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A LADY WITH A VAN: OR (IN)SECURITY OF TENURE FOR RESIDENTS OF ALMSHOUSES

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One of the recurrent attractions of combining an academic post with a practice at the bar is the tendency to find oneself coming across notionally obscure corners of land and housing law which present factual scenarios raising a combination of issues which from a teaching or writing perspective one would rarely put together, and which in analytical terms present principles that one might instinctively think are indefensible, but which then appear credible on closer examination, only to seem once again ill-founded following rigorous scrutiny. Such was the case of Miss A; an elderly lady with a van, a flat in an almshouse and a demonstrably eccentric view of the world around her.

Miss A sought legal assistance from Shelter when possession proceedings were instituted against her in 2008. She had lived for a year or so in a self-contained studio flat in a small block of almshouses. She appeared to have exclusive occupation of her flat, and she paid a monthly fee of some £220 to occupy it. For any student at an early stage of inquiry into the intricacies of English housing law, the obvious presumption - flowing from the principles articulated by the House of Lords in *Street v Mountford*¹ and affirmed in *Bruton v London and Quadrant Housing Association*² - would be that Miss A had an assured shorthold tenancy of the premises.

However Miss A also had a written occupancy agreement from the owner of the almshouses, a body (hereafter called XYZ Homes) which was both a registered charity and a registered housing association. The scheme establishing XYZ Homes as a charity contained, inter alia, the following clauses;

“22. Almshouses – the Almshouses belong to the Charity and the property occupied therewith shall be appropriated and used for the residence of alms people in conformity with the provisions of this scheme

24 Qualification of Alms People – the alms people shall be poor pious widows or spinsters of good character who are not less than 57 years of age...

34 Setting Aside Appointments

1) The Trustees may set aside the appointment of an alms person of any alms person who in their opinion:

¹ [1985] AC 809; [1985] 2 All ER 289 (HL).

² [1999] 1 WLR 150 (HL).

- (a) persistently or without reasonable cause either disregards the regulations for the alms people or disturbs the quiet occupation of the almshouses or otherwise behaves vexatiously or offensively; or
- (b) no longer has the required qualification; or....
- (d) is suffering from mental or other disease or infirmity rendering her unsuited to remain an alms person.

2) Upon setting aside the appointment of an alms person the Trustees shall require and take possession of the rooms occupied by her.

The written occupancy agreement between XYZ Homes and Miss A did not identify her occupancy as a ‘tenancy’, but rather called it an ‘appointment’. Miss A was not described as a ‘tenant’, but as a ‘beneficiary of the charity’. Nor was the fee Miss A paid characterised as ‘rent’, but as a ‘Maintenance Contribution’, which was initially set at £220 per month; (the label notwithstanding, Miss A had applied for and been granted housing benefit which covered the entire sum due). The agreement also contained the following provision:

“8. Neither the Residents nor any relation or guest of theirs will be a tenant of the charity or have any legal interest in their almshouse”.

Miss A had certainly – so it appeared – not been an ideal occupant of her accommodation from the Almshouse’s perspective. Her behaviour in the premises in terms of her interactions with other residents and employees had been eccentric to the point that one might characterise it as mildly anti-social. More significantly she had – in evident breach of her occupancy agreement parked a dilapidated, untaxed, MOT-less and rusty van in the communal front garden and had ignored repeated requests to move it. (Unlike Alan Bennett’s celebrated Miss Shepherd,³ Miss A did not actually sleep in her van but apparently used it for storage; she had no expectation – and certainly not a legitimate one – that it would ever again be roadworthy). The Almshouse’s main concern, however, was that it doubted that Miss A had actually moved into the premises on a permanent basis, but thought rather that Miss A had another home elsewhere. She denied this in her instructions to Shelter, saying that it had simply taken her a few months to feel settled in her new home, and that she had in the interim spent quite a lot of time staying with friends.

The Almshouse clearly took the view that Miss A was not to be believed, and served a series of notices on Miss A which purported to terminate her ‘appointment’ and requested her to leave the premises. She of course declined to do so, whereupon – after some delay engendered by Miss A’s perennial habit of writing long, rambling, largely irrelevant and in part incomprehensible letters to the Almshouse in response to their various communications to her⁴ – possession proceedings were initiated.

Drafting a defence

The instinctive response to the claim would be that it rested on a misconceived presumption that the labels attached to Miss A’s occupancy of her home in the

³ Most inexpensively available (£3.15 through Amazon) in an edition published in 1999 by Profile books; (<http://www.amazon.co.uk/Lady-Van-Alan-Bennett/dp/1861971222>).

⁴ A trait which in one respect at least proved helpful to her case; see further p xx below.

agreement between the parties were determinative of her legal status. The contrary presumption would be that because she had exclusive occupation of the premises for a term on payment of a rent she was necessarily an assured shorthold tenant of the Claimant. Reference would obviously be made to various passages of Lord Templeman's forceful judgment in *Street v Mountford*:

"If....residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance nor services, the grant is a tenancy; any express reservation to the landlord of limited rights to enter and view the state of the premises and to repair and maintain the premises only serves to emphasise the fact that the grantee is entitled to exclusive possession and is a tenant. In the present case it is conceded that Mrs Mountford is entitled to exclusive possession and is not a lodger. Mr Street provided neither attendance nor services....On the traditional view of the matter, Mrs Mountford not being a lodger must be a tenant".⁵

Street v Mountford also confirms that the labels which the parties to an occupancy agreement might attach to their relationship or its constituent parts has no bearing on what the legal effect of the agreement would be:

"...If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade".⁶

Assuming that analysis to be correct, one would have expected a claim for possession against Miss A to have been pleaded (alternatively and/or additionally) in three distinct ways.

The first possibility would be for the Claimant to aver that Miss A did not occupy the premises as her 'only or principal home' within the meaning of the Housing Act 1988 s.1. If that assertion were to be proven correct, Miss A would have only a contractual tenancy, which could have been determined by a properly served and valid notice to quit. Miss A could have no defence at all if that was indeed the fact of the matter. Even a Human Rights Act defence would not arise if the premises were not her home. On the basis of the instructions she gave to Shelter, any such claim would have been contested on the facts, with reliance being placed on a now quite substantial body of case law which indicates that the notion of 'only or principal' home in respect of assured and secure tenancies can properly encompass tenants who may be absent from the premises even for substantial periods of time.⁷

The second possibility would arise if the assertion that Miss A did not live in the premises could not be made out by the Claimant at trial. In those circumstances, she would be an assured shorthold tenant and therefore the notices served by the Claimant would be of no legal effect. Any possession proceedings would have to be begun by

⁵ [1985] AC 809 at 826.

⁶ Ibid.

⁷ See for example *Brent LBC v Cronin* (1998) 30 HLR 43; *Crawley BC v Sawyer* (1988) 20 HLR 98 (CA); *Preston BC v Fairclough* (1982) 8 HLR 72 (CA); *R v LB Croydon, ex parte Toth* (1988) 20 HLR 576 (CA). For comment and analysis see S. Bridge, "The Security of Tenure of Absent Tenants" (1988) *Conveyancer and Property Lawyer* 300; J. Luba et al, *Defending Possession Proceedings* ch.1, pp 199-203 (2006 6th ed).

service of a Housing Act 1988 s.8 notice identifying a breach of the tenancy agreement, the particulars of which would likely be her refusal to move her clapped-out van from the front garden. In respect of this claim, the Claimant would obviously have to prove the breach and convince the court that it was reasonable for a possession order to be made. The obvious response to any such claim would be to advise Miss A to get rid of her van straightaway, have her undertake not to bring it back, and assert that any anti-social behaviour she might have committed was too trivial and/or unlikely to be repeated to merit any kind of order being granted.

The third option would be for the Claimant – assuming Miss A to have been in residence for at least 6 months – to serve a Housing Act 1988 s.21 notice. If a valid s.21 notice is ‘given’ to the tenant, the landlord has a mandatory right to possession.⁸ In all likelihood, the only defences which might arise to such a claim would be a (very speculative) Human Rights Act *Kay* ‘gateway A’ challenge to the compatibility of s.21 with art. 8 of schedule 1 of the Human Rights Act. It is improbable – given the Court of Appeal’s judgment in *R (Weaver) v London and Quadrant Housing Trust*⁹ – that this particular Alms house would have been a public authority/body amenable to judicial review for the purposes of a *Kay* ‘gateway B’ defence,¹⁰ nor – relatedly – that its decision to seek to evict Miss A would have been a ‘public function’ undertaken by an otherwise private body for HRA s.6 purposes.

Those expectations would apparently founder however on the Court of Appeal’s 1998 judgment in *Gray and Others v Taylor*,¹¹ which while reported in the WLR is a judgment of sufficient obscurity not to feature at all in Jan Luba et al’s standard work of reference, *Defending Possession Proceedings*.¹² *Gray*, it seems, deals a heavy blow to the argument that Miss A would have been an assured shorthold tenant.

⁸ There seems to be no authority on the issue of whether the term ‘given’ in s.21(1) and s.21(4) is a concept distinct from that of ‘served’ in s.8. It might be suggested, given the draconian consequences of a properly ‘given’ s.21 notice, the term is used in contrast to that of ‘served’ in s.8 to require that a s.21 notice must be expressly brought to the attention of the tenant rather than simply – as may be the case in ‘serving’ a s.8 notice – delivering it to the premises or putting it in the post.

⁹ In the High Court; [2008] EWHC 1377 (Admin); [2009] 1 All E.R. 17. In the Court of Appeal; [2009] EWCA Civ 587; [2009] 4 All E.R. 865; [2009] H.R.L.R. 29. For comment see N. Billingham, “Private Act or Public Function? Weaver Sows Confusion in the Court of Appeal” (2009) J.H.L. 83.

¹⁰ The Court of Appeal in *Weaver* had narrowed the question to be answered under HRA 1998 s.6. The correct question was not – as had been posed in the Court of Appeal – whether or not London and Quadrant was a ‘public authority’ for the purposes of s.6. Rather one should ask if London and Quadrant’s decision to seek to evict Ms Weaver was a ‘public function’. In deciding the answer to the question was ‘Yes’, the Court of Appeal broadly endorsed the methodology used in the High Court. Relevant factors would be: whether (and if so in what amount) the landlord received grants from the Housing Corporation (a government body) to buy or develop new properties; whether a high proportion of its lettings were to persons nominated by local authorities and whether the landlord was statutorily required to co-operate with local authorities for this purpose; whether the landlord could be categorised as a commercial, profit-making (and thus presumptively private for HRA purposes) organisation; and to what extent the landlord was a result of government policy increasingly playing the role of provider of low cost accommodation previously undertaken by local councils. XYZ was obviously a charity rather than a commercial organisation, but it did not fall within any other of the *Weaver* criteria.

The allusion to a *Kay* defence refers to the judgment of the House of Lords in *LB Lambeth v Kay* [2006] UKHL 10; [2006] 2 AC 465. The judgment is too well known to require repetitious analysis here. See generally I. Loveland, “A Tale of Two Trespassers...” parts 1 and 2 (2009) 2 *E.H.R.L.R.* 148 and (2009) 4 *E.H.R.L.R.* 495; G. Griffiths, “Article 8 and Possession Proceedings – the Saga Continues” (2008) *Conveyancer and Property Lawyer* 437.

¹¹ [1998] 1 W.L.R. 1093.

¹² Nor is it mentioned in the leading academic work on housing law, D. Hughes et al, *Text and Materials on Housing Law* (2005).

Was Miss A a tenant ? *Gray and Others v Taylor*

The Defendant in *Gray* occupied an almshouse set up under a similar scheme to that establishing XYZ homes. Her occupancy agreement was also drafted in terms much like those of Miss X's agreement. Her occupancy fee, however, was set at the extremely low level of no more than £2.50 per week. Ms Taylor had however been decidedly anti-social and unpleasant in her behaviour, and her almshouse wanted shot of her. She was therefore issued with what the Court of Appeal styled a 'notice to vacate'. It is not clear from the judgment if the 'notice to vacate' was to be regarded as a notice to quit, and so subject to relevant common law and statutory rules as to its validity.¹³ That point was not in any event taken by the Defendant. The case was defended simply on the basis that – per *Street v Mountford* – Ms Taylor was an assured tenant.

Ms Taylor's defence was rejected. The sole judgment, given by Sir John Vinelott, is not a model of clarity. It seems however to break down into three distinct but presumably inter-related parts.

The first and apparently dominant element of the judgment was that an almshouse 'appointment' fell outside the general presumption laid out in *Street v Mountford*. After having quoted the passage from *Street* cited at footnote 5 above, Sir John then skipped a few lines in Lord Templeman's judgment and continued:

“However, it is important to bear in mind a subsequent observation which comes almost immediately after the passage I have cited, where Lord Templeman said:

‘There can be no tenancy unless the occupier enjoys exclusive possession; but an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier....

Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy. Legal relationships to which the grant of exclusive possession might be referable and which would or might negative the grant of an estate or interest in the land include occupancy under a contract for the sale of the land, occupancy pursuant to a contract of employment or occupancy referable to the holding of an office’.

That passage reflects an observation of Denning L.J. in *Errington v Errington and Woods* [1952] 1 K.B. 290, 298, cited with approval by Lord Templeman, at pp. 820–821, where Denning L.J. said:

‘Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that

¹³ These being respectively that the notice must be said to expire on the first or last day of the period of the occupancy agreement; see *Precious v Reddie* [1924] 2 KB 149; *Queen's Club Garden Estates v Bignell* [1924] 1 KB 117; that there must be a minimum of 4 weeks notice given per the Protection from Eviction Act 1977 s.5; s.3; and that the notice – if given by the 'landlord' must contain the information identified in the Notices to Quit (Prescribed Information) Regs 1988 SI no.2201; (namely that the 'landlord' cannot evict the occupiers without a court order and that the occupiers can seek legal advice from a lawyer, law centre or Citizens Advice Bureau.

the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only’.

Sir John Vinelott appeared to fasten on Lord Templeman’s reference to an ‘object of charity’ as being of great significance to Ms Taylor’s situation. He concluded on the basis of these passages that Ms Taylor was a ‘beneficiary’ or licensee, not a tenant. He was not dissuaded from this conclusion by the fact that Ms Taylor paid a regular fee for her occupancy. Rather he equated this sum with a service charge one might pay under a lease; it was not a ‘rent’.

Given that the fee charged to Ms Taylor was not to exceed £2.50 per week, that conclusion – on the facts of the case – is readily understandable. Unhappily, the judgment is couched in much more general terms and seems to have been intended to be (and has been taken to be)¹⁴ of universal application to almshouse occupancy arrangements. In that respect, Sir John Vinelott’s reasoning on this point is obviously and profoundly unsatisfactory. Two problems might be identified.

The first is that he appears to have elided the quite distinct phenomena of occupying a property which is owned by a charity with occupying a property as an ‘object of charity’. One might much more readily be thought to be an ‘object of charity’ if one is receiving from the charity a benefit at no cost to oneself – or, as was Ms Taylor, at markedly subsidised cost – than if one is paying for the benefit at something approaching the cost one would pay for the benefit from a non-charitable organisation. Had Miss Taylor been paying £50 or £60 per week – a level which was broadly comparable to that charged for similar accommodation by a local authority or housing association in the area – the suggestion that she was an ‘object of charity’ would seem notably less compelling. And particularly so if that fee was being met by housing benefit payments, which are intended to cover a person’s housing costs.

A better way to analyse the position might be to suggest that where an almshouse charges its residents only a minimal – indeed tokenistic occupancy fee – then there is actually no intent between the parties to create legal relations and so no tenancy arises. The resident is an ‘object of charity’ because she is not in any meaningful sense legally obliged to ‘pay’ for her occupancy. But when she is charged a sum similar to that she might pay an RSL for an assured tenancy or to a local authority for a secure tenancy that classification is not immediately compelling.

The second objection to Sir John’s reasoning on this point is essentially one of constitutional law. If Parliament wishes to prevent certain types of occupancy agreement being tenancies - or being particular types of tenancies - it need only say so in express terms. And if one turns to the relevant provisions of the Housing Act 1988 one finds that Parliament has exercised this power in quite broad terms in respect of the assured tenancy. Indeed, among the expressly identified exceptions to the assured tenancy regime are – at Schedule 1 (‘Tenancies which are not secure tenancies’) para 3 and 3A respectively are categories which would obviously embrace the ‘object of charity’ scenario:

3. A tenancy under which for the time being no rent is payable.

¹⁴ The judgment did not attract any substantial attention in academic or professional journals at the time it was decided. The few short comments it provoked in professional journals appeared to construe it as applicable to all almshouse residents. See for example J. Dollimore, “Do the Occupiers of Almshouses have Security of Tenure?” (1999) 1 *Private Client Business* 47; Case Comment, “Occupiers of Almshouses” (1998) *Landlord and Tenant Review* 2 (3) D40; P. Smith, *The Law of Landlord and Tenant* pp 58, 371 (2002, 6th ed).

3A. A tenancy—

(a) which is entered into on or after 1st April 1990 (otherwise than, where the dwelling-house had a rateable value on 31st March 1990, in pursuance of a contract made before 1st April 1990), and

(b) under which the rent payable for the time being is payable at a rate of, if the dwelling-house is in Greater London, £1,000 or less a year and, if it is elsewhere, £250 or less a year.

Parliament has similarly chosen to exclude lettings to students by higher education institutions or other designated providers, holiday lettings, agricultural tenancies and tenancies in properties with a resident landlord from the assured tenancy regime. No mention is made of almshouses. It is a rather trite point perhaps, but if Parliament has chosen expressly to exclude situations (a) – (f) from a particular legal regime then a court which concludes that unmentioned situation (g) is also excluded is straying into distinctly legislative functional territory.

Strictly speaking, the Court of Appeal's judgment does not cross this boundary, as its conclusion does not recognise Miss Gray as having a tenancy which is not assured; (and so must be purely contractual). The judgment goes rather further by denying there is a tenancy at all. The headnote to the case framed the question before the court as being whether Miss Gray occupied qua tenant or licensee. And of course, it is the tenant/licensee dichotomy which lies at the heart of the House of Lords' judgment in *Street v Mountford*. Sir John Vinelott did not in terms classify Ms Gray's 'appointment' as a form of 'licence', but it would seem that he did so classify it by implication when he invoked and approved the passage from Lord Denning MR's judgment in *Errington v Errington* that was quoted above. For reasons that will become apparent below, we were concerned to establish that if Miss A's rights of occupancy were not derived from a tenancy, then they were at least rooted in a sub-species of licence rather than in some wholly distinct form of legal relationship.

It should also be observed that occupancy agreements for almshouse accommodation would be licences - and are expressly exempted from the secure tenancy provisions of the Housing Act 1985 (by Schedule 1 para. 12) - if the scheme establishing the charity does not empower it to grant tenancies. Since 1997, an almshouse could not in any event satisfy the landlord condition for the grant of a secure tenancy, so the exemption is largely of historical interest. But the fact that there is no analogous provision to para. 12 in the Housing Act 1988 with respect to assured tenancies might be thought to strengthen the presumption that the *Street v Mountford* principle bites on residential occupancy agreements made by bodies which cannot grant secure tenancies.

The second plank of the Court's judgment in *Gray* rested on a presumption as to desirable policy outcomes, the naked nature of which was not at all well-concealed by being dressed up in ludicrously ill-fitting hypothetical clothes:

"The creation of a tenancy of functional land would be inconsistent with the performance by the trustees of their duties as trustees of a charity, for the tenancy would impose a burden which might make it impossible for the trustees to ensure that occupation of an almshouse was restricted to almspersons who satisfied the qualifications set out in clause 36. For instance, an almsperson who inherited a substantial legacy or won a prize in a national lottery would no longer be a poor person and a proper object of charity.

Mummery L.J., in the course of the argument, put forward a more extreme example, where all the residents of an almshouse joined together to buy a ticket in a lottery, transforming their fortunes when the ticket came up. They might all decide to stay

where they were, amongst familiar surroundings and with familiar neighbours. Lottery winners often announce that they do not intend that their good fortune should be allowed to change their pattern of life. The almshouse would then become something like a rich persons' club.....”.

That this dreadful scenario would ever occur might be thought a little unlikely. The Court was unable to identify an almsperson who had won the lottery (or the premium bonds – or in distant days past – the football pools) and then sought to stay put in her home.

We might also note that many Registered Social Landlords (RSLs) – including some of the largest in the sector - are registered charities. Many of them also identify their purpose as the provision of housing to people who are unable to afford properties - whether as owner-occupiers or tenants – in the private sector. Yet RSLs do not style their occupancy agreements as ‘appointments’; they charge ‘rents’ not ‘maintenance contributions’; and all of them seem to face with equanimity the supposedly horrendous prospect that one or some of their tenants might win the lottery yet still wish to live in the rented social housing. And – obviously – local authorities qua landlords are now almost exclusively playing that role to tenants of quite limited financial means.

It may be that the Court in *Gray* did not have in mind situations where almspersons paid substantial fees for occupancy of their homes. The Court’s immediate concern was presumably to dispose of the case before it. But whatever force this part of the judgment may have had on the facts of *Gray* has of course been much diminished by the changed presumption introduced by the Housing Act 1996 as to whether an assured tenancy is an assured tenancy simpliciter or an assured shorthold tenancy. When Ms Gray took up occupancy of her home, the statutory presumption was that all assured tenancies were assured simpliciter rather than assured shortholds. For a landlord to create an assured shorthold tenancy - and so to be able to avail him/her/itself of the straightforward and prompt mandatory ground of possession arising under s.21 – the various pre-tenancy formalities specified in s.20 had to be complied with. That presumption was reversed by the Housing Act 1996 with respect to assured tenancies created since 28.02.1997. Such tenancies are shorthold in nature unless they are expressly stated to be assured simpliciter.

Ms Gray fared no better in asserting that she might derive a certain fixity of occupancy from the terms of her ‘appointment’. The Court of Appeal also indicated that the terms of Miss Taylor’s occupancy agreement - and whether they had been breached - were not something that could be evaluated and enforced by a court. Any presumptive jurisdiction that the court might have in that regard was, in Sir John Vinelott’s view, effectively ousted by cl. 51 of the scheme establishing the charity, which provided that:

“If any question arises as to the regularity or the validity of any decision made by the trustees, then, under clause 51, that question falls to be decided by the Charity Commissioners and not by the court”.

Whatever contractual entitlements Miss Gray might have were therefore a matter for the Charity Commissioners, not for the court. On quite what empirical basis the Court of Appeal considered this assertion to be well founded is something of a mystery. The inference which presumably underlay Sir John Vinelott’s assertion was that the Charity Commission would in effect act as an arbitrator and decide if the terms of the agreement had been breached. Assuming – quite reasonably – that the Charity

Commission qua arbitrator would provide both an expert and impartial forum for the resolution of any dispute, there would be no obvious substantive objection to the matter being dealt with in that forum rather than in the county court.

Miss A's occupancy agreement contained the following term:

"15. The trustees retain the power to set aside a Resident's appointment for good cause, eg in the case of serious misconduct or if there is a breach of the regulations, or if he or she is no longer a qualified beneficiary or is a risk to other residents, as outlined in the Charity Commission Schemes referred to above".

The clause is rather a shambles from a drafting perspective, but from Miss A's viewpoint offered up the possibility of arguing that she had a contractual right only to be evicted for 'good cause', and that whether or not good cause existed was a matter for the court to determine. Furthermore, she might have also have argued that c.15 of the agreement had to be construed in the light of the aforementioned cl.34 of the scheme establishing the charity, namely that:

- 1) The Trustees may set aside the appointment of an alms person of any alms person who in their opinion:
 - (a) persistently or without reasonable cause either disregards the regulations for the alms people or disturbs the quiet or disturbs the quiet occupation of the almshouses or otherwise behaves vexatiously or offensively;

However the scheme establishing XYZ Homes as a charity also had a provision similar to cl. 51 of the almshouse in *Gray* to the effect that the validity of any actions of the almshouses under the scheme was to be determined by the Charity Commissioners. In principle, at least, having the question of whether there was cause for Miss A to be evicted by the Commissioners rather than a court could have been acceptable from Miss A's perspective. So, wondering if there was some credible foundation for the Court of Appeal's view in *Gray*, we wrote to the Charity Commissioners in the following terms:

Dear Madam/Sir,

We are writing to you on behalf of Miss A. Miss A has instructed us to represent her in possession proceedings which have been issued against her by her landlord, the Trustees of XYZ Homes.

XYZ Homes is a Registered Charity no. 111111. It also a Registered Housing Association no. 222222. The charity was formed to provide what it calls 'almshouses' for impoverished people to use as their residences.

The scheme establishing the charity includes the following provision:

'39. Questions under Scheme. – Any questions as to the construction of this Scheme or as to the regularity of any acts done or about to be done under this Scheme shall be determined by the Commissioners upon such application made to them for the purposes as they think sufficient.'

One of the grounds of defence which Miss A is advancing is a contention that the grounds on which the Charity can regain possession of her home are fixed by the terms of her 'occupancy agreement', and that the grounds are not met on the facts of the case.

We are writing to ask if the Commissioners are willing to accept jurisdiction to resolve that factual dispute? Whether or not the Commissioners are prepared to do so is likely to be of some significance to the court that will hear the possession claim.

If the Commissioners are willing to accept jurisdiction, could you please let us know as soon as possible and also give us details as to what information the Commissioners would require and what procedures would be followed in addressing the issue.

Yours sincerely

The reply, promptly sent, was as follows:

Thank you for your letter...

Clause 39 (questions under the scheme) refers to the Charity Commission's power to interpret the scheme alone (for example what particular clauses within the scheme mean). Our power does not extend to the administration and management of charities. This means that we cannot assist with 'occupancy agreements'. It is for the trustees of the charity and their legal advisers to determine whether Miss A has met the terms of her occupancy agreement.

Unfortunately the Charity Commission has no jurisdiction and cannot intervene in disputes of the type set out in your letter. I apologise for being unable to assist on this occasion.

Yours sincerely....

The Court of Appeal in *Gray* presumably did not bother to take any steps to establish if its assertion had any empirical defensibility: which apparently it does not. Whatever force that might therefore have been attached in *Gray v Taylor* to this element of the court's reasoning is rather bluntly negated by the Commission's evident unwillingness and/or incapacity to involve itself in evaluating the merits of disputes between almshouse trustees (or 'landlords') and their occupants (or 'tenants').

Massaging *Gray*: was Miss A an assured shorthold tenant ?

It is one of the happy luxuries of the academic lawyer's life that she can - in academic fora - restrict herself simply to identifying (with good explanations) the inadequacies of a judicial decision and expressing the view that the decision should be overturned. For that purpose *Gray* serves as a useful tool. Such analyses - however compelling they might seem to readers of learned journals - obviously takes one nowhere in a hearing in the county court; beyond enabling one to make the observation that one's client wishes to reserve the right to challenge the correctness of the particular decision in the appropriate appellate forum. Since - in respect of *Gray* - that forum would be the Supreme Court - any such challenge would seem a very long way away.

In the event, we sought to distinguish *Gray* from Miss A's case in several ways. As is often the case in possession proceedings, the directions issued by the county court in *XYZ Homes v Miss A* meant that her initial defence would have to be filed before Shelter had had sight of Miss A's full housing file; Miss A herself had furnished us with an eclectic but presumptively incomplete account of her correspondence with the trustees. Our defence was consequently liberally sprinkled with reservations of a right to amend or supplement the defence in the light of yet to be revealed documentation.

We began in this way:

Ground 1. The Defendant occupies her home qua assured shorthold tenant.

3. Paragraph 3 of the Particulars of Claim is admitted to the extent that the Defendant occupies the premises in pursuance of an agreement dated 16th

February 2007. It is denied, for reasons particularised below, that the agreement is an 'appointment'.

In respect of the sub-paragraphs of Paragraph 3 of the Particulars of Claim:

(a) It is admitted that the said Letter of Appointment states that the Defendant would pay a 'maintenance contribution' of £220 on the first day of each month. It is denied that this payment is a 'maintenance contribution'. The Defendant avers that the payment is rent.

(b) It is admitted that the said Letter of Appointment states that the Defendant would not be a tenant of nor have any legal interest in the property. The Defendant avers that wording of the agreement and the intention of the Claimant do not determine the effect of the agreement, and the Defendant further avers that the effect of the agreement between the parties was to create an assured shorthold tenancy.

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(i) The premises are a self-contained studio flat. The flat has its own entrance. The Defendant does not share any part of the premises with any other person. The Defendant has exclusive possession of the premises, let to her on a monthly periodic basis, on payment of a rent of £220 per month.

(c) It is admitted that the said Letter of Appointment states that the Claimant would retain the power to set aside the Letter of Appointment and/or the Defendant's licence. However, insofar as that assertion derives from cl. 15 of the agreement, the relevant clause continues 'for good cause'. For the reason particularised at paragraph 3(b) above, it is denied that the Claimant has such power. The agreement inasmuch as it created an assured shorthold tenancy cannot be determined by the Claimant other than by securing an order of the Court.

4. It is acknowledged by the Defendant that the judgment of the Court of Appeal in *Gray and Others v Taylor* [1998] 1 WLR 1093 indicates that some almspersons will not occupy their premises as assured tenants. The Defendant will seek to distinguish *Gray* from her own case, on the bases that:
 - (i) While Miss Gray averred that she had an assured tenancy of her home, the Defendant avers only that she has an assured shorthold tenancy, which tenancy can promptly be terminated via the s.21 procedure; and
 - (ii) Ms Gray paid only a 'maintenance charge' fixed at a maximum of £2.50 per week, while the Defendant pays some £50+ per week; and
 - (iii) There is no prohibition in the scheme establishing XYZ Homes which prevents the Claimant from creating a tenancy in respect of its almshouse accommodation. The scheme provides simply (at para 22) that the almshouses shall be used 'for the residence of almspeople'; and
 - (iv) The Claimant's scheme expressly provides that residents shall have 'possession' of their accommodation; cl. 32; cl. 34(2).

Still massaging Gray: did Miss A have some contractual security of tenure ?

In the event that the argument on the assured shorthold point were to be lost, we sought to argue that Miss A derived some significant degree of protection from the terms of her occupancy agreement. The defence continued:

In the alternative

Ground 2. If the Defendant does not occupies her home qua assured shorthold tenant, she has a contractual entitlement qua licensee of the premises that her occupancy can be ended by the Claimant only if the Court is satisfied that there is 'good cause' for the Claimant so doing.

8. If the Defendant occupies the premises under a licence or 'appointment' , then insofar as the Claimant has a power to terminate the licence that power is constrained by cl.15 of the agreement to be exercised only for 'good cause'.
9. The Defendant denies that there is any such 'good cause', and puts the Claimant to strict proof thereof at trial.
10. Further the Defendant observes that the scheme establishing the Claimant as a charity;
 - (i) restricts the power of Trustees to recover possession to four grounds; cl. 34(1).
 - (ii) precludes the trustees from making any regulations for the government of the almshouses which are 'at variance or inconsistent with the terms of the scheme'; cl 35; and
11. The Defendant avers that insofar as the Claimant asserts that there is 'good cause' to terminate the Defendant's occupancy of her home, any such 'good cause' must be restricted to the factors identified in cl. 34 of the scheme, and the Claimant is put to strict proof of such good cause.
12. The Defendant further asserts that insofar as the Claimant's scheme purports to grant to the Charity Commissioners an exclusive power to determine if the Claimant's is acting qua licensor/trustee in accordance with the said scheme, the Charity Commissioners have decided that they have no jurisdiction to consider the dispute between the Claimant and the Defendant.

Challenging Gray: a Kay 'gateway A' defence

By the time XYZ began proceedings against Miss A, the House of Lords had issued judgment in *LB Lambeth v Kay*¹⁵ and the ECtHR had handed down its opinion in *McCann v The United Kingdom*.¹⁶ The House of Lords' response to *McCann – Doherty v Birmingham City Council*¹⁷ – appeared just as Miss A's defence was being drafted.

We had already taken the view that there was no realistic scope to make a Kay 'gateway B' defence (ie that XYZ Homes was acting unlawfully in a public law sense' in initiating and/or continuing to seek to have Miss A evicted from her home) on these particular facts. As noted above, it seemed most unlikely that XYZ Homes would have been regarded as a public authority or to have been carrying out a public function in bringing proceedings against Miss A.

We did however see some merit - assuming we lost our argument seeking to distinguish Miss A's case from *Gray* - in pleading that the rule in *Gray* was per se incompatible with art 8 of Schedule 1 of the HRA 1998. The upshot of the Court of Appeal's judgment in *Gray* is that no court has any power to form any view at all on the substantive merits of an almshouse's decision to evict an 'appointee' from her home. It is not even open to a court – if the claimant is not amenable to judicial review – to evaluate the decision against orthodox administrative law criteria. This situation appears presumptively inconsistent with the ECtHR's assessment in *McCann* of the effect of Art 8 ECHR as a matter of general application in all possession proceedings:

“50 The Court is unable to accept the Government's argument that the reasoning in *Connors* was to be confined only to cases involving the eviction of gypsies or cases where the applicant sought to challenge the law itself rather than its application in his particular case. The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Art.8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end”.

Relying on this passage, we pleaded:

In the alternative

Ground 4. Kay 'gateway A' defence. The rule in *Gray and Others v Taylor* is incompatible with Art 8 of Schedule 1 of the Human Rights Act 1998.

¹⁵ [2006] UKHL 10; [2006] 2 A.C. 465.

¹⁶ (2008) 47 E.H.R.R. 40; [2008] H.L.R. 40.

¹⁷ [2008] UKHL 57; [2009] 1 AC 367. *Doherty* seems to have been widely taken as confirming that a Kay 'gateway B' can now invoke all recognised grounds of judicial review. There is no apparent consensus on whether the case has also authorised courts to apply a more stringent test than *Wednesbury* irrationality when assessing the substantive merits of a landlord's decision to seek possession of someone's home. See generally Loveland op cit. n.xx supra: A. Arden “*Doherty*: how far did the pendulum swing” (2008) 6 *J.H.L.* 93. See also the comments of Collins J in *Defence Estates v JL* [2009] EWHC 1049 (Admin) at para 78; “[W]e have three House of Lords' decisions which have left the law frankly in something of a mess”.

13. The Defendant accepts that the Claimant is not a body amenable to judicial review nor a public authority per s.6 of the Human Rights Act 1998 nor is it performing a public function within the meaning of s.6 of the Human Rights Act 1998 in seeking possession of the premises.
14. The Defendant asserts that if the rule in *Gray v Taylor* controls this case, then that rule is incompatible with Art 8 of schedule 1 of the Human Rights Act 1988.
15. The Defendant avers that the said incompatibility arises because if the rule in *Gray v Taylor* controls this case, the court must make an immediate possession order in favour of the Claimant without having given any consideration to the proportionality of the Defendant being evicted from her home.
16. The granting of a summary order of this nature is inconsistent with the meaning of Art 8 ECHR as adumbrated by the ECtHR in *McCann v United Kingdom* 2008) 47 E.H.R.R. 40; [2008] H.L.R. 40 (esp at para 50).

Quite how far this would take us - even assuming the trial court were to accept our reasoning on the incompatibility point – was unclear. There seems to be a widespread presumption in housing law circles that the effect of Lord Bingham’s judgment in *Kay*¹⁸ (in respect of which on this point all seven of the judges were in agreement) is that a lower court is bound to apply the ruling of a higher court even if it is satisfied that the ruling is inconsistent with a later judgment of the ECtHR. In such circumstances, the correct way for a lower court to proceed would be to hear argument on the point and – if it considered the Defendant’s argument well-founded – to give judgment for the Claimant in accordance with the binding authority but grant permission to appeal.

A narrower reading of Lord Bingham’s reasoning would suggest that this principle need not apply when the ‘binding authority’ in question was reached without any reference to or consideration of Convention jurisprudence. A county judge would perhaps have to be unusually bold to accept that argument, and in the expectation that we would come before a judge with a conservative approach to the question of the HRA’s impact of the doctrines of precedent and judicial hierarchy we pleaded the point in the following way:

17. The Defendant accepts that per *Kay* a lower court is bound by the judgment of any higher court as to the compatibility of a rule of common law with any Convention Right, notwithstanding any subsequent decision of the ECtHR which indicates an incompatibility between the said rule of common law provision and the relevant Convention Right; (*LB of Lambeth v Kay* [2006] UKHL 10; [2006] 2 AC 465 at paras 40-45 per Lord Bingham of Cornhill).

¹⁸ [2006] UKHL 10; [2006] 2 A.C. 465 at paras 40-45.

18. However, the Defendant will maintain that a lower court is not bound by a higher court's ruling on a rule of common law if that ruling is prima facie incompatible with a Convention Right and was reached prior to the HRA coming into force and without any consideration at all being given by the higher court to the requirements of the HRA 1998 Schedule 1 and/or the ECHR. The Defendant relies upon *Kay* [2006] UKHL 10; [2006] 2 AC 465 at para 45 per Lord Bingham.
19. The Defendant invites the court to reconcile *Gray* with the requirements of Art 8 of Schedule 1 of the Human Rights Act 1988 by reading it down to the extent that a resident of an almshouse who has exclusive occupation of the premises for a term whether fixed or periodic on payment of a substantial fee occupies her home qua assured shorthold tenant.
20. If the court considers itself bound to apply *Gray* notwithstanding having concluded that *Gray* is prima facie incompatible with Art 8 of Schedule 1 of the Human Rights Act 1988, the Defendant reserves the right to challenge the correctness of *Gray* in the appropriate appellate forum.

Having offered up a potentially elaborate argument on this point, we then ventured back onto rather more mundane legal territory.

Accepting *Gray* – has the Claimant served a valid notice to quit ?

The penultimate ground of defence was one which – if successfully argued – could have only a short term, delaying effect on XYZ's Homes attempts to have Miss A evicted. The trustees had begun the process without having sought any legal advice and were evidently unfamiliar with the legal niceties relating to the validity and service of a 'notice to quit'.¹⁹ They had served a series of notices on Miss A over a period of several months, each of which was evidently flawed from either a common law or statutory perspective.

This element of the defence relied in part on the provisions of the PFEA 1977. In express terms, those provisions apply presumptively only to 'tenancies' or 'licences'. Parliament has also specifically excluded certain types of tenancy or licence from the relevant statutory protection. None of those exclusions referred to almshouses or their occupants. We were conscious however of the possibility that the Claimant might seek to argue that an 'appointment' was neither a tenancy nor a licence, and so was wholly outwith the scope of the Act (and associated common law rules).

In the alternative

Ground 5. The Claimant has not served a valid notice to quit determining the licence/appointment

¹⁹ As one of the trustees of XYZ Homes (a very polite lady in her 60s wearing a twinset and pearls) told me at court on the day of the first hearing in the matter: "We have never had to do anything like this before".

21. If the Defendant occupies the premises under a licence or 'appointment', it is a periodic monthly licence or 'appointment' in respect of which she is obliged to pay a regular monetary sum of (initially) £220 per month.
22. Unless the Defendant's permission to occupy her home falls within the 'excluded licence' provisions of PFEA 1977 s.3, a notice served by the landlord to end the licence is ineffective unless it complies with the requirements of PFEA 1977 s.5(1A). The Defendant avers that this licence does not fall within PFEA 1977 s.3.
23. The notice served on 19th September 2007 – of which service is admitted - does not comply with S.5(1A) and therefore the Defendant's licence to occupy her home has not been determined by the said notice:

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- (i) The notice did not give at least 4 weeks notice of the termination.
- (ii) The notice does not contain the prescribed information.

24. The Defendant relies upon the PFEA 1977 s.5.
25. The notice served on 22nd January 2008 - of which service is admitted - does not comply with S.5(1A) and therefore the Defendant's licence to occupy her home has not been determined by the said notice:

PARTICULARS

- (i) The notice does not contain the prescribed information.

26. Further, the notice served on 22nd January 2008 is invalid at common law because it is not said to expire on a day which is either the first or last day of a term of the licence.
27. The Defendant relies upon the PFEA 1977 s.5 and upon *Precious v Reedie* [1924] 2 KB 149; *Queen's Club Garden Estates v Bignell* [1924] 1 KB 117.
28. The notice served on 2nd April 2008 – of which service is admitted - is invalid at common law because it is not said to expire on a day which is either the first or last day of a term of the licence.

Thereafter, XYZ Homes had sought legal advice, and subsequently served a notice which satisfied common law and statutory requirements. XYZ's lawyers had however overlooked the point that the occupancy agreement did not make provision for the services of notices by post by the trustees, which was apparently how the notice was sent to Miss A. She claimed not to have received it. On this issue at least, her habit of

writing long letters in response to communication she had received from the trustees proved helpful. She had provided us with copies of the letters she had sent in reply to each of the three invalid notices. There was no response of any sort to the fourth notice, an omission which we felt was cogent evidence that she had not received the notice. While there is some ambiguity about just what amounts to adequate service of a notice to quit, we considered there was sufficient authority to support the argument that in order for the notice to be effective it had to have come to Miss A's attention.²⁰ The final element of our defence was thus the most straightforward:

29. As to the notice of 5th May 2008, it is admitted that the notice is in compliance with the requirements of the common law and of the PFEA 1977 s.5.
30. Service of the notice is not admitted, and the Claimant is put to strict proof thereof.
31. The Defendant relies upon *LB Wandsworth v Attwell* (1995) 27 HLR 536: *Trustees of Henry Smith's Charity v Kyriacou* (1990) 22 HLR 66 (CA).

Conclusion

Having filed Miss A's defence, having received a robust reply from the Claimant and having secured an extension of Legal Services Commission funding to take the matter to trial, we found the legal ground cut from beneath our feet by Miss A's decision that she actually did not want to live in her almshouse any more. And having found a new home which better suited her personality and circumstances, she moved out some weeks before the case was due to come on for trial. As I understand it, she left her van behind.

While her decision no doubt saved the almshouse and the Legal Services Commission a substantial amount of money in legal costs, it is perhaps unfortunate from a wider public interest perspective that the issues raised by her case were not addressed by a court. The almshouse sector plays only a very small part in quantitative terms within the United Kingdom's social housing sector. It appears that there are some 1800 separate Almshouse Charities, which in total provide accommodation for around 36,000 (mostly elderly) people.²¹ There is no basis to think that the trustees of the various almshouses (most/all of whom serve as trustees in an unpaid capacity) act to any significant extent in a way that is insensitive to or abusive of residents' occupation of their homes. Although one might make just the same observation in respect of most RSLs, to whom the full rigours of the *Street v Mountford* principle are invariably extended.

One should also recall that the implication of *Gray* is not just that almshouse residents are deprived of (even a rudimentary form of) security of tenure. The surviving spouse or civil partner would have no right to succeed to an appointment in

²⁰ Cf Luba et al op. cit pp 268-270 and sources cited therein.

²¹ See www.almshouses.info/ – the website of the Almshouse Association. For a history of the almshouse movement and its traditions see B. Jobson, *Houses of Noble Poverty* (2008)

the way he/she would be entitled to succeed (per Housing Act 1988 s.17) to an assured shorthold tenancy.

More broadly, residents are also unable to rely upon the implied terms that attach to all short term periodic tenancies of residential premises. Perhaps the most important of those are the landlord's repairing obligations imposed by s.11 of the Landlord and Tenant Act 1985. Miss A's occupancy agreement contained an express term similar to the s.11 requirement, but in the absence of any such term residents would have no effective remedy for even substantial disrepair to their premises. Nor could residents invoke the covenant of quiet enjoyment against the almshouse or persons claiming under it. Miss A's occupancy did not contain any express term to this effect and there is no reason to suppose her agreement was atypical of those in use in the sector as a whole. Additionally, applying the reasoning of the House of Lords in *Hunter v Canary Wharf*,²² an almshouse resident would have no capacity to sue either her landlord or any adjoining occupant for nuisance-causing activities which interfered with the amenity value of her home. It perhaps compounds rather than negates the unsatisfactory situation illustrated by that last point that, by the same token, the resident herself could not cause a nuisance to others by misbehaving in her home since she is not in possession of the land. None of these points seem to have been considered by the Court of Appeal in *Gray*.

There seems little prospect that any government would be sufficiently concerned by the implications of *Gray* to promote a legislative reversal of the decision, and it is likely to be quite some time before the question again comes before the higher courts. When it does so however, it might be hoped either that the opportunity is taken to reverse the decision is limited in its reach to the period when any tenancy would have been assured rather than assured shorthold in nature and/or to contractual relationship in which residents pay no more than a token cost for their occupancy of their homes.

²² [1997] AC 655.