

# HOUSING LAW UPDATE: FEBRUARY 2007



The following is an update on housing law developments including a digest of cases on housing law reported or decided between April 2006 and January 2007, and legislation passed between April 2006 and January 2007. It includes English cases where those cases are significant and are relevant to Scottish law. Readers should however approach such cases with care due to the differences in the legislation and common law between the two jurisdictions. Full texts of the cases cited can usually be found on the web. [www.bailii.org](http://www.bailii.org) should contain all the English Court of Appeal decisions and House of Lords decisions referred to here. It also contains some High Court decisions. [www.scotcourts.gov.uk](http://www.scotcourts.gov.uk) has all Court of Session decisions and some sheriff court decisions. Unreported sheriff court decisions not on this site can be obtained from the court concerned for a fee. The Scottish legislation can be found at [www.opsi.gov.uk/legislation/scotland/s-acts.htm](http://www.opsi.gov.uk/legislation/scotland/s-acts.htm) and the official Statute Law Database (with updated legislation) is at [www.statutelaw.gov.uk](http://www.statutelaw.gov.uk).

## CASELAW

### Eviction

*Aberdeen City Council v Shauri* 2006 HousLR 40 (Sh Pr)

The pursuers obtained decree by default for recovery of possession against the tenant, a failed asylum seeker, on the grounds of rent arrears. The defender appealed and sought to be reopened. He claimed that he was present in the court building on the day that decree was granted and had not found out about the decree until too late. The reason for the rent arrears was because his benefit payments had stopped after his application for asylum

had been turned down. His solicitors had made a second application for asylum which if granted, would permit him once more to obtain benefit. The Sheriff Principal refused the appeal. While an appeal court would be reluctant, in any case in which *prima facie* there appeared to be a proper defence, to allow decree to pass without investigation of that defence, this was one of the rare cases in which it would not be appropriate to allow the defender to be reponed against the decree by default since if the sheriff had to reconsider the matter afresh, he would be driven inexorably to grant decree given that the rent arrears had risen to over £4500 with the defender only able to make five monthly payments of £20. The success of the future application for asylum was purely speculative.

*Glasgow Housing Association Ltd v Gourlay* 2006 HousLR 52 (Sh)

The pursuers sought recovery of possession on the grounds that the tenant had been convicted of supplying drugs from the house. The action was defended solely by the wife of the tenant as a qualifying occupier. She resided in the property with her two adult sons who were also qualifying occupiers. She claimed that she was unaware of any drug dealing from the premises and that she had led a separate life from her husband. She accepted that there was alternative accommodation available to her. The sheriff held that it was reasonable to grant the order since the wife could not have been unaware of her husband's dealings, the dealings were anti-social behaviour and she had done nothing to improve the situation. The tenant continued to reside in the premises following a police search. It was reasonable to grant decree.

*Glasgow Housing Association Ltd v Marshall* 2006 HousLR 56 (Sh)

The pursuers sought recovery of possession on the grounds of anti-social behaviour by the tenant and her children or those visiting the property. The

pursuers said they could not rent the neighbouring property while the defender and her family remained in the house. The Sheriff held that the tenant and her children were guilty of anti-social behaviour. Even though there had been a reduction in that behaviour since the action was raised, given the defender's general dishonesty and her behaviour over a considerable period of time, the sheriff considered it was not reasonable that the pursuers should be required to make other accommodation available. He also considered that it was reasonable to grant decree for recovery of possession.

*City of Edinburgh Council v Catherick* 2006 HousLR 62 (Sh)

The pursuers sought recovery of possession of the house from the daughter of the deceased tenant. The defender claimed that she had succeeded to the tenancy since it was her only or principal home at the time of her father's death. Prior to the father's death, the pursuers had carried out various works of adaptation to the house due to the father's disability which took seven to ten days to complete, costing nearly £4,000. The pursuers claimed that the effect of the works was that the house had been "substantially adapted" and that since the defender did not have special needs requiring accommodation of the kind provided by the house, she was not entitled to succeed to the tenancy in any event. The sheriff held that as at the date of the death of her father, the defender's only or principal home was her father's house; that the defender was her father's carer; but that the property had been substantially adapted for occupation by a person whose special needs required accommodation of the kind provided in the house and that since the defender did not have special needs requiring accommodation of that type, the pursuers were entitled to decree.

*Glasgow City Council v Nisala* 2005 HousLR 108 (Sh Pr) [*sub nom* Nisala v Glasgow City Council]

The defender entered into a tenancy agreement with the pursuer. The tenancy agreement provided that the tenancy was granted on a temporary basis in fulfilment of the pursuers' statutory duty to homeless persons. Schedule 1(5) to the Housing (Scotland) Act 2001 provides that a tenancy is not a Scottish secure tenancy if the house has been let to the tenant expressly on a temporary basis for a term of less than six months in fulfilment of a duty imposed on a local authority by the homelessness legislation. The sheriff granted decree on the basis that the tenancy was not a Scottish secure tenancy, being one that fell within schedule 1(5). The defender appealed. The Sheriff Principal allowed the appeal. The tenancy agreement made no reference to the term of the tenancy being for less than six months. Since the term had to be stated expressly, the tenancy was a Scottish secure tenancy, given that the other conditions for the creation of a SST were fulfilled.

*Elizabeth Brown v Glasgow Housing Association Ltd* [2007] CSOH 32, 13 February 2007, Lord Glennie.

In this action, the tenant pursuer sought suspension and reduction of a decree, granted in her absence in the sheriff court for recovery of possession of her flat, and interim interdict against eviction. The pursuer had been in arrears of rent and the sheriff court action had been continued to allow her to make payments. She did not appear in court on the day that the sheriff granted decree. Neither was she represented. On learning that decree had passed, she sought to appeal but had to abandon the appeal as the decree had been extracted. She could not seek recall as that had already been done. However, the respondents had not ejected her from the subjects and she retained possession. The respondents opposed interim orders. The Lord Ordinary granted interim suspension of the decree and interdict. In doing so,

after a review of the authorities, he accepted that there was a *prima facie* case and that the balance of convenience favoured the pursuer.

### **English eviction cases**

*Lambeth LBC v Vandra* [2006] HLR 19

The local authority granted the defendant a secure tenancy of a flat. It then found that the flat had apparently been sub-divided and let to a number of other people. The authority decided the defendant was no longer a secure tenant because she had sub-let the whole of the flat. Possession proceedings were commenced. The defendant denied she had sub-let the flat claiming it was being looked after rent-free by one person who had allowed the other four people into occupation. The district judge rejected the defendant's explanation. The defendant appealed to the circuit judge. The circuit judge allowed the appeal. The authority appealed to the Court of Appeal. The Court of Appeal restored the original decision. It held that the evidence of the authority placed an onus on the defendant to explain why she was not living at her flat and other occupants were. The district judge had been entitled to conclude that there was sufficient evidence from which it could reasonably be inferred that the whole of the flat had been sublet.

*Desnousse v Newham LBC and Paddington Churches HA and Veni Properties Ltd* [2006] HLR 38

See below under Homelessness cases.

*Patel v Pirabakaran* [2006] HLR 39 CA

Premises were let to the claimant for both business use and residential use. The landlord commenced proceedings for possession. The tenant took separate proceedings for an injunction to prohibit the landlord from excluding him from any part of the property on the basis that under section 2

of the Protection from Eviction Act 1977, it was unlawful for the landlord to enforce a right of entry other than by court proceedings because the property was "let as a dwelling". The Court of Appeal held that the words "let as a dwelling" in section 2 of the 1977 Act meant "let wholly or partly as a dwelling". Accordingly, where premises are let for mixed residential and business purposes, a landlord may not enforce a right of re-entry or forfeiture otherwise than by taking court proceedings. Furthermore, any other interpretation would be incompatible with the rights of the tenant in terms of Article 8 of ECHR.

*Knowsley Housing Trust v McMullen* [2006] HLR 43 CA

The tenant had an assured tenancy of a house into which he moved with her son aged 14. The defendant had a low IQ and was barely literate. For a period of three years, the defendant's son was guilty of a very large number of anti-social behaviour acts, was sentenced to 12 months detention and had an ASBO granted against him. The Housing Trust commenced proceedings for possession. The defendant admitted that her son had committed acts of nuisance but claimed that she was disabled for the purposes of the Disability Discrimination Act 1995 and that she had not been able to control the actions of her son; nor was she in a position to exclude him from their home. She claimed that a possession order was not necessary because the behaviour of her son was adequately controlled by the ASBO and by the conditions of his release from detention. The judge found that the allegations were proved and it was reasonable to make a possession order. He however postponed the order on terms that the defendant and her son did not commit any further acts of nuisance. The defendant appealed to the Court of Appeal. The Court of Appeal held that there was no general principle that a court may not make a possession order on the grounds of nuisance simply because the tenant is unable to control the person in his household who is responsible for the

nuisance. The fact that the tenant cannot control such a person may assist her to resist a possession order especially where she has done all she can to stop the nuisance. Unless however the nuisance-maker has vacated or will shortly vacate the property, the tenant's inability to control that person is a factor which may operate in favour of an outright possession order. The court also held that where the person responsible for a nuisance is subject to an ASBO, there is no reason why the existence of that order should prevent the court making a possession order. The existence of the ASBO may however be relevant where the court is deciding whether it is reasonable to make a possession order or whether to postpone any such order to see whether the ASBO prevents any further nuisance.

*McCabe v Wilson* 2006 Hous LR 86 (Sh)

A landlord granted a short assured tenancy commencing on 7<sup>th</sup> April 2005 and terminating on 6<sup>th</sup> October 2005. The lease was entered into on 7<sup>th</sup> April 2005 during normal office hours. The landlord's representative sought recovery of possession. The tenant resisted the action on the grounds that the lease was for a term of less than six months and therefore could not be a short assured tenancy. The sheriff granted decree. The agreement expressly provided that the short assured tenancy was for a period of six months commencing on 7<sup>th</sup> April. The parties had therefore intended the tenancy to commence on the first moment of that day. The parties intended it to be a short assured tenancy. They were entitled to agree this. What is important is what the parties intended. The parties' intention was clear.

### **Right to Buy**

*Martin v Medina Housing Association Ltd* [2006] HLR 40 CA

In 1989, the tenant served the local authority with a notice seeking to exercise the right to buy. The authority admitted that the claimant was entitled to

exercise the right to buy and served a notice proposing to sell with the purchase price. The tenant did nothing in response. The authority recorded the right to buy application as cancelled. The tenant died and the claimant became the tenant of the house. The house was transferred to the association. In 2002, the claimant told the association he intended to exercise the right to buy on the terms proposed by the authority in 1989. The Court of Appeal held that although a notice withdrawing the right to buy under section 122 of the Housing Act 1985 must be in writing, the tenant may abandon or waive his right to buy under normal principles of common law and equity and may be estopped from continuing to exercise it. Furthermore, the oral withdrawal of the right to buy application amounted to an express release. Given that on the part of the local authority, it had recorded that the right to buy application had been cancelled and had not taken any further steps, the application had been terminated in 1990.

*Johnston v Dundee City Council* 2006 Hous LR 68 (Lands Tr)

The applicant appealed to the Lands Tribunal against a decision by the respondents to refuse his application to buy his house on the basis that he had not been in occupation of the house for a continuous period of two years prior to his application. The Tribunal refused the appeal. The applicant had not satisfied the Tribunal that in the year immediately prior to his application to purchase that he was at any time in occupation of the house and on the balance of probabilities he had intended to make his home at his wife's flat after his marriage and had in fact done so.

*Dorman v Edinburgh City Council* 2006 Hous LR 74 (Lands Tr)

The applicant was a school janitor. He applied to the Tribunal for a finding that the respondents' offer to sell the property, following amendments made by the 2001 Act to the 1987 Act, did not stipulate the correct price for the

house in that the discount had been calculated on the basis of the reduced discount available under the 2001 Act and not the larger discount available under the 1987 Act. He claimed that the 1987 Act provisions should apply since he had acquired the right to buy before the conversion date (30 September 2002). This was because although the house which he occupied was close to the school, the school had been severely damaged by fire three days before the conversion date requiring complete demolition and that therefore there was no curtilage within which the house could be situated. Therefore, from the point at which the school became unusable, or at least from the date on which the decision to demolish was taken, both of which were before the conversion date, he thereby acquired the right to buy under the 1987 Act and with that, the larger discount. The Tribunal refused the application. The house was certainly very close to the main building and appeared to have been part of the original school development. The consequences of the fire were not material to the issue while there was still a building on the conversion date even though the building was severely damaged, completely unusable and in the course of being demolished. Furthermore, the school building was held by the landlord for a non-housing purposes and the house remained within the curtilage of the building; therefore the statutory exception was applicable and he did not have a secure tenancy on the relevant date. Accordingly, the purchase price stipulated by the council was correct.

*Williamson v Fife Special Housing Association* 2006 Hous LR 80 (Lands Tr)

The occupier of a house applied to the Lands Tribunal for a finding that he had a right to purchase his home. The application had been refused by the respondents on the grounds that the applicant had previously assigned his tenancy to his wife who did not have the right to buy. The Tribunal refused the application. On a careful analysis of the documents completed by the

applicant and his wife, the tenancy had been assigned with immediate effect and therefore the applicant had no right to buy.

*Fee v East Renfrewshire Council* 2006 Hous LR 99 (Lands Tr)

A school janitor and his wife sought to purchase their house which was situated near the school. The respondents refused the application on the grounds that the applicants were not secure tenants because the house lay within the curtilage of the school. The application to the tribunal was refused. Although the respondents' case on curtilage based on the 'use test' failed, on the geographical test, the house was within the curtilage of the school building.

### **Human rights**

*Tower Hamlets LBC v Rahanara Begum* [2006] HLR 9 CA

See Homelessness cases below.

*Desnousse v Newham LBC and Paddington Churches HA and Veni Properties Ltd* [2006] HLR 38

See Homelessness cases below.

*Patel v Pirabakaran* [2006] HLR 39 CA

See English eviction cases above.

*YL v Birmingham CC and Southern Cross Healthcare LTD* High Court, 5 October 2006 and Court of Appeal [2007] EWCA Civ 26

See Residential Accommodation below.

*Tsfayo v United Kingdom* ECtHR application 60860/00, 14 November 2006

The court held that the availability of judicial review from a tribunal which is not independent and impartial may be a sufficient safeguard of a person's right to a fair trial under Article 6 where the issues before the tribunal require a measure of professional knowledge or experience and the exercise of

discretion pursuant to wider policy aims. Where however the tribunal is deciding simple questions of fact, judicial review is not an adequate safeguard because the High Court has no power to rehear the evidence or substitute its own view as to the credibility of witnesses. The Court so held in relation to a challenge to a decision of a Housing Benefit Review Board.

### **Homelessness cases**

*Morgan v Stirling Council* 2006 Hous LR 95

The petitioner sought judicial review of the decision of the respondents that she was not in priority need on account of her claimed “depression and nervous disability”. She claimed that the respondents had applied the wrong test in deciding whether she was vulnerable. The Lord Ordinary refused the petition. On the facts, the respondents had applied the correct test. Furthermore, it could not be said that the decision of the respondents was the irrational. The decision on this question was a matter for the respondents which the court was not entitled to second-guess.

*Tower Hamlets LBC v Rahanara Begum*[2006] HLR 9 CA

The defendant was offered temporary accommodation as a homeless person. Two years later, the local authority made her an offer of permanent accommodation which she refused because she believed it was unsuitable. The local authority decided that it had discharged its full duty to her and raised proceedings for recovery of possession of the temporary accommodation. The Court of Appeal, allowing the local authority appeal, held (*obiter*) that domestic law contains all the substantive rights which an applicant for housing assistance is entitled and all the procedural provisions by which such rights are determined. The defendant’s Article 8 rights were not violated because her right to occupy her flat had been determined as a result of her failure to comply with the time limits for bringing an appeal to

the County Court against the authority's decision that they had discharged her duty to her. Furthermore, the defendant was not entitled to judicial review of the local authority's decision to take possession proceedings because she had neither sought a statutory review of their decision nor had she exercised her statutory right to appeal to the County Court in time.

*Crossley v Westminster CC* [2006] HLR 26 CA

The issue in contention here was the determination as to whether a person is vulnerable and therefore in priority need where the person has a long history of chronic drug abuse. In this case, the claimant, who had a history of repeated relapses into drug abuse after partial recovery, and who had been sleeping on the streets for 16 years with only occasional hostel accommodation had been assessed by the local authority as not vulnerable for the purposes of the homelessness legislation. The Court of Appeal held that the authority had failed to have proper regard to the claimant's history and refused the local authority's appeal for that reason. *Obiter*, the court held that drug addiction by itself cannot amount to a special reason for the purposes of assessment of vulnerability. However, local authorities should carefully consider whether there are other factors which make a drug addict vulnerable for a special reason such as suffering from a particular form of harm or spending a significant amount of time in care without family support. In the claimant's case, the special reason could have been that he was vulnerable to relapse into drug abuse if he were to be street homeless. Furthermore, when assessing whether a person is vulnerable, as a result of two different causes which together produce a single set of effects, local authorities should not artificially distribute those effects between the separate causes.

*Desnousse v Newham LBC and Paddington Churches HA and Veni Properties Ltd*  
[2006] HLR 38

The claimant applied to the first defendant authority as homeless. The authority secured a self-contained flat managed on behalf of its owner by the third defendant. The agreement signed in respect of that flat at acknowledged that the claimant had been placed in the flat by the authority and that the flat was being managed by the Association. The authority then decided that the claimant was intentionally homeless and was told that her accommodation would be cancelled. The claimant claimed that she could not be evicted without a court order and sought an injunction to prevent this. The County Court judge refused the injunction on the grounds that he was bound by authority to hold that interim accommodation provided under the homelessness provisions did not attract the protection of the Protection from Eviction Act 1977 (which prohibits the eviction of certain classes of occupiers without court order). The claimant appealed to the Court of Appeal. The Court of Appeal dismissed the appeal. The court held that the case of *Mohammad v Manek and Chelsea RLBC* (1995) 27 HLR 439, CA was authority for the proposition that the Act does not apply to a licence of accommodation secured for a homeless person by a local authority in discharge of their duty under the 1996 Act. It held that it was unnecessary to decide whether the proposition extended to tenancies. Further, an applicant provided with accommodation under section 188 has civil rights to which Article 6 of ECHR could apply and that by the time of the hearing, the flat had become the claimant's home and she was accordingly entitled to the protection of Article 8 of the Convention. However, (by a majority) various factors justified the interference with Article 8 rights which occurred because of the absence of the procedural safeguards afforded by the 1977 Act.

*R (Conville) v Richmond-upon-Thames LBC* [2006] HLR 45 CA

The applicant was homeless and applied to the authority for accommodation. The authority determined that she was homeless, eligible for assistance and in

priority need but that she was intentionally homeless. She was told she could remain in the temporary accommodation it had provided for a further 28 days. The authority granted her a number of extensions. Refusing a further extension, the authority stated that taking into account the scarcity of housing in the locality, the claimant's circumstances (including the fact that she did not have money for a deposit or advance rent and the difficulties this posed for her), the authority was satisfied that she had been provided with accommodation for a sufficient period to give her a reasonable opportunity of securing accommodation. The claimant sought judicial review on the ground *inter alia* that she had not been offered accommodation on a temporary basis for a long enough period. The Court of Appeal held that when an authority decides for how long it should secure that accommodation is available so as to give an applicant a reasonable opportunity of securing accommodation for himself, pursuant to their statutory duty, it is not permitted to have regard to considerations which are particular to the authority, such as the extent of its resources and other demands on it. What is reasonable for the purposes of the legislation is to be assessed by reference to the particular needs and circumstances of the applicant, including the possibilities open to him of obtaining accommodation. If the applicant is not making reasonable efforts to seek accommodation, that will be a strong indication he should not be given more time. Even where the applicant makes reasonable efforts, a moment will normally be reached when time will expire if those possibilities have not come to fruition.

### **Rights of EU nationals to housing**

*R (On the application of Mohamed) v Harrow LBC* [2006] HLR 18 (QBD)

The claimant, a Dutch national, came to the United Kingdom. She worked for nine months until she was made redundant. Then two of her dependent children came to live with her in the United Kingdom. She registered as

unemployed and claimed income support and housing benefit. She then became homeless and sought assistance from the local authority as a homeless person. The local authority refused to provide her with assistance on the grounds that she was not exercising rights as a worker for the purposes of Article 39 of the EC Treaty, that she did not have the right to reside in the United Kingdom under Article 18 and because she did not have sufficient resources to support herself. In any event, even if she was exercising EU rights, the provision of accommodation was not necessary to avoid a breach of them. The claimant sought judicial review on the grounds that she was a worker (because she had retained that status since losing her job by virtue of the Immigration (EEA) Regulations 2000) and that she had been discriminated against contrary to Article 12 of the treaty. The application for judicial review was dismissed. The court held that the authority was entitled to decide that the claimant was not a worker for the purposes of Article 39 because she was not in paid employment, and she had not retained the status of a worker, did not have a sufficiently close connection with the employment market and had failed to find work for a period substantially longer than six months. Furthermore, the right of a European Union citizen to reside within the territory of a member state under Article 18 is subject to the limitation in directive 90/364/EEC that he has sufficient resources to avoid being a burden on the social assistance system of the host member state. Furthermore, there was no discrimination because she had not been exercising Treaty rights. Furthermore even if the claimant was a work-seeker for the purposes of Article 39 of the treaty, the provision of interim accommodation under the homelessness legislation was not necessary to enable her to take up activity as an employed person or to pursue such activity. [Note: that since this decision was made, there is been substantial change to UK law in this area by virtue of Regulations made under Directive 2004/38/EC, the so-called Citizens' Directive, with effect from 30 April 2006]

*Abdi v Barnet LBC and Ismail v Barnet LBC* [2006] HLR 23 CA

The appellants were Dutch nationals who came to live in the United Kingdom. Both appellants were unable to work because they had to look after children. Both appellants were in receipt of income support. They claimed that in terms of the Homelessness (England) Regulations 2000, a person who is subject to the immigration control and who is also in receipt of income support is eligible for assistance under the homelessness legislation. Paradoxically, they therefore claimed that they were persons who were subject to immigration control and were therefore entitled to housing assistance. Their applications for housing as homeless persons were refused by the local authority. They were successful in challenging that decision at first instance. The authority appealed to the Court of Appeal. It claimed that such persons were not subject to immigration control. The Court of Appeal held as follows. An EEA national who is not a qualified person for the purposes of the Immigration (EEA) Regulations 2000 requires leave to remain in the United Kingdom and accordingly he is subject to immigration control when determining whether he is eligible for assistance under the homelessness legislation. [Note: the result, and basis for it, is different from the *Mohammed* case noted above. The same caveat referred to at the end of that digest applies equally here. There is no direct equivalent to the Homelessness (England) Regulations 2000 in Scotland.]

### **Disrepair**

*Angela Mack v Glasgow City Council* 2006 SC 543; 2006 Hous LR 2

In this case, in which the Sheriff Principal upheld the pursuer's appeal against the decision of the sheriff, the Inner House upheld the decision of the Sheriff Principal (reported at 2005 HousLR 66 (Sh Pr)) to the effect that in an action for damages arising out of housing disrepair, a claim for inconvenience is not

a claim for *solatium* and therefore, such a claim prescribes after five years and not three. The decision of the Outer House in *Fleming v Strathclyde Regional Council* 1992 SLT 161 to the opposite effect was wrongly decided.

*Marlborough Park Services Ltd v Rowe* [2006] HLR 30 CA

Cracks appeared in the walls of a maisonette. The weight of a concrete ceiling caused movement in the timber ceiling beneath it which in turn caused cracking in the walls. Works were required to strengthen the timber ceiling. If the works were not carried out, there was a risk of it collapsing which collapse would reduce the natural support for the walls. The court held that the timber ceiling between the ground and first floors of the maisonette played a significant part in keeping the block stable in that it provided a degree of support for the walls. If this ceiling were to collapse there would be a direct impact on the walls of the block. The timber ceiling was therefore part of the “main structures” of the block and therefore the freeholder was responsible in terms of the lease for carrying out the works.

*R (Vella) v Lambeth LBC and London & Quadrant Housing Trust* [2006] HLR 12 (Divisional Court).

The Divisional Court upheld the decision of the High Court [2005] EWHC 2473 (Admin) holding that, on a proper interpretation of Environmental Protection Act 1990, section 79(1)(a), premises which lacked adequate sound insulation were not in such a state as to be prejudicial to health, and accordingly were not a statutory nuisance. That followed the decision of the Court of Appeal in *R. v. Bristol City Council ex p. Everett* (1999) 31 H.L.R. 1102, and the House of Lords in *Birmingham City Council v. Oakley* [2001] 1 A.C. 617. The contention that lack of adequate sound insulation can cause premises to be in such a state as to be prejudicial to health for the purposes of section 79 of

the Environmental Protection Act 1990 is no longer sustainable (see ScoLAG April 2006 for digest of previous decision).

### **Miscellaneous**

#### **Succession**

*Stephens v Kerr* 2006 [2006] HLR 21 CA

In a question as to whether or not the claimant had succeeded to a statutory tenancy under the Rent Act 1977, which turned on the question as to whether the claimant occupied the house as her residence, the Court of Appeal held that it is a question of fact and degree which should be approached in a commonsense way. The recorder in the court at first instance was entitled on the evidence to make the findings that he did with regard to her occupation of the house as her residence.

#### **Tenancy agreements**

*Riverside Housing Association v White and White* [2006] HLR 15 CA

In 1999, the claimant housing association granted the defendants an assured tenancy. The agreement was in the association's standard form. In terms of that agreement, the association could increase the rent by giving the defendants four weeks notice in writing. The agreement also provided that the rent payable "will be increased annually with effect from the first Monday of June each year". The agreement also provided that the terms of the tenancy agreement, other than changes in rent or service charges, could only be varied by written agreement between the parties or a specified procedure. For various sound reasons, the association decided that it was necessary to bring forward the date of the rent increase for assured tenants from June to April. It did so. The Court of Appeal held as follows. First, the presumption against time being of the essence had no application in the circumstances. Nonetheless, the rent variation clause was an important provision, linked with the rent formula, which gave the tenant the certainty of the date from

which an increased rent could be demanded if the stipulated procedures were followed. The judge below was entitled to conclude that the association had not complied with those procedures. The words of the operating clause were clear and unambiguous. They did not allow the association to substitute another date as the rent variation date. Although it was possible for the association and the defendants verbally to enter into an agreement to vary the tenancy agreements, no offer had been made by the association which was capable of being accepted: the rent-increase notices did not amount to such offers. The failure of the tenants to object at an earlier stage to the level of rent arrears claimed did not amount to a clear and unequivocal representation that they were waiving their rights under the tenancy agreement. [Note: leave to appeal to the House of Lords has been allowed].

*Kilby v Basildon DC* [2006] HLR 46 QBD

The claimant was a secure tenant of the local authority. Clause 11 of the secure tenancy agreement provided that the agreements could only be changed if the majority of tenants' representatives agreed at a special meeting. When changes were agreed, four weeks notice would be given to the tenants. The authority decided to approve and implement a new secure tenancy agreement. One of the proposed changes was the deletion of that clause. The authority decided to vary the terms without the agreement of the tenants' representatives on the basis that they were permitted by the Housing Act 1985 to do so. The claimant objected to the terms being amended without the agreement of the tenants' representatives and sought judicial review. The court dismissed the application for judicial review. It held that clause 11 was ineffective since section 102 of the Housing Act 1985 provided exclusively for the ways in which a secure tenancy may be varied and any other means was prohibited. The clause therefore unlawfully fettered the discretion of the authority. Furthermore, the statutory powers of housing management

conferred on a housing authority by the 1985 Act envisaged that secure tenancies may be granted for the purposes of alleviating social housing need. The corollary to those powers is the right of the authority to vary the terms of any secure tenancy. Clause 11 of the tenancy agreement was therefore an unlawful fetter on their management powers. Clause 11 of the agreement did not create a legitimate expectation since the clause had been void from the beginning of the tenancy and it could not be a proper expectation for the authority to go through an unlawful procedure to amend the tenancy agreements.

*Islington LBC v Uckac* [2006] HLR 35 CA

The local authority granted the defendant a secure tenancy of a two-bedroom flat. It subsequently decided that the defendant had made false representations on their homeless application form. This was denied by the defendants. The authority commenced possession proceedings relying on ground 5 of schedule 2 to the Housing Act 1985 (which provides a ground for possession where the landlord was induced to grant the tenancy by a false statement made knowingly or recklessly). The Court of Appeal held as follows. Ground 2 of schedule 2 provides a ground for possession where the current tenant or a person acting at his instigation induced the landlord to grant the tenancy by a false statement. The ground is not available where the false statement was made by the tenant's predecessor in title. The effect of the 1985 Act is that the landlord cannot bring a secure tenancy to an end by rescission, whether for misrepresentation or any other reason. Schedule 2 to the 1985 Act provides a detailed and exhaustive code of the grounds on which a landlord may bring a secure tenancy to an end and obtain a possession order.

## **Allocation**

*Mei Ling Lin v Barnet LBC and Murude Hassan v Barnet LBC* [2006] HLR 44  
QBD

The local authority's allocation scheme was a choice based scheme. When a property became available, it was advertised and applicants who were eligible for accommodation of that size could bid for it. Each property was let to the bidder with the highest number of points. Each claimant applied to the authority for accommodation as a homeless person and challenged the local authority allocation scheme by judicial review. They claimed that the allocation scheme was unlawful on the grounds that *inter alia*: it was contrary to the policy of the homelessness legislation; the award of 10 points did not afford them a reasonable preference as homeless persons; since transferor applicants were entitled to 100 points, a homeless applicant could not acquire a reasonable preference over a transfer applicant; the points award to transfer applicants was indirectly racially discriminatory. The court held as follows. Although an authority's allocation scheme must be framed to give persons owed a duty under the homelessness legislation a reasonable preference, the purpose of the Act is not to ensure that all such persons obtain tenancies with security of tenure. Applicants who are owed a duty under the legislation are only one group who were entitled to a reasonable preference. Determining priorities between competing groups is a matter for the authority. Furthermore, although persons who are homeless and owed a duty under the Act were only entitled to 10 points, that did not mean that they had not been afforded a reasonable preference. However, in competing for any property, a transfer applicant would always defeat an applicant owed a duty under the homelessness legislation and who otherwise shared the same characteristics. In that respect, the allocation scheme was unlawful because it failed to accord a reasonable preference to applicants owed a duty under the homelessness legislation. Finally, the evidence did not substantiate the contention that the points awarded to transfer applicants were points for which a considerably

smaller proportion of ethnic minority applicants than white applicants would qualify. Therefore, it was not indirectly discriminatory on racial grounds.

*R (Lynch) v Lambeth LBC* High Court (Admin) 16 October 2006

The High Court held that providing a local authority's allocation scheme gave a reasonable preference to persons who needed to move on medical or welfare grounds, as required by section 167(2) of the 1996 Act, the scheme did not need to specify in detail how the authority would assess such a need.

### **Closure Orders**

*Chief Constable of Merseyside Police v Harrison* 7 April 2006, Divisional Court.

Sections 1 and 2 of the Anti-social Behaviour Act 2003 provides a mechanism by which a police constable may apply to the court for a closure order of premises which have been used unlawfully in connection with drugs, where the premises is associated with the occurrence of disorder or serious nuisance and the making of the order is necessary to prevent the occurrence of such disorder or serious nuisance for the period specified in the order. The Divisional Court held that the standard of proof was the civil standard and is not the criminal standard as it would be for an ASBO. The making of a closure order differed in several ways from the making of an ASBO. Furthermore, the court must take into account that at the time the 2003 Act was passed, the minister promoting it stated the intention that the civil standard of proof should be the appropriate standard.

### **Residential accommodation**

*YL v Birmingham CC and Southern Cross Healthcare LTD* High Court, 5 October 2006 and Court of Appeal [2007] EWCA Civ 26.

The Court of Appeal upheld the decision of the High Court that a private provider of residential accommodation in a care home, by arrangement with a local authority pursuant to section 21(1) of the National Assistance Act 1948, is not exercising a public function and giving an occupant of such a care home notice to leave is a private act for the purposes of section 6(3)(b) and (5) of the Human Rights Act 1998. Southern Cross was not exercising public functions by caring for and accommodating the claimant and the service of notice on her to leave was a private act because Birmingham City Council was a core public authority lacking the power to delegate its obligations under the 1948 Act. Southern Cross was a private company which could not be required to provide residential accommodation; the relationship between the Council and the company and between the claimant and the company was governed by contract; the services provided by the company were private services often provided by private individuals; Southern Cross was not a dominant provider in the marketplace; Southern Cross had no coercive powers enabling it to detain the claimant and although the Care Standards Act 2000 set minimum standards, it did not impose any regulatory regime on the company. The Court of Appeal held that it was bound by its own decision in the *Leonard Cheshire* case ([2002] EWCA Civ 366) because that case stood with the decision of the House of Lords in the case of *Aston Cantlow* [2003] UKHL 37; [2004] 1 AC 546 and in particular, in the *Leonard Cheshire* case, the court did not adopt an institutional rather than a functional approach and neither did it wrongly apply the law on the amenability of bodies to judicial review rather than the jurisprudence under the Convention. Furthermore, there was insufficiently clear and strong convention jurisprudence that care homes should be treated as public authorities to require it to have been adopted by the court in *Leonard Cheshire*.

### **Violent profits**

*Ashford and Thistle Securities LLP v Kerr* 2006 Hous LR 6 (Sh Pr)

The court confirmed the general proposition that in an action for extraordinary removing (that is, where possession is sought before the natural expiry of the lease), a motion for caution for violent profits is incompetent. That is so even where the court has already granted an order for removing (or recovery of possession) and the motion is made during the course of the tenant's appeal against that order. However, in principle, a motion for caution for expenses would be competent in these circumstances.

### **LEGISLATION**

*Primary Legislation from April 2006 to January 2007*

None

*Statutory Instruments made from April 2006 to January 2007*

The Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2006, No. 108.

The Registered Social Landlords (Purposes or Objects) (Scotland) Order 2006, No. 211.

The Housing (Scotland) Act 2006 (Commencement No. 2) Order 2006, No.252.

The Housing (Scotland) Act 2006 (Commencement No. 3) Order 2006, No. 395.

The Council Tax (Exempt Dwellings) (Scotland) Amendment Order 2006, No. 402.

The Housing (Scotland) Act 2006 (Commencement No. 4) Order 2006, No. 569.

### **ABBREVIATIONS**

#### *Case reports*

AC	Appeal Cases
All ER	All England Reports
HLR	Housing Law Reports
HousLR	Greens Housing Law Reports
SC	Session Cases

SCLR Scottish Civil Law Reports

SLT Scots Law Times

WLR Weekly Law Reports

*Neutral citation*

CSIH Inner House of the Court of Session (the appeal court)

CSOH Outer House of the Court of Session (a single judge)

EWCA Court of Appeal

EWHC High Court

*Level of court (inserted after the case citation where not otherwise apparent)*

CA decision of the Court of Appeal in England

QBD decision of the Queens Bench Division in England

Sh decision of a sheriff

Sh Pr decision of a sheriff principal

Lands Tr Lands Tribunal for Scotland

[The author acknowledges the assistance provided by the helpful summaries of some of the unreported English cases by the Arden Chambers ([www.ardenchambers.com](http://www.ardenchambers.com)), which site is recommended.]

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