ONE PUMP COURT

HOUSING LAW PRACTITIONERS' ASSOCIATION POSSESSION PROCEEDINGS UPDATE[1]

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POSSESSION PROCEEDINGS: THE CURRENT POSITION AND IMPACT OF COVID 19

NOTICE PERIODS: ENGLAND ONLY

From 26 March 2020, the default notice periods in respect of notices seeking possession on specified tenancies (secure, assured, introductory, demoted and regulated tenancies) became 3 months: Coronavirus Act 2020, Schedule 29.

This was modified again for notices served from 29 August 2020 by the Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2020 [SI 2020/914] which applies until 31 March 2021.

The default notice period became 6 months, save in certain circumstances (generally ASB, domestic violence, fraud or serious rent arrears i.e. over 6 months). The current government guidance sets out a helpful chart with most of the circumstances colleagues will come across here.[2]

POSSESSION PROCEEDINGS STAY

Possession proceedings brought under Part 55 were stayed between 27 March and 20 September 2020:

- CPR Practice Direction 51Z applied between 27 March 2020 and 24 June 2020, suspending all current possession claims for 90 days. This (as amended) did not apply to all proceedings e.g. claims against trespassers.
- CPR 55.29 was introduced and applied initially between 25 June 2020 and 23 August 2020, and was then extended until 20 September 2020.
- From 20 September 2020, a modification to Part 55 came into force, which is currently due to end on 28 March 2021 ('the interim period'). This is set out in CPR 55C and the Master of the Rolls' "Overall Arrangements".
- From 1 October 2020, CPR Part 83 was amended to introduce a 14 notice period for executing a writ or warrant for possession (CPR 83.8A).
- On 17 November 2020, the Public Health (Coronavirus) (Protection from Eviction and Taking Control of Goods) (England) Regulations 2020 apply in England. They remain in force until 11 January 2021 and prohibit a person from attending a dwelling house for the purposes of (a)

[1] These notes are not a replacement for legal advice and are subject to change as the law develops. Please do not reproduce them without the permission of the author.

[2] https://www.gov.uk/government/publications/covid-19-and-renting-guidance-for-landlords-tenants-and-local-authorities/technical-guidance-on-eviction-notices

executing a writ or warrant of possession; (b) executing a writ or warrant of restitution; or (c) delivering a notice of eviction. This does not apply where:

i. the court is satisfied that the notice, writ or warrant relates to an order for possession made:
   a. against trespassers pursuant to a claim to which rule 55.6 applies.
   b. wholly or partly under section 84A of the Housing Act 1985 (Absolute ASB ground)
   c. wholly or partly on Ground 2, Ground 2A or Ground 5 in Schedule 2 to the Housing Act 1985 (grounds for possession of dwelling houses let under secure tenancies)
   d. wholly or partly on Ground 7A, Ground 14, Ground 14A or Ground 17 in Schedule 2 to the Housing Act 1988 (grounds for possession of dwelling houses let on assured tenancies)
   e. wholly or partly under case 2 of Schedule 15 to the Rent Act 1977 (grounds for possession of dwelling-houses let on or subject to protected or statutory tenancies)

ii. the court is satisfied that:
   a. the case involves substantial rent arrears (if the amount of unpaid rent arrears outstanding at the date on which the order for possession is granted is at least an amount equivalent to 9 months' rent, disregarding any unpaid rent arrears accrued after 23 March 2020); <u>and</u> the notice, writ or warrant relates to an order for possession made wholly or partly:
      i. on Ground 1 in Schedule 2 to the Housing Act 1985;
      ii. on Ground 8, Ground 10 or Ground 11 in Schedule 2 to the Housing Act 1988; or
      iii. under case 1 of Schedule 15 to the Rent Act 1977.

   b. the notice, writ or warrant relates to an order for possession made wholly or partly on Ground 7 in Schedule 2 to the Housing Act 1988. In this case, the person attending at the dwelling house must take reasonable steps to satisfy themselves that the dwelling house is unoccupied before (a) delivering a notice of eviction; (b) executing a writ or warrant of possession; or (c) executing a writ or warrant of restitution.
   c.

<u>CASE LAW</u>

A. STAY ON POSSESSION PROCEEDINGS

<u>***Arkin v Marshall (HLPA & Lord Chancellor Intervening)*** **[2020] EWCA CIV 620, [2020] 1. W.L.R. 3284 (11 May 2020)**</u>

PD51Z was not ultra vires and applied irrespective of agreed case management directions. The Court had the power to lift the stay imposed by PD51Z but in practice it was very difficult to envisage a case where it would be right to do so having regard to the purpose and nature of the stay. This case was not such a case. The parties could if they choose to carry out the agreed tasks but not enforce compliance against the other for not doing so.

Mr Arkin ('Arkin') was a fixed charge receiver. On 24 September 2019 he began two sets of possession proceedings in the County Court at Hereford: the first against Mr Marshall ('Marshall') and the second, acting on behalf of Marshall against his son (and later his wife). All of them occupied properties which were subject of a mortgage which was security for a loan to Marshall. The mortgagees claimed that monies due under the loan agreement were in arrears and/or that Marshall had breached other terms of this agreement. The claims were contested for multiple reasons, allocated to the multi-track and transferred to the County Court at Central London.

On 26 March 2020 two significant events occurred:

First, the parties agreed directions which set out various trial directions leading to a trial window between 5 October 2020 and 8 January 2021, with a telephone listing appointment to take place in due course. These were incorporated into a sealed order by HHJ Parfitt on the next day, 27 March 2020.

Secondly, the Master of the Rolls issued Practice Direction 51Z to the CPR (PD51Z) "Practice Direction 51Z: Stay of Possession Proceedings, Coronavirus" which took effect from 27 March 2020. PD51Z was expressly made under rule 51.2 of the CPR in response to the coronavirus pandemic.

PD51Z as amended from 20 April 2020 reads as follows (added provisions which were not contained in the original version of the PD in March are underlined):

1. This practice direction is made under rule 51.2 of the Civil Procedure Rules ("CPR"). It is intended to assess modifications to the rules and Practice Directions that may be necessary during the Coronavirus pandemic and the need to ensure that the administration of justice, including the enforcement of orders, is carried out so as not to endanger public health. As such it makes provision to stay proceedings for, and to enforce, possession. It ceases to have effect on 30 October 2020.
2. Subject to paragraph 2A, all proceedings for possession brought under CPR Part 55 and all proceedings seeking to enforce an order for possession by a warrant or writ of possession are stayed for a period of 90 days from the date this Direction comes into force.

2A. Paragraph 2 does not apply to—

(a) a claim against trespassers to which rule 55.6 applies;

(b) an application for an interim possession order under Section III of Part 55, including the making of such an order, the hearing required by rule 55.25(4), and any application made under rule 55.28(1); or

(c) an application for case management directions which are agreed by all the parties.

3. For the avoidance of doubt, claims for injunctive relief are not subject to the stay in paragraph 2, and the fact that a claim to which paragraph 2 applies will be stayed does not preclude the issue of such a claim.

The parties made written submissions to the Judge about the implications of PD51Z. Arkin sought to enforce compliance with the directions as originally agreed. The stay did not apply but if it did it should be lifted. Marshall argued that the steps to carry out the directions did not need to be taken within the 90-day period. Neither could the listing appointment take place in that time either. Judge Parfitt postponed the directions for 90 days on the basis that he did not consider he had power to lift the stay, and directed that the telephone listing appointment be listed for the first open date after the stay ended.

Arkin appealed that order, contending that:

(i) PD51Z had been made ultra vires. It was not properly authorised by CPR r.51.2 as a pilot scheme "*for assessing the use of new practices and procedures in connection with proceedings*" ('the *vires* point').

(ii) In any event, the agreed case management directions meant that paragraph 2A(c) of PD51Z applied and excluded this case from falling within the automatic stay (hereafter 'the discretion point').

The High Court granted permission. It transferred the case to the Court of Appeal. Both grounds failed.

- **Jurisdiction:** The vires point had not been argued in the Court below and Marshall, supported by the Lord Chancellor, argued that it should have been brought by way of a claim for judicial review. The Court of Appeal held that in the circumstances of this particular case, it had jurisdiction to consider this issue because:
  - (i) PD51Z 'came from nowhere' and they had been required to prepare submissions as a matter of urgency in a novel situation
  - (ii) the issues raised were not exclusively of a public law character and there was in any event a degree of overlap between the validity of PD51Z and its scope and meaning,
  - (iii) no unfairness or insuperable difficulty had been created by Arkin taking this course

(iv) there was a very strong public interest in an early and authoritative ruling as to the validity of PD51Z which the Court was in a position to give.

The Court emphasised however that this was based on the very particular circumstances of this appeal, and no general principle was being established or amended about which route such cases should take.

- **The *vires* point:** Arkin argued that PD51Z was not facilitating assessment of any '*new practice or procedure'* and was not therefore a pilot authorised by r.51.2. Marshall and the Lord Chancellor argued that the "new practices and procedures" were those which may be introduced to deal with the continuing problems caused by Covid-19 or other pandemics, or in other emergencies. The Court concluded that this was plainly a pilot. PD51Z expressly stated that it is intended to assess modifications to the rules and practice directions that may be necessary during the Coronavirus pandemic and the need to ensure that the administration of justice including enforcement of orders does not endanger public health. It was reasonable to assume that the intention was to assess future modifications that might need to be made to the CPR during an epidemic that might last months or even years. A stay of possession was being trialled for effectiveness.

  There was no inconsistency between the Coronavirus Act 2020 and the blanket stay imposed by PD51Z. The latter is temporary and designed to protect and manage County Court capacity, whereas the former changes the substantive law.

  PD51Z was not *ultra vires* for preventing access to justice and did not breach Article 6 ECHR or the fundamental principle of access to justice. The short delay to possession litigation was authorised by Parliament and amply justified by the exceptional circumstances of the pandemic. It created no risk that someone will effectively be prevented from having access to justice.

- **The discretion to lift the stay:** Paragraph 2A(c) applied only to an application for an order reflecting directions which are agreed, nothing more. The parties can agree a timetable and get on with preparing the case, but directions cannot be enforced during the stay.

  A judge theoretically retained the power to lift the stay imposed by PD51Z. However, it would almost always be wrong to use it. The power is informed by the nature and purpose of the stay which here was a blanket measure lifting of the burden on the County Court having to deal with possession proceedings for reasons of public health. It would be undermined if parties could rely on their particular circumstances or normal case management reasons to lift the stay. Whilst there might be a case where it was proper to do so, the Court had "*great difficulty*" in envisaging one other than perhaps where the stay would defeat PD51Z and endanger public health.

- **Should the judge have lifted the stay in this case?** This case did not meet the standards of exceptionality to justify lifting the stay, which was the only real question. Arkin could ask the Court to consider Marshall's failure to do what was agreed when seeking revised directions but could not apply to the Court to enforce compliance. Parties are not required to take those steps during the stay because it operates to "freeze" the proceedings.

Additionally, HHJ Parfitt should not have postponed the directions when he did. It was before PD51Z had been amended to include paragraph 2A and in any event no joint application had been made. He should not have allowed any application or made directions during the stay and the telephone listing appointment also had to wait for the stay to end.

Hackney LBC V Okoro **[2020] EWCA CIV 681, [2020] 4 W.L.R 85 (27 May 2020)**

The stay imposed by PD51Z applied to appeals from possession order which were extant when the stay began and could not proceed while the stay is in force.

Mr Okoro ('Okoro') occupied a hostel room. Hackney LBC ('Hackney') issued Part 55 possession proceedings in December 2019 for rent arrears and damages for use and occupation. A possession order was made on 24 January 2020. The Deputy District Judge refused permission to appeal but adjourned the money claim to be heard on 17 March 2020.

Permission to appeal the possession order was granted on 25 February 2020 with the appeal listed for 21 May 2020. The possession order was stayed pending the outcome of the appeal. The hearing of the money claim was adjourned by consent pending the appeal. After PD51Z came into force:

i. DJ Swan adjourned the money claim until 25 June 2020, and
ii. HHJ Dight CBE vacated the appeal hearing listed for 21 May 2020 and transferred the claim to the Chancery Division of the High Court for consideration of the issue of whether PD51Z operated to impose a stay on an appeal from a possession order.

Okoro appealed against the order of HHJ Dight on the basis that transferring the claim to the High Court itself had implicitly lifted the PD51Z stay, and that the judge was wrong not to order a stay of the appeal under CPR Part 52 pursuant to PD51Z following *Arkin v Marshall* [2020] EWCA Civ 620. The parties agreed that as was done in *Arkin*, the case should be transferred to the Court of Appeal pursuant to CPR r.52.23(1) rather than be decided by the High Court.

The Court of Appeal held that PD51Z applies to an appeal against a possession order as much as the first instance proceedings:

- First, reference to all proceedings for possession *brought* under CPR Part 55 focuses on how the proceedings were initiated, and therefore applies even when they are under appeal where the procedure is governed by CPR Part 52.

- Secondly, the objectives of the stay as articulated in *Arkin* are met just as much in the case of an appeal.
- Thirdly, it was accepted that a set-aside application was covered by PD51Z and would be odd if an appeal was not when they both aimed to achieve the same result.

The stay would apply to every stage of proceedings up to a final judgment in the Court of Appeal, but not to the Supreme Court, because the Master of the Rolls' jurisdiction to make practice directions under CPR 52.1 does not extend to the Supreme Court. PD51Z also prevents enforcement of possession order made under rules other than CPR Pt 55

Accordingly, the stay did apply to the appeal, but it was right to have lifted it to answer this question.

***Copeland v Bank of Scotland Plc* [2020] EWHC 1441 (QB) (4 June 2020)**

The PD51Z stay was lifted when the only outstanding matter in an appeal against the refusal to set aside a possession order was to hand down a reserved judgment, and the consequential order included staying the possession order and extending time for bringing a second appeal until after the PD51Z stay had ended.

Bank of Scotland Plc ('BOS') had brought a claim for possession in September 2013. A possession order was made on 6 August 2018. Ms Copeland did not attend the possession hearing. She unsuccessfully applied to set aside the possession order, then appealed out of time against the refusal of that application.

The appeal was heard on 26 and 27 February 2020. Ms Copeland appeared in person. Judgment was reserved. Between the draft judgment being provided to the parties and the hand down of judgment, PD51Z was made. BOS submitted that PD51Z did not prevent the handing down of judgment or making of a consequential order provided no steps were taking by either party during the stay period.

The judge considered *Arkin* and *Okoro* and decided that whilst this appeal would have been stayed if it was due to be *heard* after PD 51Z came into being, he would lift the stay pursuant to CPR 3.1. for the very narrow purpose of handing down a reserved judgment and making a consequential order.

He stressed that this was not intended to inform any other Court about what to do, but that in the circumstances of this case, it was undesirable to postpone that matter alone until the stay was lifted and handing down judgment would not run contrary to PD51Z. In particular he took account of the following:

- that the judgment had followed a heavily contested appeal
- there was a reserved judgment ready to be handed down following extensive preparation
- the possession order would and must be stayed for the duration of PD51Z and
- an extension of time for permission to appeal until after PD51Z ended would preserve the same purpose as continuing the stay.

(See also below for the Court's judgment on the substantive issues).

***Bromford Housing Association v Nightingale* [2020] EWHC 1532 (QB) (12 June 2020)**

Judgment in an appeal would not be handed down until the PD51Z stay was lifted, despite the approach taken in *Copeland.* In this case it was appropriate to give the parties a further opportunity at the end of the stay to make submissions.

On 28 April 2020, Cavanagh J heard a rolled up application for permission to appeal with an appeal to follow. The hearing on 28 April 2020 post-dated the PD51Z stay being made, but pre-dated the handing down on *Arkin* and *Okoro*. On 28 May 2020, Cavanagh J directed that:

(i) judgment in the appeal would not be handed down until the PD51Z stay was lifted,
(ii) Nightingale's Counsel would notify the Court promptly once a date for lifting the stay had been set,
(iii) The parties had 14 days from the stay being lifted to lodge further submissions, or indicate that they do not intend to make any further written submissions or to apply for a further oral hearing

The Court would not follow the same approach as in *Copeland*, because that case had been heard before the stay was imposed whereas this case was not. As the stay was in force when the appeal hearing had taken place, it should have been stayed, and would have been had he had the benefit of the decisions in *Arkin* and *Okoro*. In keeping with the spirit of the stay the parties should be given a further opportunity at the end of the stay and before judgment is handed down to make submissions.

***TFS Stores Ltd v (1) Designer Retail Outlet Centres (Mansfield) General Partner Ltd (2) British Overseas Bank Nominees Ltd (3) WGTC Nominees Ltd : BMG (Ashford) Ltd & 5 Ors V TFS Stores Ltd* [2020] EWCA Civ 8 (2 July 2020)**

PD51Z covered all proceedings for possession brought under Part 55. This applied whether the possession claim had been the claim which initiated the proceedings or was contained in the counterclaim. Once the case included a relevant claim for possession, the whole action became proceedings for possession brought under CPR 55 and the stay applied.

TFS were the commercial tenants of the various Respondent landlords. In two cases they disputed whether leases under which they occupied various retail outlets had been lawfully excluded from protections under the Landlord and Tenant Act 1954. In both cases the Court found they were and made possession orders against them in respect of 5 of the 6 properties.

They appealed, and applied to adjourn the appeal hearing first on the basis of hardship caused by COVID-19, then because the appeal was automatically stayed under PD51Z. Lewison LJ refused the application on the papers. The hearing took place on 24 June 2020 with judgment given on 2 July 2020,

TFS argued that the stay did apply, and should not be lifted having regard to *Arkin*. The landlords relied on *Okoro*, arguing that neither action here was "brought" under CPR Part 55.

The Court of Appeal held that the stay applied to both cases:

(i) The first action was brought by TFS for declarations that the tenancies were not lawfully excluded from protection, and for an injunction to stop possession action. Those were not proceedings for possession within CPR Part 55 or to enforce an order for possession within the meaning of PD51Z (hereafter 'relevant proceedings'). However, as the landlord's counterclaim in that action was for possession, and Part 55 is mandatory for such a claim, it constituted 'relevant proceedings'. Once the counterclaim was initiated, the whole proceedings became relevant proceedings caught by the stay. Any other conclusion would defeat the purpose of the stay.

(ii) In the second action, the landlords claimed for a declaration that the tenancies were not protected. They had not sought possession because the terms had not by then expired. However, as some did expire by the time judgment was given, the parties agreed that orders for possession should be made in respect of those, without the claim ever having been formally amended to claim possession. The Court found that one cannot have an order for possession without there having first been proceedings for possession, again because CPR Part 55 is mandatory. Those proceedings too were relevant proceedings and must be stayed.

The Court emphasised the undesirability of any approach which allows claims or appeals that are part and parcel of possession claims to be continued despite the automatic stay, and reiterated the deliberate blanket approach explained in *Arkin*. It was not for the Court to second guess the policy behind PD51Z of the new rules by lifting it. The blanket stay must be given effect. The Court did not agree that the approach taken in Copeland was the appropriate course, and expressed in strong terms:

> "a stay means what is says. If the proceedings are stayed, nothing can happen in court at all. The exceptions to the stay are spelt out in paragraph 2A of PD 51Z, and none of them applies to the delivery of a reserved judgment. I repeat for the avoidance of doubt that I have great difficulty in envisaging any circumstances in which it would be appropriate to lift the automatic stay (see Arkin at [42]). Possession proceedings can and will resume once the stay is lifted."

Arnold LJ dissented. He concluded that the landlord's counterclaim in the first action could not have fitted into Part 55's prescriptive procedural code. It was a Pt.20 counterclaim, did not transform the claim into relevant proceeding and did not engage the stay. He also did not see this as the sort of case which the stay of proceedings, as opposed to the stay of enforcement imposed by 55.29 was intended to cater for. Finally, he thought that the fact that some of the claim being stayed whilst other was not was an exceptional circumstance which justified lifting the stay.

B. SETTING ASIDE/APPEALING A POSSESSION ORDER

Sangha v Amicus Finance Plc (In Administration) [2020] EWHC 1074 (Ch), [2020] 5 WLUK 5 (5 May 2020)

A possession order is a final order, and the circumstances where the Court will set it aside under CPR 3.1(7) are rare save where a defendant does not attend.

Mr Sangha borrowed £550,000 from Amicus Finance ('Amicus'), secured by a first legal charge over a residential property in Edgbaston. The loan was repayable in April 2016 and Amicus brought a possession claim later that year. There were 3 further sets of proceedings between Amicus and companies of which Sangah was the sole director and/or shareholder. A possession order was made and in due course a warrant applied for. Sanga first applied to suspend the warrant, which was adjourned to enable further consideration of section 36 of the Administration of Justice Act 1970, and whether the loan was secured by a fixed term mortgage or and all monies charge.

Sangha then applied to set aside the possession order under CPR 3.1(7). He claimed that a subsequent conference with Counsel had made him aware of a potential defence arising from allegedly false representations made in respect of the business deals which entitled him to rescind the loan in issue in these proceeding. A draft defence and counterclaim was pleaded. The application to suspend the warrant and the possession order were stayed pending determination of the set-aside application. The set aside application was dismissed in April 2018 on the basis that findings of fact in the other proceedings meant the defence and counterclaim was bound to fail.

Sangha appealed on the basis that an overly restrictive interpretation of the Court's powers under CPR 3.1(7) was applied, and characterising the possession order as a final order was wrong.

His appeal was dismissed. A possession order was a final order. No further order from the court was needed to establish Amicus's right to possession. The Court's power under rule 3.1(7), is heavily circumstanced in circumstances where a final order has been made, if it applies at all. The importance of finality is a critical consideration in an application to set aside a final order. It is not sufficient to show that there was a change in circumstances or that the facts were misstated at the time of the original decision. Absent non-attendance by a defendant, the circumstances in which it might be appropriate to set aside a final order will be very rare. A defendant who physically attends a hearing, but does so "*ineffectually*", is not the touchstone for setting aside an order. Sangha had attended and knew the relevant facts. His lack of representation at the hearing was unexplained and he had not shown any exceptional circumstances justifying the set-aside of a final order. It was not enough just to show that relevant factors should have been balanced differently so as to come to a different conclusion.

***Copeland v Bank of Scotland Plc* [2020] EWHC 1441 (QB) (4 June 2020)**

An appeal against the refusal to set aside a possession order was dismissed when the Appellant had no real prospect of resisting a possession order even though the Judge had erred in applying too stringent a test when considering whether medical evidence showed good reason for not attending the hearing.

On 19 November 2001 Ms Copeland ('Copeland') was offered a £97,500 loan from Bank of Scotland Plc ('BOS') said to be to move from her home ('Lavender Cottage') to another property in Bury St Edmunds ('Southgate Street'). She accepted that offer on 22 November 2001 and the purchase completed on 7 February 2002. The loan was secured as a mortgage against Southgate Street. Copeland paid the mortgage payments until July 2007.

Shortly before, in October 2001 Copeland, persuaded by her sister, had applied for a loan of £134,985 from BOS to invest £125,000 in what later transpired to be a Ponzi scheme. That had been secured by a first charge against Lavender Cottage. Her sister, and other family members also invested. In 2002 some of the invested money was returned but her sister reinvested it back into the scheme, again through BOS and apparently with Copeland's authority and on advice of a bank official (and a dishonest accountant).

After 6 years of non-payment, the bank brought a claim for possession of Southgate Street in September 2013. Copeland defended and counterclaimed. She alleged fraud, namely that an officer of the bank had, through intermediaries, encouraged and advised her to borrow and invest money in a fraudulent investment scheme to which he was connected. The loan being enforced was said to represent the money she had lost in that scheme. Her defence and counterclaim were struck out on 2 May 2014 due to abuse of process and limitation. An unless order was made giving her opportunity to apply to serve an amended defence. She appealed the whole of that order which was dismissed but was given another opportunity to put in an amended defence. The claim was transferred to the QBD.

A 'disposal hearing' took place on 6 August 2018 which Copeland did not attend. An outright possession order was made. There was no amended defence. Her permitted participation was by then limited to putting the bank to proof. Arrears were over £23,000 with no payments made for over 10 years.

Copeland applied to set aside the possession order. Her application was dismissed. The Court was satisfied that it had been made promptly but found she had consciously decided not to attend and without a good reason. In any event, none of her points already before the Court disclosed a defence with reasonable prospects of succeeding.
Copeland appealed against that order, 2 business days late and apparently in the wrong court. Time was extended and relief from sanctions given: the delay was short, there was no prejudice to BOS and the issue over the wrong court was technical for a litigant in person. He also granted permission to appeal due to the complexity of the case and need to consider all the facts and history before assessing merit. However, having done so, he dismissed the appeal.

- **Applicable factors:** Whilst the hearing had been referred to as a disposal hearing not a trial (and there were compelling reasons to consider that it was in fact a trial), the factors in CPR 39.3(5) applied in any event, either directly or by analogy. Alternatively, if this was being treated as a case under CPR 23.11 (relisting of an application which proceeded in the absence of a party) , it was not a case where the court could set aside the order without at least being satisfied that there were real prospects of success.

- **No reasonable prospects:** The Judge was entitled and right to find that Copeland had no reasonable prospects of defending the possession claim. Whilst the mindful that this was a review, not a rehearing, he did consider some arguments which were not put previously but even then, Copeland had disabled herself from being able to put forward a positive defence and confined herself to putting the bank to proof. She made a number of arguments about jurisdiction, defects in the mortgage deed and the nature of the loans, but none were accepted.

- **No good reason for non-attendance:** BOS objected to this being considered at all due to how Copeland had pleaded her grounds. However, the application did contend that Copeland satisfied all three limbs. Implicitly there was a challenge even if not finessed. The judge below had erred in approach towards the medical evidence about Copeland's fitness to attend by applying the more stringent test in *Levy v Ellis-Carr* [2012] EWHC 63 (CH) rather than *Bank of Scotland v Pereira* [2011] EWCA Civ 241. Nevertheless, a report from Copeland's GP hadn't satisfied that lower *Pereira* test either. It had not been available at the possession hearing, did not identify when Copeland was seen or why the condition was so acute as to prevent her from attending, and the Court had also been entitled to find that the stress was common to all litigants especially litigants in person but would not normally prevent attendance.

Finally, the Court rejected BOS' contention that relief from sanction was also needed. The requirements of CPR 39.3 were sufficiently rigorous to meet the justice of the instant case.

Mohammed Araho v Southwark London Borough Council **[2020] EWHC 2633 (QB) (29 Sept 2020)**

Permission to appeal was granted where an appeal against a possession order had been struck out for being out of time when that was in part because of administrative shortcomings in the Court, which contributed to the Judge's adverse credibility assessment of the Appellant.

Mr Araho ('Araho') was a secure tenant of Southwark LBC from 2001. In 2018 Southwark issued a possession claim on the basis that he no longer occupied the property as his main residence. A possession order was made by on 5 March 2019. Unrepresented, but with the help of the PSU, Araho attempted to file an Appellant's Notice with a fee remission on 22 March 2019, 4 days before the deadline on 26 March 2019. The notice was stamped by the Court but the Court office decided he was not entitled to a fee remission and returned the Appellant's Notice. Araho paid the fee, but after the deadline. The Appellant's Notice was stamped again on 28 March 2019.

HHJ Luba QC recorded that the appeal was brought on 22 March 2019, unaware of the above fee/inconsistent stamp issues. He noted some defects in the appeal which Araho, upon instructing solicitors, applied to rectify. The day before that application was due to be heard on 1 November 2019,

the two date stamps were noticed by Counsel, and an application to extend time was made. At that hearing, Counsel conceded that the appeal was not filed in time. Applying the *Denton v White* [2014] EWCA Civ 906 factors for relief from sanction, and having considered Araho's oral evidence and his solicitor's witness statement, HHJ Luba QC refused the application and struck out the appeal. HHJ Luba QC did not believe the applicant and was unaware of the evidence corroborating his account within the court records. The fee remission application seems not to have been available.

Araho sought permission to appeal that order. It was refused on the papers but without knowledge that Araho had by then also applied for permission to admit further evidence of the fee remission application which his solicitors had managed to get from the Court. He sought a full merits hearing rather than review. An oral hearing was listed. Southwark argued against admitting the new evidence also contending that Counsel's concession that the appeal was out of time should not be allowed to be withdrawn. The fresh evidence could have affected the outcome, but the defects within the fee remission application were fatal in any event.

Kerr J allowed the fresh evidence to be admitted, and on the basis of that evidence, granted permission to appeal. He accepted that the *Ladd v Marshall* [1954] 1 W.L.R. 1489 criteria were relevant and met. The evidence could not have been obtained with reasonable diligence in the very unusual circumstances of the case, and is plainly relevant and credible. If the evidence could previously have been obtained reasonably diligently, it would have been obtained by the court, who held the records. In any event it was consistent with the overriding objective to permit the fresh evidence to be adduced where the administrative shortcomings of the court had contributed to an adverse assessment of Araho's credibility by the judge. It was also arguable that had HHJ Luba QC been informed by the misapprehension that the appeal was out of time when it was arguably not. A decision about the concession and whether the appeal should be a rehearing which was adjourned to the judge hearing the appeal.

***Vale of Aylesbury Housing Trust Limited v Richens* [2020] EWHC 685 (Ch) (20 March 2020)**

Appealing findings of fact by a trial judge is particularly high. Whether the appeal court would have reached a different conclusion was irrelevant and the question was whether the judge conclusions were ones which no judge could reasonably have reached.

Mr Richens was the grandson of a former tenant of Aylesbury Borough Council, Mr Townsend, who had died in 2017. After Mr Townend died Richens suffered a series of devastating personal event and pleaded guilty to arson, committed at the property. An order preventing his return was obtained temporarily. Aylesbury then brought a possession claim, initially pleading that Richens was a successor to his grandfather's tenancy. At trial it relied on grounds 7,9,12 and 14 of Sch 2 to the Housing Act 1988.

Richens and other witnesses gave evidence that a housing officer had formerly attended the property and offered a joint-tenancy to Mr Townend, Richens and his brother, which had been agreed. There were multiple contradicting documents and limited records held by Aylesbury supporting such the inter-generational agreement, which it said was "*exceedingly unusual*". The trial judge accepted the evidence of the witnesses, when taken with such documents as there were, found that they were not lying, and concluded therefore that neither ground 7 nor 9 were made out. Ground 12 and 14 were made out but having regard to all the circumstances, no possession order was made and an ASB injunction discharged.

Aylesbury appealed, challenging the Judge's approach to the evidence and conclusion that there was a joint tenancy. In particular, it submitted that the Judge was wrong to

- record that no submission was made that the witnesses were lying about a meeting taking place in which they were offered, and accepted a joint tenancy agreement, and
- ask herself whether Richens and his witnesses were lying when the question was simply whether a joint tenancy had been offered and accepted.

Zacaroli J dismissed the appeal.

- On the first point, the Judge had considered whether the witnesses were lying, and for various reasons concluded that they were not.

- On the Second point, the Judge had in asked the wrong question. The question of whether the Aylesbury's housing officer had offered a joint tenancy gave rise to scope for witnesses to be wrong without having lied. However, whilst that was a misdirection, it was not determinative because she still made a decision she was entitled to make and on the right question and made a finding of fact that the meeting at the property where the tenancy was arranged had happened. She had not placed the evidential burden on the Claimant to disprove assertions that a joint tenancy had been created. She was entitled to place particular weight on unchallenged corroborative evidence, and had taken into account evidence as to the unlikelihood of Aylesbury having done what it was alleged (and found) to have done, but accepted that the housing officer was mistaken in what they did (rather than not having done it at all). The findings were open to her and would not be set aside because the appeal court would have made different ones.

On the approach to factual findings, the High Court said

> *"30. This being an appeal against a finding of fact, it is common ground that there is a particularly high hurdle to overcome. As summarised by Lord Sumption in Volcafe Ltd v Cia Sud Americana de Vapores SA [2019] AC 358, at [41], it must be shown that the judge fundamentally misunderstood the issue or the evidence or that she plainly failed to take the evidence into account, or that she arrived at a conclusion which the evidence could not on any view support.*
>
> *31. I also bear in mind that a trial judge is not required to refer expressly to all of the evidence and that an appeal court is bound to assume, in the absence of compelling evidence to the contrary, that the trial judge had taken the whole of the evidence into account: see Henderson v Foxworth Investments Ltd [2014] 1 WLR 2600, per Lord Reed JSC at [48]. In this case, as I have noted, the Judge's conclusion that Mr Richens and his family were telling the truth was prefaced with the statement "…taking all of the evidence into account". Moreover, where the judge has expressly referred to evidence in one part of her judgment then it would require particularly compelling reasons to conclude that she had not taken account of it when expressing her reasons for a conclusion in another part of the judgment.*

C. ENDING TENANCIES & POSSESION PROCEEDINGS

***Greenwich LBC v PB*, County Court at Bromley *Legal Action* April 2020 (14 February 2020),**

Landlord was not entitled to possession where it had failed to show that accommodation occupied by a successor was more extensive than is reasonably required by the tenant.

Greenwich LBC sought possession against PB under Schedule 2 Ground 15A of the Housing Act 1985 (accommodation occupied by a successor other than the previous tenant's spouse/civil partner, which is more extensive than is reasonably required by the tenant and notice was served more than 6 but less than 12 months after the relevant date – usually the death or the previous tenant). PB had lived at the property since 1996 and succeeded to his mother's secure tenancy. She had lived there since 1971. The property had 2 bedrooms.

PB argued that he needed the second bedroom because he often required the assistance of a carer due to his incontinence and his son stayed overnight there 4-5 times a week. He also relied on his local network of close friend. An occupational therapist assessed that one bedroom was insufficient. Accordingly, he contended that the property was not "more extensive than is reasonably required".

Greenwich's possession claim was dismissed by District Judge Brooks on the basis that Greenwich had failed to adduce any evidence to suggest that the flat was more extensive than PB reasonably required, and in any event, it would not have been reasonable to make an order for possession.

***Croydon London Borough Council v Chipo Kalonga* [2020] EWHC 1353 (QB) (2 June 2020)**

A landlord cannot determine a flexible tenancy before the expiry of the fixed term in the event of default by the tenant unless the flexible tenancy contains a forfeiture clause which enables the landlord to determine the tenancy at an earlier date.

Kalonga held a secure flexible tenancy with a 5 year fixed term from 25 May 2015-24 May 2020. The tenancy agreement contained provision for eviction action to be taken at any time if one of more of the grounds for possession set out in the Housing Act 1985 were met. Croydon could end the tenancy by serving notice seeking possession and applying to the court for a possession order, or notice to quit if the tenancy was no longer secure.

After 2 years, Croydon served a notice seeking termination of the tenancy and stating its intention to claim possession on grounds 1 and 2 of Sch 2 to Housing Act 1985. The notice relied upon was a standard prescribed form. It expressly stated that it applied to secure tenants and, where the tenancy is for a fixed term containing a provision allowing the landlord to bring it to an end before the fixed term expires i.e. a provision for re-entry or forfeiture. It's cover letter claimed not to need to terminate it.

Kalonga defended possession proceedings on the basis that: the conditions of the tenancy did not include a forfeiture provision. Further, Croydon had

- failed to serve a valid notice under s.146 LPA 1925
- waived their right to forfeiture, or to rely on allegations by accepting and/or demanding rent.

Further, the claim was defective insofar as it claimed possession of a secure flexible tenancy during the fixed term, which required that the fixed term be terminated by way of forfeiture proceedings.

Croydon argued that the tenancy agreement did contain a forfeiture clause. It also contended that "a fixed term secure tenancy can be brought to an and by <u>any</u> means in section 82(1A), namely *either* by (i) obtaining and executing a possession order, (ii) determining the fixed term and replacing it with a period tenancy, which is only available where the fixed-term secure tenancy has provision for re-entry or forfeiture, or (iii) obtaining a demotion order.

Mrs Justice Tipples found that the terms of the tenancy did not give Croydon a right to re-enter the property, nor did they amount to a right to forfeit the agreement. They did not meet the fundamental requirement of bringing the lease to an end earlier than the natural termination date. Further, if the landlord does not have that right, the tenancy will not be able to be brought to an end under s.82(1A). Reference in the terms and conditions to serving a notice seeking possession or claiming possession were not the same as Croydon exercising a right to determine the tenancy before the fixed term ended in the event that the tenant broke the terms of the agreement. Croydon's agreement did not contain that right, and its claim were dismissed, with the counterclaim remitted to the County Court.

D. RIGHT TO RENT

***R (on the application of Joint Council for the Welfare of Immigrants) v The Secretary of State for the Home Department (Liberty, EHRC and the NRLA intervening* [2020] EWCA Civ 542, [2020] H.L.R 30 [21 april 2020].**

The "Right to Rent" scheme under the Immigration Act 2014 is not incompatible with Articles 8 and 14 ECHR because it is capable of being applied in a way which is not discriminatory and in any event is proportionate to its aim of discouraging illegal immigration.

In January 2018, JCIW brought a claim for judicial review against the "Right to Rent" scheme introduced in the Immigration Act 2014 (Part 3 Chapter 1/ss 20-37), rolled out across England in 2016. JCIW brought a claim for judicial review and sought a declaration that it was discriminatory contrary to Article 14 ECHR taken in conjunction with Article 8. In particular JCIW challenged the unintended but inevitable discriminatory consequences of the scheme on those who do not have British passports and, in

particular without British attributes (e.g.name), rather than the effect on those it was targeted at i.e. illegal/irregular migrants. Therefore, it argued, the scheme was discriminatory on grounds of race and/or nationality.

The High Court (Admin) allowed the claim and made declarations that (i) the scheme was incompatible with Article 14 in conjunction with Article 8 ECHR (but not article 8 directly) and (ii) a decision to commence the scheme in Scotland, Wales and Northern Ireland without further evaluation of its efficacy and discriminatory effect would be irrational and in breach of s.149 of the Equality Act (PSED).

The SSHD appealed to the Court of Appeal. The NRLA, Liberty and the EHRC intervened. The Court of Appeal allowed the appeal and dismissed JCWI's cross-appeal against the finding that Art.8 was not directly engaged.

- **The ambit of Article 8:** The Court of Appeal unanimously found that Article 8 is not directly engaged and dismissed JCIW's cross-appeal on this point. As Martin Spencer J had concluded below Strasbourg jurisprudence was clear that Art.8 does not give a person a right to a home: (*Chapman v UK* (2001) 33 E.H.R.R. 18). In any event, such discrimination would not be disproportionate (see below). The Court was less clear about whether the facts of the case did however bring it within '*the ambit'* of Article 8, ultimately choosing not 'to express a conclusion on the ambit issue' because it was not determinative having regard to the findings on justification. That said, Hickinbottom LJ indicated that the ECtHR authorities suggest that the facts of this case might well wall within the ambit of Art.8 for the purposes of Art.14 and decided the case on that basis. Davis LJ disagreed, concluding that Art.14 being non free-standing must mean some limitation and the connection with Art 8 in this case was too indirect and at best "tenuous".[3]

- **Discrimination:** The Court of Appeal did not agree with Martin Spencer J below on all of his analysis and findings and agreed with the SSHD that the data needed to be approached with some caution. In particular, the Court appeared to criticise the judge's approach to the evidence, which in their view was not as straightforward as he made it seem. However, the Court found by majority that the judge was right to find that some landlords discriminate against those who had right to rent, but did not have British passports (or, particularly those without British Passports nor 'ethnically-British attributes) on the basis of their actual, or perceived nationality. The discrimination was caused by the Scheme in that almost all of the evidence showed that but for the Scheme, the level of discrimination would not have occurred. LJ Davis strongly dissented, finding that to the extent that there was such discrimination, the Scheme, and by extension the SSHD was not responsible for it. Landlords, by their own actions will have "*chosen not to comply with the law...for their own perceived administrative convenience and/or economic advantage*".

- The Court of Appeal did not Martin Spencer J's remarks that landlords' reactions in discriminating were "*rational*" or "*logical*" when they were knowingly acting unlawfully. Nor was that supported by the evidence when less than half discriminated in the way suggested. There was also evidence of discrimination before the scheme. Further, the judge had erred in failing to make any adequate assessment of the nature and level of discrimination there might have been. He should not have inferred that there will be tenants unable to find private accommodation at all because they lack a British passport, which was important in respect of justification.

- **Justification:** The Court of Appeal emphasised that being a challenge to the validity of the scheme, JCWI faced a higher hurdle than a claim brought directly by a victim of discrimination.

[3] Martin Spencer J had concluded that Art.8 was not directly breached, because However, he also found that that this case fell within the broader ambit of Art.8 for the purposes of Art.14, because it does give everyone the right to *seek* a home, and the playing field should be level for everyone in the market for housing, irrespective of race and nationality. Where the state interferes with the process of seeking to obtain a home, it must do so without causing discrimination

The fact that the Scheme is capable of being operated without discriminating in most if not all cases (which the Court found was possible on the evidence), was found to provide a complete answer (or defence) to the claim under Art 8 and/or 14. Alternatively, that the appropriate criterion for deciding justification was whether the scheme was "*manifestly without reasonable foundation*", which is not restricted to welfare benefits cases as JCIW had argued. This was not said to be determinative however as the Court found that applying that criterion or not, the proportionality point fell in favour of the SSHD, and the scheme was proportionate means of achieving its legitimate objective.

- In particular the Court found the following factors tipped the balance in the SSHD's favour:

  (i) Very considerable deference was to be afforded to Parliament implementing a socio-economic policy against the backdrop of relevant and consistent EU law. The greater the element of economic and/or social policy involved, the greater the margin of judgment and the greater the deference that should be afforded to the assessment of the democratically elected or accountable body enacting it, though that will reduce if it involve adverse discriminatory effects.

  (ii) The scheme appeared to be successful in that there was no evidence that irregular immigrants do not obtain such accommodation. The evidence, pointed towards *some, more than insignificant* contribution towards the aim of discouraging illegal immigration and was not of "little to no effect" on its aim.

  (iii) The fact that it does not persuade irregular immigrations to leave the UK is met by other factors including it being one of a set of measures and it's logical discouragement of illegal immigration. The difficulty in verifying effectiveness is for Parliament.

  (iv) Parliament was aware of the risks of discrimination and how it was proposed to be managed. If in fact the discrimination was greater than envisaged, that is for Parliament or the SSHD to address.

  (v) The discrimination was entirely coincidental and collateral, which the Code of Practice recognised and sought to address.

  (vi) Landlords are not agents of the state when performing checks but engage in such discrimination as private citizens. The primary ground for the discrimination is nationality.

  (vii) Whilst landlords do discriminate against those without a British Passport, the administration is not burdensome, employers have similar obligations, most landlords comply without discriminations, and the nature and level of discrimination is as such that victims do not necessarily become homeless. The most vulnerable may be entitled to some assistance e.g. under the Housing Act 1996.

The Court agreed with the SSHD that it was premature for the Court to have made a declaration that rolling out the scheme to the other nations would be irrational and a breach of the PSED. It was a matter for the SSHD at the relevant time.

Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) (Amendment) Order 2020 SI 2020/1047

On 2 November 2020 the prescribed requirements were changed and a revised Codes of Practice on the Civil penalty Scheme for Landlords and Agents, (published Sept 2020) came into effect. The changes were intended to "modernise" checks under the scheme and included making provision for the new online "right to rent" checking service, and amending the list of documents deemed acceptable under a manual right to rent check.

E. NOTICES SEEKING POSSESSION

***Pease v Carter (and Carter)* [2020] EWCA 175, [2020] 1. W.L.R. 1459 (17 February 2020)**

A notice seeking possession is to be interpreted "*as it would be understood by a reasonable recipient reading it in context*". A reasonable recipient noting a typographical error on the date in a notice would have appreciated the error and be in no reasonable doubt as to what the notice was intended to say.

Captain Pease granted the Carters an assured shorthold tenancy on 1 August 2008 for a fixed term of 6 months, after which they continued to occupy the premises as statutory periodic tenants. They fell into rent arrears and on 7 November 2018 were served with a two notices seeking possession (both identical other than being addressed to one not the other) under section 8 of the Housing Act 1988, relying on grounds 8, 10 and 11 of Sch 2 of that Act. The notice stated that court proceedings would not begin until after 26 November 2017 not 2018.

Possession proceedings were commenced in December 2018, whereupon the District Judge noticed the error and permitted Pease to amend the date on the notices to 2018, and to dispense with re-service. The Carters appealed on the basis that the District Judge did not have power to allow the landlord to amend the notices. Pease agreed but argued that the notice were valid in any event.

HHJ Gargan found that this was an obvious typographical error and that the reasonable recipient of the notices would have realised it was intended to read 2018 (not perhaps 2019 as was contended). However, the notices were nevertheless invalid because the reasonable recipient test did not apply to section 8 notices when applying *Fernandez v McDonald [2003] EWCA Civ 1219, [2004] 1 WLR 1027*, The error with the date meant that the notices were not "*substantially to the same effect*" as the prescribed form and whilst it was just and equitable to dispense with service of the notice in respect of grounds 10 and 11 this could not be done in respect of ground 8.

Pease appealed to the Court of Appeal against the finding that the reasonable recipient test did not apply to section 8 notices, or alternatively that they were not substantially to the same effect as the prescribed forms. Carter cross-appealed against the conclusion that the reasonable recipient would have understood that the intended date was 26 November 2018. Knowing the year was wrong would have caused uncertainty about the intended day and month.

Having considered, the authorities, the Court allowed Pease's appeal:

- The judge had misapplied *Fernandez.* A statutory notice is to be interpreted as it would be understood by a reasonable recipient reading it in context. If a reasonable recipient would appreciate that the notice contained an error, for example as to date, and would appreciate what meaning the notice was intended to convey, then that is how the notice is to be interpreted.

- It is still necessary to consider whether, so interpreted, the notice complies with the relevant statutory requirements, beginning with a consideration of the purpose of those requirements. If it does, the notice will be valid. If it does not then it may be possible to conclude that it is "*substantially to the same effect*" as a prescribed form if it nevertheless fulfils the statutory purpose. This is so even if the error relates to information inserted into or omitted from the form, and not to wording used instead of the prescribed language.

In this case, the relevant sections required the landlord to give notice that proceedings will begin no earlier than two weeks from serving the notice. It was to give a tenant time to take steps to deal with the threatened proceedings. The notices served that purpose and were valid.

Carter's cross appeal was dismissed. The Court did not accept that knowing the year was wrong created uncertainty about the date and month. 2017 was wrong because it predated the date on which the

notices were served. This was a literal typo (i.e. the wrong digit being pressed) rather than someone mentally getting it wrong. The reasonable recipient would, having mentally corrected that error, conclude that the right date was 26 November 2018, as was also recorded in the cover letters.

***Ratcliffe and Ratcliffe v Patterson*, County Court at Luton, Legal Action July/August 2020 and *Nearly Legal* 26 April 2020 (17 March 2020)**

Miss Patterson was the assured shorthold tenant of Mr & Mrs Ratcliffe. She had mental health diagnoses and multiple physical health problems. She suffered from difficulty with concentration, poor and interrupted sleep had cognitive deficits and battled constant health-related crises. The Ratcliffes accepted she was disabled within the meaning of section 6 of the Equality Act 2010. She began to accrue rent arrears. She was initially on sick leave and then unable to work which affected or ability to manage her finances. Medical evidence supported the cause of the arrears as being in consequence of her disability.

Ratcliffes' agent served a notice under section 8 of the Housing Act 1988, relying on grounds 8, 10 and 11 of Sch 2. The notice was purportedly signed by the agent, a company.

Patterson defended the possession claim and brought a counterclaim for disrepair, disability discrimination, and failure to comply with tenancy deposit protection requirements. She argued that

(i) the Notice was not valid because it had not been signed in accordance section 44 of the Companies Act 2006
(ii) a section 8 notice was a demand for rent within the meaning of section 47 of the Landlord and Tenant Act 1987 and therefore required the landlord's name and address, which in this case it did not contain,
(iii) she was entitled to set off her counterclaim against the Ratcliffes' claim for rent arrears.

The Deputy District Judge did not accept that failing to follow s.47 made the notice invalid. Whilst he accepted that a section 8 notice was a demand for rent, the consequence for not compliance with that section was not to render the notice invalid. (**This should now be read in accordance with the subsequent Court of Appeal decision in *Lakhany v Prempeh* below**).

However, the notice was invalid by reason of the failure to signed it in accordance with section 44 of the Companies Act 2006:

(i) The notice was signed by a corporate landlord or agent and is required for some formal legal purpose. It is in a prescribed form, requires signature specifically by landlord, licensor or agent and is necessary step in taking possession. It therefore has a formal legal purpose.
(ii) Section 44 requires that the execution of documents by a company be done by affixing the common seal or signing it in accordance with that section's provisions. The latter requires two authorised signatories (directors, or where applicable, a secretary) or a director's signature in the presence of a witness who attest the signature. In this case the notice had only one signature, therefore could not comply with section 44, irrespective of who's signature it was. It was not therefore a validly executed document 'signed' by the company.

It was just and equitable to dispense with the requirements to have served a valid notice, allowing the Ratcliffe's to proceed under Grounds 10 and 11, but not the mandatory ground 8.

The Court allowed the counterclaim which, taken together extinguished and exceeded the arrears. It was not therefore reasonable to make a possession order and the claim was dismissed:

(i) Bringing possession proceedings because of arrears accruing in consequence of Patterson's disabilities was unfavourable treatment. The Ratcliffe's had known of the disabilities and knew or could reasonably be expected to know that she had disabilities which caused the arrears. The proceedings were not proportionate because there were alternatives such as seeking direct payment of seeking possession on discretionary

grounds only. Section 15 of the Equality Act 2010 was therefore breached and the Court awarded £2000 plus 10% Simmons v Castle uplift.

(ii) The tenancy deposit certificate was also not signed in accordance with section 44 of the Companies Act 2006 for the same reasons as above. Therefore, the required prescribed information had not been given. As the deposit had been protected and the breach was minor only the sum equivalent to 1 times the amount of the deposit was awarded, but for three distinct breaches.

(iii) The disrepair claim was assessed at between 2% and 10% rent diminution for various periods in respect of broken light fitting, historic but minor leaking bath and leaking boiler (Plus Simmons v Castle uplift) Other disrepair was recorded by an expert but not reflected in the damages.

Trecarrell House Ltd v Rouncefield **[2020] EWCA Civ 760, [2020] H.L.R 39 (18 June 2020)**

A landlord's failure to provide the required gas safety record before the occupier moved in did not create to a permanent bar on serving a section 21 notice.

Ms Rouncefield rented a self-contained flat pursuant to an assured shorthold tenancy starting in February 2017 with a 6-month fixed term. Trecarrell House Ltd ('Trecarrell') was her landlord. There was no gas appliances or pipes within the flat itself but central heating and hot water were provided by a communal gas boiler. Rouncefield was not given a gas safety certificate before moving in nor was one displayed in a prominent part in the common parts of the building.

On 9 November 2017 she was given a certificate dated 31 January 2017. A second certificate, dated 3 April 2018 was provided to her in May 2018. This suggested that 14 months had elapsed between the two latest inspections. Trecarrell later claimed that this certificated was generated in error and produced a third certificate, recording to an inspection on 2 February 2018. It was not clear whether this was provided to Rouncefield prior to the s.21 notice being served.

In May 2018 Trecarrell served a notice pursuant to s.21 Housing Act 1988 and brought possession proceedings. Rouncefield defended the claim on the basis that the s.21 notice was invalid because:

- A landlord cannot serve a s.21 notice when in breach of a prescribed requirement: s.21A(1) Housing Act 1988:
- Trecarrell had not provided her with the January 2017 gas certificate before she moved innor had it displayed a copy of the record in a prominent position in the premises which it could do in the alternative.
- These steps were required by reg 36(6)(6)(b) and (7) of the Gas Safety (Installation and Use) Regulations 1998 ("the 1998 regulations"), which are prescribed requirements for the purposes of S.21A: Regulation 2(1)(b) of the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 (the 2015 regulations).
- As Trecarell had not complied with the prescribed requirements the notice was invalid.

The District Judge did not accept that the notice was invalid or that regulation 36 applied at all, and made a possession order under the accelerated procedure.

Rouncefield succeeded on appeal to the Circuit Judge. It was agreed that reg 36(7) applied and HHJ Carr found that late compliance with the requirement to give a new tenant a certificate before they move in did not entitle a landlord to then serve a s.21. HHJ Luba QC's reasoning in C*aridon Property Ltd v Monty Shooltz, County Court at Central London (2 February 2018)* was followed.

Trecarell appealed. It argued that the effect of Regulation 2(2) of the 2015 regulations[4] was:

[4] Regulation 2(2) of the 2015 regulations states "(2) *For the purposes of section 21A of the Act, the requirement prescribed by paragraph (1)(b)* (compliance with regulations 36(6) and (7) of the 1998 regulations) *is limited to the*

(i) to remove both the 28 day compliance limit for complying with reg 36(6)(a) of the 1998 regulations (the requirement to provide an existing tenant with a copy of an inspection record) *and*

(ii) To enable compliance with reg 36(3)(b) even if the latest record was not provided before a new tenant moved in, or

(iii) Alternatively, to exclude reg 36(3)(b) entirely. The wording meant the requirement was limited to providing the latest record within 28 days but without the 28 day requirement i.e. the requirement didn't include regulation 36(6)(b) at all.

(iv) Further, the conclusion of HHJ Carr, and HHJ Luba QC in *Caridon*, that a failure to comply strictly with the requirements meant permanent exclusion from relying on a s.21 notice was not justified by the legal framework/scheme.

Rouncefield resisted the appeal and also argued that in any event the notice was invalid because over 12 months had elapsed between inspections, which was a further breach (of Reg 36(6)(a)) and the second notice was not compliant with Reg 36 (3)(c) because it had the wrong date, and the third notice which had the right date, was not served before the s.21.

The Court of Appeal allowed Trecarrell's appeal by majority. It's reasons/considerations were that:

- Reg 36(6)(b) was not excluded in its entirety. It made no obvious sense why compliance in respect of existing tenants was still needed, but not prospective ones or if its aim was to exclude it all, by it had been drafted in such a cryptic way.
- However, Reg 2(2) should be read as referring to Reg 36(6) as a whole, and therefore the obligation is simply to provide the tenant, existing or prospective, with the relevant gas safety record. In both cases the timeframes are removed.
- the primary sanction for non-compliance with the safety regulations was criminal sanction, not prohibition on serving a s.21 notice.
- Similar albeit more specific terminology in respect of tenancy deposit sanctions under the Housing Act 2004. That provided an embargo but also circumstances where that embargo could be brought to an end (by returning the deposit). In cases such as this, the breach ends when the record is provided.

The Court was not persuaded that a late inspection prevented compliance with reg 36(6)(a) when an inspection is then carried out and a record given. The inspection itself is not a prescribed requirement, which in practice is to provide a record of every inspection carried out. Accordingly, the appeal was remitted to the County Court to decide whether the third/February record was served before the notice. If it was, the notice was valid, it not, it was not. The outcome will depend on that.

***Prempeh v Lakhany* [2020] EWCA Civ 1422, (30 October 2020)**

A section 8 notice is not invalidated where an agent signs the form and gives their own name and address, rather than the landlords.

Ms Prempeh (and another) rented accommodation in London under an assured shorthold tenancy agreement with a 12 month fixed term commencing 16 December 2016 and thereafter a monthly periodic tenancy. That tenancy agreement recorded the landlord as Mrs Lakhany with an address care of O'Sullivan Property Consultants ("O'Sullivan"). Rent was £1500 pcm. Prempeh argued that a further agreement was entered into in December 2017 and produced a copy of it. Lakhany argued there was no such agreement and the 2016 agreement was the one under which Prempeh occupied the flat.

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requirement on a landlord to give a copy of the relevant record to the tenant and the 28 day period for compliance with that requirement does not apply."

The 2017 agreement was different insofar as (i) The flat was let to Prempeh alone, (ii) the term was for "*one calendar year with a 6 month get out clause*" and (iii) the landlord was recorded as being O'Sullivan, nor Mrs Lakhany.

Prempeh fell into rent arrears. A section 8 notice was served by Mrs Lakhany's solicitors in April 2019 relying on Grounds 8, 10 and 11 of Sch 2 of the Housing Act 1988. Arrears were over £11,000. The notice was signed by the solicitors as the '*landlord's agent*' giving their name address and telephone number, but not Mrs Lakhany's, whose address was also not mentioned in their cover letter.

Possession proceedings were brought,. At the first hearing, Prempeh raised three issues in defence of the claim all of which were rejected by the Deputy District Judge:

(i) The wrong party had brought the claim because the 2017 tenancy was the one in force and the landlord under that agreement was O'Sullivan. The DDJ heard from Lakhany's brother-in-law (an O'Sullivan's employee), but not Prempeh and found that the tenancy in force was the 2016 one.

(ii) The notice was invalid because it was a demand for rent within the meaning of s.47 of the Landlord and Tenant Act 1987 and did not have, as it was required to under that section, the name of the landlord herself. The DDJ rejected this.

(iii) Prempeh had an outstanding claim against Lakhany for failure to protect her deposit. Whilst this would be insufficient to extinguish the arrears, it was a partial defence. The DDJ found this could be pursued separately.

A possession order was made. Prempeh appealed, raising issues over: unfairness in the hearing; reasoning; making a money judgment before, and rather than, directing a trial of the deposit counterclaim; erring in respect of the section 8 notice being valid. HHJ Letham allowed Prempeh's appeal on the basis of fairness and the deposit counterclaim, but not on the validity of the notice.

A further appeal to the Court of Appeal on the validity of the notice was dismissed. Prempeh argued that the notice was invalid because:

(i) as a matter of law, a section 8 notice is a demand for rent within the meaning of s.47 of the 1987 Act, and therefore had to give the landlord's own name and address (HHJ Lethem had declined to follow HHJ Saunder's judgment in *CY Property Management Ltd v Babalola* (25 Jan 2019) that a section 8 notice is a demand for rent), and
(ii) without the landlord's own name and address, the s.8 notice was not in the required prescribed form. It was accepted on behalf of Lakhany that if a s.8 notice is a demand for rent, that this one had not complied with section 47(1) of the 1987 Act.

The Court of Appeal rejected both grounds:

- **Demand for rent:** A s.8 notice is not a demand for rent. After considering the authorities, the Court held that a s.8 notice does not say anything about requiring payment, which is necessary to constitute a demand for rent. Further, it does not spell out any *implicit* demand. Rather, it follows the statutory scheme and *informs* the tenant of things which are necessary under s.8(3), namely the intention to bring proceedings, the grounds, the date after which he will do so and when the notice will lapse. There was no guarantee that paying arrears would avoid proceedings and some grounds do not require outstanding rent (e.g. ground 11). Accordingly,

> ***"34...****Nothing in the prescribed form demands, or requests, politely or otherwise, or even invites, the tenant to do anything, save that the notes at the end advise the tenant to contact the person signing the form if they are willing to give up possession, and to take the notice to a solicitor or other source of advice if they need advice about it and what to do about it."*

- **Effect of non-compliance:** the inference drawn from sections 47 and 48 LTA 1987 is that Parliament deliberate excluded rent from s.47(2) and intended that rent should remain due dispute a demand for rent not complying with it. Aside from that, the Court would not express a view on the effect of section 47 on a non-compliant demand for rent.

- **Prescribed form:** Form 3 (a prescribed form) did not require the landlord's own name and address to be provided. The form expressly states that it can be signed by a landlord's agent and it is sufficient to give the name and addresses of the person signing, which may be an agent. There is also no place for doing so or instruction to add additional names/addresses. Considering other forms supported the same conclusion. If the landlord's name had to be added, then given how the form is set out and it's guidance, it would be a "*trap for the unwary*" lay person to whom the forms are targeted.

Jarvis v Evans (Shelter Cymru intervening) **[2020] EWCA CIV 854, [2020] H.L.R. 40 (7 July 2020)**

The prohibition on landlords of domestic tenancies who are not licensed under the Housing (Wales) Act 2014 from serving notice to terminate a tenancy applies to notices served under section 8 Housing Act 1988. A section 8 notice served by an unlicensed landlord in breach of section 7(2) of the Housing (Wales) Act 2014 was invalid.

Since 23 November 2016, Wales has had in place a mandatory scheme for domestic tenancy landlords. It requires all such landlords to be registered with a central licensing authority – Rent Smart Wales, and, save in some limited circumstances, requires all those carrying out defined "letting activities" or "property management activities" to be licensed. The latter includes, amongst others, collecting rent, making arrangements with a person to carry out repairs or serving a notice to terminate a tenancy.

The Evans' ('Evans') were tenants of Mr Jarvis since 2012. In 2018 they accumulated rent arrears of £8000 (4 months' rent). In October 2018 Jarvis served a section 8 notice seeking possession relying on grounds 8, 10 and 11 of Sch 2 Housing Act 1988. He was neither registered nor licensed when

- he served the notice,
- he commenced possession proceedings in December 2018,
- the possession claim was heard at the County Court in June 2019

However, this was not raised before the District Judge. A possession order was made with directions given in respect of the Evans' money claim (for renovation works on adjoining land). The Evans' appealed, and raised Jarvis' lack of registration and licensing, which was said to make the service of the notice ineffective. HHJ Garland-Thomas agreed and allowed their appeal, despite Jarvis being registered and licensed by this time.

Jarvis appealed to the Court of Appeal. He argued that:

- a notice under s.8 of the 1988 Act is not a "*notice to terminate a tenancy*" within the meaning of section 7(2) of the Housing (Wales) Act 2014, but a preliminary to an application for a possession order, and
- in any event, an unlicensed landlord is not prohibited from serving a section 8 notice in the way that (s)he is a section 21 notice, which is expressly barred by section 44 of the Act, and which the difference in Court forms also was said to reflect. The fact that the Court can dispense with a section 8 notice in some cases also made a bar on it redundant.

The Court of Appeal disagreed and dismissed the appeal. It's reasons were:

(i) The language of the section showed that the Assembly/Senedd had not limited the section to notices which themselves end a tenancy. The section would be all but nugatory if it was limited to such notices.
(ii) The ability to dispense with notice took the case no further. It is only available in respect of some grounds and even then should occur only in relatively exceptional cases: *Braintree DC v Vincent* [2004] EWCA Civ 415.

(iii) The Court forms, could at most only reveal how those responsible for the forms i.e. HMCTS, interpret the legislation, not the intention of the Senedd in passing the legislation. In any event, the difference in the forms might be explained by the fact that one is used for accelerated procedure, and the others are not.

(iv) the fact that criminal sanctions could follow did not detract from the general bar in s.7 from doing those activity whilst unlicensed. There was force in the observation of HHJ Jarman QC in *Evans v Fleri* (County Court at Cardiff 18 April 2019, unreported) to the effect that it would be surprising if the intention had been to allow the landlord to obtain possession in reliance on a notice when serving that notice was itself made a criminal offence.

(v) the Assembly would not have wanted to leave tenants dependant on local authorities bringing proceedings for Rent Stopping Orders or Rent Repayment Orders.

(vi) Whilst section 44 of the Act does create some overlap with section 7 insofar as prohibiting service of section 21 notices whilst unlicensed, it also applies when landlords are unregistered, and is more likely ot be a "belts and braces" approach.

F. DISABILITY

***TM (by his litigation friend) v Metropolitan Housing Trust* [2020] EWHC 311 (QB), [2020] 1 WLUK 373 (30 January 2020)**

A recorder had not erred in making a possession order against a tenant with serious mental health conditions where there had been a number of incidents of violence, the landlord had not successfully moved him, he could not realistically remain and a possession order would not be enforced until alternative accommodation was available.

TM was an assured tenant of Metropolitan Housing Trust ('Metropolitan'). He suffered from a schizoaffective disorder and treatment resistant paranoid schizophrenia. He had been detained on several occasions under the Mental Health Act 1983. He moved into the property in 2014. It was part of a development designed for those with moderate to severe mental health difficulties with the intention to transfer residence to unassisted or less heavily supervised accommodation after 2 years. Support was provided initially by Metropolitan then by a third party.

Metropolitan brought proceedings to evict TM in 2018 after he hit a member of staff in the face/jaw and had exposed himself to a female resident. Two other assaults were also found to have occurred. Before this, eviction proceedings had been considered in 2016 for punching/jabbing staff, but Metropolitan instead tried to find alternative appropriate accommodation, without success. It was agreed that all incidents arose as a result of TM's disability.
TM defended the claim, raising disability discrimination/breach of the Public Sector Equality Duty and the unreasonableness of making a possession order per section 7(5) of the Housing Act 1988.

The recorder heard evidence from Metropolitan's decision-maker about steps taken before proceeding with possession, including a meeting with support and mental health staff, completing an Equality Impact Report, and trying to make enquiries about TM's capacity. A capacity report assessed TM as lacking litigation capacity. The accepted evidence therein expressed serious concerns over TM's eviction amounting to neglect of the collective duty to protect him as a vulnerable person if done without careful planning involving his family and clinical team and without provision of suitable alternative accomodation and care. In oral evidence, Metropolitan's decision-maker said that "*he had to make the decision today, he did not feel he would have pursued possession proceedings, he would have tried an alternative way of dealing with the situation if that was at all possible*" but that eviction remained in his opinion a proportionate response.

The recorder found that ground 14 of Sch 2 of the Housing Act 1988 was made out. Whilst bringing possession proceedings amounted to unfavourable treatment and thus engaged section 15 of the 2010 Act, Metropolitan had legitimate aims including protecting staff and others, and demonstrating that violence and criminal behaviour would not be tolerated. Those aims were of very high importance and seeking possession was no more than necessary to pursue them having regard to TM's needs, his own vulnerability, and the risk of further attacks.

Metropolitan breached the PSED in that it should have reassessed the situation after seeing the capacity assessment, but this review was in effect done when the decision-maker gave evidence. A possession order was made but stayed pending the provision of appropriate accommodation.

TM appealed to the High Court.

- **Proportionality**: TM argued that the Recorder misapplied the proportionality test under section 15(1)(b) of the Equality Act. The evidence that Metropolitan's employee's that he would have tried alternative ways of dealing with the issue rather than seeking possession was determinative. In any event the Recorder didn't hadn't engaged with the alternative intermediate measures between doing nothing, and seeking possession. Johnson J disagreed. The decision-maker's evidence raised a number of other questions e.g. what he would have done instead. However, the Recorder had applied his mind correctly to the questions in *Akerman-Livingstone v Aster* [2015] UKSC 15. It was not a case where alternative measures might have cured the underlying problems and attempts to move him before had failed. In any event the order would not be enforced until alternative accommodation became available so he would not be homeless.

- **PSED**: TM argued that the Recorder erred in failing to follow *Forward v Aldwyck Housing Group Limited* [2019] EWCA Civ 1334 [2019] HLR 47. Having found a breach of the PSED he should have granted a remedy. It was not open to him to find the breach was not material because the decision-maker himself gave evidence that he would have made a different decision. It was wrong to permit the PSED to be discharged on an ad-hoc basis from the witness box. Johnson J held that the decision *to issue* proceedings could not be impugned on grounds of PSED breach on the facts as found, and thereafter it was for the court to decide whether to make a possession order. It was not obvious that the capacity report required any significant change to the assessment. The breach took place when the Court was seized with the case and could assess for itself. It was capable of later remedy. It was also highly likely that the same decision would have been reached without the PSED breach.

Anonymised Tenant (A) v Anonymised Letting Agent (LA), County Court at York *Nearly Legal* 14 July 2020 (2 July 2020)

Ms A is a 44 year old single mother of two with Attention Deficit Hyperactivity Disorder, anxiety and depression. She is disabled within the meaning of section 6 of the Equality Act 2010. She approached a letting agents ('LA') in November 2018, responded to an advert for a 2-bedroom property in York and requested a viewing. She explained that she had excellent references and payment history, worked part time and received some housing benefit. LA responded that they "*do not accept housing benefit so could not proceed with a let on this basis*". Further enquiries disclosed that for many years there was a blanket policy not to accept housing benefit tenants.

A brought a claim in the County Court challenging the legality of that policy. In particular, she contended that the policy was unlawful in that it indirectly discriminated on grounds of sex and disability contrary to sections 19 and 29 of the Equality Act 2020. She sought a declaration that the policy was unlawful, damages for discrimination, interest and costs. The following month, LA abandoned that policy.

A contended that the 'No DSS' policy was a provision, criterion or practice and applied to those who shared the protected characteristics of sex (women), and disability and those who didn't. Substantial evidence from Shelter showed that it placed those with these protected characteristics at a particular disadvantage when compared with those without:

- **Sex**: Women renting privately were more than 1.5 times as likely to rely on housing benefit, and therefore be excluded. Similar results were reflected in respect of occupiers of housing generally. Women are substantially more likely than men to claim Housing Benefit and thus more likely to be adversely affected by a No DSS policy.

- **Disability**: Analysis of the Understanding Society Survey showed that of those renting privately, disabled households were nearly three times as likely to rely on Housing benefit over non-disabled households. This increased to almost 5 times when considering housing occupiers generally. Accordingly, disabled persons are more be excluded by a No DSS policy.

The policy had put A at a disadvantage in that she was prevented from viewing a property she was interested in renting. It was agreed that the policy was not justified.

Accordingly, the policy was declared unlawful for being indirectly discriminatory. The Claimant was awarded £3,5000 and her costs.

***Tyler v Paul Carr Estate Agents*, County Court at Birmingham *Legal Action* Nov 2020 (8 September 2020)**

Mr Tyler brought a claim for indirect discrimination against Paul Carr Estate Agents' blanket police of refusing to rent to those receiving housing benefit. He argued that this indirectly discriminated against people who were disabled and placed them at particular disadvantage when compared to others. He was disabled, in receipt of welfare benefits and could not rent from them despite having good references and good payment record.

HHJ Stacey agreed and awarded £6000 in damages. (S)he particularly considered the distress caused to Tyler by being told that he could not apply for three properties which were perfectly located for his children's school, his GP and health needs, and extended family support, solely because he was reliant on housing benefit.

G. TENANCY DEPOSITS

Liaw v Sohal (10 Jan 2019, County Court at Central London,) *Legal Action* March 2020 and *Nearly Legal*, 11 Jan 2020.

Ms Liaw was the tenant of Ms Sohal. They entered into an assured shorthold tenancy agreement starting in October 2013 with a fixed term of 12 months. Liaw paid Sohal a deposit of £2100 before the tenancy began. The deposit was protected but the prescribed information was not provided to Liaw. The tenancy was renewed twice for 12 months at a time. Liaw left on 1 October 2016 having given a week's notice. The deposit was not returned to her. She brought a claim for its return and three penalty payments for failing to provide the prescribed information.

Sohal defended and counterclaimed for rent loss, council tax and other bills/disbursements. She claimed that there had been no renewal tenancies and the prescribed information had been provided within 30 days.

The District Judge rejected Sohal's defence. S(he) was fairly certain that a letter purporting to be sent on 25 October 2013 was not genuine. There was also clear evidence of the two renewal agreements and on each occasion an obligation to serve the prescribed information had arisen which the Court found Sohal was aware of. The penalty had to be awarded for each of the three occasions but only two times the deposit because it had been protected. The return of the deposit was also awarded.

The counterclaim was dismissed save for some minor labour/purchases. The tenancy did not require Liaw to give notice where the fixed term was in place and naturally came to an end on the last day of the stated period, which was the case here. Therefore, no lost rent or council tax costs were awarded in the counterclaim. The alleged repairs were largely pre-existing or wear and tear and disbursements claimed were not consistent with the evidence.

H. WATER RE-SELLING

***The Mayor & Burgesses of the Royal Borough of Kingston-Upon-Thames v Moss* (2020) EWCA Civ 1381 (27 October 2020).**

Mr Moss was the secure tenant of a one-bedroom flat let to him by Kingston-upon-Thames (Kingston). His tenancy commenced in October 1999 and the terms varied from 1 September 2003. The agreement provided that he was obliged to pay water charges to Kingston, initially, for "*the actual amount payable for the premises*" then "*the exact amount payable for the property to the water authority*".

Kingston had a written agreement with Thames Water Utilities Ltd ('Thames Water') dated 14 January 2003 ('the 2003 agreement') for Thames Water to supply water to Kingston's properties. This continued until 3 August 2017 when the agreement changed. Under the agreement, Thames water charged Kingston for water and sewerage, who in turn charged its tenants, including Moss. The charge which Kingston paid to Thames Water was subject to (i) an agreed 3.5% "voids allowance" which took account of the fact that some of the properties which Kingston were in theory 'paying' for properties which would be empty at various points, and (ii) an agreed commission of 9.3% less the voids allowance, offset against the charges otherwise payable.

Moss argued that Kingston was a "*water re-seller*" within the meaning of the Water Resale Orders 2001 and 2006. Kingston was bound by maximum charges in the Water Resale Orders and had charged Moss in excess of the cap by not applying the deductions for voids allowance and the commission referred to in the 2003 agreement, and Moss was entitled to recover that amount. Alternatively, the terms of the tenancy required the exact or actual amount payable, which necessarily meant how much Kingston had to pay and thus required deducting the commission and voids allowance. Morgan J agreed. Kingston appealed.

The Court of Appeal considered that the critical question was whether Thames Water had supplied Kingston, directly or indirectly with a supply of piped water and/or sewerage service. Kingston argued that it had not, and that the water was supplied directly from Thames Water to the tenants. Its own role was limited to collecting charges of Thames Water's behalf. Moss argued that the 2003 agreement meant that Thames water had supplied piped water and sewerage to Kingston, and he 'bought' it from them. Whether he paid or not, the 2003 agreement made Kingston responsible to pay the charges.

The Court of Appeal had little difficulty in concluding that Kingston was a water re-seller.

- There were many features of the 2003 agreement which pointed to the conclusion that Thames Water supplied piped water and sewerage services to Kingston, replacing the liability of the occupier and making Kingston a water re-seller.
- These included descriptions of Kingston as "the Customer", references to it "paying" for services and charges rather than collecting charges from others, invoicing, which usually denotes a sale, the payment intervals, interest terms and the voids allowance itself, which is premised on there being nobody occupying a property who is liable to pay.
- The refence to commission was one counter-indicator but in fact the 'commission' was merely to take account of the administrative burden and risk that Kingston, rather than Thames Water would bear.

The case law on local authorities and water agreements was considered, but of limited use in interpreting the document before them. The appeal was unanimously dismissed

I. INJUNCTIONS & COMMITTAL

***Rhondda Housing Association v Addison* [2020] EWMisc 17 (CC), (17 January 2020)**

In October 2019, Mr Addison ('Addison') was made subject to an ex-parte injunction with a power of arrest, prohibiting him from using or threatening to use violence towards any lawful resident or visitor to his property in Pontypridd. A return hearing was listed for 2 weeks later. Rhondda Housing

Association ('Rhondda') effected personal service of the order and papers upon him on 3 November 2019. Addison failed to attend the return hearing. The injunction was maintained and that order delivered by process server 3 days later whereupon Addison was aggressive to him. Addison was arrested on 18 November 2019 for directly threatening to harm a neighbour that day. He was brought to court, granted bail and given documents to read and/or give to a solicitor he instructs, as he had indicated he wanted to do. He attended the next hearing the following week unrepresented but wanting more time to secure representation. Directions were given and he was urged to get legal advice and representation and warned that the case would likely proceed on the next occasion.

Between then and January 2020, he failed to attend any listed hearing. He was twice arrested again, brought to court and given various documents and statements. He filed no evidence in response to any of the allegations. A hearing proceeded in his absence on 9 December 2019 where 4 breaches were proven. These included blocking the process server's vehicle from leaving, shouting and swearing at them, throwing documents at the car, banging on neighbour's doors or windows threatening to 'slice' and 'cut up' another neighbour. A further breach involving knocking on a neighbour's door was proven at a further hearing on 17 January 2020, which he again did not attend.

Addison was sentenced in his absence to 9 weeks imprisonment, suspended for the duration of the injunction.The most serious breach included acting deliberately and clearly causing distress to a victim who was in any event vulnerable by reason of limited mobility. Others were committed whilst on bail. He had been a former patient of the community mental health team and had a diagnosis of paranoid schizophrenia said to be in remission in 2015 which the Court considered. He had not engaged with assessments or services provided nor in the Court proceedings but even his neighbours considered he needs some support.

***Places for People Homes Ltd v Waite*, County Court at Bristol, *Legal Action* November 2020 and Judiciary.uk (20 August 2020)**

Ms Waite was an assured tenant of Places for People Homes ('PFP'). In March 2020 PHP issued a claim for an injunction against her due to noise nuisance affecting the tenant living above her. On 17 April 2020 an injunction was made forbidding her from playing music or creating any other form of noise at home at a level which could be heard outside the home at any time, and from causing noise nuisance anywhere and at any time in the building or locality of the building as a whole. Further complaints arose and an application for committal was made relying on 5 allegations of breach. Waite did not attend the committal hearing. HHJ Ralton found each of the allegations proved and was concerned about the impact of the music on the neighbour.

Waite was sentenced in her absence to 28 days imprisonment for each breach, served concurrently and suspended for 12 months on condition that she complies with the injunction terms. The breach was deliberate. It was not violent but was anti-social behaviour. It was suspended as this was Waite's first occasion before the Court in proceedings and the objective was to secure compliance, not punish.

***Poplar Housing v McHale*, County Court at Central London,*Legal Action* November 2020 and Judiciary.uk(20 August 2020)**

Mr McHale was the assured tenant of Poplar Housing and lived in 1 bedroom flat in east London. In October 2019 he was made subject to an anti-social behaviour injunction prohibiting him from engaging in conduct which was likely to cause harassment, alarm or distress to anyone, and in particular certain named residents of the block of flats, or nuisance or annoyance to anyone in their immediate vicinity. This included shouting inside the flat, out the windows or in the communal areas, playing loud music, slamming doors and stomping or making other excessive noise which could be heard outside the flat. In April 2020 Poplar applied to commit him to prison for 97 separate breaches over 8 months, under 10 umbrella allegations. All were found to be proved.

HHJ Hellman sentenced McHale to six weeks' imprisonment concurrent on each allegation and suspended for 12 months. The breaches were deliberate and had begun shortly after the injunction was made. The level of harm had seriously damages the quality of life of the residents of the block,

who had lived in "misery". McHale had an alcohol dependency which was the root of the problem and which he recognised and was seeking to address.

Hussain v Vaswani **[2020] EWCA Civ 1216, [2020] 9 WLUK 184 (18 Sept 2020)**

Mr Hussein was the tenant of the Vaswani's at a flat in London. The rent was £1950 per week. Hussein fell into rent arrears in January 2019 and the Vaswani's served notice and commenced possession proceeding in May 2019. A 14 day possession order was made in October 2019 by District Judge Parker with a money judgment for £61,150. Hussain appealed and sought a stay of execution. HHJ Lethem refused permission to appeal the money judgment, but listed the applications for permission to appeal the possession order and for stay of the possession order for hearings in February 2020 and December 2019 respectively. The Vaswanis obtained a warrant of possession, to be executed on 7 January 2020.

Hussain applied to adjourn the December hearing, which was refused. He did not attend and his application for a stay was dismissed by HHJ Lethem in his absence. Hussein applied to set aside that order pursuant to CPR rule 39.3 and for a stay of execution, but did to give notice of the application to the Vaswanis. At the hearing of that application before HHJ Lethem on 2 January 2020, he gave reasons for not attending in December which differed to those in his adjournment application. HHJ Lethem dismissed his set-aside application but adjourned the application for a stay to be heard on short notice on 6 January 2020. This was based on Hussain's evidence, having been warned as to the potential consequences of perjury or breaching an undertaking, that he was able and willing to pay the arrears in full (now at least £92,500) and had access to the funds, and his undertaking to pay £92,500 within 4 working days of notification of the account to which he should pay, irrespective of the outcome of his application or the appeal.

On 3 January 2020 Hussain was given details of the nominated account. On 6 January 2020, Hussain attended Court and said that the money had been paid. He produced a letter from a capital management company stating that it agreed to pay the sum of £92,500 and expected the funds to reach the nominated account in short order and in any event within four working days. On that basis, HHJ Lethem granted a stay of execution and suspended the warrant on the basis that there had been a change of circumstances since December 2019. However, that was conditional upon Hussain giving a further undertaking to pay the Vaswanis £1,950 use and occupation charges per week until the appeal concluded.

Shortly after the stay was granted, Hussein issued a £264,904 claim in the High Court against the Vaswanis, and applied to the High Court for permission to appeal against HHJ Letham's order of 2 January 2020. He wanted to replace the undertaking to pay the £92,500 with one to "use best endeavours" to procure that the capital management company made the payment. Permission was refused.

Neither the £92,500 nor the £1950 per week were paid. The Vaswani's applied for Hussain to be committed to prison for contempt of court on 4 ' grounds' failing to comply with undertakings given on 2 and 6 January 2020, breaching a further undertaking, and giving undertakings on 2 and 6 January 2020 dishonestly in that he did not intend to comply with them.

Hussain argued that he had never had the money to pay the sums and that the capital management company, despite what was said in its letter, had declined to pay the money because of the tax status on the nominated account. It also emerged that at the time Hussain was an undischarged bankrupt whose discharge from bankruptcy had been suspended, which he had not disclosed to HHJ Lethem. In due course the stay of execution was lifted, and permission to appeal against DJ Parker's order refused.

Hussain applied to strike out the committal application on the basis that:

(i) the County Court did not have jurisdiction to deal with the dishonesty ground, which HHJ Lethem accepted and struck out the application so far as it concerned that ground.

(ii) section 4 of the Debtors Act 1869 precluded him finding contempt of court on the other grounds. Judge Lethem rejected that submission but subsequently dismissed the ground that he had breached the another undertaking allegedly given on 6 January 2020.

At a further hearing not attended by Hussain, he found the remaining two counts of contempt proved, and also that Hussain had no intention of complying with the undertakings which was relevant to sanction. Hussain failed to attend for sentencing but set out his mitigation in a witness statement. He was sentenced to 12 months imprisonment.

Hussain appealed to the Court of Appeal. His appeal was dismissed:

(i) Hussain argued that the Debtors Act did not preclude the court from finding that he was in contempt of court, but did prevent it from imposing a sanction of imprisonment. The Court of Appeal rejected this ground. The wording of CPR r.81.4 makes clear that an undertaking by a party may be enforced by an order for committal, subject the Debtors Acts 1869. Section 4 of that Act provided that subject to exceptions "*no person shall be arrested or imprisoned for making default in payment of a sum of money*." Hussain was not being imprisoned for "*making default in payment of a sum of money*" or failing to pay an ordinary debt within the meaning of section 4. He gave the undertakings to procedure Court orders in his favours - to establish a change of circumstances which would open the door to a reconsideration of the refusal of a stay and to persuade the court to exercise its discretion in his favour by granting a stay. Whilst in practice it amounted to failing to make a payment, in fact it was a failure to honour extra obligations to the court which Hussain had assumed, over and above the ordinary debts he owed, for the purposes of obtaining advantages in the proceedings.

(ii) Of his 12 month sentence, 8 months was punitive, and 4 months coercive. The Court rejected Hussain's argument argued that HHJ Lethem could not impose the coercive term. It made no difference,

(iii) The Court did not accept that 12 months was manifestly excessive. It was high but not outside the ranges of sentences reasonably open to the judge. He had considered relevant factors, considered each county separately and substantially discounted the sentence in acknowledgment of the mitigating circumstances and heavier impact of a custodial sentence in light of COVID-19.

***Home Group Ltd v Fletcher*, County Court at West Cumbria, unreported, Judgment on Judiciary.uk (26 October 2020)**

Mr Fletcher was the tenant of Home Group Ltd. He has PTSD and had a problem with drugs when living in Brighton. He made significant efforts to come off them. He eventually came off methadone but the lockdown caused by COVID-19 meant his usual PTSD support stopped. He self-medicated heavily with alcohol. An interim injunction was made on 9 July 2020 and made final on 21 July 2020 in respect of his behaviour earlier in the year which was said to resemble having various people at his properties, fighting and the police being called. Home Group applied for Fletcher to be committed to prison for breaches of the then interim injunction. The application was adjourned for legal advice. Fletcher admitted two incidents on 11 and 14 July 2020. On both occasions he had social gatherings, uninvited people attended, fights proceeded in the front garden and police attended.

HHJ Dodds sentenced Fletcher to 6 weeks custody, suspended for one year. One breach was minor but the second was not. The breach was deliberate but not very serious or persistent. The events were not causing very serious harm or distress and were not serious criminal behaviour, but the effects on the neighbours must have been significant. However, as things stood it was not likely to be repeated given his more recent behaviour. There had been no repeated incidents since. His personal life had much improved. He stopped using drug (or drug replacements) and relying on alcohol.

ELERI GRIFFITHS **One Pump Court Chambers**