Housing Law Practitioners' Association

Minutes of the Meeting held on 20 July 2016
University of Westminster

Judicial Review and Housing

Speakers: **James Harrison, Edwards Duthie Solicitors**
Martin Westgate QC, Doughty Street Chambers

Chair: **Tessa Buchanan, Garden Court Chambers**

Chair: Thank you very much for attending our July meeting, which is about Judicial Review and Housing. My name is Tessa Buchanan. I'm a barrister at Garden Court Chambers and Vice-Chair of HLPA.

I have received one correction to the minutes of the previous meeting from David Foster of Foster & Foster. If anyone else has any corrections you can submit them in writing to me after the meeting or other points of information if you wish.

Before I introduce our speakers tonight I would just like to take a moment to say on behalf of HLPA what I'm sure everyone in this room will agree with, which is how sad we were to learn of the passing of Bryan McGuire QC earlier this week. I am sure that everybody in this room will know him either personally or by reputation and what an important figure he was in our world and in the legal world generally. So if we could just mark that for a minute.

I will now introduce our speakers. Firstly we have James Harrison from Edwards Duthie Solicitors, who is a partner having joined in 2002. He not only heads several of their teams but also has overall responsibility for the court duty scheme, which I'm sure is not an easy task, but he was also a member of the Executive Committee of HLPA for several years until 2011 and we are very grateful for his continued support.

Next we have Martin Westgate QC, from Doughty Street Chambers, who again I'm sure everybody here will be aware of, both for his work in this field and his reputation, and the important cases that he's been involved with.

James Harrison: I thought we'd start with a bit of nostalgia with some old logos of our masters the Legal Aid Board, the Legal Services Commission and more recently the Legal Aid Agency. When I started preparing this paper it occurred to me that one of the strengths of HLPA is just the wide range of experience of its members, from people who have been doing legal aid for decades through to those who have been doing legal aid for a much shorter period of time. That though presented a bit of a challenge in deciding what level to pitch this talk at, so I hope I've got it right, so there'll be something here for you whether you've just been battling with the Legal Aid Agency or whether, like me, you've battled with all of them in your time. The fourth logo on my first slide, RISK, is there because I'm afraid to say that is a theme that permeates this talk and as we go through you'll see the various risk factors that we as lawyers have to deal with.

So let's just take a brief outline of what we're going to talk about. I will start with some fairly basic information about the categories and whether allocations is in scope. I would imagine that for the vast majority of housing lawyers it's homelessness and allocations which is your main JR activity with perhaps some benefits work thrown in. We will then look at the public law category, then move on to delegated functions, then the remuneration regulations - that really is a matter of risk for reasons you probably know and will understand as we go through - and finally, I couldn't give a talk on legal aid without touching on CCMS, a risk of getting things wrong and a risk to one's sanity one might think.

So we start with homelessness. This is quite straightforward. So LASPO s9, civil legal services are to be available to an individual if they are civil legal services described in Part I of Schedule 1, and we find at paragraph 34 of Schedule 1 civil legal services provided to an individual who is homeless, threatened with homelessness under Part VI or under Part VII and further down, in subsection (3) there's a very reassuring provision because it says: homeless and threatened with homelessness has the same meaning as s175. So we all breathe a sigh of relief and know what we're dealing with. The category definitions, reflect that position, so it's Parts VI and VII to an individual who is homeless, or threatened with homelessness. So the position is pretty clear with homelessness cases.

Allocations though I suggest is far less clear. My interpretation of LASPO is that you can do allocations work but only if the client is homeless or threatened with homelessness. I gave a similar paper to this at the HLPA conference in December and I know that different people take different views on it and it would be very interesting at the information exchange stage to find out what people's experiences are. The cautious view is that you can give advice to a client about Part VI because it relates, or it can relate, to the discharge of the homelessness duty because we know, at least in theory, that you can discharge the Part VII duty by an offer of accommodation under Part VI. A bolder interpretation is to say that if the client's circumstances are such that you can argue that they are homeless or threatened with homelessness you can say that allocations work is within scope. We'll all be familiar with those cases of severe overcrowding or perhaps more recently unaffordable accommodation by virtue of the benefit cap and other welfare reform.

The point though, and this is really the first point on risk, is of course thinking practically you sign your legal help form with the client and you think, I will run this case as an allocations case because I can argue that they are homeless, it's not reasonable to continue an occupation of the property. You are then at risk because if you clock up lots of costs, you consider the allocations file, the tenancy file and so forth, and you submit it to the Legal Aid Agency as an exceptional case there is the risk that it will be nil assessed as being out of scope. So my approach to this is to think about that very carefully and realise that you're running that risk when you run your allocations case. I don't believe it's the case that you can deal with allocations in the same way as we used to, giving broad advice, getting information about their application and so forth, unless there's a homelessness angle.

Or, and this is where we move onto public law, unless you can argue that it falls within the public law category if, indeed, you have a public law contract, because, of course, not everyone does. Obviously in order to suggest and maintain that it's a public law case you need to find a potential ground for challenge on public law grounds. So in your routine enquiries about the client's priority and so forth under the allocations scheme you are not identifying a public law ground, you will need to do some more spade work before you can make out that there is a potential JR claim. We'll all be familiar with those, maybe we're tackling the scheme itself or the assessment of the client's application under that scheme and I know that Martin has got a number of examples on that. The LASPO provision that's relevant is para 19(1) which refers to judicial review of an enactment, decision, act or omission.

Now an important point at 19(3) is that it doesn't extend to services that don't have the potential to produce a benefit to the client, their family or the environment. So if you have a pure public interest challenge when your client isn't going to benefit, you are not within the scope of LASPO. We'll come on later on to talk about the criteria for getting legal aid, but just to mention in passing that of course the removal of the borderline merits test further restricts the availability of legal aid for public law and public interest cases.

If you're ahead of me you will have been thinking, well, what happens if you have a housing contract and a public law contract? Which contract do I use? Which category? Well, you have a rare bit of liberty here because if you have both categories and it falls within two or more categories you can choose which category to have the case in. That's found at paragraph 6 of the category definitions.

Paragraph 13 relates to public law category definition and there you do it in the category to which the underlying substance of the case relates, so if it's an allocations case you're doing it under the housing category. That, of course, is good news because if you don't have a public law contract, but you have a housing contract, you can bring your JR case. I've had questions in the past about, can we do a JR because we don't have a public law contract? The answer is you can. It's there under the housing category.

So that deals with legal help. We're now thinking that we will be moving on to the certificate. Now set out at page 5 of your handout are the various criteria that need to be complied with when you apply for a certificate. They will be fairly familiar because as you go through your legal aid form those are the questions that you're answering. Of course these days as you go through CCMS those are the questions you are answering, but I always find it helpful to go back to the regulations and remember what it says because it informs how you might answer them in some of those difficult cases. So there are a certain number of criteria which are common to applications for full representation and for investigative help and, as you will see in a minute, there are then some criteria which are relevant only to investigative help and others which are relevant only to full representation.

So dealing with the common ones first, regulation 39 criteria met. These are familiar: no other sources of funding; unsuitable for a CFA; client's exhausted alternative remedies; there is no other person who would benefit who could bring the proceedings; need for representation given the complexity of the case etc.; and it's not a small claim. As I say, they will be familiar to you from completion of legal aid forms.

The next criterion is whether the act, omission or other matter complained of in the proposed proceedings appears to be susceptible to challenge. Now it's worth pausing here to say that there is fairly useful guidance from the Lord Chancellor on Judicial Review case. The Lord Chancellor's Guidance runs to about 60 odd paragraphs. You'll find the guidance in relation to Judicial Review at pages 29 to 31. I have set the relevant bits out in the appendix to my note as well.

So in terms of this criterion, the guidance says it may be important to focus attention independently on the question of whether there does exist a matter capable of giving rise to a public law challenge. That's fairly obvious really. Obviously you have to be able to demonstrate that there is an arguable case that there's a breach of public law and, for example, the defendant was carrying out a public law function.

Another obvious point really, it has to be capable of challenge at the time that you make the legal aid application. There's no point making an application before the local authority or whoever the defendant is has made that decision. It can't be pre-emptive.

The next criterion is that there are no alternative proceedings before a court or tribunal which are available to challenge the act, omission or other matter, except where the directive considers that such proceedings would not be effective in providing the remedy that the individual requires.

Now it seems to me a good example of that is your homelessness appeal case where, no doubt, your local authority is massively behind with their review decisions and you may be thinking that you could bring an appeal in default. Of course, if you bring an appeal in default the challenge is to the original decision and the court will not see all the evidence you've been able to gather together in your well-crafted representations. So you're thinking JR instead of an appeal in default. That is where you would need to make it clear on your legal aid application that your appeal in default is not an alternative remedy.

So, as I say, those are the criteria that are common to both full representation and investigative help. Dealing now briefly with the investigative help criteria: the individual has notified the proposed defendant of the individual's potential challenge and given a reasonable time for the proposed defendant to respond, or shown that doing so would be impracticable. The important part that arises from the Guidance here is that we're not talking about the Letter Before Claim in accordance with the JR protocol. It can simply be that you have written to them putting them on notice of the potential for a claim but you've not yet formulated that as precisely as you might have done in a Letter Before Claim. That is enough to satisfy the Legal Aid Agency and, after all, the whole point of applying for investigative help is to explore the prospects of success and then formulate those grounds. I should say that I think the timescales with Judicial Review are such that I would have thought that investigative help applications are probably pretty rare because really you want to be granting full representation, getting counsel's opinion and then pressing on with bringing the case as soon as possible for fear of running out of time. Again, in the information exchange it would be interesting to hear the extent to which people use investigative help to explore prospects of success.

So we move on to full representation. Here we do see a requirement that a Letter Before Claim has been sent to the proposed defendant, except where it is impracticable, and that the proposed defendants have been given a reasonable time to respond. The guidance makes the common sense point, but nonetheless worth flagging up, that of course if you need to show that a Letter Before Claim has been sent you are carrying out that stage of the protocol at least under legal help, not after you've got your legal aid certificate. Of course, what you may be doing is, once you've got legal aid and you've got grounds, you may be sending them to the opponent before you issue as a sort of other pre-action, or pre-issue step, but Letter Before Claim has to be done under legal help before you apply for your full representation legal aid certificate.

Next criterion: The proportionality test is met.

Next criterion: Prospects of successfully obtaining the order sought in the proceedings are very good, good or moderate. As I mentioned earlier, you will remember that the borderline criterion has gone. It has to be at least moderate.

Finally: The case is of significant wider public interest; or the case is one of overwhelming importance to the individual; or the substance of the case relates to a breach of Convention rights.

<u>Exceptional Funding</u>

Now what I should mention here for completeness is Exceptional Funding - reportedly massively underused. Very, very few applications made, but it is there for cases that perhaps aren't ordinarily within the scope of legal aid where the lack of legal aid would breach an individual's Article 6 rights.

The Lord Chancellor published guidance on Exceptional Funding and there are two very helpful articles by Martha Spurrier in the April and May 2013 editions of Legal Aid. That is, of course, for as long as we have the ECRH.

Delegated Functions

Now the tightness of the Judicial Review time limit, of course, means that it's almost always necessary to apply for an emergency certificate. I can't conceive of a situation where you could run the risk of an application for a substantive certificate which would take our dear friends at the Legal Aid Agency a good number of weeks to process and you are then already in dangerous territory in terms of the three month absolute time limit. So I would suggest it would nearly always be an emergency certificate.

I've made reference to the *Frank Kigen and Janet Cheruiyot* case. That is a quite depressing and, might I say, a case that is terribly out of touch with the very real difficulties of getting legal aid for some clients. You may remember that in this case, fundamentally the Court of Appeal has said: Don't come to us with difficulties in legal aid to explain an application being late. In this particular case, it was an immigration case, and I think there was a 13 day delay. They were 13 days out of time and that was not allowed and what Lord Justice Moor-Bick said in that case is: *There has been a very significant increase in the number of claims for judicial review, many of which are in substance little more than private proceedings between the claimant and the relevant public body rather than proceedings which raise issues of importance to the public at large. Moreover, the change in the climate of litigation which has come about since that case was decided makes it no longer appropriate to treat delay in obtaining legal aid as a complete answer to a failure to comply with procedural requirements. It may still be a factor that can be taken into account* - so a tiny window of opportunity there perhaps, but no more. *To hold otherwise would place those who apply for and obtain legal aid in a better position than those who, through no fault of their own, are forced to represent themselves.*

Lord Justice Davis adds, at the end: *For the future, however, practitioners and parties cannot proceed having any such expectation* - and here he's referring to the court exercising its discretion to extend time. *On the contrary, they should proceed in the expectation that any explanation based on the proposition that the delay was "only" for a few days, whether or not coupled with an explanation that a decision from the Legal Aid Agency was awaited, will not be received with indulgence by the tribunal or court.* So, very worrying developments there.

Here is another appearance of this concept of risk that I mentioned, because what are you to do? You have done your best to get legal aid for this client. Maybe you simply haven't heard back from the Legal Aid Agency or you are having numerous means enquiries explaining various transactions on bank statements. You do not have legal aid in place. You are becoming increasingly nervous about the time limit. Your client may be able to issue the claim themselves with some help from you, but quite possibly not given our usual client group. What are you to do? You cannot be confident that the court will understand your problems and nod sagely, they will expect that case to be issued and fundamentally we are being required to act pro bono for fear that the case is not proceeded with. That's exactly what happened in the case of *Hillsden,* which Martin may make reference to, where we didn't have legal aid for our appeal to the Court of Appeal for various reasons and we had to issue and we decided that we would pay the court fee. So there are some very real problems there, and that was a real risk to run. I guess it's a matter for you and for your counsel to decide whether you just put in very brief grounds and look to flesh that out once you have obtained legal aid.

So coming back more directly to delegated functions, the general rule is that you do not have delegated functions for Judicial Review cases. There are a number of exceptions though, and happily for us as housing lawyers one of those exceptions is Part VII of the 1986 Housing Act. There are other exceptions that relate to community care. I think probably many of those provisions are being appealed, at least in full or in part, by the Care Act, so I've lifted that out of the contract spec. It won't surprise you to know it's not completely up to date, although they have put in the Care Act, but you get the point that there are some community care cases where you do have delegated functions and, importantly for us, Part VII cases. Not, obviously, Part VI cases, so if you have an allocations JR that you're wanting to get off the ground quickly you're not using delegated functions, you're applying for an emergency certificate in the usual way using your trusty computer and CCMS.

The Legal Aid Remuneration Regulations

This is perhaps the biggest area of risk in my talk this evening. Now you may remember with a warm glow that on 3 March last year the High Court ruled that the Regulations were unlawful on the ground that they were inconsistent with the statutory purpose of LASPO. There was a relief hearing on 24 March and the Regulations were quashed.

Celebrations though were short lived because within three days the government had passed the Remuneration Amendment Regulations. That was on the last day that parliament sat before it was dissolved for the General Election so interesting, was it not, that the coalition government's last act, or one of their last acts, was to make this attack on challenges to the rule of law? But there we are.

So the regulations apply to all legal aid certificates applied for on or after 27 March last year. Now of course with a JR case we're dealing on the whole with fairly recent certificates so I would imagine that all our current cases now probably fall within this category.

So to take you through the regulations, I have set out a flow chart type structure in page 9 of my handout which hopefully is a bit easier to understand than the regulations. So there are four instances when you clearly will be paid. First of those is perhaps the most commonly known: the court gives permission to bring JR. Or, you effectively win in that the defendant withdraws the decision to which the JR relates and as a consequence the court either refuses permission or doesn't do anything, and doesn't refuse or give permission. The third instance is that the court orders an oral hearing to consider whether to give permission to bring JR proceedings or, indeed, a relevant appeal - relevant appeal meaning in JR cases - or the court orders a rolled up hearing, obviously to deal with permission and the substantive hearing.

There is a discretion which you'll see at the lower part of that flow chart and effectively at the end of the case you can ask the Legal Aid Agency to exercise its discretion to pay you. Obviously if you're relying on a retrospective request to be paid you are at risk from the point that you effectively move beyond the upper part of that table that we've just looked at. We'll look at that in a little more detail but the discretion is that the court neither gives nor refuses permission and the Agency considers payment is reasonable taking into account the reason why the provider did not obtain a costs order or costs agreement in favour of the legally aided person, the extent to which and the reason why the legally aided person obtained the outcome sought in the proceedings; and the strength of the application for permission at the time it was filed, based on the law and on the facts which the provider knew, or ought to have known, at that time.

Now there is guidance from the Lord Chancellor. I have to say, I tried to find it online and I couldn't find it anywhere. The only place I found it was set out in the Ben Hoare Bell case, which was a case which Martin was involved in, which was a challenge to the regulations. There are some useful points

that come out of that. The regulations apply to the payment of profit costs and counsel's fees but not other disbursements, so it's not all of your costs, at least disbursements are covered. Small comfort maybe but important to make that clear.

The restriction on payment only applies where the application for JR has been issued. If it's not issued all the preparatory work will be remunerated in the usual way. So it's at the point of issue that the risk kicks in.

As it says in the guidance, the effect of Regulation 5A is that work on an application for JR, including drafting, or instructing counsel to draft, the grounds of claim, preparing the claim form or an application for permission and the bundle of documents will, if proceedings are issued, be undertaken by providers at risk of not being remunerated. Any work done for a rolled up hearing will also be at risk, and then Paragraph 4 of the guidance: Regulation 5A does not apply to the earlier stages of work on a case to investigate the prospects and strength of the claim, including advice from counsel on merits, and to engage in pre action correspondence aimed at avoiding proceedings under pre action protocol. Interestingly, as well, the exclusion on payment doesn't apply to the costs of an application for interim relief even if it's made at the same time as an application for JR. So if you have a s188 (1) or 188(3) case and you're applying for interim relief, that aspect of it is not at risk.

That arises because of the way the regulations interpret the meaning of making an application for JR. That refers only to Part 54 rather than other applications, for example under part 24, and I've seen it suggested that maybe other applications outside of Part 54 could therefore be remunerated applying the same logic. So if, for example, you're making an application for disclosure under Part 31 you could say that it's not an application under Part 54, applying the same logic.

So tactics – how do you deal with this very difficult situation? Obviously it makes sense to do as much work as you can in the early stages of the case, frontload it as far as possible, so you're doing the work before it's issued. For example when you instruct counsel you might want to have prepared a lengthy statement for the client at that stage so you've done that pre issue. You have to show the costs were reasonably incurred obviously, so it's a bit of a balancing exercise, but it would make sense to do a lot of work rather than simply send it to counsel with very little work, assuming you're going to do the other work later on. If you have an application for interim relief think about how you do your attendance notes because you want to make it really clear the work you're doing relates to the interim relief application which won't be at risk, rather than work that relates to the JR itself.

Also, don't be shy and embarrassed about talking to counsel about the regulations. Don't assume counsel will know because that is obviously risky. I would suggest it needs to be almost as a standard paragraph in your instructions for JR cases so you and counsel know where you are and that you and counsel recognise when you're now taking this case at risk and you ask counsel to agree whether they are willing to work on that basis. This is a matter for counsel, but it seems to me that given that preparation of the grounds could be at risk it might be attractive to give very full advice on grounds and then when you're instructed to prepare the grounds you can virtually do a cut and paste job.

The final thing to mention on this is that there's a pro forma that the Agency has published for requesting the exercise of discretion to make a payment. That's at the back of these notes. It's a rather bizarre letter because it's written as if from you and then as if from the Legal Aid Agency. But if you put that aside it does set out the regulations. I'm told there is an equivalent on CCMS but I don't know whether that's true.

Finally, just a few brief points on CCMS. Obviously now mandatory for all civil legal aid applications so, as I've said here, practice your deep breathing techniques. It can be pretty frustrating as you all know - although I think generally I have found it better the more you get used to it.

Obviously you're not using an old APP6 as you might have been for emergency or delegated functions case. You are having to use CCMS and making an emergency application in that way.

Remember the difference between single stage and dual stage applications. Those who know what I'm talking about will nod at that point. Those who don't will look at me blankly. The idea of a single stage is that you make the application having all the information that you need including information about means and so forth. Why do that? Well the big attraction is if you do a dual stage you have to do your CCMS application for the emergency and then when you've got all the information you have to do it all again for the substantive application. It is a bit soul destroying, so if you have the information and you can do a single stage, do a single stage - it's an enormous time saver.

Don't forget about the need to assign counsel. This is new for solicitors and it's also new for counsel. It's probably quite a good discipline in terms of thinking about budgeting the case and what counsel's fees will be, but you will need to speak to the chambers that you're instructing to make sure that that it is done and you will need to make sure you do it.

The final point from me is on limitations. This, I'm afraid to say is, at the moment at least, really quite tricky. In preparation for this talk I spoke to some of my colleagues and I also set up a test matter on CCMS for Mr Matter and tried to do a JR legal aid application without actually submitting it. You will find that once you set up the proceedings as housing, Judicial Review (housing) and you then go to choose your limitation, what you're looking for is that nice old friend JR004 which is the ability to do an application for permission on the papers and reviewing it or leave for advice by counsel. You need that obviously because circumstances in a 188 case are often very fast moving. You could be instructing counsel in the afternoon, applying to the duty judge in the evening. What you can't do in between there is make an application to the Legal Aid Agency for an amendment because your client's going to be on the street for the night.

As CCMS is at the moment that JR004 application is not there. You choose the default one of hearing, which will not really do the job, or you choose various applications in relation to counsel's opinion, which, for the reason I've just mentioned, will not really do the job for your client. I have raised that with the Legal Aid Agency. They came back to me late this afternoon and acknowledged the problem, and have said they will try and sort it out.

So for the moment, be aware of that and you will probably have to phone them once you have submitted your application if it's an urgent case and get the customer help line to see if that can be sorted out and the rights then added. I think that's probably to do with delegated functions and not realising that you have delegated functions in homelessness cases.

Chair: Thank you very much. I will now introduce Martin Westgate.

Martin Westgate QC: First of all I will make a few points about the object of this talk, because I was asked to speak about JR and housing but then when you think about what that actually means, it's quite hard sometimes to think about what is the scope of that. We all know there is a number of housing cases that end up in the admin court, but if you just talk about those then that's not talking about JR and housing. So instead of talking about particular cases that happen to have been in the admin court, I thought I would try and identify some current themes that are arising as an issue of law that may be of relevance to housing cases, and then think about how some of them might have

applied, particularly in allocations cases which is where quite a lot of the activity is happening. When you think about doing an exercise like that, you inevitably think about: well, what are the themes, what are the points that are current in Judicial Review and Judicial Review law now. I suppose if there is a theme it's one that much housing law, like many areas of local government or third sector activity, is more and more becoming centred around discretions that are given to decision makers, because more and more government isn't saying proscriptively here are the rules you have to follow, they're saying: Well, if you like you can set up this kind of scheme, you have discretions to do this and that, particularly in allocations with the criteria of who qualifies and who doesn't, and the same sort of thing applies when you're dealing with broad discretions about dealing with no recourse to public funds and cases like that. That is something that we're perhaps unused to dealing with as public lawyers because it's almost axiomatic that when authorities have broad discretions like that then the court really backs off, so the task is to find the way in which you can get under the skin of those discretions and make the court take a closer look at what the authority is doing and hold them to account.

So at the same time as government is tending to tell local authorities they have these discretions, the courts are developing a series of techniques - or rediscovering or working on a series of techniques that have always been there - that allow them to take that kind of closer look. It may be that that reflects a level of judicial impatience about the very high standard that administrative courts normally apply about decisions being rational, or it may reflect other things. It comes at an important juncture, of course, because as James has alluded to, we are facing possible repeal of the HRA and certain, if the new Prime Minister is to be believed, exit from the EU and so we won't necessarily be able to rely on those foundations. I'm not in fact going to be saying a great deal about the ECHR, I'm going to be concentrating mainly on domestic judicial review principles. What I will do is simply sketch out a few points because the reality is that each of the points I make would probably justify a talk on its own and it's really a case of signposting issues rather than going into any detail.

If I can just pick up a few points regarding my paper, what I have done is give you fairly extensive quotes, not just to pad out the paper but because I often find it helpful to see what the judge has actually said, rather than rely on a summary of it. But my first point breaks that rule actually, it's just a headline point about who can be judicially reviewed. Ever since the decision of the Court of Appeal in *Weaver* there's been a sort of phony war where there hasn't been much activity to push housing associations about whether or not they're judicially reviewable. When challenged housing associations tend not to get into the fight. The level of understanding has come about that certain areas are going to be reviewable and others aren't.

R (McLeod) v Peabody is a rare example of a case that actually gets to court on the issue and it was a case where Mr Justice Davis held that Peabody, in respect of a particular part of its stock, wasn't reviewable, when it refused to deal with a request by Mr McLeod for a mutual exchange with another tenant in Scotland. He had the misfortune to be trying to transfer with someone living in Scotland. If he'd been trying to transfer with someone in England he'd have been covered by the legislation so would have been able to pursue the transfer, but because it was Scotland the edict didn't apply. But the judge held that although Peabody was very substantial housing provider there was an insufficient public element. Because it had been transferred from the Crown Estates Commissioners, the Judge didn't think they were a public body, they didn't act in close cooperation with the local authority, they bought the property using funds on the open market. That rather overlooks the fact that they bought it with a massive discount which was a level of subsidy in itself. The properties weren't pure social housing. They were below market rents but to people whose incomes were below I think £60,000 so I think the Judge thought that it was not normal social housing territory. So it's a bit of an outlier because the Judge felt that these were very special circumstances and it certainly doesn't derail the

idea that housing associations generally, particularly where they have taken a transfer of stock from a local authority, are liable to be judicially reviewed. I mention that point simply because it's a topic that's always there in housing with Judicial Review.

I will now come on now to deal with the kind of principles that the courts apply when they intervene. Just to start at the beginning with the classic approach which we're all familiar with, which is a very hands off approach, that the court will respect the decision of the local authority's decision maker and will give them a very wide latitude. I give one example really which is just one that comes to the top of the pile. It's quite a helpful summary of the position. It's a case called *R (O) v LB Lambeth* where Helen Mountfield QC, sitting as a high court judge, dealt with the question of whether an authority was entitled to decide that a family was destitute because that would trigger the entitlement to support under s17. She sets out the test that the courts apply of not reading decisions like a statute, giving social workers a wide level of discretion and, as long as they've acted fairly and take proper steps, then the decision's one for them. It also has quite an interesting discussion about the duties on the individual applicant to make full disclosure, but I won't get into that. That, of course, reflects the usual balance that we're familiar with, between the courts holding authorities to account but doing so in a way that respects the authority's decision making functions.

The question then is how can you get out of that, because if that's the standard that you apply then it's very rare that you're going to be able to challenge anything because the local authority's always going to be able to justify one thing or another, and there are just a few points that I suppose emerge from this. The first I have described as legality and the first question you have to ask is: Is what the local authority is doing something that fits within the wording of the statute? But it goes beyond that and links to what I have described as the *Padfield* principle, from the case that gave rise to it, which is that you can't use a statute for an unauthorised purpose. So, in other words, you can go beyond the bare wording of the statute and ask: What's the object of this? And if what's being done falls outside the object then it's unlawful, just as much as it would be if it was a breach of express words in the statute.

A useful example of that I practice fairly recently is *Winder v Sandwell* which is where the authority had, in effect, a residence test on council tax subsidy. The reason that was unlawful - well there were lots of reasons it was unlawful, but the particular reason it was unlawful I am focusing on - is one where the court said: Well you have a council tax subsidy provision, but that's about alleviating liability to tax for people who can't pay. It's not about discouraging people from moving into the area to place a burden on the local authority. So what you can't do is impose a residence test for the purpose of discouraging movement into the area, because that's not why the power has been given to you. The power has been given to you to alleviate people who are in financial distress and can't afford to pay their taxes. It's a useful discipline to think of when you're looking at a broad discretion like this, to ask: How does it actually fit in with the purpose of the act?

There is another fairly recent case which helps you to decide what the purpose of the statute is, and I set it out in some detail from *M v Scottish Ministers*, where they say: You can look anything really, you can look at something in the nature of the thing empowered to be done; something in the object for which it's been done; some of the conditions; or the type of person or purpose and so on, so you can look at the whole statute to decide what the purpose is, and, as I say, it's a useful discipline.

So that's one technique you can use. Another one, again which is the subject of a lot of discussion at the moment, is how you can expand common law unreasonableness and how far the decision maker has got to explain itself. There are really, I suppose, three strands to this. I'll take them fairly quickly because in the detail it can be quite dusty but: (1) can the court now weigh up the merits more than

they are accustomed to doing under the rationality of *Wensbury*; (2) can they make the decision maker explain in more detail; and (3) what difference does the human rights context make. Each of those pointers had an outing in recent case law with fairly differing results.

I have set out some citations from *Kennedy* and *Pham* and those are cases where basically what the Supreme Court has been saying is that the more a decision interferes with fundamental rights the more a court will be looking at it more closely, and it might get to a point where the court will say: Well you only really have one choice open to you. Or it might get to the point where the court itself will say: This isn't proportionate, and so the idea of proportionality and common law irrationality is coming together.

Now that's all fine and it fits in at a level of principle where rights like rights to information, rights like asylum and so on can fit into that framework. But Mr Justice Hickinbottom took a different view in relation to homelessness. He said that: "importance … is necessarily a relative concept". Well, we wouldn't disagree with that, but he then goes on to say: "Vulnerable as the homeless may be those rights [to an inquiry and interim accommodation] are not in the same category of importance as other rights, eg the right to life". Well, he may be right about the right to life, but the reality is that the principles that he's talking about probably go to many other rights as well. It's a point that's still there, and ripe for discussion and certainly in the homelessness context it may be something that the Supreme Court is going to look at in a case called *Poshte*, which I think they're hearing in February or March next year. The issue there is whether the fact that Article 6 is now being held to apply to homelessness cases makes a difference, but they'll probably look at this point as well.

So you can contrast the Hickinbottom decision in *Edwards* with a case called *FM v SSHD* which is the second strand that I was talking about where you make the authority explain itself. In that case you use the same sort of reasoning - you're engaging fundamental rights - but that means that the court has to take a really close look at it. What Mr Justice Silber said in that case - which was a trafficking case, but the same principles ought to apply in housing cases where you have particularly pressing interests at stake, for example housing as a provision of last resort for someone who's otherwise going to be street homeless or something like that – was in practice it meant the need for decisions to show by their reasoning that every factor that might turn in favour of an applicant has been properly taken into account. Again, how often do we see a decision where you can genuinely say that's what's happened? So again, if you can bring it within the field of saying this is a fundamental rights case you might be able to rely on the Silber decision. That decision is worth looking at in detail - it's a very long decision - but I've given some paragraph references where what Mr Justice Silber said was there was an expert report explaining, for example, why a victim of trafficking might give an inconsistent account.

Now we know what happens with a homelessness case when you have an inconsistent account – the decision maker simply says well I don't believe that. You've been inconsistent, why should I believe anything you say. But in this case a much more nuanced approach was taken and the judge said that what the decision maker had to do was recognise the conclusions of the report, engage with them, explain however briefly, why they disagreed with them. The duty in that case went on to consider whether the inconsistencies could be attributable to the victim's experiences of victim trafficking and so on, and so it enables the court to look at the decision in a very close and tight way. Of course it's all the better if you have guidance in place because, again, as *Nzolameso* suggested, where someone has departed from guidance it's got to be clear that they gave proper consideration to the guidance, and, if they departed from it, why they did so.

So that's the way the common law is going about irrationality. I've put a very brief note about convention cases because that's rather up in the air because what local authorities normally say is: You can only interfere with us if what we've done is manifestly without reasonable foundation which is practically impossible, although there are cases where it's been found and, frankly, the case law's in a mess. It applies in some cases and doesn't in others. I've given a summary but we'll see what's going to happen when the bedroom tax case comes out, which probably isn't going to be before the summer break now, so we're looking at October or later. There's also – and again I'm not going to deal with it in detail – a section in the notes about circumstances where you can get the High Court directly to find the facts and there's a series of points there, but for reasons of time I'm not going to go through that.

But I will come on to the point about policies and fetters. We're familiar with housing allocation cases because local authorities have to have housing allocation schemes – they've got to publish them so you know what they're doing. But again it's one of the principles that's getting quite a lot of traction recently. Even if they're not obliged to publish a policy, if they're exercising a discretion or a judgment that crops up a lot, or at least in certain circumstances, then they may have to devise their own policy, and if they don't that might be a breach in itself because they're not then exercising their discretion consistently. The starting point for that is a case called *R (WL (Congo) v SSHD* which is a detention case where the Secretary of State had to have a policy about how they applied administrative detention cases to people who were foreign national prisoners. But importantly it improved an earlier case called *Saleem v Secretary of State* which was all about what was then hard cases support for failed asylum seekers, which is much closer to the sort of territory we're talking about.

So the limits of the principle haven't been fully developed but where, for example, the subject matter is significant: you have a series of vulnerable clients; there's a need for consistency with some guidelines in order to make sure that decisions aren't completely arbitrary; then the principle's going to be engaged and you do have to have a policy. Certainly in other contexts, for example housing allocations outside the borough, the Supreme Court in *Nzolameso* suggested that you should have policies there about how you do it, and that's consistent with this WL principle.

So where you have fairly broad discretions again you may either be able to force an authority to have a policy, or at least disclose it, because the other part of the principle is that if you have a policy you have to publish it. So it's perhaps an underused principle. It's being applied at the moment in a case concerning asylum support and we'll get a judgment on that probably in the autumn.

But where you do have a policy, again, it's settled law that you can't have a policy that's so rigid that it amounts to a fetter and quite a lot of the cases that we've had are ones that are in that sort of territory. I've given a big reference to a case called *CTMU v Southwark* just to show how that principle applies here. That was a case about the amount of payments that should be made to a non-recourse to public funds family under s17 of the Children Act, and the authority in that case had benchmarked them as a general rule to the amount that you got on asylum support. That was held to be unlawful – and there are fairly lengthy passages I've set out which I won't go into – but what they give you is quite an interesting extension of the principle that if you have a policy then you can't be over-rigid about it because what the policy said was, as a starting point, we're going to benchmark it.

Now you might think that an argument that this was a fetter would be hopeless because you go to court and the court would say: Well they can depart from it. Where's the fetter? What are they doing wrong? But what the court said was: Well, actually, because this is about children and because you're having to carry out a detailed investigation about the needs of children, simply to say you're taking this as a starting point isn't good enough because it drags you in the wrong direction and so it's still

an unlawful fetter. In one sense it's an application of the fetter principle together with the bit of the purpose of legislation *Padfield* point that I was mentioning. But it does show that, in context, even things that look like they might not be a fetter, might be if the kind of decision that the authority is having to take is one that requires special consideration. So it's something you need to take a careful look at.

That brings me on to my last two general points, which are about factors in the law that might require a closer look, and there are two I want to identify. One is about children and the other is a public sector equality duty, because again both of those are featured quite prominently in the recent allocation cases.

I'm not going to say a lot about the children materials. It's probably fairly familiar to most of you. I would just like to emphasise three points.

The first point is that the duty arises in domestic law and a series of international law provisions, but it applies to individual decisions and general decisions whether you are formulating a policy or dealing with an individual case.

The second point is to emphasise the extent of the reasoning and investigation process that's needed, especially if you can argue that you're in human rights or Article 8 territory. I've set out a number of quotes. The one I'll take you to is *JO and Others v SSHD* which you have in paragraph 23. It's an immigration case but it's again worth looking at what Mr Justice McCloskey said: "There are two guiding principles …. The first is the decision maker must be properly informed. The second is that, thus equipped, the decision maker must conduct a careful examination of all relevant information and factors…" If you go right down to the end of that, it says: "Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter related tasks of identifying the child's best interests and then balancing them with other material considerations" and then the last sentence: "It cannot realistically or sensibly be undertaken unless and until the scales are properly prepared". So where you have a children case you've got to actually start - or if not start certainly as part of your process - to identify what are the children's interests. What will promote the welfare of these children? Until you've done that you can't lawfully carry out the rest of the exercise. Again, how many decisions have you had recently that involve children where you can look at that passage and say, yes, that's what they did? Probably not that many. But that's the standard that you can legitimately argue for applying. The same applies through UNCRC which I refer to at 24 onwards.

I make a similar point about the PSED - Public Sector Equality Duty - under the Equality Act. I've set out a fairly lengthy citation from *Bracking v SSWP* which has really become the standard statement of what that duty requires. It was approved by Lord Neuberger in *Hotak v LB Southwark*, and in *Hotak* he also said that this was something where decisions which previously passed muster may not do if you look at them through the lens of the Public Sector Equality Duty. That was in a homelessness review decision, but of course the same would be true of other decisions that would be the province of judicial review, like: interim accommodations pending review or appeal; or discharge of limited housing duties; or whether accommodation that can't be reviewed is suitable. You will have to carry out the more intrusive involvement in deciding under the PSED if it's engaged, and again the point I want to make about that is that it applies both to individual decisions and to collective decisions. It requires rigorous consideration and will apply where there's real reason to think that one of the factors is triggered, so if there's real reason to think that someone is disabled then the duty will be triggered. What it means in practice, if you take the Children Act and the PSED together, is it's not good enough for an authority to say: Well, if there was any real issue here then the mother, or the

person, would have told me. Because there's a proactive duty of investigation and again it's honoured more in the breach than the reality.

I will very briefly wrap up by considering some of the ways in which some of these principles may be said to have come out of the allocation cases recently. The starting point is the changes to Part VI where the Localism Act allowed authorities to decide what classes of person are, or are not, qualifying persons but they were still under a duty to secure reasonable preference to the specified groups. There have been a series of cases of testing the boundaries of that. The first one I've noted is *R (Hillsden) v Epping Forest* which was a slightly unusual decision. It's one of those ones where you get the impression that the judge had a lightbulb moment and wouldn't be deflected, however good the arguments were that were being put. It was a case where the authority had a residence requirement that you had to have two and a half years' residence, but they didn't have exceptions. What they said was that they had to have clear rules, so there's no room for doubt. That ought to be a clear fetter, you would have thought, but the judge held: No, it's not, because the Act says you can have classes; and if the Act says you can have classes, then it contemplates that you have classes without exceptions. I'm paraphrasing quite a complex judgment, but that's the thrust of it. It's doubtful whether that reasoning would be sound, even on its own terms, particularly if you look at the purpose of the Act, but it really can't stand with later cases. I think it went to the Court of Appeal but was then compromised from the authority's point of view - the client was compromised, but not the case.

The next case was *R (Jakimaviciute) v Hammersmith & Fulham LBC* and the main point there was that you couldn't get out of the reasonable preference duty by saying: Oh, but we're saying who qualifies, rather than what the reasonable preference is, and that happens before the reasonable preference kicks in. The Court of Appeal said: No, that's not right. When you decide who qualifies the reasonable preference duty applies to it. But the point for present purposes, and the point that ties in with what I've been saying about public law principles, is that the way the scheme operated was that if you were a homeless person - so that's a person to whom homelessness duty has been accepted, so someone within the reasonable preference categories - you didn't qualify. So in other words you didn't get any reasonable preference, because you didn't even get on to the list - as long as you were in what they described as long term suitable temporary accommodation, which seems like an oxymoron, but it was basically private sector accommodation, with some exceptions.

The Court of Appeal held that didn't give a reasonable preference because it created a sub group of a class who were entitled to a reasonable preference, ie the people who were in long term temporary accommodation, and that was impermissible because you were carving out a bit of the class that didn't have a reasonable preference, whereas you had a duty to give the whole of the class the reasonable preference. Now that's not a particularly revolutionary bit of reasoning, but the reason why it's interesting is because it's not the kind of argument you would expect to have found favour given the earlier ways in which local authorities had been given huge discretion about framing their allocation schemes before the Localism Act changes, and if this had been put as a pure reasonableness argument it wouldn't have stood a chance. The reason it was able to get through, and the reason the Court of Appeal accepted it, was it was possible to reason it as a legality challenge rather than as a reasonableness challenge, by saying that it didn't meet the conditions of the statute. The later cases have really been testing the boundaries of that and they've come to some conclusions which probably do push right at the boundary.

The next case is *R (Alemi) v Westminster* which is a case where again the claimant was found to be owed the full housing duty, was placed on the register, but the allocation scheme said that we pause giving it to you, in effect, for 12 months. The idea behind that was to encourage flexibility, and so on, but again it was held that that was carving out a class, so in other words the class of people who have

got reasonable preference are those who are homeless. These are people within that group and you've said for some of them: You don't get a preference at all. Now again the local authority probably had quite a good argument because they said: No, that's looking at it too narrowly because you should look at reasonable preference over a period of time. The truth is no one will be housed within 12 months, and the reality is that if you look at the whole scheme and how it operates over the whole period then you do get a reasonable preference because you come back after 12 months and then you can bid. But that was rejected, again because the court was persuaded that this was a legality point, not a reasonableness point.

The next case, *R (HA) v Ealing BC* is one which really asks you how far can that argument go? Because that was a case where HA moved to Ealing to escape domestic violence and she fell foul of a five year residence condition because she'd just moved into the area and there were some unspecified exceptional circumstances, but it was held those couldn't save the provision. But the Judge accepted a challenge to the effect that if you frame the policy in that way then it doesn't give a reasonable preference, because some victims of domestic violence simply won't be able to meet the five year criteria because they'll have moved into the area and those people will be people that will be homeless. Therefore there's a category of people who are entitled to a reasonable preference who don't get it.

Where that reasoning leads is potentially very wide indeed. Because the previous two cases are ones where you say: Well we've got the class, and we're taking some people out of the class, and so it was directly saying we're taking some people out of the class. This one's different because what this one's saying is: Well it's a condition we're applying to absolutely everyone. It just so happens that it hits some people in some of the classes. If the reasoning is right then it means that any condition like this becomes very very difficult to justify indeed and it threatens, in one sense, to undermine the entire exercise, particularly when you think about how wide the reasonable preference categories are, because they include people who are homeless. Not people who have been accepted as homeless, or to whom a duty is owed, just people who are homeless within the meaning of the Housing Act. It includes people who are otherwise living in unsatisfactory housing. It includes people who need to move for welfare reasons. Once you get those three categories together you've practically caught everyone who comes within a housing allocation scheme anyway.

So it then means, well, how do you apply categories like this? So it's a case that really tests the boundary between whether it's all about reasonableness in deciding how you frame the scheme, or whether it's about the legalities of the scheme. The Judge was persuaded it was legality and it's a case that was obviously helped by the fact that the facts were extremely sympathetic, and certainly if there's one point I'd make it's that if you're taking the case forward then it's one where we don't want these kind of arguments to be devalued from overuse. It will be important to try and pick your cases if you're trying to push this forward.

The case was also held to be unlawful because of indirect discrimination, but interestingly, also, a challenge under the Children Act succeeded and, again, the passage that I cite in the notes shows just how searching the court was prepared to be. So it says: "there is nothing to show that the defendant made arrangements to ensure that it discharged its functions having regard to the need to safeguard and promote the welfare of children either in terms of formulating the policy or, more particularly in applying it to the individual circumstances". So, again, the burden is on the authority there to show what they had done.

Then the final case is *R (H) v LB Ealing*, which is again was an indirect discrimination case where there was a scheme that limited 20% of available lettings to people who were employed at least 24 hours a

week. That indirectly discriminated against people who found it difficult to access the labour market. A legality challenge wasn't run in that case but various discrimination challenges were and the discrimination argument succeeded. I won't deal with that. Also, though, a challenge under the PSED succeeded and, again, it's useful just to reflect on the way in which the court dealt with this and just how searching they were prepared to be about the kind of evidence that needed to be put in. The same point can really be made about the Children Act point, which is that there appears to be no actual consideration of the interests of children in this context. All the defendant said was they're aware of the s11 duty, but that wasn't enough.

So the way that discretions are structured gives with one hand and takes away with the other. It potentially makes it more difficult because it gives these wide powers to local authorities to arrange things as they see fit, but in the course of doing that there are a series of actions they have to take which they quite often fall short on and that's really where the potential for judicial challenges can come in.

Chair: Thank you very much indeed both our speakers for those very interesting and helpful talks and for their papers. Do we have any questions from the floor?

Connor Johnston, Garden Court Chambers: Question for Martin, directed at paragraphs 10 and 11 of your paper regarding the suggestion that following cases like *Kennedy* and *Pham* that the court should be paying rather closer attention to decisions involving important subject matter. I've always been a bit shy of trying to advance that argument in the homelessness context because of what Lord Bingham said in *Runa Begum* where he really dismissed the idea of paying anxious scrutiny in homelessness cases, which I thought was ab it harsh, but that did appear to be what he said. So I was just wondering how you think the cases you've cited there marry up.

Martin Westgate QC: Well, the *Runa Begum* decision was in the context of Article 6 where he's saying Article 6 doesn't demand it. Obviously he wasn't then saying: but you can get there under the common law, but I think the point there is that was before all these later developments like *Pham* and *Kennedy* and there is a speech by Lord Sumption that deals with same point, and so the understanding of the limits of judicial review has moved on from there, even though it's only a few years ago. The *Begum* point itself is one which will be up for grabs in *Poshte*, because *Poshte* is a suitability case where somebody found the accommodation reminiscent of where they'd been imprisoned. One of the issues is just how intrusively you should look at the decision letter, and very shortly after the application was put in for the Supreme Court the ECHR, in effect, reversed the decision in Ali and decided that suitability decisions did engage Article 6. So one of the questions the Supreme Court has asked is: Does that mean that we have to look again at the place of Article 6 in homelessness?

So *Runa Begum* will be up for discussion anyway, but in the meantime I think you're entitled to argue that the reasoning has since moved on and is now more nuanced. The difficulty is that the arguments do tend to be ones that run in types rather than looking at the facts of individual cases so, for example, certain kinds of decision will be treated as engaging principles like some trafficking decisions, some right to life decisions, information decisions. Although quite wide, whether those have a greater priority than homelessness decisions is unclear, but if you're looking at it in terms of types rather than individual cases that's where Higginbottom says: Well homelessness isn't that special, which is dispiriting and it's may be that it's committing the error of confusing frequency with importance. Just because it happens a lot doesn't mean it's not important.

Chair: James, I would like to ask you about your experience of getting legal aid under the discretion where you haven't got permission, you haven't fallen under any of the set rules, but you've asked for it under their discretion. Is that something you've done and, if so, have you had much success with it?

James Harrison: Happily I haven't had cause to do that because if I've had cases they've been able to be settled favourably with costs orders so I do not have any personal experience with it I'm afraid. I don't know whether other members of the audience have and whether they're brave enough to share those experiences.

Contributor: I've had it in one case and essentially the JR was taken over by events and became academic. We put in fairly detailed representations and the LAA did agree to pay it, but that might be a one off.

Martin Westgate QC: Well certainly when we were doing the Ben Hoare Bell case the impression you got was that they were expecting it to be very limited because it would very rarely be the case that new facts emerged that you didn't either know or ought to have known beforehand. Of course, we all know that that's completely unrealistic. The companion question I'd have is: How far the rules are, in effect, changing your behaviour. So for example what the rules are intended to do with the discretionary payment is that you put your application in, you undertake due diligence, which of course we all do, but if new facts come in, saying: Push it to the hearing anyway and see how we get on. Which will mean that you might then lose, you will then withdraw and throw yourself on the mercy of the LAA and I just wonder, is there a pattern of that happening, or do people tend to just press ahead anyway, or does it just not happen that frequently? Are people taking fewer cases now do you think because of the risks? No to all of those it seems.

James Harrison: My comment on that would be if you put a number of factors together that is the end point that you get to. I mentioned earlier Means Enquiries, which I think I highlighted last time I was here. It's still an issue so I think right from the process of applying for legal aid, through to the issues over payment with no permission etc, I think there is a gradual erosion in the availability of legal aid for these cases and, rightly, a greater caution in bringing these cases.

Martin Westgate QC: Because, again, one of the issues was that it's having this huge chilling effect and will to mean that people are so cautious that they won't take good cases as well, and good cases will fall down. The answer to that was: Well where's your evidence? Which of course we couldn't have at the time because they'd only just brought in the regs and we couldn't tell how people would behave, but it sounds like we haven't got the evidence now either, because it is so incremental, isn't it?

James Harrison: Yes, and the extent to which organisations are actually swallowing the risks. They're paying the court fees. They're doing pro bono stuff. They're making up the shortfall.

Desmond Rutledge, Garden Court Chambers: I'm interested in Martin's views on the possibility where legal aid is bogged down, they're asking for your means again and again, and a deadline is there. The suggestion is that one might be tempted to put in a quasi-protective claim to rebut what was being said in that court of appeal decision - how do you think that would go down with the High Court? And what would it look like?

Martin Westgate QC: I suppose what it looks like is fairly easy because you would exhibit all the correspondence and you could probably have just a couple of sentences saying you disagree with the response of the complainant, if there has been one. If there hasn't been a response then it's fairly

easy, you just say our claim is good for the reasons set out in our Letter Before Claim. But as to how it would be received, actually nothing in the rules says that you have to front load like this. Although I suppose a Part 54 claim is a Part 8 claim and so you're expected to have all the material there. In one sense it would call the Court of Appeal's bluff to do it, because they would then have to say of a group that is, by definition, likely to be vulnerable, that they should not only take the initiative in bringing the claim but also take the initiative in fully arguing it out. So I suspect that quite a lot of judges in the first instance would be quite receptive to it for at least two reasons. One is that the admin court would be delighted if you issue a case and then say, but we don't want you to do anything about it for a bit, because they've got so many to do; and similarly the judge would be delighted to have a case that was properly pleaded and with representation if legal aid is granted, rather than having a litigant in person coming along.

Desmond Rutledge, Garden Court Chambers: So, in summary, before I have legal aid you would be persuading counsel to do a fully pleaded claim and hoping that the officer of the admin court would not throw it out, accept it, give it some sort of stamp, even though it's all a quasi-claim?

Martin Westgate QC: If you get counsel to come along and just draft the claim anyway then, subject to the client being able to get a fee waiver, you just issue that, but what I understood you to be suggesting is that you just put in a blank claim form saying here's our Letter Before Claim, details to follow.

Desmond Rutledge, Garden Court Chambers: When legal aid's granted

Martin Westgate QC: Yes exactly. It serves a purpose of telling the authority that you really are serious about bringing the claim. So they can't complain that they've acted on the basis it's not going to be challenged.

Desmond Rutledge, Garden Court Chambers: And quote the Court of Appeal authority

Martin Westgate QC: Yes. Certainly one point that did occur to me was that, and it may well be again that what *Kiden* doesn't deal with, is issues like protected characteristics in the public sector equality duty because they have a duty to act in a non-discriminatory way themselves. So if you have, for example, a client who either for reasons of language difficulties or disability can't put the claim together themselves then that's something they ought to be taking into account as well. It may well be that a case that is properly put together like that, if it went up, would produce a different result. It does seem to me it's a case that's absolutely right to go to the Supreme Court, particularly where, in the Supreme Court, all you've got to do is say we're applying for Legal Aid and it's stops time running. It just seems bizarre that in the lower courts you can't do something similar.

Chair: There is also arguably inbuilt mechanism in the CPR for issuing protectively in that you have seven days after issue to serve the claim form. I've applied that in the past to mean that you can issue a very brief claim form and then put it together and serve it in more detail seven days later. That may not be of much practical use because it is only seven days, but it is something I've known to be used in the past and I've used it in that way.

Martin Westgate QC: Well you can always get an extension of seven days. And in fact isn't that one of the things you can agree with the other side, so you can't agree a three month extension, but you can agree seven days?

David Foster, Foster & Foster Solicitors: We still do try and issue JR proceedings where necessary for homeless applicants but it's all about risk now so you have to consider risk all the way through and try and evolve strategies to minimise that risk. We tend to use investigative representation a lot and front

loading rather than legal help. This morning we had an appeal decision upheld by an independent costs assessor where we'd spent two hours preparing a judicial review pre action protocol letter in a very complex case of a young disabled man sleeping in an electricity cupboard who'd had an adverse s282 decision and who, as a result of that letter, was provided with accommodation pending the outcome of a review. We were told that two hours was excessive and 30 minutes only was allowed for such a letter. That's why we started to use investigative representation in that situation, and possibly get counsel to settle the letter.

So that is by way of information exchange. My question is, if you don't have a public law contract, and you only have a housing contract, how can you use it on welfare benefit cases? In particular, if you're in possession proceedings and there's an outstanding housing benefit issue where the only remedy is judicial review, can you use your housing contract to bring that judicial review claim? Or, for instance, if there's a discretionary housing payment outstanding and the only remedy is judicial review.

James Harrison: Thinking aloud, if your claimant is the local authority and it's their housing benefit department, presumably you could construe some sort of public law defence in relation to their unlawful dealing with the housing benefit claim or not dealing with it. If you don't have that happy coincidence and it's another social landlord that's more difficult. Don't know whether you've got any suggestions? I can't think of anything immediately.

Martin Westgate QC: Not unless you can make it into a defence in some way.

Chair: You may just have to refer them to an organisation that could deal with that part of it.

Martin Westgate QC: What would happen in the housing claim if you have a Part 20 claim against somebody else? Does that fall within?

Chair: If it's a counter claim which is a defence, then that's covered. I think personally there's some ambiguity over whether it's covered where it's a counter claim that's not, strictly speaking, an offence, but certainly I've been told by the LAA that it's not covered.

Martin Westgate QC: Maybe you could think of a remedy that you could pursue by way of a Part 20 claim. I suppose the difficulty would be in the county court, but the only reason you have to go to the high court is because of all these procedural exclusivity rules that have now gone out of the window by and large.

James Harrison: I certainly have a case brought by a private landlord who is in business providing temporary accommodation. The background is a discharge of duty by Newham, who have been joined as the second defendant. One of the arguments we are running relates to the unlawful dealing with the housing benefit claim in that they stopped claiming the housing benefit when they discharged the duty for no good reason it seems. So maybe that goes some way to answering your question David.

Chair: I have a case as well where I have brought a Part 20 claim in the same proceedings against a third party to whom we paid the rent and they were saying we should have paid it to someone else, and that was covered, but I appreciate it doesn't really help if it's a public law point against a local authority.

Simon Mullings, Edwards Duthie Solicitors: Returning to the protective judicial review point, just to note that because legal aid grants costs protection as well as remuneration there is a whole ecology of risk involved. If a protective claim were to be issued, it may be appropriate to think about whether it's necessary to write to the other side saying this is what we've done, please don't do anything.

Martin Westgate QC: James mentioned the guidance referred to in the Ben Hoare Bell case. I haven't checked whether it's been updated but of course that's the guidance before it was quashed, so the points about still being at risk on rule of hearings obviously don't apply. I wondered whether the bit about being at risk, whether once you issue you're not retrospectively at risk, so in other words all the work you've done preparing you ought to get paid for anyway is the point you make clear. I don't think this really comes out from the guidance, but that is the way it works.

James Harrison: Curiously they seem to have updated the pro forma letter that I refer to on 26 March with unnatural efficiency but, yes, I don't know what's happened with the guidance.

Chair: So we're starting to segue into it anyway but we will move onto the information exchange part of the evening. Obviously since the last meeting we've had two Supreme Court decisions in the area of housing and referendum. Has anyone any thoughts on those decisions or on anything else, any cases they've been dealing with that they wanted to discuss?

David Araya, TV Edwards: I would like to mention two points. The first was just following up on what James said, at the end of his helpful talk, about limitations. We've had this problem as well with making CCMS applications where the limitation isn't there so it's quite reassuring, or not perhaps, to know that it's a general problem. We called the LAA and they said it's OK, just put in the box the limitation that you want that isn't there, which we did, and it did actually work, so perhaps that might be a better way of dealing with it if you call the LAA first and get the person's name. Although we were first told by two people that you can't delegate functions for JR work, we got there in the end.

The other thing was in relation to the *James v Southwark* water rates case, I see that Southwark have finally agreed to make payments going back to 1 April 2001. I wondered whether anyone has experience of other local authorities or housing associations? It seems as though something like 68 or so have similar agreements with Thames Water. I haven't had any progress with litigation myself. I know that Islington are keen to have a test case and I understand also that Greenwich and Wandsworth have had recent agreements, but if anyone else has any sort of experience that would be helpful to know.

David Foster, Foster & Foster Solicitors: On the *Jones* water charges case, we have a case, *LB Haringey v Patel*, where the tenant has very substantial rent arrears but there's been a water charges element going back more than six years which could be defended against where we're thinking of running the argument. I have no doubt that Haringey will have similar arrangements as Southwark. It appears to me that this probably applies to all London boroughs and that it's a defence that should be investigated in every case, and in particular in a case like this where we have to do everything possible to reduce the arrears.

Martin Westgate QC: Following on from that, you're right that there are a lot of authorities that just seem to have copied the same agreement so they still have the Southwark agreement. But even if you haven't got that, and it's a Thames case, and it may be for other water undertakers as well, the decision wasn't just on the agreement, it was also on the basis of the charging scheme for some of the issues going back, so even if you can't get by on the agreement you may still have a point under the charges scheme.

David Foster, Foster & Foster Solicitors: Going back to the last meeting, is there any report from the Executive Committee about a meeting that was coming up to discuss with the Legal Aid Agency the contents of the future housing contract?

Sara Stephens, HLPA Executive and Anthony Gold Solicitors: I had a meeting with the LAA. They scheduled an hour meeting to cover a number of different areas of law so it was obviously insufficient. They turned up with a load of proposals, most of which didn't sound very viable. I know other HLPA members attended the meeting. We told them why all of their proposals wouldn't work and they told us how unhelpful we all were. They've agreed to have another meeting if they come up with anything better but basically they haven't worked out what to do.

The issue we're having is that the contracts are working, as much as they can do, in urban areas, but they're not working in rural areas where there are massive advice deserts. Their proposals to deal with that are to have effectively super contracts where one provider would manage a contract in a very, very large geographical area, operate remote advice sessions etc, and subcontract out to other local providers where appropriate. We've advised that they need to look at more flexible options for rural areas where they are struggling to get people to maintain a contract but those kind of contracts are not appropriate in London and other urban areas because that would just result in one provider sweeping up the contract and only giving away the cases that they didn't want.

Chair: Thank you again to our speakers and thanks to everyone for coming. The next meeting is on 21 September on the topic of Possession Update.