Minutes

Chair: Welcome to tonight's meeting. Could I first ask if there are any corrections to the Minutes from the last meeting? I would also like to remind people to complete their evaluation forms, particularly as tonight's meeting is being monitored by the Law Society.

I would now like to introduce our first speaker, Jan Luba QC from Garden Court Chambers. It is quite hard to introduce Jan as I have done so many times before, but as everyone will know Jan has been involved in most of the big cases on housing and human rights so it is most appropriate that he has been invited to speak tonight.

Jan Luba QC: Good evening colleagues. The two speakers this evening are myself and Nic Madge. The way that we have divided the presentation between us is that Nic Madge will speak after me exclusively on the subject of the interface between the Human Rights Act and proceedings for possession. It will therefore fall to me to deal with everything else that connects the Human Rights Act and the issue of housing. We have prepared two separate handouts and I have also put together a very simple slide presentation which you do not have copies of, largely because I hope it is regurgitating the information and material you have already. We will each speak for about 20 or 25 minutes, followed I hope by a lively discussion which will also involve Nic and myself answering such of your questions as we are able. Clearly the course of the next 20-25 minutes is something of both a celebration and a tribute to those housing practitioners, many of whom are in this room, who have spent the last decade constructively deploying the Human Rights Act in housing cases and for housing clients. I want to review the work that has been done by considering the way in which housing cases have deployed the facility of the Human Rights Act 1998 and hopefully flag up some more things we can do to make that legislation even more useful to us and our clients in practice.

Before I come to my notes proper, can I just say something about the essential materials that one needs to involve oneself in this particular area of work? First and most obviously, the Human Rights Act 1998; this has become a little bit like Section 11 of the Landlord and Tenant Act 1985, almost every practitioner in this room thinks they know what is in it and believe me, as someone whose almost every case turns on it, there is no excuse for not having the actual copy of the legislation with you when you are considering the application of human rights to a particular housing problem. My notes do start, however, by reminding you of two textbooks produced soon after the Act came out and just before it came into force which set, as it were, something of an agenda as to how we might, as housing practitioners, use and deploy the provisions of the Human Rights Act 1998. I hope that many of you have either one or both of those two books and have found them useful on your passage through the last 10 years of activity. In terms of case law, and much of my noted material is about case law, we have in the course of the last decade become spectacularly well served by the internet in giving us access to the cases we need to have. Everybody in this room will be familiar with the wonders of the British and Irish Legal Information Institute's database of Supreme Court cases, Court of Appeal cases, High Court cases and the rest. Of particular relevance for tonight is that the Bailii website also incorporates the judgements of the European Court of Human Rights and applies to them its usual wordsearch facility, so Bailii is the place you want to go, primarily, to follow up any of the cases that I mention by name. I will, however, be dealing with one or two Strasbourg cases and if you want the decisions of the Strasbourg Court they too are available free of charge on the internet; the Hudoc database allows a searching facility of all decisions issued by the Strasbourg Court of Human Rights. Much more user friendly, perhaps, is the excellent casebook that Nic writes with Claire Sephton, now in its 4th edition, the first chapter of which is given over to an analysis of human rights casework in relation to housing. Of course, Nic has kept that up to date with his excellent articles in the Journal of Housing Law and in the Landlord and Tenant Review and I hope you have those to hand as a useful aide memoire to how things have been unfolding.

In relation to possession proceedings, which I am not going to speak about at all, so much has been happening that we dedicated a whole chapter to human rights defences in the last edition of Defending Possession Proceedings and I apologise for having mistyped the chapter reference, it is, of course, chapter 26, of DPP No 7. I hope you have found that chapter useful in the work you have been doing on possession cases.

I will move on to my notes proper by inviting your attention to the rather surprising extent to which housing work has influenced the development and application of the Human Rights Act 1998 in the course of the last 10 years. I start with the first relevant provision for present purposes of the Human Rights Act and that is Section 2 of the Act, which is the Section which requires our domestic courts to stay broadly in line with the jurisprudence of the Strasbourg Court of Human Rights. It is housing

cases, and in particular the housing cases which Nic Madge is going to review later on this evening, that have led the way in how our domestic courts should construe their obligation under Section 2 to take into account decisions of the European Institutions insofar as relevant. The interchange between domestic courts and the Strasbourg Court which he has described very realistically as "a game of ping pong" has been played out in the context of our field of activity, housing law, more perhaps than in respect of any other. It is from housing cases that we now get the leading guidance on the proper approach to Section 2 of the Human Rights Act. But I have not started my notes with those cases because they are included in Nic's presentation and he will come to them in a moment.

Where I want to start is with the impact of the Human Rights Act Section 3 on our cohort of housing cases because here again, rather surprisingly, it has been housing casework that has led the way in showing how the provisions of the Human Rights Act should work. Section 3 of the Act provides that, so far as it is possible to do so, primary legislation, Acts of Parliament and subordinate legislation, regulations and orders must be read and given effect in a way which is compatible with the Convention Rights. Moreover, that obligation to construe legislation compatibly with the Convention applies to all legislation whenever passed, so not just from when the Human Rights Act came into force in October 2000 but running backwards indefinitely through all of our legislative history. Now it is housing cases, as you see from my notes, which have given us the greatest steer on how this interpretative obligation is to be played out. The leading case, perhaps, is a housing case, the *Ghaidan v Godin-Mendoza* decision of the House of Lords in 2004. That, you will recall, dealt with the provisions for succession to Rent Act tenancies. The tenant had died and their partner wished to take over the statutory tenancy. The partner in question was the same sex partner and the Rent Act on the face of it made no provision for same sex partners. The only material words in the statute were "living together with the deceased as husband and wife". On any traditional approach to statutory construction it would be inconceivable that the words "as husband and wife" applied to a same sex couple. Nevertheless the House of Lords, using the new interpretive provision in Section 3 of the Act, held that the words were to be read in a way which enabled them to embrace same sex couples. That is now the leading case on the extent to which you can construe legislation constructively so as to make it consistent with the recognition of Convention Rights.

Attracting a lot less publicity is the Court of Appeal's decision in *Patel v Pirabakaran*, which is the second case on my list. In that case the question was whether the Protection from Eviction Act 1977 applied to protect the tenant. The tenant was the tenant of a shop and he lived in the flat above it. The landlords claimed that the lease was forfeit and that they could put him out without the need for a court order. The issue in the case was whether the Protection from Eviction Act Section 2 applied so as to require the landlord to go through a court procedure and that would only apply to premises "let as a dwelling." So the simple question was, is a lease, which is both for a dwelling and a business, a tenancy let as a dwelling? Can you have a mixed use dwelling within those provisions? The Court of Appeal decided, firstly, that on a matter of strict construction of the Act and in the light of previous authorities, "let as a dwelling" did cover mixed use properties. But more importantly they went on to say that even if they were wrong about that, if you used Section 3 and applied it to the words "let as a dwelling" it gave you two possible answers. Either people who live in properties above the business are protected by the Act or they are not. Only one of those two interpretations was consistent with the protection of human rights and it was to say that Section 2 applied to a mixed use property; a very good example of the way in which the legislation can be interpreted under Section 3 to give appropriate respect for human rights.

The third case on my list, *Desnousse v Newham LBC* was also concerned with the interpretation of the Protection from Eviction Act and it split the Court of Appeal. Two members were prepared to hold that the legislation could be interpreted Convention compliantly even if it left homeless households without the protection of the Protection from Eviction Act. The dissenting member would have said that the requirement under the interpretive obligation in Section 3 was to hold that the homeless people were covered by the Protection from Eviction Act. I flag that case up in particular because it is unfinished business; if any of you are representing somebody who is accommodated under the temporary accommodation provisions of the housing legislation (Section 188, the interim duty, or Section 190, the duty towards the intentionally homeless), it is about time we had a fresh case on whether those people are covered by the Protection from Eviction Act. It would be my analysis that if we get back to the appellate courts again we will reverse *Desnousse* and the Protection from Eviction Act will be interpreted using Section 3 of the Human Rights Act in a way that is appropriate for the protection of those individuals. You may ask why did Mr Desnousse himself not appeal? Unfortunately, as in so many cases when the issue of law is good, the client has interests elsewhere.

The importance of the first two of the cases that I mentioned is, of course, obvious from their names; they are disputes between private individuals. There was no public authority involved in the first two of those cases and that enables me to make the important point that the interpretive obligation falls on the court even if the parties before it are entirely private individuals. That is something that I will come back to because I think what we may get from Nic's talk is that the next step in the application of the Human Rights Act in possession proceedings might well be to proceedings involving individuals rather than the state.

My last two cases under Section 3 are, of course, the recent cases which touch on possession proceedings but they are important illustrations of the reach of Section 3. In those two cases the relevant statutory provisions appeared to require the county court to grant possession if particular conditions were fulfilled. They used such engaging words as "shall" and "must" which appeared to mean that a court had to grant a possession order. In the hands of the Supreme Court Section 3 was used to hold that "shall" did not mean "shall" and "must" did not mean "must" if shall or must would lead to an infringement of Convention Rights. I reproduce for you that very short sentence from Lord Phillip's speech in *Hounslow LBC v Powell* which I think is about as far as it is humanly possible to take Section 3 of the Human Rights Act. He said "*compatibility can be achieved in the case of either subsection"*, it was there dealing with "shall" in relation to introductory tenancies and "must" in relation to demoted, *"by implying the phrase 'provided that article 8 is not infringed'".* Well, you take your starting point from that; any statutory provision that you are looking at, you will now suggest that there be inserted into it "provided that article so and so is not infringed." How far we have come in 10 years; 10 years ago I argued a case called *Poplar Harca v Donaghue*. It was about assured shorthold tenancies and I suggested to the court that all they needed to do was insert after the words "shall grant possession" the small additional words "if reasonable to do so". What could possibly be wrong with using the interpretive provision in Section 3? The Court of Appeal was having none of it. If only Lord Phillips had been presiding maybe we would have had a different result. Ten years on, I think, we can expect a different approach to the use of Section 3 from that we have had hitherto. So a lot we have got from, and a lot we have done with, Section 3 of the Human Rights Act.

Let me move to Section 4. There are some statutory provisions that, however you look at them, cannot be interpreted compatibly with the Convention. The Human Rights Act tells us what should happen there; it is that the court should make a declaration of incompatibility and Parliament should set about changing or amending the incompatible provision. Here in housing we have had instances of that in two respects. The first case related to people who are non-United Kingdom nationals; that was the situation in *Westminster City Council v Morris*, a homelessness case in which a person could not get priority need because their dependent was of the wrong sort of nationality. Not surprisingly that was held to be incompatible with the anti-discrimination provisions in Article 14 of the Convention. As a result of that decision, some four years on it must be said, Parliament got around to changing the law but only modestly and as a result there is now pending in the Strasbourg Court the case of *Bah v United Kingdom* which will decide whether the Government's fix was good enough to eliminate the discrimination or not. The second area in which we have identified incompatible legislation is in relation to the treatment of gypsies and travellers on official caravan sites. In *Connors v United Kingdom* the Strasbourg Court gave the British Government a strong hint that the continued exclusion of such occupiers from security of tenure would be found unlawful. In due course, in *Doherty v Birmingham CC*, our House of Lords decided that the exclusion of gypsies and travellers from security of tenure was discrimination contrary to the Act and incompatible with the Convention. There again, the Housing and Regeneration Act 2008 changed the legislation as a result. We should continue our search for the identification of other statutory provisions which offend the Convention. Either they should be re-construed under Section 3 or we should have them declared incompatible under Section 4. Sadly the message that arises from both those fields that I have mentioned, non-UK nationals and gypsies and travellers, is that it seems to take an inordinate time in the field of housing to get the necessary legislative changes that we need.

I will now move on to the next Section of the Act on which housing has had a large measure of influence and that is Section 6 of the Human Rights Act 1998. That, if you like, contains the main bite of the 1998 Act; the provision in subsection 1 that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. That seems very straightforward except that there is no exhaustive list of what is or is not a public authority. That rather straightforward seeming question of identifying whether a body is public or private caused anxiety all the way up our appellate court system and you will recall that in *YL v Birmingham CC & Ors* the House of Lords decided by a bare majority that a private company providing care homes for the elderly which was full of people placed there by the council was not a public body. That was shortly thereafter reversed by Parliament in respect of that particular form of provision and private care home providers are now within Section 6 subsection

1. A bit closer to home, if I can use the pun, than the residential care home however, is the housing association provider and the question of whether they are public authorities for the purposes of Section 6 of the Act. *London & Quadrant Housing Trust v Weaver* was an illuminating case not least because it was not until well into the argument in the Court of Appeal that one of the Lord Justices drew attention to the fact that we were all arguing about the wrong thing. The issue under Section 6 subsection 1 is not the bare question of whether the landlord or claimant is a public authority; it is about what the particular body is doing. You will see that subsection 3(b) provides that a public authority includes any person certain of whose functions are functions of a public nature. There is no question at all that a housing association does have functions of a public nature; that much was conceded before the Court of Appeal. They can, for example, apply for ASBOs which is a public function matter par excellence.

The real question is the question posed by Section 6 subsection 5 and that is whether the nature of the thing being done by this particular public body is private. What London & Quadrant argued was that the giving of a notice to quit or a notice to terminate a tenancy was a private act between landlord and tenant. The Court of Appeal decided by 2 to 1 that the management and letting of social housing was an act of a public nature and therefore for those purposes the London & Quadrant Housing Trust was a public authority. Permission to appeal to the Supreme Court was refused to the Trust in *Weaver* on the particular facts of the case and it must be said that this is something again of unfinished business in the development of Section 6 of the Act. While we wait for the Supreme Court case we are, of course, testing the boundaries all the time. In *R(McIntyre) v Gentoo Group* the Gentoo Group, which is a large registered social landlord, had to accept that *London & Quadrant v Weaver* was binding on the court but the question became, what is the reach of "letting and managing" social housing? In that particular case it was held that it embraced an application for a transfer or a mutual exchange; that is an act of a public nature and therefore caught by Section 6 of the Human Rights Act. It seemed likely that we would have a problem, not just in housing but in all fields of application of the Human Rights Act, with Section 6 subsection 2 which excuses a public authority from acting unlawfully if it is acting pursuant to or in accordance with a statutory provision. The argument was being run by local authorities that "we are statutory, everything we do is statutory therefore we are exempt". That was put to bed very firmly by Lord Neuberger in *Manchester City Council v Pinnock* and I hope we need never be troubled by Section 6 subsection 2 again.

Section 7 of the Act deals with how we give effect to the teeth provided by Section 6. We are able to bring proceedings alleging an unlawful act by the public authority or, more importantly for the purposes of the people present in this room, we are able to rely on Convention Rights in any legal proceedings taken against our client. It seemed to me 10 years ago that that straightforwardly meant that you could run a Human Rights Act defence to anybody else's claim. However it took us until *Manchester City Council v Pinnock* to get a firm endorsement of that proposition from all the members of the Supreme Court. At least we are now there.

What about remedies? Well, the Human Rights Act Section 8 provides that if it is established that a public authority has acted in contravention of the Convention Rights then remedies are available and those remedies include damages. I do remind you that it is housing cases that have led the way on the scope of the remedial provisions in Section 8. You will recall in *R (Bernard) v Enfield LBC* somebody in quite appalling housing accommodation obtained £10,000 in damages from the Enfield London Borough Council for breach of their Article 8 rights. It was an extreme case; it was exceptionally bad; it did involve very singular disability and very poor housing but it goes to show how Section 8 of the Act can be used in appropriate cases. *Anufrijeva v Southwark LBC* is a decision of the Court of Appeal which represents something of a rolling back in the applicability of Section 8 and the availability of damages but nevertheless upheld the decision in *Bernard* itself.

I hope those notes indicate the reach that housing cases have had in respect of the Human Rights Act 1998. Let me move now to the meat of the Human Rights Act 1998 and that is the Convention Rights that are protected by Schedule 1 of the Act. I often hear it said in court and in my instructions that "counsel is asked to give effect to Article 8 of the European Convention on Human Rights". I do not do that because I cannot do that. The only thing I can give effect to in the domestic courts is Schedule 1 of the Human Rights Act 1998 and the sooner everybody starts saying "Article 8 of Schedule 1 of the Human Rights Act 1998" the better. What are the relevant Articles applicable to housing cases? Article 3 is the earliest of the Articles that might bite on a housing case. You will recall that this is the one that deals with inhuman or degrading treatment and you might have supposed that that had nothing to do with accommodation at all until we had the *Secretary of State for the Home Department v Limbuela & Ors* case, and the many cases associated with it, in which the State had deliberately deprived "late-claiming" asylum seekers of any recourse to accommodation at all, with the result that

they were on the street starving and suffering detriment to their health and that was held to be an infringement of Article 3 of the Convention. Since *Limbuela* we have not really had that head of steam as the Asylum Support System was implemented after that. Hard Cases Support took care of that particular problem. We should ask ourselves how much further do we think we can take Article 3 of the Human Rights Act in the context of housing?

Article 6 of the Convention essentially contains the right to a fair trial by an independent tribunal and we have had quite a bit of difficulty with that in the housing field. Not with the notion of what the Article means but on the applicability of it to the sorts of "rights" that our clients seek to enforce. In *Tomlinson & Ors v Birmingham City Council* it was suggested that the provision for review of homelessness decisions failed to meet the requirements of Article 6 because the review was undertaken by the authority's own officers and access to the court was only available on points of law. Their Lordships decided that there was no infringement of Article 6 in that class of case and now the appellants in those cases are in the course of making their applications to the Strasbourg Court. The difficulty is that Article 6 only operates when there is a dispute about "civil rights or obligations". Mr Brown, therefore, lost his challenge to South Oxfordshire District Council when he sought but was refused a discretionary housing payment to top up the shortfall between his housing benefit and his rent. The key to why he lost is in the name of the particular assistance, Discretionary Housing Payment; not something anyone has a right to and therefore the adjudication and determination of whether he should have it or not was not something that attracted the impact of Article 6. What about the allocation of social housing where there is not even a right of access to the county court on a point of law? In *London Borough of Wandsworth v Dixon* on a renewed application for permission to appeal the Court of Appeal was prepared to embrace the idea that maybe human rights might be engaged in allocation decisions. Even so the availability of an internal review, coupled with judicial review, was sufficient to discharge the obligation under Article 6. I think this again may be an area of unfinished business to which we will have to return at least when the Strasbourg Court gives its judgement on the appeal arising from the *Tomlinson* case.

Now I can reach Article 8 which is where, sadly, too many of us have become familiar with starting and finishing our consideration of the Human Rights Act 1998. Article 8, as you know, provides that the individual has a right to respect for his/her home. No right to a home but the entitlement to respect for the home you have got. And we have been, have we not, over the course of the last 10 years pushing the frontiers in relation to that? What does it mean? Is it possible that a property might be allowed to fall into such bad condition that that would, itself, infringe Article 8 because the landlord is not showing sufficient respect for the individual's home? In *Lee v Leeds CC* the Court of Appeal decided that indeed there could be such a case but *Lee* itself was not sufficiently severe to get over the Article 8 threshold. That was a case of condensation dampness; you may have a worse case, why not run it? *Erskine v Lambeth LBC*, the fact that council tenants were not covered by the unfitness for human habitation regime held not discriminatory but on the facts, no breach of Article 8 in any event. So we have to think more imaginatively about the way in which people's homes are adversely impacted and the way we might prevent that. In *Andrews v Reading BC* a council tenant living quietly in their home suddenly found out that a major road had been diverted to run outside their house, massive traffic noise, dirt, dust, everything else. They brought an action for infringement of their right to respect under Article 8 against the council which was also a highway authority. *Andrews* is an attempt to strike out Mr Andrews' claim which was roundly rejected by the High Court and sent for trial. *Dennis & Anor v Ministry of Defence* is a home-owner who did get to trial. Mr and Mrs Dennis were greatly disturbed by the noise of the Harrier jump jets flying at low level over the mansion house that they had bought. They brought an Article 8 claim against the Ministry of Defence. The Ministry of Defence said "Article 8 is a qualified right; we can interfere with your right to respect for your home in the interests of, amongst other things, national security and we do have to test these jump jets somewhere". The Judge had no hesitation in finding an infringement of Article 8 and awarding £950,000 damages. It just goes to show what you can achieve.

Over the page there are other things we should think about; there are other ways that people's homes are interfered with. *Marcic v Thames Water Utilities Ltd*, a flooding case from the sewers, *Dobson & Ors v Thames Water Utilities Ltd*, smell and mosquitoes from a sewage treatment works; these are the sorts of things that really bother people and they think they have no remedy but if their right to enjoy their home is infringed then Article 8 may be engaged. What about unchecked anti-social behaviour? Does the State have an obligation to protect people from that? Under our domestic law, no, *X & Y v Hounslow LBC* but *X & Y* are presently waiting the hearing of their case in Strasbourg in which they assert that there is an obligation on the State to protect individuals from serious anti-social behaviour. Now we are starting to explore all other aspects of things that are done, in particular by the court system, that impact on people's rights to respect for their home. What about charging orders against

the title of a house to enforce debts? Order for sale forced in a beneficial interest claim under the Trusts of Land Act. Those are the sorts of areas where we are now seeing Article 8 deployed.

I am not going to say anything at all about Article 14 and Article 1 of the First Protocol; I want to finish by by-passing eviction which Nic Madge is going to deal with in a moment, and alight on Article 10, freedom of expression. Now I know you are thinking, "Luba is a Human Rights Act junkie, what could the right to free expression possibly have to do with housing cases?". Well you could not get a better instance of the application of Article 10 to housing and claims for possession than a case I have mentioned here and the case you have recently been reading about in the newspapers. The claim for possession of Parliament Square Gardens was resisted on the basis that the eviction of those in occupation of Parliament Square Gardens was an infringement of the right of expression under Article 10 of the Convention. I represented some people called The Peace Village and they lost but the Court of Appeal remitted for trial on the facts the claim for possession against Brian Haw on the issue of whether an order for possession was compatible with his Article 10 right to freedom of expression. As you know, he has recently lost that case and the Mayor now has an order for possession for Parliament Square Gardens. Those many of you who have been to Parliament Square Gardens since my clients were evicted will have noticed that it is now not possible to access Parliament Square Gardens at all because of the various barricades that have been erected. You will recall that the Mayor wanted my clients evicted specifically so that the public could better enjoy Parliament Square Gardens! However it is rumoured that on 29 April for some reason that may have to do with somebody's wedding, Parliament Square Gardens will magically once again become available.

I want to finish with the other Article 10 case, the Swedish case mentioned in my notes. This I think is the springboard for some of our future work. The facts could not have been more simple; a private landlord and tenant case in which the tenancy agreement prevented the erection of any satellite dish on the exterior of the flat. The sort of provision you might find in a tenancy agreement anywhere. The tenants, as you will gather from their names, were not native Swedes; they were asylum seekers, I think, from Iraq and they wished to erect a satellite dish so that they could receive Iraqi television programmes which were only available by satellite. This was, therefore, a clear breach of the provision in their lease and the private landlord took action for breach of the tenancy agreement. The Swedish Court of Appeal granted an order for possession; the European Court of Human Rights decided that that was an infringement of their Article 10 right to freely exchange and receive information. I repeat: the order for possession was an infringement of their Article 10 rights to exchange and receive information. Now I am not suggesting you all rush off and run an Article 10 defence to a possession claim; what I do draw to your attention is that this was a possession claim by a <u>private</u> landlord against a <u>private</u> tenant and the Strasbourg Court held that the State was engaged because a court had made the possession order. You may think that that resonates with much of what Nic Madge is about to say to you.

Chair: Thank you. I will now introduce our second speaker, Nic Madge. Nic is now a circuit judge spending part of his time in Peterborough and part of his time in central London. Before he became a judge he was a housing solicitor which in some way goes to explain why most of you will know him for his and Jan's marvellous contributions to Legal Action and Housing Law Update, which is our working tool for our daily practice. Also Nic is the man with the very interesting website so when you get tired of housing law then go to Nic's website and you will learn something you did not know about housing law and something else besides.

Nic Madge: Thank you very much Vivien. It is wonderful to be invited back because some of you may know I moved away slightly, not completely, but I have moved away slightly metaphorically.

Viv has paid tribute to a number of people; it is a tribute to HLPA that there are so many people here tonight. It is frankly, I think, a miracle that there are still this many housing practitioners around given all of the cuts, all of the public funding difficulties that there are. I think thanks really do deserve to go to all of the housing practitioners who are continuing to work away hard. I am, as Jan and Viv have said, going to talk about human rights and possession claims. I will follow the order of my handout which takes the form of a question and answer sequence.

The starting point, which I think sums it all up, is a phrase "an unedifying game of ping pong"; Strasbourg and the House of Lords Supreme Court batting to and fro arguments about the extent of Article 8. We can forget now, given *Pinnock*, *Powell*, *Hall* and *Frisby*, a lot of the earlier decisions and I think we can start really with what was said in Strasbourg in *Kay v United Kingdom*, namely that there was a breach of Article 8 in its procedural aspect because a decision by the county court to strike out the occupants' Article 8 defences meant that the procedural safeguards required by Article 8 for the

assessment of proportionality of the interference were not observed. They noted the developments in the House of Lords in *Doherty* and said that had *Kay* been heard in the post-*Doherty* regime there would have been no breach. But, given that there was no right to challenge in the county court proportionality there was a breach. So in other words the substantive law was correct, the problem was procedural. That is the immediate background to *Pinnock*. *Pinnock*, as we all know from a single speech by Lord Neuberger, Article 8 requires courts asked to make possession orders against demoted tenants to have power to consider whether the order would be "necessary in a democratic society"; the issue of proportionality. The court must have the power to assess the proportionality of making the order, and, in making that assessment, to resolve any relevant disputed question of fact. I will come back to the issue of disputed question of fact in a minute.

In *Pinnock* the Supreme Court rejected with remarkable ease, without having to analyse them at all, the earlier decisions of the House of Lords in *Qazi, Kay* and *Doherty*. What Lord Neuberger said was that that there was a clear and consistent line of Strasbourg decisions, the reasoning in Strasbourg does not appear to overlook or misunderstand some argument or point of principle and so it would be wrong for the Supreme Court not to follow the Strasbourg line of authority. The Supreme Court accepted the minority view in *Qazi*, *Kay*, etc. We remember, though, that the Supreme Court in *Pinnock* dismissed Mr Pinnock's appeal because of the history of crime, nuisance and harassment. In that particular case it was proportionate to make a possession order.

So we move on to the recent decision on 23 February in *Hounslow LBC v Powell; Leeds CC v Hall; Birmingham CC v Frisby*. *Pinnock* was demoted tenants; *Powell* and *Hall* and *Frisby* considered the question of introductory tenants. Mr Frisby and Mr Hall were introductory tenants; Miss Powell had a non-secure tenancy granted after the local authority was exercising its duties under Part 7 of the Housing Act. So that is where we are and we move on to the questions. When does Article 8 come into play? In *Powell, Hall* and *Frisby* Lord Hope said that it only arises if the property constitutes the occupant's home. There have to be sufficient and continuing links with a place to show that it is his or her home for the purposes of Article 8. "In most cases it can be taken for granted that a claim by a person who is in lawful occupation to remain in possession will attract the protection of Article 8". Lord Hope said that the "court will only have to consider whether the making of a possession order is proportionate if the issue has been raised by the occupier and it has crossed a high threshold of being seriously arguable". "The question is whether making an order for an occupier's eviction is a proportionate means of achieving a legitimate aim".

The next question, does *Pinnock* apply to other kinds of occupancy lacking security of tenure? On the face of it, reading the speech of Lord Neuberger in *Pinnock*, the answer to that was clearly yes. Although *Pinnock* only related to demoted tenancies much of what is said and some of the quotations that I have put in my paper appeared then to show that what was said applied to other types of occupancy lacking security of tenure. But as we know, that was what was argued in *Powell, Hall* and *Frisby*. The occupants said that Section 172(2) in relation introductory tenancies should be interpreted by adding the words "*where otherwise lawful to do so*" after the court shall make an order for possession. The Secretary of State effectively accepted that but the representatives for some of the landlords said that there was no requirement for independent determination of proportionality under Article 8 and that *Manchester CC v Cochrane* remained good law. That argument was roundly rejected in *Powell, Hall* and *Frisby*. Lord Hope said that there was "sufficient similarity between Section 127(2) and Section 143(d) to apply the reasoning in *Pinnock* to introductory tenancies". Lord Phillips, agreeing, said that he could "see no principled reason for distinguishing between the two." So proportionality issues can arise in all cases where local authority landlords are seeking possession. Although there is no express provision in Part 7 which empowers the court to refuse to grant a possession order against a non-secure occupant provided accommodation after a homelessness application, similarly there is nothing in Part 7 which either expressly or by necessary implication prevents the court from refusing to make an order for possession. Lord Phillips in *Powell, Hall* and *Frisby* said that compatibility with Article 8 can be achieved, as Jan mentioned earlier, by implying the phrase "provided that Article 8 is not infringed." So the answer is clearly "yes", what was said in *Pinnock* applies to other kinds of occupancy lacking security of tenure.

The next question is what is the extent of proportionality? I think that the key sentence is what comes from Lord Neuberger in *Pinnock*, "An occupier who is the defendant in possession proceedings in the County Court and who claims that it would be incompatible with his article 8 Convention rights for him to be put out of his home must be able to rely on those rights in defending those proceedings". So arguably it is wider than what the House of Lords said in *Doherty*; it is wider than the expanded judicial review that was talked about in *Doherty*. In *Pinnock* Lord Neuberger rejected the view that it would only be in exceptional cases that Article 8 proportionality would even arguably give a right for an

occupant to remain in possession. That was the phrase used in Strasbourg in *McCann v UK*. Lord Neuberger said that it would be "unsafe and unhelpful to invoke exceptionality as a guide". So, it is clear that "exceptionality" is not the test. However, Lord Neuberger did say that "in the absence of cogent evidence to the contrary, [an authority should] be assumed to be acting in accordance with its duties, will be a strong factor in support of the proportionality of making an order for possession". He also said that "in virtually every case where a residential occupier has no contractual or statutory protection, and the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate". This was explained in *Powell, Hall* and *Frisby* where Lord Hope said "The threshold for raising an arguable case on proportionality [is] a high one" it "would only succeed in only a small proportion of cases". "… no need, in the overwhelming majority of cases, for the local authority to explain and justify its reasons for seeking a possession order".

In *Pinnock* the Supreme Court had given no further guidance as to the implications of the obligation saying that the issues "are best left to the good sense and experience of judges sitting in the County Court". But that begs the question, doesn't it? It is the $64,000 question. In what kind of cases will proportionality defences succeed? How much wider is the proportionality defence than the conventional administrative law defence? I read *Pinnock* and *Powell, Hall* and *Frisby* several times before spotting something which is not down there expressly; it is not there in words of black and white. That is the difference between judicial review, administrative law defences or even the expanded judicial review that was talked about in *Doherty* on the one hand and Article 8 proportionality on the other. Judicial review, administrative law defences are about the procedure; they are about the steps that the local authority, the public body is taking. It is about their decision-making process. Proportionality is about outcomes. As Lord Bingham said in *R (Begum) v Denbigh High School Governors*, case about Islamic dress in schools - "What matters in any case is the practical outcome, not the quality of the decision making process that led to it".

From a tenant's point of view, from an occupant's point of view, that is better because it means that the focus is upon them; the focus is upon their personal circumstances. It avoids the difficulty which all of us have come across in judicial review that it may be that a decision of a public body can be quashed because of the procedure that they followed, because they failed to take into account relevant considerations or took into account irrelevant considerations. Then immediately afterwards the public body can reconsider the same thing and reach exactly the same decision having done it correctly, having followed the correct procedures, having taken into account all relevant considerations. Proportionality is different and we can see that from the quotations over the page where I say that the personal circumstances of the occupants will be important. Lord Neuberger said in *Pinnock*, totally accepting Jan's submissions on this point, "that proportionality is more likely to be a relevant issue 'in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty." So that is the difference between proportionality and conventional judicial review. It may well be that in defending possession proceedings you use both arguments. It may be that there is a combination of both a more traditional, administrative law defence looking at the decision making of the public body but also a proportionality defence looking at the occupant's circumstances. It may be that one or other on its own is not enough. It may be that relying upon both together, the combination of both of them, may be the tipping point in defeating a claim for possession.

I put in the notes five possible examples of the types of cases in which occupants may succeed in defeating possession claims; four of them are very much proportionality type circumstances, one of them perhaps more of a conventional administrative law type circumstance. The first of the five possible examples relates to joint tenancies terminated by one tenant's notice to quit, the *Monk* situation and I have given an example. Joint tenants; one is blameless, the other leaves. For whatever reason, out of spite, to avoid the continuing rent liability or even at the suggestion of the local authority the absent joint tenant serves a notice to quit terminating the tenancy; in other words cases like *Qazi*, *Bradney, McCann*, etc but with merits. I can see no reason now, provided that there are merits, provided that the occupant's personal circumstances are strong why post *Pinnock, Powell, Hall* and *Frisby* that kind of argument should not succeed.

Secondly, where a non-tenant family member has lived in premises for many years but security has been lost. We all know about the failed succession cases, cases where there is a secure tenancy and there can be no second succession. I set out an example of a failed second succession case. Tenancy granted to man in 1954, he lives in the flat until he dies in 1999, wife succeeds, she dies in 2005; notice to quit, local authority seek to evict the son who has lived in the property since he was six months old. Those are the facts in *Coombes v Secretary of State for Communities and Local*

Government and Waltham Forest LBC but we have also seen *Gangera v Hounslow LBC*, we have also seen the very sad case of *Sheffield City Council v Wall*, the articled clerk who did not succeed when the tenant whom he really regarded as his mother, although there was no formal adoption, died. He was unable to succeed pretty much on a technicality. Those are the kinds of cases where clearly there are going to be arguments which have a prospect of success. But what about another situation? Say you have a single tenant, say a mother, she has a young adult son who lives in the property and has always lived there. She abandons the tenancy, he is blameless, he may be vulnerable, he may have real difficulties; it has been his home. Again, that is the kind of situation where, if the local authority serves a notice to quit and tries to evict him, proportionality may well come into play.

Thirdly, cases involving housing associations where they rely upon a mandatory right to possession, ground 8. What about ground 8 proceedings where the tenant is not at fault and it is all a housing benefit problem? The circumstances in *North British Housing Association Limited v Matthews*, is, I think, open to be revisited if the housing association is a core public authority or it is exercising public functions. Similarly, what about Section 21, an assured shorthold tenancy with a housing association which is a core public authority or is exercising a public function? Arguably, if the tenant's arguments have merits, if the tenant's personal circumstances are strong that, too, is a situation in which proportionality can be argued.

I am going to jump to (e), pure personal circumstances, circumstances for example where a tenant is terminally ill and is likely to die in six months or is about to undergo major surgery. It may well be that those are the kinds of things that could be raised as a proportionality defence. Going back to (d) where a local authority brings a possession claim despite failing to comply with its own statutory obligations. That is more akin to a traditional *Wandsworth v Winder* case, a more traditional administrative law defence, perhaps though with issues relating to the occupant's personal circumstances which bring in proportionality as well. What is clear from *Pinnock, Powell, Hall* and *Frisby* is that such matters can be raised as a defence to the possession claims so it is reversing what was said in *Kay* and *Qazi*.

There is reference in *Pinnock, Powell, Hall* and *Frisby* to dismissal of defences summarily. What Lord Neuberger has said is that the court should initially consider Article 8 points raised by occupants summarily. If "the court is satisfied that even if the facts relied upon are made out, the point would not succeed, it should be dismissed". Lord Hope said much the same thing in *Powell, Hall* and *Frisby.* So what is the test for "summary" disposal? The origin of the phrase "summary disposal" is in Strasbourg when the European Court considered *McCann*. In *Frisby, Hall* and *Powell* counsel for the Secretary of State argued that regard should be had to Civil Procedure Rules Part 55.8(2) and the phrase where the claim is genuinely disputed on grounds which appear to be substantial. I do not think, and Jan will correct me if I am wrong, that anyone in that case referred to Rule 24 of the Civil Procedure Rules, (Grounds for summary judgement) where there is a slightly different test. The court can grant summary judgement if it considers that the defendant has no real prospect of successfully defending the claim or issue. Is there a difference? Does it matter? There may be a difference, it may not matter, and it is something which is there to be thought about.

I will not go through the facts of the cases that I have listed in deference to the advocates, many of whom are here. I do not think I am going too far in saying that the merits of many of them were really quite appalling. It is not a criticism of the advocates; everything should be done to preserve and to try to protect an occupant's home, quite rightly. But in a lot of those cases a real uphill struggle was faced. Those are the kinds of cases which I have listed where courts may well say that proportionality defences should be dismissed summarily. There are a couple of exceptions that I set out there.

The next question is what facts should county court judges consider? This is where, again, we see the difference between proportionality and conventional judicial review. If you had asked pre-*Doherty* should county courts be considering facts in administrative law defences the answer is obviously no. Administrative law is equivalent to judicial review. The Administrative Court does not consider facts, it considers the route to the decision. Proportionality is different; personal circumstances need to be considered, facts need to be considered, as I have said, because the focus is on outcomes and not just procedure. In a way the starting point in relation to that is what the Strasbourg Court said in *McCann*, namely that the "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". So in *Pinnock* Lord Neuberger said the court considering Article 8 challenges must have power to make its own assessment of any relevant facts. That may extend to reconsidering facts already found by a local authority or, indeed, considering facts which have arisen since the issue of proceedings. But in considering the facts as I have already said, the public authority's aim in wanting possession should

be a “given”. The “court will only be concerned with occupiers’ personal circumstances” and only in exceptional cases the landlord’s reasons for seeking possession so all facts relating to occupant's personal circumstances, if they are not agreed, will need to be determined. The real practical difficulty in this age of cuts in public funding for representation, cuts in courts, courts facing a 25% cut in sitting hours, is how, in those circumstances are courts and, I suppose, landlords as well, actually going to be able to cope with the increased number of occupants raising personal circumstances as a defence to possession claims? I do not know.

The next question is what, if any, is the effect of *Pinnock* and *Powell* on possession claims against tenants enjoying security of tenure, facing a discretionary ground for possession? The answer to that is very simple, the answer is none. If there is a discretionary ground for possession the court has to consider reasonableness. Any factor which has to be taken into account for the purpose of assessing proportionality under Article 8 would have to be taken into account or resolved for the purpose of assessing reasonableness. That is no different to what was said by the Court of Appeal in *Castle Vale Housing Action Trust v Gallagher*.

Is there a difference between reasonableness and proportionality? In theory there is; reasonableness involves a consideration of both the landlord’s reasons for wanting possession and the effect upon the tenants. Proportionality is primarily concerned with the tenant’s position with the landlord’s desire for possession being taken as a given. So there is a theoretical difference. Whether there is a difference in practice remains to be seen.

What, if any, is the effect of *Pinnock* and *Powell* on landlords other than local authorities? I think it is important to split this up into two things. Firstly, Jan has already talked about *Weaver*. Lord Neuberger said that the court’s observations in *Pinnock* applied equally to other social landlords to the extent that they are public authorities under the Human Rights Act but that nothing in the *Pinnock* judgement applied to private landowners. So *Weaver* is crucial. If the landlord seeking possession is a core public authority or a hybrid authority performing a public function, what is said in *Pinnock, Powell, Hall* and *Frisby* applies equally to it. Apart from *Gentoo* that Jan referred to, it seems to me that this is an area which has gone slightly quiet. There has been no landlord’s challenge to the decision in *Weaver* that I am aware of and it seems to me that there has been very little argument as to whether housing association landlords seeking possession have been exercising public functions. Why that is I do not know, maybe you know about cases that I do not know about. The second point is in relation to private sector landlords and there is the reference in *Pinnock* to the Strasbourg case of *Zehentner v Austria*; that was a case involving a “judicial sale”. Jan has also mentioned the Swedish case under Article 10. Maybe Jan is more optimistic about this than I am. I suspect that, notwithstanding the argument that Section 6(1) requires courts as public authorities to act in a way which is compatible with Convention rights and although Article 8 is not being closed off in claims by a purely private landlord, I have some doubts as to how likely it is that an Article 8 proportionality defence would work in a claim by a purely private sector landlord. The other side of the coin is the private sector landlords’ rights under Article 1 of the First Protocol but, as Jan says, it is undecided.

The final page, to what extent is the current statutory regime compatible with Article 8? In relation to possession claims against non-secure tenants, given the decisions in *Pinnock, Powell, Hall* and *Frisby*, given the reading in of, effectively, the words “provided that it complies with Article 8” clearly that regime is Article 8 compliant. But that leaves Section 89 of the Housing Act 1980, the provision which in many non-secure cases provides that the maximum period for which an order for possession can be postponed is 14 days unless there is exceptional hardship, in which case the maximum period is six weeks. In *Pinnock* Lord Neuberger said that that might present difficulties in cases where Article 8 claims are raised. It was considered and, effectively, knocked on the head in *Powell, Hall* and *Frisby* where Lord Hope said that there was no evidence put before the court to show that in practice the maximum period of six weeks was insufficient to meet the needs of cases of exceptional hardship. He said that reading down the section, using Section 3, would go well beyond what Section 3 permitted. However, that does not prevent the court from exercising its ordinary powers of case management to defer making an order for possession. So, what is the position if a local authority claims possession against someone with no security of tenure, claims possession against a non-secure occupant who is likely to die in six months time? The court can probably adjourn the claim before making findings; that is probably what is meant by case management powers. But what if it has actually heard the evidence? It is faced with a stark choice of making an order for possession in six weeks or saying that it is not proportionate to make an order for possession in six weeks and therefore dismissing the claim. So, effectively, the Supreme Court has knocked away the middle ground; it is a stark choice between the judge dismissing the claim because it is not proportionate to make a possession order in six weeks or allowing it.

Finally, how far has the law really moved on as a result of *Pinnock, Powell, Hall* and *Frisby*? It really depends on where we started from on this journey. The House of Lords/Supreme Court has moved a long way from *Qazi* and *Kay*. It has moved from *Wandsworth v Winder* but it has not moved nearly as far as from *Qazi* and *Kay*. In one view, as anyone who lives or works in West London knows, the journey from Wandsworth to Hounslow is short. The Supreme Court/House of Lords have taken the scenic route; they have travelled from Wandsworth to Hounslow via Leeds, Birmingham, Manchester and loads of other places in between.

Chair: Thank you, Nic. I am sure you will agree that we have had a lot of rich material. So at this point I will invite questions to the speakers.

Tracey Bloom, Doughty Street Chambers: I wanted to ask you about the applicability of these arguments to private landlords. Do you think it would be fair to say that it is a two stage process really, that one might be able to get to the point of saying that the court is a public authority and that it ought to be applying these principles and it would be unlawful for it not to do so, but the difficulty is always going to be the second point which is where there is a private landlord the competing rights are going to be very difficult to argue that it is proportionate. I realise that so far we have not got over hurdle one but that may be the easier hurdle than the second hurdle, which is the problems of proportionality in this context?

Nic Madge: I agree entirely, it may well be that it has to be decided in the Supreme Court.

Jan Luba QC: Which makes it all the more important that we take heed of what Nic has said about merits. Part of the reason we went on the eight year grand tour was the need to try and find good cases. Rather ironically, I think you are going to be more able to find good cases in the private sector context than in the public sector. The private landlord will be relying, axiomatically, on a statutory entitlement to possession and their Article 1, Protocol 1 right to the State's recognition of their possession. The tenant will be relying on their Article 8 right and everything in the history of the Convention teaches us that it is about the balance of rights. Therefore I think you will need a stark case of hardship, beyond the routine hardship that the person will be homeless and will have to find somewhere else to live, but genuine hardship. Perhaps of the extremes that Nic has described in his paper in order to get the case to run the proposition that Article 8 applies to private landlords. We really need life and death, very serious personal circumstances.

Michael Paget, Garden Court Chambers: Can I ask Nic a question about *Powell*? In the example (e), pure personal circumstances, if you are terminally ill perhaps there is a good chance after hearing the evidence that the court may say that it is disproportionate to make an order. Of course, before hearing the evidence, the court can always adjourn off but once having heard the evidence what should the court do with the second half of that example where there are prospects of major surgery but in the long-term there is reasonable grounds to think that the occupier will be perfectly alright? Has the court just got the two options, dismiss the case or grant the possession order?

Nic Madge: Again, it depends so much on the personal circumstances and the individual merits of the case. It is impossible, without knowing what those individual circumstances might be, to say what the court would do.

Elaine Sherratt, Kent Law Clinic: We are interested in the position of borrowers from banks who own their own home and who have the misfortune to have a mortgage under an all monies charge. A lot of small business people have taken loans for their business and then they suddenly get a call requesting the whole amount at once. We have a client who simply wants a reasonable time to pay who is in that situation and who can demonstrably pay over a reasonable period of time. What is standing in the way is that Section 36 of the AJA applies but by case law a reasonable period has been determined to be a very small period of time on an all monies charge. So we would like to argue some proportionality there, where he is in a position to make a good and fair and reasonable offer. I suppose the judge would be adjudicating on his Article 1 Protocol 1 right plus Article 8 against the banks Article 1 Protocol 1 right and whether we think there is any mileage there in arguing the court does have power to postpone possession on terms for a rather longer period than they seem to think they can?

Nic Madge: The starting point is, is Article 8 engaged? Almost certainly yes. Then, moving on to the balancing act between the lender's Article 1 of the First Protocol rights and the occupier's Article 8 and Article 1 of the First Protocol rights. The court has an obligation as a public authority to take those

conflicting rights into account. At the moment the only authority is *Habib v Taylor*, the pre-Human Rights Act authority. My view is that it is arguable both ways; it is really not very much different from the position that Tracey was talking about at the beginning of the questions. It is arguable.

Jan Luba QC: If anything it is slightly stronger than the scenario Tracey outlined because we are much more likely to have institutional claimants than little old lady landlords, if I can use Nic's terminology, and the great advantage in the mortgage possession case is that the constraints of Section 89 do not apply so you escape the difficulties postulated by Michael Paget's question where the preferred outcome from everybody's point of view is a long-term suspended order. You cannot have that if it is a case to which Section 89 applies but Section 89 does not apply to mortgage possession proceedings so it seems to me that there is rich scope there for testing both of the points that the previous questioners have raised; the applicability of the Article 8 defence to non-public authority claimant possession claims and the scope of the court to make a proportionate suspended or postponed order.

Nic Madge: On the other hand there is the vulnerable position of the occupier, the home owner, in terms of costs and the risk of the costs being added to security.

Jan Luba QC: You are starting to get the picture. Highly meritorious circumstances of occupier, no equity in the house which is going to be snatched by the costs so we want the perfect factual storm before we run any of these cases.

Stephen Pierce, Pierce Glynn Solicitors: I am thinking about the consequences of the potential orders that are made, if you think about a situation such as the couple splitting up and a notice to quit served or the person going into, say, residential care, leaving a family member in the property where the landlord has served a notice to quit. The case reaches the court, ostensibly the occupier is a trespasser; the court refuses to make a possession order, what is the outcome of that? Does that leave the occupier as a trespasser? What is their status in the property following the court's refusal to make a possession order?

Jan Luba QC: Their status is that they are a court tolerated trespasser. Their contractual right to be in occupation will have ended with the notice to quit and, but for the court's order, they would have been evicted but for the court's dismissal of the claim. So they remain in possession with no legal right to do so and Article 8 does not create for them any property rights; you do not get, as it were, an equitable tenancy or anything of that nature. But it rather makes the point that where you can, it is a good idea to combine in your defence to the possession claim both a conventional judicial review type defence and an Article 8 proportionality defence. So in circumstances such as you posit, the defence might read "it is not proportionate to make a possession order therefore please dismiss the claim" and, furthermore, "it was unlawful of the authority to turn down the applicant's application for the grant of a tenancy of the property under the Housing Allocation Scheme".

Chair: Assuming such an application has already been made?

Jan Luba QC: I think by definition Stephen is describing a case in which the occupier is represented and no representative would fail to make such an application.

Chair: It depends when you get the case, though, doesn't it? We do not always get the case at the ideal time.

Mike O' Dwyer, Philcox Gray & Co: It does seem to me that the really negative element of *Powell, Hall* and *Frisby* is the survival of Section 89. It really does close the door on a lot of practical casework that we might be able to develop because it does appear that you will either win with a pretty massive argument on proportionality, whether or not combined with Gateway B matters, when what we really would have wanted was suspended possession orders and we have not got it. Is there any way in which we can continue to attack Section 89? It does not appear as if there was a great deal of discussion about suspended orders as opposed to postponed orders. My second point is that I see that Nic actually got a mention in paragraph 118 of *Powell, etc.* for his suggestions in the article *La Luta Continua?* for some sort of pre-action protocol, for want of a better word, I was going to say quazi pre-action protocol but perhaps not, for local authorities to be developing some sort of dialogue with potential defendants in these sorts of circumstances.

Jan Luba QC: I am going to answer the first part of your question as best I can and then Nic will deal with his claim to fame in paragraph 118. The question of suspension or postponement. For our

clients the possibility of achieving a finding from a court that what would be proportionate would be a suspended or postponed order has obvious attractions. From the perspective of the State, it would annihilate the difference between security of tenure and non-security of tenure. That, ultimately, is, I think, what drove the Supreme Court to take the position it did in holding that Section 89 could not be modified or read down under Section 3 because if you could do that, you would eliminate the last difference. Can anything be done? Yes, I think so. With an appropriate case on the facts, if you could demonstrate that the only proportionate disposal would have been a postponed, deferred, suspended, call it what you want order for possession, then I think you may find that Strasbourg is attracted to that proposition. Some of you, like me, will have cases running through the court system at the moment where the obviously sensible disposal is a deferral for six months with the arrears being cleared at £100 per month for six months. Now the courts simply cannot achieve that under what we have been left with after *Hall, Powell, Frisby* and *Pinnock* but it may be that we can find a case, and we would have to go to Strasbourg with it, which would establish that that was a non-compliant situation with the Convention. But it must be emphasised that if we got there, it would be the elimination of the last difference between cases with security of tenure and cases without.

Nic Madge: The question of a pre-action protocol where public authorities or whatever are seeking possession against an occupant lacking security of tenure. This was something that was considered by the now defunct housing committee of the Civil Justice Council. The suggestion was that where such a body was about to seek possession, it should notify the occupant that they were going to do so and invite them to set out any reasons that they would seek to rely upon in challenging the decision to seek possession and that any such reasons should then be considered and should be attached to any claim for possession. There were arguments for and against that. The argument against it that some people put forward was the difficulty of so many occupants who are unrepresented not actually putting forward arguments or a response to the landlord's pre-possession claim letter. On balance, my view was that it was something which would make the position better than without it because there would be something in writing that the court could see that the landlord might have ignored or might not have taken into account and so that would have helped any admin or conventional judicial review defence. The Civil Justice Council referred the matter to the Law Society housing committee which decided that it was not a good idea and so, practically speaking, the idea was dead. It was referred to in Lord Phillips' speech. It is something which I think needs very careful thought before it is progressed in any way. It relates and is far more relevant to judicial review, admin law type defences than to proportionality because of the way in which admin law defences are related to the claimant's decision making process rather than the occupant's personal circumstances. There is lesser need, if any need, for such a protocol if the court has the power to examine the personal circumstances to make its own determinations about facts. I think it is something which housing practitioners should think about before anyone tries to resurrect it.

Chair: I would like to ask one short question myself. Nic mentioned in his paper, I think it is from *Powell, Hall* and *Frisby*, that the court shall consider the issue of proportionality only if the issue has been raised by the occupier and that the case meets the threshold of being seriously arguable. I just wondered, for a client who goes to a possession hearing unrepresented, in what way do you think the issue would be considered to be raised? Do you think the court would insist on the words "proportionality" and "Article 8" being used and at what level do you think it could be said that such issues have been raised? I am thinking about how most unrepresented clients would present their situation.

Nic Madge: It depends. If the circumstances giving rise to proportionality are obvious to the court, it may not matter whether it is formally raised in the form of a defence or as a proportionality submission. I think that if it is before the court, then the court has an obligation to consider it.

Chair: Thank you, I like that answer.

Jan Luba QC: Let me immediately undermine it then! I agree entirely with what Nic said but the question of whether the court could assume for itself the jurisdiction to determine the question of proportionality was very much live in the representations that the Supreme Court heard and it is no accident that that is not referred to in the judgement of the Court. They were extremely keen to avoid any suggestion that there would be a burden on the district judges, that level of judiciary mainly dealing with these cases, to, as it were, tease out the defences. So the onus is on the individual to bring forward their defence but I agree with Nic, it will not take much teasing by the district judge who says, "well, tell me why I shouldn't evict you, Mrs Bloggins" to then get the answer, "well, because I've been there 18 years and I've 17 kids". "Well, what you are really saying Mrs Bloggins is it wouldn't be

proportionate to evict you isn't that right?" "Yes, exactly". "Oh well, it seems to me a reasonable defence."

The second part of Viv's question was about the high threshold. I wish I had one of those checkers that could tell me how many times Lord Hope, in particular, managed to get "high" and "exceptional" into the course of his judgement. But one of the most remarkable things about the judgements in *Powell, Hall* and *Frisby* is what they did with Miss Powell's case. I will remind you, in particular, to have a look at paragraphs 65 and 66 which is where Lord Hope deals with how Miss Powell's case would have been disposed of. She was a non-secure tenant of temporary, homelessness accommodation who had managed to clock up £3,500 rent arrears, not difficult when your rent is £350 a week. Her circumstances were "I'm on benefits and I will be until the three tiny kids I've got grow up so please don't evict me and I'll pay it off at £3.50 per week." Have you ever met anybody with those sorts of circumstances? You might think there was nothing exceptional about those at all because you deal with them day in and day out in the county court. What Lord Hope said at paragraphs 65 and 66 is that is the sort of case where consideration should be given as to whether it was proportionate to evict. Well, if that is what they mean by applying a high threshold I do not think anybody in this room is going to have any problems.

Before we leave the question and answer session, can I just mention that through the good offices of the Legal Action Group, chapters 25 and 26 of Defending Possession Proceedings which deal, respectively, with public law defences and Human Rights Act defences are both being updated on the LAG website for those who have purchased the book but wish to use it taking into account the provisions and changes that have taken place. So I hope you find that useful and, indeed, we hope you find the book useful but we hope you find the update useful.

Nic Madge: Just going back to Viv's question very briefly, there is one other practical difficulty relating to an unrepresented occupant and a district judge perhaps going out on a limb and saying "it has not been formally raised but it is before me, I find it disproportionate, I dismiss the claim for possession". There will then probably be an appeal by represented local authority against unrepresented occupant and the difficulties that arise from that.

Chair: We will now end that part of the meeting and I would like to thank Jan and Nic for a fascinating presentation and, as usual, laying down challenges for us to spot those cases that should be being brought and challenged. So we now move to the Information Exchange and it is open to anyone to give any contribution on any cases, developments, policies, practices of local authorities, etc. so any contributions from members? I have a contribution to make on behalf of David Watkinson who, as people know, co-ordinates HLPA's activities on law reform. David has given us an update on the Localism Bill where the consultation has been finished and the Government has published a summary of consultation responses. David has produced an article in LAG March edition summarising the responses and they are quite interesting so I will just run through a snapshot of what they say. On the subject of the proposals for fixed term, flexible tenancies around two-thirds of landlords who responded said they would make use of proposed fixed term, flexible tenancies but they had reservations about them. A large majority expressed the view that a two year flexible fixed term tenancy, and the Government proposed a minimum term of two years, would rarely or never be enough for a general needs social tenancy. In other words it would not be long enough for somebody who has qualified for a social tenancy to drastically improve their financial and other circumstances sufficiently to enable them to move on and buy or whatever else they would next do and there was a significant degree of consensus among landlords in favour of a five year period.

On allocation, which is also dealt with in the Localism Bill, about two-thirds of local authorities said that they would use restricted waiting lists and the remainder, along with the majority of voluntary and community groups who responded to the consultation, supporting the retention of open waiting lists. Those who were considering restricting waiting lists said that they would place a strong focus on housing need although most indicated that this would also be linked to some form of local residency criteria. On the subject of homelessness, more than three-quarters of local authorities welcomed the prospect of being able to discharge the full homelessness duty by an offer of accommodation for a minimum term of 12 months in the private rented sector. Only half of local authority respondents thought that 12 months was the right length and the majority would be in favour of two years. A significant number of local authorities believe that housing benefit changes would restrict this means of discharge by reducing the amount of affordable accommodation, which is very interesting and nice to realise that local authorities are alert to that danger. There were also concerns about standard and suitability of private rented sector accommodation and concerns about placements from out of the borough. The Government, apparently, at the moment does not propose to alter any provisions of the

Bill as a result of the consultation. However, it expects the vast majority of new tenancies to be granted on longer terms than two years, which they set as their minimum, and particularly for vulnerable households or those with children. On allocation it does not propose to make any changes to the existing reasonable preference categories at the current time. The progress of the Bill is that I think it goes to the House of Lords after Easter.

If there are no other contributions I would like to thank the speakers once again and remind you that the next meeting is on Wednesday 18 May on the subject of Possession and Housing Benefit.