

Public Law Newsletter

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Just before you head off on your summer break we have some news for you from Hardwicke. Andy Lane discusses mandatory possession claims while Robin Jacobs examines the proposed changes in the Academies Bill passed by Parliament.

Mostly this month we have been . . .

- **Robin Jacobs** appeared in several cases concerning non-attendance at school, arguing whether bullying amounts to “unavoidable cause” under the Education Acts.
- **Fiona Scolding** has been arguing in Tribunal about whether or not someone can be a “child” for education law purposes at the age of 21.
- **Kerry Bretherton** and **Laura Tweedy** have been in the Court of Appeal acting in *Berrisford v. Mexfield Housing* concerning whether or not a landlord can recover possession of a property without establishing a breach of the terms of the tenancy.
- Not content with one Court of Appeal hearing a month, **Kerry Bretherton** has been back on two other occasions. She appeared in the landmark case of *G v E, a Local Authority & F [2010] EWCA Civ 822* which considered the application of Article 5 to Court of Protection cases and appeared for the local authority in *Corcoran* in which the authority overturned the decision to suspend an order for possession.
- **Andy Lane** has been in the High Court acting for the respondent, *Poplar HARCA*, in *Poplar Housing v Howe [2010] EWHC 1745 (QB)* concerning a challenge by a former tenant to a possession order.
- **Barbara Hewson** is chairing the morning session of The Public Law Projects “Trends and Forecasts 2010” conference in October.
- **John McKendrick** has been brushing up on statutory construction in the Upper Tribunal, arguing about the meaning of “person affected” for the purposes of housing benefit appeals. In the Autumn he will be chairing the Optimus Child Protection in Education Conference and speaking at the CLT Protecting Vulnerable Adults Conference, both being held in London.

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Gateway Blocked

Andy Lane has appeared in a number of Gateway A and Gateway B cases. In this article he brings us up to date on where tenants and landlords have got to in regard to this issue and considers what practical steps social landlords can take when faced with human rights and public law defences to possession claims.

For the last four years at the least, local housing authorities and private registered providers have faced numerous defences in the County Courts in relation to what would otherwise be mandatory possession claims. These defences have been based on what are now commonly referred to as the gateway (a) and gateway (b) defences (***Kay v. Lambeth*, UKHL 2006** and ***Doherty -v- Birmingham CC*, UKHL 2008**).

In short, these are challenges to the landlord's decisions to bring proceedings for possession in which the tenant relies on alleged breaches of Convention Rights, invariably Article 8, (gateway a) and/or public law (gateway b). The challenges are generally based on the decision to issue a notice or to bring or continue proceedings.

There has been great excitement in the Social Housing world (at least since England were knocked out of the World Cup!) anticipating the Supreme Court's decision in the demoted tenancy case of ***Manchester CC -v- Pinnock*** heard over four days in early July. No doubt this case will provide helpful guidance and clarification – especially for demoted tenancies - but I think we should not expect too much of a change from the growing body of case law.

My somewhat jaundiced approach can be arguably justified by two recent Court of Appeal authorities which confirm – at the higher Court level at least – the restrictions inherent in the gateway defences. The practical question for landlords is what to do in the County Court.

In ***Brent -v- Corcoran & O'Donnell* [2010] EWCA Civ 774** HHJ Copley made, and later suspended for 12 months, possession orders in respect of licences for two pitches at a travellers' site in Wembley. The Court of Appeal allowed the authority's appeal stating that they wanted "*to make it absolutely clear that public law attacks of the technical and over-theoretical sort advanced here have no merit whatsoever in this sort of case*". They confirmed that the correct approach was set out in ***Doran v. Liverpool CC, 2009*** where it was held that unreasonableness "*is a high test and rarely likely to be satisfied where the decision was made in good faith*".

The Court in ***Brent -v- Corcoran*** went on to say "*the real battle ... comes when the question of suspension of an order of possession comes to be considered. All factors (including but*

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not limited to all Convention considerations) can come into play then.”

After this the Court went through the various public law defences one by one, dismissing each of them. It rejected alleged failures under the *Race Relations Act 1976* and the *Disability Discrimination Act 1995*. It readily dismissed the claim that the authority should have “*put in place ... procedural safeguards having regard to the fact that termination of the licence would end the licencees’ contractual rights*”. Lord Justice Jacob then gave landlords’ representatives something to quote: “*The ... public law defences ... were hopeless from the outset. Such defences should only be raised when they have real and obvious substance: it is not appropriate to construct intellectual edifices of public law without any proper foundations in reality.*”

In a recent “five-hander” the Court of Appeal considered those cases where the claim for possession is mandatory, ***Mullen –v- Salford CC, 2010***. There Lord Justice Waller noted in respect of non-secure tenancies:

“Where a notice to quit has been served on a non secure tenant occupying accommodation as a homeless person it will take highly exceptional circumstances for there to be a gateway (b) defence. Barber may be an example of such circumstances where it seemed the Local Authority had been unaware when it served a notice to quit of the mental illness of the occupier and of the risk to his life if he were moved. Anything less than that kind of risk would be unlikely to qualify ...”.

This language is strict and restricting. One might therefore expect a tailing off in the pleading of such defences or a rise in the number of applications by claimants for a strike out and/or summary judgment where a gateway defence is raised. That is not the experience of the Public Law team at Hardwicke, just as Lord Bingham’s views in *Kay*, as to the initial question of whether a seriously arguable case actually exists not “*call[ing] for a full-blown trial*” and being susceptible to a summary decision do not seem to have been followed by the majority of County Court judges.

A similar point arose earlier in *Kay*, when Lord Bingham reassured Judges that “*the practical experience of county court judges is likely to prove the surest guide*” to whether the “*highly exceptional*” circumstances exist to allow a gateway defence to proceed. Current practice does not seem to reflect this. Pinnock may restate earlier principles and may clarify the position in demoted tenancies. It may give practitioners a chance to pause and reflect on the practicalities of this litigation but it is unlikely to change the established principles set out above.

Finally, before this article sounds too negative, I should record the successful appeal by a non-secure tenant in ***Barber-v-Croydon LBC [2010] EWCA Civ 51***. The local authority’s failure

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to follow its own anti-social behaviour policy (which it is of course required to have by law) was such that on the facts of the case its decision to seek possession was one which no housing authority could reasonably have taken. An important reminder to local authorities and private registered providers alike that a gateway defence can succeed and that their policies must be understood, applied and followed in a proper and appropriate fashion.

Hardwicke's **Kerry Bretherton** appeared in *Corcoran*

The Academies Bill: six reasons to worry

Academies have had a lot of press coverage recently to the extent that you would have only missed it if you have been too fixed on the back pages of the paper to notice the front! Robin Jacobs stands back from the fray to look at some of the debates that the proposed changes will produce.

At the top of the schools reform agenda is the Academies Bill. This Bill made its way through Parliament at a blistering pace and looks set to become law before the summer is out, now just awaiting Royal Assent. The Bill would enable maintained schools (at all levels) to become academies. However, the Bill raises a number of concerns and here (in no particular order) are some of them.

- **Responsibility:** academies are characterised by a high level of autonomy, which extends to total control of the budget. Some commentators fear that staff whose expertise lies in teaching may find it both difficult and overly time consuming to act as business people, for example trying to secure the best deals when it comes to buying in services. This problem could be particularly acute in the case of primary schools in rural areas, where head teachers not only retain an active teaching role but in some cases constitute a significant proportion of the teaching staff. At the other end of the scale large secondary schools will certainly need a qualified bursar.
- **Curriculum:** the new academies will have considerable freedom when it comes to setting the curriculum, only needing to provide a broad and balanced curriculum – wide open to interpretation. As it stands the Bill includes precious little by way of protection against narrow religious ideologies, inadequate sex education, warped interpretations of history and dubious science. The Lords tried to bring in amendments to keep mainstream schools in the cultural mainstream but they were voted down.
- **Democracy:** the Bill proposed by the government enables the governing body of a school to adopt academy status simply by passing a resolution and signing an agreement

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with the Secretary of State. Staff need to be consulted under TUPE but the lack of requirement for consultation, either with parents, the community or the LEA has been controversial.

George Pulman QC	1971 (1989)
John Friel	1974
Charles Calvert	1975
Barbara Hewson	1985
Karl King	1985
Deborah Hay	1991
Kerry Bretherton	1992
Arthur Moore	1992
Margaret Bloom	1994
Clive Rawlings	1994
Brendan Mullee	1996
Fiona Scolding	1996
Alison Meacher	1998
Alastair Redpath-Stevens	1998
Andrew Lane	1999
Sarah Malik	1999
John McKendrick	1999
David Lawson	2000
Shazia Akhtar	2001
Diane McBrinn	2002
Dean Underwood	2002
Sarah Venn	2002
Morayo Fagborun-Bennett	2004
Ajmal Azam	2006
Robin Jacobs	2006
Laura Tweedy	2007

- **Staff:** staff will be employed directly by the academies, which unlike schools under LEA control will be able to set their own pay scales and award bonuses. This has sparked fears that other state schools will be drained of teachers in shortage subjects, such as physics and maths because academies can pay them more. There are also concerns that money may be expended in bidding wars as rival academies battle it out to recruit or retain the most in demand teachers. Alternatively support staff, particularly outside London, may see their pay hit hard as wage rates become set very locally and by market forces rather than by union bargaining.
- **LEAs:** by granting so many schools independence and giving them much of the budget which LEAs once spent on their behalf, the Bill is likely to weaken LEAs significantly. LEAs still provide extensive services, for example in SEN, in education welfare and to schools in difficulties. It is not clear how these services can continue at the same level.
- **Admissions:** the controls on the admissions criteria of all these new academies remain unclear. In the absence of any central body to coordinate admissions for a given geographical area some children may fall between the cracks and struggle to find any appropriate – or perhaps any - school.

Members of the Hardwicke education team are familiar with the Academies Bill and have advised on or appeared in cases concerning academies.

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