Neutral Citation Number: **[2021] EWHC 283 (QB)**

Claim no: F04EC590

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 11 February 2021

Before :

MASTER DAGNALL

- -

Between :

THE MASTER WARDENS AND ASSISTANTS OF THE GUILD FRATERNITY OF THE BROTHERHOOD OF THE MOST GLORIOUS AND UNDIVIDED TRINITY AND ST CLEMENT IN THE PARISH OF DEPTFORD STROND COMMONLY CALLED THE CORPORATION OF THE TRINITY HOUSE OF DEPTFORD STROND	**Claimant**
- and -	
(1) DEQUINCY PRESCOTT	**Defendants**
(2) CLODAGH BYRNE	

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Ms Evie Barden (instructed by **Forsters LLP**) for the **Claimant**
The Defendants in Person
Hearing dates: 2 and 10 February 2021

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JUDGMENT

MASTER DAGNALL :

Introduction

1. The COVID-19 pandemic has had an unprecedented effect on life and business in this country. The Government has responded in numerous ways and including by restricting the circumstances when evictions of tenants from their homes can take place. The most recent regulations to such effect are the Public Health (Coronavirus) (Protection from Eviction) (England) Regulations 2021 SI2021/15 ("the January Regulations") which took effect from 11 January 2021 and which prohibited ("the Prohibition") the execution of a (High Court) Writ of Possession or a (County Court) Warrant of Possession or the service of a "notice of eviction" ("Eviction Notice") in relation to residential premises, in each case following the making of an order for possession ("the Possession Order"; and which order was made in this case on 10 January 2020) until after 21 February 2021.

2. The Prohibition is subject to certain exceptions including where there are substantial rent arrears ("Substantial Arrears") being more than six months' worth in amount ("the Rent Exception"). In this case the arrears are said to be now over £70,000 and in the region of 21 months' amount; and I am, in effect, being asked by the Claimant, by an Application Notice dated 22 January 2021, to make a declaration that the court is satisfied that the Rent Exception applies. However, the main question before me is whether the Rent Exception only applies where (as the tenant Defendants contend) the Possession Order was made on grounds which wholly or partly were based on non-payment of rent or whether it can also apply (as the landlord Claimant contends) where the Order for Possession was made solely on a different

basis. While the words actually used in the January Regulations support the Defendants' case, the Claimant contends that that construction is discriminatory for human rights purposes and that I should read the January Regulations in a modified way to accord with the Claimant's contentions. However, this case also involves some other points relating to the procedure for applications regarding the January Regulations.

The Tenancy and the Statutory Framework

3. The tenancy in this case was granted of residential premises known as 13 Merrick Square, Southwark, London, SE1 4JB ("the Property") by the Claimant to the Defendants by a written document dated 16 November 2018 for a term certain ending on 30 November 2019 but determinable by 2 months' notice, and with a monthly rent. As the Defendants occupy the Property as "their only or principal home" the tenancy is an Assured Shorthold Tenancy under the provisions of the Housing Act 1988 ("the 1988 Act") which governs most (not long lease)| short private sector residential tenancies. The consequence is that it can only be brought to an end by an order of the court, and on the ending of the fixed term a statutory period tenancy would (and did) arise which also could only be brought to an end by an order of the Court (for all this, see section 5 of the 1988 Act).

4. However, a Landlord can end an Assured Shorthold Tenancy by obtaining an order of the court on a number of different bases, including:

   i) Following the service of a 2 months' notice under section 21 of the 1988 Act. Provided that the Landlord has complied with various

statutory requirements (which will generally have been in the Landlord's power), the Court must then make an order for possession

ii) Following the establishment of a "Ground", being one of the grounds for possession set out Schedule 2 to the 1988 Act. To seek such an order for possession, the Landlord must first have served a notice seeking possession ("NSP") setting out the alleged existence of the Ground under section 8 of the 1988 Act. These Grounds are divided into "Mandatory Grounds" under Part 1 of Schedule 2 and "Discretionary Grounds" under Part 2 of Schedule 2

iii) The Mandatory Grounds include "Ground 8" being that rent of at least 2 months (or an equivalent over other periods depending on how the rent was payable; here the rent was payable monthly so this is the applicable approach) as at the dates of both the service of the NSP and the Hearing of the claim for possession. If Ground 8 is established then the Court must make an order for possession

iv) The Discretionary Grounds include "Ground 10" (non-payment of rent) and "Ground 11" (persistent non-payment of rent). However, even if the Discretionary Ground is established, the Court will only be able to make an Order for Possession if it is reasonable to do so. Moreover, unless and until the Order for Possession is executed, the Court retains a jurisdiction to stay or suspend the proceedings or any Order for Possession or its enforcement, all under section 9 of the 1988 Act.

5. Thus both Section 21 and Ground 8 give the Court no choice but to make an Order for Possession. In addition, and unlike Discretionary Grounds cases,

section 89 of the Housing Act 1980 ("the 1980 Act") provides, in effect, that in a Section 21 or a Ground 8 (or other Mandatory Ground) case, the Order for Possession must provide for possession to be given by the Tenant within no more than 14 days (or 6 weeks if exceptional hardship is shown) whereas in Discretionary Ground cases there is much more of an open discretion as to time (although still to be exercised on a principled basis).

6. One consequence of the compulsory operation of both Section 21 and Ground 8 is that, except perhaps where such contravenes other provisions of law, the Landlord's motivation for bringing the claim is irrelevant and the Order for Possession will stand irrespective of what happens in the future. In particular, if the claim was brought because of rent arrears, even if the Tenant discharges all of the outstanding rent, interest and costs, the Landlord can simply still enforce the Order for Possession as a matter of right. This is not the case in relation to Discretionary Grounds which gives rise to questions of reasonableness and where payment off of arrears may have great weight in persuading the Court either that it is not reasonable to make an Order or to set aside or suspend an Order following its having been made but not yet having been executed.

7. Once an Order for Possession has been obtained in relation to an Assured Shorthold Tenancy with the time for delivery up of possession having expired, it is enforced in the County Court by the obtaining of a Warrant of Possession directed to county court Bailiffs and in the High Court by the obtaining of a Writ of Possession directed to High Court Enforcement Officers; in each case to carry out its execution by an eviction of the Tenant. Since reforms in 2020:

i) This is done by without notice application under Civil Procedure Rules ("CPR") 83.26 (Warrant) or 83.13 (Writ), and where judicial permission is not ordinarily required

ii) However, under CPR83.8A and unless a court has otherwise ordered, the Landlord must deliver a Notice of Eviction at least 14 days prior to the Eviction to the relevant premises, thus giving the occupiers a chance to apply to the court (should they have a relevant right) or make appropriate arrangements to vacate.

8. If the Landlord has an Order for Possession in the County Court, then the Landlord may apply to the County Court to transfer the Order to the High Court for the purposes of enforcement (by way of a Writ of Possession) under section 42 of the County Courts Act 1984 ("the 1984 Act"). I deal with that statutory provision further below.

The Order for Possession and Pre-COVID Steps

9. In this case it appears from the documents, and is (relatively) common-ground that:

i) The Defendants fell into substantial (more than 2 months) arrears of rent in 2019

ii) The Claimant on or about 16 August 2019 served:

a) A Section 21 Notice expiring in about October 2019, and

b) A NSP under section 8 of the 1988 Act relying on arrears of rent (then 5 months) and threatening proceedings under Grounds 8, 10 and 11

iii) No payments of rent (arrears or accruing) were made. On 25 November 2019, the Claimant issued a County Court Claim and Particulars of Claim Form ("the Claim Form") in accordance with CPR55 which sought both possession and a money judgment for arrears. However, the only basis given for the claim for possession was the Section 21 Notice, and the NSP and the various Grounds were not then referred to in the Claim Form

iv) The Claimant issued an Application to amend the Claim Form ("the Application to Amend") on 6 January 2020, seeking also to be able to rely on Grounds 8, 10 and 11

v) The Claim was then hearing by Deputy District Judge Rea ("the DDJ") on 10 January 2020. The DDJ:

a) Made no order on the Application to Amend; it seems because, the DDJ having stated that Section 21 was satisfied and the Defendants not seeking to oppose that, Counsel for the Claimant (presumably on the basis that there was no point as the Claimant was going to obtain possession under Section 21) did not seek to pursue the Application to Amend

b) Held that Section 21 was applicable and had been complied with and made an Order for Possession to be given by 24

January 2020 and which was expressed to be on that basis "This Order has been made on mandatory grounds, Section 21, AST…"

c) Held that rent arrears existed and gave the Claimant judgment for them against the Defendants in the sum of £27,633.36 (8 months). The order made was for possession to be given up by the Defendants on or before 24 January 2020.

10. Since then the Defendants have remained in possession of the Property with their three young children (and possibly also an elderly relative). They have paid a total of £100 to the Claimant. The arrears are now slightly over £70,000 (21 months). I do add that the Defendants have said that the rent arrears have arisen due to problems the First Defendant has had with work, that they intend to discharge the arrears in the near future, and that the Claimant has indicated that it may have a means of enforcement of its money judgment by way of charging order proceedings against another property which he says is owned beneficially by the First Defendant's mother (although the First Defendant says that he has no beneficial interest but that his mother is seeking to assist him by raising money on the security of that property, and the Claimant seemingly asserts that the First Defendant has a beneficial, as well as a joint legal, interest in that property).

11. The Claimant then applied for a Warrant of Possession directed to County Court Bailiffs to execute the Order for Possession of the Property and which was issued on 14 February 2020. Owing to the COVID circumstances to which I refer below, the Warrant was never executed. Instead on 8 December

2020 the Claimant obtained an order from District Judge Desai (at a hearing attended by the Defendants) for the County Court to transfer the Order for Possession to the High Court for enforcement under section 42 of the 1984 Act, and a Writ of Possession was issued by the High Court on 8 January 2021 directed to an HCEO to enforce by eviction and delivery of possession to the Claimant. However, no further steps have been taken due to the January Regulation and to which I refer below.

COVID-19

12. In March 2020 the escalating COVID-19 pandemic resulted in the Coronavirus Act 2020 and numerous Government Regulations restricting very many aspects of business and domestic life. The first lock-down and the need to protect public health led to most people being much confined to their homes from mid/late March 2020 either by very strong guidance or statutory regulation.

13. Although the administration of justice was always regarded as an essential matter which had and has to be continued in the public interest, the coronavirus health situation resulted in numerous practical difficulties including risks to court users, court staff and judiciary in travelling to and attending courts. While it was possible (although with great effort being required from court staff and administrators as well as the judiciary) in some courts (and in particular the High Court) to work electronically and remotely in ways which would still achieve justice and without excessive disruption, the same was not necessarily true of the County Court which was and is still much more paper based and under much greater pressure. Further, there was a

particular difficulty with occupiers who were threatened with eviction and losing their homes (in the circumstances of the pandemic) and who might well wish to contest proceedings and/or to apply to seek protective orders (including to set aside or stay orders for possession) but who could not, consistent with the need to protect their and other's health, travel to courts and where, in any event, there might not be judges present or with time to hear their applications or the usual duty solicitors to provide them with urgent and needed advice and assistance.

14. For these and other reasons, the Civil Procedure Rules Committee ("CPRC") exercised its powers under the Civil Procedure Act 1997 ("the 1997 Act") on two occasions (the second being as a result of an express statutory request made by the Lord Chancellor under section 3A of the 1997 Act) to make and continue CPR Practice Direction 51Z which stayed all then subsisting and new possession proceedings and including the enforcement of existing orders for possession except in particular defined circumstances (and which did not apply to this case). Essentially what was being exercised was the CPRC's power (under section 1 of the 1997 Act) to regulate court procedure in order to enable justice to be achieved in unprecedented circumstances. However, PD 51Z expired and ceased to have effect on 20 September 2020.

15. The CPRC has also by a new CPR55.29 and PD59C set up a system with regard to the making and re-activation of possession claims and applications. There has further been senior judicial guidance (following the deliberations and recommendations of a Working Group) regarding the County Court which has influenced its listing and approach in relation to possession matters

including in terms of seeking to ensure that (i) parties, in particular occupiers, have the opportunity to obtain legal advice and assistance (ii) the potential for settlement is fully explored (and see below) and (iii) the more serious and egregious cases are prioritised. This is outwith the CPR and not directly relevant to this case, but is indirectly so in that it reflects and is part of the fact that the effect of the pandemic has been to disrupt and to increase the delays within the county court system, and where careful steps have had to have been taken to achieve the objectives of the court system being available to parties (in particular claimants who wish to progress their claims and have them heard) but on a basis which enables justice to be achieved for all (in particular defendants who wish to protect their own rights and to obtain advice and assistance to enable them to do so) in ways which are consistent with the need to protect and preserve the health of all involved as well as of the wider public in the unique circumstances of the pandemic.

16. The Secretary of State for Health, however, following the expiry of the stays imposed by PD 51Z and then the initiation of a "second lock-down" in November 2020, regarded it as appropriate to exercise different statutory powers to continue to restrict the process and taking place of evictions. The relevant powers are contained in section 45C of the Public Health Act (Control of Disease) Act 1984 being, in essence, to make regulations to seek to preserve and promote public health in response to outbreaks of infectious disease. Under section 45R the relevant Regulations can be, and were, made with immediate effect (i.e. without going through the usual procedure of first laying regulations before Parliament for positive or negative approval) but on the basis that a laying before Parliament process would then take place for the

approval of both Houses to be sought (and which has, on each occasion, been given).

17. This was done first by The Public Health (Coronavirus) (Protection from Eviction and Taking Control of Goods) (England) Regulations 2020 SI2020/1290. These operated in England with regard to evictions from 17 November 2020 until 11 January 2021. They contained similar provisions to the January Regulations (which operate from 11 January to 21 February 2021) except that the Rent Exception only applied if the Substantial Arrears were at least 9 months' in amount accrued before 23 March 2020 (when the first lock-down started). The Government's position during the laying before Parliament and debating process was (except regarding the calculation of what amounted to Substantial Arrears) essentially the same (and expressed in the same way) as with the January Regulations and to which I refer below.

18. However, the Defendants have also drawn my attention to the fact that at the time of the making of the January Regulations the Government (by the Secretary of State for Housing) also announced the creation of "A new mediation pilot [which] will further support landlords and renters who face court procedures and potential eviction… It will offer mediation as part of the possession process to try and help landlords and tenants to reach a mutual agreement and keep people in their homes." The Defendants say that they have sought to negotiate an agreement for time to pay and stay in their home, and have simply been rebuffed by the Claimant, although the Claimant says that the Defendants have advanced nothing of substance to support their promises of future payment.

19. I am not in a position to determine the reasonableness (or unreasonableness) of the Claimant's approach, although I am sure that the Claimant will say that arrears of over £70,000 are simply unacceptable. However, it does not seem to me that that is relevant to what I have to decide. The Order for Possession was obtained on a basis (Section 21, although the same would have applied to Ground 8) which was a "matter of right" to which the Claimant was entitled and where (assuming no other matter of law arose, such as charitable, social housing or equalities law, or contractual provision for alternative dispute resolution) the Claimant's motivation and conduct is irrelevant and the Claimant simply has no obligation or duty to negotiate or bargain, and there are express statutory provisions restricting the court's ability to give occupiers time (section 89 of the 1980 Act). The new mediation scheme is, of course, voluntary, there being no statutory provision requiring parties to have to engage in it.

20. The courts are always keen to encourage negotiation, and to ensure that opportunities for negotiation have not been (at least inadvertently) missed or ignored, but it is not generally appropriate for the court to impose a delay on the determination and enforcement of a legal right, in the interests of there being negotiation, (at least) where the existence of the legal right is clear. CPR3.1(2)(m) provides that the court can itself list an Early Neutral Evaluation hearing to give guidance to the parties as to the likely outcome of an eventual trial (or even a Dispute Resolution hearing, which is somewhat similar to a mediation), and can do so even in the face of opposition from the parties – see Lomax v Lomax 2019 1 WLR 6527. However, the court would be unlikely to do so where one side was effectively seeking summary

judgment on the basis that their claim was clear, and I cannot see how such discretions could be exercised properly where there was already an existing Order for Possession made on a mandatory basis (let alone where there was such a level of outstanding arrears) with a statutory prohibition on the grant of further time to stay to the occupiers.

21. It may be that in deciding how to prioritise cases in the circumstances of the present pressure and strains on the courts (in particular the county court) system, courts may decide to factor the desirability of ensuring that opportunity has been given for negotiation, including negotiation at court with occupiers having the benefit of advice and assistance from duty solicitors, into their listing process. This may be usefully combined with the desirability of ensuring that the occupiers have had advice and assistance with regard to what arguments and claims they may be able to advance; and all this is very much an holistic process (directly where there are discretionary grounds relied upon and where there may be negotiation of adjournments and of suspended possession orders on terms; but also where the existence of any ground may be challenged as a matter of fact or law). Senior judicial guidance has encouraged this, with a view to ensuring justice and the achievement of the CPR1.1 overriding objective. However, this is not relevant to this matter. The High Court has had availability for this hearing, there is an Order for Possession made on a mandatory ground, and it seems to me that I simply have to decide the applicability of the January Regulations and the Rent Exception on the unchallenged facts of this case.

The January Regulations

22. However, from 11 January 2021 until (at least as present 21 February 2021) the position is now governed by the January Regulations. These provide in Regulation 2 that:

"2.—(1) Subject to paragraphs (2), (3), and (5), no person may attend at a dwelling house for the purpose of—

(a) executing a writ or warrant of possession; or

(b) delivering a notice of eviction.

(2) Paragraph (1) does not apply where the court is satisfied that the notice, writ or warrant relates to an order for possession made—

(a) against trespassers pursuant to a claim to which rule 55.6 (service of claims against trespassers) of the Civil Procedure Rules 1998(1) applies;

(b) wholly or partly under section 84A (absolute ground for possession for anti-social behaviour) of the Housing Act 1985(2);

(c) wholly or partly on Ground 2, Ground 2A or Ground 5 in Schedule 2 (grounds for possession of dwelling houses let under secure tenancies) to the Housing Act 1985(3);

(d) wholly or partly on Ground 7A, Ground 14, Ground 14A or Ground 17 in Schedule 2 (grounds for possession of dwelling houses let on assured tenancies) to the Housing Act 1988(4); or

(e) wholly or partly under case 2 of Schedule 15 (grounds for possession of dwelling-houses let on or subject to protected or statutory tenancies) to the Rent Act 1977(5).

(3) Paragraph (1) does not apply where the court is satisfied that—

(a) the case involves substantial rent arrears; and

(b) the notice, writ or warrant relates to an order for possession made wholly or partly—

(i) on Ground 1 in Schedule 2 to the Housing Act 1985 [this is a discretionary non-payment of rent ground applying to public sector residential tenancies];

(ii) on Ground 8, Ground 10 or Ground 11 in Schedule 2 to the Housing Act 1988; or

(iii) under case 1 of Schedule 15 to the Rent Act 1977 [this is a discretionary non-payment of rent ground applying to certain now very old private sector residential tenancies].

(4) For the purposes of paragraph (3), a case involves substantial rent arrears if the amount of unpaid rent arrears outstanding is at least an amount equivalent to 6 months' rent.

(5) Paragraph (1) does not apply where the court is satisfied that the notice, writ or warrant relates to an order for possession made wholly or partly on Ground 7 in Schedule 2 to the Housing Act 1988…"

23. I am concerned principally with sub-paragraph (3) as the Claimant contends that I should be "satisfied" in relation to sub-paragraph (3)(a) that the case involves more than 6 months' rent arrears (and hence Substantial Arrears) and that this is a sub-paragraph (3)(b)(ii) case notwithstanding that the Order for Possession was made under Section 21 and not (wholly or partly) under any of the "rent" Grounds i.e. Grounds 8, 10 and 11. In the light of the history which is set out above, it seems to me clear that while the Claimant had applied to rely on "rent" Grounds, DDJ Rea refused that application and made the Order for Possession simply on the basis of Section 21 and as the Order for Possession itself states.

The Explanatory Note

24. However, the other Exceptions and the rest of Paragraph 2 is relevant in that the Secretary of State's approach is explained in an Explanatory Note to the Regulations sections of which I now quote. While this Explanatory Note is no part of the January Regulations themselves, and I doubt are directly relevant or admissible as an aid to its construction, they do express what is the apparent policy underlying them. They read:

"EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations prevent, except in specified circumstances, attendance at a dwelling house for the purpose of executing a writ or warrant of possession or delivering a notice of eviction.

The specified circumstances are where the court is satisfied that the claim is against trespassers who are persons unknown or where it was made wholly or partly on the grounds of anti-social behaviour, nuisance, domestic abuse in social tenancies, false statements, substantial rent arrears exceeding 6 months' rent or, in cases where the person attending is satisfied that the dwelling house is unoccupied at the time of attendance, death of the occupant."

The Explanatory Memorandum

25. However, the Regulations, or rather the policies underlying them, are further explained in an Explanatory Memorandum prepared by the Ministry of Justice and which was provided to the Joint Committee on Statutory Instruments as part of the process by which the January Regulations were laid before Parliament.

26. Paragraph 2 expressed the underlying purpose:

"2.1 The purpose of this instrument is to protect public health and reduce the public health risks posed by the spread of severe acute respiratory syndrome coronavirus 2 (SARS- CoV-2) in England which causes the disease Covid-19.

2.2 This instrument prevents the enforcement of evictions, including the service of notices of eviction, against residential tenants, other than in the most serious circumstances, until the end of 21 February 2021. By restricting the enforcement of evictions at a time when pressure on public services is acute and the risk of virus transmission is very high, this measure will help control the spread of infection, prevent any additional burden falling on the

NHS and avoid overburdening local authorities in their work providing housing support and protecting public health."

27. Paragraph 5 recorded that the Parliamentary Under-Secretary of State for Justice had stated:

"In my view the provisions of the Public Health (Coronavirus) (Protection from Evictions) (England) Regulations 2021 are compatible with the Convention rights."

28. Paragraph 6 referred to section 45C of the Public Health (Control of Disease) Act 1984 and stated that:

"6.4 This instrument is made under section 45C to enable public health measures to be taken for the purpose of reducing the public health risks posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2 (SARSCoV-2)."

29. Section 7 was entitled "**Policy background**" and read as follows:

"***What is being done and why?***

7.1 The purpose of this measure is to protect public health by restricting the enforcement of evictions at a time when pressure on public services is acute and the risk of virus transmission is very high. The measure will help control the spread of infection, prevent any additional burden falling on the NHS and avoid overburdening local authorities in their work providing housing support and protecting public health.

7.2 During the first national lockdown evictions were prevented from going ahead, other than in cases of trespass against persons unknown, through amendments to the Civil Procedure Rules which stayed possession proceedings and enforcement proceedings by way of writ or warrant of possession. The stays ended on 20 September and evictions were able to resume following this point.

7.3 A package of measures was introduced following the lifting of the stays to provide support for tenants. Regulations in force until at least 31 March 2021 require landlords to give tenants six months' notice of their intention to seek possession, except in the most serious circumstances such as anti-social behaviour, fraud and arrears greater than 6 months' rent. These regulations apply to new cases where the landlord served notice on or after 29 August 2020. Landlords who served notice between 26 March and 28 August were required to give 3 months' notice. Temporary court rules are also in place regarding the arrangements and procedures for the resumption of possession proceedings in the courts.

7.4 On 16 November 2020 the Government laid the Public Health (Coronavirus) (Protection from Eviction and Taking Control of Goods) (England) Regulations 2020. The regulations prevent the enforcement of evictions (other than in limited circumstances as set out below) from 17 November 2020 until 11 January 2021. The Government considered this necessary in order to protect public health and avoid placing additional burdens on the NHS and local authorities during the time when national restrictions were in place under the Health Protection (Coronavirus,

Restrictions) (England) (No.4) Regulations 2020 and during the following mid-winter period.

7.5 On 4 January 2021, as a result of the exponential rise in cases and pressure on the NHS, the Prime Minister announced a national lockdown and the Government published National Lockdown: Stay at Home Guidance. As a result of the national lockdown the Government believes that it is necessary to extend the restrictions on the enforcement of evictions in England, including the service of eviction notices, beyond the 11 January.

7.6 To ensure the measure remains proportionate to the public health risk identified, and in light of the competing public interest in ensuring access to justice, preventing harm to third parties, taking action against egregious behaviour and upholding the integrity of the rental market, the measure contains some limited exemptions from the ban on enforcing evictions. These exemptions are for those circumstances where the Government feels that the public health risk is sufficiently outweighed by the wider public interest. Allowing evictions to be enforced in these circumstances while the ban is in force is intended to ensure that the policy does not disproportionately negatively impact on landlords and enable them to re-let their properties to tenants in need. Although this means that some people will be evicted, restricting enforcement of evictions aside from under the most egregious grounds will substantially decrease the volume of people being evicted and thus better ensure local authority capacity to support them.

7.7 The exemptions are for cases where the public health risks are judged as likely to be lower; where harm to third parties may occur if the order is delayed; or where there is a need to uphold the integrity of the residential housing market by addressing the most egregious cases involving unlawful entry, misleading statements or substantial rent arrears. The measure therefore provides exemptions for:

- cases where the court is satisfied that the claim is against trespassers who are persons unknown; or
- cases where the court is satisfied that the order for possession was made wholly or partly on the grounds of anti-social behaviour, nuisance, false statements, domestic abuse in social tenancies, rent arrears of at least six months; or
- in cases where the person attending the property is satisfied that the dwelling house is unoccupied at the time of attendance, where the court is satisfied that order for possession was made wholly or partly on the grounds of death of the occupant.

7.8 These are the same exemptions that were contained in the Public Health (Coronavirus) (Protection from Eviction and Taking Control of Goods) (England) Regulations 2020 (S.I. 2020/1290), subject to one amendment to the rent arrears exemption. In the earlier regulations, landlords could only seek to enforce evictions in cases with rent arrears of nine months or more which had accrued before the 23 March 2020. The Government believes that it is proportionate to widen that exemption to cases where a possession order was granted on the grounds of rent arrears

and where more than six months of rent is outstanding. The Government has made this change in order to balance the impact of the extension of the restriction on the enforcement of evictions on landlords, while continuing to protect tenants from eviction.

7.9 The regulations require the court to be satisfied that one of the exemptions applies before an eviction can be enforced. While the prohibition is in force, when making an order for possession, the court will record whether the order falls within one of the exemptions. In cases where there is an existing possession order and an exemption is not identified on it, claimants may make an application to court under Part 23 of the Civil Procedure Rules in order for the court to determine whether one of the exemptions applies. The application must be made on notice to the defendant.

7.10 The regulations also permit warrants and writs of restitution to be enforced. These warrants and writs are issued in cases where a person who has been evicted from premises re-enters those premises illegally…"

The Parliamentary Debates ("the Debates")

30. The Claimant has also sought to adduce Hansard records of the consideration of Parliament's Commons' Delegated Legislation Committee's consideration of, and the House of Lords' debate of, the January Regulations on their being laid before Parliament. Such material is only usually available for the purpose

of resolving ambiguities in legislation (the "Pepper v Hart" doctrine) and not where the wording used is clear. However, it may be admissible for the purpose of considering what is the policy underlying the relevant legislation, and so I set out the relevant citations as follows.

31. The Parliamentary Under-Secretary of State for Justice, Alex Chalk, in the Delegated Legislation Committee debate, explained:

"… The instrument renews the restrictions on enforcement agents carrying out evictions that were in place between 17 November 2020 and 11 January 2021. It will prevent enforcement agents from giving tenants notices of eviction or from attending residential premises to enforce a writ or warrant of possession, except in the most serious circumstances. That will ensure we continue to protect public health during the national lockdown at a time when the risk of virus transmission is high, and to avoid placing additional burdens on the NHS and local authorities. The instrument continues to provide for exemptions from the ban in cases where the competing interests of preventing harm to third parties, or taking action against egregious behaviour, make an alternative course appropriate.

The exemptions are as follows: when a claim is against trespassers who are persons unknown; where the order for possession was made wholly or partly on the grounds of antisocial behaviour or nuisance, or false statements, or domestic abuse in social tenancies; for substantial rent arrears equivalent to six months' rent; or where the order for possession was made wholly or partly on the grounds of death of the tenant, and the enforcement agent attending the property is satisfied that the property is unoccupied.

The instrument contains a requirement for the court to be satisfied that an exemption applies on a case-by-case basis. That will ensure that there is a clear, uniform and transparent process for establishing whether an exemption to the ban applies.…"

32. And then regarding the change as to the requisite quantum of rent arrears: "The requirement in the last statutory instrument was for nine months of arrears, not including any arrears that had accrued since March 2020. We have revised the definition to balance the need to continue to protect tenants with the impact of the ongoing restrictions on landlords. As a result of action that the Government and the courts have taken during the pandemic, we expect that most of the cases that fall within the exemption will relate to possession claims that began before the six-month stay on possession proceedings from March 2020. In those cases, landlords may have been waiting for over a year without rent being paid, and it is appropriate that they are able to seek possession in those unusual cases."

33. And, further at 14:41: "... Ultimately, we have to strike an important balance. Prior to this measure, some landlords might have been in a situation where their tenant was in arrears to the tune of eight months or so, but they had no ability to take possession of their property. Such cases are vanishingly rare, but in those rare cases, it is appropriate that scope for action exists..."

34. The Parliamentary Under-Secretary of State for Justice, Lord Wolfson, in the House of Lords debate, stated at 14:24: "There have been no broken promises. On the point made by the noble Lord, and repeated by the noble Baronesses, Lady Bennett of Manor Castle and Lady Uddin, because of measures taken in

response to the pandemic, we calculated that it would be unlikely that a case would have yet reached the enforcement stage where a landlord had initiated possession proceedings as a result of rent arrears that had begun to accrue since the start of the pandemic. First, the Coronavirus Act 2020 provides that landlords must give tenants longer notice periods before starting possession proceedings in the courts, apart from in the most egregious cases. Previously, two weeks' notice was required, and between 26 March and 28 August last year, three months' notice was required. Since then, landlords have been required to give six months' notice where arrears are less than six months, and four weeks' notice where the arrears are at least six months. We also take into account the amount of time it takes possession proceedings to progress through the courts, and the new arrangements that are in place to deal with the resumption of cases following the resumption of possession proceedings at the end of September. Importantly, at each stage of the process the tenant is provided with time in which to seek advice or make alternative arrangements. If we were to consider a hypothetical case, where a tenant has rent arrears that only started to accrue since the pandemic began, that case will have been affected by the requirement for longer notice periods, the six-month stay on possession proceedings and then the need to follow due process in the courts. When we assess it, it is unlikely that such a case would yet have reached the enforcement stage. There could, however, be cases where landlords have been waiting to recover possession orders where the rent arrears began to accrue before March 2020. In such cases, where there are very significant rent arrears, we consider that those landlords ought to be able to enforce those orders. [...] Many landlords depend on the rent that they receive for their sole

income; if no rent comes in, they can be placed in a precarious financial situation. Over and above all of that, linking protection from evictions automatically to the existence of Covid-19 restrictions assumes a correlation, and indeed a causation, where neither might exist. By contrast, the statutory instrument seeks to find and maintain a balanced approach, taking all matters into account."

35. On the change from the quantum of arrears, Lord Wolfson stated: "My noble friend Lord Bourne of Aberystwyth and other noble Lords asked about the change from nine months to six months. The rent arrears exception has been redefined to cases with rent arrears that are greater than six months because that is proportionate, given where we are in the pandemic, given the other protections in place and given the support that has been put in place for renters specifically and for people more generally. It is a question of balance, and that is where we consider the balance is best struck. We anticipate that most of the cases in which an exemption applies will involve a significant level of rent arrears that predate the pandemic and where landlords may have been waiting over a year without rent being paid…"

The Claimants' Application

36. Ms Barden for the Claimant accepts that unless this case comes within the Rent Exception, the eviction process is suspended (both in relation to the initial Notice of Eviction and the ultimate evicting) until 21 February 2021 under paragraph 2 of the January Regulations. She has made clear that this case does not involve any attempted attack on the legitimacy or "vires" of the January Regulations themselves and does not seek to argue that they are

irrational. That would require the use of the judicial review process under CPR54 even if any grounds (whether under the Human Rights Act or otherwise) were asserted to exist. Neither does she seek any declaration of incompatibility under the Human Rights Act. Rather she seeks to have the Rent Exception "read" in a way which would enable the Claimant to proceed with the eviction process at this point.

The Claimant's Application – Procedure

37. The Claimant's Application asks for this Court to grant "permission to execute the Writ of Possession". I do not regard that as a correct formulation of the relevant power of "the court". The January Regulations provide that the eviction process cannot continue except "where the court is satisfied" of the existence of an Exception. It therefore seems to me that the question is simply whether the court is so "satisfied" and that the means by which the court should express its satisfaction (if it so satisfied) is by way of a declaration. The court is not granting any permission, although I suppose it could direct the relevant statutory officer to proceed in those circumstances.

38. However, it does seem to me that two sets of procedural questions do arise, and especially where the CPRC has not made any Rules to specifically implement the January Regulations.

39. The first is as to which is the appropriate "court" to be "satisfied" in circumstances where, as here, the Order for Possession was made by the County Court but has been transferred to the High Court for enforcement. Ms Barden contends that either it is the High Court or that I should exercise my power under section 41 of the 1984 Act to transfer the remainder of the

County Court Claim to the High Court in order to enable myself to consider the "satisfied" issue. The Defendants have not made any particular submissions as to this aspect. In considering this aspect, I note that the terms of section 40 of the Housing Act 1998 imply (in subsection 40(4)) that the jurisdiction of the County Court in relation to that Act (and thus Assured Shorthold Tenancies) is not exclusive.

40. It seems to me that in this case the appropriate court is the High Court, for two sets of statutory reasons. The first is the wording of sections 42(5) and 42(6) of the 1984 Act which (following on from the power of the County Court under section 45(2) to transfer to the High Court as was exercised here) are as follows:

"(5) Where proceedings for the enforcement of any judgment or order of the county court are transferred under this section–

(a) the judgment or order may be enforced as if it were a judgment or order of the High Court; and

(b) subject to subsection (6), it shall be treated as a judgment or order of that court for all purposes.

(6) Where proceedings for the enforcement of any judgment or order of the county court] are transferred under this section—

(a) the powers of any court to set aside, correct, vary or quash a judgment or order of the county court, and the enactments relating to appeals from such a judgment or order, shall continue to apply…"

41. Thus, except for the purposes of setting it aside, varying it etc. the Order for Possession is now to be treated as if it were an order of the High Court. The Claimant's Application is not in any way to seek to set aside or to vary or otherwise to alter that Order. What the Claimant is seeking is a determination that "the court" is satisfied of a matter consequential to that Order of Possession as part of an attempt to enforce it. It seems to me that subsection 42(5) does apply here and that this does not fall within the exception in section 42(6).

42. Second, there are CPR23.(2) and (5) dealing with the procedure for applications and which provide that:

"(2) If a claim has been transferred to another court, or transferred or sent to another County Court hearing centre since it was started, an application must be made to the court or the County Court hearing centre to which the claim has been transferred or sent, unless there is good reason to make the application to a different court…

(5) If an application is made after proceedings to enforce judgment have begun, it must be made to the court or County Court hearing centre which is dealing with the enforcement of the judgment unless any enactment rule or practice direction provides otherwise."

43. Although section 42(6)(a) may "provide otherwise" in certain circumstances, I do not think that its wording is clear enough (even if my construction above were to be incorrect) to displace CPR23.2(5) which seems clearly to require applications regarding a judgment to be made in the court which is dealing with the enforcement of the judgment, here the High Court. That is the clear

policy underlying CPR23.2 and, indeed section 42 of the 1984 Act except where there is an attack (or similar) upon the County Court judgment itself.

44. If I was wrong as to that, then I would regard this as a proper case to direct a section 41 of the 1984 Act transfer. Although the making of the Order of Possession is within the preserve of the County Court, that has already occurred and the case has moved on (at the instance of a transfer order from the County Court) to High Court enforcement. To leave this aspect to the County Court would be inconsistent and result in a waste of time, cost and resource. In the circumstances which I have set out above regarding pressure on the county court etc., to act otherwise would be disruptive and would also destroy the point of the Application as the matter could not practically be listed, heard and determined before 21 February 2021 being the expiry date of the January Regulations. Applying CPR Part 30 and the overriding objective, I would order a transfer if required for the purpose of the Claimant's Application.

45. The second question is as to the form and process of an application for such a declaration as none is prescribed by Rule. The Explanatory Memorandum states in paragraph 7.9 that a CPR Part 23 application is required and which must be on notice to the defendant. However, this is merely a statement of the Government's view and is not part of the January Regulations. Nevertheless, it seems to me to be accurate in practice in general as:

i) This is an application in existing proceedings

ii) Such applications are generally governed by CPR23 in the absence of any other CPR rule or practice direction

iii) CPR23.3 provides that the general rule is that there should be an application notice

iv) CPR23.4 provides that the general rule is that an application notice should be served upon a respondent (here the Defendants). While the court can dispense with such service there is then a right in the respondent to apply to seek to set aside or vary any order which is made under CPR23.8

v) This all reflects the general principle of natural justice that both sides should have a chance to be heard on matters which very much affect them in the absence of any express rule permitting applications to be made without notice. Also it would be potentially inefficient for an order to be made and then the respondents apply to set aside thus requiring at least two judicial considerations.

46. In any event, the Claimant did issue a formal Application Notice; and, sitting in the High Court, I not only regarded it, for the reasons given above, as appropriate for the Defendants to be notified, but it was convenient to arrange a hearing speedily and to give them an opportunity to attend, even though they turned out only to have two (rather than the usual three) clear days' notice. In any event, the First Defendant was able to attend a remote hearing on behalf of both Defendants on 3 February 2021. However, having heard Ms Barden for over the time which had been allocated for the hearing, it seemed to me best to adjourn until 10 February 2021 to enable Ms Barden to complete her submissions, give the Defendants a further opportunity to obtain legal advice, and to ensure proper consideration of what are important points of law. The

further hearing then took place on 10 February 2021 after the Defendants had managed to obtain some very limited assistance from Shelter, and they have subsequently sent me a Note repeating and advancing various of their arguments. I have sought to consider all the parties' submissions in coming to this judgment, and where I do not mention any such is the result of pressure of time rather than an absence of consideration of them.

The Initial Construction and Application of the January Regulations

47. Ms Barden accepts, in my view correctly, that if the January Regulations are to be read, construed and given effect according to their literal wording then I should not be "satisfied" that the Rent Exception applies. That is because even though there are Substantial Arrears (and the evidence demonstrates more than £70,000 being at least 18 months' worth of arrears) the Order for Possession was not made "wholly or partly… on any of Grounds 8, 10 or 11". It was made under (or more accurately in consequence of) Section 21 and:

    i) The Application to Amend had not been pursued before DDJ Rea, and so that while there was a claim for rent arrears there was no claim for possession on any Ground based on non-payment of rent

    ii) DDJ Rea framed the Order for Possession itself so as to state that it was made in consequence of Section 21.

The Human Rights Act

48. Ms Barden contends that this should not be determinative, because she contends that I should "read" the Rent Exception within the January Regulations as extending to a situation in which there are Substantial Arrears

and where there is an Order for Possession, at least where that was made under Section 21 (or made under Section 21 with also a judgment for rent arrears) and so that there are no other special considerations as might attach to Orders made under other (non-rent arrears) Mandatory or Discretionary Grounds. In essence she contends that I can and should so "read" the January Regulations as it is clearly disproportionate and discriminatory (in human right terms) in to allow in Substantial Arrears cases Landlords who have (perhaps fortuitously) to have included and obtained a judgment on a "Rent Ground" to succeed but not to extend this to Landlords who simply proceeded under Section 21 prior to COVID. She says there is no sufficient difference; the underlying policy is that Orders for Possession should be enforced in Substantial Arrears cases; and that this case of such a large amount of arrears is a paradigm example of where it would be discriminatory for this not to be allowed to occur. However, as stated above, she does not seek to challenge the validity of the Regulations but rather to have them read and construed as she desires.

49. Ms Barden's legal route is as follows. She relies upon section 3(1) of the Human Rights Act 1998 ("the 1998 Act") which provides that:

"**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."

50. Ms Barden submits that the January Regulations need to "be read and given effect" in the way for which she contends as she submits that that is necessary for them to be compatible with Convention rights.

51. Ms Barden submits that the January Regulations are inconsistent with and have to be justified under Article 1 of the First Protocol to the Human Rights Convention ("A1P1"), being that human rights include:

"***Article 1***

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property

in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

52. Ms Barden submits that the effect of the January Regulations is to interfere with the Claimant's property rights, and in particular the Order for Possession, and court-ordered right to have possession of the Property. However, she accepts that the circumstances of the pandemic justify this in general, but she goes on to submit that this is only the case in relation to interference which is not "discriminatory" relying on Article 14 of the Convention:

"***Article 14***

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention 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."

53. Ms Barden submits that there is such discrimination here as the January Regulations appear to "discriminate" in Substantial Arrears cases between Landlords who have obtained their Orders for Possession on the basis of a rent-arrears ground and those who have an Order for Possession on the basis of Section 21 (especially where, as here, there has also been a judicial determination of substantial rent arrears when making the Order for Possession). She contends that where the underlying policy of the Rent Exception is the existence of Substantial Arrears, to differentiate between these classes of Claimant is both "discrimination" and unjustifiable.

54. Ms Barden submits (but also accepts) that:

i) "discrimination" for these purposes is a wide-ranging concept which covers any difference in treatment regarding the availability of or interference with Convention rights, and not just one on the specified grounds (race, sex etc.)

ii) The difference in treatment is not compliant with the Convention unless it is justified and which involves that:

a) It is directed towards a legitimate aim which is sufficient to justify the difference

b) The discriminatory measure is rationally connected to that aim

c) No lesser measure could have been sensibly used to seek to achieve the legitimate aim; and

d) The result strikes a fair balance between the rights of the various individuals and the community.

55. Ms Barden further submits (and accepts) that when applying section 3 in relation to subordinate legislation as here, the Court should consider the matter in the following stages:

i) Whether a Convention right is engaged – which she says is the case here in relation to A1P1 and Article 14

ii) Whether the statutory provision on its ordinary construction is Convention compliant – which she says the January Regulation is not

because it is discriminatory as it produces different outcomes for Landlords who have brought their Claims for possession (or received judgments from Judges) on different bases entitling them to possession but where each has the common problem, justifying the existence of Rent Exception, of Substantial Arrears. She says that the basis of the original Claim and of the Order is irrelevant to the justification for the Rent Exception and the policy underlying it

iii) Whether it is necessary to read the statutory provision (here the Rent Exception) in a way different from its literal wording, and including by the addition or deletion of words, to remove the discriminatory effect, and in which case the Court will do so (as provided for by section 3)

iv) Unless, such a reading goes against the "grain" or the "thrust" of the legislation so that it is not possible to so "read" it, and so that section 3 does not therefore have that effect (as it only applies where such is possible). She says that would only be the case where such a reading would change the substance of the provision or alter it completely or violate the underlying principles and policy. She submits that the relevant policy here is that Landlords should be able to evict Tenants who are in Substantial Arrears, and so that there is no such incompatibility.

56. In support of her contentions, Ms Barden has cited two main authorities. The first is Matheison v Secretary of State for Work & Pensions 2015 1 WLR 3250 regarding a restriction on the availability of disability living allowance between parents whose children spent a long time in hospital and those who

did not. At paragraphs 17-18 it was held that it was necessary to invoke Article 14 to establish a link with a free-standing human right but that A1P1 would do and that was conceded with regard to disability living allowance as a property right in that case. At paragraph 23 it was held that there was discrimination on a specified basis i.e. disability (even though as between different disabled people). The Supreme Court then considered the approach to justification of discrimination as follows.

57. Paragraphs 24 to 27 read:

"24 In Stec v United Kingdom (2006) 43 EHRR 1017 the Court of Human Rights determined challenges to social security provisions which linked compensation for the financial effects of an accident at work to the different state retirement ages for men and women. So the argument was that, taken with A1P1, article 14 had been violated by discrimination on ground of sex. The Grand Chamber observed at para 51:

"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."

It is worthwhile to note, in parenthesis, a terminological difference between the Court of Human Rights and the House of Lords. In the RJM case [2009] AC 311, cited at para 21 above, Lord Neuberger considered at para 22, as did Lord Walker at para 5 and Lord Mance at para 7, whether the discrimination can be justified . I confess that I prefer the approach of the Court of Human

Rights. If justification is established, the result is not justified discrimination. For justification will negative the existence of discrimination at all."

25 In the Stec case 43 EHRR 1017 the Grand Chamber proceeded at para 52 to address the margin of appreciation which it should afford to the UK in relation to its social security provisions and held that it should generally respect its policy choices in that area unless they were manifestly without reasonable foundation ; by application of that principle, it concluded that the challenges failed. Of course it does not necessarily follow that the domestic judiciary should accord a margin of equal generosity to the domestic legislature: In re G (Adoption: Unmarried Couple) [2009] AC 173, para 37 (Lord Hoffmann). Indeed this court has at last helpfully recognised that the very concept of a margin of appreciation is inapt to describe the measure of respect which, albeit of differing width, will always be due from the UK judiciary to the UK legislature: In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill [2015] AC 1016, paras 44—54 (Lord Mance JSC).

26 Nevertheless, in the RJM case [2009] AC 311, Lord Neuberger cited para 52 of the judgment in the Stec case and concluded at para 56 that the provision of state benefits to the homeless was an area where the court should be very slow to substitute its view for that of the executive . In Humphreys v Revenue and Customs Comrs [2012] 1WLR 1545, this court went further. There a father in receipt of means-tested benefits who cared for his children for three days each week challenged a rule that child tax credit should be paid entirely to their mother because she had the main responsibility for them. He alleged indirect discrimination on grounds of sex because the rule prejudiced more

fathers than mothers. Having considered the Stec case and the RJM case, Baroness Hale JSC (with whose judgment all other members of the court agreed) held at paras 19 and 20 that the court should determine the father's challenge by reference to whether the rule was manifestly without reasonable foundation; but she added at para 22 that it did not follow that the rule should escape careful scrutiny. Applying those principles, she rejected his challenge. She considered that the rule- makers had been entitled to conclude that some of a child's needs, such as for clothes and shoes, would be more likely to be met if the entire benefit was paid to the primary carer: para 29; and that there were costly administrative complexities in any apportionment of some of the benefit to the secondary carer while he remained in receipt of means-tested benefits: para 30. It is noteworthy that, in a table of policy issues which Baroness Hale JSC annexed to her judgment, the makers of that rule, when resolving not to amend it so as to permit the benefit to be shared, had carefully set out the rival advantages and disadvantages of so doing.

27 One of the rule-makers arguments in the Humphreys case, as in the present case, was that a bright-line rule has intrinsic merits in particular in the saving of administrative costs. The courts accept this argument but only within reason. In R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] AC 1312, Lord Bingham accepted at para 33 that hard cases which fell on the wrong side of a general rule should not invalidate it provided that it was beneficial overall. And when the Carson case had been considered, with another case, by the House of Lords, in R (Carson) v Secretary of State for Work and Pensions [2006] 1AC 173, Lord Hoffmann had observed at para 41 that a line had to be drawn somewhere. He had added:

All that is necessary is that it should reflect a difference between the substantial majority of the people on either side of the line."

58. The outcome was that the relevant statutory provision was simply struck-down. However, an attempt to invoke a section 3 reading process was rejected on a basis which appears from the next decision.

59. The second decision is R (Aviva) v Secretary of State for Work & Pensions [2021] EWHC 30 which involved the application of section 3 of the 1998 Act to read down primary legislation which had inserted a deemed wording into policies of insurance regarding the liability of particular insurers for asbestos-related disease and thus, by placing liabilities upon them, interfering with their A1P1 rights mesolithoma in an unjustified manner.

60. At paragraph 28, after having considered Mathieson and other authorities, the Judge said:

"28. As to how to reconcile these two strands of authority, I do not consider the answer to be that the court has a discretion as to whether or not to apply section 3(1). Instead, when considering whether a Convention-compliant reading is "*possible*", the court must keep in mind that section 3(1) mandates and permits a reading down only to the extent that it is *necessary* in order to make the legislation Convention-compliant; and that a reading down will not pass that test if it pre-empts alternative ways in which the court might reasonably anticipate the legislature could choose to render the provisions compliant. In *Mathieson*, reading down was not possible because the claimant's proposed reading (disapplying the 84-day rule to all children) evidently went further than necessary. As Lord Wilson pointed out, his

judgment in the claimant's favour took account among other things of the extent of care provided to this particular claimant by his parents at the hospital in question."

61. The Judge then considered the principles to be applied further in Paragraphs 32-34:

"32. As to whether such a reading is "*possible*", the applicable principles are familiar. The Divisional Court in *Connolly v Director of Public Prosecutions* [2007] EWHC 237 (Admin) § 17 found it sufficient to refer to the following passage from Lord Nicholls' judgment in *Ghaidan*:

"30. From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require thecourt to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.

31. On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the "interpretation" of legislation, it is natural to focus attention

initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.

32. From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.

33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross

the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, "go with the grain of the legislation". Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

33. Lord Bingham in *Sheldrake* said:

"…there is a limit beyond which a Convention-compliant interpretation is not possible, such limit being illustrated by *R(Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 and *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] 2 AC 467. In explaining why a Convention-compliant interpretation may not be possible, members of the committee used differing expressions: such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation (paras 33, 49, 110-113, 116). All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: "*So far as it is possible to do so* ..." While the House declined to try to formulate

precise rules (para 50), it was thought that cases in which section 3 could not be used would in practice be fairly easy to identify." (§ 28)

34. The Claimants point out that a Convention-compliant interpretation under HRA section 3 need not necessarily involve detailed (notional) redrafting of the provisions in question. They cite as examples:

i) *MB*, where Baroness Hale (with whom Lord Brown agreed) concluded that certain provisions of the Prevention of Terrorism Act 2005 should be read and given effect *"except where to do so would be incompatible with the right of the controlled person to a fair trial"* (§ 72);

ii) *Connolly*, where the Divisional Court concluded that section 1 of the Malicious Communications Act 1988 should be interpreted *either* by giving a heightened meaning to the words *"grossly offensive"* and *"indecent"*, or *" by reading into section 1 a provision to the effect that the section will not apply where to create an offence would be a breach of a person's Convention rights, i.e. a breach of article 10(1), not justified under article 10(2))"*; and

iii) *R v Waya*, where the Supreme Court held that section 6(5)(b) of the Proceeds of Crime Act 2002 should be read as subject to the qualification *"except in so far as such an order would be disproportionate and thus a breach of article 1, Protocol 1"*."

62. Ms Barden submits that in these circumstances I can and should "read" the January Regulations so that paragraph 2(3)(b)(ii) effectively had added at the end the words "or in consequence of Section 21 of the Housing Act 1988" with or without the additional words "and provided that there had been a

judicial determination of the existence of rent arrears", and which would extend to what DDJ Rea actually had done. She submits that since the underlying policy is (she says) to enable recovery of possession in the "egregious case" of Substantial Arrears, it is unjustifiable discrimination for it not to also apply in those cases.

63. Ms Barden accepted that her case involves an interference with the Defendant's Article 8 rights to their private life and home:

> ***Article 8***
> ***Right to respect for private and family life***
>
> Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 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 well-being 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.

64. However, she submits that the Order for Possession after judicial determination is compliant as being in accordance with law (and see FJM v United Kingdom 2019 HLR 8) and that the Rent Exception is necessary and justified in rent-arrears cases and therefore also in any other case where there is an existing Order for Possession and Substantial Arrears.

65. The Defendants referred me to the fact that they had obtained advice from Shelter to the effect that the Rent Exception should be read in accordance with its literal wording, but did not add further submissions to the attempts which I

had made with Ms Barden to "reality test" her submissions, and which are effectively recorded in the following paragraphs.

Analysis

66. I have had some doubts as to whether I should engage on this 1998 Act analysis at all at this point, and especially as (1) the Government could have a real and proper interest in this matter as affecting important policy regarding measures enacted in consequence of the pandemic, and it might well be appropriate for it to be given a chance to be heard (2) the Defendants are in person without easy access to legal advice within a short time in relation to complex matters of law (3) this is connected with public law but does not involve the use of the usual judicial review process even though Ms Barden submits that it actually only engages private law rights. However, I have decided that it is technically a question of private law and that in view of the time left to 21 February 2021 it would be contrary to justice (and especially to the Claimant) not to determine it now.

67. I agree with Ms Barden that section 3, as explained by the case-law, does effectively require an analysis in stages of:

i) Is a Convention right being interfered with

ii) Is the interference "discriminatory" within the meaning of Article 14

iii) Is the discrimination justified

iv) If not then is it possible to read further words removing the relevant discrimination in to the Rent Exception in a way which is not incompatible with the legislation and its underlying "grain" or "thrust".

68. I agree that the first stage is satisfied. The January Regulations do interfere with the existing Order for Possession and associated rights and thus with the Claimant's A1P1 rights. I note that there is no general challenge to that interference, it being generally justified by the circumstances of the pandemic and the need for measures to protect the public.

69. I am more hesitant with regard to whether the Rent Exception in the January Regulations involves "discrimination" within the meaning of Article 14 when it arises merely from the basis of the original Order for Possession. The concept of its being "discriminatory" to provide that a Landlord who has obtained an Order based on rent arrears has certain rights in certain circumstances when a Landlord who has obtained an Order on other grounds will not have those rights in the same circumstances does not seem easily to be discrimination "on grounds… of other status" and especially where the specified classes of status are very different indeed from such a distinction. It may be that there would be more force in an argument from Ms Barden to the effect that the A1P1 interference with the Claimant's rights is not justified where there is no similarly extensive interference with Landlords who have Orders for Possession based on rent arrears, and thus without directly invoking Article 14 at all. Nevertheless, I am content to proceed on the assumption that there is relevant discrimination effected by the words used in and the natural construction of the Rent Exception.

70. The third stage involves the question of justification and (as does the fourth stage) includes a consideration of the reasoning and policy which does (or might) underlie the requirements set out in paragraph 2.3(b) for the Order for Possession to be based wholly or partly on rent arrears.

71. In the Rent Exception itself, and in Explanatory Note and in the Explanatory Memorandum, it was clearly stated that the Rent Exception applied where there were both Substantial Arrears and the Order for Possession had been made on a rent-arrears basis (even though they contain incorrect statements as to the Order having been made on a "six months" rent arrears basis and which is not a correct reading of the words used – the six months only applies to the present time, not to when the Order for Possession was made). However, in the Debates the Ministers used a standard-form paragraph which literally reads "The exemptions are as follows… for substantial rent arrears equivalent to six month's rent" and the wording "the order for possession was made wholly or partly on the grounds of" is lacking (it is used in describing the other Exceptions). On the other hand, this may well have been due to the fact that the Rent Exception (and the Order for Possession) would not have required the six months of rent arrears to have accrued as at the making of the Order for Possession (even Ground 8 only requires two months' arrears and it is a mandatory ground), and I do not regarding the language used by the Ministers (who were directing themselves to general explanation rather than a very specific technical analysis) as stating unambiguously that the intention was that there would only be a need for Substantial Arrears and nothing else.

72. The Explanatory Note is silent as to policy. The Explanatory Memorandum: in paragraph 7.6 says that the Exceptions apply where the "Government feel that the public health risk is sufficiently outweighed by the public interest" so that "the policy does not disproportionately negatively impact on landlords and enable them to re-let their properties to tenants in need. Although this means that some people will be evicted, restricting enforcement of evictions aside from the most egregious grounds will substantially decrease the volume of people being evicted…"; and then in paragraph 7.7 "The exemptions are for cases… where there is a need to uphold the integrity of the residential housing market by addressing the most egregious cases involving… substantial rent arrears. The measure therefore provides exemptions for… cases where the court is satisfied that the order for possession was made wholly or partly on the grounds of … rent arrears of at least six months…" Although that paragraph includes the error which was avoided in the Debates as to the Order having been based on six months' arrears, this is corrected in paragraph 7.8 where it was stated that "The Government believes it is proportionate to widen that [previous] exemption to cases where a possession order was granted on the grounds of rent arrears and where more than six months of rent is outstanding."

73. It seems to me that this expresses a policy of a need to balance public health risks and "the most egregious cases" and which involve situations which are thought to affect "the integrity of the residential housing market". When one looks at those paragraphs as a whole, it seems to me that the Government is there expressing the fact that the order for possession itself was made on the basis of rent arrears is part of what renders the case "egregious" and such as to

affect "the integrity of the residential housing market" when combined with there being a total of at least 6 months' rent arrears.

74. It is correct that in the Debates, Ministers did not express the underlying policy in quite those terms. They laid much more stress on the simple statement of the level of rent arrears. However, that was very much in the context of the original 9 months pre-pandemic and the reduction to 6 months at point of implementation of eviction. It seems to me that the Explanatory Memorandum is the detailed document and comprehensive statement of the underlying policy, both in terms of its nature and because it reflects the actual clear drafting of the Rent Exception as it appears in the January Regulations. There was no need for the Ministers to explain further in the Debate what was very clearly set out in paragraph 2.3(b).

75. Turning directly to the question of justification, and although I might have wished to see more authority in support, I am content to adopt Ms Barden's four staged approach.

76. The first is whether the difference is directed towards a legitimate aim which is sufficient to justify the difference. It seems to me that the policy is directed towards it being particularly both egregious and potentially capable of affecting the integrity of the housing market for tenants to being in Substantial Arrears where Orders for Possession have been made on rent-arrears grounds. In such cases there has been a judicial determination both of the fact of rent arrears (present, or possibly (Ground 11) persistently in the past) and which have themselves justified the making of an Order for Possession (either on Ground 8 in a situation regarded by Parliament as justifying a mandatory order

or (Grounds 10 and 11) where it was judicially held to be reasonable to make an order for possession). For the tenant then to continue, after having been ordered to give up possession due to non-payment of rent, to be allowed simply have Substantial Arrears continue to arise or remain can be properly seen to amount to a defiance of the law and the Order for Possession and to be both egregious and to affect the integrity of the residential market. It is simply building on the existing wrong.

77. It seems to me, though, to be legitimate to see an Order for Possession based on Section 21 to fall into a different category. The basis of such an Order is simply a matter of a Landlord's choice, for whatever reason (and the court will not have been concerned with the reason which is irrelevant) to deprive the Tenant of their home. It has no necessary connection with any rent arrears. However, it may not seem so egregious (although wrong) for a tenant in those circumstances (especially in the light of the pandemic and its effects) to cease paying rent and to allow Substantial Arrears to build up. That does not seem to me to potentially affect the integrity of the residential market in the same way or to the same extent.

78. Ms Barden, however, points out that there were substantial rent arrears at the time of the Order for Possession and judgment for them, and says it was simply a random event that the Application to Amend was not proceeded with. Nevertheless, it was the Claimant's choice (even if made with no ability to forsee either COVID or the Regulations) to proceed simply under Section 21. There was no judicial determination of any of the rent-arrears Grounds or the existence and validity of the NSP notice etc. The Defendants were told (and it

seems conceded on this basis) that the Claimant was simply exercising its Section 21 right.

79. Ms Barden also points out that Ground 11 technically only requires persistent rent arrears in the past and not any arrears as at the date of the Order for Possession. However, it seems to me that that is still in substance and in form a "rent-arrears" case in that the Tenant is losing their home due to failure to pay rent, and for them to then allow Substantial Arrears but to remain in possession is particularly "egregious" and apt to affect "the integrity of the residential property market".

80. In circumstances where the Government had powerful policy reasons to enact the January Regulations (and it is common-ground that that was so), it seems to me that the difference was directed towards a legitimate aim.

81. It also seems to me that the discriminatory measure is rationally connected to that aim. Although in some cases (as may have been the case here) the Landlord may have been motivated to engage in the Section 21 process by the fact of rent arrears, the difference is expressly based on the grounds for the Order for Possession.

82. I also do not think that any lesser measure could have been sensibly used to seek to achieve the legitimate aim. The rationale is the basis of the judicial decision to make the Order for Possession. The Rent Exception makes clear that the Order need only have been made "partly" on a rent-arrears basis. Just for there to have been rent-arrears (and which might have not in themselves justified an order for possession) does not seem to me enough to satisfy what I see as having been a legitimate policy.

83. It also seems to me that the result strikes a fair balance between the rights of the various individuals and the community. I bear in mind that Tenants such as the Defendants have their own Article 8 rights. Section 21, while 1998 Act compliant, is a somewhat draconian right and remedy as far as tenants are concerned, and in the unique circumstances of the pandemic, it seems to me to fair to restrict the Rent Exception to where the Order for Possession was made on grounds of rent-arrears. While Ms Barden says that the result is "random" as far as the Claimant and its pre-pandemic litigation and Order for Possession are concerned, in the substantial majority of cases (and cf. the analysis in Mathieson) the relevant Landlord will simply have chosen to use Section 21 and either not have had then rent arrears or have taken an informed choice not to rely upon them as a ground for possession (and the Claimant itself could have done so).

84. It therefore find that any discrimination is "justified" and thus that the January Regulations are not "not compliant with Convention Rights".

85. However, it seems to me sensible, in case I am wrong as to the above, to consider whether it is "possible" to read down the January Regulations in one or other of the ways in which Ms Barden contends.

86. On the basis of the authorities cited above, that is only "possible" within the meaning of section 3 if the change would not be inconsistent with the underlying thrust of the legislation i.e. would not involve the court transgressing into the legislative area which is the province of the Parliament and the body (here the Secretary of State for Health) to whom Parliament has granted the subordinate legislative power. On the other hand, it seems to me

that the court may take a more interventionist approach in general with subordinate legislation, where the grant by Parliament of the right to make it is, at least impliedly, on some basis that it will be Convention compliant, but that this situation is more of an intermediate situation where (1) the subordinate legislation has obtained, and has had to obtain, a positive approval from Parliament and (2) the subordinate legislation is a measure taken to deal with a national emergency and to protect and preserve public health.

87. I have come to the conclusion that what Ms Barden seeks is so inconsistent with the Rent Exception and the January Regulations, that it would not be "possible" in section 3 of the 1998 terms to read the Rent Exception in the way she contends, essentially for the following reasons:

i) The thrust of the January Regulations is to prohibit evictions. The Rent Exception is an exception to the general rule, and it is thus itself inconsistent with the general rule (and which is designed to preserve and promote public health in accordance with the underlying policy nd purpose of section 45C of the 1984 Act and which is the subordinate legislation making power). To introduce words which would serve to widen the Rent Exception would thus be inconsistent with the essence of the subordinate legislation and its justifying power which is restrictive in nature

ii) The January Regulations are short with a distinctly limited number of exceptions. To make a change of the nature for which Ms Barden contends would be a major one and not just a tinkering with a minor element

iii) The January Regulations are clear in their terms that the Rent Exception has two separate requirements being of (1) Substantial Arrears and (2) the Order for Possession having been made on a rent-arrears ground. It seems to me that Ms Barden's contention would effectively remove the second limb altogether. It is difficult to see why the Rent Exception should not simply apply purely because there were now Substantial Arrears whatever the basis of the relevant Order for Possession. It does not seem to me that this violence to the existing provision could be sufficiently ameliorated by restricting it to cases where there had been a judicial determination of the fact of some rent arrears, and which would immediately raise the question of "how much would do?" To do such violence to the wording and meaning would, it seems to me, go too far

iv) The intention (and policy) underlying the Rent Exception as requiring an Order for Possession on rent-arrears grounds was clearly stated not only in the January Regulations but also in the Explanatory Note and the Explanatory Memorandum. To introduce words to change (and potentially defeat) that intention is again going too far

v) If there was such a change, then it could well be asked whether the Secretary for State and/or Parliament would simply have preferred to remove the Rent Exception and simply leave the full prohibition on eviction in place in these circumstances. That would also have been Convention compliant even on Ms Barden's case. It seems to me that this is a situation canvassed in the citations from Connolly v DPP in

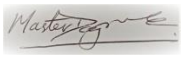
> Aviva where it is not possible to use section 3 to change the meaning of legislation where, if the apparent meaning is to be departed from, there would then exist a legislative choice as to by which route to then proceed.

88. Therefore, even if there is discrimination and such was not justified, I do not think that it would be possible to read in the words which the Claimant desires to appear in the Rent Exception both because that is against the thrust (or grain) of the legislation and would involve an impermissible venture of the court into what is the area of the legislator.

89. For all these reasons, I am not "satisfied" that the Rent Exception applies and will not make the declaration or grant the other relief sought by the Claimant.

90. I do add, of course, that the January Regulations will expire on 21 February 2021 as will their restrictions on evictions (unless renewed in some way), although it also seemed to me unjust simply to deprive the Claimant of a chance to have their case heard usefully by only hearing it after then. I have written a full judgment now because of the nature of the human rights challenge and the fact that it could be sought to be advanced in other cases, and because the outcome may well be seen by some (including the Claimant) as being unjust, in that it can be said that it results in tenants being able to simply stay in a property notwithstanding an Order for Possession, arrears of over £70,000 and their not paying anything (although accruing further personal liabilities on a continuing basis). However, the COVID pandemic is unprecedented and Parliament has charged the Secretary of State for Health with the task of devising measures to promote and preserve public health and

the powers to make regulations under section 45C of the 1984 Act. While they must act in accordance with law, it is for the Secretary of State to decide what measures are appropriate.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