Neutral Citation Number: [2013] EWHC 2945 (Ch)

Claim No. HC12D01728 & HC12B02739

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 31 July 2013

BEFORE:

MR JUSTICE BURTON

- - - - - -

BETWEEN:

Secretary of State for Defence	**Claimant**
- and -	
Helen Nicholas	**Defendant**
&	
Secretary of State for Transport	**Claimant**
- and -	
Margaret Blake	**Defendant**

- - - - - -

Mr Jonathan Davey (instructed by **the Treasury Solicitor**) for the **Claimants**
Mr Toby Vanhegan (instructed by **Arkwright Solicitors and Luton Law Centre**) for the **Defendants**

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Approved Judgment
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(Official Shorthand Writers to the Court)

Wednesday, 31 July 2013

JUDGMENT

1. The hearing before me was of two possession actions, one which started in the Luton County Court ("Blake") and one in the Watford County Court ("Nicholas"), transferred to be heard together in the High Court because of the similarity of the issues and the availability if necessary of the powers of a High Court Judge under the Human Rights Act 1998 ("HRA").

2. Both are claims brought by Government Departments, the Secretary of State for Transport ("DfT") in the case of Blake and the Secretary of State for Defence ("MOD") in the case of Nicholas, for possession of premises. Mrs Blake was the tenant of premises in Luton (50 Seabrook) which were let out temporarily once they had been acquired by the MOD because of a proposed road widening scheme, and Mrs Nicholas's husband, Squadron Leader Nicholas (whom I shall call "H") was the licensee of premises in Bushey Heath (4 Thorn Avenue) which were and are owned by the MOD as one of their many homes for servicemen or women and their families ("Service Family Accommodation" or SFA) when posted locally, and Mrs Nicholas has remained in the premises after H had left, and they have subsequently divorced.

3. In respect of both premises the Claimants' case is (and with regard to Blake it is admitted) that the tenancy or licence has been determined and that they are entitled to possession. As Crown properties, they are not subject to statutory protection under either of the two relevant systems, the Housing Act 1985 ("the 1985 Act") which governs and regulates a secure tenancy (and by s.79 also governs licences) and the Housing Act 1988 ("the 1988 Act") which governs and regulates assured tenancies, including assured shorthold tenancies (s.19A ff):

   i) By s.79 and s.80 of the 1985 Act the only landlords covered are listed and the Government is not listed.

   ii) By s.1 and Schedule 1, paragraph 11 of the 1988 Act "Crown tenancies" are excluded namely:

      "*11(1) A tenancy under which the interest of the landlord belongs to Her Majesty in right of the Crown or to a government department or is held in trust for Her Majesty for the purposes of a government department*".

   Mrs Blake's tenancy was accordingly a common law tenancy and Mrs Nicholas a common law licence (or tenancy, as Mr Vanhegan for Mrs Nicholas contends).

4. Consequently Mrs Blake has no protection upon the termination of her tenancy (save for the right not to be removed without a court order under the Protection from Eviction Act 1977). Mrs Nicholas, upon the basis that H's licence (or tenancy) has been terminated, and H having vacated the premises, has no protection, notwithstanding the provisions of s.30 of the Family Law Act 1996 ("FLA") which would, if there were statutory protection, treat her occupation as H's.

5. The Blake proceedings were begun in the Luton County Court on 12 March 2010, seeking possession and arrears of rent. The claim for rent arrears and a cross-claim in respect of alleged breaches of repairing covenant were compromised in July or August 2010, and the claim for possession (and for continuing mesne profits) was transferred to the High Court, after amendment of the Counterclaim to include a claim under the HRA, on 23 March 2012, and to the Chancery Division to be heard together with Nicholas on 30 May 2012. The Nicholas proceedings were commenced in the Watford County Court on 9 March 2009 for possession and arrears. Possession was ordered on 3 August 2009, but such order was set aside on 2 February 2011 and after similar amendment by way of counterclaim the Nicholas case was transferred to the Chancery Division on 3 April 2012.

6. It is common ground that, although neither of the two Claimants have any general housing responsibilities, they are subject to the provisions of Article 8, and the public law responsibility to consider the appropriateness and proportionality of their acts prior to obtaining possession of premises. Article 8 does not give an unqualified right to an occupier to remain in possession of a home, be it owned, tenanted or licensed. Article 8 reads as follows:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

7. There has been recent guidance in the Supreme Court, addressing the role of Article 8 where a tenancy has expired. Lord Neuberger said at paragraph 45 of his speech as follows, of which the most relevant passage is at 45(d), where he spoke of the application of Article 8 proportionality only arising in *exceptional* cases:

> "*. . . it is clear that the following propositions are now well established in the jurisprudence of the European Court:*
>
> *(a) Any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure, and to have it determined by an independent tribunal in the light of article 8, even if his right of occupation under domestic law has come to an end: **McCann v UK** 47 EHRR 913, para 50; **Cosic v Croatia** 52 EHRR 4098, para 22; **Zehentner v Austria** 52 EHRR 739, para 59; **Paulic v Croatia** (App no 3572/06), para 43, and **Kay v UK** 2011 HLR 13, paras 72-3.*
>
> *(b) A judicial procedure which is limited to addressing the proportionality of the measure through the medium of traditional judicial review (i e, one which does not permit the court to make its own assessment of the facts in an appropriate case) is inadequate as it is not appropriate for resolving*

> *sensitive factual issues:* ***Connors v UK*** *40 EHRR 189, para 92;* ***McCann v UK****, para 53;* ***Kay v UK****, paras 73-4.*
>
> *(c) Where the measure includes proceedings involving more than one stage, it is the proceedings as a whole which must be considered in order to see if article 8 has been complied with:* ***Zehentner v Austria****, para 54.*
>
> *(d) If the court concludes that it would be disproportionate to evict a person from his home notwithstanding the fact that he has no domestic right to remain there, it would be unlawful to evict him so long as the conclusion obtains – for example, for a specified period, or until a specified event occurs, or a particular condition is satisfied.*
>
> *Although it cannot be described as a point of principle, it seems that the European Court has also franked the view that it will only be in exceptional cases that article 8 proportionality would even arguably give a right to continued possession where the applicant has no right under domestic law to remain.*"

He continues at paragraph 52, again concluding that an order for possession would be proportionate in "*virtually every case*", as follows:

> "*52. . . . The question is always whether the eviction is a proportionate means of achieving a legitimate aim. Where a person has no right in domestic law to remain in occupation of his home, the proportionality of making an order for possession at the suit of the local authority will be supported not merely by the fact that it would serve to vindicate the authority's ownership rights. It will also, at least normally, be supported by the fact that it would enable the authority to comply with its duties in relation to the distribution and management of its housing stock, including, for example, the fair allocation of its housing, the redevelopment of the site, the refurbishing of sub-standard accommodation, the need to move people who are in accommodation that now exceeds their needs, and the need to move vulnerable people into sheltered or warden-assisted housing. Furthermore, in many cases (such as this appeal) other cogent reasons, such as the need to remove a source of nuisance to neighbours, may support the proportionality of dispossessing the occupiers.*
>
> *53. In this connection, it is right to refer to a point raised by the Secretary of State. He submitted that a local authority's aim in wanting possession should be a 'given', which does not have to be explained or justified in court, so that the court will only be concerned with the occupiers' personal circumstances. In our view, there is indeed force in the point, which finds support in Lord Bingham's comment in* ***Kay v Lambeth*** *[2006] 2 AC 465, 491, para 29, that to require the local authority routinely, from the outset, to plead and prove that the possession order sought is justified would, in the overwhelming majority of cases, be burdensome and futile. In other words, the fact that the authority is entitled to possession and should, in the absence of cogent evidence to the contrary, 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. But, in a particular*

case, the authority may have what it believes to be particularly strong or unusual reasons for wanting possession – for example, that the property is the only occupied part of a site intended for immediate development for community housing. The authority could rely on that factor, but would have to plead it and adduce evidence to support it.

Unencumbered property rights, even where they are enjoyed by a public body such as a local authority, are of real weight when it comes to proportionality. So, too, is the right – indeed the obligation – of a local authority to decide who should occupy its residential property. As Lord Bingham said in ***Harrow v Qazi*** *[2004] 1 AC 983, 997, para 25:*

> *'[T]he administration of public housing under various statutory schemes is entrusted to local housing authorities. It is not for the court to second-guess allocation decisions. The Strasbourg authorities have adopted a very pragmatic and realistic approach to the issue of justification.'*

Therefore, 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. However, in some cases there may be factors which would tell the other way."

8. This guidance has been followed in **Powell v London Borough of Hounslow** [2011] UKSC 8, where Lord Hope at paragraphs 33 and 35 spoke of the "*high threshold . . . which would succeed in only a small proportion of cases*", and similarly in the Court of Appeal in **Corby BC v Scott** [2012] EWCA Civ 276 at para 35 per Lord Neuberger MR. In **Defence Estates v JL** [2009] EWHC 1049 (Admin), 2012 EWHC 2216 (Admin) and 2013 EWCA Civ 449, the MOD obtained possession of premises notwithstanding an Article 8 contention.

9. There are 50,000 service premises in the UK owned by the MOD and occupied by servicemen or women on similar terms to those of H, and some 1,200 premises owned by the DfT on a temporary let pending infrastructure works on similar terms to those of Mrs Blake.

10. Oral evidence was heard in the Blake case from Ms Tina Barrington, Property Management Team Leader in the Highways Agency, from Mr Richard Bramley of the managing agents for the Highways Agency and from Mrs Blake. In the Nicholas case evidence was given by Ms Elizabeth Adedeji of the MOD and Ms Gemma Thirlwell, who had no original knowledge of the case, from the MOD's managing agents, previously called "Defence Estates", and from Mrs Nicholas. A statement by H was taken as read, as was a statement filed in both actions by Mr Patrick Owen of the Department for Communities and Local Government.

Blake

11. In 1994 the DfT acquired the freehold of the property and 68 others in the area for the purpose of a road widening scheme in respect of part of the M1, and following

its acquisition the property was not immediately required for such scheme, so the DfT decided to let out the property.

12. In 2001 Mrs Blake became the tenant of the property, initially pursuant to a one year written agreement, but thereafter she entered into two further written tenancy agreements, the last being dated 1 January 2005. During the course of 2005 Mrs Blake fell into arrears of rent and the Claimant commenced possession proceedings, which were discontinued upon settlement being reached. Following the expiration of the term of the agreement, Mrs Blake remained in occupation of the property, initially paying rent on a monthly basis.

13. Ms Barrington explained in paragraph 5 of her witness statement that:

> "*The duration of the leases were deliberately kept short. The Highways Agency is not responsible for social housing. Where the Highways Agency owns residential properties these are invariably let for short periods at a time, as this is ancillary to its function of implementing road improvement schemes and it is vital that vacant possession can be obtained quickly for maximum flexibility. Ms Blake would have been aware that it was never intended, at the outset or later, that she and her children would reside at the Property otherwise than on a short-term basis.*"

14. Unfortunately arrears began to grow again, and by 2009 the extent of the arrears exceeded the value of one year's rent. Eventually a notice to quit was served on 9 November 2009, giving more than 2 months notice (1 month being required under the Tenancy Agreement) expiring on 31 January 2010. As mentioned above, those arrears together with a cross-claim for repairs were compromised, but by this time the property was no longer required for the motorway scheme, as the TR111 Route Protection Order, enforced to protect the route of the original widening scheme, was lifted, and the properties which the DfT had acquired became surplus to requirements. As Mr Vanhegan explained in his skeleton, the DfT:

> "*7. . . . was required to dispose of them in accordance with the guidance given in the HM Treasury Publication 'Managing Public Money', published in |October 2007, and an Office of Government Commerce Publication 'Guide for the disposal of surplus property', published in November 2005* ['the 2005 Guide']. *These documents place the Claimant under a duty to obtain best value for the properties.*
>
> *8. The Highways Agency took professional valuation and disposal advice from its property agents Smith Gore, the District Valuer and their solicitors and were advised to carry out a phased sale of the properties in order to avoid flooding the market and ensure that the best price was obtained. The Claimant was advised that the value of the properties on the open market with tenants in possession is likely to be 5 to 10% less than the value with vacant possession. The disposal process started in February 2010 and is ongoing. The properties have been released for sale in tranches. So far 33 have been sold, out of the 74 acquired.*"

15. The Claimant's solicitors wrote a letter dated 10 November 2010 to Mrs Blake as follows:

> "*As both you and your client are aware, the Property that is the subject of the above claim was acquired by our client pursuant to its statutory functions as part of the M1 junction 10 to 15 widening scheme (later known as junctions 13 to 15 widening scheme). That road scheme has been altered and the property has been declared surplus to requirements, along with others in the surrounding area. Our client therefore also requires vacant possession in order to dispose of the property in accordance with the Treasury Rules on the disposal of surplus Government property.*
>
> *We are writing to inform you that the above has been taken into account as part of our client's decision to continue with the proceedings to obtain possession of the Property. Our client has concluded that it is necessary to continue with the proceedings.*
>
> *Our client wishes to give your client the opportunity to reconsider her position in light of the above information and openly invites her proposals for consenting to the making of an order for possession of the Property.*
>
> *Our client is prepared to discuss the time your client considers that she will require in order to vacate the Property and to find alternative accommodation, bearing in mind that your client has now had a period of over a year since our client first served Notice to Quit on her in which to seek suitable alternative accommodation. After consideration of any proposals your client wishes to advance, our client may be able to agree to a form of order that affords your client more time in which to vacate the Property than would be afforded were the Court to make the order itself.*"

No agreement was reached and the proceedings have continued. Very recently the outstanding claim for mesne profits was compromised, so that the only issue before me is the claim for possession.

16. As can be seen, there is no dispute at all that the common law tenancy has terminated. I turn therefore to consider whether this could be said to be an "*exceptional case*" by reference to Article 8, and whether the DfT has fulfilled its public law duties of due consideration of reasonableness and proportionality for the purpose of obtaining possession:

    i) Mrs Blake lives at the premises, and has done so for more than 11 years, now with a son of 18 and a 17 year old daughter, who suffers from cerebral palsy. Having lived in the area for some considerable time she has developed, as she explained, in her witness statement and subsequently in evidence, considerable ties in the area, of which the most significant is the availability of medical advice and physiotherapy for her daughter (although she is currently in limbo waiting for a new referral to an adult, rather than a paediatric, team). However the DfT has plainly taken a good deal of care to

take account of these matters, being in regular contact with the social services of Luton Borough Council since 2009 and carrying out their own assessment in December 2010, notwithstanding the fact that Mrs Blake did not in fact give any co-operation as she was invited to do in the letter of 10 November 2010 set out above. I do not consider that there was anything more that was required of the DfT.

ii) More significant however is its contact with the Luton Borough Council. Ms Barrington describes in paragraph 18 of her witness statement:

> "*A recent development is that Luton Borough Council ("LBC") has expressed an interest in acquiring some or all of the local housing stock that the Highways Agency wishes to sell. Negotiations are currently taking place. It is understood by the Highways Agency that the LBC is prepared to acquire some properties with sitting tenants. How it might affect Ms Blake if the Property was to be acquired by LBC is unclear: Ms Blake's tenancy has come to an end at common law and it is not known whether the LBC would offer her a new tenancy.*"

17. The 2005 Guide, referred to in Mr Vanhegan's skeleton above, refers to the possibility of selling properties without vacant possession, particularly to a council which has responsibilities for housing such tenants. Mr Jonathan Davey for the Claimant described the position in his skeleton argument in reply as follows:

> "*It was asserted on behalf of the Defendant that the Claimant had not taken account of the wider social issues raised by the seeking of possession of properties in Luton. This runs entirely contrary to the evidence given by Tina Barrington, who (it is submitted) was a knowledgeable and thoroughly straightforward witness. Her express oral evidence was that the Claimant (through the Highways Agency) did take account of wider social issues. Specifically, Tina Barrington was asked whether she had considered the personal circumstances of all of the Claimant's tenants and any effect that gaining possession in each case might have on Luton BC. Tina Barrington explained that the Claimant (like any landlord) did not know all of the detailed personal circumstances of every single tenant; and, to ensure that relevant information was taken into account, officers of the Claimant would have meetings with Luton (who do carry out assessments of individual tenants) where the effect on Luton of the Claimant seeking possession in a particular case was discussed. Luton were able to consider the effect because the Claimant shared with them the details of who its tenants were. Taking the wider social issues into account, the Claimant entered into negotiations with Luton for a transfer of some properties to Luton, with tenants in situ, but at market rates assuming vacant possession, less an abatement to reflect the genuine savings the Claimant would be making by participating in the transfer (not a discount). This clearly demonstrates the Claimant's understanding*

of the wider social issues and its desire to work with Luton in a pragmatic fashion to reduce any impact."

18. Subject to what is discussed hereafter relating Article 14, there is no answer to the claim for possession: I am satisfied that the DfT's public law duties, including those by reference to Article 8, are satisfied by their careful consideration of the Claimant's circumstances and now the undertaking which the DfT has agreed to give to the Court to continue its negotiations with Luton BC, and not to enforce the order for possession for a period of 3 months for such purpose, so as to see if those negotiations are successful and if so to allow for a sale to the Luton BC with Mrs Blake and her family remaining in occupation. The Claimant is not a housing authority, and does not hold property save in these temporary circumstances and it is in my judgment plainly legitimate for them to sell the property so as to obtain the best price reasonably possible, but if they can do so to Luton BC so as to allow Mrs Blake and her family to remain in possession, that would obviously be a satisfactory outcome.

Nicholas

19. Mrs Nicholas now lives alone (with her dog) in a 3 bedroom property which was the subject of a licence dated 20 May 2005 to H. As Ms Thirlwell describes in her witness statement, the MOD owns the leasehold of this and many other service family properties, of which it is also the ultimate freeholder, and enters into licence agreements with service personnel once they have been allocated SFA, which is then managed by the managing agents, previously called Defence Estates. The licence was entered into on 20 May 2005 between Defence Estates on behalf of the MOD as licensor and H, and it contains the following material terms:

"*1.1 In this Licence:*

1.1.1 The Licensor is referred to as 'We'. The words 'Us', 'Our' and 'Ourselves' are also used in relation to the Licensor.

1.1.2 The Licensee is referred to as 'You'. The words 'Your' and 'Yourself' are also used in relation to the Licensee.

. . .

2. PERMISSION TO OCCUPY THE PROPERTY

2.1 The Licence gives You the right to occupy the Property for the duration of this Licence. Other persons, such as Your children and Your spouse, may only occupy the Property in accordance with MoD's current policy . . .

2.2 Permission to occupy the Property is personal to You only.

2.3 Your right to occupy the Property commences on the Start Date.

2.4 Your right to occupy the Property under this Licence will cease if the Licence is terminated, either rin accordance with the relevant provisions of the Licence, or in any other way permitted by law.

3. PAYMENT OF THE FAMILY QUARTER CHARGE

3.1 You are responsible for and agree to the Family Quarter Charge . . . being deducted from Your pay.

4. HOW YOU CAN END THIS LICENCE

4.1 You must give Us at least 93 days' written notice that You intend to vacate the Property. In cases of short notice postings We will accept a lesser period of notice from You provided that such notice is given to Us within 7 days of notification to You of Your short notice posting. This may not be possible if You are deployed on operations or at sea, in which case You must notify Us within 7 days of Your return. Any notice You send to Us must be sent in accordance with paragraph 10.2 of this Licence.

5. HOW WE CAN END THIS LICENCE

5.1 We shall only end this Licence by providing You with written notice of termination. The period of notice of termination that We will give You will vary depending on the circumstances. These circumstances are set out in paragraphs 5.2 and 5.3 below. On or before expiry of the notice of termination, You must leave the Property and have complied with Your other obligations under this Licence.

5.2 We will give You 93 days' written notice of termination in the following cases:

5.2.1 Your marital status changes, resulting in loss of entitlement to Service Family Accommodation.

5.2.2 You are discharged from the Services.

5.2.3 You vacate the Property on matrimonial breakdown. What constitutes marital breakdown for the purposes of this Licence is set out in JSP 464.

5.2.4 Your spouse vacates the Property on matrimonial breakdown and You are no longer entitled to occupation of Service Family Accommodation as set out in JSP 464.

. . .

5.3 We will give you 28 days' notice of termination in the following cases:

5.3.1 You breach the terms of this Licence.

. . .

6.1.4 You must only use the Property as a single private dwelling for Yourself, Your spouse and, if applicable, Your dependent children as defined in JSP 464. You must not, without Our prior written consent, use the Property or any part of it for any other purpose nor allow anyone else to do so.

. . .

10.1 We will serve any written notice on You at the Property.

10.2 You must serve any notice (other than notices in legal proceedings) on Us at the Defence Estates office shown below. [the address is given]

. . .

10.4 Any notice (other than notices in legal proceedings) will be treated as having arrived 48 hours after posting.

. . .

I have read and agree to the terms of this Licence. I understand that this Licence is to be granted because my occupation of the Property is required for the better performance of my service with the Crown and that this Licence is not a tenancy. [I shall call this last the 'Express Recital']"

20. Mr Vanhegan submits that, although described as a licence, it was in fact a lease, because it provided for exclusive possession for H and his family (referring to **Street v Mountford** [1985] A.C. 809). There are three consequences of this, he submits:

    i) As no term is specified for the lease, it is, by virtue of **Berrisford v Mexfield Housing Co-operative Ltd** [2011] UKSC 52 a lease for life, which was converted into a term for 90 years by virtue of the Law of Property Act 1925 s.149. As there is no forfeiture clause in the licence, that means the 'lease' is non-terminable for 90 years.

    ii) Since neither party thought that the licence constituted a long lease, it is not surprising that no notice was served under s.166 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). Thus no rent is payable.

    iii) As it is a tenancy (even if not for 90 years) any notice to quit (a) must be served by the landlord personally, not by Defence Estates as agent (b) must

if this be a periodic tenancy (e.g. monthly) expire at the end of a relevant period of tenancy or on a rent day. Both contentions (a) and (b) arise out of **Lemon v Lardur** [1946] KB 613, though, as Mr Davey points out by reference to **Woodfall's Law of Landlord and Tenant**, (a) would not apply here since Defence Estates (actually referred to in the licence) are authorised agents (**Harmond Properties Ltd -v- Gajdzis** [1968] 1 WLR 1858) and (b) can be expressly excluded (**Harler v Calder** [1989] 1 E.G.L.R. 88) which in the present case the provisions for 93 and 98 days' notice would be likely to achieve.

21. However the product of Mr Vanhegan's fertile mind is just not viable:

i) A licence such as this is expressly excluded from the ordinary exclusive possession test by Lord Templeman in **Street v Mountford**. At 818G he states that "*the test is whether the servant requires the premises he occupies in order to better perform his duties as a servant*". The parties so agreed in this case in the Express Recital (though that would not be wholly determinative if there were any contrary indications) and it would seem to be the case, in order to facilitate a married serviceman to work and have his family nearby. But in any event Lord Templeman, when he returned to define the exception, simply described it as an "*occupancy pursuant to a contract of employment*" (827B).

ii) As for **Mexfield**, although on the facts of that case a tenancy without a term was held to be a lease for life, and hence for 90 years, that was because the House of Lords concluded that that was what the parties in fact intended (paragraph 44). Applying ordinary principles of contractual construction (which Lord Clarke at para 107 made plain should be adopted in relation to a lease – including **Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd** [1997] AC 749), it is inconceivable that this licence should be construed as a 90 year lease – and all the other 50,000 MOD premises likewise. As Mr Davey pointed out, the more relevant conclusion to be drawn from **Mexfield** is, as there stated by Lord Neuberger, that without the certainty of a term there would not be a tenancy (paragraph 35). Here there was not a tenancy. There was a licence, as per the Express Recital. James Whitcomb Riley's quacking ducks come to mind.

iii) The restrictive common law rules for service of a notice to quit terminating a tenancy (even if not excluded) do not apply to a licence, whose express terms, set out above, in any event govern.

22. Was the licence terminated? I must set out the history in order to arrive at the answer:

i) By letter dated 7 April 2008, H wrote to inform the MOD (addressed to '*Dear Sir/Madam*') that he had moved out of the premises "*a while ago*" – in fact it was in about April 2007 – and was now at RAF Bentley Priory, and he had instituted divorce proceedings: Mrs Nicholas had "*suffered for a long time with depression-related illnesses*" and was going to need time to find accommodation with the help of Social Services. This was noted

internally by the MOD as "*confirmation that the above named RAF Officer has vacated his SFA accommodation*".

ii) On 22 May 2008 a letter was sent to H by Defence Estates at RAF Bentley Priory (although it appears that it was sent by recorded delivery and returned without signature, and then resent) enclosing copies of what was being sent to the premises. Enclosed was a '*Notice to Vacate Service Family Accommodation*", addressed to H and Mrs Nicholas <u>at the premises</u>, where it was indeed sent, commencing:

> "*We are sorry to learn of the breakdown of your marriage. Unfortunately this means that your entitlement to live in* [SFA] *has come to an end. The first step is a notice to vacate, which is issued to you, and we enclose your notice with this letter.*"

Attached was an identically headed document but addressed to Mrs Nicholas only whereby:

> "*You are hereby required to vacate the* [SFA] *at 4 Thorn Avenue on or before 24 August 2008 due to your Marital Breakdown*".

There was a completely disorganised use of the word '*you*' in the rest of the letter, because in the following paragraphs '*you*' and '*your*' ('*your licence*') plainly refer to H, as did the enclosed '*Prescribed Information for Licensee*'. The notice required vacation on 24 August 2008, where after '*you*' will become an Irregular Occupant. Allowing the specified 48 hours as per clause 10.4 of the licence, that in fact is 93 days, insofar as that was required.

iii) H ceased to pay the monthly Family Quarter Charge (by deduction from his wages) in August 2008.

iv) It appears that Mrs Nicholas had a telephone conversation with a Mr Griffiths of Defence Estates, when he accepted that she "*did not receive the required 93 days notice*" (wrongly, as I have explained above, though Mr Griffiths does not seem to have challenged her) and she was told by a follow-up letter, referring to that conversation, dated 11 November 2008 to "*disregard earlier correspondence*" and to "*find enclosed re-issued letters requiring you to vacate your SFA by no later than 18 February 2009*". There was another identical set of letters sent, as previously on 22 May; the notice to H and Mrs Nicholas <u>at the premises</u>, with the same wording as before, and enclosed Notice to Mrs Nicholas, again with the same wording. In a separate letter to Mrs Nicholas she was told that she would be an Irregular Occupant from 18 February 2009.

She still remains in the property. H, having left the property in April 2007, has not only left his subsequent Service Single Accommodation, but is no longer in the Services.

23. Mr Vanhegan asserts that the licence has not been terminated, because no Notice was properly given to the licensee, H, or if given, was to be '*disregarded*' (though it is plain that such statement was addressed to Mrs Nicholas in the light of her telephone conversation) and never properly re-given. But, to return to the avian metaphor, turning for inspiration to Mr Cleese's ex-parrot, there is no doubt whatever in my judgment that the licence is an ex-licence, terminated by (at the latest) February 2009. Because every way in which the case is put results in termination by that date (or earlier), none of the alternative respects in which Mr Davey puts his case (relying if necessary on objective construction as in **Mannai**) is inconsistent the one with the other (see **Stocznia Gdynia SA -v- Gearbulk Holdings Ltd** [2009] 1 Lloyd's Rep 461 CA.)

24. The licence was terminated:

i) by H's letter of 7 April 2008. By that date H had already vacated (more than 93 days earlier) and MOD clearly waived any need for a more formal notice: alternatively MOD accepted his repudiation of his obligations under clause 2 of the licence.

ii) by the Claimant's notice sent to H at the premises, by notice dated 22 May 2008 and in accordance with clauses 5.2 and 10.1, alternatively clause 5.3 if (contrary to my conclusion) there was inadequate notice. This termination was in any event accepted by his non-payment after August 2008.

iii) if necessary by the Claimant's notice to H at the premises by notice dated 11 November 2008, exactly as above.

On any basis the contract (rightly or even wrongly) was at an end. This is a contractual licence, and quite apart from the fact that H plainly did not keep the contract alive pursuant to the doctrine in **White and Carter (Councils) Ltd v McGregor** [1962] 2 AC 413, leaving the premises and not paying, and entering into email communication thereafter without asserting the licence to continue, Mrs Nicholas plainly could not do so.

25. I turn to questions of public law duty and Article 8. Although the Claimant was put on notice by H of Mrs Nicholas's illness, neither such depression nor the fact that subsequently, after proceedings had been commenced, she was for a short time (at most July to November 2009) certified as unable to make decisions (though this was actually reconsidered on review by the certifier) begins to constitute an argument of disability, either by reference to the Equality Act 2010 or its predecessor: and the MOD did attempt to obtain co-operation in the context of consideration of her personal circumstances in July 2008 and again in February 2009. Her distress caused by the divorce and the uncertainty in relation to these proceedings caused her, as she has now said in evidence, to take an overdose last May, and she remains unsettled and has not yet been offered any accommodation where she can keep her dog. But retention of this three bedroom house is obviously not necessary for her requirements. As an Irregular Occupant since February 2009 she owes mesne profits of £15,927.41.

26. I have no doubt that the MOD has fulfilled its public law duties, and those by reference to Article 8, and is entitled to possession, although in the event it has

given an undertaking not to enforce for three months to give her more time to find alternative accommodation.

Article 14

27. I turn then to Article 14, raised by Mr Vanhegan on behalf of both the Defendants, who are otherwise liable to possession orders. Article 14 is not a self-standing provision, but it is available to be applied where, as here, it is "*in the ambit*" of another substantive article of the Convention, that is in this case Article 8, and there is no need for Mr Vanhegan to rely on Article 1 of the First Protocol. Article 14 reads as follows:

> "*The enjoyment of the rights and freedoms set forth in the European Convention on Human Rights and the Human Rights Act shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*"

The case that Mr Vanhegan makes is that the statutory exemption of Crown tenancies (and licences) from protection as referred to above constitutes discrimination unlawful by virtue of Article 14 between tenants of the Crown and other tenants, and cannot be justified.

28. He claims that s.3 and s.4 of the HRA are thereby in play:

> *"**3. Interpretation of legislation**.*
>
> *(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*
>
> *(2) This section—*
>
> *(a) applies to primary legislation and subordinate legislation whenever enacted;*
>
> *(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and*
>
> *(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.*
>
> ***4. Declaration of incompatibility.***
>
> *(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.*

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

. . .

(4) If the court is satisfied—

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

it may make a declaration of that incompatibility.

. . .

(6) A declaration under this section ("a declaration of incompatibility")—

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made."

29. He urges that I should, if I can, 'read down' the statutory exception pursuant to s.3, as for example in **Ghaidan v Mendoza** [2004] 2 AC 557. I am entirely satisfied that I cannot read down either the relevant provision of the 1995 Act – I would have to add in the Crown to s.80 – or the 1988 Act – I would have to delete paragraph 11 of schedule 1. All therefore that I can do, if persuaded, is to make a declaration of incompatibility, but Mr Vanhegan accepts that by s.4(6) there would be no impact on the Defendants' tenancy/licence nor would it affect the validity of the existing legislation: to the same effect is s.6(2):

"***6. - Acts of public authorities***

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the

authority was acting so as to give effect to or enforce those provisions."

30. The starting point for Mr Vanhegan is the case of **Larkos v Cyprus** [1990] 30 EHRR 597. In that decision of the European Court of Human Rights (ECtHR) it was held that a Government tenant had been unlawfully discriminated against in the enjoyment of his home, on account of the fact that he, unlike a private tenant renting from a private landlord, was not protected from eviction on expiry from his lease. The distinction seems to have arisen not because of the terms of the Cypriot Rent Control Law 1983 but because of the Cypriot court's interpretation of that law by reference to Article 54(c) of the Cyprus Constitution: and Mr Davey points out that the ECtHR could easily have resolved the case by addressing a misconceived interpretation of that Constitution. However that was not the ratio, and the case itself, though not seemingly applied in the United Kingdom since, was referred to without caveat by the House of Lords in **Kay v Lambeth LBC** [2006] 2 AC 465 at 527.

31. Mr Vanhegan helpfully set out an analysis of tenancies in descending order of statutory or other protection:

    i) Long leases, only determinable by forfeiture (with relief available): application of s.166 of the 2002 Act.

    ii) Secure Tenancies (from which Crown tenants are excluded) 1985 Act: Protection which includes sections 83-5 (restrictions on obtaining possession), 86A, 92 and 93 succession/assignment/subletting rights: the right to buy: the application of s.30 of the FLA referred to above. Mr Vanhegan points out that by virtue of the Court of Appeal decision in **Department of Transport v Egoroff** 18 HLR 326 there is no implied obligation to repair (as in s.11 of the Landlord and Tenant Act 1985) in a Crown tenancy, though that derives from caselaw and not in statute.

    iii) Assured Tenancies (from which Crown tenants are also excluded) 1988 Act: protections include sections 5-9 (restrictions on obtaining possession), sections 13-14 (restrictions on rent/increases) and s.17 (succession rights): plus s.30 of the FLA.

    iv) Assured Shorthold Tenancies available from all save council landlords – but again not the Crown: s.21 of the 1988 Act permits (save for the first 6 months) possession on 2 months' notice.

    v) Common law tenancies, including Crown tenancies.

    Mr Vanhegan points out that by virtue of the decisions in **Hussey v London Borough of Camden** 27 HLR 5 CA and **Greenfield v Berkshire County Council** 28 HLR 691 CA, a protected tenancy may 'pass in and out of security' – Mr Vanhegan calls them "in/out cases". The question of whether a tenant is protected may change and will fall to be tested when a notice is served. Thus in **Greenfield**, the defendant was allowed by the landlord to stay on after termination of his employment, and thus became secure by the time of the notice, while in the earlier

case of **Elvidge v Coventry City Council** [1994] QB 241 in a reverse situation the tenant lost security by subsequently becoming an employee.

32. There is no disagreement between counsel that:-

    i) Article 14 is engaged (being within the ambit of Article 8):

    ii) differential treatment as between Crown tenants and other tenants is capable of being discrimination on the ground of "*other status*" within Article 14:

    iii) there is prima facie such discrimination, such as to shift the onus to justify it.

33. It is also common ground as to what is necessary in respect of such justification. The seminal passage is in **Belgium Linguistic Case (No 2)** [1968] 1 EHRR 252 at 284 in the judgment of the ECtHR:-

> "*It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14. On this question, the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim. Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.*"

34. Thus insofar as Article 14 is in issue, the Claimant must establish (i) a legitimate purpose and (ii) proportionality in carrying it out. There is disapproval of 'blanket' exemptions or provisions, or 'bright line rules', as discussed in **Re G** [2009] 1 AC 173 and **T v Chief Constable of Greater Manchester** [2013] 1 Cr App R 27, but it is still the case that there is a '*margin of appreciation'* for the national legislature in the context of economic and social strategy, including housing. Thus:-

    i) In **Blecic v Croatia** [2005] 41 EHRR 13 the ECtHR said at paragraph 65:-

    > "*State intervention in socio-economic matters such as housing is often necessary in securing social justice and public benefit. In this area, the margin of appreciation available to the State in implementing social and economic policies is necessarily a wide one. The domestic authorities' judgment as to what is necessary to achieve the objectives of those policies should be respected unless that judgment is manifestly without reasonable foundation....The Court... considers that the State enjoys [a]*

wide margin of appreciation as regards respect for the home…in the context of Art 8. Thus the Court will accept the judgment of the domestic authorities as to what is necessary in a democratic society unless that judgment is manifestly without reasonable foundation, that is, unless the measure employed is manifestly disproportionate to the legitimate aim pursued. "

ii) In **Runkee v United Kingdom** [2007] 2 FCR 178 the Court said at paragraphs 35ff:-

> "*35. . . . A difference of treatment is, . . ., discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see **Stec v UK** [2005] ECHR 65731/01 at para 51).*
>
> *36. The scope of this margin will vary according to the circumstances, the subject-matter and the background. As a general rule, very weighty reasons would have to be put forward before the court could regard a difference in treatment based on exclusivity on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation' (op cit, at para 52).*"

iii) So far as housing or property rights are concerned, Lord Bingham in **Kay** at 32-33 spoke of the "*search for balance between the rights of the individual and the wider rights of the society to which he belongs, neither enjoying any absolute right to prevail over the other…Our housing legislation strikes a balance between the competing claims to which scarcity gives rise, taking account, no doubt imperfectly but as well as maybe, of the human, social and economic considerations involved.*"

35. In **Larkos** the ECtHR concluded at 609 that:-

> "*The Court would also note that the legislation was intended as a measure of social protection for tenants living in particular areas of Cyprus. A decision not to extend that protection to government tenants living side by side with tenants in privately-owned dwellings requires specific justification, more so since the government is itself protected by legislation when renting property from private individuals. However, the Government has not adduced any reasonable and objective justification for the distinction which*

meets the requirements of Article 14 of the Convention, even having regard to its margin of appreciation in the area of the control of property. "

It is apparent that the only justification put forward in **Larcos** related to the fact that (paragraph 26) the government "*rather than renting property primarily for profit based considerations... had to take account of the public interest in their transactions*", as to which the Court concluded (paragraph 31) that "*there is nothing to prevent the authorities from requiring their tenants to pay a market rent*".

36. The Claimants here submit that it is significant that:

i) The policy of exclusion of Crown property from security of tenure is of long standing. Mr Davey has submitted that this is not simply a matter of longevity but that it has been considered and approved by Parliament on 13 legislative occasions since 1925 (Law of Property Act 1925 s.208, Landlord and Tenant Act 1954 (s.21(6)), Leasehold Reform Act 1967 (s.33), Rent (Agriculture) Act 1976, Rent Act 1977 as amended by Housing Act 1980 (s.13), the 1985 Act itself, Landlord and Tenant Act 1985 (s.14(5)), Landlord and Tenant Act 1987 (s.56), Agricultural Holdings Act 1986 (s.95), the 1988 Act, Leasehold Reform, Housing and Urban and Development Act 1993 (s.94), Housing Act 1966 (s.221(3)), and Land Registration Act 2002 part 7.

ii) It is in line with the non-absolute nature of Article 8 – as discussed above, and is a '*socio-economic matter*', within the legislature's margin of appreciation.

iii) It is, as appears from the evidence, with which I shall now deal, explicable, and fully explained, to be contrasted with the approach in **Larkos**.

37. The evidence before me on which the Government Claimants rely to justify the policy is as follows:

i) DfT in Blake. In the witness statement of Tina Barrington I have already referred to what she said in paragraph 5, relating to the need to acquire premises as ancillary to their statutory role in respect of infrastructure, and to let them on a temporary basis. She says at paragraph 15:-

> "*The Highway Agency's asset disposal programme is factored into its budget for capital projects to carry out improvements and renewals of the national trunk road and motorway network in England. If the sums expected are not realised, money will have to be found from other areas (i.e. by cutting some planned expenditure). The Property is far from being the only one in the locality that was rendered a surplus asset by modification of the road-widening scheme . . .*[there are] *73 such properties (69 in Luton).*"

As to such disposal, she refers, in paragraphs 13ff, to the 2005 Guide, to which I have referred above. She quotes extracts from the Guide whereby "*the Government does have a responsibility to the taxpayer to maximise efficiency and effectiveness in the management of the estate that may result in surplus property being identified*" and "*Departments have a duty to dispose of property surplus to requirements within three years and should not hold land speculatively*". The properties are required to fulfil the Claimants' statutory functions, furthering the construction, maintenance and operation of the national transport infrastructure. In the witness statement of Mr Owen, which was adduced in both actions, he explained that "*The original rationale for excluding Crown tenancies from security of tenure provisions seems to have been first expressed by the then Home Secretary, Sir David Maxwell Fyfe, during the passage of the 1954 Landlord and Tenant Bill. In essence Sir David said that Government Departments did not hold properties as investments but as instruments of departmental functions, to be contrasted with both the private sector and the Crown Estates. It seems that this view prevailed in housing legislation in the 1980s and 1990s concerning security of tenure.*"

ii) MoD in Nicholas. In this case the Claimant's aim is to recover possession of the properties specifically to fulfil what Mr Davey called a key aspect of the MoD statutory functions, namely providing accommodation to servicemen/women and their families. Ms Adedeji in paragraph 94 of her witness statement stated that even an assured shorthold tenancy would be inappropriate:-

> "*To create assured tenancies would seriously bind the MoD's hands in respect of the allocation of residential housing to service families. Even assured shorthold tenancies would be inappropriate: for instance, a 6-month minimum tenancy and notice requirements could hinder the flexibility required. For example, a sudden need for changes in posting (as opposed to operational deployment where the SFA is retained by the family whilst the service person is deployed on operations) may mean that the service person and his/her family need to move before the 6 month point. In such cases the service person is required to move on the date specified by the MoD and their family should go with them at the same time. This is considered best for morale as well as effective use of MoD housing.*"

iii) Ms Thirlwell gave evidence at paragraph 16 of her witness statement that vacant possession of the property was sought so that the MoD can:-

> "*after effecting whatever repair and refurbishment may be necessary, use it to house a service family. Family accommodation in the Bushey/Watford area is in very high demand, so it is unusual not to have families waiting for accommodation. MoD have three families in the Bushey/Watford area currently housed in Substitute Service Family Accommodation ("SSFA") which is accommodation rented by MoD in the private sector. This is very expensive: the average monthly cost excluding Council tax and water/sewage is £2,300. MoD have another 2 families currently being sourced SSFA*

> *of the same type. The Property, which has 3 bedrooms, could be used to house one of these families.* "

38. In considering the issue of discrimination, Lady Hale emphasised an important question in **<u>Ghaidan</u>** at 133, namely in the context of a case of difference in treatment between a complainant and others put forward for comparison "*Were those others in an analogous situation?*"

39. Of course in this case it is said that the distinction is simply between all those with and those without statutory protection, but it does seem to me worth considering the position of the two Defendants, against the background of the *legitimate purpose* asserted by the Claimants:-

    (i) Mrs Blake. If she had had an assured shorthold tenancy she would, given that she was well past the first 6 months, have been entitled only to 2 months notice. She had nearly 3 months. So far as the 1985 Act is concerned, her position would have fallen within the exemption provided by Schedule 1 paragraph 3, namely:-

    > *(i) a tenancy is not a secure tenancy if a dwelling-house is on land which has been acquired for development and the dwelling-house is used by the landlord, pending development of the land, as temporary housing accommodation.*"

    Even on the basis of Mr Vanhegan's "in/out" cases, I am satisfied she would have remained excluded from protection at the time of the notice to quit. It is now 3 and a half years since that notice.

    (ii) Mrs Nicholas. The same applies to her in respect of a hypothetical assured shorthold tenancy, insofar as she was given until February 2009. Again the licence to H would have been exempted from protection under the 1985 Act by Schedule 1 paragraph 2(1) whereby such tenancy would have been excluded as being one under which H was an employee of the MoD and "*his contract of employment requires him to occupy the dwelling-house for the better performance of his duties*", as per the Express Recital. It is 4 and a half years since February 2009.

40. There was a very recent development, just prior to the hearing, which was put in evidence by Mr Owen, in paragraph 3 of his witness statement:-

    > "*Very recently, as set out in the Minister of State for Housing's parliamentary answer of 18 July 2013, the Government has announced an intention, subject to finding parliamentary time, to amend legislation to ensure that tenants of government departments are, in general, and subject to exceptions, provided with the same statutory rights as tenants subject to the assured tenancy regime. The Government recognises that there may be situations where there are compelling reasons why a tenancy granted by a government department might need to be terminated after a shorter period or with less notice than would be possible with an assured shorthold tenancy. The Government accordingly intends to retain*

an exemption for Crown tenancies from the assured tenancy regime in some circumstances, for example, where occupants may need to be moved at short notice for military operational reasons. The Government recognises that there may be several other contexts in which the assured tenancy regime should not apply to Crown tenancies. There is no immediate plan to legislate and appropriate consultation will take place in respect of any proposed changes. Any legislative changes would be prospective in character. "

This was supported by the statement to that effect made in Parliament. There is, as he says, no immediate timescale, but plainly the Government and Parliament are going to look at, and consult about, the 'blanket' exemption.

41. I have already indicated that, subject to the undertakings given, possession will be ordered in respect of both these premises, and notwithstanding any declaration I might make or any prospective legislation consequent upon the newly announced consultation. I am however pressed by Mr Vanhegan to exercise my discretion to grant a declaration.

42. On the one hand is the decision in **Larkos**, which Mr Vanhegan submits will be more than persuasive if a UK case were taken to Strasbourg, although I note that the arguments put in that case by the Government (if put at all) were very different from those put before me. Further the strength of Mr Vanhegan's case can be seen from the very wording in which the statement to Parliament is couched. On the other hand it can be seen from **Blecic** cited above that "*the Court will accept the judgment of the domestic authorities as to what is necessary in a democratic society unless that judgment is manifestly without reasonable foundation*", and at least until now that judgment has been in accordance with the existing policy.

43. I am not persuaded to exercise my discretion in favour of granting a declaration:

    i) In the light of my consideration of the facts of this case, where statutory protection would in fact have made 'no difference' (by reference to the traditional Administrative Court approach – and to Lady Hale's comparative exercise), I am not persuaded that this is a suitable case to make a declaration, even if it were otherwise appropriate. There is obviously much to consider before this long standing policy were to be changed or abrogated, particularly where, as here, some, many or most of those with Crown tenancies may not in fact be in any worse or different position.

    ii) I am extremely influenced by the evidence of Mr Owen. Although legislation is very far from imminent, nevertheless as in **Chester v Secretary of the State for Justice [2010] EWCA Civ 1439**, particularly where there is a *margin of appreciation*, it is the right course for me to leave this question, at least for the moment, to the national legislature.