Housing Law Practitioners' Association

Minutes of the Meeting held on 15 March 2017
University of Westminster

Defending Possession Claims

Speakers: **Andy Lane, Cornerstones Barristers**
Ian Loveland, City University and Arden Chambers

Chair: **Simon Marciniak, Miles & Co Solicitors**

Chair: Good evening everyone and welcome to tonight's meeting which is on the topic of Defending Possession Claims. Firstly I would like to ask if anyone has any corrections or amendments to the minutes of the last meeting. If not, I will introduce tonight's speakers. Ian Loveland is Professor of Law at City University and a barrister at Arden Chambers. He's written many seminal and influential articles on various topics, including Landlord Liability for Nuisance; Challenging the Rule of *Hammersmith and Monk*; Procedure and s2 Reviews and many more. Tonight he's going to talk about defence in survivorship and second succession cases.

Before that, however, we have Andy Lane of Cornerstone Barristers. Andy specialises in Housing Law. I'm just going to quote from a couple of quotes from Chambers and Partners 2016: "His management of the case and the way others defer to him is wonderful to watch. You're always glad to have him on your side. Without doubt one of the best social housing juniors out there." So we're very pleased to have Andy on our side tonight and he's going to talk about defences, the Dos and Don'ts.

Andy Lane: I think this is my third occasion here and it is a privilege. Obviously although my work at present is almost exclusively in possession terms for housing associations and local authorities, one never knows and it's also good to get an idea of what's happening on both sides. Also I'm now a reviewer of the Bar Pro Bono unit so most of those cases that come through the unit obviously are about tenants, so it's always helpful to get an idea of what the current thinking is.

Going first obviously is great because it means I can steal all Ian's good lines: The last time I was against Ian – I've told him I'm going to tell this story – it was a possession claim in Cambridge. I was for the local authority. I think it was just a standard Grounds 1 and 2 anti-social behaviour trial against an elderly gentleman in his 70s who seemed to have an interest, or at least a predilection, towards prostitutes. The neighbours weren't too keen on some of his visitors and there were also drug issues etc. Although it ended up with an SVO, because he clearly was guilty of breaching many terms of the tenancy agreement, I think probably – I don't know about Ian, but probably for me – the line of the trial was hearsay witness evidence of somebody who said they were bothered by all these prostitutes around and that they heard lines such as: That was never worth £51. We did have a little debate as £51 seems a very precise figure, but I think we fixed upon the idea with the judge that that must have been VAT. But anyway, very interesting case, although perhaps in a legal sense not particularly earth shattering given the clear breaches of tenancy and clear satisfaction of Ground 2, and the clear inability of the defendant in that particular case to really defend that, but obviously promising to stay in future in a way that wouldn't allow prostitutes into the building.

Now obviously, as I say, I come at this very much from a landlord perspective because that's where my work is. I actually started out, as some of you will know, before coming to the bar at a mature age, working for the voluntary sector and then working for the CAB service for tenants and doing a lot of pro bono work, a lot of lay advocacy work particularly in the Oxford and Banbury County Courts. I was also a local authority Councillor and sat as Chair of Housing on Oxford City Council as well, so I had that wonderful idea of both saying to the Director of Housing: You shouldn't do this, and him saying to me: but that's your client, isn't there a conflict of interest? Which of course there was.

But I'm going to just give an overview of my analysis of what I've seen when I do possession claims in terms of the defences that I'm faced with and the client is faced with. I've phrased it *Common Defence Errors* not in any insulting or pejorative sense, but just that there are certain things – and obviously some are just things I would do differently – which doesn't mean they're wrong. But there are some things which are just simply wrong and you sometimes sit there thinking: Thank God they didn't do that, because that would have been our weak point. And the section where you will have to forget at the end of the evening, in case you're ever against me, *Improving Prospects of Defence*. I will hopefully give some ideas, and I suspect most of you will have these ideas already, but it's just about reaffirming what perhaps we already know.

So looking at an overview, and again this is fairly straightforward, there are many cases where there is no credible defence. By that I mean – there are not many of them I hasten to add, but you'll get some – for example subletting cases where it's so obvious what has happened. To give you one example, I represented London & Quadrant in a case in Bromley where the gentleman had a one bedroom flat but he also had several other properties which we found out about, including one that he owned, and he let out the property to a student. We had the tenancy agreement. He said at the first hearing: Well, yes, I accept I'm letting out the property but she has the bedroom and I live in the lounge. But he accepted that he let it out. I said to the judge, more just out of interest and fun, do you mind if I ask a couple of questions? The Judge said: Yes fine. I said to the gentleman: Well is this tenancy agreement the one that you gave to the tenant? He said: Yes, apart from I didn't sign it. That signature's not mine.

So then I said to him: Well, OK, that's fair enough, I'm not worried about that, but look at the address you've given for yourself – it's not this one. On this Agreement you're saying you're living elsewhere. Now as it transpired because obviously of the powers of landlords, particularly of local authorities since the Prevention of Social Housing Fraud Act and, of course, they have certain of these powers anyway, we managed to get his bank details which clearly show every month, going into his account, the name of the person and he aptly called it rent. We knew that two people were living there in this one bedroom flat. He didn't actually turn up for the trial because his friend came along with a bottle of pills, not the alcohol Pils, and said he had a sporting injury which mean that he couldn't sit down. But those kind of cases – I hasten to add he wasn't represented by any legal presentation – are hopeless. There's just no defence to that kind of thing. He's clearly subletting. He's clearly committing a criminal offence, although we didn't need to prove that, of course, and there's clearly no point.

But what I tend to see because, as I say, in most cases there is some defence - whether that succeeds or not is another matter – is how important it is to do the work prior to filing the defence. I often feel very sorry for my opponents who have been given the case just before the trial because they've already had incomplete defences; they've already had inconsistent witness statements; they've already had witnesses perhaps who are the kind of witnesses you'd want to call; and it does seem to me – and I do appreciate when I say any of this that it's all very well for me to say that because if I want a conference I can have a conference – but of course I appreciate, legal aid being what it is it's not always possible. But it is amazing the number of cases where people very quickly realise from

their defence; or very quickly fail to realise, what they've put in a statement is not the same as what they put in their defence; or very quickly are exposed as being simply giving false information. A lot of that is about the ability to sit down with somebody – and I appreciate, again, time is another factor – and make sure that proper instructions are given. So in anti-social behaviour cases, let's be honest in most of those cases there is something in it. In most - I'm not saying all – but in most of those cases there is something in it. So, to give one recent example, this lady said that the problem was that one neighbour had it in for her. That was her evidence, her defence. She denied everything. There was just this neighbour who had it in for her. When I said to her, in cross examination: Well I understand that. Let's assume that's right. I've been through the papers and I've noticed 13 people who seem to have it in for you. Do you have a problem with these other twelve people? Oh no, just this person. And you think, well, it just doesn't add up. And sometimes, if you have the opportunity, you need to make sure that the most work that happens is going to be pre-defence.

It also seems to me that with anti-social behaviour cases and subletting cases in particular there is a story to be told. There ought to be a story to be told in putting that across. It's easy for the landlord – let's be honest it's a fairly straightforward process – we've got all the evidence on our side normally. There's got to be a story told to explain what are apparent inconsistencies and there may be a good explanation, but there has to be that explanation, and it has to be clear. Sometimes you're perfectly able to make concessions, able to accept faults, while still having a good defence and so many people seem to think that it's either all or nothing, and, of course, the reality is it's often not that. So many people, when I was doing defendant work, which I appreciate was some time ago, wanted to have a story as to what was happening. Why were there problems in this area; why where there no problems for the first couple of years and more recently there's been a problem; what was the story before that and really pushing that forward in terms of your submissions, in terms of your statement of claim, in terms of your witness statements, in terms of your final submissions, and having a consistent story that explains as far as you can. And, of course, making sure key evidence is available at trial.

The only or principal home trial I had yesterday, for example, I don't think anything would have saved the guy to be honest with you, but one of the questions I asked him was: Look, we say you're not living at this place, we say you're subletting part of it at least, but we're not so fussed about subletting. You say you're not living there. He said: Well I am living there. I said: Well all you've got is your say so and you've got a couple of mates – who, as it turned out, were just hopeless. Why haven't you got your wife? Why haven't you got your grown up daughters, whom you say live with you at this property? He just said: Well, one of them's at the back of the court. Well, what's the good of that? It's too late – we're at trial. I didn't know we needed a witness statement. Well you knew you needed a witness statement for your friends, but you didn't know for your daughter – it just didn't make sense. But he was represented, of course. So it really is important to have that evidence available at trial and, of course, that applies to landlords as well. Quite often, as you'll see, there is often information that isn't available which the landlord ought to have but they don't have.

Incomplete instructions – well again I think often you see it's clear that you haven't been able to get instructions – so many things are not admitted, you know, if for example we take an ASB example, if I'm being accused of shouting abuse at my neighbour I should be able to say whether that happened or not. People who say things like: Well that's not properly particularised or nonsense like that – well look, either I shout at people or I don't shout at people. It should be fairly obvious if I do that kind of thing. And if I don't behave like that I should be able to say: Well I don't know what you're talking about but I don't do that kind of thing. It is about making sure you have good instructions – which goes back to the fact about the hard work happening before the defence.

On a more specific thing which Ian may deal with so I won't deal with it to any great extent – this is purely in there because it's a bugbear of mine. Equality Act issues are often badly pleaded but in particular reasonable adjustments are an incredibly important factor, particularly when it comes to policies etc. and whatever. Just as indirect discrimination under s.19 is a very, very important power and duty.

But people often just bung in "reasonable adjustments" because they're going through the list aren't they? I've even had them saying: Oh, we're going to go under s.13, s.15, under s.19, under s.20, under s.149, and you think: Well which one is it? Direct discrimination. Is it really direct discrimination? It's very rare you're going to get that. With reasonable adjustments, remember, there must be a request. When was the request? Hopefully you plead it but of course normally there isn't a request. Now it may be that the pleading is the request, and maybe that's a fair point, but at least there ought to be some acknowledgement that if you want a reasonable adjustment there needs to be a request by or on behalf of the individual. The other point that really gets me is when people say things like: Well there ought to be a reasonable adjustment, and the reasonable adjustment is that this person should be able to move. Well of course the reasonable adjustment is to enable the person to enjoy the premises. I don't see how you can enjoy the premises if the solution is to move. It's not a reasonable adjustment. It may be something else. It may be there elsewhere in the defence, maybe even a public law defence which I always think is a more impressive pleading, but it's not there.

Inconsistent pleadings – the obvious example is: I deny I did any of these things, and then you put in s.15, disability discrimination, which is almost like saying: I deny I did them but if I did do them it's because of my disability. So which one is it? Unless your disability is amnesia, which one is it? There ought really to be some consistency and, although judges are fairly lax about that, I remember District Judge Jason before he retired refusing to accept a defence because it had that inconsistency, because we just said: Look, can they make their mind up? Do they deny that he did it, in which case it's a perfectly good defence; or say, look, OK, some of these are true but that was because of my disability, or at least exacerbated by my disability. At least be clear about what it is.

Credibility of position. There are some cases – and, of course, I'm primarily talking about ASB cases, where a possession order is inevitable. We all know those cases and I've spoken to some of you at court and we all accept, fair enough, the possession order's not the point, it's whether it should be suspended or outright. And sometimes that's properly put in the pleading itself, but it always seems to me that it's a much more credible position when people come up with a certain degree of honesty and say, yes, we accept a possession order should be made, but it shouldn't be made outright because this person does have evidence that things will improve and that should be accepted. I always think that's better to be put as early as possible.

What I call overpleading – I've dealt with the Equality Act. Incredibly important piece of legislation but merely quoting sections of it doesn't really help. If you want to quote the Public Sector Equality Duty, I remember District Judge Bloom at Willesden, when we were clearing this estate for Barnet and we were moving all the tenants to another property, saying to my opponent, who had all these Public Sector Equality Defences, amongst other things, well let's say you're right. What difference would it have made? And it's about trying to think things through. There may be a very good Equality Act defence. There may be a very good Public Sector Equality Act Defence, but it's got to be thought through and it's much better if it's thought through rather than just put down there as a piece of standard pleading.

I've included Why is Article 8 pleaded? Public law in general I think is a much better defence than Article 8. Article 8, let's be honest, is not going very far is it. It means you get people like me who

just bore everyone silly by saying Thurrock and West, here's Etherton saying all these things. Apart from the cases that hit you between the eyes it's going to be very difficult to really push a credible Article 8 case. So why is it being pleaded? If in fact, for example, the landlord has breached its policy, well that's your defence. It's a breach of the policy. Yes, technically it's also Article 8 because it's not in accordance with the law, but it doesn't actually add anything to the case particularly, so I sometimes think, again, like the Equality Act, there needs to be some thought as to why Article 8 is being pleaded. It is certainly engaged – I don't dispute that – but as we know it adds nothing really to a discretionary ground claim (there are plenty of authorities that make that point) and with a mandatory ground claim it could be important but it has to be thought through.

I've finished off on this section by just talking about clarity of public law defences. As I say, I'm a big fan of public law defences – it sounds odd I know – because it does seem to me that those are the better defences. What is the landlord doing? Why is it doing it? Who made the decision? Why did they make the decision? What basis did they have? What information did they have? A whole raft of information that obviously you might want to get in cross examination – you might want to get in disclosure – but those are going to be much better defences. I always remember being against Matt Hutchings – I say against, I've been beaten by Matt Hutchings comprehensively - and every time I try to mention some Article 8 case he'd just say to the judge: Oh I'm not talking about Article 8 I'm talking about public law, and he was, of course, right.

So public law defences are important and I say they're certainly, in my view, probably the main importance in a lot of these mandatory ground defences. It's all very well saying all that, but is there anything that we can learn from that in terms of how to improve prospects of defending these proceedings? Most of this is fairly obvious stuff. It's just reminding people I think.

Considering policies. Now obviously, as we know local authorities and housing associations or any registered provider have to have, by law, a policy on anti-social behaviour. They don't necessarily have to have a policy on vulnerable tenants or whatever, but they have to have a policy on anti-social behaviour. But they may have policies on other things and the obvious one that I'm sure Ian will deal with is succession. In other words a grant of new tenancy. They have policies and of course what is generally said is that if you have a policy you should follow it. It's not really about legitimate expectation. We had that issue in Weaver when it talked about public law responsibilities of a housing association and the notion that Christine Weaver had ever read the policy. But we don't need to go to legitimate expectation, because if you have a policy the courts, and I know this is in very broad terms, I think it was *Mendoza*, but they talk about if you have a policy you should follow it. We know from *Barber and Croydon* it doesn't mean that you can't get a home because you may start again - because in Barber and Croydon remember they dismissed the possession claim because Croydon hadn't followed their policy in terms of people with mental health issues because they hadn't referred - but they'd also made the point right at the end of the judgment that there was nothing to stop Croydon coming back once they had complied with that policy.

Although, of course, if you've got somebody, let's say, with a starter tenancy, or an introductory tenancy, it may be too late because by the time you did all that and come back they've automatically been converted into an assured non-shorthold tenancy or into a secure tenancy. But policies are very important. They ought to be disclosed as early as possible. They ought to be obtained as early as possible. And if there is an objection to how these matters have been followed that ought to be pleaded, if at all possible.

I also ought to mention the was a case of *Southern Housing Group and Aherne* . They were very excited about this idea that you can't *ipso facto* correct public law errors, and I'll go on to explain a

little bit about that, but apparently it fell at the first hurdle in the sense that they found that broadly speaking the policy had been complied with. So it would be really nice to have a case that says: Can you do anything if you have. So, for example, if I'm a housing association and I've not completed my policy in some way and I should have done X, Y and Z and I say to you well we haven't got to the final hearing yet, we'll do it now. We'll have a review now of whatever it is that I'm meant to have a review of. Can I do it now, or is that too late? That was one of the arguments in Ground 2, I think, relating to *Southern Housing Group*. The Judgment is still awaited.

So policies are important and it goes back to what I was saying about public law is important. You have to follow policies. It's not about legitimate expectation, don't worry about all that public law nonsense, it is about following your policies.

Equally disclosure - and there is an error included in my handout – it's not 32, it is 31. 32 is, of course, about evidence and the CPR, 31 is about disclosure.

Let's say in a subletting only or principal home case, yes you've got some evidence, of course, from the landlord, but maybe there's other evidence which they haven't disclosed, or maybe there's third party evidence that maybe it's not housing association or the local authority that's got it but maybe it's a third party that's got it. I'm not saying it's going to be a common application, but you are entitled to consider applications against third parties for disclosure. You are entitled to say to a landlord: Well we've got your disclosure list but it doesn't include X, Y and Z, and if they don't do it you put in an application, and if they don't comply with the application you can get the claim struck out. I'm not saying that's easy, but these are things obviously that you need to think about when it comes to disclosure, and whether there's been sufficient disclosure. Because in my experience, particularly housing associations, they don't hide things. But of course, they don't always have the most efficient systems in place, and it's amazing what you find out from your clients when you get to trial.

Witness statements - massively important. The first one is me being massively pedantic. You know that little thing at the top right hand corner of witness statements – probably in a different font size, but could we put it in there. It's what's meant to be there, telling you who the deponent is, what date it is, whether there are any exhibits. It's meant to be in the top right hand corner. And also, in terms of witness statements, particularly if you've got a lengthy witness statement, subheadings are good because it makes it clear. For example, from the housing association point of view, I'm now dealing with what efforts we made to deal with this matter short of court proceedings; I'm now dealing with what efforts we made to investigate the defendant's complaints; I'm now dealing with what efforts we made to go to mediation, or whatever it is. I can put a subheading in and the judge can immediately go there.

There is also, of course, the ability to serve a notice on the other side to admit facts, just to try and narrow the issues. That may not be particularly relevant but it may be helpful in a subletting case or whatever in terms of, for example, I mentioned the case yesterday. We, in theory, had a subletting ground but, as I made clear to the judge at the start, I'm not pursuing that. You know it's clearly nonsense. We were saying he's keeping all these wild birds in his flat so he was keeping them in his flat, and he had someone staying in one of his three bedrooms. So we were saying, yes I can't really go for subletting because of course they're his birds and he's obviously using the bedroom for them – but I was going for only or principal home which is what we succeeded on.

Remember Part 18, request for further information. You could do that at any stage, normally after the defence, sometimes after the witness statement. There may be information that the person hasn't supplied which they should supply and, again, if you don't comply with that, if you don't supply

the information requested if it's relevant the court can make an Unless Order which may be appropriate. So if you are having difficulty getting information out of the landlord that's a possibility.

More importantly, perhaps, in terms of what we're talking about is witness handling, obviously who to call, most importantly who not to call. Yesterday, why on earth call those two witnesses? The guy knew the man for 30 years and yet when I said to him about the mother of the man's children he didn't know. I mean we thought the two wives were actually one and the same person, and I suspect they were. But he didn't know. And: Have you ever been in the flat. No. Known him 30 years? Clearly lying. I positioned myself in between the witness and the defendant so he couldn't look at him and made it clear to the judge that he was trying to look at him. It's pointless calling those people, it damages the case.

Of course, remember that I think often there's a case. I can certainly remember one succession case where I'm sure they would have would have won if they hadn't given evidence. If they hadn't called anyone. Because our evidence was circumstantial. The tenant, we said, who was Vietnamese, had gone to Vietnam – the dates aren't exact – but he'd gone to Vietnam in 2004. We said he'd moved there. He had a partner there, he was in his 70s, so he'd moved there, but we had no evidence of that. They said No, he's on holiday he went there every couple of years and obviously there's no point going for a week, he went there for an extended period. Perfectly reasonable explanation. They didn't tell us about it until about eight years later because they said we didn't know he'd died. And they were trying to find out what was happening to him and it took about eight years and then finally when they found out he'd died after a couple of years they told us. I remember the first trial legal aid had been pulled, so I had these Vietnamese witnesses who couldn't speak English with what was then DJ Parfitt saying: What am I meant to do Mr Lane? They don't understand you. What am I meant to do? But he also said – do you really want to pursue this claim? I'm not saying you have to withdraw, but do you really want to pursue it because it seems to me all you've got is supposition? Was he there on holiday – in which case if he was his daughter in law could succeed. If he wasn't there on holiday, he'd moved out there, of course the security of tenure was lost and there was no succession rights.

The only reason we won was because my opponent called the defendant and her brother in law and I was able to say to the judge – here are the thirteen inconsistencies. If this was legitimate why are there all these inconsistencies? In themselves not particularly important but thirteen inconsistencies, and we were lucky, we had DJ Backhouse. We managed to succeed. If they hadn't called the defendant there is no way we would have got over the hurdle and it was our obligation, of course, of being able to prove it. No way we'd have done that. So think very carefully about who to call and, in particular, remember 32.5 of the CPR where it's your choice if you've served the witness statements you have to tender that person for evidence if you want to rely on that evidence, but if you don't, you don't have to. Now the other side might then stick in an adjournment and seek a witness summons or whatever, but in theory I don't see why in certain cases it's not a good idea not to do that.

Witness Summons – We all know that's about saying why isn't this person giving evidence? I want them to give evidence. Who made the decision? It was my manager. Well I want the manager there to give evidence as to why that manager made the decision. Perfectly straightforward. Anyone can do that.

Hearsay – well of course hearsay evidence is admissible. It's a question of weight. Actually it's the 1995 Act. Civil Evidence Act 1968 obviously talks about convictions, I think, at s.11. Convictions obviously are evidence of the offence, but the 1995 Act talks about the kind of things which the court will consider when deciding what weight to give. And obviously the main thing they're looking at is: Why isn't the person here? You say they are scared to give evidence – why are they scared? This is

not one of those cases where you've got a bully boy tenant who's going round abusing everyone. It's somebody with a bit of loud noise. Why are they scared? Or: They don't want to be identified. Well if they really did spit in your face, they know who you are, so either it's true, in which case they know who you are and who must have reported it, or it's not true in which case it's a lie. I very rarely hear submissions on hearsay and I think it's probably worth looking at that and, of course, you're entitled to call the maker of a hearsay for cross examination.

I'm going to leave Public Law because I think a lot of this will probably be dealt with by Ian. I merely make the point with these cases that there is a view, and people often use *Barnsley v Norton*, of course, to say well therefore you can *ipso facto* correct matters. I think it's interesting that other cases such as *Taylor v Central Bedfordshire* and so on are not so clear. But I think that jury is still out and it may be an argument that still plays, particularly in mandatory ground claims, that if somebody hasn't followed their process, if they haven't followed the absolute ground review process they can't *ipso facto* do it. It's still an argument to be had.

Jones & Canal & River Trust. It's a more nuanced view we can take on Article 8. I must admit personally speaking I'm not convinced. It seems to me Article 8 was Article 8 and *Thurrock v West* is still good law, as confirmed by *Holley v Hillingdon*. The court, remember, has the power to restrict evidence, so if the local authority or housing association come up with a complete load of bunkum you can restrict it. You can exclude it. You can say that that's not relevant. You can say that that's not appropriate without any kind of hearsay notice. Whatever it is, you can obviously ask the court to control evidence if you feel it's not fair to your client to do so.

Lastly, of course, what you're looking at is cogent evidence in a discretionary ground case. We know from *Birmingham v Ashton* of course which is a kind of authority that people like me use all the time to say, well OK, yes, the burden's on us to prove we should have a possession order – that's normally the easy bit as it's not often in dispute – but then it's on you to prove that it should be suspended and, of course, we know that that has to be cogent evidence. And, of course, often if you've spent your trial denying things it's very difficult to know what your cogent evidence is. There is a certain opening in *City West Housing Trust v Massey* because that said things like, even if you're found lying there may still be cogent evidence. It says there may be things which a landlord should be doing – so for example if I've grown cannabis in my flat I promise not to do it again and I'm quite happy for the landlord to check that I'm not doing it – I mean you can normally see by infra-red, to be honest with you, but still. The arguments which they tried to get to the Supreme Court but failed - that that's unfair, why should the landlord have to go through all that monitoring and not the police service as it's a serious matter failed?

So cogent evidence. Again, so often you don't have that cogent evidence. In a case where somebody has a disability; in a case where somebody has an addiction of course it's a bit more obvious in the sense you may have something about medication, you may have something about counselling, you may have something that indicates that things may improve. It's a bit more difficult where somebody's just a bit of a recidivist and just out of control – not through any mental health problems but is just anti-social.

But at the very least, and I know someone who used to rough up his clients very impressively so that they always used to say, I'm really sorry, can I just apologise to my neighbours, and you think, well he's been spending all this process saying we're lying so and so's and now the person's going in the witness box saying; I didn't mean it, I'm really sorry. But trying to suggest that a bit of contrition may suggest that there is cogent evidence that what's happened in the past is in the past and therefore we can look forward to a more constructive future. But it's often not there in the evidence. It's often

pleaded as, you know, there shouldn't be a possession order but if there is it should be suspended, and sometimes you get a few bullet points, but actually it's not cogent evidence. It's just the person's been living here a long time -well, so what. It's not cogent evidence that things are going to improve in the future. Whether that's rent incidentally, same as rent, there comes a time at which you either pay your rent or you don't, and it's the same with ASB. Why is it going to be different in the future? Give me some reason why it's going to be different. The obvious one is well it's my son or daughter and they've left home, which is fair enough. But otherwise try and produce evidence which is cogent to show that this is appropriate.

Chair: We will now move on to Ian Loveland.

Ian Loveland. I'm going to talk briefly today to a couple of cases I've been involved in over the last couple of years, one of which is still ongoing in the High Court. It's called *London Borough of Haringey and Samawi* and it's a second succession case. The other is one that was due before the Court of Appeal last summer but shortly before we were down to be heard the landlord gave way and granted a new tenancy to my client and that's a survivorship case – *Heffernan* - challenging the decision in *Hickin*.

I will start here. So Will and Wilma – Dave and Davina – those of you who are a bit younger than me may not recognise this, but this is a council house and apparently between 1920 and 1970 we built quite a lot of these council houses. Anyway, early in the 1960s Dave and Davina and Will and Wilma both moved into these council houses. They weren't secure tenants then, of course, because secure tenancy regime didn't begin until 1980. Back in the day, as things often were the case, Dave and Will, being the man of the house, took the place as a sole tenant, although this story unfolds just the same way, as if each couple had taken as joint tenants. As years went on Dave and Davina had a daughter – we'll call her Doris. She lived with them in the house. She, in turn, had a daughter – we'll call her Debbie.

At the same time Will and Wilma had a daughter – we'll call her Wendy, and a grandson, Wally, and I suppose you can see the family resemblance and it's nature, not nurture, it would seem counts here. Then a bendy bus comes into my hypothetical story, and by cruel fate one day Will is run over and is killed by the bendy bus and Wilma succeeds to his tenancy.

Davina then divorces Dave. She has his tenancy transferred to her as part of the divorce settlement under s.24 Matrimonial Causes Act 1973. By even crueller fate, some years later Wilma and Davina are both run over by a new Routemaster bus on the way back from the cinema. And that, I think we can attribute to Major Johnson in his former political role.

So Dave and Davina's daughter Doris and their granddaughter Debbie; and Will and Wilma's daughter Wendy and grandson Wally are still in the council houses. Upstanding members of the labour party that their respective parents were, they never exercised the right to buy so the tenancy was ongoing. But Doris is a secure tenant and Wendy is a trespasser. They live next door to each other. Their circumstances, one might think, in terms of their wealth, their housing need, their personal history, exactly the same. But Doris is a secure tenant and Wendy is simply a trespasser.

The reason for that ostensibly rather peculiar dichotomy lies in the succession provisions of the Housing Act 1985 in relation to pre 2012, so pre localism act emphasis. Because there is, of course, provision in the Housing Act 1985 for succession on the death of a tenant, either to a spouse or to certain family members, subject to the provisions of Ground 16. But only, it seems, one succession. And under the scheme of the act the surviving tenant in a joint tenancy is also treated as a successor.

Except under s.88(2) if you are a tenant to whom the tenancy has been transferred pursuant to a s.24 Order you are not a successor, unless your spouse him or herself was a successor before you.

So, crudely put, this is the situation that the Housing Act 1985 creates. Your sole tenant dad leaves your mum by dying. She succeeds and then she dies. You can't succeed. But if your sole tenant dad leaves your mum by divorce, and she gets assigned the tenancy under the MCA 1973 and then she dies, you can succeed.

Now, for Will and Wilma's daughter there may be a contractual right to a second succession, although strictly speaking that would be the grant of a new tenancy. There may be a policy the local authority has which it hasn't followed and you could plead a breach of that, and it may be that there are various public law or Article 8 defences that you might invoke. And I suppose if you're fortunate enough that your tenants come to you before the dad dies you can advise the wife to go and divorce him in his hospital bed as he dies and get the tenancy transferred to her under s.24. It's rarely likely to be practical. I suppose in all circumstances it's going to be rather distasteful. We need to get there quickly – not presumably by a bendy bus or Routemaster - in case he dies before the divorce is finalised.

What is interesting me in the *Samawi* case, and fortunately is interesting Mr Justice Supperstone as well, is whether or not succession provisions of the 1985 act can be reconciled with Article 14 of Schedule 1 of the Human Rights Act. The No Discrimination provision. Mr Samawi is a guy is in his 50s and his mum and dad moved into a council house, I think in 1968. Dad was sole tenant and he died in 2001. His wife succeeded to the tenancy, Mr Samawi's mum. She then died, I think in 2013. He is a second successor. Haringey considered – and I'll come back to this in a minute – whether to give him a discretionary tenancy, decided not to, and began proceedings.

The problem, it seems to me, in relation to Article 14 is simply this: the widow is treated less favourably than the divorcee for the purposes of succession and also her putative successors are treated less favourably than the putative successors of the divorcee. And the question which I always suggest to my students is the most important one that any lawyer should ask is: Why? What's the reason for this distinction?

There is a lady called Fatima Serife and she was the subject of an interesting Article 14 Case before the European Court a couple of years ago in which the court laid out in general terms the approach that might be taken to Article 14 cases. This particular case was about the recognition of civil marriage in Turkey. Article 14 is really about unjustifiable differential treatment of people in similar situations. The criteria we see in Article 14 in express terms are just illustrative of the basis for differential treatment that could be problematic. There is nothing wrong under Article 14 with member states having legislation that treats people differently as long as the difference can, in fact, be justified. There has to be, as the courts put, an objective assessment of these essentially different factual circumstances, based on the public interest. And most importantly, it seems to me, it's quite clear that under Article 14 the burden of justification lies on the state, or in the domestic context, upon, in my case, the local authority.

And we suggested, in making this argument that there are three questions which are properly put and which need to be answered. The first is whether becoming a successor tenant through widowhood rather than divorce is a status for the purposes of Article 14? Assuming the answer to that is yes, is it actually appropriate to compare widows and divorcees for the purposes of succession rights? And thirdly, assuming again the answer is yes, is there any rational justification for the difference in treatment?

The "other status" problem, I think is not a very significant one, because the European Court has accepted all sorts of things can amount to a status under Article 14: whether you're a soldier or civilian; whether you're a trade unionist or not; whether you live abroad or at home; whether you own big or small bits of land; but most helpful to us in a purely domestic context, in *Re: G* case in 2008, where we had Lord Hoffman telling us quite clearly that being married is a status as far as Article 14 is concerned, and if being married is a status it must follow that not being married is a status, and our simple extension of that idea is that being a widow as opposed to a divorcee must be a status as well.

The valid comparator point, again I don't think problematic, the leading case is *Carson v Secretary of State for Work and Pensions*. This was a case you may recall about the upgrading of retirement benefits for people who live in this country which is not extended to people who live abroad. Carson had argued that was discriminatory on the basis of Article 14, the court was unconvinced by that both in the House of Lords and the Grand Chamber, because, it said, people who live in this country and people who live abroad are in essentially different situations - cost of living varies. Old age pensions are tied into a network of fiscal and social policy measures which don't permit easy comparison. But what's helpful about *Carson* as far as we're concerned is Lord Hoffman again says the question for the court is really quite a simple one. Is there enough of a relevant difference between Mr X and Mr Y to justify different treatment? And it seems increasingly both the European Court and our courts are accepting that you don't really need to worry about a comparator at all. Really what the court should be concerned about is seeing if there is any kind of justification for the difference in treatment.

Our main argument is that treating widows and divorcees differently is problematic under Article 14. A second argument is that there is a gender discriminatory basis to this differential treatment. And that's simply because women tend to live rather longer than men, and women who tend to be on their own after relationships have broken down are much more likely to be widows than men are to be widowers. The statistics are really quite striking. So we had in 2010, which is the latest stats I've found on this, 2.4 million divorced females, 1.8 million divorced males. But amongst the widowed population 2.5 million widowed women and only 712,000 widowed men.

Because women are much more likely to be widows and divorcees than men are, it seems to us there is a gender discrimination problem there and what's helpful from our perspective is that all we have to do to run this argument is to give a *prima facie* indication of differential treatment. And once we've done that the burden of proof falls upon the claimant, Haringey in this case, to justify treatment that's different.

We're accepting that we're only in the realm of rational basis scrutiny here. All that Haringey would have to come up with is some plausible explanation for why it is a widow and a divorcee should be treated differently. I've been thinking about this issue for four or five years now, both in an academic and professional context, and I've never managed to come up with any remotely plausible justification for this. Why? What on earth is the justification for this differential treatment? There is no evidence at all that back in 1980 when the Secure Tenancy Scheme was introduced, or in 1985 when the Act was slightly amended and consolidated into the 1985 Act, that anybody in parliament ever gave a moment's thought to this issue. There's no Government White Paper, there's no Law Commission Report, there's no record of parliamentary debates, either on the floor of the House or in Standing Committee where anybody gave this issue even a slight bit of thought. And that, we say, is helpful to us drawing on the principle that the European Court put forward in the *Hirst* case a few years ago, the prisoner voting case: If there is no evidence that any attention was ever given by the relevant law makers to this particular differential treatment, then it's very difficult to accept that there can be any rational justification for it. We're waiting to see if anything comes forward from the Secretary of State and I'll mention that in a minute.

When we come to the issue of remedy, well we think that's fairly straightforward. We go to *Ghaidan v Mendoza*. We make the point that it's possible under s.3 Human Rights Act for a Court simply to read words into existing legislation. In *Hounslow LBC v Powell* one of the useful things from a defendant's perspective is this comment, I think, from Lord Hope. The precise formulation of amending legislation doesn't really matter, but what we're suggesting to the High Court is that we can add in these words in green at the end of s.88 as if the successor tenant was the spouse or civil partner or opposite gender partner of the deceased tenant then they are not to be treated as a successor.

So one Friday afternoon in October 2014 I am standing in Clerkenwell County Court just in front of Mr Samawi and my solicitor, Keith Clarke from Burke Niazi, and District Judge Manners is sitting in front of me and essentially she says: what a load of rubbish. I referred her, and had done so in my skeleton argument, to a learned article I'd written in The Conveyancer in 2012 about second successions to secure tenancies. She said: I'm not reading that. And she didn't. And gave summary judgment to the claimant. Both on this Article 14 ground and on the various public law defences that we raised.

Six months later, on appeal before a Circuit Judge in the Central London County Court, we succeed on all grounds. Matter is sent back to the County Court and then it's transferred to the High Court and we came on before Mr Justice Supperstone in October last year and we had two days of essentially cross examination of local authority witnesses and I have to say my experience there, and in a number of other cases recently, is it's not just the defence that does a very bad job of martialling its case. We won the public law ground, essentially on a failure on the part of the local authority properly to consider its policy, in large part because the witnesses that the local authority put forward did not have a clue about what had been going on for the last year or so in their local authority. The people who made the decision weren't there. Documents which should have been disclosed weren't in the trial bundle but fortunately happened to be in the briefcase of one of the witnesses who did come in, and actually handed it up, to Mr Justice Supperstone's bemusement, and I think increasing irritation, as the hearing went on. It even transpired during the course of the evidence that the body that had made the decision not to grant a discretionary tenancy: Homes for Haringey, strictly speaking a legally separate entity from Haringey Council, didn't have the delegated authority to make the decision at the time it was made. So another basis for us winning.

The dilemma that we had in this case essentially is whether or not we should just rely on s.3 of the Human Rights Act or whether we should also plead s.4. That is to say, if the court accepted there was a breach of Article 14 but didn't think it could remedy that breach by adding words into the legislation, should we invite it to issue a Declaration of Incompatibility. And I was very much, as was Keith Clarke, in two minds about this, largely because we thought that if we asked for a Declaration of Incompatibility the Crown was almost certainly going to intervene and if the Crown intervened it was likely to do a much better job of justifying the differential treatment than the local authority would. Set against that, unhappily, was the feeling that if we didn't ask for the Declaration of Incompatibility and we lost on the s.3 ground that would look something close to a negligent omission on our part so we eventually ran with it.

The Crown was notified about the case, apparently, and didn't reply. We got to the end of our hearing before Mr Justice Supperstone and he was a bit concerned. It seemed very unlikely to him that the Crown wouldn't want to intervene in this particular case so he sent a second notification off to the Crown which was, apparently, received and the Crown made a belated application to intervene in the case. At the moment that's where we stand. We're part heard. We've won the case on public law grounds. We don't yet know what's going to happen in relation to the Article 14 point. We've not yet had any indication from the Crown that there is actually any contemporaneous evidence dating from 1980 or 1985 to justify the policy. It may be some will be forthcoming.

I do know there are a bunch of other cases raising this issue which are stayed at the moment. I certainly have had contact from a number of people who have been familiar with what's going on in this case. There's no immediate prospect I don't think of us being listed. We've heard nothing from the court. The likelihood is we're going to need another couple of days so we're probably not going to be back on until the summer. But certainly if you come across cases like this you're more than welcome to contact me so that you can get copies of the skeleton argument – and I think you have them here – so they can be introduced into your proceedings at least to justify a stay in any subsequent cases until we get the Judgment in *Samawi*.

The second case which I'll just mention very briefly was called *A2 Dominion Housing Association v Heffernan and Moore*. There's a copy of the skeleton argument in your materials there as well. The scenario here was that Mr Heffernan was married to Mrs Heffernan. Sometime early in the 2000s Mrs Heffernan disappeared, never to be seen again it seems by anybody. Mr and Mrs Heffernan were joint tenants, had an assured tenancy. My client, Mrs Moore, moved in with Mr Heffernan as his partner in 2006/2007. They lived together cohabiting for many years. Mr Heffernan, bizarrely, before his wife had disappeared from view, had got divorced. But unhappily whoever was advising him in relation to that divorce didn't suggest that he should have the tenancy transferred to him as a sole tenant, so he continued to be a joint tenant even though Mrs Heffernan was nowhere to be seen and then, when he died, in 2014, by virtue of the Common Law doctrine of survivorship, Mrs Heffernan became the tenant. A2 Dominion Homes served a Notice to Quit on the personal representatives, served a Notice to Quit on her at the premises, so the tenancy could be determined. Because obviously with her not living there, the tenancy was no longer assured. Our defence essentially is that the doctrine of survivorship in those circumstances cannot be reconciled with Article 8.

This sounds a bit familiar, of course, because it's the factual situation that arose in *Solihull v Hickin* and you might recall in that case the defendant was the daughter of the mother whose husband had abandoned both of them many years earlier, still though the joint tenancy subsisted and when the mother died the father became the surviving tenant. He wasn't there. Notice to Quit determined the tenancy, and the argument was made, simply on a construction of the relevant provisions of the Housing Act 1985 in that case, that an absent joint tenant should not be regarded as a potential successor under the scheme of the act, only people who would be secure tenants should have that status, and that was lost 3:2 in the House of Lords with a notable dissent by Lord Mance, but what interested us about that case when I was instructed in *Moore* by the Hillingdon Law Centre, is that no objection had been taken at any point in *Hickin* to the compatibility of the survivorship rule, per se, with Article 8.

The reason that we suggested it was problematic, you'll find essentially early on in the skeleton argument as a subject to focus on, is what's meant by respect. And that's the entitlement that arises under Article 8. And although obviously you'd look up convention jurisprudence to figure out what respect might mean, it's also an ordinary English word, in a United Kingdom statute. So it can be given its ordinary English meaning, and you'll see at paragraph 23 of our skeleton we just dipped into the Concise Oxford Dictionary to try and identify what respect might actually mean, used in a British statute, and it means, among other things, regard with deference, esteem or honour, avoid interfering with, harming, degrading, insulting, injuring or interrupting, or treat with consideration. Our argument essentially was this on the facts: that what the Common Law doctrine of survivorship does is completely ignore all of the interests that our client Mrs Moore has in her home: the fact that she's lived there for seven or eight years; it's where she's rooted her family life; it's where she's cohabited with Mr Heffernan; it's where she's nursed him; it's where she's watched him die, giving some vent there to artistic licence, but none of that matters at all. It's completely irrelevant and, instead, what

the law does is give all of the entitlements that she might hope to have in that home to someone who's not lived there for years, who's not paid a penny in rent, who's never mowed the grass, who's never changed a lightbulb, who's pursuing her family life somewhere quite different. And that, we suggested, just does not equate in any meaningful sense with any notion of respect. It's actually entirely disrespectful of Ms Moore's interests.

You will see at paragraphs 27 and 28 we broaden this argument out beyond respect for the home and we're quite interested in the family life jurisprudence as well because that's actually rather more developed, and has been for some years, than the respect for a home jurisprudence, and a couple of cases in particular we were interested in, *Kroon v The Netherlands* and *M and A v Switzerland* and they're very good authorities for the proposition that formal rules of law which pay no attention at all to the actual circumstances of the people being affected by them can't be reconciled with the family life dimension of Article 8.

We ran the argument in Uxbridge County Court before a District Judge who was much more receptive, I must say, than District Judge Manners was, to my academic ideas in the *Samawi* case. He decided against us, largely on the basis of *Hickin* but he also gave us permission to appeal and, after some to-ing and fro-ing, it transpired we were going to end up straight into the Court of Appeal on this case. We filed our respective skeleton arguments and then a week or so before we were due to be heard A2 Dominion Homes decided not to take the case any further. They offered Ms Moore a new tenancy of her property whether out of the goodness of their hearts, or a prudent financial decision because she was legally aided of course, or because they might have been scared that they would lose. But the issue is still out there. it's still a live one. So if any of you find daughters or new spouses who are victims of the survivorship rule then again there is a defence that can be run, maybe more in hope than expectation, but hopefully in the next couple of years or so I'll find out if these ideas are well founded.

I'm quite happy to take any questions on either of those two cases, practical or doctrinal if you have them, and I think questions to Andy as well.

Chair: Thank you very much to both of you for illuminating and fascinating topics. I will now invite questions from the floor.

Could I first ask Ian, on the respect point, how do you address the issue about to whom the respect is to be shown, because obviously the discrimination is towards either the widow or the divorcee? How does that translate to the person whom your client is trying to succeed, in convention terms?

Ian Loveland: I think the issues are probably different. We're only running the respect point in the survivorship case. And only in circumstances where all of the legal rights in the tenancy have gone to somebody who has no interest at all in the home, while there is someone who has profound interests in the home whose position is regarded as completely irrelevant. So the respect problem we don't think arises in the second succession cases, because there we're just going straight into Article 14.

Anna Watterson, 1MCB: At the risk of revealing a great deal of ignorance, I was wondering why in the first case you were talking about you weren't able to use the Equality Act because marriage is stated as protective characteristics.

Ian Loveland: Yes, because the issue would only have related to someone who was dead. So Mr Samawi wasn't being treated differently in any respect because of his mother's marital status. He didn't have an Equality Act defence as far as we could see.

Contributor: You mentioned the *Southern Housing Group* case and I just wondered how you think that works in relation to mandatory grant of possession and whether or not they retrospectively comply with the requirement for them to opt or whether representation should be made when they served notice for a mandatory ground.

Andy Lane: I think as I indicated the problem is it's not been properly adjudicated upon because Southern Housing Group isn't going to adjudicate upon it because it was a ground 2 which they don't get to because there was actual substantial compliance with the policy. Obviously, as I say, from a landlord's point of view, you would tend to use the obvious authorities of *Taylor and Central Bedfordshire* etcetera, and also you'd use authorities like *Hollie*, of course, which talks about you've got to look at what the impact is, in other words, would it make any difference anyway, because of course you could always argue as a landlord that even if we had have done that, but didn't, it wouldn't have made any difference. Now obviously that depends on the factual circumstances of course and I'm not suggesting that's a way forward deliberately for housing associations and local authorities, but you may wish to rely on that. I think the position probably at the moment is that if you're acting for local authorities and housing associations you would very much be promoting the idea that if you think your client has perhaps bene a bit deficient on their policy you would be wanting them to correct it even after the issuing of proceedings.

If you're for the defendant I suspect you're still going to put in a defence which is saying, well, that's all very well, but that doesn't save these proceedings. And that may, as I say, be particularly important because I think in the Southern Housing Group, from recollection, it would have been a case where they couldn't do it again, if it had been thrown out, because his tenancy would have automatically converted to assured status. So I think at the moment, to be honest with you, it's mixed. There is dicta which supports the proposition that says that you can't do it *ipso facto*, but equally, as I say, there are authorities which suggest, without being directly on point, that you can. I think it's still to be decided and there's bound to be some case – it has to be the right case because it has to be a case where it would make a significant difference I think – to go there, but at the moment I think it's still arguable on both sides.

Contributor: I agree with what you've said. The Southern Housing Case was one where the tenant was a starter tenant and the challenge was to the breach of policy and the argument was that if it's affected by public law error, the error there being which policy, then it's as if a s.21 Notice has never been served, and in the meantime time has been running, his year has come up and he's then a full tenant. And so it's for that reason that the ability within those proceedings would have been crucial because you couldn't start the proceedings because by then it's too late. And it's the *Barnsley v Norton* case that stands in the way of that argument, but that's a very special case where it was all under the Equality Act and is quite different for a reason. One of the other arguments that was run by the landlord was that you should, in County Court proceedings, be able to run a defence that you could run in the High Court on Judicial Review and say well it would have made no difference and you should be denied relief. That's something where I think that case law is pretty much against the landlord's argument because it's consistent case law in the circumstances and obviously when you're challenging in private proceedings you can't deny the relief.

Just before you move on in that case, just a couple of points on the policy points that were raised because it touches on the point that Andy was making in his. The policies in that case were scattered over various documents, as they often are, addressed to different people, sometimes you've got something annexed to the tenancy agreement or a summary of what's annexed to the tenancy agreement then you've got guidance that is sent back to officers then you've got procedural flow charts and so on, all of which push in the same general direction but tend to have different wording

as you would expect. It was something that Lord Justice Monroe described as "stuff" because he wasn't very impressed by all the volume and two points come out of that. One is, if you're going to be raising a policy challenge like that, then be as clear as you can about what the bit of the policy is that you're focusing on. The temptation is to say: Look here's all of it, they must have done something wrong because there's all these things that they've committed themselves to and they didn't follow it to the letter. You're only like to win on those kinds of cases if you've got a clear cut failure. And that in a sense was the downfall in this case because there was so much variety in the policies that the court was able to say: Well, it gives room for movement.

And that leads onto another point which Andy mentioned about origin of expectation because you're quite right, the cases seem to say that you now don't need to run legitimate expectations, you're following a policy, and there are various cases that deal with that. *Lumba* is one, *Mandeya* is another. Both immigration cases but they establish the point very clearly. But in the course of argument in that case Lord Justice Sale said: well what's the representation that is unambiguous and devoid of relevant qualification that you're relying on, which is the test for legitimate expectation? I don't know whether anything like that's going to happen in the judgment but it looks like at least one member of the court there was trying to pull back together policy of legitimate expectation so that may be one to watch.

Andy Lane: It's also worthwhile saying - I mentioned not only *Barber and Croydon* as the classic policy case which is very different because it didn't matter if it came back again because the tenancy was the tenancy, but also *Eastern Homes and White* and it was in *Eastern Homes and White* I think that Holman had said something about you can't retrospectively correct a default. I think that's where the argument is, you get *Barnsley and Norton*, which is a very particular case, which, of course, remember effectively they were saying, the local authority have mucked up what was then the s.49 public sector equality duty, but they're going to do it at some stage because they're going to have to house these people and they're going to have to do it during the homelessness provisions. Whereas, of course, if you're a housing association for example, if you're evicting somebody you're not going to be involved in the homelessness decisions and so there isn't that nice follow through anyway.

So I think *Barnsley and Norton* is a useful case for landlords but perhaps with big qualifications, and I think *Eastern Homes and White* is a *Barber and Croydon* type policy case but it is one that if you read the judgment has a few useful bits for tenants which talk about retrospective validation of policy and breaches of policy which may be possible to use, but I do think it's about picking the right case because it made all the difference in *Southern Housing Group* where in other cases it may not make the difference. It's still an interesting live issue I think.

John Gallagher, Shelter: Question for Andy on City West Housing Trust v Massey. It's obviously difficult for a defendant whose evidence has been disbelieved by the court to offer cogent evidence of reform. Does the case indicate a more sympathetic attitude by the Court into drugs offences or was it the kind of external factor of evidence inspections that made the difference?

Andy Lane: Well it was Lady Justice Arden I think and - I can't remember whether she was the main judgment in that - but I think there's a confusion anyway. Arden was out on a limb anyway in previous authorities about drug offences. I'm not so sure it indicates a more sympathetic approach to drug offences. I think there has been for many years, for example, with regard to anyone growing cannabis, certainly I do a lot of work with Poplar HARCA, they don't even bother. They can come up with all sorts of nonsense about it's my boyfriend or whatever, but they'll probably do an SPO. But I think in terms of getting tough on it and saying, well what's the point of suspending a Possession Order, what are you going to say – you mustn't grow cannabis any more in your flat? Well unless you're a complete idiot you're probably not going to. What's the point? It's a bit like having a property by deception.

I've done those cases where I've just said to the Judge, look, if you're not with me on an outright order, don't give me anything. I don't want an SPO. What are you going to say – you mustn't lie again? It's the same with the drugs ones. But I don't think City West did that, but I think if I was a tenant lawyer it might make me think more – a bit like positive requirements with s.1 Injunctions – I might start thinking about what I should be asking a landlord to do to assist the tenant to maintain the terms of the tenancy, because the concern I know of the landlords in that case wasn't so much about lying because, that's a bit of a throwaway remark which just means that you've still got to produce cogent evidence and I still think it's going to be difficult if your client's lying.

But I think it was more to do with the fact that why should the onus be put on the landlords to ensure that a tenant complies with their tenancy agreements. I mean there may be disability issues which may inform that but generally speaking if you can't pay your rent, and you can afford it; if you can't behave when you can behave, why should the landlord have to be going overboard about trying to monitor you? You should be able to just do it, and prove that you can do it and prove that if you have been found guilty by the court of misbehaving in the past, you're not going to do that in the future. I mean an obvious ASB case. But if the court says it's a more nuanced view than that and that perhaps you can use arguments, and it may help you in terms of any cross examination, for example, of the officers for the association as to support etcetera and perhaps those on the margins of needing support, particularly those with drug or alcohol problems, it may be you could argue there's a bit more input required from the association or the authority to enable them to sustain their tenancy. But we'll see. The Supreme Court weren't interested. They don't like housing. They love homelessness but they don't like housing.

Danny Dedman, GT Stewart Solicitors: I've a question for Ian about the *Samawi* case. I wonder whether the discrimination argument could be run against tenancies that are transferred pursuant to the Family Law Act 1996 because it seems to me that there's potentially some unfairness there. Using your example William beats up Wilma, goes to prison, she gets the tenancy transferred, ordered pursuant to FLA 1996, Wilma dies, perhaps as a result of her injuries and William can't succeed. Perhaps it's time for parity to be given to transfers under the FLA 1996

Ian Loveland: I think that argument would be perfectly cogent. It just so happened that Mr and Mrs Samawi Senior were married to each other and weren't just cohabiting but we could have made, I think, exactly the same argument if they were a cohabiting couple who had never married, if they had broken up and the 1996 Act could have been used to transfer the tenancy to the mother, she would have taken it as a tenant de novo not as a successor so, yes, it would work just as well.

Danny Dedman, GT Stewart Solicitors: How would you go about it because we have reference to the Matrimonial Causes Act in that legislation whereas there's no reference at all to any other exceptions?

Ian Loveland: My recollection is that there are provisions in the Family Law Act 1996 itself which identify a transfer of a tenancy as not falling within the purview of the succession provisions of the Rent Act or the Housing Act 1984 or 1988. I'd have to check that, but I think that's right. I think a transfer done under the Family Law Act, s.53 Schedule 7. In Schedule 7 there is a proviso which, in effect, replicates what's in s.88(1)(E) of the Housing Act 1985 that if you have a tenancy transferred to you under this schemata you are not a successor, you are a tenant de novo. I think that's right.

Justine Compton, Garden Court Chambers: Ian, a question on succession. Just wondered what your view was on whether a successor spouse could waive her right to succession and essentially give it away to an eligible family member or whether, through the operation of the law, she, whether she likes it or not, becomes a successor.

Ian Loveland: Yes. Presumably that would have to be done as an assignment, but successor tenants aren't allowed to assign, because the person to whom they assign wouldn't be entitled to succeed.

Justine Compton, Garden Court Chambers: Well it was done at the same time so the successor spouse never received the tenancy. They were called into a meeting and essentially it was: I'm not going to have the tenancy, I want my son to have it.

Ian Loveland: Is the first tenant still alive?

Justine Compton, Garden Court Chambers: No. The tenant died, so it passed to her.

Ian Loveland: So it's gone to her. She's already the successor.

Justine Compton, Garden Court Chambers: Well, what the Local Authority say is that she waived her right to it and said no, give it to my son. Our argument is it can't happen because by operation of the law, whether she likes it or not she succeeds, and the local authority's argument is based on there are any number of eligible people, including family members, and any one of them can be essentially chosen by the Local Authority to succeed. Our argument is the spouse comes first and then anybody else who might be eligible is subject to this choice.

Ian Loveland: Yes, I would have thought that must be right, but the choice, unless it's agreed between the potential family members' successors has been made by the Court, is that right

Justine Compton, Garden Court Chambers: The Local Authority, but yes, they can refer it to the court, but this is not between two family members, it's between the spouse which we say is the automatic successor and the son doesn't come into the equation

Ian Loveland: I can't see that there's any way she could waive it. She could give it up once she's got it by Notice to Quit or a surrender, but I don't see that she can waive it. It's just imposed on her effectively I would have thought. Andy?

Andy Lane: Yes, absolutely. I'm just amazed that they've argued it. I've had an owning a principal home and subletting case where the Local Authority purported to grant this person a tenancy in, I think, 1984 although his father had died in 1981 – or whatever it was – and it was quite clear that in fact he was entitled to succeed but the dates didn't make any difference. I remember saying to them well what are you doing granting tenancies to people who are automatically tenants. The statute makes it quite clear that although you may take some time to confirm it, in terms of evidence as to the right to succeed, you're entitled to succeed by way of statute and I don't think you can get round that. It's only what you do once you've got it – you are a tenant, then what do you do with it. If they allow you to assign or whatever that's down to them

Chair: In a sense that's not surprising because you do read in a lot of Local Authority Tenancy Agreements that the Local Authority will give a tenancy to a stator successor, as though it's something that's in the Local Authority's gift when, of course, it's not.

David Foster, Foster & Foster Solicitors: Question for Andy about disclosure. I'll give the example of Haringey Council and temporary accommodation to homeless applicants. What tends to happen is when the homeless applicant gets into rent arrears and the council, as claimant, brings possession proceedings, you then have a whole range of files which are potentially relevant, in particular if the property's also subject to substantial disrepair, which it often is with no repairs being carried out, and Haringey council say that they're not responsible for the repairs. So you have the tenancy file, which has all the correspondence about the rent arrears; you have the homelessness file because you have the issue as to whether or not the accommodation is suitable, as it should be affordable; and then you

have potentially substantial arrears of housing benefit outstanding, so there's a benefit issue, so you need a housing benefit file; and then eighteen months later you're still waiting for all two or one of the files. With the disrepair file is it disclosable by the Local Authority if it's with the managing agents, or should you be going for a third party order against the agents who must have some sort of repair records?

Andy Lane: We're talking about an unsecure tenancy aren't we? So the landlord is the local authority. It doesn't matter who the managing agent is, the landlord is still the local authority, and clearly they have duties of disclosure. Now if there's information which they don't physically have because they actually manage it through somebody else and, for whatever reason, they can't get it – it would be a bit odd if they can't get it from their own managing agents, but let's assume that is the case – then I suppose you could do an application for third party disclosure, but either way, whether you do an application for specific disclosure or an application for third party disclosure you'd want an Unless Order I'd have thought, unless they provide it within whatever time then the claim be struck out. They can't have it both ways. It's a bit like, sometimes from my perspective with tenants, when they say: I don't have this information from my bank or whatever - you say, well go and get it. They may not have it, and that may be genuine, but they need to go and get it. Sometimes judges have actually ordered it, that you go to the bank and get your last six months' statements, but that's almost an application for specific disclosure in a sense.

But I don't think it really matters which way round you do it, whether it's third party disclosure or whatever, but you would certainly have to go through the local authority route first it seems to me and ask them why they can't obtain it. Indeed, of course, you could also, remember, use Part 18 Request for Further Information in any event as another route as to what efforts they've made to obtain the information from the managing agent. Again, if you don't response properly to a Part 18 Request for Further Information, it's an Unless Order: unless he tells us where he's been living for the last five years then his defence will be struck out.

I'd have thought that's the obvious thing to do. Whether you do it through disclosure or whether you do it with Part 18, it's the Unless Order I think you'd really want and in this day and age I think the courts are quite keen on that idea. But I agree with you David. It seems to me that if you're saying as a local authority you're having to leave these premises and we've issued a notice to quit because you're in rent arrears, and your argument is: Well I'm in rent arrears in principle, save if I've got a disrepair, in which case I'm not in rent arrears because equitable set off means I'm not in rent arrears, but of course it means that the disrepair file is certainly relevant. Housing benefit is a bit more difficult because, of course, backdating is so limited these days but yes, it may also be relevant as well, of course, and that is the local authority's gift, of course, to provide that, and it should be within their ability to do that, so that is a specific disclosure application to the local authority. But yes, I don't see a great problem in a sense. I don't see many of those applications, I hasten to add, but I agree with you that it's sometimes a problem.

Chair: I think, following that up, Part 18 Requests could be used a lot more aggressively than they are. If only because they're often answered by someone who has no familiarity with the case itself, usually a lawyer and sometimes a fairly senior one, and he or she says things which are completely irreconcilable with what housing officers then say in their witness statement, and it does enable you to paint a picture of total incompetence on the part of a local authority, and if you can generate that picture it's much more likely you're going to succeed with a public law defence than not. In a recent case which I did against East Homes, over the course of six to nine months we sent several successive Part 18 Requests which were answered by the senior solicitor there. It seemed she didn't even look at her own previous requests and responses when she answered the later ones because they were

inconsistent with each other and we eventually ended up with a tapestry of completely contradictory statements from different people.

Andy Lane: It's why public law defences are so important and why if you've got a whole myriad of information often what you're saying is: Who made this decision? Who made the decision to take possession? The poor individual coming to court to give evidence on behalf of the association or the local authority is often not the person who had any role in the decision making process. They're just the local housing manager or whatever. And so that's the kind of information you can get in a Part 18: Who made the decision? When was it made? How was it made? What information did they have before them? Obviously it's got to be relevant, you're entitled not to answer questions and I might sometimes advise my clients by saying: Just ignore that letter, they're just fishing. But as long as you can prove its relevance then, of course, it's a very good tool and I agree with Ian. I've often used it – obviously for Landlords, particularly in subletting cases because you get these kind of almost bare denials and you think, we're going to go after you with this information which you should be able to provide us if you're legit. And it's exactly the same for tenants the other way round.

Ian Loveland: During the course of argument in *Samawi* I recall saying that I'm probably a bit old fashioned, but I'd expect the officer who actually made the decision that's being subject to challenge to be in court to give evidence, and Mr Justice Supperstone said: Well, yes, but that's not your problem is it and then looking at my opponent he said: It's yours.

Chair: Thank you very much again Ian and Andy. We'll move then to the Information Exchange.

Eleanor Solomon, Anthony Gold Solicitors: I've taken over from Sara Stephens on the Legal Aid Working Group. I've met with the Legal Aid Agency today and I've just got a few updates from them about things that are going on. HLPA met with the Legal Aid Agency recently to raise a list of 50 concerns we had about CCMS. Of those 50 concerns, about ten are being taken forward, and one of those things may be remedied in the coming months. At the moment, say you make an amendment to your client's MEANS as you know at the moment, you also have to fill in the whole merits reassessment all over again for no reason and get your client to sign it. The Legal Aid Agency was surprised that that was happening and have now said that they hope to stop you having to do that in the coming months.

The procurement process for new contracts is happening now in May and in the next few days they'll be announcing an exact timetable. It will be a one stage process but you'll get a little bit longer than before. For anybody who uses the SQM standard, the Legal Aid Agency are using a new audit provider starting on 1 April so if you've lost your SQM Certificate and you need it to apply for a new contract you need to ask for it before 1 April otherwise you won't be able to get it. Lastly, providers are asked, on the Legal Aid Agency's website where you find a legal aid solicitor, if the details of your firm or organisation are incorrect just email your contract manager to tell them the correct details.

HLPA is putting in the consultation response to the duty scheme proposals about competitive tendering and about merging all the different areas and that will be submitted tomorrow and will be published on the HLPA website.

Renata Burns, Hammersmith & Fulham Law Centre: An announcement on behalf of Ealing Law Centre who are recruiting a housing solicitor. For details you should contact Vicky Fewkes by email.

Chair: If there are no other questions I will close the meeting and remind you that the next meeting will take place on 17 May 2017 on the topic of *The Equality Act.*