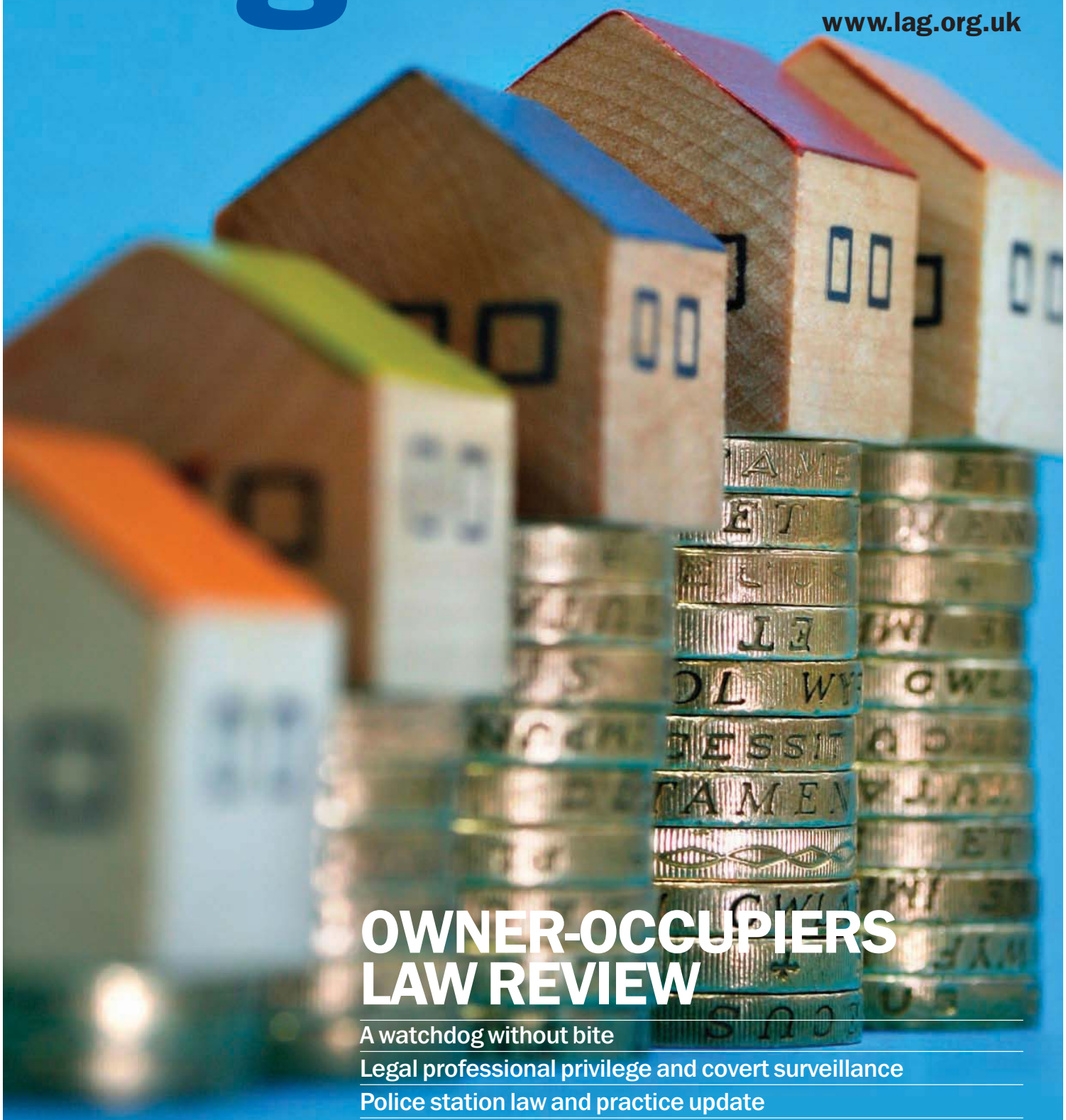
APRIL 2008 Journal of Legal Action Group

LegalAction

www.lag.org.uk



OWNER-OCCUPIERS LAW REVIEW

A watchdog without bite

Legal professional privilege and covert surveillance

Police station law and practice update

Police misconduct and the law

Local taxation update

Recent developments in housing law

Benefit rates from April 2008

LAG

The purpose of the Legal Action Group, a national, independent charity, is to promote equal access to justice for all members of society who are socially, economically or otherwise disadvantaged. To this end, it seeks to improve law and practice, the administration of justice and legal services.

LAG
242 Pentonville Road
London N1 9UN
Telephone: 020 7833 2931
Fax: 020 7837 6094
E-mail: legalaction@lag.org.uk
Visit: www.lag.org.uk/magazine

Cover photograph: Greg Meeson/ hitandrun/Alamy

Published by LAG Education & Service Trust Ltd, a registered charity incorporated in England (1095065), 242 Pentonville Road, London N1 9UN

Designed by Mick Keates and Tom Keates-Miles
Typeset by Boldface Typesetters Ltd
Printed by Reflex Litho Ltd
ISSN 0306 7963

Fund legal aid to end child poverty?

In the run up to the budget in March 2008, poverty charities were putting pressure on the government to meet its target to rescue one million children from poverty by 2010. LAG supports this aim and would argue that legal services charities need to be acknowledged for the work they do in tackling poverty.

Child poverty is defined as children living in households with an income which is less than 60 per cent of the national average income before housing costs. In 1999, the then Prime Minister Tony Blair set an overall target of eliminating child poverty completely by 2020. However, a report published by the House of Commons Work and Pensions Committee, *The best start in life? Alleviating deprivation, improving social mobility and eradicating child poverty*, in March 2008, indicates that the government is in danger of falling short of both this target and the one for 2010.

Figures for children living in poverty have increased for the first time since 1999. This fact, along with an uncertain economic outlook and other factors, such as the difficulty parents have in finding affordable childcare, means that it will be a challenge for the government to get within striking distance of its target. To his credit, Ed Balls, Secretary of State for Children, Schools and Families, while acknowledging the difficulties the government now faces said, with reference to meeting the child poverty target, 'you do not abandon your goals when the going gets tough, you redouble your efforts'.

These are fine words that need to be backed up with measures, including more affordable housing and childcare, better rights at work, as well as additional cash in the benefits and taxation systems for families. These measures could play a part in at least reducing UK child poverty to the levels in the Scandinavian countries (currently reported at around five per cent).

LAG believes that, allied to measures to tackle child poverty, there has to be a more strategic approach to the provision of legal services. We cannot help but contrast the government's treatment of an excellent and innovative charity that works with vulnerable children, Kids Company, with its behaviour towards legal services charities. After shaming the government into action, Kids Company's founder, Camila Batmanghelidjh, succeeded recently in persuading the government to come up with a three-year grant of over £4m a year to be spent on 400 of the most vulnerable young people aged 14 and over.

In contrast, legal services charities are going to the wall or facing cut backs. Stockport Law Centre® was forced to close in November 2007 as the changes to legal aid no longer made it viable to operate (see January 2008 *Legal Action* 5). Other Law Centres are facing the prospect of closure (see page 6 of this issue). They are not alone in having difficulties in dealing with the fall out from the legal aid reforms: some citizens advice bureaux have told LAG that they face cut backs and currently Shelter is in turmoil through proposed cuts to staff terms and conditions forced on it by the same changes.

LAG asks how the government can get it so right in striving to end child poverty and saving an important charity like Kids Company, but not be willing to help charities in the legal services sector? We suggest that the answer is made up of a combination of factors. These include a lack of public profile for legal services charities and their clients, no coherent national funding strategy, as well as a failure to acknowledge that demand for social welfare law services far outstrips supply.

The Legal Services Commission's (LSC's) figures on spending between different geographical areas illustrate a neverland quality to the planning of social welfare law services (see March 2008 *Legal Action* 4). For example, the London Borough of Kingston gets less than one-third of what the LSC believes would be a fair percentage of the available civil legal aid funding; this is a borough that is in danger of losing its Law Centre. In the meantime, other boroughs get three or four times what is fair according to the same calculation, but it should be stressed that even in these boroughs the demand is not being met as the system is cash-strapped.

While LAG accepts that there are local differences in the coverage of many public services, the disparities that exist in legal services would not be permitted in any other area of service provision. Families who face housing, employment, benefits and other problems which contribute to child poverty need a guarantee that government policies are underpinned by enforceable legal rights. Current policies towards the funding of legal services fail to do this, and as a result damage the chances of eliminating child poverty.

Campaign against care court fee hikes grows

CLARE KENDALL

District Judge Nicholas Crichton

Family law experts called on the government to abandon its proposals for a 2,500 per cent court fee hike in care cases as its consultation period closed in March 2008. District Judge Nicholas Crichton, who opened the pioneering specialist family drug and alcohol court at the Inner London Family Proceedings Court in January 2008, damned the proposals to make care proceedings self-financing as 'a massive disincentive' for cases involving children suffering persistent neglect to come before the courts.

The government is consulting on whether social services departments should meet the full cost of care proceedings through new court fees of £4,000 (currently £150) and £4,825 if a case goes to a full hearing. The hike would make proceedings pay their own way through the courts (their cost to the court system was £35m in 2006/2007). A new scheme could be introduced in April 2008.

'Why should the family justice system be expected to pay for itself?' asks DJ Crichton. 'The NHS is not expected to pay for itself, nor the education system, nor the Prison Service, nor the Police Service. It is hard to believe that in the first decade of the 21st century, we are living in a country where it is seriously suggested that any fee, let alone a fee of £4,000, should be levied on public authorities which have the responsibility to protect its most vulnerable citizens.'

It is 'a matter of public interest to ensure that children are kept safe and have access to justice', commented the NSPCC's director and chief executive Dame Mary Marsh. 'There is a real and serious risk that vulnerable children and their families will be prevented from having full access to justice if these proposals are implemented because some decisions about taking proceedings in relation to vulnerable children could be finance led.' In February 2008, the NSPCC and Law Society joined forces to express their concerns that 'local authorities may pursue other strategies to avoid the high costs in care proceedings where a child will not be represented, such as giving parents a second chance in cases of neglect or encouraging them to agree to the child being voluntarily accommodated temporarily instead of issuing proceedings'.

■ *Public law family fees consultation paper* is available at: www.justice.gov.uk/docs/cp3207.pdf. The consultation closed on 11 March 2008.

VHCC crime contracts revised

The furore over Very High Cost Cases (VHCC) for criminal work rolled on during March 2008 as both solicitors and barristers were asked to sign up to revised contracts in an attempt to get past the Bar's boycott of the new regime, including allowing solicitors to pay non-panel advocates directly (see March 2008 *Legal Action* 5). In the wake of the stand off between barristers and the Legal Services Commission (LSC), which saw only 130 out of a total of 2,300 counsel sign up to the original VHCC contracts, they were given another opportunity to join the panel. Barristers who join up will be offered work on the most complex criminal cases before non-panel advocates and guaranteed the rates of pay set out in the contract paid directly by the LSC.

The LSC explained that solicitors could then be able to instruct non-panel advocates if no panel member was available. Solicitors would 'have discretion to set the fee' for non-panel advocates, however the amount solicitors claim from the LSC could not exceed 'the amount payable to panel advocates'. 'The new contract will ensure that the panel arrangements which form the heart of the new high cost cases scheme can be established. This will be in the interests of clients, the justice system and the taxpayer', commented David Keegan, Director of the High Cost Cases Group at the LSC. He also said that new arrangements dealt with fears expressed by the Bar that the LSC would inspect barristers' diaries and require them to stick to the 'cab rank' rule on the acceptance of cases.

Defence lawyers were not convinced that the new proposals would be an effective way of bypassing the Bar's resistance. Andrew Keogh, a partner at Tuckers solicitors and vice-chairperson of the Criminal Law Solicitors' Association, said there was 'a sting in the tail' in that if solicitors negotiate lower rates then they can 'pocket the difference'. 'It is a grubby little deal', he added.

'I think that it would be an onerous task for solicitors if barristers are going to refuse anything less than a certain rate', commented Simon Pottinger of the legal aid consultancy JRS Consultants. 'It will effectively make panel members middlemen between the LSC and the Bar, which I am not sure is a position that many solicitors want to be in.' He was unconvinced that the proposals would increase the role of solicitor advocates. 'I do not think that there are too many solicitor advocates who would be happy acting in the role of QC and these cases will demand that.'

Meanwhile, there was hope for practitioners being pursued by the LSC for historic debt claims in the form of a Court of Appeal judgment considering the application of the statue of limitations in cases where certificates were revoked (*Legal Services Commission v Rasool* [2008] EWCA Civ 154, 5 March 2008). The dispute concerned a client who owed £17,333.70 having had his contract revoked by the then Legal Aid Board in May 1999 for failing to provide information requested. However, it was not until March 2006 that the LSC pursued the debt.

The case concerned whether the six-year limitation period ran from the date of revocation (1999) or the date of assessment of costs (2001). 'The purpose of the Limitation Act is to prevent delay', ruled Lord Justice Ward. 'The delay that has occurred in this case and in others dependent on the outcome of this appeal reveal how endemic delays of one sort or another may be. There would be no certainty for the assisted party as to when he might be called upon to pay the Board.'

While the Law Society is calling on the LSC to write off historic legal aid costs which can stretch back over 20 years and run into tens of thousands of pounds, Simon Pottinger believes that the ruling could apply equally to those cases where the legal aid certificate has been discharged. 'The LSC has not upheld its statutory obligations properly over a long number of years. It is now retrospectively trying to put this right and in doing so it is invoking an interpretation of the limitation legislation that has been oppressive for certain clients', he said.

IN BRIEF

■ A report published in March 2008 by the Children's Commissioner for England, Professor Sir Albert Aynsley-Green, uncovers a series of unacceptable practices faced by unaccompanied children when they apply for asylum in the UK.

■ *Claiming asylum at a screening unit as an unaccompanied child*, 11 MILLION, available at: www.11MILLION.org.uk.

■ *Near misses in police custody* is a collaborative study between the Independent Police Complaints Commission, the Metropolitan Police Service and forensic medical examiners working in London. It presents figures on the prevalence of near misses (also known as near deaths) in police custody, explores their circumstances, and makes recommendations on custody practice.

■ *Near misses in police custody: a collaborative study with forensic medical examiners in London*, IPCC research and statistics series: paper 10, March 2008, is available at: www.ipcc.gov.uk/ipcc_near_miss_report.pdf.

■ In March 2008, Professor Martin Partington CBE was appointed an Honorary Queen's Counsel. The honorary rank recognises lawyers who have made a major contribution to the law of England and Wales outside practice in the courts. Professor Martin Partington recently retired from the Law Commission and was recommended for his work in a number of fields, such as housing and tribunal law, including service as a Law Commissioner.

■ In March 2008, the Joint Committee on Human Rights published *The use of restraint in secure training centres*, eleventh report of session 2007–08, HL Paper 65, HC 378.

■ Available at: www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/65/65.pdf and from TSO.

■ The Ministry of Justice has published the *Review of the forum for preventing deaths in custody: report of the Independent Reviewer* by Robert Fulton, February 2008.

■ Available at: www.preventingcustodydeaths.org.uk/fulton_review_of_forum_for_preventing_deaths_in_custody.pdf.

■ In March 2008, the justice minister Bridget Prentice made a written ministerial statement announcing the government's response to the Law Commission's July 2007 report: *Cohabitation: the financial consequences of relationship breakdown*. The government is awaiting the outcome of research on the Family Law (Scotland) Act 2006 in order to extrapolate from it the likely cost of bringing the Law Commission's scheme into effect in this jurisdiction before taking further action.

■ See: www.justice.gov.uk/news/announcement060308a.htm and also page 23 of this issue.

news feature

Defence lawyers respond to BVT plans

Criminal defence lawyers queued up to pan the government's proposals for best value tendering (BVT) and recommended moves toward a market-driven approach to legal aid procurement, as the consultation period drew to a close in March 2008 (see January and March 2008 *Legal Action* 3 and 6). In a strongly-worded rebuff, the Criminal Law Solicitors' Association (CLSA) rejected the proposals on public interest grounds: 'Our legal aid system has served this country well since the 1940s following the publication of ... William Beveridge's 1942 report *Social insurance and allied services*', the CLSA wrote. 'The importance of access to justice and the right to legal representation was recognised by the Rushcliffe committee in 1945. Its recommendations led to the setting up of the first legal aid scheme in 1949. The current proposals under consultation will not permit a viable legal aid system to survive and is therefore in this association's view directly opposed to the public interest.'

The response of the London Criminal Courts Solicitors' Association (LCCSA) also betrayed that its members' patience had been exhausted. In a section headed 'Alienation', the LCCSA responded thus: 'It may be that the minister for legal aid (which in itself is a revolving door) may be irritated and disappointed at the lack of any positive engagement with the supplier base. The alienation has its roots in the sheer scale of ineptitude and mismanagement and the relentless cuts in remuneration which masquerade as reforms benefiting clients.' It went on to complain about the 'often deeply inappropriate' language of the Legal Services Commission (LSC), citing the December 2007 paper, *Legal aid reform - the next steps*, where it was asserted that '"we must move ... from a system which paid for hours worked instead of services delivered for clients"'. 'The direct meaning is that no services have been provided', noted the LCCSA. 'It is insulting as well as empty rhetoric.' The LCCSA argued that BVT was 'simply the wrong solution' which was 'draconian' in the sense that if firms failed their bid they would effectively be forced to close. As a result, BVT would force firms to make 'irrational choices with regard to bid prices, bidding basement prices as necessary in the belief that this will enable them at least to stay in the market'. The LCCSA complained of 'an inherent structural problem'. 'The LSC is a monopoly purchaser. We know of no comparable service industry which has a BVT process with a monopoly purchaser.' However, the association did have a possible solution. 'One way forward would be to end that monopoly by abolishing the LSC', it added. 'We note that from a standing start, the administrative burden of the LSC is now £100 million per annum.'

Other groups appeared to struggle with responding to the consultation. The Bar Council's working group on BVT (chaired by vice-chairperson of the Bar Desmond Browne QC and including a Court of Appeal judge and a professor of economics found that it 'proved impossible … to comment on the merits or otherwise of the proposed scheme since no details have been published'.

The Law Society argued that problems with BVT could destabilise mixed-economy firms and risked 'thinning the availability of legal aid across the board'. The society surveyed 361 lawyers and found that 56 per cent undertook civil legal aid work and 74 per cent of those practices felt their civil work would take a hit if they were unsuccessful with their criminal bids.

The CLSA had 'no doubt that those who do not succeed in the first round will leave the "market" forever'. The CLSA also found the proposals 'so vague in detail' that a proper response was 'problematic'. 'The Association believes these proposals fail on every test that the LSC set themselves namely "to create a sustainable legal aid system, with quality, access and value for money at its heart"', the CLSA concluded. 'We do not at this stage wish to answer questions set out in the consultation. The proposal is fundamentally flawed.'

news feature

NFP sector hits the buffer

The not for profit (NFP) legal advice sector has hit crisis point less than six months after the introduction of the Carter reforms, with leading Law Centres® in London claiming that their short-term futures are now under threat. South West London Law Centres were the first to announce that they were 'on the brink of closure' and Islington, Lambeth, North Kensington, and Tower Hamlets have all expressed similar concerns about their futures.

'[We have] been the last hope of tens of thousands of people for more than 30 years. We have stayed open through cuts, "reforms" and all manner of assaults on civil liberties even when staff had to work for nothing and public donations were the only thing keeping us going', said Michael Ashe, chief executive of South West London Law Centres. 'But now it seems the curtain is finally coming down on us.' He pointed out that in 2007, the five branches, which receive 68 per cent of their funding from the LSC, helped over 26,000 people 'at an average cost of less than £70 a case'. 'Last October, the Legal Services Commission [LSC] cut their funding to us by a third', he said. 'In April we will be just another excellent public service that was driven to extinction.'

It was a view echoed throughout London's Law Centres. 'The system is in crisis and the viability of Law Centres providing access to legal aid is in the balance', commented Ruth Hayes, manager at Islington. 'Our future is in the balance', said Patrick Marples, director at Lambeth. 'Everything is being destabilised because the LSC is the major funder for a lot of organisations.'

Ruth Hayes said that the move from hourly rates to fixed fees was putting her caseworkers under huge pressure and led to the Law Centre changing 'overnight' from being over-performing (having exceeded its 'hours' contract by six per cent) to failing. 'We need, in some areas of law, to do four times as many cases to bring in the same income', she said. 'Now we are working on fixed fees we are flat out trying all sorts of advice sessions, but the reality is that lots of our clients have complex problems. They are in distress, have mental health issues, disabilities, do not speak English as a first language or are not fluent. We simply cannot get an outcome which is worth having for them in the time we have got.' Ruth Hayes cites the £171 fixed fee for homelessness cases: 'It is often costing us between £350 and £400', she said. 'So, every case we open, we are losing several hundred pounds.'

Crispin Passmore, director of the Community Legal Service at the LSC, acknowledged that Law Centres were the hardest hit sector of the profession. 'We have no desire for good organisations delivering a good service with good-quality access and value for money to be struggling', he said. 'But it is important that we are clear about the many different things contributing to the situation. One of which is an ability to cope with change to fit with what we want to deliver.'

Crispin Passmore said: 'The test for me is not whether agencies pull out but can we get other people to come in and do the work at the fixed fees because, if they can on a sustainable basis, that is a successful transition.'

Sean Canning, director at North Kensington, argued that the new model was 'predicated on finding very short, rapid turnaround cases'. 'Unfortunately, our case profile does not fit that model', he said. Approximately 70 per cent of North Kensington's funding comes from the LSC. 'As one of the most established Law Centres, we have gone through very difficult funding cycles and have had difficulties attracting local authority support for years,' said Sean Canning. 'That has meant that we have become very dependent on LSC funding and the rapid changes to that funding pose potential threats to viability.'

'There were two major issues', commented Georgina Morgan, manager at Tower Hamlets. 'The first being the transitional arrangements that have been put in place by the LSC which are impacting upon our ability to manage cash flow and are causing immediate problems', she said. 'The second and more long-term issue is whether the contract is manageable at all. We are in the rare and lucky position of having reserves but obviously that will only take us so far. We are not looking at immediate closure, but it is not an impossibility within the next year given the arrangements that have been put in place.'

Transitional provisions designed to help NFP agencies ease into the new regime, whereby Law Centres receive a 'buffer' of three times the average monthly payment over an 18-month period, are also causing headaches because the buffer is being reassessed continually and has decreased as case numbers have dropped. 'It has been overcomplicated, taken a long time to get clarity and when it finally did become clearer it became obvious that it was not going to enable effective transition for the most prepared organisation with reserves which most [NFP] agencies cannot be', said one manager whose Law Centre had been paid £160,000 but has only earned £50,000. The Law Centres Federation recently contacted 54 centres and found that 20 had already exceeded their buffer payment and eight described themselves as under 'high risk of closure' (see below).

Impact of fixed fees on Law Centres: survey results

	Number of Law Centres
Contacted by survey	54
Provided complete information	41
Doing well under the new system	1
Meeting targets	9 (3 had solicitor contracts previously)
Below targets but within buffer	11
Over buffer	20
Over buffer in London	7
Over buffer outside London	13
Have made repayments	14
Believe they are at high risk of closure	8

Survey carried out by the Law Centres Federation between 22 February 2008 and 6 March 2008.

The Independent Police Complaints Commission (IPCC) is four years old this month, however its credibility has already been seriously undermined, not least when, in March 2008, more than 100 members of the Police Action Lawyers' Group (PALG) withdrew their support and two of the group's representative members resigned from the commission's advisory board. Jon Robins, LAG's communications and campaigns director, speaks to families, campaigners and commentators about their first-hand experiences of dealing with the IPCC.

A watchdog without bite

One Saturday morning in November 2005, Nicola Dennis, a 27-year-old single mother, was in her ground-floor maisonette in Woolwich, south east London with a friend, Gemma, showing her the Christmas presents she had bought for her three children when the doorbell rang. Nicola Dennis opened the door but no one was there. She tried to close the door; the lock did not catch, and so she opened it again. Pandemonium broke out: armed police officers ordered both Nicola Dennis and her friend to put their hands in the air. 'Officers grabbed hold of me like a piece of meat whilst one of them walked Gemma over to the left of the house. They dragged me a distance from the house and threw me to the floor, kicked my legs open and started shouting. It was completely terrifying', recalls Nicola Dennis.

This incident happened a few months after the killing of Jean Charles de Menezes, who was shot dead by Metropolitan police officers at Stockwell Tube station, south west London in July 2005. 'I thought I was going to die', recalls Nicola Dennis. 'I could not think of anything worse than having a policeman holding a gun to your head. They act on impulse, and if they think they are in danger they pull the trigger.' Nicola Dennis was on the pavement, face down, with her hands taped with plastic strips behind her back. She was detained for 40 minutes. She was innocently caught up in the search for the killers of PC Sharon Beshenivsky, who was shot dead as she responded to an alarm at a travel agent's shop in Bradford, West Yorkshire.

There are situations when a simple 'sorry' is not enough and, two-and-a-half years later, Nicola Dennis has yet to receive a proper explanation from the police, let alone an apology. Instead, she has been stuck in the police complaints process.

The IPCC was set up in April 2004 under the Police Reform Act (PRA) 2002 to replace a discredited Police Complaints Authority (PCA). The watchdog has been under fire since the killing of Jean Charles de Menezes. That criticism intensified this year when more than 100 members of the PALG withdrew their backing for the IPCC and Tony Murphy and Raju Bhatt, of Bhatt Murphy solicitors, resigned from the commission's advisory board as representatives of PALG.

An officer did come around that evening to visit Nicola Dennis, not to apologise but, as she recalled later in a statement to her solicitors, to explain that she happened to be 'in the wrong place at the wrong time'. The woman officer also told her that when the police investigate one of their own they 'go in harder'. Nicola Dennis complained to the Metropolitan Police and they carried out a supervised investigation. That investigation came back in April 2007 with the sole finding that a stop and search form had not been completed.

The following month, Nicola Dennis appealed to the IPCC. Its response, in July 2007, was 'confusing and confused', reckons Marian Ellingworth of Tuckers solicitors. The watchdog conceded that the officer's actions were 'overzealous' and said that he deserved 'words of advice'. 'My client suffered a terrifying and wholly unnecessary ordeal. There was no justification for suspecting Nicola or using such a high level of force and no explanation as to why she was treated so differently from Gemma. The death of PC Beshenivsky was clearly a terrible tragedy but it does not give licence to officers to behave in this way', says Marian Ellingworth. 'Nicola's detention was either lawful or it was not. The IPCC seems to acknowledge that it was wrong in fact but, as a result of weak analysis, it failed to reach the only proper conclusion that it was wrong in law.' Nicola Dennis has applied for permission to proceed with judicial review of the IPCC's decision. 'We are defending our position', says an IPCC spokesperson.

Crisis in confidence

The failure to deal adequately with concerns about the actions of the police were themes running through both Lord Scarman's inquiry into the Brixton riots of the early 1980s and the Macpherson inquiry into the 1993 killing of Stephen Lawrence.* 'Investigation of police officers by their own or another Police Service is widely regarded as unjust, and does not inspire public confidence', Sir William Macpherson wrote in his report (chapter 47).

The IPCC is run by a chairperson, a deputy chairperson and 13 commissioners who, under the PRA, must not have served in the police force. Its investigators must handle the most serious complaints autonomously and have the same powers as police to make arrests and seize documents. Not only was the IPCC conceived as constitutionally independent but it would be run by independently-minded people such as Nick Hardwick, former chief executive of the Refugee Council, as its chairperson, and John Wadham, a former director of Liberty (now legal director at the

Equality and Human Rights Commission), as its deputy chairperson.

Tony Murphy points out rightly that proper investigation of complaints against the police has 'long been held as essential for our democracy'. He says the leadership is 'failing to fulfil its responsibilities in relation to that vital task. Urgent action is needed if the IPCC is not to become another obstacle on the road to police accountability'.

In January 2008, Tony Murphy and Raju Bhatt wrote to Nick Hardwick pointing out that they had participated in its advisory board because they felt it could be 'an important means for the IPCC to take account of the interest of complainants and other stakeholders'. 'Almost four years on, it is a source of deep disappointment to find that our involvement has reaped little benefit for the complainants represented by members. Indeed, it has had a negative effect insofar as it has taken us away from our clients for nil return', they wrote.

Nick Hardwick denies that the IPCC is facing 'a crisis of confidence'. Instead, he insists it is business as usual and that the commission continues to deal with PALG members 'on a day-to-day basis without any problems. Sometimes we agree, sometimes we do not', he says.

PALG members are keen to say that the views expressed by Tony Murphy and Raju Bhatt are endorsed throughout the group. 'The IPCC should be playing an important constitutional role in holding the police to account when officers abuse their powers', says Jules Carey, head of the police action team at Tuckers. The IPCC is 'failing dismally' at this, he adds.

'Right from the start, when the IPCC took over the legacy cases from the PCA, our experience was that decision-making was poor and taken by people that were inexperienced or, to take a more cynical point of view, had a tendency to believe the police', reckons Stefano Ruis of south London firm Fisher Meredith. He cites the example of one client, Carole Tibbitts, who was arrested in May 2002 during a demonstration over a proposed development in Titnore Woods, Worthing. His client was prosecuted for assaulting a police officer but video evidence played in court told another story. 'The video shows the officer assaulting Carole, not the other way round', the solicitor says. Carole Tibbitts was acquitted.

The complaint was investigated by the local police before transferring to the IPCC. Stefano Ruis says: 'Despite the clear evidence of perjury, the IPCC agreed with the finding that the officer had "not deliberately lied" and that the officer received informal words of advice in light of the "very poor evidence given in court" and that a detailed assessment of his training needs was to be carried out.' He complained to the IPCC that the decision was 'not sustainable in law' but the commission upheld it. The solicitor then wrote a letter before claim before judicially reviewing the IPCC. John Wadham, the then deputy chairperson, looked at the case and referred it to a disciplinary panel which, according to the IPCC spokesman, 'ruled the case not proven'. Carole Tibbitts is pursuing a civil action against the police. What is Stefano Ruis's view of the IPCC? 'I have sympathy with many of my clients who have decided it is very much a waste of time', he replies. 'The only realistic way for my clients to seek redress and accountability is to resort to legal action in the courts.'

The families' experience

This is far from a local argument between the legal profession and the IPCC. Helen Shaw of Inquest, who is also on the IPCC's advisory board, shares the 'frustrations in trying to get the IPCC to listen to concerns from bereaved families over the quality of investigations and the way that the IPCC has approached families'. 'Our experience has been until very recently that the IPCC has paid lip-service to what we have been saying', she adds.

The first test case for the new watchdog came with the killing of Jean Charles de Menezes. The decision by the IPCC, which was announced on 21 December 2007, not to recommend disciplinary action against four senior officers as a result of the fatal shooting was described by Vivian Figuierdo, cousin of Jean Charles de Menezes, as 'a scandal'. 'Sadly, we have come to expect this from the IPCC – they had done nothing to hold the police to account for the killing of an innocent man', she said.

So what, in the de Menezes family's view, did the IPCC do wrong? Yasmin Khan, a spokesperson for the family, starts with its 'reluctance or inability to stand up' to Sir Ian Blair, the Metropolitan Police Commissioner and the Home Office after it was 'locked out' of the investigation in the immediate aftermath of the shooting. 'We already know CCTV footage from the platform went missing during this time, what other evidence could have been removed or tampered with?' she asks.

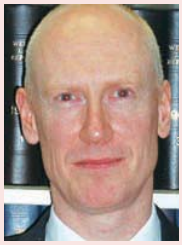
Then Yasmin Khan raises 'the failure to correct misinformation' in the press. 'The family was insisting to the world's press that their loved one did not have a bulky jacket or a bag or did not run and yet the IPCC said nothing.' It led to a leak of investigation papers by IPCC staff in August 2005. Yasmin Khan says: 'Had that leak not been made public, we would presumably not have known until over two years after the shooting that Jean did nothing wrong … It seems that the IPCC is just as capable of carrying out a whitewash as the discredited [PCA] it replaced.'

These are views echoed by the family of another high-profile police killing. In 1999, Roger Sylvester died after being restrained by six police officers who detained him under the Mental Health Act. 'We feel the IPCC has not changed much from the days of the PCA', says his cousin, Justin Waldron. In August 2007, the IPCC announced that no officers were going to be disciplined despite an inquest verdict of unlawful killing in 2003. 'We did not think it was a thorough investigation', Justin Waldron says. 'It means the police are allowed to avoid scrutiny and accountability by the IPCC washing its hands of a case.'

The perception of the IPCC as a toothless watchdog is apparently contributing to a loss of confidence in the community. Stafford Scott, who is an independent adviser to the Metropolitan police Trident Operational Command Unit (that investigates gun crime in the black community) and chairperson of the black independent advisory group to the police in Haringey, north London, believes that the body has 'no credibility'. 'The confidence of complainants in the group provides a barometer to public confidence', he says. 'We sue the police – that is what we do now. We do not go through the IPCC. We go through the civil courts.'

* See *Police Act 1964: the Brixton disorders, 10–12 April 1981 report of an inquiry by Lord Scarman*, Cmnd 8427, London HMSO, 1981, available from TSO, £20, and *The Stephen Lawrence inquiry. Report of an inquiry by Sir William Macpherson of Cluny*, February 1999, available at: www.archive.official-documents.co.uk/document/cm42/4262/4262.htm.

For a longer version of this feature, with case studies, visit: www.lag.org.uk.



James Welch, solicitor and legal director of Liberty, discusses the latest case-law on the adequacy of safeguards currently in place to protect the confidentiality of solicitor/client consultations in police stations and prisons and asks whether or not the use of bugging can ever be justified.

Legal professional privilege and covert surveillance

Introduction

The recent revelation that conversations in Woodhill Prison between Sadiq Khan MP and his childhood friend and constituent Babar Ahmad were bugged not only raised questions about the validity of the Wilson Doctrine but also reminded us of the very real possibility that communications between solicitors and their clients might also be monitored.[1] Recently, Simon Creighton of Bhatt Murphy solicitors disclosed that his telephone conversations with his prisoner client Harry Roberts had been intercepted; he knew this because transcripts of their conversations were shared inadvertently with him. Various leading solicitors, Gareth Peirce and Imran Khan among them, have expressed the belief that monitoring of conversations between lawyers and their clients, in prisons and police stations as well as over the telephone, is widespread.

With perfect timing, a decision of the Northern Irish Divisional Court, which is now bound for the House of Lords on the claimants' appeal, considers whether the safeguards currently in place to protect the confidentiality of consultations between solicitors and their clients in police stations and prisons are adequate.

C and others

In *Re C, A, W, M and McE's application* [2007] NIQB 101, 30 November 2007, the claimants challenged the police's refusal to confirm that their conversations with their solicitors (or, in the case of M, a psychiatrist) while detained at a police station or in prison would not be subject to covert monitoring. They asked for such an assurance in the light of media reports that a solicitor had been arrested for serious offences, evidence of which was obtained by the secret surveillance of legal consultations between the solicitor and clients in custody.

It was accepted that such surveillance would be 'directed surveillance' as defined in Regulation of Investigatory Powers Act (RIPA) 2000 s26 (surveillance which is covert but not intrusive,[2] which is undertaken for the purposes of a specific operation and which is likely to result in the obtaining of private information about a person). While directed surveillance, where conducted by the police, would normally be authorised by a superintendent (or inspector in urgent cases), the Covert Surveillance Code of Practice (issued under RIPA s71) requires a higher level of authorisation where the surveillance is likely to result in obtaining material, inter alia, subject to legal professional privilege: in the case of the Police Service of Northern Ireland, the authorisation should be given by a deputy chief constable.

The claimants' arguments were threefold. First, they argued that the generalised power to conduct direct surveillance under the RIPA was not sufficient to override the statutory rights to consult privately with a solicitor in Police and Criminal Evidence (Northern Ireland) Order 1989 SI No 1341 article 59 (the equivalent in England and Wales is Police and Criminal Evidence Act 1984 s58) and Terrorism Act 2000 Sch 8 para 7. Kerr LCJ and Campbell LJ dismissed this argument, Girvan LJ dissenting.

Second, the claimants argued that the police's refusal to give the assurance that they sought breached article 6 of the European Convention on Human Rights ('the convention'). Kerr LCJ considered European Court of Human Rights (ECtHR) case-law and concluded that, while the right to consult privately with a lawyer was protected implicitly by article 6(3)(c), *S v Switzerland* App Nos 12629/87 and 13965/88, 28 November 1991; (1991) 14 EHRR 670 showed that the right could be subject to limitation while *Brennan v UK* App No 39846/98, 16 October 2001; (2002) 34 EHRR 18 showed that there would only be a breach if the fairness of a subsequent trial was affected. There was nothing to show that that was the case here.

It is worth noting that the surveillance in *S* and *Brennan* (and indeed in the other ECtHR cases considered by the court, or at least those not concerned with the interception of correspondence or electronic communications) was overt: the applicants and their solicitors knew it was happening. It is open to question whether

principles derived from cases concerning overt surveillance can be applied to actions concerning covert surveillance.

It should also be noted that while the ECtHR did indeed state in *Brennan* that it was necessary to show prejudice to the fairness of proceedings, the Strasbourg court was prepared to assume such prejudice: '… the court cannot but conclude that the presence of the police officer would have inevitably prevented the applicant from speaking frankly to his solicitor and given him reason to hesitate before broaching questions of potential significance to the case against him' (para 62).

The claimants in *C and others* were, however, successful in the third of their submissions, under article 8 of the convention. All three judges noted that different forms of clandestine surveillance had different forms of authorisation procedure. In particular, they contrasted the authorisation procedure for directed surveillance, where there was a likelihood of obtaining material subject to legal professional privilege, with that under Police Act 1997 Part III. Part III governs measures that involve entry on or interference with property or wireless telegraphy. In a number of circumstances, including where the premises are a home or an office or where the action is likely to result in acquiring knowledge of matters subject to legal professional privilege, the prior approval of a surveillance commissioner is required. A surveillance commissioner has to have held judicial office of at least High Court rank. The judges also noted that an authorisation of intrusive surveillance under the RIPA must be approved by a surveillance commissioner, regardless of the nature of the material the surveillance was likely to produce.

The court could perceive no justification for the discrepancy in the levels of authorisation required. Where such an important right as the right to consult a solicitor in confidence was at stake, authorisation by a senior police officer was an inadequate safeguard for the purposes of article 8. The absence of any independent authorisation regime led the court to declare that the monitoring of the claimants' consultations would be unlawful and that the police's refusal to give an undertaking not to do so breached article 8.

R v Grant

The approach of the Northern Irish court, particularly on the issue of prejudice, can be contrasted with what appears to be a more robust attitude on the part of the Court of Appeal in England and Wales. In *R v Grant* [2005] EWCA Crim 1089, 4 May 2005, the court considered a case where it had become apparent that conversations between the defendant and his solicitor in the exercise yard of Sleaford Police Station had been secretly recorded. In two other cases where legally privileged conversations had been recorded in the same way at the same police station (*R v Sutherland* (2002) 29 January, unreported and *R v Sentence* (2004) 1 April, unreported) the trial judges had stayed the prosecutions as an abuse of process. The trial judge in *Grant* had declined to do so and the defendant was convicted of conspiracy to murder.

The listening devices had been authorised under the RIPA with the stated aim of recording conversations between detainees. However, in view of the positioning of other devices within the station and policies on who could use the yard unsupervised, the judges in *Sutherland* and *Sentence* concluded that the purpose of placing the listening device in the yard was to capture conversations between solicitors and their clients when they went outside for a cigarette. The Court of Appeal in *Grant* agreed and allowed the defendant's appeal. The court did so notwithstanding its conclusion that the defendant had suffered no detriment as a result of the recording of his conversations with his solicitor.

The court was forthright in its condemnation of what had gone on: 'Acts done by the police, in the course of an investigation which leads in due course to the institution of criminal proceedings, with a view to eavesdropping upon communications of suspected persons which are subject to legal professional privilege are categorically unlawful and at the very least capable of infecting the proceedings as abusive of the court's process' (para 52).

Sadly, it is not clear how far this bold statement of principle depends on police dishonesty in purporting to authorise the listening devices for one reason when their real motive was another. It is possible that the court would not have been so forthright if it had concluded that authorisations were granted properly under the RIPA to bug such conversations.

Can bugging ever be justified?

The justifications for legal professional privilege are obvious. Clients need to be certain that what they tell their lawyers will be confidential; otherwise they will not make full disclosure and will, as a result, be denied proper legal advice. Moreover, the bugging of consultations may place the prosecution in an advantaged position in any subsequent trial.

The possibility of covert surveillance is bound to have a chilling effect on clients' exercise of their right to obtain legal advice in confidence: if there is a possibility that a consultation between a lawyer and his/her client is being bugged, is it not safer for the client to say nothing?

Nevertheless, despite this danger, Liberty's view is that the bugging of lawyer-client consultations, and indeed other communications between them, can be justified where there is a well-grounded suspicion that the lawyer is engaged in serious criminal activity and there is no other practicable means of obtaining evidence of this. Bugging should never be used as a means of obtaining evidence against the client alone. Where it can be justified, and this is where *C and others* is on the right lines, it must be authorised by a senior judge (indeed we would say that all forms of targeted surveillance likely to capture private communications should be so authorised) and any material obtained must be vetted by a suitably independent person, ideally a judge, before it is given to the police. Only material which is not properly subject to legal professional privilege should be handed over. Such stringent safeguards are the minimum necessary to protect such an important right.

1 The doctrine that MPs' telephones would not be 'tapped', subject to a rider that the policy could be changed at any time and the change only notified to parliament when national security allowed.
2 'Intrusive surveillance' is separately defined in s26. It is covert surveillance carried out by means of a surveillance device of anything taking place in residential premises or a private vehicle. It seems that a prison cell, but not the common parts of a prison, will count as residential premises: RIPA s48(1) and (7)(b).

Police station law and practice update

Ed Cape continues his six-monthly series covering developments in law and policy affecting police station practice. He welcomes comments, and information about new developments and unreported cases.

POLICY AND LEGISLATION

Driven by a desperate desire to meet Treasury targets, the Legal Services Commission (LSC) reform juggernaut continues to career towards an almighty crash, oblivious to rational argument, evidence and the casualties that it leaves in its wake. Commenting last June on the government response to the House of Commons Constitutional Affairs Committee's critical report, *Implementation of the Carter review of legal aid*, May 2007, its chairperson Alan Beith MP said that the 'government has still failed to recognise the fundamental flaws in its proposals for legal aid reform'.[1]

As if to prove the point, the Defence Solicitor Call Centre (DSCC) came into operation on 14 January 2008, and CDS Direct was launched in three areas (Greater Manchester, West Midlands and West Yorkshire) on 1 February 2008 with plans to roll it out nationally in April 2008. This three-month pilot is meant to give time to allow the scheme to bed down and for technical adjustments to be made before it is applied to all police stations. However, the period is too short for a meaningful assessment to be made, let alone independent research, and for any amendments to be made to the Police and Criminal Evidence Act (PACE) 1984 Code C (see below).

The two schemes had a stormy beginning, with the LSC blaming 'peaks in call volume requests' for poor performance by the DSCC.[2] It was originally intended that custody officers, having ascertained that a suspect wanted legal advice, would ask whether or not s/he intended to pay privately, and contact his/her solicitor if s/he did and the DSCC if s/he did not. It was pointed out to the LSC that involving custody officers in issues of payment would take us back to the bad old days when the police used worries about cost to deter suspects from seeking legal advice, and was quite probably illegal. Thus, at the last minute, the instructions to custody officers were changed, so that all requests are now directed to the DSCC, which is no better equipped than the police to deal with financial issues. Particularly worrying is the fact that the DSCC will make the decision about whether a request should be directed to an own solicitor or to CDS Direct in cases where the suspect is vulnerable or has suffered from serious police maltreatment, a task for which it is simply not qualified or equipped.

Given that these changes have been driven largely by the desire to contain the legal aid budget, it is of concern that the Ministry of Justice still has not taken on board what is driving police station legal aid costs – or perhaps it has, and is looking to criminal lawyers to absorb the financial consequences. In his recently published review of policing, Sir Ronnie Flanagan noted that:

> *In ten years central spending on policing has risen by nearly £5 billion (an increase of 39 per cent in real terms). This extra funding has resulted in a 25 per cent growth in the overall police workforce and a ten per cent increase in the number of police officers, which now stands around 140,000.*[3]

Not surprisingly, this investment has resulted in more arrests, enabling the Home Office (HO) to boast that it has exceeded its offences brought to justice target for 2006/7.[4] In this context, the new schemes, and the police station fixed fee scheme which was introduced on 14 January 2008 to 'control legal aid costs for representing clients in police stations', appear as being particularly one-sided.[5]

Consultation on *Modernising police powers*

This review of PACE, reported in 'Police station law and practice update', October 2007 *Legal Action* 10, is continuing with government proposals expected in spring 2008. Some of the proposals are likely to require legislative changes, but readers should expect to see plans to introduce short-term holding facilities in shopping centres, allowing questioning to continue between the decision to refer a case to a Crown prosecutor for a charge decision and the time when the charge decision is made, and also after charge. Also favoured is permitting inferences to be drawn from 'silence' during post-charge questioning.[6]

PACE/Codes of Practice

Revised PACE Codes A–E were brought into effect on 1 February 2008 by Police and Criminal Evidence Act 1984 (Codes of Practice) Order 2008 SI No 167.[7] A summary of the changes can be found in HO Circular 002/2008, *Amended Police and Criminal Evidence Act 1984 (Pace) Codes of Practice (A-E)*.[8] Most of the changes are relatively minor, although amendments to Code E reflect a pilot in the Lancashire Constabulary on recording police interviews by a secure digital network rather than on tape. The revisions to Code C (*Notes for guidance* 6B, 6B1 and 6B2), which facilitate the introduction of the DSCC and CDS Direct, were out of date as soon as they came into effect because, as noted above, all requests for solicitors are now routed to the DSCC (which is not reflected in the new provisions).

When HM Customs and Excise and the Inland Revenue were amalgamated by the Commissioners for Revenue and Customs Act 2005 into HM Revenue and Customs (HMRC), their respective criminal investigative powers were kept separate. In effect, PACE could only be applied directly to functions that were formerly dealt with by HM Customs and Excise, and not to those formerly dealt with by the Inland Revenue. Finance Act 2007 ss82(2), 83(2) and 84(1) changed that, so that PACE could be directly applied to investigations conducted by any HMRC officer. The Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2007 SI No 3175, which came into force on 1 December 2007, gave effect to that so that the investigative powers and duties contained in PACE and the Codes of Practice now apply, with modifications, to all criminal investigations conducted by HMRC officers. In addition, the covert investigatory powers in the Police Act 1997 and the Regulation of Investigatory Powers Act 2000 now also apply to HMRC investigations as a result of Serious Crime Act 2007 s88 and Sch 12, which came into force on 15 February 2008.

Charge/diversion

The Criminal Justice Act 2003 (Commencement No 17) Order 2007 SI No 2874 brought into force, on 1 October 2007, Criminal Justice Act (CJA) 2003 Sch 2

para 3, which inserts a new s37B(8) into PACE. The result is that in those areas where written charge has replaced the summons procedure (see 'Police station law and practice update', October 2007 *Legal Action* 11), and a person is bailed under PACE s37(7)(a) for the purpose of a Crown prosecutor making a charge decision, s/he may be charged when s/he answers to his/her bail, or s/he may be dealt with without attending a police station by means of a written charge.

Community support officers

Police and Justice Act (PJA) 2006 ss7 and 9, etc amend Police Reform Act 2002 s38, etc, introducing standard powers for all community support officers (CSOs) as from 1 December 2007: see Police and Justice Act 2006 (Commencement No 6) Order 2007 SI No 3203 and Police Reform Act 2002 (Standard Powers and Duties of Community Support Officers) Order 2007 SI No 3202, and for further explanation see HO Circular 033/2007, *Standard powers and duties of police community support officers*.[9]

The full list of standard powers, discretionary powers and powers to issue penalty notices for disorder under Criminal Justice and Police Act 2001 Part 1 Chapter 1, is set out in the annex to the Circular. Note that the power of CSOs to detain for up to 30 minutes is not a standard power, but can be applied by chief constables to CSOs in their force.

Safety of police station lawyers

Following consultation with the professional bodies, the Home Office has introduced Circular 034/2007, *Safety of solicitors and accredited and probationary representatives working in custody suites at police stations*.[10] This sets out guidance on the arrangements for the safety and security of the custody suite, and also suggests that local protocols should be established. In particular, it reminds the police and solicitors' firms of their health and safety obligations towards their employees.

With regard to solicitors and representatives advising at police stations, it states that they should seek relevant information from the police before client consultations in order to enable them to assess risks and that they 'should not expose themselves to unnecessary risk simply for the sake of expediency'. In particular, police cells and secure visits rooms should not be offered for the purpose of lawyer/client consultations other than as a last resort and provided arrangements are in place to deal with any identified risks which may affect the safety of the lawyer. One problem that is not mentioned is how to square the delay that might result from health and safety considerations with the time pressures resulting from the introduction of fixed fees.

CASE-LAW

Stop and search, and arrest

■ (1) S Raissi (2) M Raissi v Commissioner of Police of the Metropolis

[2007] EWHC 2842 (QB), 30 November 2007

S and M were the wife and brother respectively of Lotfi Raissi who, at the time, was suspected of involvement in terrorism, and they were arrested under Terrorism Act 2000 s41(1) on suspicion that they were terrorists. They were subsequently released without charge, and later sought damages for wrongful arrest and false imprisonment. It was argued for the police that the arresting officers had reasonable grounds for suspicion. In the case of S, the arresting officer was aware of evidence that she had been abroad with her husband at a time when it was thought that he may have been engaged in training with one of the known perpetrators of the 9/11 attacks. In the case of M, the arresting officer was aware that he lived fairly close to his brother, and that they had had access to each other's houses. In addition, both officers relied on the belief that more senior officers might have additional information which they had not given to the arresting officers.

It was held that the officer who arrested S did have reasonable grounds for suspicion arising, in particular, from knowledge of her travelling abroad with her husband. However, the suspicion of the officer who had arrested M was not reasonable in the sense required by *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286, and the fact that he believed that his superiors probably did have other information justifying the arrest was not capable of making his suspicion reasonable.

Comment: See the comment on *R v Olden* [2007] EWCA Crim 726, 9 March 2007 in 'Police station law and practice update', October 2007 *Legal Action* 12. Arresting officers must themselves have reasonable grounds to suspect, and although they can base this on information given to them by another officer, they cannot simply rely on orders to arrest or assume that the other officer has information giving rise to suspicion. The arrest of S was lawful even though the government of the USA never did provide any satisfactory evidence of her husband's involvement in terrorism. He has now succeeded in establishing his right to claim for his unwarranted detention under the ex gratia scheme operated by the Home Secretary: see *R (Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72. See also page 20 of this issue.

■ R v Bristol

[2007] EWCA Crim 3214, 4 December 2007

B was seen by two police officers in the street. In the belief that B had something in his mouth, one of the officers asked him to open it and saw what he believed to be a wrap of drugs. The officer immediately applied mandibular pressure to prevent B from swallowing and instructed him to 'spit it out'. B was subsequently arrested, but no drugs or evidence of drug use was discovered. He was charged with, and convicted of, obstruction of a police officer in the execution of his duty.

On appeal, B argued that the search was unlawful. A drug search under Misuse of Drugs Act 1971 s23 is governed, procedurally, by PACE s2. This requires that before a search is conducted, the officer must take reasonable steps to bring to the person's attention his/her name and the name of the police station to which s/he is attached, the object of the proposed search, and the grounds for making it. Section 2(2) states that the search must not be commenced until this has been done. The officer said that 'he did not have time to go through the niceties' and that B knew who he was from previous contact.

The court held that the s2 requirements were mandatory, and that all the officer had to do to satisfy them was to state his name and station, and to say 'drugs search, spit it out'. In the circumstances, the judge should have withdrawn the case from the jury.

Comment: In the current climate, it is good to see the court emphasising the importance of compliance with the procedural requirements concerning stop and search. On the other hand, the court makes it clear that the expectation about the information to be given is minimal. The case also provides an important reminder to defence lawyers to examine carefully the facts surrounding the use of police powers. In his *Review of policing*, Sir Ronnie Flanagan describes stop and search as an 'invasive process' and recommends no change to the information and recording requirements.[11]

Interview/caution

■ R v Welcher, Simpson and Harper

[2007] EWCA Crim 480, 2 March 2007, [2007] Crim LR 804

W was interviewed by his senior line manager about suspicions that he was defrauding the company. During the interviews, he gave

explanations that were inconsistent with explanations he subsequently gave in police interview and in evidence. W argued that his line manager was acting under a duty to investigate offences within the meaning of PACE s67(9) and that the interviews should, therefore, be excluded under PACE s78(1) because of a failure to caution him.

It was held that the line manager's duty was limited to reporting to a company disciplinary panel about whether W should be dismissed. Therefore, he was not charged with a duty to investigate offences, and so was not bound to have regard to PACE Code C. Therefore, there was no obligation to caution.

■ R v Doncaster

[2008] EWCA Crim 5, 23 January 2008

HMRC conducted a series of enquiries into D's tax affairs as a result of his failure to notify it of his chargeability to income tax. Eventually his case was transferred to a special compliance officer (SCO), and he was subsequently prosecuted for cheating the public revenue and false accounting. He appealed against his conviction on the ground, inter alia, that the judge should have excluded evidence of interviews with the tax inspectors under PACE ss76 or 78 on the ground that they had breached Code C in that they had failed to caution him.

It was held that local tax inspectors are not persons charged with the duty of investigating offences and are not, therefore, required to have regard to the PACE Codes. In certain circumstances, for instance where an enquiry is close to the point where it is referred to a SCO, or even past the point where it ought to have been referred, there may well be the possibility of unfairness if evidence then obtained were to be admitted at a future trial. That would not turn the local tax inspectors into persons charged with a duty of investigating offences, but might nevertheless require evidence to be excluded under ss76 or 78 in appropriate circumstances.

Comment: It is well established that whether a person is charged with the duty of investigating offences, and therefore covered by the requirement in PACE s67(9) to have regard to relevant provisions of the PACE Codes (including the obligation to caution), is fact-sensitive.[12] For the HMRC civil investigations of tax fraud procedure see the HMRC website.[13] The point made in *Doncaster* was that evidence from an interview, which is conducted at a stage where a civil investigation is nearing the point when it is to be referred to a SCO for a criminal investigation, might be excluded on the ground of unreliability or unfairness even though there is no formal requirement on the revenue officer to have regard to the PACE Codes.

■ Director of Public Prosecutions v Lawrence

[2007] EWHC 2154 (Admin), 16 July 2007

According to the prosecution, L became aggressive and abusive after his car was stopped by police. He was arrested and subsequently prosecuted for disorderly conduct under Public Order Act 1986 s5. He was not interviewed, nor was he given the opportunity to examine the police officer's account of the incident. The magistrates' court excluded evidence of what L was purported to have said on the ground that there was a breach of PACE Code C para 11.13, which requires a written record to be made of any comments made by a suspect outside the context of an interview but which might be relevant to an offence and, where practicable, that the suspect be given an opportunity to verify or dispute the record.

On an appeal by the Director of Public Prosecutions (DPP), the Divisional Court held that the provisions of para 11.13 were not directed at what a suspect was alleged to have said as part of the conduct constituting the offence, but only at what s/he was alleged to have said of a self-incriminatory nature on or after arrest for it. Therefore, there was no breach of the provision.

Comment: If this is correct, it would also mean that the requirement to put a significant statement to a suspect at the beginning of an interview under PACE Code C para 11.4 would not apply to such comments. In his judgment, Auld LJ said that if L's argument had been correct it would also mean that a record should be made of acts as well as words that constitute the alleged offence which, he implied, could not be right.

The result is that the police can detain an arrested person for questioning, even though there is sufficient evidence to charge, in order to see whether the suspect wants to put forward a defence (see, for example, *R v McGuinness* [1999] Crim LR 318), but if the police choose not to interview then, according to Auld LJ, the suspect does not suffer prejudice from not being given an early opportunity to dispute the police version of events because s/he has the opportunity later to deny what the police said.

Decision to charge and diversion

■ R (G) v Chief Constable of West Yorkshire and Director of Public Prosecutions (interested party)

[2008] EWCA Civ 28, 5 February 2008

See page 18 of this issue for the facts of this case.

Comment: The applicant in the original judicial review failed because the court treated the custody officer's belief that there was sufficient evidence to charge and the decision to refer the matter to the Crown prosecutor for a charge decision as if he was simply seeking advice about whether there was sufficient evidence to charge. The court had held that the threshold test, on which the officer's decision had to be taken under *The director's guidance on charging*, was not a sufficient standard on which to base a charge decision.[14]

The Court of Appeal held that this view of the custody officer's conduct was untenable, and that the DPP's guidance could not alter the statutory framework. Section 37 required the custody officer to decide whether there was sufficient evidence to charge, and once s/he had, s37(7), as it was then, did not permit him/her to detain the suspect while the Crown prosecutor took a decision. The Court of Appeal avoided taking a view on the threshold test, but it is understood that the DPP's guidance is shortly to be revised.

As things stand, there remain difficulties with the statutory charging framework. If the custody officer decides that there is sufficient evidence to charge and refers the matter to a prosecutor for a charge decision, what is the position if the prosecutor then determines that there is not sufficient evidence to charge? The custody officer could probably argue that, in view of that decision, s/he no longer believes that there is sufficient evidence to charge (otherwise s/he has to take one of the courses of action specified in s37(7)). A more difficult problem occurs when a custody officer bails a suspect under s37(7)(b), ie, bail granted not with a view to a charge decision being made by a prosecutor. Since a custody officer has already decided that there is sufficient evidence to charge, when the person answers to bail how can the custody officer determine that there is insufficient evidence to charge under s37(1), which is the only route to further detention without charge under s37(2)? The custody officer should not be able to avoid these difficulties by stating that s/he does not believe there is sufficient evidence to charge when it is clear that there is.

In *G*, the Court of Appeal found that, in circumstances where there were positive identifications by the complainant and another witness supported by independent evidence, and the appellant had made a no comment interview, 'it was obvious' that the custody officer had sufficient evidence to charge and that, in the absence of the DPP's guidance, he would have done so. Thus, in clear-cut cases, custody officers should not be able to avoid taking a decision about whether or not there is sufficient evidence to charge by stating that they wish to take advice from a Crown prosecutor.

■ R (D) v Commissioner for the Metropolitan Police

(2008) 14 February, QBD

B and D, both youths, were prosecuted for the offence of criminal damage to a car. The police officer dealing with the case, as was subsequently conceded, had wrongly given the case a gravity score of four using the gravity matrix for the final warning scheme since, under the matrix, aggravating features can, even in combination, only increase the score by one point. Therefore, it should have been given a gravity score of three. However, the officer maintained that the public interest required a prosecution rather than a final warning.

The court refused to interfere with this decision, stating that '[a]ttempts to stifle the way in which police officers dealt with matters were to be deprecated'. Furthermore, the officer was entitled to rely on information about the value of the damage received from another officer, and was not under a duty to defer a decision until further evidence about value was available.

Comment: It is important that police station advisers have access to the Association of Chief Police Officers Youth Offender Case Disposal Gravity Factor System, which includes the gravity matrix, and are prepared to make representations about the appropriate score and whether diversion is appropriate.[15] Failure to do so is likely to mean that by the time a prosecution is commenced, it is too late since the courts are usually loathe to interfere.

Silence

■ O'Halloran and Francis v UK

App Nos 15809/02 and 25624/02, 29 June 2007, [2007] Crim LR 897

A car of which O was the registered keeper was caught on camera at 69mph in a 40mph zone. On receiving the statutory notice, he admitted being the driver. At trial he argued that this confession should be excluded because his privilege against self-incrimination had been violated. He was convicted.

F received a statutory notice in similar circumstances, but replied that he was relying on his right to silence and privilege against self-incrimination, and refused to supply the information requested. He was convicted of failing to comply with Road Traffic Act 1988 s172.

The European Court of Human Rights (ECtHR) held that although the compulsion inherent in s172 was of a direct nature, this did not necessarily violate the European Convention on Human Rights ('the convention') article 6(1). Other factors were relevant, including the fact that the compulsion was part of a regulatory scheme that fairly imposes obligations on drivers in order to promote safety on the roads, the fact that the information required is confined to who was driving, that there is a defence of due diligence, and that, in the case of O, the identity of the driver was only one element of the offence and that speeding still had to be proved. Taking these factors into account, the essence of the applicants' right to silence and privilege against self-incrimination had not been destroyed, and therefore there was no breach of article 6.

Comment: It may be that the ECtHR is developing a particular view about the 'right to silence' and the privilege against self-incrimination in relation to offences involving car drivers, which is not necessarily directly relevant to other kinds of offences. However, it is far from clear. See the useful commentary in the *Criminal Law Review* report.

Bail

■ R (Torres) v Commissioner of Police of the Metropolis

[2007] EWHC 3212 (Admin), 14 December 2007

T was arrested in September 2006 and taken to a police station. He was granted bail with conditions to return to the police station in November 2006.[16] When granting bail, the custody officer completed a pro forma which stated that T had been granted bail under PACE s34(5)(7). On answering to bail, T was again granted bail without charge subject to the same conditions. However, on this occasion, the custody officer amended the pro forma to state that bail was granted under s37. Subsequently, no action was taken against T. There was evidence before the court that although he did not amend the pro forma, the first custody officer had considered that he was acting under s37 rather than s34. T submitted that, even accepting this, it was not lawful to use s37 because the facts fell exclusively within the province of s34, under which there was no power to attach conditions, and that there was no overlap between the two provisions.

It was held that s37 applied to every occasion when a person under actual or deemed arrest was produced to a custody officer, including when s/he was first arrested. There was nothing in the language of s37 which rendered it inapplicable to the custody officer's decision in September 2006. There was a similarity between the circumstances envisaged by s34(5) and those envisaged by s37. The former concerned a situation where the custody officer considered that there was a need for further investigation, whereas the latter required the custody officer to decide whether s/he had before him/her sufficient evidence to charge the person in question. If the custody officer determined that s/he did not have such evidence, s/he could release a suspect on bail but for reasons which had to include a need for further investigation, the very subject matter of s34(5).

Since the police could now impose conditions on street bail, it would be very odd if a custody officer was unable to attach conditions in circumstances such as those that arose in September 2006. The court commented that it was surprising that parliament had not conferred a power to impose conditions when granting bail under s34(5), and until the law was satisfactorily streamlined, custody officers would be well advised to follow the procedures under s37.

Comment: The power to impose conditions when granting bail before charge was explained in 'Police station law and practice update', April 2007 *Legal Action* 9. The HO Circular that was issued to explain the changes (HO Circular 021/2007) was misleading in that it stated that '[c]onditions may now be attached to all forms of bail issued by the police …' As the court pointed out, that was incorrect, and custody officers may still mistakenly attach conditions when imposing bail under s34(5).

However, of greater importance is the fact that the police do now have extensive powers to impose conditional bail on a person who has not been charged, and there is no statutory limit on the period for which it can be imposed.[17] It is worth noting that while conditional bail will not usually be treated as a deprivation of liberty for the purposes of engaging article 5 of the convention, very onerous conditions may do so. See the series of House of Lords' decisions on control orders: *Secretary of State for the Home Department v E and S* [2007] UKHL 47, *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46 and *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45, all decided on 31 October 2007.

Identification

■ R v Robertson

[2007] EWCA Crim 1887, 9 July 2007, [2008] Crim LR 57

The victim of an assault identified the defendant as the assailant at a video identification conducted 13 months after the incident. At trial, the statement of G, who had witnessed the incident, in which she said that she would not recognise the assailant again, was read to the jury. R was convicted. Subsequently, G saw a photograph of R and made a statement that she had met the man

in the photograph some years before the incident when he had assisted her and her husband when their car had broken down, and that he was not the assailant in the incident that she had witnessed.

On R's appeal, it was held that her evidence would have been admissible at trial had it been available, and that the evidence would have affected the jury's decision to convict. Therefore, the conviction was unsafe and would be quashed.

Comment: An important reminder of the fact that false identifications can be made even though the witness (in this case the victim) is genuine in making the identification. As the commentary in *Criminal Law Review* notes, it also raises the question of what the proper course of action should be where a witness, having given a fairly detailed description, says that s/he would not be able to identify the offender again. The commentary suggests that in addition to an identifying witness being told, before a video identification, that the person s/he saw may or may not appear in the images s/he is shown, s/he should also be told that if none of the images is of the person s/he saw on the earlier occasion, s/he should say so. Any such statement should then be disclosed to the defence as part of the prosecution unused material. PACE Code D Annex A, which governs the procedure to be adopted in video identifications, does not include such a requirement.

■ R v Lynch

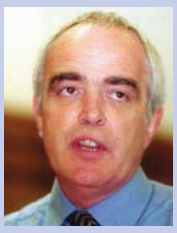
[2007] EWCA Crim 3035, 22 November 2007

A witness picked out L in an identification parade. After picking him out, the identification officer, in accordance with the standard form used in the police force, asked the witness what she had seen this person do, to which she made a response. At trial, the judge ruled that her response was admissible because it fell within the authority of *R v McCay* [1990] 1 WLR 645; because CJA 2003 s114(1)(a) applied; and because it was in the interests of justice to admit it in accordance with CJA 2003 s114(1)(d). It was held that while *McCay* was authority for the proposition that a statement made at the time of an identification may be so bound up with the identification that it forms part of it and is thus admissible as part of the res gestae, that did not mean that all statements accompanying an identification were admissible.

Comment: In *McCay*, the witness could not recall the number of the person on the parade that he had picked out, and the identification officer was permitted to give evidence of what the witness had said at the time concerning the number of the person he was picking out. However, the court in *Lynch* held that *McCay* did not extend to permitting evidence to be given of what had been said by the identifying witness about the actions of the person identified at the time of the original incident. CJA 2003 s114(1)(a) provides that hearsay is admissible if any statutory provision makes it admissible.

The court held that despite what was said in *McCay*, the fact that the statement was made by the witness during a procedure governed by a Code issued under PACE ss66 and 67 did not render admissible something that would otherwise be hearsay. However, the court held that the statement of the witness was admissible under CJA 2003 s114(1)(d) since it was in the interests of justice for it to be admitted - it was made in the formal setting of an identification parade, it had been properly recorded, and L had been given the opportunity to cross-examine the witness on the statement.

1 Press notice, 22 June 2007, available at: www.parliament.uk/parliamentary_committees/conaffcom/cacpn36_220607.cfm. The report can be accessed at: www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/223/223i.pdf. The committee is now known as the Justice Committee.
2 See CDS news, *Defence Solicitor Call Centre expansion – two weeks on*, available at: www.legalservices.gov.uk/criminal/cds_news_7655.asp?page=2.
3 Sir Ronnie Flanagan, *The review of policing: final report*, February 2008, p4, available at: http://police.homeoffice.gov.uk/news-and-publications/publication/police-reform/Review_of_policing_final_report/flanagan-final-report?view=Binary.
4 *Home Office targets: autumn performance report 2007*, November 2007, p8, available at: www.homeoffice.gov.uk/documents/HOAP07.pdf.
5 See *Police station fixed fees*, LSC website, at: www.legalservices.gov.uk/criminal/police_station_fixed_fees.asp.
6 Similar proposals for terrorism cases, contained in the Counter-Terrorism Bill, are the subject of a recent report by the Joint Committee on Human Rights. See *Counter-terrorism policy and human rights (eighth report): Counter-Terrorism Bill*, ninth report of session 2007-08, HL Paper 50/HC 199, February 2008, available at: www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/50/50.pdf.
7 These versions of the Codes will not be available in print format but may be accessed at: http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/pace-code-intro/.
8 HO Circulars are available via: www.knowledgenetwork.gov.uk/HO/circular.nsf/ViewTemplate%20For%20HOCircularsWeb?OpenForm.
9 See note 8.
10 See note 8.
11 Although he does recommend changes to the recording requirements for 'stop and account'. See note 3, at p63.
12 For cases, see Ed Cape, *Defending Suspects at Police Stations*, 5th edition, LAG, 2006, p29.
13 www.hmrc.gov.uk/leaflets/cop9-2005.htm.
14 Available at: www.cps.gov.uk/publications/docs/dpp_guidance.pdf.
15 Set out in *Defending Suspects at Police Stations*, see note 12, appendix 3.
16 The case report refers to 2006, although if that is correct, the relevant amendments regarding conditional bail were not then in force. It may be that the reference should be to 2007.
17 See 'Police station law and practice update', April 2007 *Legal Action* 11 for a comment on the case of *G v Chief Constable of West Yorkshire Police* [2006] EWHC 3485 (Admin), 21 December 2006, and for a critical analysis of the bail provisions see Ed Cape, 'Police bail and the decision to charge: recent developments and the human rights deficit', August 2007 *Archbold News* 6.



Ed Cape is Professor of Criminal Law and Practice at the University of the West of England and the author of *Defending Suspects at Police Stations*, 5th edition, LAG, 2006, £52.

Police misconduct and the law

Stephen Cragg, **Tony Murphy** and **Heather Williams QC** continue their six-monthly review of developments in police misconduct law.

CASE-LAW

Negligence

Victims of crime

In *Osman v UK* App No 23452/94, 28 October 1998; [1999] 1 FLR 193; (2000) 29 EHRR 245, the European Court of Human Rights held that article 2 of the European Convention on Human Rights ('the convention') imposed a positive duty on policing authorities to take reasonable measures to protect an individual whose life was at real and immediate risk from the criminal acts of another, where the authorities knew or ought to have known of this at the time. In *Van Colle (Administrator of the Estate of Giles Van Colle deceased) and Van Colle v Chief Constable of the Hertfordshire Police* [2007] EWCA Civ 325, 24 April 2007; [2007] 1 WLR 1; October 2007 *Legal Action* 17, the duty was breached where police failed to protect the deceased from being killed by a former employee, who he was due to give evidence against at a forthcoming criminal trial.

■ Smith v Chief Constable of Sussex Police

[2008] EWCA Civ 39, 5 February 2008

The claimant appealed the decision to strike out his claim in negligence. The issue was whether the police arguably owed him a duty of care to take reasonable steps to protect him from a foreseeable attack by his male ex-partner (GJ), who assaulted him with a claw hammer. GJ was subsequently convicted of threatening to kill him and of causing him grievous bodily harm with intent. In the weeks preceding the attack, the claimant had been subjected to many disturbing messages from GJ, including at least ten explicit threats to kill, which he had made available to the police. However, the police treated it as a civil matter and did nothing other than institute a trace on the telephone calls that the claimant was receiving from GJ.

The claimant did not bring a claim under the Human Rights Act (HRA) 1998 because of limitation difficulties. He contended that there was a sufficient relationship of proximity between him and the negligent officers as he was at foreseeable, specific risk of harm from GJ. He also contended that it was fair, just and reasonable to impose a duty of care, as the circumstances admittedly gave rise to the article 2 protective obligation, so that the alleged duty of care did no more than oblige the police to do that which they were already required to do.

The Court of Appeal found that it was arguable that he was owed a duty of care and allowed the appeal. In their judgments, Pill and Rimer LJJ indicated that it was now appropriate to absorb the rights protected by article 2 into the common law in a negligence action. Sedley LJ considered it arguable that it was incumbent on the police to take reasonable steps to protect the life or safety of a person who sought their assistance, though he suggested that a distinction might arise between neglect by inefficiency and wilful neglect.

Comment: The court rejected the chief constable's submissions that the decisions of the House of Lords in *Hill v Chief Constable of the West Yorkshire Police* [1989] 1 AC 53 and *Brooks v Commissioner of Police for the Metropolis and others* [2005] UKHL 24, 21 April 2005; [2005] 1 WLR 1495 precluded a duty of care from arising. The court noted that the claimant would have been a prosecution witness by the time of the attack if the police had reacted appropriately and charged GJ with making threats to kill: thus he was in an analogous position to the deceased in *Van Colle*. The position was distinct from the *Hill* situation where a member of the public fell victim to a criminal whom the police should have caught, but where there was no pre-existing nexus between the police and that victim. It was also suggested that the assumed facts of this case were sufficiently stark potentially to bring it within the 'exceptional' category of cases contemplated in *Brooks*, where the police might owe a duty of care.

However, the court was particularly influenced by the existence of the protective duty arising under article 2. The appellate courts had not previously considered the inter-relationship between the two potential duties in the policing context; the absence of a claim in negligence was simply assumed in *Van Colle*. Rimer LJ observed that where a common law duty covers the same ground as a convention right it should, so far as practicable, develop in harmony with it, and thus the policy considerations identified in *Hill* may require revisiting. This approach suggests that common law duties of care should be re-evaluated in other circumstances where positive obligations arise under the convention, for example, the investigative duties relating to articles 2 and 3.

The chief constable is petitioning the House of Lords for permission to appeal and is seeking expedition so that it can be heard along with the appeal in *Van Colle* in May 2008.

■ M v Commissioner of Police for the Metropolis

[2007] EWCA Civ 1361, 21 December 2007

Police investigated allegations of indecent assault and cruelty made by the claimant and her sisters against their stepfather and decided not to proceed. The claimant contended that the decision was negligent as there was a lack of prior consultation with her and her sisters and the advice of the Crown Prosecution Service (CPS) was not sought. The Commissioner of the Metropolitan Police appealed against the decision to permit aspects of the claim to proceed to trial. The Court of Appeal upheld the appeal.

The claimant accepted that in light of the decisions in *Hill* and *Brooks* (see above) there would usually be no claim in negligence for failings in a police investigation. However, it was argued that the police had assumed a responsibility towards the claimant and her sisters because the decision not to proceed had, in part, been based on the perceived adverse effects on them of a prosecution.

The court rejected this contention on the basis that the claimant had to show not only that responsibility had been assumed but also that she had relied on that assumption. The latter ingredient was missing in the present circumstances. Absent an assumption of responsibility, the reasoning in *Hill* applied; the imposition of a duty of care would lead to defensive policing, potential for conflict and diversion of resources.

Comment: This case concerned a pleaded failure to investigate crimes that had already occurred, rather than a failure to protect a potential victim from crime, as in *Smith* (above). Accordingly, the circumstances were closer to *Brooks*, where a duty of care had been rejected. However, in light of *Smith*, it may be arguable that the scope of duties of care in this area should be revisited where an investigative obligation would arise under the convention.

Article 2

■ In re Officer L (Northern Ireland)

[2007] UKHL 36,
31 July 2007,
[2007] 1 WLR 2135

The claimant police officers were due to give evidence to the public inquiry into the death of Robert Hamill in Northern Ireland and contended that to compel them to give evidence without anonymity would inter alia constitute a breach of article 2 of the convention. The inquiry rejected their application for anonymity applying a test that asked whether or not there would be a material increase to the risks which the applicants for anonymity faced if they were to give evidence named and unscreened. The police officers successfully judicially reviewed the inquiry's refusal in the Northern Ireland High Court. The inquiry was unsuccessful on appeal to the Court of Appeal, which decided that the correct approach was to consider the 'real' risk to the officers' lives rather than whether or not an existing risk would be increased.

The House of Lords allowed the inquiry's appeal and agreed it had asked the correct question. Having found that the risks would not be increased, the inquiry did not then need to go on to consider whether any increased risk constituted a 'real and immediate risk to life' as required by *Osman v UK*.

Comment: This unanimous decision provides an interesting insight into the House of Lords' approach to the substantive obligation imposed by article 2, bearing in mind that the Lords are soon to hear an appeal centred on similar principles in *Van Colle*. In a single leading judgment, Lord Carswell endorsed the definition of 'real and immediate risk' as set down in *In re W's Application* [2004] NIQB 67, namely: 'a real risk is one that is objectively verified and an immediate risk is one that is present and continuing'. He was also clear that the threshold for meeting this definition should be high and constant, so that it should not be lowered, for example, when the risk is attendant on some action by the relevant public authority. This signals a less flexible approach than adopted, for example, by the High Court and the Court of Appeal in *Van Colle* and other authorities before it.

■ Savage v South Essex Partnership NHS Foundation Trust and MIND (intervener)

[2007] EWCA Civ 1375,
20 December 2007

The claimant's mother absconded from a hospital where she had been detained under Mental Health Act 1983 s3. She walked approximately two miles from the hospital to a train station and died by throwing herself under a train.

The claimant commenced a private law claim for a declaration and damages in respect of a substantive breach of article 2 in the High Court. The court considered, as a preliminary issue, the correct test to be applied in order to establish a substantive breach of article 2 in respect of a detained hospital patient. Swift J made a declaration that the claimant would be required to establish that the defendant had been guilty of at least gross negligence such as would be sufficient to sustain a charge of manslaughter, in order to establish a substantive breach of article 2.

The claimant appealed successfully to the Court of Appeal, where the Master of the Rolls found that the position of a patient detained by the state is akin to the position of a prisoner, as both are vulnerable and under the control of the state. Accordingly, the correct test to be applied when deciding whether there has been a substantive breach of article 2 is that laid down in *Osman v UK*.

Comment: The approach taken by the Court of Appeal is perhaps unsurprising in view of the obvious parallels between detained patients and prisoners in terms of the exertion of state control. It echoes the distinction made by the Court of Appeal between detained and non-detained patients in *R (Takoushis) v HM Coroner for Inner North London* [2005] EWCA Civ 1440, 30 November 2005. Such a clear statement by the Court of Appeal that article 2 is engaged in relation to detained patients, must now mean that the deaths or near deaths of such patients will need to be investigated by an independent body in order to comply with the procedural obligations imposed by article 2 as a result.

The defendant petitioned the House of Lords successfully for permission to appeal the Court of Appeal's decision on this preliminary point. The appeal will be heard on 23 May 2008 with the appeal in *Van Colle* (see above).

Article 3

■ R (Graham and Allen) v Secretary of State for Justice

[2007] EWHC 2940 (Admin),
23 November 2007

Two prisoners claimed judicial review of separate decisions to handcuff them during visits to civilian hospitals, on the ground that the handcuffing infringed their rights under article 3 of the convention. The Administrative Court found that routine handcuffing of a prisoner receiving hospital treatment without first assessing the risk of escape in each case is likely to be unlawful and to involve a breach of article 3. Assessment of the risk of escape is a matter for the authorities on the facts of each case and will ordinarily include consideration of the detainee's antecedents, prison category, prison record, health and the ability of others to facilitate his/her escape. On the facts, Mitting J considered that the decision to handcuff Mr Graham largely constituted a breach of article 3 as his risk of escaping was low but the decision to handcuff Mr Allen was not in breach of article 3 as his risk of escaping was high.

Comment: It is relevant that Mr Graham was a terminally ill, low-level offender whereas Mr Allen was a triple-murderer with a non-fatal heart condition. It is also interesting that the court agreed that a failure by state authorities to assess the risk posed by a detainee before handcuffing him/her, particularly in public, can be sufficient to satisfy the article 3 threshold in itself. This is pertinent to police cases where handcuffing as a matter of routine, and in public, is not unusual. The award of £500 seems parsimonious even by Strasbourg standards.

False imprisonment

■ Austin and Saxby v Commissioner of Police of the Metropolis

[2007] EWCA Civ 989,
15 October 2007

This case concerned the lawfulness of holding about 3,000 protestors and other members of the public within a police cordon in Oxford Circus on May Day 2001, many for over seven hours. The claimants' case was that their detention amounted to false imprisonment and/or an unlawful deprivation of their liberty contrary to article 5(1) of the convention. The Commissioner of the Metropolitan Police contended that the claimants' imprisonment was lawful as a result of common law powers to prevent breaches of the peace and/or the doctrine of necessity and/or powers under the Public Order Act 1986. He disputed that the claimants were deprived of their liberty within the meaning of article 5(1), as opposed to their freedom of movement, and he argued (in the alternative) that any such detention was justified under article 5(1)(b) and/or (c). Neither of the claimants was violent or threatened violence, nor did they breach the peace.

Tugendhat J found at first instance that the restrictions on the claimants amounted to a deprivation of liberty for the purposes of article 5. However, he found that both at common law and in respect of article 5, the imprisonment/deprivation of liberty was justified on the basis that the police had reasonable grounds, at the time, to apprehend that the claimants and anyone else within the cordon were likely to breach the peace.

The Court of Appeal dismissed the claimants' appeal, but found that the police had acted lawfully on a different basis to that

identified by the judge below. The court considered that the judge had erred in finding that all those within the cordon were about to commit a breach of the peace. Nonetheless, the court found the action taken by the police was lawful for the following reasons:

Common law

■ Where a breach of the peace is taking place, or is reasonably thought to be imminent, before the police can take any steps which curtail the lawful exercise of rights by innocent third parties, they must ensure that they have taken all other possible steps to ensure that the breach/imminent breach of the peace is obviated and that the rights of innocent third parties are protected.
■ The taking of all other possible steps includes ensuring that proper and advance preparations have been made to deal with such a breach.
■ Only where there is a reasonable belief that there are no other means whatsoever whereby a breach/imminent breach of the peace can be obviated, can the lawful exercise by third parties of their rights be curtailed by the police.
■ This is a test of necessity which can only be justified in truly extreme and exceptional circumstances.
■ The action taken must be both reasonably necessary and proportionate.

The Court of Appeal concluded that these tests were satisfied on the exceptional facts of this case. Accordingly, the imprisonment was justified at common law.

Article 5

The court held that the judge was wrong in concluding that a deprivation of liberty had occurred. The Strasbourg cases had drawn a distinction between a 'restriction' of liberty of movement on the one hand and a 'deprivation' of liberty on the other: *Guzzardi v Italy* (1980) 3 EHRR 333.

Stressing that the case was a very exceptional one, the court emphasised that the key point of article 5(1) was that it was intended to avoid arbitrary detention and that, in some circumstances at least, the intention of the authorities in acting as they did was relevant. In this instance, the original imposition of the cordon was not a deprivation of liberty within the meaning of article 5(1) as, on the judge's findings, the police had no real alternative to imposing it, in order to contain the public order situation they faced. The continued imposition of the cordon for some hours thereafter did not become a deprivation of liberty, although duration was a relevant factor to consider. This was not simply a static crowd of protestors held for seven hours; the situation was dynamic, chaotic and confusing. In all the circumstances, there was no deprivation of liberty within the meaning of article 5(1).

Comment: The claimants have petitioned the House of Lords for permission to appeal.

■ R (G) v Chief Constable of West Yorkshire and Director of Public Prosecutions (interested party)

[2008] EWCA Civ 28,
5 February 2008,
(2008) Times 21 February

The claimant was detained in a police station for an additional three hours for a CPS 'charging decision' after the custody officer decided that there was sufficient evidence to charge him for the purposes of Police and Criminal Evidence Act 1984 (PACE) s37(7). His representative suggested to the custody officer that since there was already sufficient evidence to justify charging the claimant with the offence for which he had been arrested, the officer was obliged by s37(7) either to charge him or to release him without charge. The custody officer decided he was compelled to detain the claimant for the purpose of referring his case to a Crown prosecutor for a charging decision under *The director's guidance on charging* issued by the Director of Public Prosecutions (DPP) under PACE s37A.

The Criminal Justice Act (CJA) 2003 amended PACE s37 to include a greater role for the CPS in deciding whether a person should be prosecuted, which includes a power for the DPP to issue guidance. The claimant's case was that on the proper interpretation of PACE, as amended at the time of his detention, there was no specific power to detain a person for a further period of time to seek the CPS's decision about whether a charge will be laid.

The Court of Appeal overturned an earlier decision of the Divisional Court in finding that it was not possible to infer the existence of a power to authorise detention by reference to the DPP's guidance, to which no reference could be found in the alternatives countenanced by the statutory framework. On a correct reading of PACE, as amended, if it was intended to obtain a CPS decision on charging, a person should be bailed for that purpose.

Comment: Although the claimant was detained for 'only' an additional three hours, the practice to which he was subjected is one which was repeated probably thousands of times across the country, between January 2004 and January 2007, when amendments came into force that specifically allowed a custody officer to detain while obtaining the charging decision.

Following the Court of Appeal judgment, each such detention is likely to amount to false imprisonment. In addition, the Court of Appeal confirmed that PACE only gives the DPP the power to make 'statutory guidance' relating to the disposal of arrestees after (and not before) the custody officer had decided that there was sufficient evidence on which to charge someone. Amendment of the guidance is likely in the near future. See page 13 of this issue for further comment on this case.

Harassment

■ Conn v Sunderland City Council

[2007] EWCA Civ 1492,
7 November 2007

The employer appealed against a decision that it was liable under the Protection from Harassment Act (PHA) 1997 for the harassment of the claimant employee by his foreman. The judge found that on two occasions the foreman had lost his temper and acted aggressively. On the first occasion, he shouted and threatened to smash a window when the claimant refused to give him the information he demanded. On the second occasion, he threatened to hit him.

The Court of Appeal concluded that the first incident was not capable of amounting to 'harassment' – while it was unpleasant, there had been no physical threat, merely a threat to property, and others present had not felt intimidated. Accordingly, as there was, at most, only one episode of harassment, there was no course of conduct as the statute required and the claim failed.

Comment: The judgments of the Court of Appeal were couched in trenchant terms; the contention that the first incident amounted to harassment was described as 'completely impossible' and it was said that: 'The conduct here [does] not come close to harassment …' The court relied on *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, 12 July 2006; [2007] 1 AC 224; October 2006 *Legal Action* 16, where the House of Lords decided that usual principles of vicarious liability applied to claims brought under the PHA. In responding to a submission that a flood of claims from disgruntled employees would be the result, Lord Nicholls observed that courts were able to recognise the boundary between conduct that was unattractive and conduct that was oppressive and unacceptable, and that to cross into the latter category the conduct must be ' … of an order which would sustain criminal liability under section 2 [of the PHA]'.

In *Conn*, the court attached particular importance to whether the conduct was of such gravity as to justify the sanctions of the criminal law. This approach suggests that the concept is more restrictive than has been appreciated previously. Arguably, it pays insufficient regard to the purpose of the PHA, which was to provide criminal and civil sanctions for certain behaviour that would not

have constituted criminal offending previously. This decision may have implications for the kind of police conduct that can come within the Act: would, for example, repeated roadside stops be treated as conduct that would sustain a criminal liability? As context is important, it may be that the police's extensive powers will render certain behaviour oppressive that would be unremarkable if carried out by a private citizen.

Damages

■ Martins v Choudhary

[2007] EWCA Civ 1379, 20 December 2007

Mr Choudhary was awarded £22,500 in damages against Mr Martins for harassment. The award comprised £12,500 for psychiatric injury and £10,000 for injury to feelings. The trial judge did not make a separate award for aggravated damages, and instead reflected the aggravating features of the claim (including racism) in the award for injury to feelings. Mr Martins appealed on the basis inter alia that both awards were manifestly excessive.

The Court of Appeal unanimously dismissed his appeal finding that, while both awards were on the generous side, they certainly were not outside the range of appropriate awards. In delivering the lead judgment, Lady Justice Smith also suggested that there should be no hard-and-fast rule about whether separate awards should be made for psychiatric injury, injury to feelings and/or aggravated damages; that will depend on the facts of the individual case.

Comment: The Court of Appeal was careful to leave open the possibility of making discrete awards. However, it expressed a preference for compensating any aggravating features as part of the basic award and not as an additional award, save in exceptional cases. This is similar to the approach recommended by the Court of Appeal in *Richardson v Howie* [2005] PIQR 3. It is significant that neither Richardson nor this case were claims against the police, for there is a long line of authorities in police cases in which the Court of Appeal has underlined the importance of making separate awards for aggravated damages. These include: *Thompson v Commissioner of Police* [1998] QB 498 and *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] IRLR 102, as well as the more recent cases of *Rowlands v Chief Constable of Merseyside Police* [2006] EWCA Civ 1773, 20 December 2006 and *Manley v Commissioner of Police for the Metropolis* [2006] EWCA Civ 879, 28 June 2006. It is submitted that these later authorities remain good law in the context of police claims unless and until this issue is considered by the House of Lords.

Limitation

■ A v Hoare and others

[2008] UKHL 6, 30 January 2008

The House of Lords considered six appeals, all of which raised the question of whether assault claims fell within Limitation Act 1980 s11 or s2. Section 11 provides for a three-year limitation period running from the date of the cause of action or the 'date of knowledge' if later, and allows the court discretion to extend that period when it appears equitable to do so (s33). Section 2 provides for a non-extendable six-year limitation period from the date when the cause of action accrued. The House of Lords decided that assault claims fell within s11 and overruled its earlier decision in *Stubbings v Webb* [1993] AC 498 that assaults fell within s2.

Comment: It is clear from the Lords' speeches that they considered the wording of s11 wide enough to cover not just assault but all claims for injury sustained by the torts of trespass of person (ie, assault, battery and false imprisonment). Thus, for example, some false imprisonment claims will fall within s11 and some will not, depending on whether damages for personal injury are sought. The House of Lords did not provide an exhaustive list of the causes of action covered by the scope of s11; however, the tenor of its judgment is that s11 is wide enough to cover any cause of action which gives rise to a claim for damages for personal injury.

In light of that it is suggested that the safest way to approach limitation in police actions is as follows:

a) All common law torts, such as negligence, assault, battery, false imprisonment, malicious prosecution and misfeasance carry a three-year limitation period running from the date of the cause of action or the date of knowledge if later (with the possibility of an extension on equitable grounds) where the claimant is claiming damages for mental or physical injury; and a six-year non-extendable limitation period running from the date of the cause of action where there is no claim for personal injury.

b) The limitation period for statutory torts, which provide for their own limitation periods within the relevant statutes, such as the HRA, the Race Relations Act 1976, the Sex Discrimination Act 1975 and/or the Disability Discrimination Act 1995, are unaffected by *Hoare*, whether personal injury is claimed or not. Thus, the limitation period for a claim under the HRA, for example, remains within one year, with a possibility of an extension on just and equitable grounds.

c) Statutory torts which do not provide for their own limitation periods within the relevant statutes, such as the Data Protection Act 1998 and/or the PHA, should be treated in the same way as common law torts at a) above in terms of limitation.

It is essential for practitioners urgently to review their existing cases to see if any action is needed. It is hoped that the courts will be sympathetic to claimants with limitation difficulties created by the overruling of *Stubbings*; however, claimants will be expected to act promptly in the wake of *Hoare*.

Compensation for wrongful convictions

Under the CJA 1988 s133, compensation is paid to those who are convicted of a criminal offence, where the conviction is subsequently reversed on the ground that ' … a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice …' In *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, 29 April 2004; [2005] 1 AC 1, the House of Lords was divided over the meaning of 'a miscarriage of justice'. Lord Steyn said it was confined to where the applicant was clearly innocent of the crime for which s/he was convicted, whereas Lord Bingham suggested a wider concept that applied where a person had been convicted when s/he should not have been. In *R (Clibery) v Secretary of State for the Home Department* [2007] EWHC 1855 (Admin), 30 July 2007; October 2007 *Legal Action* 18, the Divisional Court did not decide between those two meanings, but sought to identify the parameters of Lord Bingham's approach. The court said that he had contemplated two situations. First, where the applicant was clearly innocent of the offence for which s/he was convicted. Second, where the new fact showed that acts or omissions had occurred during the investigation or trial, which so infringed the applicant's right to a fair trial that it could be said s/he should not have been convicted.

■ R (Harris) v Secretary of State for the Home Department

[2007] EWHC 3218 (Admin), 10 December 2007

The claimant was convicted of the manslaughter of her baby son. The prosecution case was founded on evidence that the child exhibited the triad of intra-cranial injuries indicative of shaken baby syndrome. Having heard evidence from consultant neuro-pathologists and ophthalmic surgeons, who disagreed both about the clinical symptoms present as well as the conclusions that could be drawn from them, the Court of Appeal quashed the conviction on the basis that the fresh evidence might have affected the jury's decision to convict. The claimant's application for compensation was rejected on the basis that her conviction

was quashed on grounds of new expert opinion, rather than new facts, and on the basis that she had not suffered a miscarriage of justice.

Mitting J held that the first of these grounds was erroneous. In cases such as the present one, it was particularly difficult to disentangle facts from opinion and it would be seriously unjust to the claimant to reject her application on this basis. However, he agreed that there was no miscarriage of justice simply because new evidence showed that the jury might have reached a different conclusion.

Comment: The claimant accepted that the court was bound by *Clibery*, but reserved her position on the correctness of that decision for any subsequent appeal. Mitting J characterised Lord Steyn's approach as focusing on an evidential miscarriage of justice and Lord Bingham's as focusing on a miscarriage of process. As in *Clibery*, the claimant's conviction was quashed on the basis of material that was unavailable at the time of the original trial, so there was no miscarriage of process.

More helpfully from an applicant's perspective, Mitting J accepted that arguably there was a 'miscarriage of justice' where it could be shown that the judge would have withdrawn the case from the jury if the new material had been available at the trial, albeit that could not be established on these facts.

■ R (Raissi) v Secretary of State for the Home Department

[2008] EWCA Civ 72,
14 February 2008,
(2008) Times 22 February

In this case, the Court of Appeal held that the erstwhile ex gratia miscarriage of justice compensation scheme for those wrongfully detained in custody could also be applicable where a person was detained for extradition proceedings.

The appellant had been detained for four and a half months on 'holding charges' relating to minor offences in the US, pending an investigation with a view to more serious charges relating to the alleged training of pilots responsible for the 9/11 atrocity. The extradition attempt failed and the claimant was released. The senior district judge stated that the court had received no evidence to support the allegation of terrorism. Since then, the appellant had not been the subject of terrorism charges anywhere.

The Court of Appeal rejected the Home Secretary's argument that, as there were no 'domestic' charges, the ex gratia policy was not intended to apply to extradition cases. The court also rejected the argument that the CPS and police had simply been acting on the instructions of the US government throughout, and therefore could not possibly be guilty of 'serious default' so as to bring the appellant within the scheme. The court found that judges and magistrates were required to make important decisions affecting the liberty of the subject. If those decisions were based on false information, resulting from the serious default of a police officer or the prosecution service, it was likely that the court's decision would result in a miscarriage of justice and unjustifiable loss of liberty. At paragraph 144, the court said:

… it seems to us that the extradition proceedings themselves were a device to secure the appellant's presence in the US for the purpose of investigating 9/11 rather than for the purpose of putting him on trial for non-disclosure offences. We also consider that the way in which the extradition proceedings were conducted in this country, with opposition to bail based on allegations which appear unfounded in evidence amounted to an abuse of process.

And at paragraph 147: '… we consider that there is a considerable body of evidence to suggest that the police and the CPS were responsible for serious defaults'.

Comment: In this extraordinary judgment, the court went as far as to say that Mr Raissi was 'completely exonerated' of terrorism offences. The Home Secretary will now have to reconsider Mr Raissi's claim for compensation in the light of the strong comments made by the court, although at the time of writing it is not known if there will be an appeal. As well as being an important judgment about the scope of the ex gratia scheme, the case also makes important comments about the role of the CPS and the police in extradition proceedings. The ex gratia scheme itself was abolished on 19 April 2006, though Mr Raissi's claim will still be considered as it was submitted before that date. The decision to abolish the scheme is the subject of a legal challenge and will be considered by the Court of Appeal in April 2008. See page 12 of this issue for a case report on the related case: *(1) S Raissi (2) M Raissi v Commissioner of Police of the Metropolis.*

Application forms

Applications for compensation for wrongful convictions under CJA 1988 s133 (the statutory scheme) must now be made on a prescribed form. It can be downloaded from the Office for Criminal Justice Reform's website.[1]

Police complaints

■ R (Bolt) v Chief Constable of Merseyside Police and Chief Constable of North Wales Police (interested party)

[2007] EWHC 2607 (Admin),
16 November 2007

This case concerned the correct procedure for a chief constable reviewing the findings of a police misconduct panel. The applicable law was the Police (Conduct) Regulations (P(C) Regs) 1999 SI No 730, which have since been replaced by the P(C) Regs 2004 SI No 645; however the principles still hold good.

The claimant was a police officer who was dismissed by a police misconduct panel for neglect of duty. The claimant applied for a review by the chief constable, who has the power to substitute a finding or sanction for that of the panel's. The chief constable decided that he had an interest in the matter and that the review should be carried out by another chief officer as permitted by the regulations. The other chief officer replaced the sanction of dismissal with a loss of pay. The chief constable chose to reject this decision and to uphold the panel's original decision to dismiss the officer.

The court held that the chief constable would normally be bound by the decision of the chief officer to whom he had transferred the review. However, the court also decided that as the review was not a full appeal, the chief officer conducting it should not overturn the decision of the original panel about the appropriate sanction simply because he would have taken a different view, but only where the sanction imposed by the panel was so plainly excessive as to be properly characterised as unfair. Underhill J decided that the decision to overturn the panel's decision was not one to which the reviewing chief officer could properly have arrived. Dismissal was not an inappropriate penalty in the light of the panel's findings.

Comment: This case is only of interest to claimant practitioners in the unusual situation where a complained-about officer is actually disciplined by a misconduct panel and then decides to ask for a review. At that stage, a complainant has a very limited role, but it is important to know that the panel's decision can only be overturned in limited circumstances, although the officer may then have a further appeal to the Police Appeal Tribunal: see P(C) Regs 2004.

■ Westcott v Westcott

[2007] EWHC 2501 (QB),
30 October 2007

This was a defamation claim brought by a man against his daughter-in-law, who had made allegations against him to the police. A deputy High Court judge decided that an initial, oral complaint to the police about an alleged crime and a subsequent witness statement were essential early steps in an embryonic criminal investigation, and therefore qualified for absolute privilege and immunity from suit. The reason for this was

that it was necessary to protect those who had given evidence to the police and to encourage them to speak freely without the fear of being sued in defamation for doing so. The court struck out the claim.

Comment: The court decided that absolute privilege had to apply to the initial oral complaint otherwise the protection given in respect of the written statement would be 'outflanked'. The principle appears to have been applied in an even more recent case: *Alexandrovitch v Khan* [2008] All ER (D) 176 (Jan).

Independent Police Complaints Commission

The Independent Police Complaints Commission (IPCC) has recently issued *Deaths during or following police contact: statistics for England and Wales 2006/07*, presenting figures on deaths during or following police contact, which occurred between 1 April 2006 and 31 March 2007.[2] The IPCC expressed 'major concern' about the 47 people who committed suicide after release from police custody. Also, *Police complaints: statistics for England and Wales 2006/07* has been published, as has the IPCC's long-awaited *Casework manual*.[3]

1 Visit: www.cjsonline.gov.uk/downloads/application/pdf/Application%20Form.pdf.
2 *Deaths during or following police contact: statistics for England and Wales 2006/07*, IPCC research and statistics series: paper 9, December 2007, available at: www.ipcc.gov.uk/death_report_2006-07.pdf.
3 *Police complaints: statistics for England and Wales 2006/07*, IPCC research and statistics series: paper 8, November 2007, is available at: www.ipcc.gov.uk/complaints_report_2006-07_v6.pdf. See also Stephen Cragg, 'Latest statistics on police complaints', January 2008 *Legal Action* 10. *The Casework manual* is available at: www.ipcc.gov.uk/index/resources/evidence_reports/ipccguidelines_papers/ipcc_resources_caseworkmanual.htm.



Stephen Cragg and Heather Williams QC are barristers at Doughty Street Chambers, London. They are co-authors (together with John Harrison) of *Police Misconduct: legal remedies*, 4th edition, LAG, 2005, £37. Tony Murphy is a partner with Bhatt Murphy solicitors, London.

Owner-occupiers law review

In this annual review, Derek McConnell looks at the changes and developments in the law relating to owner occupation. Readers are invited to send relevant case notes to LAG or direct to the author.

POLICY AND LEGISLATION

Repossession statistics

In 2007, members of the Council of Mortgage Lenders (CML) repossessed 27,100 properties: CML press release, 8 February 2008. In 2006, the figure was 22,400 properties. At the end of 2007, 73,000 mortgages were between three and six months in arrears: CML press release (see above).

Figures released by the Ministry of Justice show that, in 2007, 137,605 mortgage possession actions were commenced in England and Wales resulting in 95,374 possession orders (including suspended orders) being made.[1] The figures for 2006 were 131,232 and 90,594 respectively. In 2007, 146,881 residential possession claims were issued by landlords in the county court.

Repossession policy

In December 2007, Citizens Advice published *Set up to fail: CAB clients' experience of mortgage and secured loan arrears problems*.[2] The report calls on the government and regulators to take co-ordinated action to ensure that home ownership for low-income households is sustainable in the long term. The CML's response included the comment:

Citizens Advice has taken a sensationalist tone in this report, which risks throwing the baby out with the bathwater. In fact, sub-prime mortgages give people a way to rehabilitate their finances and are important in a financially inclusive mortgage market (CML press release, 12 December 2007).

The CML's view of how its members manage arrears and repossessions can be read in an article entitled 'Managing arrears and possessions'.[3]

In January 2008, Shelter published its policy briefing *Mortgages and repossessions. A discussion of the issues raised by the changing landscape of mortgage lending*, which assesses what lies behind the rise in repossessions since 2004 and questions whether adequate systems are in place to deal with new types of risk to which home owners are exposed.[4]

Mortgage arrears protocol

In February 2008, the Civil Justice Council issued for consultation a draft protocol for possession claims based on mortgage arrears together with a partial impact assessment.[5] This consultation ends on 23 May 2008. In October 2006, the Rent Arrears Protocol was introduced to seek to ensure that all reasonable steps are taken to avoid the need for rent possession proceedings.

Legislative reform

In November 2007, HM Treasury and the Department for Business, Enterprise and Regulatory Reform (BERR) issued a joint consultation document, *Regulation of modified credit agreements*.[6] The paper proposed changes to the Consumer Credit Act (CCA) 1974 to ensure that the regulatory regimes of the Financial Services Authority (FSA) and the Office of Fair Trading remain mutually exclusive. The paper highlights that the effect of s82 of the CCA 1974 could lead to a situation where some mortgages that are varied or extended might be regulated by both regulatory regimes.

In December 2007, the BERR issued a consultation paper indicating its intention to issue a legislative reform order under the Legislative and Regulatory Reform Act 2006 to address some unintended consequences of provisions introduced into the CCA 1974 by the CCA 2006.[7] These proposals ensure that buy-to-let lending is exempted from regulation under the CCA 1974 (as amended by the CCA 2006) following the removal of the £25,000 financial limit (above which credit agreements are currently unregulated) in April 2008.

Council of Mortgage Lenders' arrears and possessions policies

On 26 February 2008, the CML reissued its statement on arrears and possessions which now provides that:[8]

The way lenders deal with arrears and possessions is usually regulated by the [FSA] although this will depend on the type of loan and when it was taken out. First charge loans secured against a property used for residential purposes taken out after 31 October 2004 will be regulated by the FSA.

FSA regulated mortgages

Under FSA regulation, lenders are obliged to follow a regulatory framework set out in the Mortgage Conduct of Business (MCOB). The rules on arrears and possessions are in MCOB 13.[9] *This section covers procedures adopted when handling arrears and possessions, the subsequent sale of a property in possession, the records lenders must keep, the information that must be provided to customers, and the recovery of any outstanding (shortfall) debt. The FSA's rules were based on the CML's statement of practice on arrears and possessions.*[10]

MCOB 13 requires lenders to ensure that a property is only repossessed where all other attempts to resolve the position with the customer have failed. In addition, lenders are required to treat customers fairly. If a lender has not treated a customer fairly or has not followed MCOB rules, the customer can complain and, if necessary, refer the complaint to the Financial Ombudsman.[11]

Lenders will:

- *use reasonable efforts to reach an agreement with a customer over the method of repaying any arrears*;
- *liaise with a third party adviser appointed by the customer; and*
- *adopt a reasonable approach to the time over which the arrears should be repaid, and try to agree a payment plan which is practical in terms of the circumstances of the customer. The FSA states that a reasonable time period will depend on individual circumstances.*

The rules also provide that unless a lender has good reason not to, the lender should, at the customer's request, agree to a change to:

- *the date on which the payment is due (providing it is within the same payment period); or*
- *the method by which payment is made.*

Where no reasonable payment arrangement can be made, a lender should consider allowing the customer to remain in possession so that the customer can sell the property.

Where appropriate, lenders adopt a number of different strategies to help customers restructure payments if they fall into arrears. These can include:

- *extending the term of the loan;*
- *changing the type of loan, for example, from capital and interest to interest only;*
- *deferring payment of interest (normally for a short period); and*
- *treating the arrears as part of the original debt (sometimes known as capitalising arrears).*

None of these steps can be taken without the agreement of the customer. It is, therefore, of utmost importance that any customer experiencing difficulties contacts their lender either directly, or through an independent third party adviser. Details of consumer advice agencies and further steps on what a customer should do if experiencing difficulties can be found on [the CML's website].[12]

Pre-MCOB (non-FSA regulated) mortgages

Arrears and possessions on properties with mortgages taken out before FSA regulation was introduced on 31 October 2004 may be treated as if they were regulated mortgages, and lenders will apply the requirements of the FSA.

Alternatively, they may be dealt with under the old CML statement of practice on arrears and possessions …[13] *The statement largely mirrors the new requirements.*
Lenders will tell consumers on which basis their arrears are being dealt with.

Possessions proceedings

Any customers facing payment difficulties should get in touch with their lender as soon as possible-using a third party debt adviser, if appropriate. If matters cannot be resolved and the lender commences court proceedings, customers should be aware that the court proceedings are there to ensure fairness. Just because proceedings have been brought, there is still opportunity to resolve the situation. Again, customers are advised to seek independent debt advice. Further information can be found on [the CML's website].[14]

FSA information sheet on mortgage arrears

The FSA's mortgage rules require lenders to give consumers who fall into arrears information about what to do and what they can expect to happen. This information includes a copy of the FSA's information sheet.[15]
The latest version was published in August 2007 and lenders can obtain supplies from the FSA.[16]

Selling your home and renting it back

Some companies offer to help borrowers who get into financial difficulties with mortgage payments by buying the home and then renting it back for a fixed period of time (six months or more). These are sometimes called 'flash sales', because they can buy the home quickly, sometimes within a week, but more usually between three to four weeks. They are also called 'mortgage rescue', 'rent-back' or 'sell-to-let' schemes. The FSA does not regulate these schemes so customers may not have access to the complaints and compensation procedures if things go wrong. They are not the same as 'home reversion' or 'equity release' schemes which are for people who have paid off their mortgage and want to sell part or all of their home for cash and retain the right to live in it for a nominal rent.

Selling the property in this way may allow mortgage debts to be cleared and borrowers to stay in their home. However, if borrowers opt for such a scheme they will no longer own the home and could still be evicted if they fall behind with the new rental payments. In addition, most of these firms will pay less than the market value of the property, so we advise consumers to think carefully before entering into such a scheme and make sure they understand the consequences. We believe these schemes should be regulated to protect consumers and have called on government to do this: see CML, Shelter and Citizens Advice joint press release, 22 October 2007.

Possessions

If a property is repossessed by a lender when selling that property, the lender is obliged by FSA rules to:

- *market the property for sale as soon as possible*;
- *obtain the best price that might reasonably be paid, taking account of factors such as market conditions, as well as the continuing increase in the amount owed by the customer.*

Where the loan is not FSA regulated, similar obligations still apply.

If the sale results in a shortfall, MCOB sets out requirements as to what the lender must do where the loan is FSA regulated. Although lenders have the legal right to pursue customers for payment of that shortfall for a 12-year period, lenders who are members of the CML agree to limit this time period.[17]

Financial Services Authority

In August 2007, the FSA issued its information sheet *No selling. No jargon. Just the facts about what to do when you can't*

pay your mortgage.[18] Lenders of regulated mortgage contracts within the meaning of the Financial Services and Markets Act 2000 are obliged to issue this leaflet when they become aware of a borrower falling into arrears.

On 29 January 2008, the FSA issued its *Financial risk outlook 2008*.[19] This report sets out the FSA's thinking on the risks arising from recent difficulties in the financial markets and, in the context of residential mortgages, anticipates 'an even greater increase in repossessions'. It points out that an estimated 1.4 million short-term, fixed-rate mortgages are due to mature in the next 12 months and that this will increase, by approximately £210 per month, these borrowers' mortgage payments. The report also points to the fact that between the second quarter of 2005 and the third quarter of 2007, almost one-third of new mortgages were granted to borrowers who borrowed higher than average loans, had higher than average loan-to-income multiples and higher than average loan-to-value ratios:

Taken in isolation each one of the three indicators may not represent significant consumer risks. However, where consumers exhibit two or more of these characteristics there is a greater cause for concern. The borrowers most likely to have all three of these characteristics are those that have the highest risks in terms of affordability and are most likely to default on loans.

Home information packs

Housing Act 2004 Part V provides for the mandatory provision of a home information pack (HIP) by sellers for buyers of most residential premises. This requirement was introduced with effect from 1 June 2007 (see the Home Information Pack Regulations (HIP Regs) 2007 SI No 992). The HIP Regs prescribe the documents to be included in the pack, the requirement to maintain its accuracy and list a myriad of exceptions to the regulations.

The purposes of HIPs are to provide consumers with better information at the right time in order to improve the speed and certainty of transactions, and to reduce wasted costs. The documents required to be provided to prospective buyers will include an energy performance certificate and eventually a home condition report. A penalty charge can be levied against individuals (£200) and estate agents (£500) who fail to comply with an obligation in relation to a HIP. Further measures relating to HIPs were introduced by the Home Information Pack (No 2) Regulations 2007 SI No 1667 with effect from 2 July 2007 and the Housing Act 2004 (Commencement No 8) (England and Wales) Order 2007 SI No 1668 with effect from 1 August 2007.

Consumer Credit Act 2006

The CCA 2006 received royal assent on 30 March 2006 and made significant amendments to the CCA 1974. Further amendments are introduced with effect from 6 April 2008: see Consumer Credit Act 2006 (Commencement No 3) (CCA 2006(No 3)) Order 2007 SI No 3300 Sch 2. This includes the application in respect of credit agreements whenever entered into of the unfair relationship provisions in CCA 1974 s140A–D (introduced by CCA 2006 ss19–22) which were introduced on 6 April 2007 for credit agreements entered into after that date: see CCA 2006 Sch 3 para 14. These provisions replace the 'extortionate credit bargains' provisions with powers for the court to deal with 'unfair relationships'. Similarly, the provisions of CCA 1974 s127 that restrict the court from granting an enforcement order in relation to certain agreements rendered unenforceable because of failure to comply with procedural requirements, as well as the extortionate credit bargains provisions of the 1974 Act, ceased to have effect from 6 April 2007 except for agreements entered into before that date: see Consumer Credit Act 2006 (Commencement No 2 and Transitional Provisions and Savings) Order 2007 SI No 123.

The CCA 2006(No 3) Order brought into effect a number of minor provisions, in particular in relation to the Consumer Credit Appeals Tribunal, on 1 December 2007. The CCA 2006(No 3) Order implemented the remaining provisions of the CCA 2006 with effect from 6 April 2008 except for two provisions relating to statements to be given by lenders, which will be brought into effect on 1 October 2008.

From 6 April 2008, the £25,000 financial limit is withdrawn as are the exemptions from regulation for high net worth individuals and for individuals obtaining business loans above £25,000: see Consumer Credit (Exempt Agreements) Order 2007 SI No 1168. For an excellent overview of the CCA 2006's provisions as they affect mortgage borrowers, see 'The Consumer Credit Act 2006: real additional mortgagor protection?' [2007] 71 Conv 316.

Law Commission report on cohabitation

The long-awaited report, *Cohabitation: the financial consequences of relationship breakdown* (Law Com No 307) was published on 31 July 2007.[20] It proposes the introduction of a structured judicial discretion to order property adjustment on termination of cohabiting relationships by separation or death where the couple is neither married nor party to a civil partnership. A remedy would only be available where a couple satisfies certain eligibility criteria.

The scheme would apply to those couples who have a child together or have cohabited for a minimum duration. The report suggests that a period of between two and five years would be appropriate. However, simply living together for the relevant period would not be enough: it would need to be shown that the couple had made contributions to the relationship which had given rise to certain enduring consequences at the point of separation. See also page 5 of this issue.

CASE-LAW

Mortgage possession proceedings

■ Halifax plc v Okin

[2007] EWCA Civ 567, 22 May 2007

The defendant purchased a property with a mortgage from the claimant in August 2003. She contributed £5,000 towards the purchase. The monthly instalments were just over £260. In July 2004, possession proceedings were brought when the arrears were £792.50. By the time of the hearing of the claimant's application for a possession order in March 2006, the arrears were just over £3,500. A suspended order for possession was made requiring £30 a month towards the arrears in addition to the usual monthly payments. Only one payment was made by the defendant in May 2006. In August 2006, the defendant applied to suspend the warrant that had been issued; she said that she had been ill in hospital for most of July 2006. She was currently unemployed but had been interviewed for a job and was looking for other work.

On appeal to a circuit judge from a district judge's dismissal of the suspension application, the judge dismissed the appeal. He noted that the defendant's record of payment was three payments when there should have been 12, and said that the record of past payment is as good a basis as any for assessing the ability to make future payment. The defendant made an application to the Court of Appeal and was granted permission to appeal; she sought to adduce fresh evidence that she had secured employment.

The Court of Appeal observed that the fact that the defendant had a job would be a basis for making a fresh application to the county court, but given that the appeal was being heard by the Court of Appeal, it was appropriate to consider the fresh evidence. The court dismissed the appeal. Despite

being in employment for the previous five months, the defendant had not been able to make the normal monthly payments let alone pay anything in addition towards the arrears.

■ **Halifax plc v Salt and Bell**

Derby County Court,
29 November 2007[21]

The defendants fell into arrears as a result of the first defendant being made redundant in March 2007 and the second defendant being injured in a car accident. The first defendant obtained new employment but this was lost when she discovered that she was pregnant on 31 August 2007. As a result, the defendants were unable to comply with a suspended possession order that had been made on 21 August 2007.

On 22 November 2007, a district judge heard the defendants' application to suspend the warrant. The proposal was that they pay £150 each month. From May 2008, the Department for Work and Pensions (DWP) would pay sufficient benefit to cover the monthly instalments of the defendants' interest-only mortgage. It was accepted that the arrears would increase until May 2008 but thereafter they would decrease and be paid off after about three and a half years. The district judge stated that he agreed that three and a half years was within the definition of a reasonable period within Administration of Justice Act 1970 s36, and that there was no requirement that an order provides for payment of the current monthly sums during any interim period. It was also not disputed that there was approximately £15,000 equity in the property. However, he considered that there was an element of uncertainty in the proposal and dismissed the application.

HHJ Lea allowed the defendants' appeal. He was satisfied that the arrears could be paid within a reasonable period and that the DWP's payments were certain.

County court jurisdiction

■ **National Westminster Bank plc v King**

[2008] EWHC 280 (Ch),
20 February 2008

In 2007, a final charging order was made against the defendant securing over £39,000 with further interest and costs. The County Courts Act 1984 limits county courts' jurisdiction to £30,000. The claimant accordingly applied to the High Court for an order for sale. The Chancery master, having regard to Civil Procedure Rule 30.3(2) and County Courts Act s40(4), exercised the court's discretion to transfer the application to the county court. The district judge decided that the county court did not have jurisdiction. On the claimant's application, the High Court decided that in keeping with the modern policy of assigning cases to the appropriate tier in the court system, it could transfer the case to the county court, irrespective of county courts' financial limit. The power to transfer under s40(2) of the County Courts Act was not restricted to cases that were within county courts' financial limit.

Beneficial interests

■ **Stack v Dowden**

[2007] UKHL 17,
25 April 2007

A conveyance of a domestic property into joint names of cohabitants establishes a prima facie case of joint and equal beneficial interests in the property until the contrary is proved. The onus is on the person seeking to show that the beneficial ownership was different from the legal ownership. The question is how, if at all, is the contrary to be proved. Many more factors than financial contributions might be relevant to divining the parties' true intentions. Those factors included the following:

- any advice or discussions at the time of the transfer which cast light on their intentions then;
- the reason why the house was acquired in their joint names;
- the reasons why, if it was the case, the survivor was authorised to give a receipt for the capital moneys;
- the purpose for which the house was acquired;
- the nature of the parties' relationship;
- whether or not they had children for whom they both had responsibility to provide a home;
- how the purchase was financed both initially and subsequently;
- how the parties arranged their finances, whether separately or together or a bit of both;
- how they discharged the outgoings on the property and their other household expenses.

The arithmetical calculation of how much was paid by each was also likely to be less important. It would be easier to draw the inference that the parties intended that each should contribute as much to the household as s/he reasonably could and that they would share the eventual benefit or burden equally.

While observing that cases in which joint legal owners are to be taken to have intended that their beneficial interests will be different from their legal interests 'will be very unusual', the court concluded that this was one such case. As the respondent had made substantially greater contributions over the years and the parties had kept their financial affairs separate other than in relation to the purchase of the property, it was accepted that Ms Dowden was entitled to a 65 per cent share. For commentary on this case, see 'Beneficial entitlement – no longer doing justice?' [2007] 71 Conv 354 and 'The never-ending story' [2007] 71 Conv 456.

■ **Adekunle and others v Ritchie**

[2007] EW Misc 5 (EWCC),
Leeds County Court,
17 August 2007

The approach taken in *Stack v Dowden* (see above), ie, that beneficial ownership of a property should follow the legal ownership was not limited to cohabiting couples living together in a platonic or sexual relationship and applied where property had been bought by a mother and son. A mother purchased the property she was renting from a local authority with a substantial discount. Her son, who was living there, was registered as a joint owner but there was no declaration about the beneficial interests. There was a dispute about the amount that the son contributed towards the mortgage payments. The claimant administrators of the mother's estate following her death sought an order that the property be sold and the proceeds divided between the deceased's ten children.

HHJ Behrens QC held that the new approach in *Stack v Dowden* applied but the circumstances of this case were unusual, which justified a departure from the presumption of a beneficial joint tenancy. The context of the acquisition was different from that of a normal cohabiting couple. The mother would not have been able to fund the mortgage without the help of the son. The mother had nine other children with whom she was on good terms and it cannot have been her wish for the whole of her estate to pass to the son. In the circumstances, the parties had not intended a beneficial joint tenancy but that the son should have a one-third beneficial interest. An order for sale, postponed for six months, was granted.

Insolvency

■ **Haines v Hill and another**

[2007] EWCA Civ 1284,
5 December 2007

The appellant and her husband owned the matrimonial home as both legal and beneficial joint tenants. In May 2003, the couple separated and the appellant filed for divorce and started ancillary relief proceedings. In December 2004, the divorce court ordered the husband to transfer his interest to the appellant such that the order became effective on 28 February 2005. On 31 March 2005, a bankruptcy order was made against the husband on his own petition. The transfer of the husband's interest was executed by a district judge in September 2005. In due course, the property

was sold for a sum which provided £120,000 in respect of the husband's share. The respondent, the husband's trustees in bankruptcy, applied for a declaration that the transfer of the husband's interest was a transaction at an undervalue and as such should be set aside under the Insolvency Act (IA) 1986. Section 339 of the IA allows for certain transactions to be set aside where a transaction was on terms that provided for the transferor to receive no consideration (s339(3)(a)), or for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the transferor (s339(3)(c)).

Allowing the wife's appeal, the court concluded that the transfer of the husband's interest was for consideration in that, in the context of a property transfer order within divorce proceedings, the transferee is ordinarily to be regarded as having given consideration equivalent to the value of the property being transferred. Section 339(3)(c) was inapplicable because the consideration provided by the appellant was in money or money's worth and its value was not less than the value of the consideration provided by the husband whether significantly or at all. The court was clearly concerned about the implications of allowing for a situation where a property transfer could be set aside for up to five years potentially from the date of the order because a spouse went bankrupt within that period. This might even encourage such a bankruptcy on the part of a disaffected spouse. The court observed that any collusive agreement between divorcing spouses whereby property of value in excess of what the receiving party's ancillary relief claim is really worth could be set aside under IA s339.

Limitation

■ National Westminster Bank plc v Ashe (Trustee in bankruptcy of Djabar Babai)

[2008] EWCA Civ 55, 8 February 2008

The lender advanced money to its borrower secured by an 'all monies' second charge dated 8 June 1989. Few payments were made by the borrowers, the last one being on 4 January 1993. In 1993, one of the two joint owners was made bankrupt. Intermittent correspondence demanding payment was sent by the bank. No proceedings were ever issued by the lender against the borrowers. In September 2006, the trustee in bankruptcy brought proceedings for a declaration that the lender's legal charge had been extinguished by operation of Limitation Act (LA) 1980 ss15 and 17.

Dismissing the lender's appeal, the court decided that the lender's immediate right to possession was conferred on the date the legal charge was completed. The terms of the legal charge did not restrict expressly the right of the bank to take immediate possession as legal mortgagee. In January 1993, a fresh right of action arose on the date when the payment was made by the borrowers. The borrowers were in adverse possession (as explained in *J A Pye (Oxford) Ltd and others v Graham and another* [2002] UKHL 30, 4 July 2002) from the date of the legal charge. The bank could not be said to have given either express or implied consent for the borrowers to occupy the property as the borrowers were the legal owners. Given that the borrowers were in adverse possession, any claim that the lender had for possession had arisen at the latest in January 1993, more than 12 years previously, and was, accordingly, statute barred by LA s15 and the legal charge was extinguished by LA s17.

1 *Statistics on mortgage and landlord possession actions in the county courts – fourth quarter 2007*, Ministry of Justice Statistical Bulletin, February 2008, available at: www.justice.gov.uk/docs/stats-mortgage-land-q4.pdf.
2 Peter Tutton and Sue Edwards, *Set up to fail: CAB clients' experience of mortgage and secured loan arrears problems*, December 2007, available at: www.citizensadvice.org.uk/pdf_set_up_to_fail_evidence_report.pdf.
3 Mark Stephens and Deborah Quilgars, 'Managing arrears and possessions', *CML Housing Finance*, Issue 05 2007, July 2007, available at: www.cml.org.uk/cml/publications/research.
4 Available at: http://england.shelter.org.uk/files/docs/34496/1299_briefing_Lo.pdf.
5 Available at: www.civiljusticecouncil.gov.uk/files/mortgage-pre-action-protocol-final290208.pdf. Paper copies are available on request, tel: 020 7947 7870 or e-mail: Graham.Hutchens@hmcourts-service.gsi.gov.uk.
6 Available at: www.hm-treasury.gov.uk/media/4/5/consult_modifiedcreditagreements211107.pdf. The consultation closed on 14 February 2008.
7 *Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006). Consultation on proposals relating to: buy-to-let lending, provision of statements, definitions of 'payments'*, is available at: www.berr.gov.uk/files/file42664.pdf. The consultation closed on 12 March 2008.
8 Available at: www.cml.org.uk/cml/policy/issues/1629.
9 Available at: http://fsahandbook.info/FSA/html/handbook/MCOB/13.
10 See note 8.
11 Further information about making a complaint is available at: www.cml.org.uk/cml/consumers/guides/complaints.
12 Visit: www.cml.org.uk/cml/consumers.
13 See note 8.
14 Visit: www.cml.org.uk/cml/consumers/guides/assistance.
15 *No selling. No jargon. Just the facts about what to do when you can't pay your mortgage* is available at: www.moneymadeclear.fsa.gov.uk/pdfs/mortgage_cantpay.pdf.
16 For multiple copies of the leaflet visit: www.moneymadeclear.fsa.gov.uk/tools/publications/online_order_form.html.
17 For further information visit: www.cml.org.uk/cml/consumers/guides/debt.
18 See note 15.
19 Available at: www.fsa.gov.uk/pubs/plan/financial_risk_outlook_2008.pdf.
20 Available at: www.lawcom.gov.uk/docs/lc307.pdf.
21 Hassan Dervish, solicitor, Derbyshire Housing Aid.

Derek McConnell is a solicitor with SouthWestLaw in Bristol and co-author of *Defending Possession Proceedings*, 6th edition, LAG, 2006, £48.

Local taxation update

Alan Murdie summarises policy, legislation and cases dealing with various aspects of local taxation liability and enforcement over the past year.

POLITICS AND LEGISLATION

Tribunals, Courts and Enforcement Act 2007

'Local taxation update', April 2007 *Legal Action* 22, reported on the clauses contained within the then Tribunals, Courts and Enforcement Bill that allowed for forced entry to domestic premises and the use of force against a person in the seizure of goods. The Tribunals, Courts and Enforcement Act (TCEA) 2007 received royal assent on 19 July 2007, and is the culmination of a process which began in 1998 with an announcement by the then Lord Chancellor's Department of a comprehensive reform of bailiff law.

The TCEA has not fulfilled the hope of a single piece of bailiff law. As anticipated, and like many modern Acts, the TCEA is skeleton legislation that empowers the secretary of state to make regulations to flesh out its structure. The scope of the regulation-making powers are set out in TCEA Schs 12 and 13 and go much further than anything envisaged originally, with the Act raising the prospect of bailiffs not only breaking down doors, but using violence against occupiers (ie, presumably anyone obstructing or likely to obstruct a bailiff).

Concern over legislation that allows bailiffs (to be renamed enforcement agents) to use violence is growing. While the draft bill sought to give bailiffs an express power to use 'force against the person', TCEA Sch 12 para 24(2) states: 'A power to use force does not include power to use force against persons, *except to the extent that regulations provide that it does*' (author's emphasis added). Thus, it may be seen that potential still exists to create powers to use force against a person in some form at a future date.

It is unclear who proposed the alarming notion of force against persons or how it came to be included in the bill as introduced, since neither the preceding green paper nor white paper mentioned the possibility of such force. For its part, the government has stated that it will not introduce such a power unless there is a demand for it; to date, there is no interest group – including bailiffs' organisations – that appears to be lobbying for such powers to enter into law. The government has committed itself to further consultation on the content of regulations before any change in the law. Hopefully, this will avoid the situation whereby powers to force entry and guidance on using force against the person were slipped into the law for fine collection in March 2006 as a result of changes under Schedules contained in the Domestic Violence, Crime and Victims Act 2004.

At the time of writing, an amendment to remove TCEA Sch 12 para 24(2) is being put forward as an amendment to Criminal Justice and Immigration Bill cl 128 on reasonable force. If successful, the amendment will prevent such regulations ever emerging by removing the power to create them. Lobbyists are approaching the Joint Committee on Human Rights, and the author would also request concerned readers to lobby ministers and MPs both on this issue and on that of forced entry to domestic homes.[1]

Are computers exempt goods?

At common law, a bailiff could only seize goods capable of being sold to cover the debt: *Francis v Nash* (1734) 95 ER 32. Thus, personal papers and certain deeds could not be seized, along with items of nominal value. Nor were life assurance policies considered capable of seizure: *Re: Sargent's Trusts* (1879) 7 LR Ir 66 and various protections were considered to apply for patents and copyrights in the late 19th and early 20th centuries. Significantly, intellectual property is outside the definition of goods in the Sale of Goods Act 1979.

The distinction between physical and intangible property poses a problem with computers. The hard drive of a computer that is used for personal or business purposes will contain intangible property in the form of intellectual property, ie, data, information, images etc. The information on the computer may be personal or relate to financial matters or actually belong to third parties (for example, attachments, contents of stored e-mails, etc) and may also have a value far beyond that of the physical storage system. Arguably, a computer might be compared with a writing desk or bureau containing the papers of a debtor at common law. The physical item of furniture might be seized as falling within the concept of goods, but any letters, personal papers, or cheques, etc contained within it would probably not have been classed as goods for the purpose of seizure.

Alarm bells in this area began ringing over a decade ago when authors J A Keith, W B Podevin and Claire Sandbrook wrote: 'While the actual machine and supporting documents may be seized, it is unlikely that a writ of fi fa [this is the name for a warrant in the High Court] extends to the information contained in a data base.'[2]

Unless the government makes the regulations carefully, it is possible to foresee all kinds of thorny legal issues arising in the field of intellectual property. Third-party rights may also be an issue, for example, where a computer may belong to a third party, an employer or be subject to a hire-purchase agreement. This is a problem with existing physical goods; with a computer, its programming might be treated as the property of a third party, for example, a manufacturer or programmer may or may not be loaded separately to the machine under licence. It may be noted that while these arguments apply to computers themselves, they may also relate to many of the items which accompany a computer, such as computer disks and manuals.

Privilege has also been long attached to 'tools of the trade'. At common law, a debtor's tools were exempt from seizure. The protection extended to many statutory seizures such as local taxes, but does not apply to uniform business rates. Today, for many self-employed people, a computer is primarily for work purposes. It might now be classed as a modern-day equivalent of protected 'tools of the trade', although the onus will be on the debtor to show this. In cases of High Court enforcement, the burden is on the debtor to show goods are for trade use: see *Toseland Building Supplies v Bishop* (1993) October 28, Court of Appeal, per Steyn LJ. There were conflicting authorities at common law about whether or not business books and ledgers were capable of seizure; again, this is a point that will need to be addressed with computers which may contain the records of a business.

Handcuffing of council tax debtors

On 18 February 2008, Kings Lynn Magistrates' Court jailed a 76-year-old

pensioner, Richard Fitzmaurice, for 34 days for wilful refusal to pay a council tax debt of £1,359. Previously, he had been jailed for refusing to pay his council tax in a protest against council tax levels and pensioner poverty. Newspaper reports highlighted the fact that the debtor was handcuffed as he was taken from court.[3]

The use of handcuffs against a prisoner is an issue of concern, not least because precedents stretching back to the Victorian era indicate that handcuffing should not be used as a matter of course but where there is a risk of violence or escape (relevant authority can be found in *Stone's Justices' Manual* 2007 and *R v Cambridgeshire Justices and the Chief Constable of Cambridgeshire Constabulary ex p Peacock* [1997] 161 JP 113).

The most recent judgment from the Divisional Court considering the general issue of the handcuffing of prisoners is *R (Graham) v Secretary of State for Justice; R (Allen) v Secretary of State for Justice* [2007] All ER (D) 383 (Nov), 23 November 2007, where the court ruled that the unnecessary use of handcuffs on prisoners, who were either in or out patients, was capable of infringing article 3 of the European Convention on Human Rights ('the convention'). The author invites readers who have further examples of the handcuffing of council tax defaulters to send him the details.[4]

Appeals Direct

From July 2006, the government introduced a new system of appeals procedure. The new scheme is part of the overall reform of tribunals and the restructure of the tribunal system that is planned for 2008–2010. There will be a regional structure and a new management system. It is envisaged that there will be a single president who will be empowered to give directions. The government's aim is to try to standardise the tribunal system throughout England and Wales, so that decisions will be of a consistent quality.

The Council Tax (Valuations, Alteration of Lists and Appeals) (England) Regulations (CT(Appeals) Regs 2008) 2008 SI No 315 will come into force on 1 April 2008 to facilitate the Appeals Direct reforms. The CT(Appeals) Regs 2008 amend the Council Tax (Alteration of Lists and Appeals) (CT(Appeals) Regs 1993) Regulations 1993 SI No 290 in England.

Under the Appeals Direct system, the taxpayer is expected to play a greater part in taking a banding appeal to a Valuation Tribunal, with the listing officer no longer under an obligation automatically to refer the appeal to the tribunal. In order to reach the Valuation Tribunal, the proposer will have to take the necessary steps him/herself.

Under Appeals Direct, the Valuation Office Agency has four months to decide whether to allow an alteration of the list and to issue a decision notice to the proposer. During this four-month period, it will be open to the proposer to negotiate and reach an amicable solution with the Valuation Office Agency concerning banding. It is envisaged that the listing officer will discuss the proposal with the proposer and any interested parties before reaching a decision and issuing a decision notice. Under CT(Appeals) Regs 2008 reg 6 (substituting a new reg 10 in the CT(Appeals) Regs 1993), the listing officer will decide whether a proposal is well-founded, partly well-founded or not well-founded (and accordingly whether or not any alteration will be made to the list). A letter will be sent out with the notice explaining that the proposer and any interested party has a right of appeal to the Valuation Tribunal. It appears that the listing officer has a wide discretion about who may be an interested party: the basic proviso is that such a party must be a taxpayer in relation to the dwelling.

After the issue of a decision notice, the proposer and any interested party has a right to appeal to the Valuation Tribunal. CT(Appeals) Regs 2008 reg 5 amends reg 8 of the CT(Appeals) Regs 1993 to allow the proposer to go direct to the Valuation Tribunal rather than wait for the listing officer to inform the tribunal of the dispute. The Valuation Tribunal should aim to list the appeal within six months of receiving the appeal notice and give the proposer at least 28 days' notice of the hearing.

It is anticipated by the government that Appeals Direct will have a number of advantages for the taxpayer, as well as achieving savings in time and money by filtering out appeals where the taxpayer does not want to enter into the formal tribunal process. The government also considers that Appeals Direct encourages transparency in decision-making and ensures that Valuation Tribunals appear fair and independent of the Valuation Office Agency. However, the new system does nothing to restore the wider rights of appeal which existed before reforms in 1993, including allowing any person to make a proposal.

CASE-LAW

Setting aside liability orders

■ R (Freedman) v Hackney LBC

[2007] All ER (D) 304 (Oct), CO/915/2006, 22 October 2007

The applicant sought to challenge a liability order made against him in May 2005 in respect of an address where he resided with his wife. In February 2006, his papers were lodged at the Administrative Court.

Mitting J dismissed the application. The claimant's claim had been made long after the expiry of the maximum period of three months provided for under Civil Procedure Rules Part 54; no application for an extension of time had been made and there were no grounds for granting such an extension.

Comment: These two cases illustrate the difficulties facing a taxpayer who has a liability order made against him/her in the magistrates' court. Arguably, the correct forum in which to settle the question of liability to tax is the Valuation Tribunal under s16 of the Local Government Finance Act 1992; the magistrates' court being confined, on a narrow interpretation of the Council Tax (Administration and Enforcement) Regulations (CT(Enforcement) Regs) 1992 SI No 613, to whether sums have been demanded correctly and remain unpaid.

There is no right in the CT(Enforcement) Regs to set aside a liability order in the magistrates' court with the exception of a power given to local authorities to make an application under the CT(Enforcement) Regs as a result of changes achieved by the Local Government Act 2003. However, the practice has grown, since *Liverpool City Council v Pleroma Distribution Ltd* [2002] EWHC 2467 Admin, 21 November 2002, of allowing applications but has been restricted since *R (Mathialagan) v (1) Southwark LBC and (2) Camberwell Green Magistrates' Court* [2004] EWCA Civ 1689, 13 December 2004; [2005] RA 43 (CA).

These latest cases indicate that the taxpayer should begin a challenge in the magistrates' court as soon as s/he discovers the existence of a liability order, and should lodge an appeal to the Valuation Tribunal in any event. Arguably, a person might also be advised to apply for leave for judicial review if in time as a back up. The basic defects are that consistent rules for civil proceedings in magistrates' courts have never been written and set-aside proceedings for liability orders, in whichever forum, increasingly resemble a judicial game of snakes and ladders. The odds are already stacked in favour of local authorities, and perhaps it ought to be demonstrated that there was real prejudice to an authority rather than a hypothetical risk. There is also the question of costs: magistrates appear to lack a statutory basis for awarding costs since the set-aside proceedings for liability orders appear to fall outside the Magistrates' Courts Act 1980, the Magistrates' Courts Rules 1981 SI No 552 and the Courts Act 1971.

■ **R (Newham LBC) v Stratford Magistrates' Court and Dublin (interested party)**

[2008] All ER (D),
[2008] EWHC 125 (Admin),
15 January 2008

The council taxpayer was subject to three liability orders made by the magistrates' court between October 2001 and June 2003 in favour of the claimant local authority. The taxpayer applied to have the orders set aside by a district judge at the magistrates' court in November 2006, having only just learned of their existence and stating he had not been residing in the property at the time.

The evidence of the district judge was as follows:

■ that he was satisfied of a genuine dispute about liability to pay;
■ that there had been a substantial procedural error or failure; and
■ that although the defendant had not acted promptly it was in the interests of justice to set the three orders aside.

Newham sought to set aside the order of the district judge on judicial review.

The Divisional Court held that the three criteria to be applied were:

■ a genuine and arguable dispute about the liability to pay;
■ the liability order had been made due to substantial procedural error, defect or mishap; and
■ the application to set aside had to be made promptly after the defendant had notice of its existence.

With respect to the third principle, a further factor was the importance of the finality of litigation. When a defendant sought to set aside an old liability order, the court should investigate the length of notice that the defendant had. The district judge had failed to investigate the period of the defendant's notice and ought to have considered whether there would be prejudice to the local authority, including whether earlier evidence existed. A decision that the interests of justice to set aside a liability order did not determine whether the previous decision ought to be set aside, particularly when they had been made long ago.

Bankruptcy

■ **Johnson v Tandridge DC**

[2007] All ER (D) 350,
23 October

Following the breakdown of his marriage, the debtor moved out of the matrimonial home and into rented accommodation. Subsequently, he moved out of the accommodation but failed to notify the local authority. The local authority issued a statutory demand, and then presented a bankruptcy petition. The debtor appealed to the High Court arguing that neither the statutory demand nor the bankruptcy petition had been served on him in accordance with r6 of the Insolvency Rules 1986 SI No 1925. The local authority contended that the proper course was for the debtor to seek an annulment of the bankruptcy order under s383 of the Insolvency Act 1986.

The court held that on the evidence before the district judge, there was no basis on which to interfere with the bankruptcy order. The High Court did not have jurisdiction to resolve issues of fact and the proper course was for the debtor to seek the annulment of the order on the ground that the order should not have been made.

Fraud: council tax benefit sole and main residence

■ **R (Pearson) v Greenwich Magistrates' Court; Pearson v Greenwich LBC**

[2008] All ER (D) 256,
[2008] EWHC 300 (Admin),
30 January 2008

The defendant applied to the respondent local authority seeking a reduction in council tax. He submitted an application form which required him to complete a number of different sections. The defendant gave details of the property on which he sought to receive a council tax reduction but did not give details of a second property that he owned.

The authority commenced proceedings under Social Security Administration Act (SSAA) 1992 s112. It contended that the defendant had made false representations for the purpose of obtaining benefit by omitting the details of the second property. The defendant was convicted in the magistrates' court: the justices found that he made a false representation for the purpose of obtaining a benefit.

The court upheld the appeal against conviction on a case-stated application by the defendant. He had been required to provide details of the name and address on which he sought to receive the council tax reduction. He was accused of making representations that he had only one property for the purposes of obtaining benefit. However, the defendant's omission did not mean that he had made representations to the effect that he had only one property. His conviction would therefore be quashed.

■ **Smith v North Somerset Council**

[2007] EWHC 1767 (Admin),
22 May 2007,
[2007] 171 JP 509

The appellant was convicted of two offences in relation to council tax benefit (CTB) and housing benefit (HB). She was convicted under SSAA s112(1A) of failing promptly to report changes of circumstances affecting her entitlement to CTB and HB. The appellant failed to report that she had become a student and continued to claim benefits over a one-and-a-half-year period between December 2003 and June 2005. A second charge, under S112(1), alleged that between 24 March and 28 April 2005, for the purposes of obtaining benefit, she made a representation she knew to be false when she failed to state that she had received income from student grants and student loans.

Summonses for the offences were issued in April 2006, and the appellant pleaded guilty in October 2006 following the rejection of a submission of no case to answer at the close of the prosecution case. Offences under SSAA s112 must be prosecuted within either three months or 12 months of the authority having knowledge of the offence. Section 116(3)(b) of the SSAA provides that a certificate of the appropriate authority as to the date on which such evidence as mentioned in s116(2)(b) came to the authority's knowledge shall be conclusive of the date; no such certificate was produced to the court. A district judge ruled that offences under the SSAA were continuing offences and were not barred by the time limit under s116 of the Act.

The defendant appealed, by way of case stated, on the question of whether it was permissible to bring a charge in relation to the entire one-and-half-year period. The first question for the Divisional Court being:

Did the learned ... judge err in his ruling that the offence was an ongoing offence capable of continuing between 22 September 2003 and 30 June 2005? Therefore did he err in his ruling that the information had been laid within the 12-month time limit stipulated by section 116 of the Act?

The second question before the court was whether a finding of a case to answer was sustainable on the second charge. The point in issue was whether a false statement had been made where the appellant had already received the last instalment of a grant when the representation concerning what money she had coming in had been made.

The court ruled that the convictions would stand. It held that the offences under the SSAA were continuing ones. The court considered that there was an obligation to notify the change of circumstances and to do so promptly. The offence was a continuing one, not affected by the fact that the appellant was never notified by the authority. As a result, the offence continued up until 30 June 2005, and the commencement of proceedings in April 2006 was within the time permitted under SSAA s116.

On the second question, the court ruled that a submission of no case to answer had been rightly rejected: the form completed by the appellant had required the type of income to be disclosed. The evidence had been given in detail and the test at the stage of a no-case-to-answer submission was whether a court could properly convict. Although the Divisional Court did not have evidence on the point, the court expressed the opinion that the view that undeclared grant money could be interpreted as money for the summer term was 'no doubt' the correct one.

LOCAL GOVERNMENT OMBUDSMAN

Investigations

Council tax anti-poverty strategy

■ **Brent LBC**

05/A/17099,

26 February 2007

The complainant, 'Mr Holding', was an illiterate pensioner who was in poor health and in debt regarding a loan taken out to pay for repairs to his home as well as the costs of his son's funeral. The complainant had council tax arrears and a history of missed payments, and had liability orders made against him in 1996 and 2001.

In 2002, the council wrongly awarded a 50 per cent empty property discount on the complainant's property backdated to 1993. This discount had the effect of clearing arrears of council tax, as the complainant was not entitled to CTB. In March 2004, the council discovered its error and served Mr Holding a bill for £4,649.96 in April 2004, later reduced to £3,172.62. Brent asked him to pay the sum in the next 13 months. The complainant contacted the local authority and sought to resolve the situation and explained his financial difficulties. The council responded by suggesting that Mr Holding pay back the debt by instalments at the rate of £319 per month, and subsequently it issued a summons.

The hearing of the liability order was adjourned and the complainant contacted the local Law Centre®, which negotiated on his behalf. On the day of the next court hearing, the complainant spoke with a council officer and believed he had reached an agreement to pay the council £20 a month, while the council took the view it had agreed to receive payments of £140 per month. There was no documentary record of the agreement and a liability order was, nonetheless, issued. Further complaints were taken by the Law Centre and by the complainant's daughter through all three stages of the council's complaints procedure. Subsequently, after intervention by Brent's chief executive, the council accepted Mr Holding's £20 repayment offer and issued an apology.

The Ombudsman found a number of faults in the council's approach, in addition to the erroneous decision on discount. The negotiation with the council about the amount to be paid had taken much longer than was necessary. The council failed to have regard to its anti-poverty strategy and to enquire into the complainant's means. It had also failed to respond to a solicitor's letter on behalf of the complainant at the appropriate level. Nonetheless, the Ombudsman found that there was a public interest in the council's approach to recovering debt from vulnerable people and accepted that the reduction in council tax arrears of £1,477.34 was an acceptable remedy in itself.

Recovery of council tax arrears before benefit entitlement is resolved

■ **Northampton BC**

05/B/16773,

27 June 2007

The complaint arose from delays by the local authority in processing the complainant's CTB and HB claims and appeals between November 2004 and March 2006, while at the same time pursuing council tax and rent arrears against her. These arrears culminated in the council issuing possession proceedings through the county court and instructing bailiffs to collect council tax arrears while her CTB and HB claims were unresolved. The Ombudsman found maladministration causing injustice.

The council was directed as follows:

■ to apologise to the complainant;

■ to write off an outstanding HB overpayment of £79.46;

■ to write off an outstanding balance of £187.39;

■ to pay HB and CTB equal to one week's benefits for the week commencing 7 December 2005 or financial compensation to the equivalent value; and

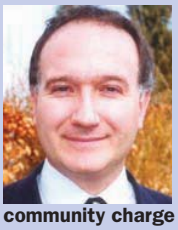
■ to pay additional financial compensation of £2,500 less the amount already written off the rent account and the amount to be written off the council tax account, ie, £1,865.

1 The Joint Committee on Human Rights published *Legislative scrutiny: Criminal Justice and Immigration Bill*, fifth report of session 2007–08, HL Paper 37, HC 269, on 25 January 2008. It is available at: www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/37/37.pdf.

2 *The execution of sheriffs' warrants,* 2nd edition, Barry Rose Law Publishers Ltd, 1995.

3 See *Eastern Daily Press*, February 19 2008 and Chris Hill, 'Norfolk council tax rebel, 76, jailed', available at: http://new.edp24.co.uk.

4 Post to: Zacchaeus 2000 Trust, 38 Ebury Street, London SW1W 0LU or e-mail: alanmurdie@z2k.org.



Alan Murdie is a barrister, who co-founded the Poll Tax Legal Group in 1990. He has been involved with many test cases concerning the community charge and has wide experience of liability order applications in the magistrates' courts. He is co-author, together with Ian Wise, of *Enforcement of Local Taxation: an advisers' guide to non-payment of council tax and the poll tax*, LAG, 2000, £12.50.

Recent developments in housing law

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

POLITICS AND LEGISLATION

National housing policy

On 29 February 2008, the government published its latest statement on housing policy in the form of a summary of responses received to a recent housing green paper: *Homes for the future: more affordable, more sustainable: summary of responses to the housing green paper*, Communities and Local Government (CLG).[1] The summary also sets out what steps the government has taken since the green paper was published, where relevant to the issues raised by the responses. Many of the matters reviewed are embraced by the Housing and Regeneration Bill which will have its Commons third reading shortly.

In February 2008, the government also launched a new national housing and ageing strategy focusing on the work that is being done to improve housing and to make it better suited to meet the needs of older people: *Lifetime homes, lifetime neighbourhoods: a national strategy for housing in an ageing society*, CLG.[2]

The national picture in relation to housing provision is set out in the annual report *Housing statistics 2007*, CLG, February 2008.[3] It reveals that 70 per cent of households are owner-occupiers, 18 per cent are social tenants and 12 per cent are private renters. The proportion of private renters has risen from ten per cent in 2001, while the proportion of social renters has fallen from 20 per cent. The proportion of owner-occupiers has remained stable.

On 5 February 2008, the new housing minister, Caroline Flint MP, gave a speech to the Fabian Society intended to open a controversial debate about the link between social housing and worklessness.[4] The Housing Corporation has published a paper on the same theme: *Housing associations tackling worklessness*, 2007.[5]

The green paper, *The path to citizenship: next steps in reforming the immigration system*, Home Office, February 2008, deals with access to benefits and services, including housing, in chapter 5.[6] The government proposes that the newly created class of 'probationary citizens' will not be entitled to local authority housing. A consultation response form is available online and responses should be made by 14 May 2008.[7]

Possession claims

The latest statistics on possession claims brought by mortgage lenders and landlords cover the fourth quarter of 2007: *Ministry of Justice statistical bulletin*, February 2008.[8] They show that, compared with the same quarter in 2006, the number of mortgage possession claims had increased by 14 per cent and the number of landlord possession claims by five per cent.

On 29 February 2008, the Civil Justice Council issued a draft pre-action protocol for mortgage arrears possession claims.[9] The protocol is intended to ensure that before proceedings are commenced all reasonable steps have been taken to avoid the necessity for litigation. Responses to the draft are sought by 23 May 2008. See also page 21 of this issue.

Private sector housing

The Chartered Institute of Environmental Health (CIEH) has published a new report exploring local authority practice in enforcing the provisions of the Housing Act (HA) 2004 relating to housing conditions: *The CIEH survey of local authority regulatory activity under the Housing Act 2004*, February 2008.[10] The report reviews the level of local authority activity, the number of prosecutions, and issues around licensing in the private sector. It notes that the number of staff available and the number of complaints which local authorities receive from residents are a greater influence on enforcement activity than addressing risks to health and safety in homes.

A new good practice guide for local authorities, Identifying and dealing with unlicensed HMOs, LACORS, January 2008 explains how councils can raise awareness of licensing of houses in multiple occupation and carry out survey work to identify unlicensed properties.11

Disability and housing

In February 2008, the government published *Disabled facilities grant – the package of changes to modernise the programme* outlining its responses to a recent consultation exercise on the future of disabled facilities grants.[12]

Homelessness

A new report, *Survey of needs and provision: services for homeless single people and couples in England*, February 2008, commissioned by the Construction and Property Industry Charity for the Homeless and CLG, contains independent research carried out by Homeless Link and the Resource Information Service into the overall extent of services for the homeless, including hostels, day centres and supported accommodation.[13]

The particular needs of female prisoners facing homelessness on release are reviewed in another new report: *The importance of housing for women prisoners*, Ministry of Justice and the National Offender Management Service.[14] The booklet considers the support available in seeking to maintain and gain housing on discharge from custody.

The latest published homelessness statistics for England cover the last quarter of 2007: *Statistical release: statutory homelessness: 4th quarter 2007, England*, CLG, March 2008.[15] They show that the number of decisions made on applications was six per cent lower than during the same period in 2006 and that the number of acceptances was 12 per cent lower.

Housing and children

On 18 February 2008, the Children and Young Persons Bill completed its committee stage in the House of Lords.[16] The bill amends substantially the key provisions that apply when accommodation is provided for a child under Children Act (CA) 1989 ss17 and 20. The Lords report stage was scheduled for 17 March 2008.

Local authorities and council housing

In February 2008, the Audit Commission published the results of its assessments of housing services provision by all local authorities for 2007: *CPA – the harder test: scores and analysis of performance in single tier and county councils 2007*.[17] Only four local authorities fell below minimum requirements for council housing services (Herefordshire, Liverpool, Rutland and

Slough). The proportion of councils performing below minimum requirements in housing (three per cent) was greater than in any other service assessment area.

Housing and human rights

On 1 February 2008, the Joint Committee on Human Rights published *The work of the committee in 2007 and the state of human rights in the UK,* sixth report of session 2007–08, HL Paper 38, HC 270.[18] An Annex to the report sets out current human rights concerns in the UK and deals with discrimination in housing at paragraphs 12–14.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 1 of Protocol No 1 and Article 2 of Protocol No 4

■ Nagovitsyn v Russia

App No 6859/02,
24 January 2008

In 1986, Mr Nagovitsyn took part in the cleaning-up operation after the accident at the Chernobyl nuclear plant. He was subsequently registered as disabled and became entitled to various social benefits, including housing. He lived in Kirov, but in October 2000, he brought proceedings against the municipality of Moscow, seeking an order that it provide him with a flat in Moscow. In January 2001, the Presnenskiy District Court of Moscow dismissed his claim. In May 2001, the Moscow City Court upheld the district court's decision. He complained that the refusal to provide him with a flat in Moscow constituted a breach of his right to liberty of movement guaranteed by article 2 of Protocol No 4 of the European Convention on Human Rights ('the convention').

In finding that complaint to be manifestly ill-founded, the European Court of Human Rights (ECtHR) noted that Mr Nagovitsyn was not in any way prevented from moving to Moscow or renting or purchasing a flat there. The fact that the domestic courts refused to allocate him free housing in Moscow could not be considered an interference with his rights under article 2 of Protocol No 4.

In November 2001, as a result of other proceedings, the Leninskiy District Court of Kirov ordered the Kirov municipality to provide Mr Nagovitsyn with appropriate housing for a family of three within three months, in accordance with existing housing and sanitary standards. That judgment was not enforced until three years, five months and one week after it had become final and binding.

Following cases such as *Malinovskiy v Russia* App No 41302/02 and *Teteriny v Russia* App No 11931/03, the ECtHR found a breach of article 1 of Protocol No 1 of the convention. Making its assessment on an equitable basis, the ECtHR awarded €2,100 in respect of non-pecuniary damage for 'certain mental distress' caused.

SECURE TENANCIES

Let as a separate dwelling

■ Mansfield DC v Langridge

B5/07/2500,
13 February 2008

Mr Langridge was the secure tenant of a house. After allegations of nuisance, Mansfield issued a possession claim, but the proceedings were stayed when Mr Langridge received life-threatening injuries from a serious assault. When he left hospital, he moved into a hostel and his mother gave up the keys of the house to Mansfield to enable the council to clean it up. After Mr Langridge issued a claim for an injunction for the return of the keys, Mansfield made a flat, which was supported accommodation, available to him on licence until the resolution of the possession proceedings. Mr Langridge signed an agreement to occupy the flat on a temporary basis as a licensee. The agreement provided that it did not create a secure tenancy. In a letter, it was stated that the agreement was purely for the purpose of providing temporary accommodation pending trial of the possession proceedings. Subsequently, Mansfield obtained a possession order in respect of the house. The council then served notice to quit before issuing proceedings for possession of the flat.

HHJ O'Rorke found that it had been the parties' mutual intention that the agreement should be limited in time until the conclusion of the earlier possession claim and that nothing had altered that mutual intention or the nature of the licence. The flat was not a separate dwelling (HA 1985 s79(3)). He made an order for possession. Mr Langridge appealed. Calvert-Smith J dismissed the appeal ([2007] EWHC 3152 (QB); 21 September 2007; February 2008 *Legal Action* 37).

The Court of Appeal allowed a second appeal. The licence agreement gave Mr Langridge exclusive possession of the flat as a separate dwelling in return for the payment of a rent. In those circumstances, the conditions of s79 were satisfied. Accordingly, despite the intentions of both parties, the licence agreement conferred a secure tenancy of the flat.

Rent-free accommodation provided to police officers

■ Holmes v South Yorkshire Police Authority

[2008] EWCA Civ 51,
7 February 2008

PC Holmes lived in rent-free accommodation provided under statutory powers by the police authority. The police authority made a policy decision to divest itself of its remaining police dwellings so that any occupier who did not choose to buy his/her home would be required to vacate it in July 2008. PC Holmes sought a declaration that he was either a secure tenant or entitled in equity to remain in occupation until he retired. Recorder Armitage refused relief on either basis. PC Holmes appealed.

The Court of Appeal dismissed his appeal. HA 1985 Sch 1 para 2(2) provides that a tenancy or licence is not secure if the tenant is a member of a police force and the dwelling-house is provided free of rent and rates in accordance with regulations made under Police Act 1996 s50. The Court of Appeal rejected an argument that the tenancy was not 'free of rent and rates' because PC Holmes had to pay water charges, formerly known as water rates. The abolition of water rates by the Water Industry Act 1991 meant that there was no longer anything for the para 2(2) exemption to bite on, assuming, which was doubted, that 'rates' in para 2(2) included water rates in the first place. It also rejected a further argument that representations made by the police authority created an equitable estoppel against evicting police officers. Although PC Holmes was assured in December 2000 that, if he did not buy his home or move elsewhere, he could continue to live in it until he left the police service or retired, he had done nothing which he would not otherwise have done, and so had not acted to his detriment in reliance on the authority's promise. It is for the party claiming detriment to show that s/he sustained it. PC Holmes would have continued for as long as he could with the undoubted benefit of rent-free accommodation even if the assurance of security had not been given because, financially, he had no other option. He had not suffered any appreciable harm by reason of his reliance on the authority's assurance.

Council employees and the right to buy

■ Wragg v Surrey CC

[2008] EWCA Civ 19,
1 February 2008

Mr Wragg was employed by the council as a countryside ranger, with duties relating to the management and conservation of areas of

common land in Surrey. He lived in a house owned by the council. His contract of employment stated:

It shall be a condition of your service … that you will occupy, on a permanent and full-time basis, a property to be provided by the county council. This property is provided for the better performance of your duties.

He served notice under HA 1985 s122 claiming to exercise the right to buy. The council served a notice under s124 denying that he had a right to buy, relying on the exclusion from secure tenancy status in Sch 1 para 2(1) (premises occupied in connection with employment). He brought a claim in the county court under s181 for the determination of that issue. The claim was decided on the assumption that he was a tenant. After a detailed review of the evidence, including the work carried out by Mr Wragg since 1984, HHJ Reid QC found that Mr Wragg's contract did not fall within the exception in para 2(1). The council appealed.

The Court of Appeal allowed the appeal. Richards LJ stated that:

[para 2(1)] is to be construed as laying down two distinct conditions: first, that 'his contract of employment requires him to occupy the dwelling-house'; secondly, that the requirement is 'for the better performance of his duties'. The first condition looks only to the terms of the contract: the question is simply whether the contract contains such a requirement or not. The second condition, however, raises an issue of fact outside the contract: the question is not whether the contract states that the requirement is for the better performance of his duties, but whether the requirement is in fact for the better performance of his duties … [The second condition] should be construed as including an objective test: 'for' is to be read as 'to enable', the essential question being whether the required occupation of the property is intended to promote, and is reasonably capable of promoting, the better performance of the employee's duties.

The court should look at all the circumstances in deciding whether the required occupation is for the better performance of the employee's duties, including the reasons given for the imposition of the requirement to occupy the property, the considerations taken into account in imposing that requirement, and the factual history in so far as it casts light on whether occupation of the property was or was not reasonably capable of leading to better performance of the employee's duties. In this context, 'better' is a true comparative. The question is whether or not the requirement to occupy the house is for the better performance of the employee's duties as compared with the position if there was no requirement to occupy.

In this case, the contractual requirement to occupy the house provided by the council was imposed under the council's policy. There was no reason to doubt the council's evidence that the policy about tied accommodation was one for which there was a continuing justification. The various considerations taken into account by the council in maintaining and applying its policy were all relevant and valid. There was good reason to consider that the required occupation of a house provided by the council was intended to promote, and was reasonably capable of promoting, the better performance of his duties and thus was for the better performance of his duties. The occupation of the house fell squarely within para 2(1) and Mr Wragg was not entitled to exercise the right to buy.

ANTI-SOCIAL BEHAVIOUR

Possession claims against Gypsies

■ Smith (On Behalf of the Gypsy Council) v Buckland

[2007] EWCA Civ 1318, 12 December 2007, February 2008 Legal Action 38

The Appeal Committee of the House of Lords has refused leave to appeal.

ASSURED TENANTS

Possession claims: alternative accommodation

■ Ward v 1066 Housing Association

(2008) 8 February, QBD

Mr Ward was a secure tenant of a local housing authority. In 1996, he signed a tenancy agreement which provided that possession would only be sought on redevelopment or construction. The freehold of the property was later transferred to the 1066 Housing Association. Mr Ward became an assured tenant and entered into a new tenancy agreement. It contained a clause that any tenant who remained a tenant at the date of the transfer to the housing association would continue to have rights under the first agreement. The housing association sought possession under HA 1988 Sch 2 Ground 9 (suitable alternative accommodation). Mr Ward argued that he required the property because he was an artist. A judge made a possession order, finding that Mr Ward's rights under the first agreement had not been preserved and that as he was not a professional artist, that need could not be taken into consideration when deciding whether the alternative accommodation was suitable. Mr Ward appealed.

Cranston J dismissed the appeal. In all the circumstances, reading the two agreements together produced the construction the judge had come to. The clause in the second agreement was introductory and had not preserved the rights, in relation to the exercise of possession, contained in the first agreement. Furthermore, the judge had been perfectly entitled to find that the tenant's art work was for recreational purposes rather than professional ones. He had balanced the needs correctly.

Possession claims: anti-social behaviour

■ Bedfordshire Pilgrims Housing Association Ltd v Khan

[2007] EWCA Civ 1445, 14 December 2007

Ms Khan was the assured tenant of housing association premises which she occupied with her four children. The housing association alleged that she had breached the terms of her tenancy by verbally harassing and physically assaulting neighbours and by causing or allowing her son, her brother and other relatives or friends to attack residents and their children in the locality. On one occasion the defendant's brother threatened a neighbour with a knife and said he would have her raped. On another occasion one of the defendant's sons broke the nose of a neighbour's son. HHJ Everall QC made an outright order for possession under HA 1988 Sch 2 Grounds 12 and 14 (breach of tenancy agreement) and (tenant or person residing in or visiting the house causing nuisance or annoyance to a person residing or visiting in the locality, or convicted of an indictable offence committed in the locality) respectively. The defendant sought permission to appeal.

The Court of Appeal refused permission to appeal. First, the judge's findings of fact were not perverse. Second, the judge was right to find that Ground 14 includes the tenant or a person residing in the premises encouraging or instigating other persons to do things which cause or are likely to cause any nuisance or annoyance. Third, in relation to reasonableness, Tuckey LJ said:

… weight in the context of a decision about reasonableness is quintessentially a matter for the trial judge who has heard and seen the people involved and is in the best position to decide what the justice of the case demands. Unless it can be shown that in carrying out this exercise the trial judge has misdirected himself or gone plainly wrong, this court will not interfere with his conclusion.

Finally, the judge was 'clearly entitled to take the view that no good would come of postponing the possession order', having regard to the absence of genuine remorse on the defendant's part and her statement that there was nothing wrong with her behaviour.

TOLERATED TRESPASSERS

■ London & Quadrant Housing Trust v Ansell

[2007] EWCA Civ 326,
19 April 2007,
[2007] HLR 37,
June 2007 Legal Action 34

The Appeal Committee of the House of Lords has given leave to appeal.

Tolerated trespassers and succession

■ Austin v Southwark LBC

[2007] EWHC 355 (QB),
29 January 2008

Alan Austin was granted a secure tenancy in 1983. In 1986, as a result of rent arrears, Southwark brought a possession claim. In 1987, a suspended possession order was made, but Alan Austin defaulted and became a tolerated trespasser. His brother, Barry Austin, went to live with him in 2003. Alan Austin later died and Southwark brought a new possession claim against Barry Austin. He made an application under Civil Procedure Rules (CPR) Part 19 to represent the estate of his brother and retrospectively to postpone the date for possession so that he would be entitled to succeed to the tenancy under HA 1985 s87(b).

HHJ Welchman dismissed the application. Following Brent LBC v Knightley (1997) 29 HLR 857, he held that the right to apply for a postponement of an order for possession under HA 1985 s85 is not an interest in land which is capable of being inherited. Any right ceased on the brother's death. Barry Austin appealed, arguing that Knightley predated the Human Rights Act 1998 and was not compliant with the convention, specifically article 1 of Protocol No 1.

Flaux J dismissed the appeal. CPR Part 19.8(1) does not permit a would-be personal representative to bring a claim in his/her own right. In this case, the claim did not survive Alan Austin's death. Article 1 of Protocol No 1 was not breached because the legal rule in *Knightley*, that an interest ceased with death, did not seem to amount to a deprivation of a possession. The purpose of article 1 of Protocol No 1 is to uphold rights, not to create rights. He concluded that the court should not exercise its discretion under CPR Part 19.8 and that HHJ Welchman was not wrong.

PROTECTION FROM EVICTION ACT 1977

■ R v Harris (Prosecution Appeal (No 28 of 2007))

(2008) 13 February, CA

A landlady, Ms Harris, agreed orally to rent out a room. After the tenants had moved in, they signed a written agreement, providing for a term of six months, and a rent of £495 per month. Ms Harris and the tenants acted in accordance with that written agreement. However, Ms Harris served a notice to terminate the tenancy before the date of termination stipulated in the written agreement. The tenants were legally advised that that notice was invalid. When they did not leave, Ms Harris attempted forcibly to enter the tenants' bedroom, removed picture hooks, disconnected the communal washing machine, removed food and other utensils, and locked the kitchen. She was charged with doing an act likely to interfere with the peace or comfort of residential occupiers contrary to Protection from Eviction Act (PfEA) 1977 s1(3A).

At the trial, the judge ruled that the terms of the agreement between Ms Harris and the tenants had been orally agreed and that the written agreement had no force. She held that, by the time of the alleged offence, the tenants had become trespassers, and so were not 'residential occupiers' under the PfEA. She upheld a submission that there was no case to answer. The prosecution appealed against the judge's ruling, under Criminal Justice Act 2003 s58.

The Court of Appeal allowed the appeal. The judge's conclusion was not sustainable in law. The notice to quit had, in law, been of no effect because, under the written agreement, the tenants had been entitled to occupation for a term of six months. Ms Harris and the tenants had acted in accordance with the terms of the written agreement, which was a concluded agreement entered into for mutual consideration. That agreement was a contractual agreement which gave the victims the right to occupy the premises. It superseded the previous oral agreement. As there was no evidence to justify the argument that the agreement had been a sham, and no evidence of a breach by the victims entitling Ms Harris to re-enter the premises under the agreement, it gave the tenants a contractual entitlement to occupation. The tenants had, at the relevant time, occupied the premises as a residence under a contract and so they had been 'residential occupiers'. There was a case to answer and the judge had erred in not so deciding.

LONG LEASES: FORFEITURE

■ Greenwood Reversions Ltd v World Environment Foundation Ltd and Mehra

[2008] EWCA Civ 47,
6 February 2008

Dr Mehra was the long lessee of a residential flat. The lease included a covenant 'not to assign … without the licence in writing of the lessor which shall not be unreasonably withheld'. Dr Mehra accrued arrears of rent and service charges. In 2001, after Greenwood had obtained a money judgment by consent, Dr Mehra assigned his interest in the lease to World Environment Foundation (WEF) Ltd, a charitable company with which he had a close connection. In subsequent proceedings, the judge found that no notice of assignment was given to Greenwood. When it heard of the assignment, Greenwood made it clear that it would not consent to the assignment. The judge held that the consent had not been unreasonably withheld in the light of the arrears. Greenwood placed a stop on demands for rent and other charges in case they might constitute a waiver of forfeiture. Greenwood's solicitors then wrote to Dr Mehra, stating that unless they received payment for all arrears, interest on the judgment debt and some form of security for costs, their client would be left with no alternative other than to take further action against him and his purported purchaser, and 'such proceedings will include a claim for forfeiture of the lease and hence possession of the flat'. They wrote to WEF with a copy of that letter. In 2004, Greenwood gave WEF notice under Law of Property Act 1925 s146 forfeiting the lease. In the proceedings which followed, HHJ Ryland found that the lease had been forfeited and that there had been no waiver of forfeiture. He refused to grant relief from forfeiture. WEF and Dr Mehra appealed.

The Court of Appeal dismissed the appeal. It was clear that Greenwood never intended to waive its right of forfeiture. When the letters were read together, it was clear that no demand for the payment of rent was made of WEF, the tenant under the lease. The letter to WEF merely required an explanation. The demand made of Dr Mehra was for payment of the judgment, interest and costs in respect of the earlier action commenced against him. These were amounts due solely from Dr Mehra. Second, the letters read as a whole were not in any event an unequivocal demand to pay rent. The court assumed that an unqualified demand for future rent operates as a waiver, and that the strict rule applicable to receipt of rent was also applicable to a demand for rent, but did not find it necessary to determine whether *Segal Securities v*

Thoesby [1963] 1 QB 887 and *David Blackstone Limited v Burnetts (West End) Ltd* [1973] 1 WLR 1487 at 1496–8, which held that an unambiguous demand for future rent, made after knowledge of the breach, operated in the same way as the receipt of rent so as to amount to an election to treat the tenancy as continuing and constituting a waiver, were decided correctly.

Finally, the judge had set out carefully the considerations which led him to conclude that this was not a case for relief against forfeiture. The Court of Appeal could not discern any error of principle or misdirection in the judge's approach. He approached the matter on the basis that he was exercising a broad discretion. There was therefore no basis for interfering with the exercise of that discretion.

ADVERSE POSSESSION

■ Ofulue v Bossert

[2008] EWCA Civ 7,
29 January 2008,
(2008) Times 11 February

Mr and Mrs Ofulue were the registered owners of a property. They went to live abroad in 1976. In 1981, Ms Bossert and her father, Mr Bossert, were let into the property by a former tenant. In 1987, Mr and Mrs Ofulue took possession proceedings. Mr Bossert counterclaimed, alleging that he had been offered a 14-year lease in return for completion of extensive repairs. Without prejudice negotiations took place, but agreement was not reached. In August 1996, Mr Bossert died. Mr and Mrs Ofulue failed to pursue the possession claim which was automatically stayed in August 2000. In September 2003, after serving two notices to quit, Mr and Mrs Ofulue began a new possession claim. In her defence, Ms Bossert contended that ownership of the property had passed to her by way of adverse possession. HHJ Levy QC held that she had acquired the property by adverse possession and that Mr and Mrs Ofulues' title had been extinguished. Mr and Mrs Ofulue appealed.

The Court of Appeal dismissed the appeal. Notwithstanding the ECtHR's decision in *Pye v UK* [2007] ECHR 44302/02, the Court of Appeal should still follow the House of Lords' decision in *J A Pye (Oxford) Ltd and others v Graham and another* [2002] UKHL 30; [2003] 1 AC 419. There were no special circumstances justifying departure from that decision. Mr and Ms Bossert's defence in the earlier claim did not prevent them from having the intention required for adverse possession. Following *Pye v Graham*, it is necessary only to show that the person who claims to have acquired property by adverse possession was in possession without the consent of the paper owner and intended to possess. A person who wrongly believes s/he is a tenant can occupy property in such a way that s/he has possession, just as much as a squatter. S/he does not have to show that s/he had an intention to exclude the paper owner. Furthermore, although the defence and counterclaim in the earlier proceedings was an acknowledgment of the landlords' title, it was not an acknowledgement that they were entitled to possession. That pleading did not therefore stop the running of time in the Bosserts' favour for the purpose of the Limitation Act 1980.

HOUSING ALLOCATION

■ R (Ahmad) v Newham LBC

[2008] EWCA Civ 140,
29 February 2008

The Court of Appeal has dismissed Newham's appeal against a declaration made by the Administrative Court that its choice-based housing allocation scheme is unlawful: [2007] EWHC 2332 (Admin); November 2007 *Legal Action* 38. The council had a banded allocation scheme supplemented by a direct letting arrangement.

The Court of Appeal held that:

■ neither element of the council's arrangements (nor the two combined) enabled applicants to have their cumulative housing needs recognised (in accordance with the statutory obligation that they be given a reasonable preference if satisfying one or more of the categories in HA 1996 s167(2)); and
■ the scheme failed to give those in reasonable preference categories priority over transfer applicants not in those categories.

Local Government Ombudsman

Investigation

■ Sheffield Council

06/C/10044,
5 February 2008

The council agreed that certain blocks of flats, previously designated for elderly tenants, could be redesignated for allocation to general needs housing applicants if that proved appropriate after scrutiny of a range of factors. The complainant's block was redesignated and young, disruptive tenants moved in. She complained that they made her very distressed, frightened and upset. The council could not produce evidence that the required pre-designation scrutiny had been undertaken. The Ombudsman found maladministration and recommended payment of compensation.

HOMELESSNESS

Definition of 'homelessness'

■ Harouki v Kensington and Chelsea RLBC

House of Lords,
28 February 2008

The claimant has lodged a petition seeking leave to appeal in this important case concerned with homelessness arising from conditions of overcrowding. For the Court of Appeal's decision see [2007] EWCA Civ 1000; December 2007 *Legal Action* 37.

Priority need

■ Sadiq v Hackney LBC

[2007] EWCA Civ 1507,
11 December 2007

In 2003, Mr Sadiq's home and village in Darfur were attacked and he fled. He arrived in the UK in 2004, claimed asylum and was accommodated by the National Asylum Support Service (NASS). In 2005, he was granted refugee status, the NASS accommodation was withdrawn and he applied to Hackney for homelessness assistance. It decided that he had no priority need for accommodation. His appeal was dismissed. He sought a second appeal relying on the priority need category in HA 1996 s189(1)(d): 'a person who is homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster'.

He contended that his present homelessness was 'as a result of' the original emergency that had caused him to lose his home in Sudan. Pill LJ refused permission to appeal. He decided that the judge had been right to hold that the present homelessness was the 'result of' withdrawal of his NASS accommodation.

Intentional homelessness

■ Ali v Haringey LBC

[2008] EWCA Civ 132,
6 February 2008

The council accepted that it owed Mrs Ali the main homelessness duty in HA 1996 s193(2) and provided her with accommodation in a non-secure tenancy. It later made an offer of accommodation under HA 1996 Part 6 which she declined. The council upheld on review a decision that the offer made had been suitable and had been unreasonably refused, releasing the council from its duty: HA 1996 s193(7). The council served notice to quit, obtained a possession order and evicted Mrs Ali.

She made a further application for homelessness assistance after that eviction. The council provided interim accommodation (HA 1996 s188) but decided that she had become homeless intentionally (HA 1996 s191). It provided further temporary

accommodation under its duty under HA 1996 s190. The finding of intentional homelessness was upheld on review and HHJ Riddell dismissed an appeal.

May LJ refused permission to bring a second appeal. The judge had been entitled to reject on the facts a contention that there could not have been intentional homelessness because the non-secure tenancy was in such poor condition it was not reasonable to continue to occupy it. The refusal of the offer had been a deliberate act leading to the loss of that accommodation. The issue of language difficulties had been explored adequately by the judge. The proposed appeal raised no issue of such importance as to justify permission for a second appeal: CPR 52.13.

Duties owed to the homeless

■ Omar v City of Westminster

B5/07/2112,
3 March 2008

The appellant was owed the main homelessness duty: HA 1996 s193(2). His baby had been born prematurely. In a period while he was still taking the baby to hospital for weekly tests, the council offered him long-term accommodation in another borough. The offer was refused on the basis that it was too far from the hospital and from the appellant's support network. The council decided that the offer had discharged its duty.

On a review of that decision, the reviewing officer sought and obtained an updated report from the hospital indicating that, by that date, the baby needed no more than normal care. The officer reviewed the facts as at the date of the review taking the hospital's report into account and upheld the initial decision. An appeal was dismissed.

The Court of Appeal allowed a second appeal. The questions for the reviewing officer under HA 1996 s202 were whether or not the offer had been suitable and whether it had or had not been reasonably refused. That required a review limited to the facts as at the date of the refusal. Although the reviewing officer was entitled to take account of facts as at that date – even if unknown previously to the council – material dealing with what had occurred since then was irrelevant: applying *Mohamed v Hammersmith and Fulham LBC* [2002] 1 AC 547 as explained in *Osseily v Westminster City Council* [2007] EWCA Civ 1108.

■ R (Niypo) v Croydon LBC

CO/288/2008,
3 March 2008

The council decided that the claimant (a single mother with two dependent children) had become homeless intentionally: HA 1996 s191. It also decided that the duty it consequently owed her (under HA 1996 s190(2)) could be met by:

■ providing temporary accommodation for ten days (expiring on 21 December 2007); and
■ giving her advice about crisis loans, registering with estate agents and obtaining access to bed and breakfast (B&B) or other temporary accommodation.

The council later agreed to extend provision of accommodation to 1 January 2008. The claimant sought a judicial review. The council then offered a further extension to 5 March 2008 if the proceedings were withdrawn.

Dobbs J dismissed the claim. She held that although the initial ten days had been unlawfully short, by the date of trial the claimant had had a period that the council was entitled to say had given her a reasonable opportunity to find her own housing: HA 1996 s190(2)(a) and *R (Conville) v Richmond upon Thames LBC* [2006] EWCA Civ 718; [2006] 1 WLR 2008. The claimant had not taken steps in that time to obtain a crisis loan or explore other housing options. The council had been entitled to suggest that she consider B&B accommodation as a means of meeting her immediate housing needs.

HOUSING AND CHILDREN

■ R (M) v Hammersmith and Fulham LBC Appellate Committee

[2008] UKHL 14,
27 February 2008

When aged 17, M was locked out of her parental home by her mother (who was being admitted to hospital for inpatient treatment for cancer). M applied to the council for help with accommodation. She was seen, and dealt with exclusively, by the housing department and was assisted under HA 1996 Part 7 (homelessness). B&B and, later, hostel accommodation was provided under HA 1996 s188. The housing department did not refer her to its social services department or arrange any CA 1989 assessment.

Following a period of custody, she applied to the council for aftercare services on the basis that she had been accommodated by the council before reaching 18 and was thus a 'former relevant child' for CA 1989 purposes. The Administrative Court and the Court of Appeal dismissed her claim for judicial review of the refusal of those services.

The House of Lords rejected her further appeal and, in particular, her claim that she should be treated as though she had been accommodated under CA 1989 s20 (so as to attract the benefit of leaving care provisions). Although the council had not adopted a joint housing/social services protocol for assessment as envisaged by codes of guidance issued to both housing and social services authorities, and had failed to make a referral that should have been made, the result was that M had never been dealt with by social services: she had only been provided with services under HA 1996 s188.

1 Available at: www.communities.gov.uk/documents/housing/pdf/greenpaperresponse.
2 Available at: www.communities.gov.uk/documents/housing/pdf/lifetimehomes.
3 Available at: www.communities.gov.uk/documents/housing/pdf/housingstatistics2007.
4 Available at: www.communities.gov.uk/speeches/housing/fabiansocietyaddress.
5 Available at: www.renewal.net/Documents/RNET/Research/Housingassociationstackling1.pdf.
6 Available at: www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/pathtocitizenship/pathtocitizenship?view=Binary.
7 Available at: www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/pathtocitizenship/.
8 Available at: www.justice.gov.uk/docs/stats-mortgage-land-q4.pdf.
9 Available at: www.civiljusticecouncil.gov.uk/files/mortgage-pre-action-protocol-final290208.pdf.
10 Available at: www.cieh.org/library/Knowledge/Housing/Housing%20survey.pdf.
11 Available at: www.lacors.gov.uk/lacors/upload/17175.pdf.
12 Available at: www.communities.gov.uk/documents/housing/pdf/dfgpackagechange.
13 Available at: www.ris.org.uk/downloads/SNaP_FullReport.pdf.
14 Available at: http://noms.justice.gov.uk/news-publications-events/publications/guidance/women_prisoners_housing?view=Binary.
15 Available at: www.communities.gov.uk/news/corporate/715137.
16 Details of the bill's provisions and parliamentary progress are available at: http://services.parliament.uk/bills/2007-08/childrenandyoungpersonshl.html.
17 Available at: www.audit-commission.gov.uk/reports/NATIONAL-REPORT.asp?CategoryID=ENGLISH^573^SUBJECT^17^REPORTS-AND-DATA^AC-REPORTS&ProdID=8906AF89-014B-4462-9094-5DE69A5D5C8F&Section ID=sect18#.
18 Available at: www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/38/38.pdf.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London, and a recorder. He is Legal Aid Barrister of the Year 2007.

Benefit rates from April 2008

New weekly rates of benefits are specified in the draft Social Security Benefits Up-rating Order 2008 SI No 632. They apply from the week beginning 7 April 2008. The draft Tax Credits Up-rating Regulations 2008 come into force on 6 April 2008.

*denotes no change from 2007 figure.

Adoption

Statutory adoption pay
- Earnings threshold £90.00
- standard rate £117.18

Bereavement

Widow's benefit
- Widowed mother's allowance £90.70
- Widow's pension (standard rate) £90.70

Bereavement benefit
- Bereavement allowance (standard rate) £90.70
- Bereavement payment (lump sum) £2,000 *
- Widowed parent's allowance £90.70

Children

Child benefit
- Eldest or only child (couple) £18.80
- Other children £12.55

Disability

Attendance allowance
- higher rate £67.00
- lower rate £44.85

Disability living allowance
care component
- highest rate £67.00
- middle rate £44.85
- lowest rate £17.75

mobility component
- higher rate £46.75
- lower rate £17.75

Industrial injuries disablement benefit
- 18 or over, or under 18 with dependants 100% disabled £136.80

Carer's allowance £50.55

Incapacity

Incapacity benefit
- long-term £84.50

Short-term (under pension age)
- lower rate £63.75
- higher rate £75.40

Short-term (over pension age)
- lower rate £81.10
- higher rate £84.50

Maternity

Statutory maternity pay
- Earnings threshold £90.00
- standard rate £117.18

Maternity allowance
- Standard rate £117.18
- Maternity allowance threshold (for variable rate) £30.00 *

Paternity

Statutory paternity pay
- Earnings threshold £90.00
- standard rate £117.18

Retirement

State pension
- Category A or B £90.70

Pension credit
Standard minimum guarantee
- single £124.05
- couple £189.35

Additional amount for severe disability
- single £50.35
- couple (one qualifies) £50.35
- couple (both qualify) £100.70

Additional amount for carer £27.75

Savings credit threshold
- single £91.20
- couple £145.80

Capital

Amount disregarded £6,000 *
Amount disregarded:
- care homes £10,000 *

Deemed income £1* for each £500* (or part) over above amounts

Housing costs

Deduction for non-dependants:
- as for income support (IS)

Severe disablement allowance

Basic rate £51.05
adult dependant £30.40
age-related addition
- higher rate £17.75
- middle rate £11.40
- lower rate £5.70

Unemployment

Jobseeker's allowance (JSA) (contribution-based)

Personal rates
- Under 18 £47.95
- 18–24 £47.95
- 25 or over £60.50

Income support and jobseeker's allowance (income-based)

Personal allowances: income support (IS)

Single person aged under 18, usual rate £47.95
Under 18, higher rate payable in specific circumstances £47.95
18–24 £47.95
25 or over £60.50

Personal allowances: jobseeker's allowance (JSA)

Single person aged under 18, usual rate £47.95
18–24 £47.95
25 or over £60.50

Personal allowances for both IS and JSA

Lone parent
- under 18, usual rate £47.95
- under 18, higher rate payable in specific circumstances £47.95
- 18 or over £60.50

Couple, both under 18 £47.95
- both under 18, one disabled £47.95
- both under 18, with responsibility for a child £72.35
- one under 18, one 18–24 £47.95
- one under 18, one 25 or over £60.50
- both 18 or over £94.95

Amounts for dependent children

Personal allowance (under 20) £52.59
Family premium/family premium lone parent rate £16.75
Enhanced disability premium – child rate £19.60
Disabled child premium £48.72

Premiums for both IS and JSA

Pensioner (under 75)
- Single (JSA only) £63.55
- Couple £94.40

Pensioner (enhanced) (75–79)
- Couple £94.40

Pensioner (higher) (80+)
- Single (JSA only) £63.55
- Couple £94.40

Disability
- Single £25.85
- Couple £36.85

Enhanced disability premium
- Single rate £12.60
- Couple rate £18.15

Severe disability
- Single £50.35
- Couple (one qualifies) £50.35
- Couple (both qualify) £100.70
- Carer £27.75

Housing costs

Deduction for non-dependants

Aged 25 or over, receiving IS or income-based JSA, aged 18 or over, not in work or gross income less than £116 £7.40 *

Adults earning gross income

£369 or more £47.75 *
£296–£368.99 £43.50 *
£223–£295.99 £38.20 *
£172–£222.99 £23.35 *
£116–£171.99 £17.00 *

Capital

Upper limit £16,000 *
Amount disregarded £6,000 *
Upper limit (claimant/partner 60 or over) £16,000 *
Amount disregarded (claimant/partner 60 or over) £6,000 *
Child's limit £3,000 *

Tariff income

£1* for every complete £250* (or part) between amount of capital disregarded and capital upper limit

Housing benefit (HB) and council tax benefit

Personal allowances: housing benefit

Single person	
16–24	£47.95
25 or over	£60.50
Lone parent	
under 18 (HB only)	£47.95
18 or over	£60.50
Couple	
both under 18 (HB only)	£72.35
one or both 18 or over	£94.95
Dependent children	
Under 19	£52.59
Pensioner	
Single person	
60–64	£124.05
65 or over	£143.80
Couple	
one or both 60–64	£189.35
one or both 65 or over	£215.50

Premiums: housing benefit

Family	£16.75
Family (lone parent)	£22.20 *
Child under one	£10.50 *
Pensioner (under 75)	
Single	£63.55
Couple	£94.40
Pensioner (enhanced) (75–79)	
Single	£63.55
Couple	£94.40
Pensioner (higher) (80+)	
Single	£63.55
Couple	£94.40
Disability	
Single	£25.85
Couple	£36.85
Enhanced disability premium	
Single rate	£12.60
Disabled child rate	£19.60
Couple rate	£18.15
Severe disability	
Single	£50.35
Couple (one qualifies)	£50.35
Couple (both qualify)	£100.70
Disabled child	£48.72
Carer	£27.75

Non-dependant deductions: housing benefit

Aged 25 or over, receiving IS or income-based JSA and aged 18 or over, not in work or gross income less than £116 £7.40 *

Adults earning gross income

£369 or more	£47.75 *
£296–£368.99	£43.50 *
£223–£295.99	£38.20 *
£172–£222.99	£23.35 *
£116–£171.99	£17.00 *

Personal allowances: council tax benefit

As for HB, except that personal allowances are not payable for young people aged 16 and 17

Premiums: council tax benefit

As for HB

Non-dependant deductions: council tax benefit

Adults earning gross income

£369 or more	£6.95 *
£296–£368.99	£5.80 *
£172–£295.99	£4.60 *
less than £172	£2.30 *
others, aged 18 or over (and not receiving IS)	£2.30 *

Capital

Upper limit	£16,000 *
Amount disregarded	£6,000 *
Upper limit (claimant/partner 60 or over)	£16,000 *
Upper limit (pension credit guarantee) from October 2003	no limit
Amount disregarded (claimant/partner 60 or over)	£6,000 *
Child disregard	£3,000 *
Upper limit (living in residential care/nursing home)	£16,000 *
Amount disregarded (living in residential care/nursing home)	£10,000 *

Tariff income

£1* for every £250* (or part) or where claimant/partner 60 or over, £1* for every £500* (or part) between amount of capital disregarded and capital upper limit

Working tax credit (per annum unless otherwise stated)

Income threshold	£6,420
Elements	
basic element	£1,800
30-hour element	£735
couple and lone parent element	£1,770
disabled worker element	£2,405
severe disability element	£1,020
50+ return to work payment (16–29 hours)	£1,235
50+ return to work payment (30 hours or more)	£1,840
childcare element: 80% of weekly cost for one child up to costs of £175* 80% of weekly cost for two or more children up to costs of £300*	

Child tax credit (per annum unless otherwise stated)

Income threshold	£6,420
Threshold (entitled to child tax credit but not working tax credit)	£15,575
Second income threshold	£50,000 *
Elements	
family element	£545 *
baby element	£545 *
child element (per child)	£2,085
disability element	£2,540
severe disability element	£1,020

Other benefits

Statutory sick pay	
Earnings threshold	£90.00
Standard rate	£75.40
Guardian's allowance	£13.45

Dependency increases

Adult dependants: for spouse or person looking after children, where claimant receiving:

retirement pension or own insurance	£54.35
long-term incapacity benefit or unemployability supplement	£50.55
severe disablement allowance	£30.40
carer's allowance	£30.20
short-term incapacity benefit (over pension age)	£48.65
short-term incapacity benefit (under pension age)/ maternity allowance	£39.40

Child dependants: where claimant receiving:

retirement pension, widowed mother's allowance, widowed parent's allowance, short-term incapacity benefit (higher rate) and long-term incapacity benefit, carer's allowance, severe disablement allowance, industrial death benefit (higher rate), unemployability supplement or short-term incapacity benefit (over pension age)	£11.35 *

updater

Legislation

CRIMINAL

Corporate Manslaughter and Corporate Homicide Act 2007 (Commencement No 1) Order 2008 SI No 401

Brings into force, from 6 April 2008, the Corporate Manslaughter and Corporate Homicide Act 2007 to the extent that it is not already in force, other than s2(1)(d) (duty owed to a person in custody, etc to be a relevant duty of care for the purposes of the Act) and s10 (power to order conviction etc to be publicised). Until such time as s2(1)(d) is commenced, s20, which abolishes the existing common law offence of gross negligence manslaughter by corporations, will not apply in respect of custodial duties.

Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) (Amendment) Regulations 2008 SI No 523

Amend the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005 (the 2005 Regs) SI No 3382, which make provision relating to the payment of legal expenses out of property that is the subject of civil recovery proceedings under Proceeds of Crime Act (PCA) 2002 Part 5 or Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 SI No 3181 Part 5. As a result of the abolition of the Assets Recovery Agency and its director by the Serious Crime Act 2007 (see below), these regulations replace references to the director in the 2005 Regs with references to the relevant enforcement authority. In force 1 April 2008.

Serious Organised Crime and Police Act 2005 and Serious Crime Act 2007 (Consequential and Supplementary Amendments to Secondary Legislation) Order 2008 SI No 574

The Schedule to this Order revokes and amends references in the secondary legislation listed in that Schedule to the Assets Recovery Agency and its director that will occur on the abolition of those persons by the Serious Crime Act 2007. Where the functions of those persons are to be taken on by another, references to that person are substituted. In particular, functions of those persons are to be taken on by the Serious Organised Crime Agency, the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions, the Director of the Serious Fraud Office, the Director of Public Prosecutions for Northern Ireland and the National Policing Improvement Agency. In force 1 April 2008.

Assets Recovery Agency (Abolition) Order 2008 SI No 575

Provides that the Assets Recovery Agency and the corporation sole that is its director shall cease to exist on 1 April 2008.

Discharge of Fines by Unpaid Work (Pilot Schemes) (Amendment) Order 2008 SI No 621

Amends the Discharge of Fines by Unpaid Work (Pilot Schemes) Order 2004 (the 2004 Order) SI No 2198, which specifies the local justice areas in which the provisions of Courts Act 2003 Sch 6 (discharge of fines by unpaid work) are to be piloted and the period of the same.

Extends the period of the pilot schemes provided for in the 2004 Order for a further year ending 31 March 2009. Also adds the following local justice areas in Cleveland to the pilot: Hartlepool, Langbaurgh East and Teesside. In force 30 March 2008.

DISCRIMINATION

Employment Equality (Age) Regulations 2006 (Amendment) Regulations 2008 SI No 573

Amend the Employment Equality (Age) Regulations 2006 SI No 1031 and take account of statutory transfer schemes in relation to the exception for provision of certain benefits based on length of service. Also amend the provision that an employee may serve a questionnaire on his/her employer, and the provision which stipulates the period in which proceedings are to be brought, to take account of the Employment Act 2002 (Dispute Resolution) Regulations 2004 SI No 752. In force 6 April 2008.

Disability Discrimination (Public Authorities) (Statutory Duties) (Amendment) Regulations 2008 SI No 641

Make further amendments to the Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 (the 2005 Regs) SI No 2966. Those regulations impose duties on public authorities listed in Sch 1 to prepare and publish a Disability Equality Scheme, to revise it at intervals, to implement certain components of the scheme, and to publish an annual report of progress.

The main purpose of the present regulations is to extend the list of public authorities to which the duties imposed by the 2005 Regs apply. The additional public authorities named in new Part VI of Sch 1 to the 2005 Regs are required to publish a Disability Equality Scheme on or before 1 December 2008.

These regulations also impose a duty on any public authority listed in Parts I to V of Sch 1 but which is created on or after the applicable relevant publication date for that Part (or in the case of those authorities listed in Parts I and II, after 3 December 2007), to publish a Disability Equality Scheme within a year of the date of its creation. A relevant publication date of 1 December 2008 is specified where a public authority listed in Sch 1 Parts I and II was created between 4 December 2006 and 3 December 2007. In force 6 April 2008.

EMPLOYMENT

Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2008 SI No 531

Amends the Public Interest Disclosure (Prescribed Persons) Order 1999 (the 1999 Order) SI No 1549 by inserting in the Schedule to that Order entries relating to the children's commissioner and the commissioner for children and young people in Scotland. Employment Rights Act (ERA) 1996 s43F provides a worker with the right not to suffer detriment, as a result of making a qualifying disclosure to a prescribed person in keeping with the requirements of the ERA. The 1999 Order specifies those persons and the matters for which those persons are prescribed. In force 6 April 2008.

FAMILY

Child Support (Miscellaneous Amendments) Regulations 2008 SI No 536

Make miscellaneous amendments to regulations relating to child support as follows:

- Make a number of amendments to the Child Support (Information, Evidence and Disclosure) Regulations 1992 SI No 1812.
- Extend the purposes for which the DVLA and credit reference agencies may be required to furnish information to the secretary of state.
- Make provision for deposit-takers, for example, banks and building societies, to be required to furnish information to the secretary of state for various purposes.
- Extend the purposes for which information or evidence may be required to include information or evidence needed to enable the collection and enforcement of child support maintenance payable or amounts payable under a relevant court order.
- Amend the Child Support (Collection and Enforcement) Regulations 1992 SI No 1989 and set out the information that a liable person subject to a deduction from earnings order must provide on leaving employment or becoming employed, or re-employed. It is an offence if a liable person does not provide such information. In force 6 April 2008.

HOUSING

Housing (Right to Buy) (Service Charges) (Amendment) (England) Order 2008 SI No 533

Amends the Housing (Right to Buy)(Service Charges) Order 1986 (the 1986 Order) SI No 2195 which sets out the calculation for the inflation allowance to be added to a landlord's estimate of the service charges payable by the tenant for repairs and major works in the initial period of a right to buy lease as follows:

- Amends the definition of 'index figure' in article 2 of the 1986 Order. This is necessary to reflect the fact that the relevant index is now published by the Department for Business, Enterprise and Regulatory Reform (BERR) under the title *BERR output deflators for direct labour: public housing repairs and maintenance* in the quarterly BERR Construction Price and Cost Indices *Online*. In force 6 April 2008.

Home Information Pack (Amendment) Regulations 2008 SI No 572

Amend the Home Information Pack (No 2) Regulations 2007 SI No 1667 (the principal Regs) as follows:

- Add new paras (ca) and (cb) to reg 8 of the principal Regs and a new Schedule, Sch 2A. The effect of these amendments is to require that for new homes in England, a home information pack must include information about the sustainability of the property. For new homes that are 'finished' within the meaning of Sch 2A, this information must be a 'sustainability certificate' or a 'nil-rated certificate'.

For new homes that are not finished, this must be an 'interim sustainability certificate' or a nil-rated certificate. Under Sch 2A para 1, a sustainability certificate or interim sustainability certificate must be based on an assessment about the sustainability of the property in keeping with the Code for Sustainable Homes. 'Sustainability' relates to the extent to which the materials, design and components of the property further the 'sustainable design principles', which are set out in Sch 2A para 1. Sustainability certificates and interim sustainability certificates must be produced by a code assessor as defined in Sch 2A paras 1, 2 and 3). Any person may produce a nil-rated certificate (para 4).

■ Amends the principal Regs to extend until 1 January 2009 the exemption in Sch 6 para 4 relating to searches and access to local authority records. In force 31 March 2008.

Rent Officers (Housing Benefit Functions) Amendment Order 2008 SI No 587

Amends the Rent Officers (Housing Benefit Functions) Amendment Order 2007 (the principal Order) SI No 2871. The principal Order amended the Rent Officers (Housing Benefit Functions) Order 1997 (the Rent Officers Order) SI No 1984 and the Rent Officers (Housing Benefit Functions) (Scotland) Order 1997 (The Rent Officers (Scotland) Order) SI No 1995 which confer functions on rent officers in connection with housing benefit and rent allowance subsidy.

Article 4(2)(d) of the principal Order inserted a new para (3A) into article 4B of the Rent Officers Order. Article 2(2) of this Order amends that inserted paragraph to allow for the local housing allowance determinations, to which this provision relates, to take effect on the first day of the month rather than the first working day of the month.

Article 6(4)(c) of the principal Order amended para (5) of article 4B of the Rent Officers Order. Article 2(3) of this Order makes a further amendment to ensure consistency with other changes that were made to article 4B by the principal Order.

Article 2(4) and (5) make similar amendments to the principal Order as it amended the Rent Officers (Scotland) Order. In force 7 April 2008.

IMMIGRATION

Immigration and Nationality (Fees) (Amendment) Regulations 2008 SI No 544

Specify fees for the following applications and processes in connection with immigration or nationality:

■ leave to remain in the UK where the application is for limited leave to remain in the UK as a Tier One (General) migrant (reg 5A as inserted by reg 2(4));

■ a sponsorship licence, except for such a licence granted to a small sponsor (as defined in these regs) and for which a fee is to be specified in other regs made under Immigration, Nationality and Asylum Act 2006 s51(3) (reg 20A as inserted by reg 2(11));

■ entry clearance as a Tier One (General) migrant (reg 20B as inserted by reg 2(11));

■ entry clearance for settlement in the UK (reg 20B);

■ entry clearance for a purpose other than that listed in reg 20B(1)(d)(i) to (vii); and

■ a certificate of entitlement to the right of abode made by an applicant who is outside the UK (reg 20E).

Reg 20C and reg 20D as inserted by reg 2(11) provide for exceptions and waivers, respectively, to the requirement to pay a specified fee for entry clearance applications. The secretary of state has also specified in reg 5B (as inserted by reg 2(4)), a fee for applications for leave to remain in the UK where such application is made in person at the relevant Public Enquiry Office of the Border and Immigration Agency of the Home Office, with the exception of those applications referred to in reg 5B(2). This fee was previously specified in the Immigration and Nationality (Cost Recovery Fees) Regulations 2007 SI No 936.

Subject to para (3), these regulations came into force on 29 February 2008. Reg 2(11) of these regulations, in so far as it inserts regs 20B–20E, in force on 1 April 2008.

PRISONERS

Offender Management Act 2007 (Establishment of Probation Trusts) Order 2008 SI No 598

Establishes the first six probation trusts using the power in Offender Management Act (OMA) 2007 s5(1). The establishment of probation trusts is part of the new arrangements for the provision of probation services in England and Wales contained in OMA Part 1. The arrangements are expected to be brought into force by geographical areas in three phases, with the first phase coming into force on 1 April 2008. They will replace the arrangements in respect of the National Probation Service for England and Wales contained in Criminal Justice and Court Services Act 2000 Part 1.

The probation trusts listed in article 2 of this Order are established for the purposes set out in article 3 on 1 April 2008. These purposes are the making and performance by the trusts of contracts for the provision of probation services with the Secretary of State for Justice under OMA s3(2) and with other persons (including other probation trusts). Contracts made with the secretary of state under OMA s3(2) will be the principal mechanism for setting out in detail the activities of the trusts, including specifying the geographical area in which the trusts will operate.

Young Offender Institution (Amendment) Rules 2008 SI No 599

Amend the Young Offender Institution Rules 2000 (the 2000 Rules) SI No 3371 and the Prison Rules 1999 (the 1999 Rules) SI No 728 as follows:

■ Rule 4 alters all references to 'boards of visitors' in the 2000 Rules to 'independent monitoring boards', following the renaming of the board by Offender Management Act (OMA) 2007 s26(1).

■ Rule 5 removes the reference to 'boards of visitors' in the 2000 Rules r64(2). Boards of visitors, now independent monitoring boards, no longer have any role in imposing punishments for disciplinary offences. OMA s22 inserted Prison Act (PA) 1952 ss40A – 40C. As a result, r7 of these rules inserts a new r70A into the 1999 Rules. Rule 70A lists for the purposes of the new PA s40C, the List C articles which it is an offence to bring, or attempt to bring, into a prison intending to give to a prisoner, or intending it to come into a prisoner's possession, or to take out of a prison on a prisoner's behalf.

These rules also make amendments to r83(3) which relates to access to the records of the young offender institution (YOI) by members of the independent monitoring board. They provide that a member of the board shall have access to the records of the YOI, except that s/he shall not have access to any records held for the purposes of, or relating to, conduct authorised in line with Regulation of Investigatory Powers Act 2000 Part II, which relates to surveillance and covert human intelligence sources. In force 1 April 2008.

SOCIAL SECURITY

Social Security Benefits Up-rating Order 2008 SI No 632

Made as a consequence of a review under Social Security Administration Act (SSAA) 1992 s150 and includes details of the sums mentioned in that section. Also made as a consequence of a review under SSAA s150A and includes details of the sums mentioned in subsection (1)(d) of that section.

■ Part 2 relates to social security benefits, pensions and allowances.

■ Part 3 relates to income support, housing benefit and council tax benefit.

■ Part 4 relates to jobseeker's allowance.

■ Part 5 relates to state pension credit.

In force 1 April 2008, 6 April 2008, 7 April 2008 and 10 April 2008. See also page 36 of this issue.

Social Security (Contributions) (Amendment No 3) Regulations 2008 SI No 636

Amend the Social Security (Contributions) Regulations (SS(C) Regs) 2001. The amendments form two groups:

■ amendments to the provisions concerning the recovery of earnings-related contributions; and

■ amendments consequential on the replacement of the penalties provisions of Taxes Management Act 1970 s98A(4) by Finance Act 2007 Sch 24. In force for the purposes of the amendments to reg 67(2) of, and Sch 4 paras 22 and 31 to, the SS(C) Regs on 1 April 2008; and for all other purposes on 6 April 2008.

Discretionary Financial Assistance (Amendment) Regulations 2008 SI No 637

Makes various amendments to the Discretionary Financial Assistance Regulations (DFA Regs) 2001 SI No 1167 including an amendment to the references in DFA Regs reg 3 in line with the Housing Benefit Regulations 2006 SI No 213 and the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 SI No 214. In force 7 April 2008.

News

17 FEBRUARY

Observer reckons that government has failed in its pledges to tackle domestic abuse after it emerges that fewer than half of all men ordered to attend specialist programmes aimed at curbing their violent behaviour actually complete them … *Observer* also reveals that police are being given testing strips to catch teenagers hiding alcohol in soft drink bottles as part of major crackdown on underage drinking.

18 FEBRUARY

Terror suspects should only be placed on control orders for a maximum of two years unless there are 'exceptional circumstances', says the government's independent reviewer of terror legislation, Lord Carlile QC, who also suggests that suspects might be better dealt with by an ASBO.

19 FEBRUARY

Daily Telegraph reckons 'thousands of children face having a criminal record if they are caught holding a can of beer, under plans being considered by ministers' … Stand off between the Bar and government over very high cost criminal cases intensifies after the Legal Services Commission (LSC) reveals only 130 out of 2,300 barristers signed up to the new contracts … In the *Times*, Bar Council accuses the LSC of 'unacceptable' behaviour and the commission counters that the Bar has used 'bully-boy tactics' putting junior barristers under pressure to decline to sign new contracts (Richard Collins, director of policy at the LSC, accuses the Bar of 'reneging on a deal agreed under the Carter review') … *Times* reveals plans for thousands of trials every year to be prosecuted by non-lawyers despite internal resistance (a survey in the Crown Prosecution Service finds that only half of 400 paralegals feel they have enough training). At present, 'designated case workers' can handle simple cases where defendants plead guilty but these powers could be widened under the Criminal Justice and Immigration Bill.

20 FEBRUARY

Thousands of airport workers will become first British nationals to be issued with new biometric identity cards within next two years in the latest government attempt to kick start the controversial scheme, claims *Financial Times*; apparently, Jacqui Smith, Home Secretary, has decided they should be used in the first instance to tackle terrorism or crime.

21 FEBRUARY

Violent crime costs the British economy more than £13bn a year, according to National Audit Office report (which claims that the annual cost to the NHS of treating victims of crime has reached £1.7bn, while prosecuting perpetrators costs taxpayers £2.5bn).

23 FEBRUARY

As many as 20 Iraqi civilians were murdered by British troops, claim solicitors Phil Shiner and Martyn Day, who produce at a press conference a dossier alleging that the British Army executed the detainees at Abu Naji military base after a three-hour gun battle near the southern Iraqi town of Majat-al-Kabir in May 2004.

28 FEBRUARY

Home Office launches investigation into how optical disc holding confidential information was discovered hidden beneath keyboard of a laptop bought on eBay – a further embarrassment to the government which has had to deal with a number of departments losing confidential information, says *Guardian* … Meanwhile, *Times* reports that two Britons cleared of crimes are bringing a landmark human rights challenge to have their DNA samples destroyed on the ground that retaining the information 'cast suspicion' on people who had been acquitted of crimes.

1 MARCH

Guardian talks to Shami Chakrabarti, director of Liberty, who is conducting a non-stop 'one-on-one lobbying campaign in the cafes of Westminster' to persuade MPs of the need to raise the limit on pre-charge detention.

4 MARCH

According to Press Association report, Metropolitan Police assistant commissioner John Yates, the policeman responsible for raising standards in rape investigations, reckons detectives do not apply the same professionalism to rape as they do to other serious crimes and blames the police for greeting complainants with scepticism … Former miners have been forced to wait more than ten years for compensation, according to the Public Accounts Committee. It found that solicitors had earned more than £1.3bn in fees with the cross-party group of MPs accusing the government of 'weak' negotiations with solicitors … Meanwhile, Lord Lofthouse, who has long campaigned for miners' compensation, on BBC Radio 4's *Today* programme, describes the practice of solicitors taking money from both the government scheme and compensation as 'an evil act'.

5 MARCH

Sun reports that Balbir Singh, legal aid lawyer and head of Equity Chambers, 'pocketed nearly £1m from the public purse' last year (£957,000, actually).

6 MARCH

Independent reports that gay teenager who sought sanctuary in Britain when his boyfriend was executed by the Iranian authorities faces same fate after losing legal battle for asylum … There is huge surge in number of solicitors gaining higher rights of audience, as practitioners are forced to seek an alternative source of income to compensate for diminishing legal aid rates, reckons *Law Society's Gazette*.

7 MARCH

Government must review urgently its funding for asylum-seeking children to stop this 'vulnerable, traumatised and frightened' group being neglected, Sir Albert Aynsley-Green, the children's commissioner, tells *Independent*. Sir Albert warns Hillingdon Council, where about 1,000 children are being housed temporarily, that there is 'no excuse for not putting the needs of children first. The fact is that Hillingdon is open to [a legal] challenge on this and it is my responsibility as children's commissioner to hold authorities to account.'

10 MARCH

'Last week, [Jack] Straw used his now familiar line that Britain has the most expensive legal aid system in the world, and that its growth from £1.5bn in 1997 to £2bn in 2005 was unsustainable. But whose fault is that?' queries *Guardian* journalist Madeleine Bunting on the newspaper's 'Comment' pages. 'At the last count, in 2006, Labour had created 3,000 more criminal offences and there have been plenty more since – many of them end up in the legal aid budget, including the big, expensive terrorism trials. But the spend on the bread and butter work of civil legal aid – housing, employment, community care, benefits – dropped by 24 per cent in real terms over the same period. Now it's taking another battering' … *Daily Telegraph* reports that the Equality and Human Rights Commission wants tough new powers to tackle employers who fail to hire or promote staff from 'disadvantaged' groups. Under plans for a Single Equality Bill inspection teams could carry out 'spot checks' to ensure that companies are obeying discrimination laws, while public bodies would award contracts only to firms with a good record of employing minority staff … Plans to allow court cases in England and Wales to be broadcast on TV have been shelved, a Whitehall source tells *Guardian*. The former Lord Chancellor, Lord Falconer, was 'poised' to allow not only hearings in the Court of Appeal but judges' summings-up to juries and sentencing remarks in Crown Court criminal trials to be broadcast, but it was reported that the initiative has now been 'killed off' by his successor, Jack Straw.

12 MARCH

Former Attorney General Lord Goldsmith unveils a package of proposals addressing the issue of citizenship, including extending citizenship ceremonies to all young people at a 'coming of age' event at 18 years, with an oath of allegiance to the Queen or to the country plus a British national day to be introduced in 2012 to coincide with Olympics and Queen's Diamond Jubilee.

13 MARCH

Legal aid minister Lord Hunt replies to Madeleine Bunting article by saying that the 'crux of legal aid reform is to ensure more efficient services - so that taxpayers' money is spent wisely and used to help more people. Fixed fees are an important part of this. But they will not reduce civil and family expenditure'. He says: '[England] and Wales already have the best funded system of legal aid in the world. Expenditure is £38 per head in England and Wales, compared with around £8 per head for New Zealand and Ireland, which have similar legal systems to our own.'

Unions – not lawyers – secure bulk of equal pay cases

Legal Action Group (LAG) does what it says on the tin; and long may it prosper. But litigation is not the only road to justice. Your piece on local authorities in February 2008 *Legal Action* 4, 'Equal pay claims crisis looms', stated that unions were caught between their attempts to negotiate collective agreements on equal pay and their members' attempts to enforce their individual rights through 'no win, no fee' lawyers.

Such an assertion implies that negotiation fails to secure women's rights: that somehow negotiation lets down the individual. Nothing could be further from the truth. Overwhelmingly, unions are the organisations that secure equal rates of pay – whether through collective bargaining or litigation – not no win, no fee lawyers. The so-called contingency fee lawyers are simply not at the races. Unions are taking the bulk of equal pay cases at the moment.

The process of negotiation does mean that tens of thousands of women, who would not qualify under the law, have secured equal pay. The difficulty of finding male comparators employed by the same employer means that many women would still be languishing on unequal pay if union negotiators had not intervened. And where councils have proved intransigent, unions have taken legal action. Unlike no win, no fee lawyers, they litigate even where cases are difficult. The problem has been that even in relatively straightforward cases, the legal system can take years to come to a judgment.

Essentially, contingency fee lawyers have concentrated their attentions on legal action for compensatory back pay – not generally to win equal rates of pay.

While any local agreement is the subject of a vote among council employees, the offer on back pay has to be accepted, or rejected, on an individual basis. The union will offer its opinion on the amount suggested by the employer, but individuals will make the final decision. Unions will take legal action to secure more where women opt to do so.

Your piece argues that any modernisation of equality law should not be at the expense of fair recompense through backdated wages for women who have suffered unequal pay. Hear hear! I would point out, by the way, that the legal entitlement to six years' back pay, based on a European Court of Justice ruling in *Levez v TH Jennings (Harlow Pools) Ltd*, [C–326/96, 1 December 1998], stemmed from earlier litigation taken by unions. It was at that time no win, no fee lawyers underwent a dramatic conversion. All of a sudden, pay inequality was a dreadful injustice. It was nothing to do, of course, with the fact that the increased entitlement from two years to six years meant higher fees. Many no win, no fee lawyers take up to 30 per cent of compensation awarded. Many of them have persuaded thousands of union members to sign up for legal action when they could have got legal help free from their unions.

While LAG's clarion call is 'equal access to justice', perhaps free access to justice is also important. It is by no means clear that no win, no fee lawyers always inform union members that they could be getting their legal advice as part of their union subscription. And it is by no means clear that they make prospective clients aware of the full financial penalties they will incur if they decide to leave the no win, no fee lawyer in favour of legal representation by their unions.

Bronwyn McKenna, director of organising and membership at the public services union, UNISON.

We welcome readers' letters and comments on *Legal Action*, which we will publish, subject to space. The editor reserves the right to shorten letters, unless it is stated that a letter should be published in full or not at all. Closing date for letters for the next issue is Monday 14 April. Send or e-mail your letters to LAG (addresses on page 2).

letters reviews

Charity governance
Con Alexander and Jos Moule

Best practice in charity governance can be compared with a sea voyage, with an organisation's constitution acting as a map and its mission statement as a compass. Despite these tools, navigation is an ongoing challenge for trustees, staff, lawyers and consultants. With royal assent, on 8 November 2006, of both the Charities Act 2006 and the Companies Act 2006, a tempestuous element was added to the journey. However, with *Charity governance* in hand, Con Alexander and Jos Moule, of Osborne Clarke solicitors provide an invaluable aid for safe operations.

From chapter one, 'What is a charity?', the source of governance disorientation is identified.

There is no single way of identifying a charity. Most will be on the register of charities maintained by the Charity Commission, but many will not. And different legal definitions determine what a charity is for different purposes. When one adds to that the very wide range of activities carried out by charities in the 21st century, the task becomes more difficult (p1, 1.1).

The authors start with the basics with chapters explaining: 'What is a charity', 'Types of charity', 'Modern legal framework' and 'The Charity Commission'. These first four chapters are written for legal professionals who advise organisations about their legal requirements and obligations; for trustees and staff, these issues can add confusion to an already tenuous understanding of charity governance.

Where the publication becomes useful for staff and trustees are the chapters covering 'Governance structures', 'Trustees' duties and liabilities', 'Trustees' powers' and 'Trustee governance'. In language employed by charity management consultants, the 'Governance structures' chapter begins:

The way in which a charity is constituted is fundamental to its governance. A charity's legal form will determine a great deal about the way in which it operates. It will also determine a great deal about whom the charity's trustees are and the powers they can exercise and the duties they are under (p51, 5.1).

These chapters are essential reading for developing board leadership. Practical information such as terms of reference for trustees can be adapted easily to define roles and responsibilities within any charity organisation and should be included in induction packs.

Finance professionals who advise charity organisations will find the final third of the publication an invaluable resource. Chapters covering 'Charity assets', 'Investment', 'Taxation', 'Trading' and 'Reporting and accounting' explain how the assets will determine the powers and duties that an organisation's trustees have in relation to it (p155, 9.1).

Charity governance concludes with a chapter on 'Restructuring', an issue explored cautiously in the board room but which is increasingly a priority concern among funding agencies.

A charity, like any other entity, will change and develop over time. This may be, for example, because its sources of funding change or its trustees decide ... its charitable purposes would best be served by transferring the charity's assets to another charity (p295, 15.1).

This final chapter invites frank discussion about constitutional changes, mergers and transfers, incorporation or dissolution. A useful addition to the publication would have been sample constitutions that could be adapted by emerging organisations or established charities updating their governance procedures. Also, a more extensive exploration of board/staff relationships and, specifically, the chairperson-director partnership would be useful. In a purely legal text such an analysis would not be necessary, but in a publication such as this, ie, a useful management consulting tool, it would be of value.

Amy Kweskin Duncan, business development manager, Legal Action Group, London.

Jordan Publishing Limited, ISBN 978 1 84661 048 6, 508pp, April 2007, £85.

▶ Books

Actions against the police

Police Misconduct
legal remedies 4th edn
John Harrison/Stephen Cragg/
Heather Williams QC
2005 ♦ Pb 978 0 905099 91 0 ♦ 760pp ♦ £37

Community care

Community Care and the Law
4th edn
Luke Clements/Pauline Thompson
Oct 2007 ♦ Pb 978 1 903307 47 2 ♦ 1064pp ♦ £48

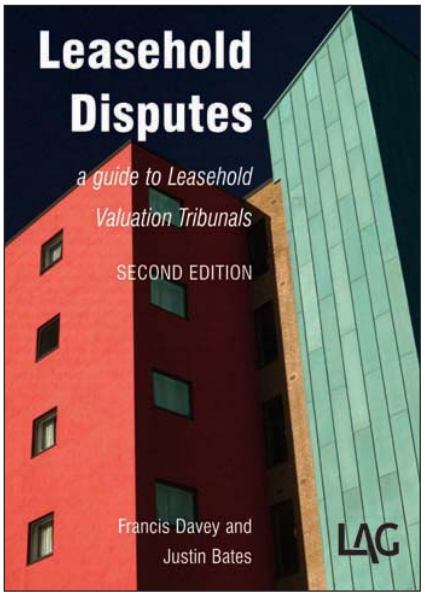
Crime

ASBOs
a practitioner's guide to defending anti-social behaviour orders
Maya Sikand
2006 ♦ Pb 978 1 903307 41 0 ♦ 496pp ♦ £45

Defending Suspects at Police Stations 5th edn
Ed Cape
2006 ♦ Pb 978 1 903307 44 1 ♦ 1008pp ♦ £52

Defending Young People
in the criminal justice system 3rd edn
Mark Ashford/Alex Chard/
Naomi Redhouse
2006 ♦ Pb 978 1 903307 34 2 ♦ 1008pp ♦ £48

Abuse of Process
a practical approach
Colin Wells
2006 ♦ Pb 978 1 903307 46 5 ♦ 384pp ♦ £45



Identification
investigation, trial and scientific evidence
Paul Bogan
2004 ♦ Pb 978 1 903307 25 0 ♦ 502pp ♦ £37

Reconcilable Rights?
analysing the tension between victims and defendants
Edited by Ed Cape
2004 ♦ Pb 978 1 903307 31 1 ♦ 148pp ♦ £15

Debt

Enforcement of Local Taxation
Alan Murdie/Ian Wise
2000 ♦ Pb 978 1 903307 01 4 ♦ 384pp HALF PRICE
** Reduced from £25 to £12.50*

Employment

Employment Law
an adviser's handbook 7th edn
Tamara Lewis
Sept 2007 ♦ Pb 978 1 903307 53 3 ♦ 864pp ♦ £30

Employment Tribunal Claims
tactics and precedents
2nd edn
Naomi Cunningham/Michael Reed
Sept 2007 ♦ Pb 978 1 903307 55 7 ♦ 472pp ♦ £30

Discrimination Law Handbook
2nd edn
Camilla Palmer/Barbara Cohen/Tess Gill/
Karon Monaghan/Gay Moon/Mary Stacey
Edited by Aileen McColgan
Jan 2007 ♦ Pb 978 1 903307 38 0 ♦ 968pp ♦ £55

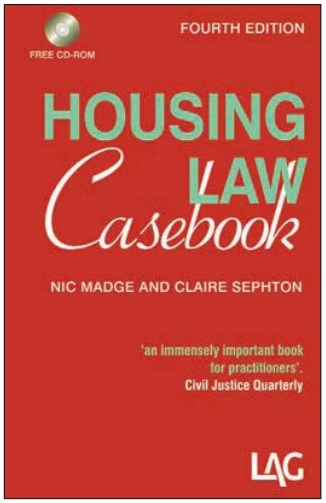
Age Discrimination Handbook
Declan O'Dempsey/Schona Jolly/
Andrew Harrop
2006 ♦ Pb 978 1 903307 48 9 ♦ 760pp ♦ £35

Maternity and Parental Rights
a guide to parents' legal rights at work
3rd edn
Camilla Palmer/Joanna Wade/
Katie Wood/Alexandra Heron
2006 ♦ Pb 978 1 903307 40 3 ♦ 880pp ♦ £35

Employment Tribunal Procedure
3rd edn
Judge Jeremy McMullen QC/
Rebecca Tuck/Betsan Criddle
2004 ♦ Pb 978 1 903307 29 8 ♦ 758pp ♦ £37

Family

Family Emergency Procedures
a guide to child protection and domestic violence 2nd edn
Nicola Wyld/Nancy Carlton
1998 ♦ Pb 978 0 905099 68 2 ♦ 448pp HALF PRICE
** Reduced from £28 to £14*



Gypsy and Traveller law

Gypsy and Traveller Law
2nd edn
Edited by Marc Willers/Chris Johnson
Sept 2007 ♦ Pb 978 1 903307 52 6 ♦ 592pp ♦ £30

Housing

Leasehold Disputes
a guide to Leasehold Valuation Tribunals
2nd edn NEW
Francis Davey/Justin Bates
April 2008 ♦ Pb 978 1 903307 62 5 ♦ 300pp ♦ £30

Housing Law Casebook 4th edn
Nic Madge/Claire Sephton NEW
Feb 2008 ♦ Pb 978 1 903307 45 8 ♦ 1192pp ♦ £55

Supported Housing and the Law
Sue Baxter/Helen Carr
Sept 2007 ♦ Pb 978 1 903307 51 9 ♦ 680pp ♦ £30

Homelessness and Allocations
7th edn
Andrew Arden QC/Caroline Hunter/
Lindsay Johnson
2006 ♦ Pb 978 1 903307 37 3 ♦ 880pp ♦ £45

Defending Possession Proceedings 6th edn
Nic Madge/Derek McConnell/
John Gallagher/Jan Luba QC
2006 ♦ Pb 978 1 903307 30 4 ♦ 840pp ♦ £48

Quiet Enjoyment 6th edn
Andrew Arden QC/David Carter/
Andrew Dymond
2002 ♦ Pb 978 1 903307 14 4 ♦ 320pp ♦ £29

Housing and Human Rights Law
Christopher Baker/David Carter/
Caroline Hunter
2001 ♦ Pb 978 1 903307 05 2 ♦ 252pp ♦ £19

▶ Books

Repairs
tenants' rights 3rd edn
Jan Luba QC/Stephen Knafler
1999 ♦ Pb 978 0 905099 49 1 ♦ 420pp ♦ £29

Human rights

Human Rights Act Toolkit
2nd edn
Jenny Watson/Mitchell Woolf
NEW
Feb 2008 ♦ Pb 978 1 903307 61 8 ♦ 268pp ♦ £30

European Human Rights Law
Keir Starmer QC
HALF PRICE
1999 ♦ Pb 978 0 905099 77 4 ♦ 960pp
** Reduced from £35 to £17.50*

Immigration and asylum

Support for Asylum-seekers
a guide to legal and welfare rights 2nd edn
Sue Willman/Stephen Knafler/Stephen Pierce
HALF PRICE
2004 ♦ Pb 978 1 903307 24 3 ♦ 788pp
** Reduced from £39 to £19.50*

Putting Children First
a guide for immigration practitioners
Jane Coker/Nadine Finch/Alison Stanley
2002 ♦ Pb 978 1 903307 11 3 ♦ 312pp ♦ £24

Law reform

Beyond the Courtroom
a lawyer's guide to campaigning
Katie Ghose
2005 ♦ Pb 978 1 903307 35 9 ♦ 396pp ♦ £20

Practice and procedure

The Adviser's Toolkit
giving legal advice
Elaine Heslop
Oct 2007 ♦ Pb 978 1 903307 49 6 ♦ 384pp ♦ £22

Parole Board Hearings
law and practice
Hamish Arnott/Simon Creighton
2006 ♦ Pb 978 1 903307 42 7 ♦ 356pp ♦ £24

Inquests
a practitioner's guide
Leslie Thomas/Danny Friedman/Louise Christian
OUT OF PRINT
2002 ♦ Pb 978 0 905099 97 2 ♦ 544pp ♦ £42
** New edition due Summer 2008*

Public law

Judicial Review Proceedings
a practitioner's guide 2nd edn
Jonathan Manning
2004 ♦ Pb 978 1 903307 17 5 ♦ 720pp ♦ £34

▶ Training

Spring/Summer 2008

Discrimination Law Update
3 April
£185 + VAT 6 hours CPD Course grade: U
Trainers: Declan O'Dempsey/Catherine Casserley/John Horan

The trainers, all barristers at Cloisters chambers, provide an update of recent developments in discrimination law which will be essential to practitioners and legal advisers who need to advise or represent claimants. It will also be extremely useful to trade union representatives as well as human resources and equality officers in public, private and voluntary sector organisations who need to comply with the requirements of anti-discrimination law.

Defending Possession Proceedings
28 April
£185 + VAT 6 hours CPD Course grade: B
Trainers: John Gallagher/Derek McConnell

Each year over 100,000 possession actions are started in England and Wales. This course is designed for housing practitioners and advisers who act for those threatened with eviction and covers claims against council and housing association tenants, private sector tenants and mortgage borrowers. Emphasis is placed on the practicalities of dealing with possession actions including public funding. The course will look in particular at recent developments including claims based on anti-social behaviour. The course is suitable for both generalist and specialist advisers.

If you register your interests at: www.lag.org.uk/getupdates, we will e-mail details of LAG's courses to you.

Training information

▶All courses take place in central London unless otherwise stated.

***▶Subscribers to Legal Action** receive a 10% discount on course fees! Discount applies to mailing address only.*

CONTINUING PROFESSIONAL DEVELOPMENT
LAG is accredited with the Law Society, the Bar Council and the Institute of Legal Executives.
COURSE GRADES Law Society-accredited courses are graded as follows:
B Basic/Introductory I Intermediate
A Advanced U Updating
S Suitable for all levels

CONCESSIONARY RATES may be available for certain individuals and organisations.

IN-HOUSE TRAINING
Do you have ten or more people in your organisation who require training on the same subject? If so, we may be able to provide an in-house course at a more cost-effective rate. For more information about in-house training, concessionary rates or for any other training enquiries, please contact the Training Department, tel: 020 7833 2931 or e-mail: lag@lag.org.uk.

New Legal Action Group 2007/2008 catalogue now available. To download a copy visit: www.lag.org.uk/catalogue.

LAG

Community Care Law Reports

practitioner seminar

Ordinary residence disputes

Speakers: Simon Bull, assistant borough solicitor, Bracknell Forest DC
Margaret Pedler, Social Care and Care Quality Commission Division, Department of Health
Pauline Thompson, policy officer, Age Concern England

8 April 2008
6.30 pm–8 pm, followed by a short reception
Doughty Street Chambers, 54 Doughty Street, London WC1N 2LS

1.5 hours CPD

CCLR subscribers are allowed two free places per subscription on this course. Additional places are charged at £25 + VAT. Non-subscribers are charged £25 + VAT.

Places are limited and will be allocated on a first-come, first-served basis.

To book
Tel: 020 7833 2931 Fax: 020 7837 6094

noticeboard

Conferences and courses

Joint Council for the Welfare of Immigrants
Entry clearance application procedure
10 April 2008
10 am–1 pm
London
£160 (JCWI members: private practitioners and statutory organisations)/£135 (JCWI members: voluntary organisations)
2.5 hours CPD
This course will enable attendees to prepare entry clearance applications more effectively and provide an overview of the relevant considerations that entry clearance officers (ECOs) should take into account.
The course will focus on:
- how to prepare an application
- what documents are needed
- time scale
- what will lead to refusal
- how to lodge an application
- how the new points system will shift decision-making overseas to ECOs

Tel: 020 7608 7306
E-mail: training@jcwi.org.uk
www.jcwi.org.uk

Rights of Women
Asylum and immigration law: protecting women from violence and securing their position in the UK
23 April 2008
9.30 am–4.30 pm
London
£160 (statutory sector)/£130 (large voluntary sector organisations)/£100 (small voluntary sector organisations)
This course will provide a practical overview of asylum and immigration law with particular emphasis on the needs of women with experience of gender-based violence.
Please note this training course is open to women only.
Tel: 020 7251 6575
E-mail; training@row.org.uk
www.row.org.uk

Child Poverty Action Group
Employment and support allowance
23 April 2008
9.45 am–4.45 pm
London
£195 (lawyers)/£140 (statutory organisations)/£100 (voluntary organisations)/£80 (reduced rates for citizens advice bureaux and DIAL UK members)
5 hours CPD
The employment and support allowance (ESA) is expected to replace both incapacity benefit and incapacity-based income support from the end of 2008. With a new benefit structure and test of capability for work, ESA is set to change both the amount of benefit sick and disabled claimants can get and how they qualify for it. The course provides a detailed introduction to this new benefit.
E-mail: training@cpag.org.uk
www.cpag.org.uk

Local Government Ombudsmen
Using the Local Government Ombudsman
London
£95
3 hours CPD
The Local Government Ombudsmen (LGO) offer training, accredited by the Solicitors Regulation Authority, to help lawyers understand when it can benefit clients to complain to the LGO instead of going to court.
The LGO know that many people go to a lawyer when they have a problem with a local authority, so they believe it is increasingly important that lawyers understand the options for dealing with these clients' cases. The course covers issues including the LGO's role and jurisdiction; how they investigate and put things right; the LGO or the courts – options; and costs.
Contact Peter Whiteley
Tel: 020 7217 4626
E-mail: p.whiteley@lgo.org.uk
www.lgo.org.uk

Lectures, seminars and meetings

Doughty Street Chambers
The great divide
22 April 2008
6 pm–8 pm
London
£20
2 hours CPD
Kate Markus leads a seminar on the relationship between NHS treatment and community care, including the role of NHS Trusts and the commissioning of services.
Tel: 020 7404 1313
E-mail: reception@doughtystreet.co.uk
www.doughtystreet.co.uk

Haldane Society of Socialist Lawyers
Universal jurisdiction: holding war criminals to account
23 April 2008
6.30 pm–8.30 pm
London
£10 (free to students, trainees and unwaged)
Speakers: Bill Bowring, Professor of International Law, and Phil Shiner, Public Interest Lawyers, solicitor for Baba Mousah and Al-Jeddah families.
www.haldane.org

CAFID (Civil Actions Arising From Immigration Detention)
Part three: challenging conditions and treatment of detainees
24 April 2008
4 pm–7 pm
London (Tooks Chambers)
£25 per session
3 hours CPD
This is the third training session on behalf of CAFID. Those with experience in immigration and asylum, prison law or civil actions against the police will find that attending one or more of these seminars will help them to consider taking up cases to support 'failed asylum-seekers' and others, an increasingly disenfranchised group of clients.
Register your interest:
www.gardencourtchambers.co.uk

Volunteers needed

East Finchley Advice Service (EFAS)
EFAS is a charitable organisation in East Finchley, London N2, providing advice to local residents on a wide range of consumer problems. It runs a weekly one-hour Tuesday evening drop-in legal session staffed by volunteer qualified solicitors who normally work one evening a month. We now need additional volunteer solicitors, particularly those specialising in family law, employment law and housing.
Contact Blessyn Ataguba,
Tel: 020 8444 6265
E-mail: help@efas.org.uk
www.efas.org.uk

Advertise your events in noticeboard for FREE!

If you have an event you would like to advertise in *Legal Action*'s noticeboard, please e-mail a short description, including contact details, cost and any CPD accreditation to: nmoorthy@lag.org.uk. We will endeavour to include as many entries as space allows. ***Advertise your events.***

Trainee solicitor and pupil barrister vacancies
If you have a pupillage, training contract or vacation scheme vacancy, you can also advertise it for FREE in *Legal Action*'s noticeboard. Please contact Nim Moorthy for details, e-mail: nmoorthy@lag.org.uk or tel: 020 7833 7430.

Copy deadlines for entries to appear in:

May: 11 April
June: 9 May
July: 13 June
August: 11 July
September: 8 August
October: 12 September

Advertise your event on this page, contact: Nim Moorthy
tel: 020 7833 7430, fax: 020 7837 6094, e-mail: nmoorthy@lag.org.uk