



MASTER OF
THE ROLLS

LORD NEUBERGER OF ABBOTSBURY, MASTER OF THE ROLLS

**THE CURRENT LEGAL CHALLENGES FACING SOCIAL LANDLORDS: A JUDGE'S
PERSPECTIVE**

KEYNOTE ADDRESS

SOCIAL HOUSING LAW ASSOCIATION ANNUAL CONFERENCE 2009

27 NOVEMBER 2009

(1) Introduction

1. Good morning. It is a pleasure to be here to kick off this year's annual Social Housing Law Association Conference. When Tim Crook asked me if I would give a speech at your conference I was relaxing on holiday – well, relaxing as much as anyone can in the internet age when you can be tracked down anywhere. Tim tempted me with the promise that all I had to do was deliver a keynote speech. There was no need for me to go into detail. True to *his* word, I shall evade the subtlety of detail and head straight for the commanding heights of overview. You will of course appreciate that whatever I say today is said without the benefit

of argument, without which judges can tend to lose their way (although some might say that even with the benefit of argument they sometimes lose their way).¹

2. Starting outside the official bullet points for my speech, and I hope you'll forgive me, I begin with human rights, which raises two topics.² In discussing human rights and social housing, I am very conscious that Professor Ian Loveland has provided an impressive overview of the topic in the *European Human Rights Law Review* in a two part article entitled: *A tale of two trespassers: reconsidering the impact of the Human Rights Act on rights of residence in rented housing: Parts 1 and 2*.³ Professor Loveland opened the first of his two articles in this way,

“A year ago, academics and practitioners in the housing law field who excitedly welcomed the Human Rights Act (HRA 1998) as an innovation that would radically reshape many features of our housing and land law landscape were a profoundly disappointed bunch. In a series of judgments, the Court of Appeal and House of Lords had told us that – with a couple of rather niche exceptions – very little domestic law would have to be changed in order to comply with the requirement of arts 8 and 14 of the European Convention on Human Rights (ECHR) and art. 1 of Protocol No. 1. In the light of the European Court of Human Rights’ recently handed down judgment in McCann v United Kingdom, some of the more optimistic souls in the field who act primarily on behalf of defendants might be finding some new reasons to be cheerful.”⁴

He concluded with an allusion to that most famous of Chinese curses, saying this,

“For housing lawyers, these are indeed interesting times. And for those of them presented with what in the light of Qazi [Harrow Borough Council v Qazi [2004] 1 AC 983] would have seemed hopeless cases, those interesting times are not a curse but an opportunity.”⁵

3. As these two extracts illustrate, there is much to think about, as is illustrated by Mr Justice Collins’ comments about the state of the law in this area in *Defence Estates v JL* [2009]

¹ I would like to thank John Sorabji for all his help in preparing this lecture.

²

<http://www.ardenchambers.com/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=18&cntnt01origid=141&cntnt01returnid=85>

³ EHRLR [2009] 2, 148; EHRLR [2009] 4, 495.

⁴ EHRLR [2009] 2, 148 at 148 – 149.

⁵ EHRLR [2009] 4, 495 at 511.

EWHC 1049 (Admin). He, of course, expressed the view that the law in this area, given the state of the current House of Lords' authorities – *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 65 and *Doherty v Birmingham City Council* [2008] UKHL 57; [2008] 3 WLR 636 for instance – was, as he put it, '*frankly in something of a mess.*'⁶

4. I intend to begin with the decision in *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587, [2009] 25 EG 137 (CS). It seems to me that it is a good starting point, as it deals with the fundamental issue of public function and public act in the context of social housing. I will then look at issues that arise from *Kay* and *Doherty*. Finally, rather self-centredly, I will review a few cases in which I was involved when in the House of Lords.

(2) *R (Weaver) v London & Quadrant Housing Trust*

5. The facts in *Weaver* are straightforward. Mrs Weaver was an assured tenant of London & Quadrant ("the Trust"). The Trust was a registered social landlord – "an RSL". Mrs Weaver's rent was in arrears, so the Trust served her with a notice to quit, with a view to seeking an order for possession. So far, so straightforward. Mrs Weaver challenged the making of a possession order on two grounds. First, that in seeking possession, the Trust was acting in breach of a legitimate expectation that arose as a consequence of Guidance issued by the local Housing Corporation. Second, she relied on her Article 8 ECHR right, to the effect that eviction would interfere with it. However, like the first argument, that second argument, as noted by Elias LJ in his judgment in the Court of Appeal, was also based on a legitimate expectation.⁷ Both lines of attack failed in the Divisional Court, as it rejected the contention that a legitimate expectation had arisen. There you might think the matter would have rested, at least unless Mrs Weaver had chosen to appeal, which she did not.

⁶ [2009] EWHC 1049 (Admin) at [78], "*This is one of the problems with this case, we have three House of Lords' decisions which have left the law frankly in something of a mess.*"

⁷ [2009] EWCA Civ 587, [2009] 25 EG 137 (CS) at [1] – [3].

(i) The Nature of the Appeal

6. There was, however, an appeal – by the Trust. That was because the Divisional Court went further than simply deciding the legitimate expectation point, which was sufficient to dispose of the case. It went on to decide wider questions that it need not have answered, namely whether the Trust was a public authority, and whether the act of terminating the tenancy was a private act for the purposes of s6(5) of the Human Rights Act 1998 (“HRA”).⁸
7. Section 6(1) of the HRA provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. By subsection (3):

“...‘public authority’ includes -

(a)

(b) any person certain of whose functions are functions of a public nature”.

This is subject to subsection (5):

“in relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.”

8. So, a “public authority” can either be a public body such as a local authority (a so-called “core” public authority), or it can be a body which is not a public authority as such, but which has functions which can be characterised as public (a “hybrid” public authority). A core public authority is a public authority for all HRA purposes, whereas, because of section 6(5), a hybrid public authority is only a public authority for HRA purposes in relation to acts which are public (i.e. not private). I return to this in a moment.
9. Returning to the Divisional court’s declaration, Elias LJ noted giving his judgment on appeal:

⁸ *Ibid* at [4].

*“Notwithstanding that they (that is the Trust) had succeeded in defending the particular application, the Trust wished to appeal that finding in relation to its status in public law. The Divisional Court granted permission to appeal and facilitated this by making a formal declaration, which could be the subject of challenge . . .”*⁹

10. All three judges when this matter reached the Court of Appeal were critical of this. Elias LJ noted, critically, that the issue on appeal was ‘*somewhat abstract and academic in form*’.¹⁰

Lord Collins said this,

“89. Normally the Trust would not have been in a position to appeal from that part of the reasoning, because of the fundamental rule of procedure that appeals lie against judgments or orders only, and not against reasons But because the Trust wanted to contest the Divisional Court’s conclusion on that issue even if Mrs Weaver did not appeal ... , the Divisional Court granted declarations (a) that the management and allocation of housing stock by the Trust (including decisions concerning the termination of a tenancy) was a function of a public nature, with the effect that the Trust was to be regarded as a public authority in that respect for the purposes of the Human Rights Act 1998, section 6(3)(b); and (b) that the Trust was accordingly amenable to judicial review on conventional public law grounds in respect of its performance of that function.

90. Whether a declaration should have been granted was of course a matter for the discretion of the Divisional Court, and there was no party at that stage, or on this appeal, with an interest in arguing that no such declaration should have been made. But the consequence of this procedural device is that this court is asked to determine the question of principle divorced from any plausible factual scenario in which the question might arise. In effect this court (by contrast with the Divisional Court) is being asked to give an advisory opinion. As Justice Heydon of the High Court of Australia has said in the context of findings which are not needed for the decision: “It is difficult to solve every aspect of a problem satisfactorily and conclusively when only one element of it is presented for concrete decision. Obiter dicta tend to share in the vice of, and even become, advisory opinions”: (2006) 122 LQR 399, at 417.

*91. The problem is particularly acute here, because this court is being asked to determine in the abstract an issue on which the Divisional Court did not focus explicitly, . . .”*¹¹

11. I think that these concerns are well-founded. While this is an area where clarity in the law is clearly desirable, it seems to be that the Court of Appeal’s concerns ought to have been in the

⁹ *Ibid* at [5].

¹⁰ *Ibid* at [6]

¹¹ *Ibid* at [89] – [91].

forefront of everyone's mind in this case. We now know that the Supreme Court has refused permission to appeal from the Court of Appeal's decision¹². In doing so, its order recorded that the issue raised is '*clearly one for the Supreme Court.*' Reflecting the new more informative approach when refusing permission, the refusal went on to say though that it '*is not a suitable case on the facts*' and '*If a suitable case can be identified consideration should be given to applying for a leap-frog to the Supreme Court.*'

12. Without knowing the Supreme Court's reasons for making the order in those terms, we can surmise that it was perhaps as concerned as the Court of Appeal regarding the artificial nature of the appeal and the procedural device employed to produce an advisory opinion. That is for the future. At present, the Court of Appeal's decision in *Weaver* is good law. That being said, and with an eye to any future appeal, the Court of Appeal's decision involves three full judgments, including a detailed and closely argued dissenting judgment from Rix LJ. One commentator, Nick Billingham, has already noted in the *Journal of Housing Law* that the last time he dissented in an appeal in this area he was ultimately vindicated by the House of Lords.¹³ Be that as it may, for the foreseeable future the law in this area remains uncertain in spite of *Weaver's* present, albeit contingent, finality.

(ii) Points from *Weaver*

13. The actual decision in *Weaver* was that (partly in the light of a rather unsatisfactory concession) the Trust was a hybrid public authority, and (Rix LJ dissenting) when serving a notice to quit on a tenant, the Trust was not performing a purely private act – so the service of the notice was subject to Human Rights Convention rights.

¹²

http://www.ardenchambers.com/index.php?mact=News.cntnt01_detail.0&cntnt01articleid=18&cntnt01origid=141&cntnt01returnid=85

¹³ Billingham, *Private Act or public function? Weaver sows confusion in the Court of Appeal*, (2009) J.H.L 12(5), 83 at 84.

14. The decision has to some extent focused the debate away from the question whether RSLs (or should I now say non-profit registered providers or NRPs in light of s115 of the Housing and Regeneration Act 2008) are hybrid public authorities (i.e. bodies only some of whose acts are treated as public) for the purposes of the HRA. This was conceded in the Divisional Court and approved in the Court of Appeal because the exercise by the Trust of powers to obtain parenting orders and ASBOs were public functions.¹⁴ One conclusion to be drawn is that RSLs in the same position as the Trust in this regard are likely to be hybrid public authorities too.
15. However, the Court of Appeal's decision identifies a possible distinction between function (whether the body in question has "functions of a public nature") and act (whether the act in question is not "private"). This is not an easy distinction to draw as Elias LJ noted – and as I noted¹⁵ in *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95 at [130]. The distinction between function and act is a hierarchical one, in that function is given effect by one or many acts – i.e., functions are given form by acts. The distinction that exists between the two concepts is important due to the level at which they operate in determining whether and to what extent bodies are susceptible to the HRA. But what are the consequences of this?
16. There are two issues which may be said to arise in respect of authorities under HRA s6(1), where an authority is not a core public authority. First, is the authority a hybrid public authority? In his judgment Elias LJ said that this issue is one which is disposed of by answering the function question. An authority becomes a hybrid authority if '*only some of its functions are public functions.*' Having accepted the concession that the Trust was such an

¹⁴ [2009] EWCA Civ 587, [2009] 25 EG 137 (CS) at [42] & [84].

¹⁵ *Ibid* at [29].

authority, it was unnecessary to assess the function question,¹⁶ because the issue of whether the management and allocation of housing stock was a specific function question, and the function question had already been conceded.

17. However, the question whether management and allocation of housing by RSLs may be a public function or act may well remain live, not least given Rix LJ's doubts on this point, and may well be revisited in any future case.¹⁷ This point did not have to be addressed because of the concession, which I have referred to as rather unsatisfactory, made by the Trust. The Trust's concession was made on the basis that the issue whether it was a hybrid authority was divisible. What do I mean by this?
18. The argument before the Divisional Court as to the nature of allocation and management seems to have proceeded on the basis that the question was whether the Trust was '*a hybrid body with respect to its housing allocation and management functions*'¹⁸, i.e a hybrid public authority in a limited respect, so that the question whether termination was public or private, was secondary to the question whether allocation and management was a public function. On this basis the Trust's concession was not determinative of either the function of management and allocation or act of serving notice to quit.
19. The Court of Appeal made the point that such divisibility is misconceived. The question is not whether the authority is a hybrid authority for the purposes of this, or that, function, but whether there is any function which is a public function and so would render the authority a hybrid public authority. It seems likely that the Trust's concession may be revisited, and a possible source of future discussion before the courts will be whether RSLs are hybrid authorities, on the basis that the power to seek ASBOs and parenting orders may be said to

¹⁶ *Ibid* at [51] – [53].

¹⁷ *Ibid* at [151].

¹⁸ *Ibid* at [54].

be insufficient to render an RSL a hybrid authority. Quite apart from this, is allocation and management sufficient to render a housing association a public authority?

20. Assuming an authority is a hybrid authority the second question that arises is the act question. Is the act in question, such as terminating a tenancy, a public or a private act? That question is not straightforward and, as Elias LJ said, is one which requires the '*context in which the act occurs*' to be taken into account.¹⁹ Once more, context is everything. Ascertaining the context, and through that assessing the nature of the act in question, involves the same examination as that which has to be carried out to assess whether a function is private or public. In holding that it was public, Elias LJ said that '*the act of termination is so bound up with the provision of social housing that once is latter is seen, in the context of this particular body, as the exercise of a public function, then acts which are necessarily involved in the regulation of the function must also be public acts.*'²⁰

21. Where does this leave us? It seems to me that, unless and until the issues in *Weaver* are considered by the Supreme Court, RSLs are left in this position.

- First, RSLs are going to have to consider on a case-by-case basis whether they are likely to be held to be hybrid authorities. This is, as Elias LJ, put it, a 'fact-sensitive' question.
- Second, in assessing whether they are a hybrid authority, they will need to assess the function question.
- Third, if the function question is such as it suggests that they are a hybrid authority is the act question must be addressed.
- In assessing both the function and act questions context is everything. What would otherwise be a private act, depending on its context, could well be a public act.

¹⁹ *Ibid* at [66].

²⁰ *Ibid* at [76].

22. I wonder, though, whether this analysis is not too over-complicated, at least in many cases: why bother with the function question at all? If, in the case before the court, the particular act complained of, or which is in issue, is public in nature, then the authority must *ex hypothesi* be a public authority as one of its acts, namely that at issue in the case, is public. If, on the other hand, the act complained of, or at issue, is private, then why does it matter whether some other act of the authority might render it a public authority? I suppose that, in some exceptional cases, the act may be unauthorised, or it may be possible to distinguish between an act and a function, but, in the generality of cases, it may well be that all the court needs to ask is whether the act concerned is public in nature. This point was made by Rix LJ at para 125. However, as I have mentioned, Elias LJ said in para 29 (politely reflecting what I said in *YL* at para 130) the distinction between functions and acts in this context is unclear. However, the notion that the two concepts are close is supported by what Elias LJ said at paragraph [60], namely that “*The Divisional Court was correct to say that the character of the function effectively defined the character of the act.*”

23. Insofar as certainty is concerned at the present time, *Weaver* leaves us with the position that for RSLs similar to the Trust, they are likely to be open to HRA challenges where they terminate tenancies. In respect of other acts done in furtherance to the allocation and management function, it is unclear exactly what the answer might be. That may well be the case in some circumstances. But in how many and what sort? Time and future authority will tell. At the present time though it seems to me that the one conclusion that we can all agree with is that, as Rix LJ termed it, the attempt by each side to the dispute “*in advancing an argument which would dispose, once and for all, of the issue whether an RSL is for all purposes a hybrid public authority or not*” has failed.²¹ Perhaps that is because this is an area where such all-embracing answers might not be possible. We must wait to see. And

²¹ *Ibid* at [15].

until we do it is likely that RSLs will find themselves subject to Article 8 defences to possession claims as well as judicial review proceedings as public authorities.

(3) *Kay, Doherty and Strasbourg*

24. Before turning to *Kay et al* it is perhaps helpful if we take a detour into asylum law and Article 9 of the European Convention. While assessing that provision in the case of *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, Lord Bingham had this to say about the approach which UK courts should take to Strasbourg jurisprudence,

“ . . . the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2003] 2 AC 295, paragraph 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”²²

This is not, I think, an invitation to national courts to adopt a slavish and unreflective approach to Strasbourg jurisprudence, as indeed Lord Brown made clear when he considered Lord Bingham’s statement in *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 at [105] – [106].

²² [2004] 2 AC 323 at [20].

25. It seems to me, however, that this observation constitutes background to what HHJ (Nic) Madge has recently described in an article as an ‘*unedifying game of ping-pong*’ between the House of Lords, now Supreme Court, and Strasbourg that has arisen in this area.²³ The article is worth a read and can be found on his website. The essential point he makes is that the law on possession and the nature of Article 8 defences to possession claims is one which is becoming increasingly difficult to fence off from Strasbourg jurisprudence. As he puts it, no doubt echoing Lord Denning,

*“ . . . for how long can the House of Lords, Canute-like, continue to resist the European tide?”*²⁴

26. The European tide he refers to is the Strasbourg court’s insistence that Article 8 considerations require a merits-based assessment, going wider than that available in traditional judicial review proceedings, by the courts as part of a necessary assessment of the proportionality of the loss of a home. This is of course the point the Strasbourg court made in *McCann v The United Kingdom* (2008) 47 EHRR 40. It said this,

“(49) . . . It must be recalled that this requirement under paragraph 2 of Article 8 raises a question of procedure as well as one of substance. The Court set out the relevant principles in assessing the necessity of an interference with the right to “home” by the application of summary possession proceedings in the case of Connors v. the United Kingdom, (no. 66746/01, §§ 81–84, 27 May 2004), which was decided subsequent to the House of Lords’ judgment in Qazi (see paragraphs 22-25 above), but before its decision in Kay (see paragraphs 26-28 above) . . .

(50) The Court is unable to accept the Government’s argument that the reasoning in Connors was to be confined only to cases involving the eviction of gypsies or cases where the applicant sought to challenge the law itself rather than its application in his particular case. The loss of one’s home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in

²³ Madge, *Article 8 – la lotta continua?*, (http://nicmadge.co.uk/index.php?pr=Art_8_-_after_Doherty).

²⁴ *Ibid.*

the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.

...

(53) As in Connors, the “procedural safeguards” required by Article 8 for the assessment of the proportionality of the interference were not met by the possibility for the applicant to apply for judicial review and to obtain a scrutiny by the courts of the lawfulness and reasonableness of the local authority’s decisions. Judicial review procedure is not well-adapted for the resolution of sensitive factual questions which are better left to the County Court responsible for ordering possession. In the present case, the judicial review proceedings, like the possession proceedings, did not provide any opportunity for an independent tribunal to examine whether the applicant’s loss of his home was proportionate under Article 8 § 2 to the legitimate aims pursued.”²⁵

27. The Strasbourg court has made this point in a number of cases now: *Connor v UK*, *Blecic v Croatia* (2004) 40 E.H.R.R. 185, *McCann v UK* and most recently *Ćosić v Croatia* [2009] ECHR 80. *Ćosić* post-dates the last of the House of Lords authorities, *Doherty*, which I return to in a moment. Ms *Ćosić* was a school teacher, who, in 1984, was transferred to work in a new elementary school. As part of her employment she was provided by a flat by the school. The school had leased the flat from a third party. That lease expired in 1990. The following year title to the flat was transferred to the State. Despite requests from the school no extension to the lease was granted. No one asked Ms *Ćosić* to vacate the flat. Possession was not sought. The school took no steps to find alternative accommodation for her. Everyone appears to have placed their heads in the sand; apart from perhaps Ms *Ćosić* who continued to pay rent to the State.

28. In 1999, some 19 years after the lease expired, the State finally issued proceedings seeking possession of the flat. It sought possession on the ground that as the lease had expired Ms *Ćosić* had no legal entitlement to occupy the flat. Three years later the State’s possession claim succeeded. The main issue before the Strasbourg court was whether “*whether the interference (with Ms Ćosić’s Article 8 rights) was proportionate to the aim pursued and*

²⁵ (2008) 47 EHRR 40 at [49] – [53].

thus “*necessary in a democratic society*”²⁶ The Strasbourg court then noted how it had set out the ‘*relevant principles in assessing the necessity of interference with the right to “home” in . . . Connors v the United Kingdom . . .*’²⁷ It noted that the relevant principles were set out at paragraphs 81 to 83 of *Connors*. It went on to say this,

“(21) *In the present case, the Court notes that when it comes to the decisions of the domestic authorities, their findings were limited to the conclusion that under applicable national laws the applicant had no legal entitlement to occupy the flat. The first-instance court expressly stated that while it recognised the applicant’s difficult position, its decision had to be based exclusively on the applicable laws. The national courts thus confined themselves to finding that occupation by the applicant was without legal basis, but made no further analysis as to the proportionality of the measure to be applied against the applicant. However, the guarantees of the Convention require that the interference with an applicant’s right to respect for her home be not only based on the law but also be proportionate under paragraph 2 of Article 8 to the legitimate aim pursued, regard being had to the particular circumstances of the case. Furthermore, no legal provision of domestic law should be interpreted and applied in a manner incompatible with Croatia’s obligations under the Convention (see Stanková v. Slovakia, cited above, § 24).*

(22) *In this connection the Court reiterates that the loss of one’s home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his or her right of occupation has come to an end (see McCann v. the United Kingdom, no. 19009/04, § 50, 13 May 2008).*”²⁸

Ms Ćosić has been afforded no opportunity in the domestic legal proceedings to have the proportionality question assessed. Strasbourg thus concluded there had been a breach of Article 8.

29. Ćosić was of course decided after the House of Lords’ judgment in *Doherty*. It clearly took a markedly different approach to *McCann* than, for instance, Lords Hope and Scott. You may well recall that Lord Hope took the view that *McCann* was ‘*almost useless*’²⁹ Lord Scott took an equally stern view, concluding that Strasbourg had misunderstood possession

²⁶ [2009] ECHR 80 at [20].

²⁷ *Ibid* at [20].

²⁸ *Ibid* at [21] – [22].

²⁹ [2008] UKHL 57, [2008], 3 WLR 636 at [20].

proceedings in the English courts and that given its 'imperfect understanding of domestic law and procedure' *McCann* was a decision which need not be followed. Turning back to *R (Ullah)* where I started, *McCann* was a case where we need not take the 'no more, no less' approach. It was a decision which we could safely disregard. And it was disregarded.

30. This has posed something of a difficulty as to the correct approach now to the application of the second of the *Kay* gateways. As Professor Loveland has succinctly described the problem, '*County court judges will surely find themselves presented by defendants' and claimants' counsel with quite differing interpretations of Doherty on this point. There is no obvious ratio to extract from the judgment(s).*'³⁰ As I noted earlier these issues are not confined to the County Court, as Collins J adverted to in *Defence Estates*. I cannot add to the weight of confusion today, to adapt Professor Loveland's point, as I may one day have to consider these issues judicially.

31. What I think can safely be said is that the *Ćosić* decision seems to bat the ball back squarely into our court, if you pardon the pun, in Nic Madge's came of Article 8 ping pong. What its effect is on the ongoing debate we will have to await. More importantly we will also have to await the Strasbourg court's decision in *Kay* itself (Application 37341/06), which may cast more light on the issue. Nic Madge notes that the Strasbourg court has posed a question to the parties in *Kay*, that question was:

*"Did the applicants have the opportunity to have the proportionality of their evictions determined by an independent tribunal in the light of the relevant principles under Article 8 (McCann v UK)?"*³¹

The reference to *McCann* in the question would appear to suggest that notwithstanding the views expressed in *Doherty* the Strasbourg court continues to view *McCann* as something

³⁰ Loveland, *ibid* at 506.

³¹ Cited in Madge, *ibid*.

more than useless. If it does and it once more affirms *O'Connor* and *McCann* in *Kay* it may well become difficult for the Supreme Court to maintain its commitment to *Kay*. That is something else for the future. I am sure it is something which we all watch with interest.

32. The proper approach to possession claims and to defences to those claims is all can agree extremely important. It is important to landlords, whether private landlords, local councils or RSLs. It is important to tenants. Clarity in the law always of fundamental importance. Here where both property rights and the right to respect for private and family life enter the equation clarity is perhaps a particularly pressing issue.

33. I wonder if we can say that we have yet achieved such necessary clarity here. The continuing debate between Strasbourg and the, now, Supreme Court suggests not. The *Weaver* decision suggests not. There may well be a case for adopting Lord Mance's suggested approach from *Doherty*. Having alluded to this area of law, and the relevant authorities, beginning to resemble '*the opposing armies around the forts of Verdun*'³² he noted that it was unfortunate that *McCann* had been decided too late for *Doherty* to be listed before a constitution of more than five Law Lords.³³ In other words, if *McCann* had been decided down earlier, the House in *Doherty* might have felt constrained to depart from *Qazi* and *Kay*. Who knows?

34. It could well be said that in the light of *Ćosić* and in the light of the Strasbourg court's decision in *Kay* when that is handed down, that the Supreme Court may give serious consideration to taking Lord Mance's approach. This may well take some time. After all, the Court of Appeal would be in difficulties: even if it thought that *Ćosić* was inconsistent with *Kay* and *Docherty*, it would be hard to justify refusing to follow those decisions of the House

³² [2008] UKHL 57, [2008], 3 WLR 636 at [125].

³³ [2008] UKHL 57, [2008], 3 WLR 636 at [126].

of Lords in the light of the reasoning in *RJM v Secretary of State for Work and Pensions* [2008] UKHL 63.

(4) The House of Lords and Public Housing Policy

35. It has perhaps unsurprising that the law relating to claims for possession in the public and social housing sector may be in some state of uncertainty so far as the impact of the HRA is concerned. It is a difficult topic, and it is hard to believe that we are still in the first decade of the Convention being part of English law (to put it inaccurately if simply). Inevitably, there is a need for the domestic courts to work out the law, often with the assistance of Strasbourg. But I hope that Strasbourg will not regard its role as being that of dictator to national courts; mutual respect and understanding, through the means of constructive dialogue, should be the order of the day.

36. When it comes to other aspects of social housing, out of the reach of the HRA, I believe, or at least I hope, that the House of Lords has shown a practical and realistic, as well as a principled, approach to the Housing legislation. Thus, in *Knowsley Housing Trust v White* and associated cases, I believe that the House of Lords introduced an element of clarity and practicality to the law and procedure relating to orders for possession made against secure and assured tenants. But as I wrote the main judgment, I would say that, wouldn't I? We tried to put an end to the oxymoronic concept of a tolerated trespasser.

37. On wider policy issues, we decided *R(Ahmad) v London Borough of Newham* [2009] UKHL 14. In that case, the House had to consider whether the Court of Appeal was right to hold that Newham's housing allocation policy was unlawful. Part 6 of the Housing Act 1996 contains provisions requiring housing authorities to have allocation policies which satisfy

certain requirements, which must include the according of priorities for certain classes of applicant, which classes are, to an extent, prescribed in the Act.

38. The Court of Appeal, reflecting the approach in a number of earlier cases, thought that an authority must go further than just applying the statutory priorities, and accord priority “*by reference to the relative gravity of [the] needs*” of the applicants within such groups (per para 37). We rejected that contention, for a number of reasons concerned with the wording and structure of part 6 of the 1996 Act, but also because, “*as a general proposition, it is undesirable for the courts to get involved in questions of how priorities are accorded in housing allocation policies*” (per para 46). As I went on to point out, almost any scheme in this field would be open to an irrationality attack, as the demands for housing are so enormous, stock is so scarce, and needs are so great and so multifarious.

39. An important point, most graphically made by Lady Hale in para 11, was that part 6 of the 1996 Act gives no right to a tenancy. Accordingly, it is important not to concentrate on the needs of a particular applicant when assessing a challenge to a housing allocation policy. Of course, it is quite different if the challenge is that the authority is not treating the particular applicant in accordance with its policy. Or that the applicant is claiming to be entitled to be rehoused under the homelessness provisions in Part 7 of the 1996 Act.

40. A recent House of Lords decision on Part 7 is *Holmes-Moorhouse v London Borough of Richmond upon Thames* [2009] UKHL 7; [2009] 1 WLR 413, another practical decision, I believe. A father had successfully persuaded the Court of Appeal that he was entitled to premises not only for him, but also for his children, who were subject to a shared residence order as between him and his divorced wife. The housing authority and the Circuit Judge thought that, while the children spent some time with their father he was not someone with

whom they “reside[d] or might reasonably be expected to reside” under section 189(1). The Court of Appeal’s contrary view was held to be irrational as it paid insufficient regard to the fact that housing was a “scarce resource” (Lord Hoffmann at para 16). The local housing authority’s decision should not be dictated by the Family Court’s decision: they involved very different considerations. The case also contains a warning against construing letters containing review decisions under Part 7 of the 1996 Act too strictly.

41. Another recent House of Lords case on Part 7 is *Birmingham City Council v Ali* [2009] UKHL 36. Again overruling the Court of Appeal, the House held that (a) the fact that accommodation was such as to render a person to be deemed homeless for the purposes of Part 7 did not mean that he had to be rehoused at once: he could be required to wait; and (b) a women’s refuge was “accommodation” for the purposes of Part 7, although it would not normally be reasonable to expect a person to remain in such a refuge once they were wanting and fit to leave. Accordingly, once a woman who has entered a refuge is ready to leave, she is not voluntarily homeless for the purposes of Part 7 if she leaves.

42. Questions of policy, and housing policy is no exception here, are something which are properly and generally in the province of government. The courts can do they best to determine questions arising from the proper application of law. That is their role. It is one which they should carry it out in a way that brings as much clarity as possible within the limits set by the cases which arise before them. They are, of course, helped immeasurably in their task by conferences such as today’s, where practitioners, experts, policy-makers and judges can debate and discuss those issues. With that thought it leaves me to wish you an interesting and enlightening day, so that we all might benefit in the future. Thank you.

Please note that speeches published on this website reflect the individual judicial office-holder's personal views, unless otherwise stated. If you have any queries please contact the Judicial Communications Office.
