cornerstone barristers

# Housing Litigation: Public law and judicial review for social landlords: key concepts

Andy Lane & John Fitzsimons

# Back to basics

- What is judicial review?

- Process by which High Court scrutinises legality of acts and decisions of public bodies, courts, tribunals

- Court has supervisory rather than appellate jurisdiction

- Process used to correct errors of law or decisions which are e.g. procedurally improper or perverse

- Not so much about outcome but legality of decision

# Public bodies and functions

- Broadly, any body performing public duties or functions
  - from the obvious:
    - central government
    - local government
    - inferior courts and tribunals
  - … to the less obvious, e.g. registered providers of social housing
    - *Poplar HARCA v Donaghue* [2001] EWCA Civ 595; [2002] QB 48
    - *R (Weaver) v LQHT* [2009] EWCA Civ 587; [2010] 1 WLR 363
    - *R (McIntyre) v Gentoo Group Ltd* [2010] EWHC 5 (Admin); (2010) 154(2) SJLB 29
    - *R. (on the application of Macleod) v Peabody Trust Governors* [2016] EWHC 737 (Admin); [2016] H.L.R. 27
    - *Southern Housing Group v Ahern* [2016] EWCA Civ ( still tbc)
- Key consideration:
  - extent to which body's activities are underpinned by statute or government authority or funding

## William Davis J in R (on the application of Macleod) v Peabody Trust Governors (2016)

"It is important to note that the general principles enunciated by Elias J in *Weaver* have to be applied to the facts of each particular case. *Weaver* did not decide that all RSLs are public bodies. On the facts of this case I am not satisfied that Peabody was exercising a public function in relation to the tenancy of Mr Macleod. I take into account the following factors:

# MacLeod (2)

## Factors

- Peabody purchased the properties…using funds raised on the open market, not via any public subsidy or grant.
- Although the properties were not let at full market rent, it is not clear that they were pure social housing. The key workers for whom the property was reserved included those with a family income of up to £60000 per annum…
- Unlike the RSL in *Weaver,* Peabody had no allocation relationship with any local authority. It was not acting in close harmony with a local authority to assist the local authority to fulfil its statutory duty.
- Rents for the properties transferred are not subject to the same level of statutory regulation as social housing in general.

# Grounds of challenge

- The three ‘i’s – the traditional formulation
  - illegality
    - *ultra vires*: decision maker acted beyond its powers
  - impropriety
    - procedural unfairness e.g. considering expectation give adequate * failing to consider relevant matters * irrelevant matters * breach of legitimate * failure to follow policy * failure to reasons etc
  - irrationality
    - *Wednesbury* unreasonableness: a decision to which no reasonable public body, in all the material circumstances, could have come
- Effect of HRA 1998? Proportionality as a new ground

# Human Rights Act 1998

- Effect of HRA 1998. Proportionality as a new ground?

# Procedure


ONE DOES NOT SIMPLY DO WORK
WITHOUT FOLLOWING THE PROPER PROCEDURE
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# Procedure

- Pre-action protocol
  - requires letter identifying act or decision in question, summary of material facts and grounds of challenge
  - should normally allow defendant 14 days to reply (though limitation continues to run)
- Issue of claim followed by:
  - application for permission: * granted if claimant has arguable case that a ground exists
    * considered on papers initially
    * right to renew application orally if refused on papers
  - judicial review itself, if permission is granted
- Procedure governed by Part 54 CPR and 54 PD
  - acknowledgement of service and summary grounds within 21 days of service

# Limitation

- CPR 54.5:
  - claim must be filed promptly and in any event not later than 3 months after grounds first arose
  - time limit cannot be extended by parties
- Policy rationale:
  - need for finality of decision-making in public sector
  - need for decision makers to know with certainty when decisions are conclusive
- Query:
  - whether time limit compatible with Article 6 ECHR
- Issuing within 3 months does not necessarily mean promptly
  - consequent need for claimants to act with alacrity

# Remedies

- Quashing order
  - quashing decision and remitting case to decision maker (cf. *Edwards v Bairstow* [1956] AC 14 HL)
- Prohibiting order
  - preventing decision maker from acting or continuing to act unlawfully
- Mandatory order
  - requiring decision maker to perform particular act or duty
- Declaration
  - determination of the rights of the claimant
- Injunction
  - requiring the decision maker to do or to refrain from doing a specified act
- Damages
  - broadly, only available in two cases: entitlement (1) in private law claim and (2) under HRA 1998

# Relief is discretionary

- No right to a remedy: like permission, relief is discretionary
- Consequence: court may refuse remedy even if act or decision was unlawful
- Relief refused e.g. where:
  - claimant has delayed issuing unreasonably
  - claimant failed to comply with pre-action protocol
  - adequate, alternative remedy available
  - claimant's conduct renders relief inappropriate or unjust
  - academic: *O'Connor v Kensington and Chelsea RLBC* [2004] EWCA Civ 394; [2004] HLR 37

# Judicial review in the county court

- Ordinarily an abuse of process:
  - *Clark v University of Lincolnshire & Humberside* [2000] 1 WLR 1988 CA
- Some proceedings now in county court by way of statutory appeal
  - e.g. homelessness appeals under the Housing Act 1996
- Public law defences to private law claims permitted
  - *Wandsworth LBC v Winder* [1985] AC 461
  - *e.g. Barber v Croydon LBC* [2010] EWCA Civ 51 [2010] HLR 26
- Relief still discretionary?
  - *Barnsley MBC v Norton* [2011] EWCA Civ 834; [2012] PTSR 36
  - *Southern Housing Group v Ahern* [2016] EWCA Civ (tbc)

# Southern Housing Group v Ahern [2016] EWCA Civ…

# Southern Housing Group v Ahern [2016] EWCA Civ…

# *Hackney LBC v Lambourne* (1993) 25 HLR 172

- Temporary Homelessness accommodation
- Refused reasonable offer – NTQ served
- Breach of statutory duty challenge to NTQ + issue
- J refused strike out of defence: LA appeal allowed
- Public law challenge only where there are private law rights

# Evans LJ in *Lambourne*

"It may be that in current circumstances the better and more convenient course is to permit the County Court Judge, in cases such as the present, to hear and determine what is in substance a judicial review application when it is directly related to the issues in the case before him. But the question has to be answered by reference to the authorities, in particular the House of Lords decisions in O'Reilly [1983] and Wandsworth L.B.C. v. Winder [1985] . And the question has to be, in the light of these authorities, whether the public law issue must be raised in separate proceedings, which follows if the "general rule" in O'Reilly applies, or may be permitted as a defence and counterclaim in this action, if the analogy with Winder holds good. In my judgment the answer should be based on the wider considerations to which I have referred, the strength of the dicta in O'Reilly in favour of judicial review applications being made in accordance with the rules provided for such applications, since 1981, seems to me to indicate that **such public law issues should not be raised in ordinary litigation, save to the extent that depriving the parties of any right to do so would infringe their "paramount right" to have recourse to the courts for the determination of their rights**, which was preserved by the House of Lords judgment in Wandsworth L.B.C. v. Winder.

# Evans LJ in *Lambourne*

Unless the rights in question are private law rights, which they are not in the present case, then the public law issues should be decided by the appropriate tribunal; but potential injustice will be avoided if the order for possession (or perhaps, in certain cases, the claim for possession) is stayed until such time as any application for judicial review which the defendant may make has been heard."

# *Hertfordshire CCv Davies* [2017] EWHC 1488 (QB)

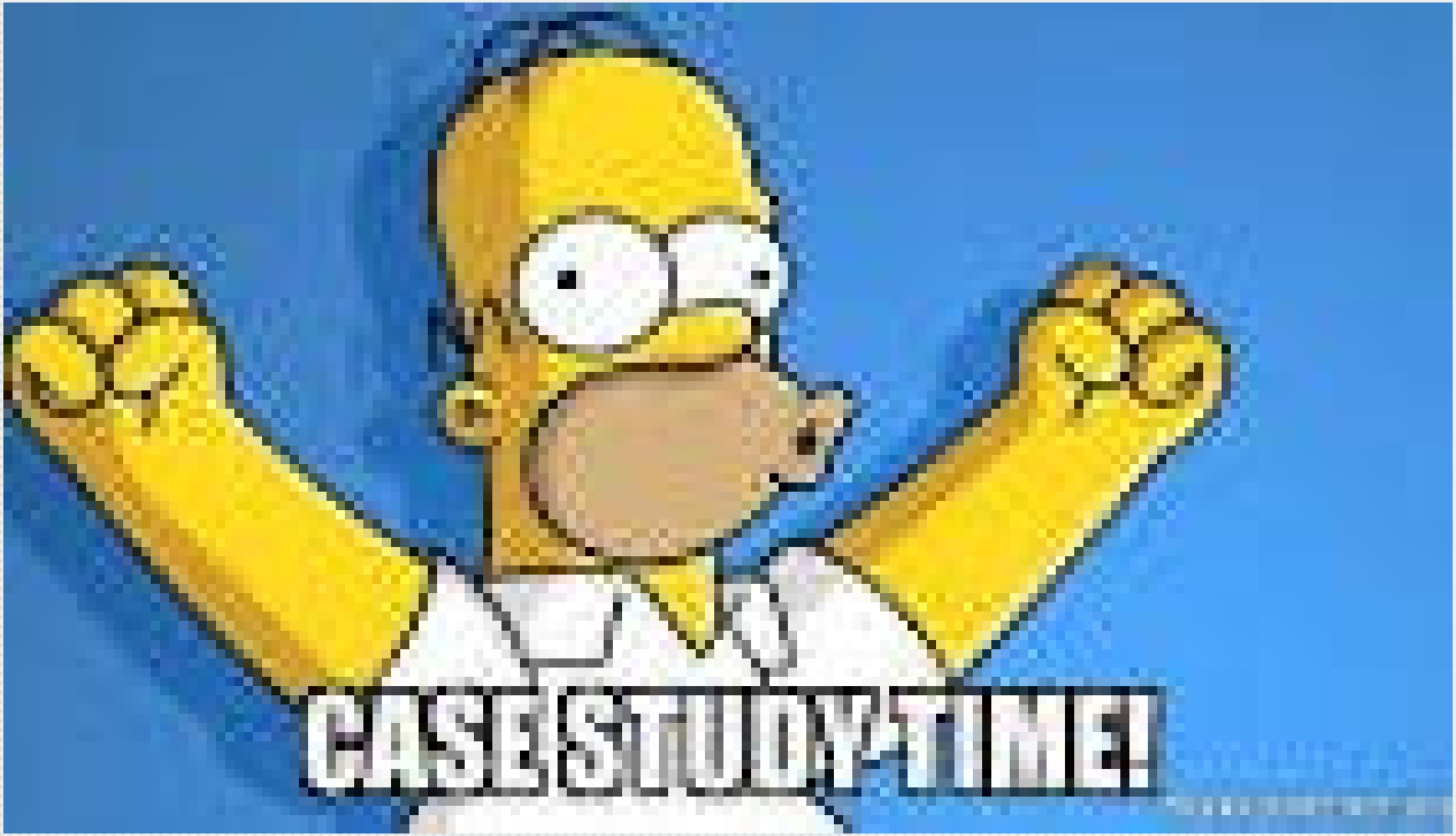
# Common Issues

- PSED
  - *Barnsley MBC v Norton* [2011] EWCA Civ 834; [2012] PTSR 56
- Section 11 Children Act
  - *Mohamoud v RBKC* [2015] EWCA Civ 780; [2016] 1 All ER 988
- Policy
  - *Barber v Croydon LBC* [2010] EWCA Civ 51; [2010] HLR 26
- ECHR – esp art. 8 & art. 14
  - *Thurrock BC v West* [2012] EWCA Civ 1435; [2013] HLR 5

# Mohamoud v RBKC – Sharp LJ

"70 If however, contrary to my view, there was a duty to conduct an assessment as the appellants assert, I do not think these facts show any basis for interfering with the possession orders that were made, as there is no link between the making of those orders, and a failure to conduct such an assessment. It would follow that a failure to comply with such a duty did not give rise to a defence to the claims in any event: see *Wandsworth LBC v Winder [1985] A.C. 461 HL* at 509E–F and *London Borough of Hackney v Lambourne (1993) 25 H.L.R. 172* at 181."

# Case study



# Case study

A housing association ('H') operates a starter tenancy programme, under which all new tenants are granted an assured shorthold tenancy for a fixed term of 12 months. The tenancy agreement provides that, if H has not served notice to extend the tenancy, or a notice requiring possession, or issued possession proceedings before the 12 months expires, the tenancy will automatically become a periodic, assured non-shorthold tenancy. It also provides that the tenancy will become fully assured if possession proceedings begun within the 12 months are dismissed; and that tenants may appeal a decision to take any of the above steps.

H has various housing management policies and procedures, including policies and procedures regulating how it will manage vulnerable tenants, anti-social behaviour and its internal appeal process. They provide, in particular, that H will provide starter tenants with floating support, if required, to help them sustain their tenancies, will interview tenants about any complaints received about their behaviour and will offer starter tenants a hearing if they wish to appeal a decision to serve them with notice or repossess their home.

# Case study

In January 2017, H grants T a starter tenancy of one of its flats. T has a history of mental ill-health and alcohol abuse. In March 2017, H begins to receive complaints about peculiar and drunken night time behaviour on T's part, which prevents his neighbours from sleeping. One of H's officers tries to call T to discuss the complaints but is unable to reach him. Another officer calls the community mental health service and discovers that T is not presently in their care. Concerned about the effect of T's on-going anti-social behaviour, H serves T with notice requiring possession. In response, T calls his housing officer, denying any wrong-doing. He indicates that he wishes to appeal the decision to serve him with notice and the officer tells him to put his reasons in writing. T does not do so. In October 2017, H issues a claim for possession of T's home.

1. Can T defend the claim on public law grounds?
2. If so, on what grounds might he defend the claim; and what case law might he cite?
3. What might H have done better; and what might it do now to improve its position?
4. What are the potential consequences of H's default?

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