published on 22 March 2017: *Data on the number of households applying to local authorities for housing assistance under the Housing (Wales) Act 2014 and the number of homeless households in temporary accommodation* (Welsh government). They show that during October to December 2016:

- 1,965 households were assessed as threatened with homelessness within 56 days and for 1,305 households (66 per cent) homelessness was successfully prevented for at least six months.
- 2,589 households were assessed as being homeless and owed a duty to help secure accommodation. Of these, 1,104 households (43 per cent) were helped to secure accommodation that was likely to last for six months, following intervention by the local authority.
- 480 households were assessed to be unintentionally homeless and in priority need and qualified for the duty to have accommodation secured for them. Of these, 396 (82 per cent) households accepted an offer of permanent accommodation.

The Joseph Rowntree Foundation and Crisis have jointly published *The homelessness monitor: England 2017* (March 2017). The report analyses the impact of economic and policy developments on homelessness.

In March 2017, the House of Commons Library published updated versions of four homelessness briefing papers:

- *Statutory homelessness in England* (Briefing Paper No SN01164, 29 March 2017);
- *Households in temporary accommodation (England)* (Briefing Paper No SN02110, 28 March 2017);
- *Homelessness Reduction Bill 2016–17: progress in the Commons and Lords* (Briefing Paper No CBP-7854, 27 March 2017); and
- *Homelessness in England: social indicators page* (Briefing Paper No SN02646, 24 March 2017).

Right to Buy

The *Department for Communities and Local Government response to the Communities and Local Government Committee's report into housing associations and the Right to Buy* was published on 4 April 2017 (Cm 9416). The paper offers the UK government's response to all 48 of the recommendations made by the select committee relating to the social housing aspects of the Housing and Planning Act (HPA) 2016.

A new House of Commons Library

briefing paper explains proposals to extend the Right to Buy to assured tenants of housing associations on a voluntary basis: *Introducing a voluntary Right to Buy for housing association tenants in England* (Briefing Paper No CBP-7224, 27 March 2017). No implementation date for full roll-out has been announced. A large regional pilot scheme is planned for 2017/18.

Private rented sector

The UK housing minister, Gavin Barwell, has stated: 'We announced at the 2016 Autumn Statement a ban on letting agent fees paid by tenants, to improve competition in the private rental market and give renters greater clarity and control over what they will pay. The government will consult in the spring on the detail of implementation' (Commons Written Answer 66288, 20 March 2017). The consultation was launched on 7 April 2017 and closes on 2 June 2017: *Banning letting agent fees paid by tenants: a consultation paper* (DCLG, April 2017). The DCLG has organised a series of public workshops to accompany the consultation exercise.

A working group review to consider whether Client Money Protection (CMP) should be made mandatory for letting and managing agents has reported: *Client Money Protection* (DCLG, March 2017). It recommends that the UK government uses the reserve power enacted in the HPA 2016 to make CMP mandatory in the sector. The UK government confirmed that it would accept the working group's recommendation to make CMP mandatory in response to an oral question in the House of Lords on 28 March 2017.

Housing estate regeneration

On 24 March 2017, the UK government announced that a £32m Estate Regeneration Fund will be distributed to local authorities and housing associations across England, targeted at 105 housing estates. Social housing providers submitted bids for the funding, which were assessed by a joint panel of the DCLG and the Homes and Communities Agency. An additional £140m loan fund, available over the lifetime of the present parliament, is designed to cover costs such as land assembly, leaseholder buy-outs, rehousing costs, demolition, and preparatory construction works. The Estates Regeneration Advisory Panel, co-chaired by the housing minister and Lord Heseltine, met six times during 2016 to help develop the Estate Regeneration National Strategy.

Human rights

Article 6

- **R (Wallace) v Central London County Court**
  [2016] EWHC 2577 (Admin), 4 August 2016

District Judge Zimmels made a possession order against Ms Wallace under Housing Act (HA) 1988 Sch 2 Ground 8 (the mandatory ground for rent arrears). HHJ Mitchell refused permission to appeal. Ms Wallace sought permission to judicially review that refusal, alleging a violation of Human Rights Act (HRA) 1998 Sch 1 article 6 because she was required to represent herself before HHJ Mitchell. She also claimed that there were errors in the calculation of her housing benefit.

Karon Monaghan QC, sitting as a deputy High Court judge, refused that application. She noted that an application for judicial review of refusal of permission to appeal 'will only succeed in very rare circumstances, such as to justify the case being treated as exceptional' (para 6). Article 6 does not grant the right to be legally represented in all proceedings. Neither of the earlier hearings was unfair as the result of the absence of representation through legal aid. Further, the letter relating to benefits did not go to the court or to the landlord in any official sense.

Articles 6 and 8

- **Karakutsya v Ukraine**
  App No 18986/06, 16 February 2017

Mr Karakutsya entered into a three-year military service contract with the Ministry of Defence in 1996. In 1999, its housing commission allocated him a studio in a residence hall for students and employees of the National Defence Academy. Mr Karakutsya and his wife moved into that accommodation. Later that year, he entered into another three-year military service contract. In 2001, Mr Karakutsya rescinded his contract with the Ministry of Defence and resigned from military service, citing family circumstances. However, the family continued to live in and pay charges for the studio, which they had renovated and modernised at their own expense. In 2002, the Defence Academy instituted proceedings in the Shevchenkivskyy District Court, seeking to evict Mr Karakutsya from the accommodation. Mr and Mrs Karakutsya alleged that he had been 'cantoned' or quartered in the disputed accommodation as a military serviceman, and that that fact triggered a special duty on the part of the state to keep providing him with housing on his resignation from the armed forces.

In November 2003, after hearing oral submissions, the court ruled for the plaintiffs. It found that the disputed accommodation had been provided on a temporary basis, as a privilege in connection with Mr Karakutsya's military service. Since it had been his decision to terminate the contract early, there was no right to keep the accommodation or any duty of the state to provide other accommodation under the applicable law. The family was legally obliged to vacate the accommodation. In January 2004, an appeal court upheld the District Court judgment. In April 2004, Mr and Mrs Karakutsya were evicted. They claimed that the Court of Appeal did not notify them of the date and time of the hearing. In December 2005, they lodged a request with the Supreme Court for leave to appeal in cassation out of time. The Supreme Court rejected that request, noting that such leave could only be granted within one year of pronouncement of the decision subject to appeal. They complained to the European Court of Human Rights (ECtHR) that they had been arbitrarily deprived of access to the Supreme Court in breach of articles 6, 8 and 13 of the European Convention on Human Rights (ECHR).

The ECtHR found that there was no breach of article 6. It recognised that rules which govern the conditions for the admissibility of appeals are designed to ensure the proper administration of justice and compliance with, in particular, the principle of legal certainty, and that those concerned must expect those rules to be applied. The procedural code provided that requests to appeal out of time could only be lodged within one year of the date on which the original right to lodge such an appeal arose. The implementation of that rule pursued a legitimate aim, namely, to ensure legal certainty. The application of the 'one-year rule' was sufficiently foreseeable and accompanied by necessary procedural safeguards. Although Mr Karakutsya did not receive any notification from the Court of Appeal, it was incumbent on him as an interested party to display special diligence in the defence of his interests and to take the necessary steps to apprise himself of the developments in the proceedings. It was improbable that Mr and Mrs Karakutsya remained unaware of the outcome of the appeal proceedings after having been evicted in April 2004. The ECtHR could not conclude that they displayed special diligence in following their proceedings. Their failure to lodge an appeal on points of law within the additional time limit was not objectively justified. The Supreme Court did not act arbitrarily in rejecting the request for leave to appeal and did not restrict their right of access to a court in a manner incompatible with article 6.

With regard to article 8, the eviction order was made by a competent court, which found at the close of the adversarial proceedings in the course of which Mr and Mrs Karakutsya were able to state their case, that their entitlement to occupy the disputed accommodation had been of a temporary nature and closely connected to Mr Karakutsya's military service. The substantive conclusions reached by the District Court and confirmed by the Court of Appeal were not manifestly arbitrary. The eviction had a basis in the substantive provisions of domestic law. The decision-making process leading to their eviction was accompanied by the requisite safeguards enabling them to defend their interests. The interference complained of pursued a legitimate aim of the economic well-being of the country and protection of the rights of others, namely students and employees of the Defence Academy and other military servicemen in need of accommodation in connection with their service. The ECtHR also noted that Mr and Mrs Karakutsya had not pursued a proportionality argument beyond making some rather general submissions before the first-instance court. Based on the material presented, it could not discern that their eviction from the accommodation actually constituted a disproportionate burden on them. The article 8 complaint did not disclose an appearance of an issue and was manifestly ill-founded. It was declared inadmissible.

Article 8

- **Zakharov v Russia**
  App No 66610/10, 14 March 2017

In 1999, on the break-up of his marriage, Mr Zakharov left the state-owned flat where he had been living with his wife and moved in with his new partner, B. For 10 years, they shared her room in a three-room communal flat that she occupied under a social tenancy agreement. Neighbours lived in the other two rooms. Mr Zakharov and B never married and he was not registered as living in the room. In 2009, B died and her neighbours locked Mr Zakharov out of the flat. The local housing authority informed him that he had to vacate the room, since he had no legal right to occupy it. He instituted court proceedings against the local administration, seeking recognition of his right to occupy the room as B's family member. He considered that despite the fact that he had not been married to B and had not been registered as living in the room,

he should be regarded as a member of her family who had acquired the right to occupy her room. In particular, he raised the following arguments:

- he had shared a common household with B;
- he had paid for the maintenance of the room;
- he had assumed the cost of B's burial; and
- he had no other housing as he could not return to his ex-wife's flat since she had become the owner of that flat and lived there with her new family.

The Leninskiy District Court considered that Mr Zakharov should be regarded as a member of B's family who had acquired the right to reside in the room. However, the neighbours, who were joined as third parties to the claim because they wanted the room, appealed to the Kaliningrad Regional Court. The regional court allowed the appeal and quashed the district court's judgment. Mr Zakharov complained to the ECtHR that there was a breach of his ECHR article 8 right to respect for his home.

The ECtHR found that there was a violation of article 8. The court stated that the 'concept of "home" within the meaning of article 8 is not limited to premises which are lawfully occupied … It is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular premises constitutes a "home" … will depend on the factual circumstances, namely, the existence of sufficient and continuous links with a specific place' (para 30). By living in B's room for 10 years, Mr Zakharov had developed sufficient and continuous links with that room for it to be considered his 'home' for the purposes of article 8. The refusal to recognise him as B's family member and to acknowledge his right to occupy her room amounted to an interference with his right to respect for his home. The interference had a legal basis in domestic law and pursued the legitimate aim of protecting the municipality as the owner of the flat and the rights of persons in need of housing.

The central question was whether the interference was proportionate to the aim pursued and thus 'necessary in a democratic society'. The regional court's conclusion was based exclusively on the fact that throughout the period in which he had been living with B, Mr Zakharov had been registered as living in his ex-wife's flat and had not asked to be removed from the register until after B's death. The regional court did not weigh the interests of his neighbours against his right to respect for his home. It failed to balance the competing rights and therefore to determine the proportionality of the interference with Mr Zakharov's right to respect for his home. That was sufficient to enable the court to conclude that the interference complained of was not 'necessary in a democratic society'.

- **Jones v Canal and River Trust** [2017] EWCA Civ 135, 7 March 2017

Mr Jones was a canal boat owner who lived on his boat, which was called 'The Mrs T'. The trust terminated his continuous navigation licence and brought proceedings for declaratory and injunctive relief, claiming that it was entitled to remove the boat from the waterway and to prevent its return. HHJ Denyer QC struck out a defence based on HRA 1998 Sch 1 article 8 (right to respect for a home). He concluded that the trust could not be expected to investigate or deal with Mr Jones's article 8 rights, as the burden imposed would be too great. McGowan J dismissed an appeal against that order ([2015] EWHC 534 (QB); June 2015 *Legal Action* 42).

The Court of Appeal allowed an appeal and reversed the order striking out the article 8 defence. In the Court of Appeal, the trust conceded that, as a public authority, it must consider article 8 issues when seeking to deal with a vessel that is someone's home. McCombe LJ stated that although 'the balance between public interests and requirements of hard pushed local authority landlords on the one hand and the relative claims of individual tenants wishing to assert and to preserve rights under article 8 on the other are well tried and tested before the courts … [t]hat may not be so straightforward in cases involving other types of public authority' (para 41). He continued:

… in parity with the housing cases, in cases of the present type the court will usually be able to proceed on the basis that the authority has sound management reasons for wishing to enforce rigorously its licensing regime, without such reasons being distinctly pleaded and proved … The management duties and the authority's ownership rights should normally … be taken as a 'given' and as having strong weight in the assessment of proportionality under article 8. However, unlike the housing cases, the relative weight of the competing interests of a boat operator, using his vessel as a home, may not always be as easily apparent in an individual case, at least where there are underlying disputes as to whether the [trust] was entitled to act as it did in terminating a licence (para 45).

McCombe LJ could 'imagine cases where the county court would be able to determine, in a *Pinnock*-style summary assessment before trial, that the boat operator's right under the convention [could not] prevail to the extent of requiring the authority to accommodate his home on the authority's waterways or on a particular part or parts of them. However, in some cases, the "personal circumstances and any factual objections" raised may give rise to a seriously arguable case' (para 46). There was, though, more difficulty in summary dismissal, on a preliminary application at the beginning of the proceedings, of a boat occupier's article 8 rights where there were continuing genuine disputes as to whether licence conditions had been satisfied or where there were other issues in play, such as questions under the Equality Act 2010. The overall context of this case did not allow the judge summarily to dismiss the article 8 defences as he had.

Articles 8 and 14

- **Turley v Wandsworth LBC** [2017] EWCA Civ 189, 24 March 2017

Mr Doyle was the secure tenant of a Wandsworth Council flat. He and Ms Turley had four children. They lived in the flat in a relationship akin to marriage from 1995 until 2010 when the relationship broke down and he left the property. The relationship was rekindled in January 2012 when Mr Doyle returned to the property. However, he died on 17 March 2012 (days before amendments to the HA 1985 made by the Localism Act 2011 took effect). Wandsworth argued that Ms Turley could not succeed to the tenancy because, inter alia, she had not resided with Mr Doyle at the flat for a period of 12 months immediately prior to his death. Ms Turley contended that this additional requirement, imposed by HA 1985 s87(b), which would not have applied if she was married or in a civil partnership (or if the tenancy had been granted to Mr Doyle after 1 April 2012), was unlawful as it amounted to unjustified discrimination under HRA 1998 Sch 1 articles 8 and 14. Knowles J dismissed Ms Turley's claim for judicial review (*R (Turley) v Wandsworth LBC* [2014] EWHC 4040 (Admin); March 2015 *Legal Action* 42).

The Court of Appeal dismissed Ms Turley's appeal. Local authority secure tenancies are a valuable and limited resource. It would not be fair to grant succession rights to family members whose relevant relationship with the tenant was essentially transient. The purpose of imposing the 12-month condition was that a reasonably long period of living together might be taken to demonstrate an element of permanence and constancy in the relevant relationship. That aim was legitimate. It was impossible to say that the imposition of the 12-month condition was manifestly without reasonable foundation as a criterion for demonstrating the necessary degree of permanence and constancy. Knowles J was right to find that even if the situations of common law spouses and married spouses were analogous for the purpose of article 14, the difference in treatment between them was justified.

Article 1 of Protocol No 1

- **Čapský and Jeschkeová v Czech Republic** App Nos 25784/09 and 36002/09, 9 February 2017

The applicants were landlords of tenement houses. Under Czech law, the rents payable by their tenants were regulated and much lower than market rents. The applicants sued the Czech government for damages corresponding to the difference between the regulated rent and the usual rent in the given locality. Domestic courts dismissed their actions.

Although the Constitutional Court found that the Czech rent control scheme was unconstitutional because it violated the owners' rights under ECHR article 1 of Protocol No 1, it did not repeal the regulations, but gave the government 18 months to change the law. The government and parliament then failed to comply with the judgment of the Constitutional Court for over four years. The applicants complained to the ECtHR that the rent control scheme breached article 1 of Protocol No 1. The court found that there was a breach of article 1 of Protocol No 1 but that the claim for pecuniary damage was not ready for decision (*R and L, SRO and others v Czech Republic* App Nos 37926/05, 25784/09, 36002/09, 44410/09 and 65546/09, 3 July 2014; [2014] ECHR 703; September 2014 *Legal Action* 44). Some applicants reached a friendly settlement but the present applicants sought just satisfaction.

With regard to pecuniary damage, the court held that the applicants had suffered pecuniary damage and so were entitled to compensation in respect of the loss of their right to use their property in the conditions guaranteed by article 1 of Protocol No 1 because they were unable to charge an adequate rent for their flats. It noted that it had previously held that when enacting housing legislation, states were entitled to reduce the rent to a level below the market value, as the legislature can reasonably decide as

a matter of policy that charging the market rent is unacceptable from the point of view of social justice (see *Mellacher and others v Austria* (1989) 12 EHRR 391). Therefore, such measures designed to achieve greater social justice may call for less than reimbursement of the full market value. The court stated that the determination of the compensation should be based, among other things, on the difference between the rent under free-market conditions and the rent to which the applicants were entitled under the domestic legislation which the court had found to be unlawful.

The court made an estimate, taking into account in particular the information submitted by the parties about the market rent for comparable flats in the relevant period and the protected rent the applicants were entitled to receive in the same period. On that basis, it awarded Mr Čapský €49,655 and Ms Jeschkeová €27,243 as pecuniary damage. It also considered that the applicants must have sustained non-pecuniary damage, in the form of continuous feelings of disappointment, frustration and even of concerns regarding the risk of deterioration of their properties. Making its assessment on an equitable basis, it awarded each applicant €3,000 in respect of non-pecuniary damage.

- **Volchkova and Mironov v Russia**
  App Nos 45668/05 and 2292/06, 28 March 2017

Ms Volchkova and Mr Mironov, together with another person, were joint owners of a plot of land and the house built on it. In March 2003, the Lyubertsy municipality ordered the expropriation of Ms Volchkova and Mr Mironov's house and land to build a block of flats. They were offered compensation and rehousing, but rejected those offers. The town administration brought proceedings in the Lyubertsy Town Court seeking judicial authorisation for the expropriation of the house and land. In April 2005, the court delivered a judgment transferring ownership of the house and land to the municipality. It awarded Ms Volchkova compensation equivalent to US$28,500 and a social tenancy contract for a one-room flat in Lyubertsy and Mr Mironov compensation of US$85,600 and a social tenancy contract for a four-room flat in Lyubertsy. Appeals were dismissed. Ms Volchkova and Mr Mironov were evicted. They complained to the ECtHR alleging that they had not been paid adequate compensation for the expropriation of their property and that there was a violation of article 1 of Protocol No 1.

The ECtHR found that there had been a violation of article 1 of Protocol No 1. The expert who prepared the valuation report should have used the 'method of prospective use' for determining the value of the house and land. Further, the expert based the valuation on the premise that the land's use was for a summer cottage use rather than for the use relating to multi-storey blocks of flats. That premise was inappropriate, given that the property was already surrounded by similar blocks of flats. It was therefore incumbent on the domestic court to assess the counter-arguments and provide reasons for dismissing them in so far as they were directly related to the subject matter of the case, namely the market value of the properties to be expropriated. The court was not satisfied that the judicial valuation of the land took due account of those elements. As regards pecuniary damage resulting from the violation, the question of just satisfaction was not ready for decision.

Possession claims

Only or principal home

- **Havering LBC v Dove**
  [2017] EWCA Civ 156, 22 March 2017

The defendants, who were twin sisters, were secure tenants of a flat. Both spent several days each week with long-term partners who lived elsewhere. The council carried out an investigation and produced a report stating that the property was not normally occupied by either sister. On the basis of the report, housing benefit and council tax benefit were withdrawn from both of them. Havering served a notice to quit, arguing that the tenancy was no longer secure and, in the alternative, a notice seeking possession relying on rent arrears.

In the subsequent possession claim, HHJ Bailey refused an application for an adjournment to obtain legal aid and made a possession order. He held that the doctrine of issue estoppel determined the question whether the property was their only or principal home, because it was difficult to conceive of a situation where the test for housing benefit would produce a different outcome from the only or principal home test. He also held that: even if he were wrong on the estoppel issue, the property was not in fact the only or principal home of either sister; there was no prospect that they would be able to pay their rental arrears; it was reasonable to make an order for possession; and neither of them could resist the order on the basis of HRA 1998 Sch 1 article 8 in the light of their personal circumstances. The sisters were granted permission to appeal: [2016] EWCA Civ 680.

The Court of Appeal dismissed the appeal. It rejected a procedural ground of appeal based on the judge's refusal to adjourn. In addition to the general undesirability of adjourning a trial, there were a number of factors specific to this case that militated against an adjournment. First, the application was made very late. Second, the cause of the difficulty was Ms Dove's legal representatives' tardiness in applying for an extension of legal aid. Third, the trial date had already been adjourned once before. Fourth, rent at the full rate had not been paid for many years. There was no realistic prospect that the sisters could pay off the arrears or even pay the current rent. Fifth, there was no realistic prospect that they could pay the costs thrown away by an adjournment. Sixth, an adjournment would have caused disruption and inconvenience to other court users. Seventh, there was no certainty that an adjournment would serve any useful purpose. What weight to give each of these factors was essentially a matter for the judge. The Court of Appeal should not interfere with case-management decisions of this kind unless compelled to do so.

Turning to the substantive ground of appeal, Lewison LJ noted that there are two parts to the question of what amounts to occupation of a dwelling as an only or principal home, namely: (a) does the person in question occupy the dwelling as a home?; and (b) if so, does s/he occupy it as his/her only or principal home?

The Court of Appeal was not required to resolve the question of whether the decision of the First-tier Tribunal (FTT) created an issue estoppel between Havering and the sisters because the judge heard the evidence and made his own findings of fact, and came to the same conclusion as the FTT. The judge's findings of fact were that neither of the sisters was occupying that flat as her *principal* home. He was entitled to reach that conclusion. Neither, therefore, was a secure tenant. Havering was entitled to possession without the need to prove a statutory ground.

Introductory tenants

- **Islington LBC v Dyer**[1]
  [2017] EWCA Civ 150, 22 March 2017

Mr Dyer was an introductory tenant. Islington gave notice that it would seek possession against him after an alleged assault at the property. He did not exercise his right of review under HA 1996 s128 within the prescribed time limits. He raised a defence that the s128 notice was defective in that although it contained information as to the right of review under s128(6), it did not contain the information contained in s128(7) directing him to seek legal advice. Islington claimed that other documentation served with the notice in a separate document entitled 'Information Leaflet' contained the information concerning legal advice. District Judge Sterlini held that the notice was valid and ordered possession. HHJ Baucher allowed Mr Dyer's appeal and set aside the possession order, finding that the requirement in s128(7) was mandatory and that, as a matter of construction, the notice did not include the required information (County Court at Central London, 18 December 2014; May 2015 *Legal Action* 44). Islington appealed.

The Court of Appeal allowed the appeal. It proceeded on the assumption that the provisions of s128(7) are mandatory. As there is no prescribed form for a s128 notice, the starting point is whether the document or documents relied on can reasonably be described as a notice. To do so, they have to give the tenant notice of the intended proceedings in compliance with the section (s128(1)). To comply with the section, the notice must contain the other information that s128 prescribes. There is nothing in s128 that limits the notice to a single page or a single document. No such restriction can be spelt out of the statute. It is therefore a question of objective fact in every case whether the documents relied on do or do not form part of the notice.

HHJ Baucher was wrong to attach so much importance to the way in which the relevant documents were drafted and to the nomenclature used in them. Although the council called one document the 'Notice' and the other an 'Information Leaflet', that could not override the substance of the documents or be determinative of the statutory question. From an objective point of view, both documents were intended to and did perform the function of a s128(1) notice. The 'Notice' document directed the tenant in terms not only to that document but also to the notes in the 'Information Leaflet'. The 'Information Leaflet' stated that it was intended 'to accompany Notice of Proceedings'. Although the language used fell short of an express incorporation of the contents of the 'Information Leaflet' into the 'Notice' document, any reasonable tenant receiving the letter and the documents it enclosed would have realised that s/he needed to read the contents of both documents together to understand the action which the council was proposing to take. Looked at objectively, the two documents functioned together as the notice for the purposes of s128, even though only one of them was in fact called the 'Notice'.

Water and sewerage charges

- **Greenwich RLBC v KW**[2] County Court at Woolwich, 2 March 2017

The defendant had been a secure tenant since 2008. Greenwich obtained a possession order based on rent arrears. As part of an application to suspend a warrant for possession, the defendant sought disclosure of the agreement for water and sewerage charges with Thames Water as in *Jones v Southwark LBC* [2016] EWHC 457 (Ch); April 2016 *Legal Action* 39; May 2016 *Legal Action* 18. Greenwich accepted that the decision in *Jones* applied to the tenancy agreement.

Deputy District Judge White held that, although the term of the tenancy agreement for levying water service charges on unmetered tenants purported to be an agency term, in fact Greenwich was a reseller of water and that the defendant had been overcharged unlawfully. On the evidence presented by Greenwich, the defendant was entitled to a set-off of 20 per cent with interest but subject to a small administration charge on all of the water charges from the outset of the tenancy. As Greenwich's agreement with Thames Water continued to operate, the defendant was entitled to the discount on future charges. The judge stated that the overcharging applied to all unmetered tenants of Greenwich who were paying for water services.

Setting aside

- **Chatsworth Court Freehold Co Ltd v Sartipy** [2016] EWHC 2391 (Ch), 26 July 2016

Ms Sartipy was found liable for outstanding service charges. Chatsworth obtained a charging order and, in June 2015, an order for sale, which required Ms Sartipy to deliver up possession and provided that either party could apply to vary the terms of the order. Ms Sartipy and her son sought permission to appeal. Her son attended an oral hearing, but permission to appeal was refused. He sought to appeal against that refusal without success. The possession order was executed in September 2015, but the property was not sold. Ms Sartipy submitted that her appeal had not yet been heard and sought to vary the possession order or to set it aside on the basis that her son had a regulated tenancy. She submitted that the variation application should be adjourned for further evidence and that the sale be stayed in the meantime.

Newey J held that it was not impossible, as a matter of jurisdiction, that a possession order could be set aside under a provision in the order enabling either party to apply to vary it. He adjourned the application and gave directions for further evidence, but refused a stay of the order for sale, given the passage of time since the possession order had been made.

Assured shorthold tenancies

Validity of fixed term followed by periodic tenancy

- **Leeds City Council v Broadley** UKSC 2016/0230, 27 February 2017

The Supreme Court has refused permission to appeal against the decision of the Court of Appeal ([2016] EWCA Civ 1213; 6 December 2016; February 2017 *Legal Action* 47) because the proposed appeal did not raise an arguable point of law.

Disability

- **SA v City of Edinburgh Council** [2017] SC EDIN 8, 3 February 2017

SA owned two properties in Edinburgh, which were licensed for multiple occupation under Housing (Scotland) Act 2006 Pt 5 and Sch 4. He had a hidden or invisible disability, namely Asperger syndrome. SA's licences fell due for renewal. He was unable to engage in the property inspection procedure, which was essential to the grant of a renewal licence. Edinburgh then refused to renew the licences. SA appealed that decision on the basis that he had been discriminated against because of his disability.

Sheriff T Welsh QC found that SA's disability was central to determination of the case. He was 'less connected with the proceedings than a typical party litigant' (para 7). He was fixated by his own side of the argument and disengaged from the defender's predicament. His conduct and presentation were symptomatic of his disability. The sheriff found that the council had 'made significant reasonable adjustments to deal fairly and equally with' SA and gave him repeated opportunities to allow access for inspection (para 15). The defender's policy to conduct inspections with the landlord or an authorised agent present was perfectly reasonable and sound. Were it not for SA's disability, the sheriff would have been inclined to refuse the appeal. However, he decided to remit the decision to the defender for reconsideration on the basis that SA's wife would attend the two property inspections personally.

Adverse possession

- **Boot v Bromford Housing Association** [2017] UKFTT 182 (PC), 17 January 2017

Mr Boot claimed to have been using land, of which Bromford became the registered proprietor, since 1977. He applied to register title acquired by adverse possession, stating that he had cut down weeds and brambles, and seeded potatoes and other vegetables on a weekly basis. He used a garage on the land to store an old flatbed truck. He also claimed to have replaced gates and fencing. On the other hand, his sister claimed to have had exclusive use of the land since 1986. She claimed to have laid a lawn.

Judge John Hewitt concluded that, on the evidence, Mr Boot had not made out his case. Although he used the land on occasions between 1977 and 1980 and may have grown some vegetables, his 'occasional and transient use' (para 57) was not sufficient to establish a case. On his own admission, his use of the land after 1989 was minimal. He did not have the necessary degree of custody and control over the land, and did not have the requisite intention to possess the land. He simply used it occasionally when it was convenient. The judge required the Chief Land Registrar to cancel Mr Boot's application.

Long leases

Service charges

- **Sheffield City Council v Oliver** [2017] EWCA Civ 225, 4 April 2017

Ms Oliver was a long lessee in a block of council flats on the Lansdowne Estate. The council carried out citywide major works, which included works on the estate. Some of the works were eligible for a contribution from a commercial energy company as part of the Community Energy Savings Programme (CESP). In total, 15 of the 25 blocks on the Lansdowne Estate were eligible to receive CESP funding. The contribution to Ms Oliver's block was £43,570.44. The council decided not to pass the CESP directly to the leaseholders as a set-off against their service charge contributions. Rather, it decided to attribute the money to the funding of works to its citywide housing stock. The effect of this was that every leaseholder's service charge was reduced irrespective of whether their block had been entitled to CESP funding. The Upper Tribunal (UT) held that where funding has been provided from a third party and the purpose of the funding is specifically intended to meet the cost of certain works, it is impermissible to calculate the amount a leaseholder must pay under a service charge without reference to the receipt of that money ([2015] UKUT 229 (LC); September 2015 *Legal Action* 52).

The Court of Appeal dismissed the council's appeal. A construction of the service charge provisions in the lease that permitted the council to make double recovery would produce a result that reasonable parties in the position of the council and Ms Oliver could not sensibly have intended. Briggs LJ stated: 'I have therefore not found it difficult to conclude that a way has to be found to interpret the lease so as to prevent all such forms of double recovery, upon the simple basis that the lease would otherwise lack common sense, as between long leaseholder and lessor. I have however found it rather more difficult to identify an appropriate means of doing so' (para 46). The UT was right to treat the avoidance of double recovery as a necessary objective in seeking to construe the lease.

The determination of a fair proportion did require the council to give credit for the relevant parts of CESP funding received. Briggs and Longmore LJJ both stated that the best way of doing this was to treat the avoidance of double recovery as a matter to be taken into account when determining a 'fair proportion' of the council's incurred costs, expenses and outgoings to be paid by the lessee, under the terms of the lease. Lewison LJ, however, preferred treating the words 'actual costs, expenses and outgoings' in the lease as limited to those that leave the council out of pocket. The cases of *Windermere Marina Village Ltd v Wild* [2014] UKUT 163 (LC) and *Gater v Wellington Real Estate Ltd* [2014] UKUT 561 (LC) were both correctly decided.

- **Bretby Hall Management Company Ltd v Pratt** [2017] UKUT 70 (LC), 17 February 2017

A long lease entitled the lessor to recover as service charges '[a]ll other expenses (if any) incurred by the manager in and about the maintenance and proper and convenient management and running of the development'. The lessor included as part of the service charge the sum of £11,100 in respect of its legal fees in a dispute with Mr and Mrs Pratt. The FTT disallowed that item in its entirety because proceedings had not commenced.

HHJ Behrens allowed the lessor's appeal. The clause was wide enough to cover the costs of intended proceedings. It was plainly

contemplated that the reasonable costs of managing the development should be recoverable under the service charge. Subject to the question of reasonableness, the costs of defending threatened proceedings fell squarely within the definition. There was no reason why the parties should have intended that the costs would only be recoverable under the service charge if proceedings were actually commenced. Further, the FTT was wrong to have disallowed these costs under Landlord and Tenant Act 1985 s20C. That section is concerned with proceedings before a court, tribunal or arbitral tribunal. In this case, the threatened proceedings did not materialise and so the jurisdiction under s20C did not arise. The reasonableness of the costs within s19 had not been determined and so the matter was remitted to the FTT to determine the extent to which the sums were reasonable.

Airbnb

- **Ashley Gardens Freeholds Ltd v Landor**
  County Court at Central London, (2017) *Times* 5 April; (2017) *London Evening Standard* 5 April

Ms Landor was a long lessee of a flat in Belgravia. She sublet the flat to 'a string of artists and writers, saying she considered the flat to be an art installation'. Neighbours complained about loud parties that 'set chandeliers swinging on the floor below and the regular sound of guests wheeling suitcases on the marble floors'. The landlord claimed that by advertising the flat on Airbnb she had breached a clause in her lease requiring the flat to be occupied as a single family home.

HHJ Lochrane found that there was a breach of covenant, stating 'if it looks like a duck and quacks like a duck, the chances are very high that it is indeed a duck. I am quite satisfied that in every meaningful sense it was indeed a business ... dedicated to supplementing her very meagre income and thereby allowing her to maintain a style of living which she enjoys and enjoys sharing with others'. He ordered Ms Landor to sell the flat within six months, failing which the lease would be forfeited.

- **Bermondsey Exchange Freeholders Ltd v Conway**[3]
  County Court at Lambeth, 10 November 2016

Bermondsey was the freehold management company of an apartment building in Southwark. Mr Conway was the lessee of one of the flats. His lease included a covenant '[n]ot to use or permit the use of the demised premises or any part thereof otherwise than as a residential flat with the occupation of one family only'. Bermondsey alleged that he had been subletting on Airbnb and other short-term letting sites. Following complaints from other residents about noise and disturbance, Bermondsey requested that he stop this. He did not. Bermondsey sought an injunction to prevent use of the flat for short lets.

After trial, District Judge Desai granted an injunction. She found that there had been a breach of covenant.

Houses in multiple occupation (HMOs)

- **Nottingham City Council v Parr**
  [2017] EWCA Civ 188, 29 March 2017

Mr Parr provided accommodation to students in a house in Nottingham with five bedrooms that was modified to provide a sixth attic bedroom. When granting a new HMO licence (HA 2004 s61(1)), the council imposed a condition prohibiting the use of the attic bedroom for sleeping 'except where it is let in combination with another room within the property in such a way as to provide the occupant with the exclusive use of two rooms'. Mr Parr appealed the condition. The FTT allowed the appeal and deleted the condition. It found that the attic room was suitable for students. It did, though, formulate a specific condition requiring that the attic room be used as sleeping accommodation only 'by a person engaged in full-time education and who resides in the dwelling for a maximum period of 10 calendar months over a period of one year'. The council appealed to the UT. Martin Rodger QC, deputy president, dismissed the appeal ([2016] UKUT 71 (LC); April 2016 *Legal Action* 41). The council appealed to the Court of Appeal, arguing that the condition was unlawful.

Subject to amendment of the licence to include conditions (i) requiring a sitting room and kitchen/diner to be kept available for communal use, and (ii) prohibiting any bedrooms to be let to persons other than students engaged in full-time education, the Court of Appeal dismissed the second appeal. The condition restricting occupation to full-time students was not unlawful

Although the licensing regime concerned the physical characteristics of the relevant property, there was no doubt that the general characteristics of occupiers were relevant in some contexts connected both with HMOs and with housing standards generally.

Anti-social behaviour

Committal

- **Walsall Housing Group Ltd v Bryce**
  [2017] EW Misc 2 (CC), County Court at Walsall, 13 March 2017

After a neighbour and her family experienced an unacceptable level of disturbance through loud noise involving music, shouting, swearing and banging, Walsall Housing Group obtained an injunction restraining Ms Bryce from causing or threatening to cause a nuisance or annoyance. On 3 July 2016, Ms Bryce was arrested for a breach of the injunction. She admitted the breach. District Judge England made no order, but warned her about her future behaviour. She committed three further breaches in the second half of July. She was arrested. District Judge Wyley sentenced her to a term of six weeks' imprisonment, but the sentence was suspended. In late October and early November, Ms Bryce committed a further six breaches through misbehaviour and noise nuisance. District Judge Wyley sentenced her to an immediate term of imprisonment. Ms Bryce was released from prison, but arrested again on 17 February 2017. HHJ Gregory found four breaches of the injunction proved. They primarily involved noise nuisance.

HHJ Gregory stated:

You have had repeated chances. You have been advised by a district judge to modify your behaviour. You were given a suspended sentence. You have shown contempt for those orders of the court. You have displayed nothing but violent animosity towards your neighbour, and I am quite convinced that you do not care tuppence about the effect that your behaviour has upon perfectly decent and respectable people next door. Everybody is entitled to live in a degree of peace and quiet with the usual give and take of society, but you do not behave like a civilised person, and you have got to learn that you will.

He imposed sentences of eight weeks' imprisonment, to run concurrently.

Ombudsman complaints

- **Complaint against Bron Afon Community Housing Ltd**
  Case No 201503581, 15 September 2016

Ms X, an owner-occupier, made complaints to Bron Afon Community Housing about anti-social behaviour by one of its tenants. She alleged that over a number of years, Bron Afon failed to investigate her complaints effectively. The Public Services Ombudsman for Wales found that, in the main, Bron Afon made reasonable efforts to resolve her complaints. When matters escalated, it took action in accordance with the relevant procedures. There were, though, a number of shortcomings in that Bron Afon failed to manage her expectations and was not rigorous enough in its record-keeping. It also failed to communicate effectively with Ms X about the way in which it was managing her complaints. The ombudsman recommended that Bron Afon should apologise, issue a reminder to its staff about the importance of record-keeping and consider what lessons should be learnt.

- **Complaint against United Welsh Housing Association**
  Case No 201601298, 16 November 2016

Ms X complained that United Welsh Housing Association failed to take action in relation to her complaints of anti-social behaviour against her neighbour. Ms X said that she had suffered anti-social behaviour for several years, which culminated in police involvement in October 2015.

The Public Services Ombudsman for Wales found that United had acted reasonably in considering the anti-social behaviour complaints. The ombudsman was satisfied that United took appropriate steps to resolve matters in accordance with its relevant policies and procedures. The ombudsman concluded that United's actions did not amount to maladministration. The complaint was not upheld.

Homelessness

Applications

- **Complaint against Barnet LBC**
  Local Government Ombudsman Complaint No 16 002 971, 8 March 2017

A homeless woman first approached the council for help with accommodation in January 2015, after she was evicted by her private landlord. The council provided her with a place in a hostel for three nights, but failed to determine whether it owed her a duty as a homeless person. She approached the council four more times over the following 14 months, but on each occasion she was told that she was not a priority case and was given advice on contacting charities for support. On no occasion did the council give her a formal written decision: HA 1996 s184. As a result, she had no means of challenging the council's position. She was left street homeless over the winter months and spent her nights sofa surfing with friends or sleeping

on the night bus. At one point, she was hospitalised for 10 days due to a severe asthma attack. During the ombudsman's investigation, the council said that if it 'were to issue formal decisions to all those seeking housing assistance there would be significant challenges with the number of Housing Needs officers being required to conduct such a high volume of assessments and write the subsequent decision letters' (para 29).

The ombudsman recommended that the council: provide the complainant with a written decision on her homelessness application; pay her £300 to reflect her lost review and appeal rights; pay her father £200 to reflect his time and trouble in complaining on behalf of his daughter; and ensure that, in future, homelessness applications are taken and decision letters issued in all appropriate cases.

Intentional homelessness

- **EC v Westminster City Council**[4]
  County Court at Central London, 23 February 2017

The appellant was a British citizen who lived in the USA with her two sons aged three and 23. The adult son was killed in a hit-and-run accident on the same road as the family home. The appellant was in a state of overwhelming grief and mental fragility. Her son's body had lain undiscovered for some hours. She had to pass the scene of his death every day. The killer had not been found. She gave up the home and moved to the UK with her youngest son to stay with friends. When the friends asked her to leave, she applied to the council for homelessness assistance. It decided that she had become homeless intentionally: HA 1996 s191. Her solicitors submitted that, after her son had been killed, it had not been reasonable for her and her young son to continue to occupy the accommodation in the USA. A reviewing officer upheld the finding of intentional homelessness having concluded that it had been reasonable to continue to occupy that accommodation.

Recorder Hancock QC quashed the decision. Given the close association between the accommodation and the death of the son, the decision that it had been reasonable to continue to occupy the accommodation was, on the face of it, surprising. That was not to say that the conclusion had been irrational, but at least some further explanation was called for. The solicitors had argued, in their response to the reviewing officer's 'minded to' letter, that the provisional conclusion was irrational. They had expected the reviewer would make clear that s/he had taken the points made into account. The judge said he was left with the overwhelming impression that either those submissions had not been taken into account or that the reviewer did not adequately explain the reasons for nevertheless concluding that the accommodation had been reasonable to continue to occupy.

Housing and community care

- **R (Ahmed) v Enfield LBC**
  Administrative Court, 30 March 2017

The claimant was an adult with mental health difficulties. He sought judicial review of the council's refusal to accommodate him, relying on the Care Act 2014 and Human Rights Act 1998 Sch 1 articles 3 and 8. Pending the hearing of the claim, he sought continuation of a mandatory injunction ordering the council to take reasonable steps to provide him with accommodation. The claimant's mental health condition was common ground but the extent of it was disputed. He claimed that if he was not provided with interim relief, he was at risk of becoming homeless and his situation would be further aggravated by his mental state. The council's case was that the claimant was seeking bed-and-breakfast accommodation without support and that he was manipulating the situation to get his preferred accommodation at public expense.

HHJ Lane, sitting as a judge of the High Court, said the court had to ask whether there was a good arguable case and whether the balance of convenience favoured granting interim relief. Although he had an arguable case, in relation to the balance of convenience it was necessary to deal with issues relating to the claimant's support network. The council's position was that the claimant always managed to secure accommodation with friends and relatives. It was clear that: he could interact with his relatives and friends; he engaged in social activities; he was able to maintain a routine; he was well groomed; and he was not destitute. The Official Solicitor was appointed as a litigation friend but interim relief was refused.

1 Tim Baldwin, barrister, London.
2 Nik Antoniades, solicitor, Powell & Co LLP, London, and Tim Baldwin, barrister, London.
3 This case was first noted on Nearly Legal (https://nearlylegal.co.uk/).
4 Joanne Wong, solicitor, Osbornes Law, London, and Liz Davies, 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 at notes 1, 2 and 4 above for providing details of the judgments.

Public law: update

Samuel Jacobs, Lindsay Johnson, Jesse Nicholls and Martin Westgate QC look at the latest CPR developments, recent statistical releases and cases on sources of power/prerogative, ouster, consultations, estoppel, discrimination, immigration, and costs.

Samuel Jacobs

Lindsay Johnson

Jesse Nicholls

Martin Westgate QC

Rule changes and statistics

Civil procedure

The Civil Procedure (Amendment) Rules 2017 SI No 95 make significant changes to the rules in the Civil Procedure Rules 1998 SI No 3132 (CPR) relating to costs in environmental (Aarhus Convention) claims with effect from 28 February 2017. The amended rules substitute new rules 45.41–45.45 under which:

- A claimant is now required to state that the claim is an Aarhus claim for the costs rules to apply[1] and they must file a schedule of their financial resources with the claim.
- Where there are multiple claimants or defendants, the limits on liability of £5,000, £10,000 and £35,000 apply in relation to each such claimant or defendant individually and may not be exceeded, irrespective of the number of receiving parties.
- The limits on liability may now be varied but only if the court is satisfied that to do so would not make the costs of the proceedings prohibitively expensive for the claimant or, in the case of an order reducing a claimant's liability or increasing that of the defendant, the proceedings would be prohibitively expensive for the claimant without the variation. It seems that an order of this kind can be made at any stage in the proceedings.
- Rule 45.44(3) defines 'prohibitively expensive' for these purposes as meaning that either the proceedings would exceed the financial resources of the claimant or they would be objectively unreasonable having regard to various enumerated factors.

In the case of an appeal, a new CPR r52.19A requires the court to make an order ensuring that the costs of any appeal will not be prohibitively expensive for a claimant.

The 88th CPR update also makes some consequential changes to the undertakings required for interim injunctions. In addition, a change to Practice Direction 54A para 5.9 means