Administrative discretion to adjourn possession claims where Universal Credit leads to serious rental arrears.

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Welfare/housing benefits (Universal Credit); housing haw (mandatory possession proceedings); administrative discretion; adjournments and stays.

Abstract

Systemic features as well as maladministration in the operation of the Universal Credit system expose tenants claiming support with their housing costs to an increased risk of serious rental arrears through no fault of their own. However, following *Matthews v North British Housing* [2004], tenants who are in receipt of support with their housing costs, and who face problems with decisions on entitlement or payment through no fault of their own, currently have no defence to claims for possession based on mandatory Ground 8. This steers mandatory possession claims towards summary possession hearings and outright (immediate) possession orders, and so operates to preclude the protections that would otherwise act as a safety net against this outcome. This discussion proposes that the combined effects of these measures justifies a reconsideration of *Matthews.* Underlying this proposal, it is argued that there are insufficient grounds for excluding administrative discretion to adjourn mandatory possession claims where arrears are attributable to public benefit maladministration, or other substantive wrongs, and that this blanket restriction goes beyond what is necessary to safeguard the rights of landlords. Following on from this, it identifies a broader range of substantive and procedural grounds for granting adjournments where serious rental arrears are attributable to maladministration, or other public law wrongs in the determination or payment of Universal Credit (housing element) awards. More broadly, rather than requiring amendments to the Housing Act 1988 or the Civil Procedure Rules, it is proposed that due process and procedural fairness may be bolstered by amending the Pre-Action Protocol and Practice Directions relating to possession claims.

Introduction

Tenants are now more likely to accrue serious rental arrears through no fault of their own, either through maladministration, or due to systemic features of Universal Credit ('UC') such as payment of housing costs in arrears and challenges associated with having decisions on entitlement

administratively reviewed or legally challenged. Consequently, tenants are now more likely to face possession claims based on Ground 8, Schedule 2 of the Housing Act 1988 (HA 1988), which provides that where a court is satisfied that a Ground 8 rental arrears threshold has been established, then it must grant the landlord a possession order. These provisions have been interpreted to preclude the administrative discretion of County Court judges to grant adjournments where serious rental arrears are attributable to maladministration in the payment of housing benefits.[1] The mandatory ground for possession under Ground 8 applies to assured tenancies (usually granted by housing associations) and assured shorthold tenancies (granted by private landlords). This discussion argues that this blanket restriction undermines the protection otherwise available to tenants under the rules and practice of civil procedure, as well as public, private and equality law. Indeed, possession proceedings may need to be adjourned or stayed in order to preserve the position of landlord and tenant pending the outcome of interrelated challenges.[2] This discussion argues that there are insufficient grounds for excluding administrative discretion when considering applications for adjournments in possession cases where arrears are attributable to public benefit maladministration. For example, it is suggested that the direct payment of benefits from a public benefits authority to a private or public/social landlord may give rise to defences based on private law doctrines of agency, contractual waiver and estoppel. There may also be equality law or debt relief issues that have to be factored into decision-making. The discussion concludes by querying whether the differing procedural rights of tenants in the private and public/social sectors, and the differing procedural obligations of private and public/social landlords (e.g. housing associations and private registered providers of social housing), go beyond what is necessary to safeguard the rights of landlords given that no such distinction is made under the HA 1988 itself.

Overview of the convergence of the Universal Credit system and mandatory possession proceedings under the Housing Act 1988

Design features of Universal Credit

UC incrementally replaces a range of 'legacy benefits'. For instance Housing Benefit is replaced by an award of UC (housing costs element) (hereon referred to as 'UC (HCE)').[3] This new system

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[1] *North British Housing Association v Matthews* [2004] EWCA Civ 1736.

[2] C. Hunter, S. Blandy, D. Cowan, J. Nixon, E. Hitchings, C. Pantazis, and S. Parr, *The Exercise of Judicial Discretion in Rent Arrears Cases* (Department for Constitutional Affairs: Research Series 6/05, October 2005). Law Commission, *Renting Homes: The Final Report Volume 1* (Law Com no 297, 2006) para. 2.49. Law Commission, *Renting Homes in Wales* (Law Com no 337, 2008) paras 2.24 and 3.38. N. Hickman, 'Seeking Grounds for Injustice', *the Law Society Gazette* (28 January 2005). C. Hunter, 'Ground 8 and Housing Associations' (2005) 8 (2) Journal of Housing Law, 13-14.

[3] Universal Credit Regulations 2013, SI 376, reg. 25.1, schedules 1 - 3.

is administered by the Department for Work and Pensions (DWP) under the Universal Credit Regulations.[4]

Accessibility

UC is administered online via an 'online journal', which is used for making claims, messaging, notifications and payment statements. On the claimants' side, this may pose a challenge or create problems for those in 'digital poverty', i.e. those who lack access to the digital infrastructure, or who lack the necessary 'digital skills', such as scanning and sending supporting evidence online and file management.[5] On the DWP's side, policy and organisational issues have led to systemic delays and errors, e.g. failing to respond to messages, failing to consider evidence, poor systems for internal communication.[6]

In contrast with Housing Benefit, UC (HCE) is paid directly to claimants by default. The goal of this is to make claimants responsible for managing their finances, including the onward payment of rent to their landlords, whether they be in the private sector or the public/social sector (e.g. housing associations, registered social landlords, private registered providers of social housing).[7] Alternative Payment Arrangements (APA) in the form of Managed Payments to Landlords (MPTL) may be set up for claimants who are unable to manage this standard process. The conditions for setting up an APA (MPTL) can be said to limit their availability and uptake. Namely, a claimant must have at least two months' worth of rental arrears, continually underpaid rent for at least two months resulting in at least one month's worth of rental arrears, and/or any Tier 1 or Tier 2 APA factors. These factors include drug/alcohol problems, learning difficulties, and mental health conditions.[8] An APA (MPTL) allows housing costs to be paid by the DWP directly to a landlord on behalf of a tenant. This may also be referred to as a 'landlord payment'.[9] An APA (MPTL) can be set up by the DWP where it has information that a tenant has fallen into

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[4] *ibid.*

[5] Child Poverty Action Group, *Rough Justice: Problems with monthly assessment of pay and circumstances in universal credit, and what can be done about them. Findings from CPAG's Early Warning System* (August 2018) 6 - 17.

[6] National Audit Office, *Rolling out Universal Credit* (HC 1123, 2018), 2.31 - 2.25, 4, 6 - 8, 31 - 33, Appendix 4.

[7] National Audit Office *ibid*, para 2.3. The issue of removing landlord payments has attracted controversy, see generally, P. Hickman, P. Kemp, K. Reeve, and Wilson, 'The impact of the direct payment of housing benefit: evidence from Great Britain' (2017) Housing Studies, 1 - 3. A. Irvine, P. Kemp, and K. Nice, *Direct Payment of Housing Benefit: What Do Claimants Think?* (Coventry: Chartered Institute of Housing, 2007). R. Peeters, 'Responsibilisation on government's terms: New welfare and the governance of responsibility and solidarity' (2013) Social Policy and Society, 12(4), 583–595. S.Trnka and C. Trundle, 'Competing responsibilities: Moving beyond neoliberal responsibilisation' (2014) Anthropological Forum, 24(2), 136–153. D. Garland, *The Culture of Control* (Oxford University Press, 2001). Institute for Public Policy Research, *Universal Credit White Paper: Response of IPPR* (2010). N. Keohane and R. Shorthouse, *Sink or Swim: The impact of Universal Credit* (London: The Social Market Foundation, 2012).

[8] Department for Work and Pensions, *Alternative Pay Arrangements Guidance* (updated 13 May 2020), Section 5, Annex A: factors to consider for Alternative Payment Arrangements.

[9] The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013, SI No.380, regs 47 & 58. Hickman, n 7 above, 2 - 3.

qualifying rental arrears,[10] or otherwise by a claimant, their representative, or their landlord.[11] Landlords can also apply for deductions from a claimant's UC to repay existing rent arrears.[12] It is at the DWP's discretion whether to set-up an APA, and there is no right of appeal against a DWP refusal to set one up. However, in exercising its discretion, the DWP must act in a fair and reasonable manner. 'More Frequent Payment' APAs are also available for tenants who find it difficult to budget on a monthly basis, and so may have UC paid on a fortnightly or a weekly basis instead.

Under UC, the DWP no longer discusses claims with third party representatives (e.g. legal advisers) based on implied consent. Rather, explicit consent for the DWP to disclose information is now required from a claimant. As this pertains to disclosure for a specific request, or for a given monthly assessment period, it does not apply on an ongoing basis.[13] As such, where there are benefits issues downstream that cause knock-on problems with rental arrears, legal advisers may face delays or obstacles in receiving relevant information on behalf of their clients where the DWP has doubts concerning whether explicit consent has been given for that particular assessment period or issue.[14] In turn, this may diminish the ability of legal advisers to provide the courts with important information relating to benefits issues underlying rental arrears. For example, information relating to the establishment of an APA (MPTL), or applications for deductions from a claimant's UC account to repay existing rent arrears.[15]

Payment of Universal Credit (housing element): payment in arrears and delays

A core design feature of UC is that payments for new claims are not made for at least five weeks. This comprises a four-week assessment period followed by a further seven days to process the first payment.[16] Many claimants face delays beyond the five-week assessment period due to administrative failures or errors on the part of the DWP. [17] Following on from the initial assessment period, UC is paid monthly in arrears as assessment periods run per calendar month from the date that UC is first awarded. This means that a claimant's income and circumstances are assessed at the end of each calendar month in order to determine their entitlement to UC based on their monthly earnings, with the payment being made a week later in arrears.[18]

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[10] Department for Work and Pensions, *Alternative Pay Arrangements Guidance*, n 8 above, Annex A.
[11] Department for Work and Pensions, *Universal Credit and rented housing: guide for landlords* (updated 13 May 2020), para 8.3.
[12] *ibid* para 8.4.
[13] Department for Work and Pensions, *Guidance: Universal Credit consent and disclosure of information* (5 March 2018).
[14] National Audit Office, n 6 above, para 2.33.
[15] *ibid* paras 2.29 - 2.30. DWP n 11 above.
[16] National Audit Office, *ibid,* 70 & Appendix 4.
[17] Department for Work and Pensions, *Universal Credit Statistical Ad Hoc: Length of Payment Delays for New Claims to Universal Credit* (July 2018). Department for Work and Pensions, *Official Statistics: Universal Credit Statistics: 29 April 2013 to 9 July 2020* (11 August 2020) National Audit Office n 6 above, paras 2.12 - 2.25.
[18] Child Poverty Action Group, n 5 above, chapters 1 - 4.

Challenging DWP procedures and decision-making

Claimants cannot make a statutory appeal of a decision to reduce, refuse or stop a UC claim until they have requested the DWP to review the decision by way of mandatory consideration and have received a mandatory reconsideration notice. This administrative review process may be subject to further delays caused by the DWP ignoring or overlooking requests, or by failing to give a mandatory reconsideration notice (decision) or reasons for a decision.[19]

The convergence of Universal Credit with possession proceedings based on Ground 8 HA 1988

The systemic challenges that tenants face with entitlement to and payment of UC (HCE) exposes them to significant risks of serious rental arrears and increased risk of eviction.[20] Where this results in private or public landlords issuing possession claims based on mandatory Ground 8 of the HA 1988, rather than encouraging settlement and resolution, County Court judges are compelled to grant immediate possession orders on the date fixed for hearing.[21] This section briefly outlines the main features of the HA 1988 in relation to mandatory possession proceedings on Ground 8, and the way in which they have been interpreted.

The Court of Appeal in *Matthews v North British Housing* acknowledged that there is no express or absolute rule against exercising the discretion to adjourn in possession claims based on Ground 8 before a court is satisfied that the landlord is entitled to possession. Nevertheless, it concluded that it is not a legitimate exercise of discretion to adjourn possession hearings based on Ground 8 where rental arrears are attributable to housing benefit maladministration and the purpose of adjourning is to allow time for resolution.[22] Dyson LJ (as he then was) found that adjourning for the 'sole purpose [...] to await a future event which will defeat a claim', namely resolving underlying benefits issues in order to bring rental arrears below a Ground 8 threshold at which a possession order is mandatory, serves to defeat the policy of the HA 1988, namely to prioritise landlords where they base possession claims on mandatory grounds.[23] Ultimately, it was held that adjourning on this basis did not fall within following bases that were deemed legitimate, and which were implied into the HA 1988, notwithstanding the issue that their purpose and/or effect may render mandatory possession claims under section 9 paragraph (6) and Schedule 2 Ground 8 defeasible: (i) legitimate case management reasons, e.g. over listing or non-availability of judges; (ii) substantive defences that have a reasonable prospect success, e.g. where a tenant seeks to off-set the cost of repairs against rent, where a tenant seeks to judicially review a public

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[19] Child Poverty Action Group n 5 above, 6 - 17.
[20] Hickman *et al* n 7 above, sections 6 - 9.
[21] National Audit Office n 6 above, paras 2.31 - 2.25, Appendix 4.
[22] *Matthews* [2004] n 1 above, [13] [17].
[23] *ibid,* [13] [17].

landlord's decision to evict, e.g. abuse of power,[24] or where a tenant seeks to rely on a conditional payment, accord or satisfaction or estoppel;[25] or (iii) where the existence of exceptional circumstances means that 'refusal of an adjournment would be considered to be outrageously unjust by any fair minded person'.[26] Dyson LJ recognised that this interpretation of the HA 1988 is 'draconian', given that the granting of possession orders have drastic and generally irreversible consequences for tenants who are not at fault.

That said, that the conclusion in *Matthews* and the reasoning behind the principle on which it is based are problematic. The HA 1988 does not specifically provide for the judicial management of interrelated claims before a court is at the stage where it can be satisfied that a landlord is entitled to a possession order. Despite this, the effect of the Court of Appeal's decision is to cut down protections that may otherwise be available to tenants. The HA 1988, *inter alia*, sets out the general procedural stages and substantive requirements to end leases before they have expired. For instance, before a court can consider a possession claim, a valid notice must be served on a tenant,[27] and generally, the relevant notice period from service to commencement of possession proceedings must be observed by the landlord.[28] Commencement begins by a landlord issuing a possession claim, which must be based on one or more grounds listed under Schedule 2 Part 1 or 2.[29] From there on, the HA 1988 sets out the various endpoints, or grounds for granting possession orders. For instance, a court must order possession where it is satisfied that a landlord has demonstrated a Ground 8 rental arrears threshold, both at the date of service of the notice, and at the date of the hearing. Ground 8 thresholds include at least 8 weeks' arrears for weekly or fortnightly tenancies, or at least two months' arrears for monthly tenancies.[30]

On hearing a possession claim, courts have extended discretion to adjourn possession proceedings for such a period or periods as they think fit, to stay or suspend the execution of a possession order, or postpone the date of possession. This extended discretion applies in relation to Grounds 9-14 under Part 2, where the burden of proof is on a landlord to demonstrate that it is reasonable for the court to make a possession order.[31] This extended discretion to consider the reasonableness of making a possession order does not apply in relation to Part 1 of Schedule 2, where possession must be ordered '*if the court is satisfied* that the landlord is entitled to possession' on Grounds 1-8' (emphasis added to this conditional clause).[32] That said, administrative discretion to adjourn for such a period as a court thinks fit still applies *before* a court is satisfied that the

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[24] *Manchester City Council v Cochrane* [1999] EWCA Civ 1967.
[25] *Coltrane v Day* [2003) EWCA Civ 342.
[26] *Matthews* n 1 above [32].
[27] Housing Act 1988, s.8 (1) - (2).
[28] Housing Act 1988 s. 8 para (1) (a) (b). N.B. This discussion does not consider the temporary changes made under The Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2020 (S.I. 2020/914).
[29] Housing Act 1988, sections 5 and 7.
[30] Housing Act 1988, Schedule 2 Part 1 Ground 8 (a) - (d). S 9 para (6), schedule 2, Part 2 Grounds 10 and 11. Civil Evidence Act 1995, s.9. M. Walsh, 'Property: Ground Offensive', New Law Journal (2009) 159, 339.
[31] Housing Act 1988 s.9 paras (1) - (2).
[32] Housing Act 1988 s.9 para (6).

landlord has demonstrated any of the grounds in Part 1 of Schedule 2. *Matthews* affirms that a court cannot be satisfied that a landlord is entitled to possession before the date of a hearing, and that this is the date when the claim is heard, as opposed to the date fixed for the hearing. Therefore, no hearing takes place if the date fixed for the hearing is adjourned or stayed. The significance of this is that a landlord is not necessarily entitled to a possession order at the date fixed for hearing. In other words, there is no absolute right to an outright (immediate) possession order there and then.[33]

As discussed below, this permits case management directions to be made prior to an adjourned possession hearing. Importantly, this allows for the outcome of interrelated claims to have a bearing on possession claims. Ultimately, this enables a court to be in a position where it can be satisfied definitively, in law and/or fact, that a landlord is entitled to a possession order under Ground 8 HA 1988. This is significant given that the effect of a possession order is generally irreversible once executed. *Matthews* also clarified that the point at which a court is satisfied that it must order possession under the HA 1988 is when its judgment is perfected by a sealed order of the court.[34] Therefore, following a hearing, a judgment may be reserved or corrected at any time before a court order is perfected.[35] *Matthews* thus acknowledged that a mandatory possession claim does not connote a requirement for an immediate possession order on the date fixed for trial, or the hearing itself, if it is not satisfied that factors relating to a landlord's entitlement have been fully resolved or determined. Conceivably, this allows for time, even following a hearing, for any outstanding issues and arguments to be considered before a judgment is perfected. Despite this, where public maladministration in the determination or payment of benefits leads to a possession claim based on Ground 8, then the effect of *Matthews* is to compel a County Court to perform a summary eviction at the date fixed for hearing. As discussed below, this is problematic as it prevents the prior resolution of interrelated and material claims, regardless of their individual merits.

Matthews, the meaning of maladministration, and other public law wrongs

If the main goal of the Court of Appeal in *Matthews* was to forestall judicial divergence by imposing a blanket restriction on adjournments in cases where arrears are attributable to 'maladministration or other unjustified failures' on the part of public benefits authorities, then this is undermined in the following ways: firstly, the absence of a clear and properly reasoned approach to the concept of maladministration,[36] secondly, the narrow focus on maladministration given that maladministrative decision-making or procedures may overlap with, or fall exclusively within other categories of wrongs that are susceptible to judicial review or statutory appeal, and thirdly, the failure to consider properly the implications arising out of the common type of scenario

[33] *Matthews* n 1 above, [9]
[34] CPR 40.2(2) (b).
[35] *Matthews* n 1 above, [36]. See also *Stewart v Engel* [2000] 1 WLR 2268.
[36] *Matthews, ibid*, [1].

whereby there are alleged procedural defects in relation to the direct payment of rent to landlords on behalf of tenants by a benefits authority, as the Court of Appeal has done elsewhere.[37] It is suggested that these oversights make it difficult for the courts to fulfil their duty to actively manage individual possession cases that give rise to interrelated issues, in public, private or equality law.

The concepts of 'maladministration *or* other unjustified failures' (emphasis added) are central to the conclusion in *Matthews* and the principle on which it turns. Accordingly, the construction given to these words is an important question of law which was handled in a rather imprecise and incomplete fashion as the Court did not elucidate the meaning or scope of 'maladministration' or 'other unjustified failures'[38] If 'other unjustified failures' was used conjunctively with 'maladministration', then the restriction would apply to arrears that are attributable to what amounts to various forms of service failure.[39] However, if the word 'or' was used as a disjunctive conjunction, then there is the danger that 'other justified failures' is used to cover wrongs that are actionable by way of judicial review of statutory appeal. Such a construction should be regarded as erroneous given that 'maladministration comes in many guises, and while there is a substantial element of overlap between maladministration and unlawful conduct [...] *they are not synonymous*' (emphasis added).[40] In view of this prior assessment by Lord Justice Henry, it is problematic that the Court of Appeal in *Matthews* did not provide, at the very least, a general statement of principle concerning the meaning and scope of the concept of maladministration in order to provide legal certainty for the lower courts when having to determine whether all forms of maladministration are caught by the blanket restriction, even where they are severe, and/or where they overlap with other substantive wrongs. Furthermore, the Court of Appeal in *Matthews* produced no authority that specifically precludes the lower courts from adjourning housing possession claims in order to resolve or determine interrelated claims based on maladministration, or other substantive wrongs.

This is not to argue that the Court of Appeal in *Matthews* erred by failing to provide a definitive or exhaustive or definition of the concept of maladministration. Such an approach is neither just nor convenient as it could 'work to the disadvantage individual[s] [...] with justified grievances which [do] not fit within a given definition'.[41] Rather, it is argued that the Court failed to have proper regard to any previous judicial consideration of the meaning and scope of the concept of maladministration, and in doing so, it failed to delineate the administrative or procedural jurisdiction of the lower courts with sufficient clarity. This is problematic where lower courts are called on to manage interrelated claims, such as housing possession claims that are bound up with claims for administrative redress, challenges by way of judicial review or statutory appeal, or interrelated claims based on private law, equality law, or human rights law.

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[37] *Waveney District Council v Jones* [1999] EWCA Civ.

[38] *R v Local Commissioner for Administration for the North and East Area of England ex parte Bradford Metropolitan City Council* [1979] 1 QB 287, 311 [H], (Lord Denning).

[39] *R (Attwood) v Health Service Commissioner* [2008] EWHC (Admin), [27] [29] (Justice Burnett).

[40] *R v Local Commissioner for Administration in North and North East England ex p. Liverpool City Council* [2000] EWCA Civ 54, [2001] 3 All ER 462, [17] (Lord Justice Henry).

[41] W.K. Reid, *Annual Report, 1993* (16 March 1994).

Previous judicial consideration of the concept of maladministration indicates that whilst this concept is 'clearly open-ended', it may nevertheless be said to cover 'the *manner* in which a decision is reached or discretion exercised' (emphasis added), but excludes 'the merits of the decision itself or of the discretion itself' where they have been 'properly exercised'. Examples of maladministration which have been given Parliamentary and judicial approval include 'bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness',[42] as well as 'faulty administration' or 'inefficient or improper management of affairs, [especially] public affairs.'[43] Importantly, the concept of maladministration is not concerned with 'the nature, quality or reasonableness of a decision',[44] and is not the same as unlawfulness or illegality.[45]

Accordingly, the following general principles are advanced: maladministration concerns the manner or process of decision-making, rather than its merits, and so generally covers forms of administrative action or inaction based on or influenced by faulty, improper, or inefficient considerations of conduct;[46] the proper exercise of administrative decision-making or discretion does not constitute maladministration where the manner in which the decision was taken cannot be faulted; maladministration should not be interpreted to include actionable public law wrongs, such as illegality, irrationality or unreasonableness, and procedural propriety;[47] maladministration may overlap with public law wrongs, but maladministration is usually construed in a broader fashion than public law wrongs to include considerations of policy, best practice and injustice; the Court of Appeal in *Matthews* did not sufficiently define the concept of maladministration in order to disentangle it from other public law wrongs and did not set out authority that precludes County Courts from adjourning possession claims where arrears are attributable to maladministration.

As such, it may be said that three of the core design features of the UC system that have increased the risk of tenants falling into arrears through no fault of their own, namely the five week assessment period, direct payments to tenants by default, and the continuous payment in arrears following each monthly assessment period do not constitute maladministration (or at least have yet to be characterised as such). Rather they are administrative features of the UC system functioning as it has been designed to function. However, it is important to stress both here, and below, that the government responsible for designing and implementing the UC system did not carry out a proper impact assessment of certain features of the new UC system. Where these design features are administered in a maladministrative manner and cause tenants to fall into serious rental

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[42] *Ex parte Bradford MCC* n 38 above, 311 [H]: For what has been referred to as the 'Crossman Catalogue' of maladministration, see Hansard (734 H.C. Deb., col. 51, 18 October 1966).

[43] *Ex parte Bradford MCC, ibid,* 314 (Lord Justice Eveleigh).

[44] *R v Local Commissioner for Administration ex parte Eastleigh Borough Council* [1988] QB 855, 863 [E] (Lord Donaldson MR).

[45] *R v Parliamentary Commissioner for Administration ex parte Balchin* [1996] EWHC Admin 152, [15] (Justice Sedley).

[46] K. Wheare, *Maladministration and its Remedies* (Stevens 1973). B. Frank. 'The Ombudsman and Human Rights Revisited', (1976) Israel Yearbook on Human Rights 6, 132. G. Caiden, 'What Really is Public Maladministration' (1991) Public Administration Review 51(6), 7. J. Halford, 'It's Public Law, But Not As We Know It: Understanding and Making Effective Use of Ombudsman Schemes', (2009) Judicial Review, 84 - 88.

[47] *Council of Service Unions v Minister of Civil Service* [1985] AC 374, 410 (Lord Diplock).

arrears, then following *Matthews*, County Court judges are seemingly unable to adjourn possession claims to allow for forms of administrative, and following on from this, substantive redress, despite the fact that this procedural jurisdiction is provided for under the rules and practice of civil proceedings.

That said, given that maladministration is not synonymous with public law wrongs, it is proposed below that it remains open to the courts to adjourn or stay possession claims where arrears are attributable to public law wrongs such as illegality, irrationality and procedural impropriety. Moreover, stays or adjournments may be granted to allow tenants to pursue interrelated challenges under equality and/or human rights law.[48] To proceed with granting immediate (outright) possession orders prior to the outcome of such interrelated claims risks causing prejudice to tenants who are in arrears through no fault of their own, but where, for example, it is subsequently found that -

- The DWP/SSWP has implemented regulations or policies that are perverse or irrational.[49]
- The DWP/SSWP has come to a decision which is unlawful, perverse or irrational.
- The DWP/SSWP is in breach of its statutory duties, e.g. the Public Sector Equality Duty (PSED) under section 149 Equality Act 2010 and/or section 6 paragraph (1) Human Rights Act 1998. Discriminatory decisions may not merely be regarded as maladministrative, but may also be actionable in public law, in particular where they are incompatible with Articles 8 and 14 of the ECHR, as seen in *R (TP & AR No.3) v SSWP* [2022] EWHC 123 (Admin), where the failure to provide transitional relief for severely disabled people who naturally migrated to UC and suddenly lost legacy benefits, e.g. by moving to a different local authority areas, amounted to unlawful discrimination. This was because they were treated differently from other severely disabled people with the same needs, but who did not incur such a 'trigger event' requiring natural migration to UC, e.g. moving within a local authority area, and there was no reasonable justification given for this difference in treatment of people with the same needs.
- The DWP has failed to follow the UC Regulations, its own policy, or its own procedure in relation to an individual or a class of people. Whilst this may be regarded as

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[48] *Wandsworth London Borough Council v Winder* [1985] AC 374. See also, *Clarke v University of Lincolnshire and Humberside* [2000] 1 WLR 1988. In particular, where tenants raise defences to possession in County Court that are based on the principle of legality, the proceedings are amenable to judicial review: *R (Weaver) v London Quadrant Housing Trust* [2009] EWCA Civ 587.

[49] *R (TD & Ors) v Secretary of State for Work and Pensions* [2020] EWCA Civ 618. *SSWP v Johnson and others* [2020] EWCA Civ 778: where it was found that the DWP's interpretation of the UC Regulations was wrong, and that its refusal to change its calculation methods led to nonsensical situations and errors that led to severe cash flow problems for UC claimants resulting in rental arrears. Generally, the test for whether a public body has acted rationally in the exercise of its power is whether the decision was 'one which no reasonable person would consider justifiable': *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] 1 AC 367, [55].

maladministration, it nevertheless overlaps with procedural impropriety that is actionable in public law. [50]

- The DWP has failed to make findings of fact, has taken into account irrelevant factors, or has ignored relevant factors.[51] Whilst such actions may constitute maladministration, they may also be actionable public law wrongs, for instance, where there are failures to perform a due inquiry or take account of relevant considerations.[52]
- The DWP has failed to make a decision, or provide adequate reasons for its decision. Whilst an unreasoned decision is maladministrative, it may nevertheless overlap with procedural impropriety and unfairness which are actionable in public law.[53]
- The DWP has failed to make decisions or to review decisions within a reasonable time. Whilst this may generally be regarded as maladministration, excessive delay may nevertheless be regarded as unlawful or irrational and so actionable in public law where it undermines the purpose for which statutory powers have been granted.[54]
- The DWP has fettered its discretion, i.e. it has prevented itself from properly considering the exercise of its discretion in individual cases.[55] Whilst this may be maladministrative, it can also be an actionable ground for judicial review, e.g. where a policy is exercised in an overly rigid manner,[56] or where the threshold for exceptional circumstances is set so high that it effectively operates as a blanket policy.[57]
- The DWP has defeated, without good reason, the legitimate expectations of procedural or substantive rights that it has created in UC claimants, for instance where it has stated that it will establish rental payments direct to landlords on behalf of tenants.[58]

As will be discussed below, the blanket restriction on administrative discretion is problematic not only in cases where rental arrears are attributable to forms of action or inaction that are otherwise

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[50] *R v Commissioner for Local Administration ex parte Blakey* (1994) COD 345. *R v Local Commissioner for Administration in North and North East England ex parte Liverpool City Council* [2000] EWCA Civ 54. Halford, n 46 above, para.18.

[51] National Audit Office, n 6 above.

[52] Halford, n 46 above, para 22.

[53] *ibid,* para. 21.

[54] *R v Tower Hamlets London Borough Council ex parte Khalique* (1994) 26 HLR 517, 522. For instance, a public body may be deemed to have acted irrationally where it has no rational means of prioritising competing demands on its resources and taking into account relevant considerations in any prioritisation exercise: *R v North West Lancashire Health Authority ex parte A* [2000] 1 WLR 977, 991[D]. Halford, n 46 above, para.19. *R (C&W) v SSWP* [2015] EWHC 1607 (Admin): there is no specified timescale in which the DWP is required to respond to a request for a mandatory reconsideration or give a mandatory reconsideration notice, but the SSWP/DWP has a duty to fulfil these functions within a reasonable time. What constitutes a reasonable time depends on all the circumstances of the case, including the impact that the delay has had on the claimant.

[55] *British Oxygen Co Ltd v Minister of Technology* [1970] 3 WLR 488, [1971] AC 610, [1970] UKHL 4, [1969] 2 WLR 892, [1970] 3 All ER 165.

[56] *R (Ann Marie Rogers) v Swindon Primary Care Trust* [2006] EWCA Civ 392, [62].

[57] *R v Warwickshire County Council*, *ex parte Collymore* [1995] ELR 217.

[58] *R (Weaver) v London and Quadrant Housing Trust* [2008] EWHC 1277 (Admin), [2009] 1 All ER 17 [87]: for there to be a legitimate expectation there must be a 'clear, unambiguous and unqualified promise'.

susceptible to interrelated public law challenges, but also where they are amenable to substantive and procedural challenges by way of statutory appeal, and arguably, even mandatory reconsideration. As such, it will be suggested below that according to the rules and practice of civil proceedings, courts have administrative and procedural jurisdiction to adjourn possession claims in order to allow tenants to pursue interrelated challenges, not only by way of judicial review and statutory appeal, but also administrative redress by way of mandatory reconsideration which is now a prerequisite for substantive and procedural challenges.

By introducing a blanket restriction that operates to cut down such protections for tenants now claiming Universal Credit (HCE), the conclusion in *Matthews* should be reconsidered, not only on the basis of the flaws with the reasoning underlying the conclusion, as outlined below, but also in view of the supervening systemic changes that converge with this conclusion, and render it an unfair and disproportionate blanket restriction on the administrative/procedural jurisdiction of County Courts.[59]

Supervening features of the UC system that call for a reconsideration of Matthews

Maladministration was found to be frequent and widespread under 'legacy benefits' such as Housing Benefit, just as it is increasingly becoming apparent under the UC system. However it is suggested that the systemic features of the UC have increased the scope and severity of maladministration, and unlawful conduct, in that when combined with the conclusion in *Matthews*, the effect is to weaken, and in places remove, the safety net against rental arrears and resultant evictions.[60]

In relation to errors, in 2019-20 the DWP underpayment rate was 1.1% and the overpayment rate was 9.4%.[61] This was the highest recorded rate of overpayment for any benefit

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[59] CPR 54.1(1). The Civil Legal Aid (Merits Criteria) Regulations 2013, SI No 104, regs 6 - 8, 43, 53(a) - (b), 56(2)(a).

[60] *Matthews*, n 1 above, [2] [32]. L. Phelps and M. Carter, *Possession action - the last resort? CAB evidence on court action by social landlords to recover rent arrears* (Citizens Advice, 25 February 2003). G. Peaker, 'What do we do with a Problem like Ground 8' *Nearly Legal: Housing Law News and Comment* (28 December 2006). P. Butler, 'DWP finally acts to end housing benefit 'maladministration' scandal', *The Guardian* (6 October 2015): claimants losing Jobseeker's Allowance and incorrectly having HB payments discontinued, e.g. where DWP computer systems wrongly informed local authority housing departments that a claimant's jobseeker benefit had been cancelled, when it had been temporarily suspended, and sanctioned claimant's not being informed that their housing benefit had been cancelled. Homeless Link, *Understanding the link between Jobseeker's Allowance and Housing Benefit being stopped*, (2015). M. Oakley, *Independent review of the operation of Jobseeker's Allowance sanctions validated by the Jobseekers Act 2013* (July 2014): 'No matter what system of social security is in place, if it is communicated poorly, if claimants do not understand the system and their responsibilities, and if they are not empowered to challenge decisions they believe to be incorrect and seek redress, then it will not fulfil its purpose. It will be neither fair nor effective.' Homeless Link, *A High Cost to Pay - The impact of benefits sanctions on homeless people* (2013).

[61] National Audit Office, *Department for Work & Pensions: Universal Credit: getting to first payment*, (HC 376, 2020), 39, 41: DWP data from 2019-20 indicates that around one fifth (22%) of fraud and error occurs at the new claim phase, a higher proportion than for the other benefits. Reasons include the DWP not being informed of, not accurately recording, or failing to act on a change in the claimant's circumstances. The DWP has estimated that the total monetary value of fraud and error, arising from both new claims and changes in circumstances, as 10.5% of all Universal Credit payments in 2019-20. This was made up of 9.4% (£1,730 million) overpayments and 1.1% (£200 million) of underpayments. Universal Credit has the highest rate of fraud and error of any benefit and the highest ever

apart from Tax Credits in 2003-4 when 9.7% of payments were overpaid.[62] Where overpayments are made, then the DWP can recover them through deductions to UC that range from a minimum of 10% of UC standard allowance (which is double the 5% deduction of the personal allowance allowed under Housing Benefit), and up to 20%.

In terms of payment methods, UC seeks to promote behavioural change in the form of 'responsibilisation', whereby rent is paid monthly in arrears directly to tenants, who then have the responsibility of managing their finances, including rental payments to their landlord. Legacy benefits were usually paid weekly, fortnightly or four-weekly, e.g. Housing Benefit, which was usually paid directly to the landlord by local authorities. Direct payments to tenants are associated with many rent accounts going into arrears, and in some instances this is attributable to tenants not being able to manage single monthly UC payments. Where this is the case, the DWP may set up an APA in the form of a MPTL, and these have been associated with a significant reduction in rental arrears.[63] However, the criteria for APAs are more restrictive under UC compared with legacy benefits. Under Housing Benefit, local authorities could use their discretion to make landlord payments where they assessed that this would help the tenant obtain or keep a tenancy. Under UC, the DWP may set-up landlord payments under an APA where the tenant is either in two months' rental arrears, or where Tier 1 and Tier 2 APA factors apply**.** Additionally, the minimum five week assessment period to process and pay UC claims is longer than the minimum for each of the benefits that it replaces,[64] and furthermore, the benefits that UC replaces were usually paid as soon as they were processed. Even though 'legacy benefits' were not always paid on time, they had processing targets of between five and twenty two days.[65] Thus under legacy

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recorded rate of overpayment for any benefit other than Tax Credits (administered by HM Revenue & Customs), which peaked at 9.7% in 2003-04. Errors in payment are attributable to the DWP lacking knowledge, underestimating, or finding it hard to verify claimants' capital (2.8%), earnings and employment income (2.4%), housing costs (1.2%), and whether or not conditions of entitlement have been met (0.4% and 1% respectively). In relation to official error in excluding entitlement, the NAO found that standards were not met in 45% of case managers' work that was tested, and that no targets are in place in relation to processing UC claims accurately. Within the estimated 10.5% total fraud and error rate: 1.8% was official error, when a benefit is paid incorrectly due to inaction, delay or a mistaken assessment by the Department, and 1.1% was claimant error, when claimants make mistakes with no fraudulent intent, for example if they provide inaccurate or incomplete information. The NAO notes that the scope for error has increased because of how the DWP assesses claimants' monthly income compared with legacy benefits, e.g. Tax Credits. Namely, under UC, the DWP does not make provisional awards and then calculate entitlement at the end of the financial year, but rather makes a monthly assessment of claimants' income, and then makes a monthly adjustment where there is any change in income.

[62] National Audit Office, *ibid*, 11.

[63] P. Hunter, *Falling Behind – The Impact of Universal Credit on Rent Arrears for Council Tenants in London,* (The Smith Institute, 2020), 8, 25-26. See also I. Wilson, 'Direct payment of housing benefit: responsibilisation at what cost to landlords?' (2019) 19(4) International Journal of Housing Policy, 566-587

[64] National Audit Office, n 61 above, 22.

[65] *ibid,* 8: processing targets of five days for Income Support and 22 days for Tax Credits. The NAO notes that UC covers a range of benefits and so processing claims may involve multiple checks, e.g. identity checks apply to all claimants, while others, such as the Habitual Residency Test, only apply to specific groups. Some checks involve third parties, such as landlords verifying claimants' housing costs. Failure to complete certain processes results in the whole claim not being paid. This can include, for example, failure to verify the claimant's identity or UK residency, or the claimant not signing a claimant commitment. Failure to verify specific costs, such as housing costs, results in that specific element of the claim not being paid.

benefits, claimants could receive payment of a range of separate entitlements, including support with housing costs, more quickly where they provided all of the correct information in a timely manner. [66] As will be discussed below, compared with the two week assessment period administered by local authorities under the Housing Benefit system, the five week assessment period administered by the DWP under the UC system creates cash-flow losses for tenants which increases the risk of no-fault rental arrears and mandatory possession claims. Compared with Housing Benefit, the UC assessment period has effectively reduced the amount of available time in which any benefits issues relating to entitlement or payment may be resolved before rental arrears reach the Ground 8 threshold in relation to weekly, fortnightly and monthly tenancies, i.e. from six to three weeks. To try and mitigate the five week assessment period, claimants may try to claim Housing Benefit run-ons for two weeks, or they may try to claim advance payments of up to 100% of expected UC to tie them over until first payment. However, advance payments have to be repaid, usually through deductions. A knock-on consequence of this is that some UC claimants have been found to struggle to pay off arrears given that deductions can range from 10% to 20% of the standard UC allowance.[67]

The effects of the UC waiting period are compounded in cases where there are delays beyond the five week assessment period. Although the overall percentage of claims that the DWP has paid late has fallen, a large number of claimants continue to be affected. Indeed, the number of people paid late has increased with the increase in UC claimants. In 2019, 312,000 claimants did not receive payments in full, and on time, and these claimants faced an average delay of three weeks beyond the five week assessment period. Approximately 105,000 new claims waited around eleven weeks or more for full payment.[68]

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[66] *Ibid*, 22.

[67] National Audit Office, n 61 above, 24: NAO analysis of DWP data from January to September 2019 shows that, excluding sanctions and fraud penalties, 61% of new claims due for payment had deductions applied to their first payment, rising to 70% by the fourth payment. NAO notes that a higher proportion of claimants with low incomes or a disability (or a disabled child) were repaying advances and other debts. This suggests that they are more likely to claim an advance and join Universal Credit with existing debt. These groups are therefore more likely to have deductions in place. For example: 80% of claims from low-income households had a deduction in place in the first assessment period, compared with 61% of all claims, and 67% of claims that include a limited capability for work element and 70% of claims which included the disabled child element had deductions in place. The scale of deductions can be significant in the context of the core amounts of money that the DWP considers claimants need to live on (the standard allowance). A claimant's standard allowance is designed to cover their food, bills and daily living costs. Claimants with no additional income from employment must also cover any shortfall in their rent created by the cap on the local housing allowance.

[68] National Audit Office, n 61 above, 10, 35, 45-46: in 2017, 113,000 claims were not paid in full and on time, out of 162,000. This increased to 226,000 claims in 2018 and 312,000 claims in 2019. Claimants with claims due for payment in 2019, who were not paid on time faced average delays of three weeks in addition to the five-week wait. Some 6% of households (105,000 new claims) waited around 11 weeks or more for full payment. People of certain age groups and family types are more likely to have their claims paid late. DWP data on claims due for payment between January 2017 and August 2019 showed that payment in full and on time decreased as the age of the claimant increased. 82% of claimants aged 25–29 were paid in full and on time, compared with 74% of claimants aged 60–65. 82% of claims for single claimants were paid in full and on time compared with 72% for couples. Disabled people are also less likely to be paid on time. In March 2019, 75% of claims from people receiving Personal Independence Payment (PIP) or Disability Living Allowance (DLA) were paid in full and on time, compared with 82% of claims not in receipt of PIP or DLA. The NAO noted that some of those paid late were waiting for processes to be completed in other areas of the

Finally, in contrast with those challenging the Housing Benefit decisions of local authorities by way of direct appeal to a First-tier Tribunal, those claiming UC must now request the DWP to review the decision by way of mandatory consideration, and have received a mandatory reconsideration notice before being able to make an appeal to the First-tier Tribunal. Thus under the UC system, substantive or procedural issues cannot be challenged by way of a statutory appeal where the DWP either fails to process a request for mandatory reconsideration, fails to send a mandatory reconsideration notice (decision), or where there are delays or errors in either of these regards. The apparent lack of legal redress by way of statutory appeal in such circumstances may only be circumvented through judicial review where any maladministration on the part of the DWP is also justiciable as a public law wrong.[69] Here it is worth noting, in general terms, that almost nine out of ten mandatory reconsideration requests have been refused by the DWP. A freedom of information request about this revealed that a Key Performance Indicator or target of the DWP has been to refuse eight of ten mandatory reconsideration requests. Ministry of Justice data indicates that six out of ten claimants who then appeal have their mandatory reconsideration rejections overturned by the First-tier Tribunal.[70]

DWP, such as a Work Capability Assessments (WCA), which on average, take around four months from a claimant declaring a health condition until the WCA decision is due. The NAO also noted a Government Internal Audit Agency Review indicating that in a sample of 25 late payment cases, reasons for late payments included claimants not providing sufficient evidence to allow claims to be verified, failing to attend initial interviews, or failing to accept claimant commitments. The DWP reviewed a sample of 415 late payment cases and found that one third were due to outstanding action by the DWP, e.g. problems with making a Habitual Residence Test decision, verifying a claimant's information against benefit system records, and making back-dating decisions; two-thirds were the claimants responsibility, e.g. claimant behaviour in failing to verify bank details, reporting income and employment status in a timely manner. However NAO noted that claimants often struggled with UC claims where they are self-employed, have issues with English-language proficiency (not being able to dispute errors, not understanding what is required etc), or issues with the Habitual Residency Test (inefficiencies in HRT process). Department for Work and Pensions, *Households on Universal Credit, Payment timeliness by New Claims by month for England* (Stat-Xplore, 23 February 2021): 14% of new claims in England in March 2020 did not receive payment on time or only received some payment on time. This reduced to 5% in April 2020, though this is still almost 40,000 households who were not paid in full for their claim after the five-week wait. F. Hobson, E. Spoor and L. Kearton, *Managing Money on Universal Credit,* (Citizens Advice, 2019): managed payments do not come into effect immediately. DWP advice is that a first MPTL payment is normally received within 6 to 8 weeks from the end of the assessment period in which the APA (MPTL) commenced.

[69] *R v Inland Revenue Commissioners Ex parte Preston* [1985] AC 835.

[70] Welfare Reform Act 2021, s.102. The Universal Credit etc. (Decisions and Appeals) Regulations 2013, SI No 831, reg. 7(2) (c). Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 SI No 2685, rule 22(3) and (4). The appeal must be sent to HM Courts and Tribunals Service Appeal centre within one month of the date of the mandatory reconsideration notice, but may be extended by the First-tier Tribunal for up to 13 months under rule 22(8)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. Child Poverty Action Group n 5 above, 6 - 17. Department for Work and Pensions, *Employment and Support Allowance: Work Capability Assessments, Mandatory Reconsiderations and Appeals* (April 2016 to March 2017): the DWP's performance measures for April 2016 to March 2017 showed that 87.5% of mandatory reconsideration requests were refused. According to a Freedom of Information Request, during this period, a DWP target was that 80% of mandatory reconsideration requests be refused:
<https://www.whatdotheyknow.com/request/402400/response/978248/attach/2/FOI%201740%20response.pdf>
(last accessed 22 December 2021). Department for Work and Pensions, *Tribunal Statistics, January – March 2019*: 63% of appeals mandatory reconsiderations were successfully overturned by the First-tier Tribunal. Child Poverty Action Group, *'COMPUTER SAYS 'NO!' Stage two: challenging decisions* (July 2019).

Features of the UC system that are associated with an increased risk of rental arrears and evictions

Rent payment can be a complex structural and behavioural phenomenon which is relatively under-researched. Assessing whether systemic features of UC cause rent arrears is further complicated given that to-date, the DWP has never made its assessments of this issue publicly available. Indeed, the National Audit Office has officially noted that the DWP has adopted an defensive posture to feedback from local and national organisations that represent and support tenants, leading it to 'not accept that Universal Credit has caused hardship among claimants' and 'often dismiss evidence of claimants' difficulties and hardship instead of working with these bodies to establish an evidence base for what is actually happening'.[71] There is currently no single body of research or data that is precise and comprehensive enough to identify definitively the extent to which arrears are caused by maladministratively or unlawfully administered aspects of the UC system, as opposed to fault on the part of individual claimants, e.g. failing to provide evidence to support a claim. That said, recent studies by Paul Hickman, Paul Hunt and Ian Hardie, together with the qualitative and quantitative studies that they build on, begin to piece together an emerging picture that associates the UC system with increased rental arrears and evictions, and indicates that these problems have worsened under UC when compared with 'legacy benefits'.

Hickman contributes quantitative and qualitative data on tenants' rent underpayment behaviour in the context of Direct Payment Demonstration Projects by analysing rent payment behaviour in relation to the capabilities, opportunities, and motivations of tenants.[72] This is useful as it gives an indication of the individual and structural determinants of rent payment behaviour. In terms of the behavioural determinants, the concept of capability relates to psychological and physical attributes that impact on behaviour, the former relating to knowledge, memory, as well as reasoning and comprehension skills;[73] the concept of opportunity relates to the impact that external factors and constraints have on behaviour, and include physical opportunities such as available resources and social opportunities such as social support structures;[74] the concept of motivation concerns mental processes that direct behaviour, and comprises reflective processes that involve evaluation, assessment, and reasoning, as well as automatic processes, that involve emotions and impulses that are innate or learned.[75] Hickman's research highlights that rent underpayment may be caused by a range of external factors ('opportunities')[76] such as low incomes

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[71] National Audit Office, n 6 above, 10, 63.
[72] P. Hickman, 'Understanding social housing tenants' rent payment behaviour: evidence from Great Britain', (2021) Housing Studies 36(2), 254.
[73] *ibid*, 241
[74] *ibid.*
[75] *ibid.*
[76] *ibid,* 246

and lack of savings;[77] having to service pre-existing debt, rent arrears or deductions; [78] automatic deductions from earnings or benefits;[79] the affordability of rent;[80] unexpected financial 'shocks' that undermine the financial position of tenants, such as losing a job; problems with Housing Benefit administration, direct payments, payment changes, e.g. non or partial payment or delayed payment;[81] Housing Benefit administration problems leading to bank charges that undermine ability to pay rent;[82] loss of income due to reduction in benefits.[83] In relation to individual capabilities as a determinant of behaviour, Hickman's research also highlights how rent payment is impacted by a tenant's knowledge of the benefits system and money management. For instance, some tenants were found to underpay rent as they did not understand how banking or benefits processes operate, for example Direct Debits and/or direct payments, or underpaid inadvertently.[84] Connected to this, Hickman's research also reveals that the motivation of some tenants is affected by their immediate financial pressures, with some tenants choosing not to prioritise the payment of rent, instead using housing benefits to satisfy other 'higher order' goals.[85] Factors influencing this choice include prioritising paying-off other debts, using housing benefit to pay for other essential bills such as food and/or utilities such as electricity or gas,[86] or caring for other family

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[77] *ibid*: only 6% of respondents were found to have savings. National Audit Office, n 61 above: Many claimants are in financial difficulty before they apply for Universal Credit, as they typically apply after a 'financial shock' such as losing a job. DWP earnings data found that nearly half of claimants (49%) had no earnings in the three months before they applied for Universal Credit. English Housing Survey 2019-20, Figure 1.8: Proportion of households without savings by tenure: 80% of social renters, and 60% of private renters, have no savings.

[78] *ibid*: 40% of respondents were found to have debt.

[79] Hickman, n 72 above, 247: 31% of respondents were found to have at least one automatic deduction.

[80] *ibid*, 247: tenants with relatively high levels of rent (over £115 per week) were more likely to underpay rent by levels greater than 15% compared with tenants with levels of rent that were relatively low.

[81] *ibid*: 7% of respondents cited non-payment, partial payment, or delayed payment as the principal reason for accruing new arrears.

[82] *ibid*, 246: 4% of respondents with new arrears cited bank charges caused by housing benefit administration as the principal reason for accruing arrears.

[83] *ibid*, 248: being subject to 'bedroom tax' or 'benefit cap' was found to be statistically related to the accrual of new arrears. 10% of respondents stated that one or more of these reductions was the principal reason for falling into arrears.

[84] *ibid*, 250. National Audit Office, n 61 above, 12, 46: the NAO found that some claimants with more complex needs and circumstances struggle to engage with the claim process or provide the evidence required, leaving them at greater risk of being paid late. According to the NAO, the majority of late payments appear to result from claimants not engaging with the claim process or providing evidence in a timely manner. Contributors to the NAO report expressed concern that situationally vulnerable individuals, such as people with learning disabilities, people with chaotic lives and people with low digital skills may find it particularly difficult to make a claim and provide the evidence required. A NAO case review found that some claimants struggle due to overlapping factors such as needs and capacity, claimant engagement, the quality of DWP communications, the accuracy of DWP systems and the efficiency of DWP administration. In particular, a NAO case review identified communication issues, e.g. where claimants struggled to understand or communicate in written English, or where they found it more difficult to understand what the Department was asking of them or complete their claim form correctly. The NAO found that in some cases the DWP's communication with claimants was unclear or not sufficiently tailored to their needs and abilities. The NAO noted that dealing with self-employed claimants is complex and requires specially trained staff that have long waiting times for appointments.

[85] *ibid*, 249, 250: one third of respondents reported that they did not prioritise paying rent.

[86] *ibid*: 17% of respondents reported that they prioritised paying electricity bills and 9% reported that they prioritised gas or other fuel bills.

members.[87] Hickman's research revealed that such behaviour shows 'high levels of reasoning and capability' as it treats the rent account as a 'surrogate bank account' with no interest payable, and so avoids high interest loans from private sector lenders.[88] This type of behaviour was demonstrated by all types of money managers, from those that were 'orderly' to those who were 'chaotic'.[89]

Hickman's research is important as it demonstrates that structural features beyond the control of tenants, such as benefits administration, had a significant impact on rental arrears for a number of respondents. For present purposes, these factors are easily identifiable and may require case management decisions where they lead to possession claims that are interrelated with other administrative or legal challenges. Unfortunately, the study also reveals that financial shocks or precarity can significantly impact on tenants' motivation to pay rent where other costs of living are perceived to be more important, and so any rental arrears may be regarded as being attributable to fault on the part of the tenant, notwithstanding the issue that such 'goal conflict' was brought about by welfare cuts that render benefits and any income insufficient to cover rent and basic costs of living.[90]

In order to draw a bigger picture of the extent to which systemic features of UC contribute to rent arrears, and the extent to which tenants fall into arrears as a result of the introduction of UC, as compared with 'legacy benefits', the research of Paul Hunter and Ian Hardie is useful as it fills gaps left by the DWP's failure to publish its own assessments. The significance of these studies to this discussion is that they provide quantitative data that suggests not only that core design features of UC contribute to rental arrears, but also that tenants claiming UC are more likely to be in arrears, and in higher average arrears than those who received Housing Benefit.[91]

Paul Hunter's research indicates that the UC assessment period which requires claimants to wait for a minimum of five weeks before they receive their first payment does not merely

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[87] *ibid*: 8% of respondents identified 'unexpected' expenses as being the single main reason why they were in arrears.
[88] *ibid*, 251.
[89] *ibid.*
[90] *ibid*, 246, 253.
[91] National Housing Federation, *Universal Credit in a Time of Crisis - An Exploration of Rent Collection and Support by Housing Associations During the Pandemic* (2021), 1, 3, 5, 32, 58. House of Commons Work and Pensions Committee, *Universal Credit: the wait for a first payment: Third Report of Session* 2019–21 (HC 2020). Peabody, *The Impact of Universal Credit: Examining the risk of debt and hardship among social housing residents*, (2019): Peabody found that their residents transitioning to Universal Credit experienced a spike in arrears, which increased by an average of 28%. This remained elevated in the long-term (52-weeks after Peabody became aware of the claim). For their residents, 76% of households on Universal Credit were behind on their rent payments and about one third were in arrears of more than eight weeks' rent. They were three times more likely to be in this position than other benefit claimants were. Welsh Assembly Government, *Understanding the Impact of Universal Credit on the Council Tax Reduction Scheme and Rent Arrears in Wales: Final Report* (29 July 2020), 161: this report found that rent arrears tended to be higher under Universal Credit compared to legacy benefits and that average arrears under legacy benefits were £206 compared to £495 under Universal Credit. Welsh Assembly Government, *Analysis of the impact of the UK welfare reforms on households in Wales* (March 2019). National Audit Office, n 6 above. 'UK housing bodies warn 'flawed' Universal Credit is causing debt and hardship for families in social housing' *Scottish Housing News* (10 July 2018). IFF Research, *Universal Credit Full Service* (2018). Ipsos Mori, *Universal Credit Test and Learn Evaluation: Families* (Ipsos Mori for DWP, September 2017).

exacerbate debt and financial difficulties,[92] but is a contributing factor to new rent arrears for the majority of claimants,[93] regardless of the level of arrears that tenants have when making a claim.[94] The quantitative data presented in Hunter's research demonstrates that for the majority of tenants rental arrears worsen after a claim for UC is made[95] as the five week waiting period creates a greater cash-flow loss compared with Housing Benefit.[96] The research found that in almost two thirds of claims, rent arrears increased before UC claims were made, and then they increased significantly following a UC claim as claimants waited for their first payment. [97] In the initial week following a UC claim, the majority of rent accounts were in arrears,[98] and arrears were found to be highest in the period immediately after the UC rent verification date, i.e. when tenants have their claim accepted but are waiting for payment.[99] The research found that one in three rent

[92] National Audit Office, n 61 above, 9, 13, 19, 23-26, 53**:** DWP data indicates that rent arrears generally start before a Universal Credit claim but then increase more rapidly until the first payment. The NAO notes that these arrears increase more rapidly after people make their Universal Credit claim, peaking around 13 weeks following the claim, after which they begin to decline. It takes around a year for claimants' arrears to return to the level they were at the start of a claim. The Trussell Trust, *The State of Hunger: a study of poverty and food insecurity in the UK*, (2019): statistical and qualitative data in this study indicates that UC design features increased the demand for food banks.

[93] P. Hunter n 63 above, 30. Based on analysis of 3,373 rent accounts of social housing tenants residing across 12 London boroughs in the three months to September 2019, this study found that arrears rise sharply in the weeks immediately following a UC claim before plateauing after approximately 12 weeks. Almost two-thirds of tenants saw a significant increase in rent arrears after claiming Universal Credit, with tenants accumulating an average of £240 in rent arrears in the 12 weeks after they first claimed UC. On average tenants build-up £240 of rental arrears after they make a UC claim. In the initial week, two-thirds of tenants underpay with 30% of rent owed going unpaid. One in three (35%) of accounts in the first week on UC underpay by 75% or more. This drops to around one in ten by week 20. In terms of whether tenants consistently underpay, the study found that in the first week after the Universal Credit Rent Validation Date (UCRV) date two-thirds (65%) of accounts underpaid their rent. This dropped to under half (48%) for week 13. Over the 13 weeks more than half (54%) of rental weeks saw rent underpaid. For those accounts with 20 weeks of data, 67% underpaid their rent in the first week and 45% in week 13. By week 20 the decline had eased, with 43% of accounts underpaying. Underpaying rent was not confined to a small group as the vast majority of accounts studied (93%) had at least one week of underpaying their rent.

[94] P. Hunter, *ibid,* 30.

[95] *ibid,* 8.

[96] *ibid*. National Housing Federation, n 91 above, 3, 26: households claiming UC accounted for 28% of those owned by housing associations, and of these, 60% had fallen behind on rent compared with 36% of those paying by other means including housing benefit. The average amount owed by Universal Credit households in rent arrears was £609.92, more than double the £301.29 for those who pay by other means including Housing Benefit.

[97] P. Hunter, *ibid,* 30.

[98] *ibid.* 18: Data from rent accounts studied in this report show that most tenants struggled to meet their rents owed in the initial weeks when they moved on to UC. In aggregate terms the weekly arrears of tenants are highest at the start of UC claim – with 31% of rents owed by UC claimants not paid in the first week even with advance payments being available. This declines rapidly to 19% in week five and 5% by week 10.

[99] *ibid,* 18, 30. The study showed that arrears start to accumulate before the UCRV date. In particular, arrears rise from around 2%-4% four months prior to the UCRV date to around 6% by two months before, rapidly rising to 17% a week before the UCRV date after which they increase to over 30% on the week of UCRV date. On average, this results in a rise of just under £400 between eight weeks before the UCRV date and 12 weeks after, and that the arrears that build up are not paid down. The study found that the majority of rental accounts were in deficit at the UCRV date (66%) and that this increased slightly at the end of the three-month period for which rent account data was available (72%). Overall, the study found that 64% of rent accounts were in a worse financial position than they were in when the claim for UC was first made.

accounts were underpaid by 75% or more in the first week on UC.[100] It also reveals that whilst APAs are significant in stopping high levels of arrears from increasing, their availability was not enough to prevent a significant build-up of new arrears, possibly because of the restricted availability, and claimants' limited knowledge.[101] However, the data did indicate that APAs are most effective in preventing a significant increase in arrears when they are put into place as early as possible.[102] Overall, the study found that the arrears position of tenants worsens under UC, particularly during the weeks when claimants migrate onto UC,[103] and that the waiting period creates new rental arrears that some claimants may never be able to fully repay.[104]

Finally, whilst not showing which, if any, particular features of UC contributes to rental arrears, Ian Hardie's analysis of data from the Ministry of Justice and the DWP is important as it shows a link between UC rollout and increased possession proceedings. In particular, quantitative analysis of Ministry of Justice data shows that on average there is a higher number of possession proceedings in areas that have UC 'Full Service' rollout, compared to non-UC 'Full Service' areas. It also shows that local authorities with a higher number of households on UC (HCE) tended also to have higher landlord repossession rates.[105] When compared to rates in the pre-roll-out period, Universal Credit 'Full Service' roll-out, on average, led to a 4.6% increase in possession claims, a 4.8% increase in possession orders, and 3.8% increase in warrants for possession within local authorities up to the first quarter of 2019.[106] Furthermore, the impact of UC 'Full Service' roll-out on possession claims tends to increase where it has been rolled out for 12 months or more, given that it affects more claimants over time. In such instances, 'Full Service' roll-out is associated with

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[100] *ibid,* 8, 21: One in three (35%) of accounts in the first week on UC underpay by 75% or more. This drops to around one in ten by week 20. These larger underpayments contribute to two thirds of the value of total underpayments. The research found that the proportion of accounts underpaying their rent by large amounts (75% and more) is highest in the initial weeks after making a UC claim. Around a third of accounts underpay by 75% or more in week one which declines to around 20% by week six, falling to 12% in week 13 and settling around 10% in the later weeks. The study found that at an aggregate level, larger under payers not only underpay large amounts in the initial weeks but are also consistently underpaying by larger amounts thereafter. By week 20 they are still underpaying 17% of rent due.

[101] *ibid,* 30.

[102] *ibid*. The study found that one in five (20%) of accounts had an alternative payment in place and that APAs appear to have a significant impact on limiting further arrears. For accounts with two-months of arrears, those with APAs saw arrears rise by £279 but those without APAs saw a larger rise – averaging £640. Those with APAs within four weeks of the UCRV date had £337 of arrears by week 13. However, arrears rose to £692 for those whose APA was in place eight weeks after the UCRV date.

[103] *ibid*.

[104] *ibid,* 20, 30. The study found that rent arrears that accumulate in the initial weeks are not generally paid back. The results of the study show that on average rent arrears by the end of the period covered by the study (week 27) are around £240. The study found that within 20 weeks of claiming UC 63% accounts were in a worse financial position, and following 20 weeks 65% of accounts were in a worse financial position. The study found that cumulative rent arrears built up quickly in the initial weeks of claiming UC before plateauing. However, projections from the data indicates that there is little prospect that rent arrears built up in the initial weeks will be paid back. This is because tenants on very low incomes will find it challenging to pay-off arrears through deductions.

[105] I. Hardie, 'The Impact of Universal Credit Rollout on Housing Security: An Analysis of Landlord Repossession Rates in English Local Authorities', (2021) Journal of Social Policy, 50, 2, 225–246, 235 - 236.

[106] Hardie, n 105 above, 236 - 239, 240.

a 6.9% increase in possession claims, a 9.8% increase in possession orders, and a 5.9% increase in warrants for possession when compared to rates in the pre-rollout period. [107]

The existence of broad administrative discretion to manage possession claims

A misreading of *Lovell* by the Court of Appeal in *Matthews*?

In *Bristol City Council v Lovell*, the House of Lords considered whether there was discretion to dismiss a tenant's injunction application to enforce a 'right to buy', and proceed with the landlord's possession claim on the basis of the tenant's misconduct.[108] The order in which these two separate but related claims were heard would, in effect, determine the substantive outcome.[109] According to Lord Hoffmann, the core issue concerned the scope of the administrative discretion to manage claims, and not discretion in relation to the satisfaction of claims. Lord Hoffmann defined administrative discretion as being within the procedural jurisdiction of a court to 'regulate its business and to decide when and in what order it will hear the cases which come before it'.[110] He ruled that it 'must be exercised judicially and not for the purpose of defeating the policy of the statute or the rights which it confers'.[111] *Matthews* lost sight of the central issue of procedural jurisdiction to manage interrelated claims, which is likely to arise where rental arrears are attributable to underlying benefits issues. Instead, by generally presuming that the adjournment of possession claims to allow underlying benefits issues to be resolved constitutes judges choosing not to apply, and thus defeating the policy the HA 1988, i.e. to give priority to landlords where possession claims are based on mandatory grounds, *Matthews* conflated the judicial management of claims with the judicial satisfaction of claims.[112] The reasoning behind this was that adjourning in such instances allowed tenants time to take advantage of 'different future facts', and create a substantive defence that was not otherwise available at the date fixed for hearing. As discussed below, this is generally incongruous with the CPR. For instance, a refusal to adjourn an undefended possession claim where a defendant wishes to advance a substantive defence constitutes a case management decision that may be appealed on the ground of procedural unfairness where it is plainly wrong.[113] In contrast, a refusal to adjourn a defended claim on the basis that the defendant has shown no real prospect of success in defending a claim constitutes a merits assessment, and may be appealed where the merits of the prospective defence were wrongly evaluated.[114]

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[107] *ibid*, 236 - 239, 240
[108] *Bristol City Council v Lovell* [1998] 1 All ER 775, 782 [C].
[109] *ibid* 782 [A].
[110] *ibid* 782 [J].
[111] *ibid.*
[112] *ibid*.
[113] CPR 55.7 (3). *Global 100 v Laleva* [2021] EWCA Civ 1835, [9] [10]. *Birmingham City Council v Stephenson* [2016] EWCA Civ 1029, [2016] HLR 44. *Global Torch Limited v Apex Global Management Ltd (No 2)* [2014] UKSC 64.
[114] CPR 55.8 (3). *Global 100* n 113 above, [9] [15] [16]

A close reading of *Lovell* suggests that the conclusion and the principle upon which *Matthews* turns do not follow-on from *Lovell*, and generally do not have a sound basis in law. To the contrary, the speeches of Lord Hoffmann and Lord Clyde affirm the existence of open administrative discretion during the exercise of claims, right up until their end point, i.e. the point at which a court can be said to be satisfied that a landlord is entitled to a possession order. In this way, *Matthews* erred by partly basing its principle on comments made early on in Lord Lloyd's speech where he stated '[i]n the present case the purpose of the adjournment was […] to enable […] a defence which was not otherwise available when the tenant's application came on for hearing […] this goes far beyond the ordinary limits of case management'. It is crucial to note that these comments differ from his final conclusion, and were described as *non sequitur* by Lord Hoffmann and Lord Clyde, on the basis that they were based on an analysis of the position of the parties in that case which was found to be both 'wrong' and 'positively misleading'.[115] What Lord Lloyd ultimately said was that given the application for an injunction to exercise the 'right to buy' was 'not the end of the road' in this case, 'it must follow that the court has a procedural discretion to adjourn'. Otherwise, Lord Lloyd stated that 'court proceedings would be brought into disrepute'.[116] By this, it is suggested that Lord Lloyd recognised that blanket restrictions on the administrative discretion of lower courts undermines procedural fairness as it can inhibit their ability to manage interrelated issues, and steers them towards particular outcomes, no matter the individual merits. More to the point, Lords Hoffmann and Clyde found that on giving notice, the tenant commenced the process of exercising the right to buy, and such a claim could be delayed, interrupted, or defeated at any point during the right to buy process, right up until the 'end point' of a court ordering the freehold conveyance through an injunction.[117] As such, this form of a remedy could be adopted in the county court 'if the circumstances justify' and therefore 'should not be seen as automatic'.[118] This defeasibility led Lord Hoffman to rule that courts retained their ordinary discretion to hear applications 'at whatever time and in whichever order appeared just and convenient' under the County Court Rules, and remitted the case to County Court for a rehearing of the appeal on this basis.[119] As to what this meant in practice, Lord Clyde found that:

> '[t]he proper course in the present case was for the judge to look at the whole situation as it was presented before him, with the conflicting claims by the two sides, and decide what course should be followed in the handling of the various issues raised.'[120]

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[115] *Lovell* n 108 above, 788 [C-G] (Lord Clyde), 784 [A-J] (Lord Hoffmann), 785 [A-B] (Lord Hope): The House of Lords found that a notice exercising the right to buy did not give rise to an equitable interest under a deemed contract. There was therefore no entitlement to an equitable injunction ordering the immediate conveyance of the freehold to the tenant, and, conversely, no equitable discretion for the court to refuse one owing to the tenant's misconduct. Rather, such notice constituted a 'claim to exercise' the right to buy, and so they remained a secure tenant until the 'end point', i.e. where a court was satisfied to grant an injunction ordering that the freehold be conveyed to the tenant. Such a notice was 'only of procedural and jurisdictional significance'.

[116] *ibid*, 781 [C].

[117] *ibid,* 783 [E-H] 784 [G] (Lord Hoffmann), 785 [F] (Lord Hope), 787 [D] (Lord Clyde).

[118] *ibid,* 788 [H].

[119] *ibid,* 783 [H]. See also *Salekipour v Parmer* [2016] QB 987.

[120] *ibid,* 789 [C].

In this way, *Matthews* misconstrued *Lovell* by failing to recognise that arrears attributable to public benefit maladministration may give rise to interrelated applications that require the exercise administrative discretion, so as to be handled in a manner consistent with the requirements of justice and convenience.

Did the Court of Appeal in *Matthews* extend *R v Walsall Justices* beyond its sensible limits?

To reach its conclusion, the Court of Appeal in *Matthews* amalgamated the principle on which its conclusion rests in the following way: it extracted the narrow principle in *R v Walsall Justices*, namely that adjournments to benefit from a change in the law are unjudicial,[121] and extended this by ruling that adjournments to benefit from a change in the law are equivalent to adjournments to benefit from a change in the facts. It then combined this extended reading of *Walsall Justices* with a misreading of *Lovell* to find that adjournments to benefit from a change in the facts are unjudicial as they have the effect, if not the purpose, of enabling defences that are not otherwise available when an application comes on for hearing, and so go beyond the ordinary limits of case management because they serve to defeat the policy of statute.[122] This does not constitute a sound basis for ensuring that possession cases are dealt with in a just and fair manner, especially given that the appeals in *Matthews* did not concern issues such as adjourning to benefit from any change in the law,[123] to pursue interrelated claims, or to resolve procedural defects in the payment of awarded benefits.

Walsall Justices concerned a judicial review of a criminal case in which the prosecution sought to adjourn in order to benefit from a change in the rules of evidence, effectively making it easier to secure a conviction. For want of legitimate case management reasons, the Divisional Court found that the adjournment appeared to have been granted for 'extraneous reasons', which were presumed to be choosing not to apply the law in force at the date fixed for trial on the basis of a 'qualitative judgement' that it was 'unfair or wrong', and 'would not do justice (or as much justice)' as later law.[124] Accordingly, this type of cherry-picking constituted an 'unjudicial' exercise of administrative discretion which, it is suggested, either verges on, or is tantamount to apprehended bias.[125] Thus, whilst *Walsall Justices* found that adjournments to benefit from a change in the law may be unjudicial where they are granted for such 'extraneous reasons', it did not go as far as to state that this includes adjournments otherwise enabling 'the same law to be applied to future facts'. Nor did the Divisional Court rule that there can never be legitimate

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[121] *R v Walsall Justices ex parte W* (a minor) (1989) 3 All ER 460, 260 D.
[122] *Matthews* n 1 above, [17].
[123] CPR 1.1 (2) (d).
[124] *Walsall Justices* n 121 above.
[125] *ibid.* See also A. Higgins, I. Levy, 'Judicial policy, public perception, and the science of decision making: a new framework for the law of apprehended bias' (2019) Civil Justice Quarterly 38(3) 376 – 399.

substantive or procedural justifications for either of these grounds.[126] Moreover, it did not suggest that there is a substantial or rational connection between these two phenomena. All of these features were introduced by the Court of Appeal in *Matthews* without proper consideration. Indeed, the notion that it is 'not legitimate' to adjourn in order to benefit from so-called 'different future facts' or a 'future event' is generally untenable, as it does not have a sound basis in law, or the rules and practice of civil proceedings. Justice may require courts to stay or adjourn proceedings in order to allow time to demonstrate that which is to be proved, as opposed to that which has not happened or is not the case.[127] Characterising that which has to be proved as 'taking advantage' of 'different future facts' is obviously problematic in circumstances where it is yet to be demonstrated through disclosure, further investigation, or where its existence is dependent on or influenced by another fact or event, for instance, the outcome of an interrelated challenge. Aside from having no basis in law, such a general principle is untenable as it may lead to odd and unjust results, for instance, pre-determining individual claims before they have reached the 'end of the road', such as by precluding the outcomes of successful interrelated challenges.

Did the Court of Appeal in *Matthews* disregard the balance of prejudice test in *Kingcastle*?

In amalgamating the principle on which its conclusion turned, the Court of Appeal in *Matthews* gave insufficient weight to its prior decision in *Kingcastle* which queried whether *Walsall Justices* had 'much bearing' on the management of civil possession proceedings involving interrelated claims, given that it concerned a judicial review of a criminal case. The Court of Appeal in *Matthews* stated that it was nevertheless 'plainly' relevant as it was cited by Lord Hoffmann in *Lovell*. However, this is a misreading of his speech, which merely uses the following in text citation: '[...] (cf R v Walsall Justices, ex p W (a minor)'. The use of the abbreviation 'cf' is merely a passing reference by way of comparison, and so indicates that Lord Hoffmann did not actually confirm that the reasoning in *Walsall Justices* had relevance to the instant possession case, but rather that it did not. Lord Hoffmann immediately followed this up by explaining why: 'the consequences would be extremely arbitrary'. For example, it risks the outcomes of claims being swayed by competing races to judgment. *Walsall Justice*s was cited *en passant* in order to distinguish, rather than to affirm and/or apply. Through this misreading, *Matthews* arrived at a conclusion based on a principle that is diametrically opposed to the type of open and broad administrative discretion envisaged in *Lovell.* The Court of Appeal in *Kingcastle* mirrored the approach taken in *Lovell* that the County Court Rules confer 'complete discretion' to adjourn possession claims, and usefully went further by endorsing *Martin*, which set out what may be described as a structured approach to exercise of this administrative discretion. Thus *Matthews*

[126] *Kingcastle Ltd v Owen-Owen* [1999] EWCA: concerning the adjournment of a possession claim pending the outcome of the House of Lords' decision in a similar test case, thus allowing a party to 'take advantage of' a 'change in the law', in terms of how the law is interpreted.

[127] *Walsall Justices* n 121 above 285 [F] (non-availability of expert evidence).

largely failed to consider and apply the relevant factors outlined in *Martin,* which courts may use to balance the prejudice caused in either granting or refusing applications for adjournments before they are satisfied that a landlord is entitled to a possession order. For instance, the likely adverse consequences and risk of prejudice of refusing an adjournment, as well as the extent to which a tenant applying for an adjournment is responsible for the rental arrears, etc.[128] The Court of Appeal erred by imposing a blanket restriction that operates to preclude the application of the balance of prejudice test in possession cases. Furthermore, this runs counter to the CPR which provide that appellate courts may only interfere with first hearings and first appeals where they are 'plainly wrong'.

Did Parliament abrogate administrative discretion to adjourn in cases where rental arrears are attributable to public benefits maladministration, or unlawfulness?

In *Matthews,* the Court of Appeal noted on one hand that Parliament chose not to abrogate the power to adjourn before a court is satisfied that a landlord is entitled to a possession order. It found therefore that jurisdiction to grant adjournments remains, albeit on a limited number of bases, as set out and endorsed by the Court itself. These are detailed above, and are discussed further below. However, on the other hand, despite the absence of an express statutory provision that precludes adjournments that enable tenants to adjourn mandatory possession proceedings where arrears are attributable to benefits issues in cases where they are not at fault, the Court seemingly presumed such legislative intent by reviewing the House of Commons 'Clause 88' debate that took place on 30 April 1996. This debate concerned proposed amendments no. 37 and no. 38 to the Housing Act 1996 ('HA 1996') which, *inter alia*, reduced the HA 1988 Ground 8 threshold from thirteen to eight weeks. The Court remarked 'it is of interest' that Parliament could have mitigated the consequences of this reduction by making 'special provision' to adjourn where arrears are caused by benefits issues, but instead, rejected such a proposal. Given the apparent tensions here, it is worth reviewing the Court's approach to statutory interpretation in *Matthews.*

Firstly, it is worth pointing out an obvious inconsistency. Namely, the 'Clause 88' debate discussed proposed amendment no.38, which sought to mitigate the reductions to the Ground 8 threshold periods by granting courts the express power to refuse possession orders where a claim is made to off-set repair costs against rental arrears which have otherwise reached a mandatory threshold. Even though this proposed amendment was rejected, it did not prevent the Court from viewing set-off as a legitimate basis for granting adjournments, as will be discussed below. This

[128] *R. v Kingston upon Thames Justices Ex p. Martin* [1993] 10 WLUK 115. In particular, the factors upon which adjournments may be considered when exercising ordinary discretion to adjourn context of possession proceedings include: '(a) the importance of proceedings and their likely adverse consequences to the party seeking the adjournment, (b) the risk of the party being prejudiced in the conduct of the proceedings if the application were refused, (c) the risk of prejudice or other disadvantage to the other party if the adjournment were granted, (d) the convenience of the court, (e) the interests of justice generally in the efficient despatch of court business, (f) the desirability of not delaying future litigants by adjourning early and thus leaving the court empty, (g) the extent to which the party applying for the adjournment had been responsible for creating the difficulty which had led to the application.' See also *Matthews* n 1 above, [35].

was despite James Clappison, the Parliamentary Under Secretary of State at the time, rejecting this amendment on the seemingly inconsistent bases that it 'would lead to long and protracted disputes' and 'the existing state of the law caters sufficiently well for the question' of set-off.

Secondly, the conclusion in *Matthews* appears to be undergirded by the Court's reading of the 'Clause 88' debate, wherein proposed amendment no. 37 tabled by Simon Hughes MP was rejected by the Parliamentary Under Secretary of State. Again, we see a conflation of two separate issues, namely the judicial management of claims and the judicial satisfaction of claims. Amendment no. 37 sought to do the latter, i.e. expressly grant courts the *power to refuse* possession orders in cases where rental arrears have reached a Ground 8 threshold, yet relate to a period in which a claim for Housing Benefit has been made, but that claim has not been finally determined by a benefits authority. The rejection of such an express mitigation to the reductions introduced under the HA 1996 was thus cited in *Matthews,* seemingly to bolster the conclusion that it is not legitimate for courts to adjourn where benefits issues are attributable to public benefit maladministration. Here, it is worth emphasising that amendment no.37, and the apparent reasons for rejecting it, did not quite involve the material issues raised in *Matthews*, i.e. the administrative/procedural *jurisdiction to adjourn* possession proceedings in cases where benefits claims *have not* been finally determined, i.e. the scope for judicial management of claims. Perhaps more significantly, neither the 'Clause 88' debate nor *Matthews* considered or resolved the pertinent issue of administrative/procedural *jurisdiction to adjourn, stay, postpone or suspend* possession proceedings in cases where benefits claims *have* been determined, but there are ongoing issues with payment.

The Under Secretary of State seemingly rejected proposed amendment no.37 on the basis that it was not necessary. The reasons given were that local authorities had a statutory duty at the time to process Housing Benefit claims within fourteen days, and furthermore, Ground 8 possession orders are not made immediately after two months. Apparently, the Under Secretary of State did not therefore feel the need to be 'generous' and accept the proposed amendment because 'an extra period of two weeks is required after proceedings commence before a hearing can take place', and '[w]hen one has to wait a little while for a court hearing, it will be longer than that'. His rejection of the proposed amendment that would have allowed courts to refuse a possession order outright (as opposed to adjourning or staying possession proceedings) appeared to be partially based on the notion that 'in practice, the problem of housing benefit would be dealt with in that fairly lengthy period'.

In relation to amendment no.37 not being necessary because the Housing Benefit Regulation in force at the time imposed a statutory duty to process Housing Benefit within fourteen days, it is worth noting that MPs Diana Maddock and Simon Hughes stated that the Under Secretary of State appeared not to have understood the concerns raised during the Committee stage in relation to the combined effect of reducing the Ground 8 threshold periods and issues relating to the capability of the benefits system to process claims within fourteen days. Both MPs appeared to be left unsatisfied with the Under Secretary of State's response, effectively, that there was no problem 'in practice' when left to the courts and the existing state of the law. Simon Hughes MP

noted that the Under Secretary of State's reference to 'an extra period', i.e. the two week period between notice and possession claim, and then the time between possession claim and hearing, was not a generally satisfactory response given the unpredictability of the benefits system. Nevertheless, in the face of resistance from the Under Secretary of State, Simon Hughes called on him to ensure that courts were informed about the statutory duty of benefits authorities to process Housing Benefits claims within fourteen days. The Under Secretary of State stated that he would 'reflect' on this point, but that 'as a matter of basic knowledge, courts would be aware of [the] statutory duty' of 'local authorities to make payments on account'. Therefore, one could equally read into the Under Secretary of State's statement the position that 'special provision' was not needed, as in practice, issues with the processing of benefits claims was something that courts could already factor into their decision-making. This re-reading contradicts the presumptive claim made in *Matthews* that adjournments in the face of benefits problems are illegitimate as they undermine the policy of prioritising landlords that issue mandatory possession claims on Ground 8.[129]

Indeed, it is worth noting that the 'Clause 88' debate concerned proposed amendments to the HA 1996 reductions, and so it is arguably of limited assistance when it comes to assessing the plain meaning of and/or the legislative intent behind section 9 paragraphs (1) and (6) HA 1988 itself. A close reading of these existing provisions clearly indicates that discretion to 'adjourn possession proceedings for such period or periods as [a court] thinks fit' applies before or until such time that a court is satisfied that the landlord is entitled to possession on any of the grounds in Part I of Schedule 2. Discretion to adjourn does not cease to apply as soon as a landlord makes a claim on any of the grounds in Part I of Schedule 2. Nor does it cease as soon as it is transferred to a judge on the date fixed for hearing. That would neither be fair nor just as it could serve to treat claims fixed for hearing as foregone conclusions before the discrete issues can be heard, and may prevent them from being heard properly. It is proposed that this indicates that Parliament envisaged the existence of administrative discretion to adjourn, even in relation to claims made on mandatory grounds, for instance where there are unresolved benefits issues or evidentiary gaps that require further time for resolution. It is suggested that the subsequent 'Clause 88' debate in relation to the HA 1996 reductions affirms this, as opposed to being a source for some perceived legislative intent to preclude or delegitimize adjournments that enable benefits issues to be resolved. Again, the Under Secretary of State emphasised that 'as a matter of basic knowledge, courts would be aware of' the issue that 'local authorities have a statutory duty to make payments on account'. In other words, they need not be satisfied that a landlord is entitled to a possession order at the date fixed for hearing where it is apparent that moves are afoot to resolve a benefits claim or 'payment on account'. Taken together with the existence of broad and open administrative discretion to adjourn or stay under the broader rules and practice of civil proceedings, then it is indeed correct to say that within the HA 1988 itself, there is no practical necessity for express mitigation through

[129] *Matthews* n 1 above, [34]. Hansard (Clause 88, 276 H.C. Deb., 30 April 1996). In relation searching for Parliamentary intention to cut down substantive and/or procedural rights in the absence of express provisions in primary legislation, see generally the reasoning of the Supreme Court in *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [79] [112] [257].

adjournments, specifically in relation to rental arrears attributable to housing benefit issues. By and large, that is the *raison d'etre* for the procedural jurisdiction of the courts, which is guided by the underlying rules and practice of case management. As these are mostly cast in general terms in order to enable the administration of a broad array of challenges and circumstances, then to use the absence of express provision in primary legislation as a basis for presuming that there are no legitimate grounds for such adjournments whatsoever is *non sequitur*. This is particularly so given that the effect of such a presumption is to cut down the substantive and/or procedural rights of defendants. Rather, a reading of the 'Clause 88' debate indicates an intent to leave possession claims with underlying benefits issues to the courts and the existing state of the law, rather than specifically legislating for this issue either way.

Finally, given that the previous two week statutory assessment period for determining benefits claims fit well within the minimum eight week threshold period for mandatory possession orders, then whilst it may have been unnecessary to mitigate in 1996 and 2004, the same cannot be said now. This is because the change from the Housing Benefit (General) Regulation 1987 to the Universal Credit Regulations has brought in a supervening context in which assessment periods apply up to and frequently beyond five weeks, and as discussed above, there have been unreasonable delays, errors or deductions in relation to the payment of determined claims or migration to UC (HCE). Such features have exposed tenants to mandatory possession claims through no fault of their own.[130] It is worth stressing therefore that at the time of the Housing Benefit (General) Regulation 1987, the statutory period for authorities to determine Housing Benefit claims was two weeks, and the threshold for landlords to be entitled to a mandatory possession order was 8 weeks' worth of rental arrears. This gave tenants on weekly, fortnightly or monthly tenancies at least six weeks to resolve benefits issues before a Ground 8 notice could be served, plus a further two week notice period, after which a possession proceedings could commence by the landlord making a possession claim. Given the minimum five week assessment period under the Universal Credit Regulations, then tenants have at most three weeks to resolve benefits issues before a Ground 8 notice can be served, plus a further two week notice period, after which a possession proceedings can commence by the landlord making a possession claim. However as noted above, this reduced time frame for resolving benefits issues, is frustrated by the system of UC payment in arrears, and most significantly, where there are further delays beyond the assessment period (e.g. in relation to decisions on entitlement or payment) that may eat into the notice period, and then the date fixed for hearing.

Whilst James Clappison's claim that 'in practice, the problem of housing benefit' could be accommodated within a truncated framework was viewed to be unpersuasive and unsatisfactory by MPs in 1996, it is suggested that this issue has been exacerbated by the introduction of Universal Credit. As this claim was used to reject a proposed amendment that essentially related to the issue of the judicial satisfaction of claims, then it arguably has no purchase in relation to the separate issue of the judicial management of claims arising in and out of possession claims under the HA 1988 in accordance with the rules and practice of civil proceedings, as will now be discussed.

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[130] *ibid.* See also Housing Benefit (General) Regulation 1987, SI 1987/1971, reg. 76(3).

General case management powers to adjourn and stay possession proceedings

This section outlines the ways in which possession cases may be adjourned or stayed to allow resolution by way of statutory appeal, judicial review, or even, it is argued, mandatory reconsideration in cases where rental arrears are attributable to public benefit maladministration or other wrongs. Generally, the blanket restriction imposed by *Matthews* is incongruent with the otherwise unqualified administrative discretion to adjourn under section 9 paragraphs (1) and (6) HA 1988, i.e. before a court is satisfied of a landlord's entitlement; the County Court Rules, which provide that courts 'may at any time, and from time to time [...] adjourn or advance the date of the hearing of any proceedings';[131] and the general case management powers of courts to adjourn proceedings under Part 3 CPR,[132] which includes a duty to manage cases actively, in particular, by deciding the order in which issues are to be resolved,[133] fixing timetables or controlling progress of cases,[134] encouraging the parties to cooperate,[135] and helping the parties to settle.[136] It is also incongruous with equality legislation and debt relief regulations. More broadly, it is argued that *Matthews* does not affect the broad powers of the Court of Appeal or the High Court to stay possession proceedings pending the outcome of satellite litigation, e.g. statutory appeal or judicial review.[137] In focusing narrowly on the question of adjournments (postponement to future date), the related question of stays (postponement to future event or date) was not considered and is seemingly left untouched. This undercuts the conclusion and the principle in *Matthews*. [138]

Stays pending statutory appeal

As the tests for first and second appeals are general, and seemingly sufficient, *Matthews* cannot restrict the power of appellate courts to consider the individual merits of applications arising out of, or in connection with mandatory possession proceedings, even where arrears are attributable to

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131 CCR Ord 13, r 3(1).
132 CPR 3.1 (b) (f).
133 CPR 1.4 (2) (b).
134 CPR 1.4 (2) (g).
135 CPR 1.4 (2) (a).
136 CPR 1.4 (2) (f). Lord Justice Coulson, *The White Book Service 2021: Civil Procedure Volumes 1 & 2* (Sweet and Maxwell 2021), para 9A-183.
137 Senior Courts Act 1981, s. 49, s.31 (2A). County Courts Act 1984, s. 76 (lacunae in the County Court Rules may be redressed by adopting and applying general principles of practice from the High Court). Stays may be imposed where the Court of Appeal or the High Court think fit to do so, either *proprio motu*, or on application.
138 *The White Book* no 136 above, paras 9A-161 and 9A-59. CPR 3.1(2) (b) (f), 15.10(3)(4) (money claim paid), 26.4 (stay for settlement of the case), 36.11(1) (stay where Part 36 offer accepted), 52.7 (appeals to appeal court—stay of order of lower court), 54.10 (stay of judicial review claim). See also *Dunn v British Coal Corp* (CA 5 March 1993) (stays to prevent abuse of process/disclosure of medical records). S. Sime, *A Practical Approach to Civil Procedure* (21st edn, OUP 2018), 336.

public benefits maladministration.[139] Given that this issue was not given full and proper consideration, it cannot be said that individual applications in such instances can never have a reasonable prospect of success, compelling reasons for being heard, and in relation to second appeals, also raise important points of principle or practice. As discussed below, there are a range of conceivable scenarios where it may be entirely proper to stay or adjourn the hearing of a possession claim, or the execution of a possession order, pending the outcome of an interrelated appeal of an underlying benefits issue.[140] Indeed, the outcome of a successful appeal may require that a possession order be set-aside, or that a claim or appeal be remitted for rehearing. Given such contingencies, then unless there are clear and express provisions in primary legislation, it cannot be presumed that Parliament intended to deny tenants 'the fruits of a (potentially) successful appeal'. Accordingly, appellate courts have broad discretion to stay the execution of possession orders pending an appeal from the court that made an order for possession.[141] This preserves the position of the parties pending the outcome of an appeal, and forestalls the 'odd and unjust result' of a tenant eventually succeeding on appeal, but losing possession of the rented premises in the meantime.[142] Therefore, mandatory possession claims may be stayed where they involve interrelated statutory appeals of DWP decisions in order to preserve a tenant's security of tenure pending the outcome.

Stays pending judicial review

Matthews framed the possibility of adjourning possession hearings pending the outcome of judicial review applications narrowly, namely, only where there is a real chance that the tenant would be given permission to apply for judicial review of a public landlord's decision to claim possession, for example, where it is acting unfairly or unlawfully in pursuing the claim for possession. The question of whether registered social landlords, or private registered providers of social housing may be regarded as functional public authorities was left open.[143] As discussed below, this narrow and categorical approach is problematic given that it fails to consider situations where claims based on private law are tied up with separate public law claims. From the point of view of landlords, where a statutory scheme provides for payments by a public body directly to landlords on behalf of tenants, applications for judicial review on the part of landlords may be the most appropriate

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[139] CPR 52.6(1) (permission to appeal on first appeal: a real prospect of success or some other compelling reason why the appeal should be heard; second appeals to the Court of Appeal: a real prospect of success and raise an important point of principle, or there is there is some other reason for the Court of Appeal to hear it).

[140] *Kingcastle* above n 126.

[141] CPR 52.16, 52.7, 52.24 (d) (e). *The White Book* n 136 above, para 9A-180. *Admiral Taverns (Cygnet) Ltd v Danie*l [2008] EWCA Civ 1501.

[142] *Admiral*, *ibid.*

[143] *Matthews* n 1 above [11] [50]-[53] [63]: *Matthews* left open the question of whether registered social landlords, or private registered providers of social housing may be regarded as functional public authorities by stating that 'Administrative Court is the appropriate forum' in appropriate cases, without providing further guidance on this point. *Cochrane* n 24 above. D. Rutledge, 'Adjournments and the Scope for Resolving Benefits Issues Post-LASPO' (Housing Law Practitioner's Association, The Housing Law Conference, London, 12 December 2018), 17.

course of action.[144] In such instances, it may be entirely appropriate for a court to give directions ordering a stay, or even to dismiss or strike out a private law possession claim, and give directions that the claim be enforced by way of an application for judicial review of public law duties.[145] From the point of view of tenants, judicial review constitutes an opportunity to challenge a variety of forms of public maladministration where they amount to public law wrongs. This is particularly important where the improper exercise of public functions has the combined effect of both causing private possession claims, and effacing the very basis for statutory appeal of the public authority, e.g. where inaction or unreasonable delay on the part of the DWP in serving a mandatory reconsideration notice prevents an appeal getting off the ground, as there is no decision *per se* that can be substantively challenged.[146] Therefore, given that there is no blanket restriction on the grounds on which the exercise of public functions may be reviewed, mandatory possession claims may be stayed where they involve interrelated challenges by way of judicial review of DWP decisions in order to preserve a tenant's security of tenure pending the outcome, particularly given the generally irreversible effects of granting a possession order.[147]

Stays pending mandatory reconsideration

Practice Direction 55A under CPR 55.8 provides that case management directions, e.g. ordering stays and adjournments, may be made at the date fixed for hearing, or any adjournment of that hearing, where a claim is 'genuinely disputed on grounds which appear substantial'.[148] Factors that are 'relevant' in the exercise of a court's active case management duties include the amount of outstanding housing benefit payments in relation to rental arrears, the status of claims for housing costs, and the status of applications to review or appeal the decision of a benefits authority.[149] These provisions are broad enough to allow for a stay or adjournment of a possession claim where a UC (HCE) payment is materially relevant to the issue of rental arrears, and where there is a pending request for mandatory reconsideration (administrative review and redress) of a UC decision.[150] Below, it will be argued that 'substantial' grounds for disputing a mandatory possession claim may include defences based on the doctrines of waiver by contract and/or estoppel, unlawful discrimination, and debt relief protections.

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[144] *Waveney* n 37 above. See also *Wyatt v Hillingdon LBC* (1978) 76 LGR 727, 733. *O'Rourke v Camden LBC* [1998] AC 188, 193. *Haringey LBC v Cotte*r (1997) 29 HLR 682. *R v Stoke City Council ex parte Highgate Projects* (1994) 26 HLR 551.

[145] 24 PD.

[146] *R v Inland Revenue Commissioners ex parte Preston* [1985] AC 835. Rutledge, n 143 above, 16.

[147] CPR 54.10 (1) (2). *The White Book* no 136 above, para 54.10 (2). *R v Secretary of State for the Home Department ex parte Avon County Council* [1991] 1 QB 558.D. O'Callaghan, 'Staying Judgments and Orders in Judicial Review' (2012) Judicial Review 124, paras 1 - 4.

[148] CPR 55.8 (1) (b) (2)

[149] 55A PD 55.8, para 5.3.

[150] Rutledge n 143 above, para 12. Law Com no 337 n 2 above, para 2.26.

Pragmatic considerations associated with discretion to adjourn possession claims

Whilst ostensibly basing its conclusion on principle rather than pragmatic considerations, the Court of Appeal in *Matthews* nevertheless attached significant weight to pragmatic considerations that, in its view, militated against the recognition of a broad discretion to adjourn.[151] Such considerations seemingly all went one way. Namely, that it is neither practicable nor efficacious for County Court judges to inquire into claims that rental arrears are attributable to public benefit maladministration. Furthermore, the Court speculated that there was a 'real danger' that housing lists would become 'congested with contested applications for adjournments' if this were to be allowed.[152] The difficulty in disentangling the Court's application of principle from its view on the pragmatic considerations is not necessarily problematic, as the latter fall within the ambit of the CPR overriding objective of ensuring that cases are dealt with proportionally. That said, in focusing solely on procedural efficiency, the Court did not attempt to strike a balance with the factors associated with the countervailing overriding objective that cases be dealt with justly, for instance, by ensuring that procedural safeguards undergirding substantive rights are not undermined. This is because the Court gave the appearance of partly basing its blanket restriction on speculation, rather than allowing courts to be guided by established control mechanisms on a case-by-case basis, such as the threshold criteria for judicial review and appeals, as well as the balance of prejudice test.[153] Indeed, the Court appears to treat its pragmatic considerations as justifications for its conclusion, rather than as factors that may be considered among others before and during dates fixed for possession hearings. As will be discussed below in relation to the public service equality duty, this seemingly narrow, and one-sided focus on pragmatic considerations would now appear to be inconsistent with the requirement that courts undertake an open-minded and conscientious inquiry where equality issues are raised.

Disclosure before possession hearings

Given that the Court of Appeal in *Matthews* stated that it was neither feasible nor pragmatic for judges to inquire into benefits issues associated with possession claims, then it is important to note that Practice Direction 55 provides guidance that landlords 'must set out' any relevant information relating rental arrears and underlying benefits issues where it is known to them, e.g. where benefits are paid directly to a landlord.[154] A failure to comply with these service provisions may constitute

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[151] *Matthews* n 1 above, [35].
[152] *ibid.*
[153] CPR 54.10. CPR 52.7. *The White Book* n 136 above, para 52.7.1. *Haringey LBC v Powell* (1996) 28 HLR 798. Rutledge n 143 above, 3.
[154] 55 PD, para 2.3 (5) (a) (b). Form N119: 'Particulars of Claim for Possession' (rented residential premises), section 7.

a procedural irregularity that provides grounds for an adjournment, [155] and is something that can conveniently be brought to the court's attention on the possession defence form for rented residential premises, [156] as well as through documentary evidence such as witness statements, which can be filed and served at least two days before hearing.[157]

Disclosure during possession hearings

Where a possession claim is disputed on grounds which appear to be substantial, the CPR and PD allow for case management directions to be made, and do not restrict the factors that a court may consider.[158] On the contrary, when determining applications for adjournments or stays, courts may legitimately consider factors such as the importance to the tenant of staying in possession, the complexity of facts, law and evidence, and the views and circumstances of the parties, etc.[159] Evidence in any of these regards may be brought up-to-date, either orally or in writing, on the date fixed for hearing, or the hearing date itself.[160] Where the evidence appears to substantially dispute a possession claim at the date fixed for hearing, then a court may not be in a position to be fully satisfied that a landlord is entitled to a possession order then and there. In such a circumstance a court may give case management directions, which include the allocation of a claim to a track, or directions to enable it to be so allocated. This may require an order to stay or adjourn possession proceedings.[161] In *Global 100 v Laleva*, the Court of Appeal found that the threshold for resisting summary possession orders under CPR 55.8 (2) in *defended* claims is the same as the test for resisting summary judgment under Part 24 CPR, i.e. there must be a 'real prospect of success in defending the claim', in other words it must not be 'false, fanciful or imaginary'.[162] Furthermore, decisions under CPR 55.8 (2) relating to whether a defendant has shown a real prospect of success in defending a claim are not in themselves case management decisions, but rather 'an evaluation of the merits of a potential defence', and so may be subject to appeal, not on the basis that there has been a wrongful exercise of administrative discretion, but rather on the basis that there has

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[155] CPR 55. 55 PD. 55A PD. 16 PD, para 7.3. Walsh n 30 above. P. Jolly, 'Possessing the Knowledge to Tackle Arrears' *The Law Society Gazette* (15 April 2005). Pre-Action Protocol for Possession Claims by Social Landlords (Monday 13 January 2020), paras 2.12 - 2.15. Landlord and Tenant Act 1987, s. 48.

[156] Form N11R: 'Defence Form' (rented residential premises), questions 11 - 15 and 29.

[157] CPR 55.8(3). 55A PD, para 5.1.

[158] CPR 55.8. CPR 54.10. CPR 52.7. Rutledge n 143 above, 3. *The White Book* n 136 above, para 52.7.

[159] CPR 26.8. 55A PD, para 5.2

[160] 55A PD, para 5.3.

[161] CPR 52.7, 55.9, 54.10, 52.7, 55.8. Rutledge n 143 above, 3. *The White Book* n 136 above, paras 54.10.2 and 52.7.1. *Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited)* [2015] UKSC 15, [60] - [65] (Lord Wilson).

[162] *Global 100* n 113 above, [14]. *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 539, [15]: 'Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case'.

been a wrongful evaluation of the merits of a defence.[163] As alluded to above, there are a range of conceivable scenarios where it may be entirely proper to stay or adjourn the hearing of a possession claim, or the execution of a possession order, pending the outcome of an interrelated appeal, judicial review, or even mandatory reconsideration of an underlying benefits issue. Were it otherwise, the fruits of a potentially successful interrelated challenge or review requiring, for example, that a possession order be set-aside, or that a claim or appeal be remitted for rehearing would be lost. In contrast, for *undefended* claims under CPR 55.7(3), defendants 'may take part in any hearing', and so following *Global 100* it appears that the correct approach is to apply *Stephenson* and consider whether it would be 'procedurally unfair to decide a case [where] there is (or may well be) a substantive defence which [the defendant] wishes to advance'.[164] In such cases, appeals would be against case management decisions, e.g. refusal to adjourn due to procedural unfairness or an error of law in applying the Part 24 summary judgment threshold in an undefended claim. The threshold for challenging a case management decision is comparatively high in that it must be 'plainly wrong in the sense that it is outside the generous ambit where reasonable decision makers may disagree'.[165] Nevertheless, this latter point is relevant in disability discrimination claims under the Equality Act 2010, which will be discussed further below.

Evidence of grounds which appear to be substantial

Given that the Court of Appeal in *Matthews* stated that it is not practicable for County Courts to inquire into interrelated benefits issues, it is important therefore to outline the types of evidence which presently allow them to form a more general assessment of whether a possession claim is disputed on substantial grounds that show a real prospect of success. Accordingly, in relation to staying the execution of a possession order, or adjourning possession proceedings where arrears are attributable to public maladministration or other wrongs in the determination and/or payment of housing costs, County Courts may have regard to the following types of evidence as they go towards the issue of whether a court can be satisfied that a landlord is entitled to an immediate possession order:

- Evidence relating to the status of a UC (HCE) decision, or setting-up an APA (MPTL).
- An application to witness summons an official representing the Secretary of State for Work and Pensions to attend the possession proceedings to explain the status of the tenant's application for UC (HEC), or an APA (MPTL).[166]
- Evidence of a request or application for a revision of a UC decision (mandatory reconsideration). [167]

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[163] *Global 100*, *ibid,* [15] [16].
[164] *Global 100*, *ibid,* [9] [10]. *Birmingham City Council v Stephenson* n 113 above.
[165] *Global 100* n 113 above, [15]. *Apex Global Management Ltd (No 2)* [2014] UKSC 64.
[166] CPR 34.
[167] e.g. a letter to the DWP from the claimant or their legal adviser, or a copy of a message left in their online journal.

- Evidence of a failure to determine a mandatory reconsideration request, or forward an appeal to the First-tier Tribunal.
- An application to lodge an appeal with the First-tier Tribunal, together with the grounds on which the tenant relies, and a copy of the mandatory reconsideration notice which sets out the reasons for refusing to revise a UC decision. [168]
- Evidence that permission to appeal a UC decision has been granted.
- Evidence that demonstrates that the judicial review Pre-Action Protocol is underway, such as complete standard form Pre-Action Protocol letters sent to the DWP, or evidence that a judicial review application has been granted.

Jurisdiction to adjourn in its wider legal and administrative context

Reviewing the 'legitimate' bases for adjournments in *Matthews*

This section examines the reasoning behind the following bases for adjourning that were deemed 'legitimate' in *Matthews*. Namely, accord and satisfaction, estoppel, conditional payments and set-off. It also examines the way that the Court framed exceptional circumstances. It is argued that there is no sound basis for excluding discretion to adjourn possession cases where arrears are caused by public benefit maladministration or other wrongs, and that it may be regarded as manifestly unjust to refuse to do so, particularly where the DWP is to pay rent on behalf of a tenant.

Accord and satisfaction, estoppel and agency

According to *Matthews*, adjournments can be based on the defence of accord and satisfaction. Essentially, adjournments or stays on this basis allow for an alternative agreement or arrangement to be effected. This acknowledges that collateral agreements or arrangements may be used to estop/preclude a landlord from claiming an immediate possession order on mandatory grounds without defeating the policy of statute.[169]

Following on from this, it is proposed that the operation of an APA (MPTL) can be examined from the viewpoint of agency principles and relations, e.g. although the DWP is not a party to tenancy agreement, an APA (MPTL) may be viewed as a form of collateral agreement or arrangement that varies the contractual position of landlord and tenant. It does so by discharging the tenant *qua* principle from their covenant to pay rent directly to the landlord, and gives rise to

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[168] The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013, SI No 381, reg. 7.CPR 55.8, 5.3 (1) and (2). Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, SI No 2685, rule 22(3) and (4).The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, rule 22(8)(b): a tenant may also provide evidence that they have sought to expedite the hearing of an appeal through an application to a District Tribunal Judge of the First-tier Tribunal. Rutledge n 143 above, 12.

[169] *Matthews* n 1 above, [11] [48].

an agency-type of relationship whereby the DWP *qua* agent becomes directly liable to the landlord *qua* third party for the rent.[170] Such an agency-type relationship may arise where an APA (MPTL) is requested or authorised by the tenant or otherwise requested by the landlord.[171] Where an APA (MPTL) is set-up by the DWP, a landlord's conferral of authority, or a tenant's assent for the DWP to pay rent directly to the landlord on behalf of the tenant may be implied. [172] The courts also have the discretion to impose an agency-type relationship where it is necessary to safeguard the interests of a tenant,[173] for instance where it is deemed that the DWP have acted in the *bona fide* interests of a tenant by undertaking to pay rent on their behalf.[174]

In such instances, the DWP's role *qua* agent is to perform the tenant's covenant to pay rent, which it does by deducting UC (HCE) from the tenant's account, holding it on behalf of the landlord, and then paying it directly into the landlord's rental account via a bank transfer. Here, it is suggested that rent should be regarded as paid for the purposes of Ground 8, as this is nothing like the appeals in *Matthews*, i.e. it is not a prospect of a future benefit being awarded, and therefore possibly contingent, but rather, it is a benefit that is already determined, but the rent is diverted via the DWP to the landlord, at the behest of the landlord, tenant, or the DWP itself. Where the DWP takes the money from the tenant's benefits account, and holds it on behalf of the landlord, then this is arguably akin to an agency type of relationship. An adjournment or stay of a possession hearing merely allows this agreed process to be completed without causing an injustice to the tenant by evicting them before the payment has cleared.

If an agency-type relationship can be established, it may be claimed that there is a contractual undertaking, or at least a reasonable expectation, that the DWP will pay rent directly to the landlord on behalf of a tenant. Failing to perform such an undertaking within a reasonable time, or with reasonable care or skill, may give rise to an estoppel claim,[175] for instance, where it is argued that it would be manifestly unjust to grant an immediate possession order, without first adjourning to allow recovery and settlement pursuant to an APA (MPTL).[176] Given the proposed

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[170] *Bridges & Salmon Ltd v Owner of The Swan* [1968] 1 Lloyd's Rep 5. *Montgomerie v United Kingdom Mutual Steamship Association* [1891] 1 QB 370 (QB). *Young v Schuler* (1883) 11 QBD 651. *Collen v Wright* (1857) 8 E&B 647,658. *Yonge v Toynbee* [1910] 1 KB 215 (CA). Re discharging contractual obligations of principals towards third parties, see generally: *Smyth v Anderson* (1949) 7 CB 21. *Wakefield v Duckworth & Co [*1915] 1 KB 218 (KB). E. Baskind, G. Osborne, L. Roach, *Commercial Law* (3rd edn, Oxford University Press 2019), 172, 147.

[171] Re expressly appointing agents, see generally: *Case C-3/04 Poseidon Chartering BV v Marianne Zeeschip VOF* [2007] Bus LR 44. *Yasuda Fire & Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174 (QB) 185. Law of Property Act 1925, s 53(1) (a).

[172] For example, through acquiescence arising from inactivity. Re varying contractual positions, see generally: *George Whitechurch Ltd v Cavanagh* [1902] AC 117 (HL) 135 (Lord Robertson). *Pickard v Sears* (1837) 6 A&E 469. *Freeman v Cooke* (1848) 2 Exch 654. P. Watts, *Bowstead & Reynolds on Agency* (21st edn, Sweet & Maxwell 2018), paras 2–029, 2–074. *Marine Blast Ltd v Targe Towing Ltd* [2004] EWCA Civ 346. *Harrison & Crossfield Ltd v London & North-Western Railway Co* [1917] 2 KB 755 (KB) 758.

[173] *Coltrane* n 25 above [9]. *Beevor v Mason* (1978) 37 P & CR 452: where the Post Office was treated as the landlord's agent for the purposes of deciding when a cheque was delivered.

[174] *China-Pacific SA v Food Corporation of India* [1982] AC 939 (HL) 966.

[175] *Fraser v BN Furman (Productions) Ltd* [1967] 1 WLR 898 (CA). *Turpin v Bilton* (1843) 5 Man & G 455. Consumer Rights Act 2015, s. 49.

[176] CPR Part 36. *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc* [1978] 2 QB 927. *Geldoff Metaalconstructie NV v Simon Carves Ltd* [2010] BLR 401. Watts, n 172 above, para 2–102. *Rama Corporation Ltd*

equivalence between an accord and satisfaction and an APA (MPTL), ordering an adjournment cannot be construed as changing the substantive position of the parties, but rather giving effect to the express or implied intention of the parties to vary their contractual positions themselves, or, to allow time for the private law position of the parties to be determined.

Failing to perform an undertaking or fulfil a reasonable expectation is relevant to whether a court can be satisfied that a landlord is entitled to an immediate possession order, or whether case management directions for an alternative course of action are appropriate. In view of *Waveney,* where there are procedural defects associated with a DWP's undertaking to pay rent directly to a landlord, it may be appropriate for the matter to be dealt with by a landlord bringing either an ordinary action for debt recovery, or a judicial review claim against the DWP.[177] Finally, the formation of APA (MPTL) may trigger a court's active case management duties, which include encouraging the parties to cooperate and settle,[178] and where appropriate, ordering a stay for the parties to pursue a means of settlement. [179]

Conditional payment and APA (MPTL)

Where there is a deficit in a landlord's rental account, and a cheque for an amount to reduce or discharge rental arrears below a Ground 8 threshold has not been cleared by a hearing date, then it is legitimate for a court to adjourn to see 'whether the cheque will be honoured'.[180] According to the Court of Appeal, this does not violate the principle against adjourning to change the substantive position of the parties, or taking advantage of different future facts, as this merely allows a tenant the opportunity to show at a later date that they had a defence to a possession claim at an earlier date.[181]

As such, the issue of rental arrears is not always simply a matter of fact. As a matter of law, where an uncleared cheque is delivered to a landlord or a landlord's agent, either at or before a hearing, and is expressly or impliedly accepted by a landlord, then it will be regarded as an actual

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v Proved Tin and General Investments Ltd [1952] 2 QB 147 (QB) 149 - 150. *Freeman & Lockyer v Buckhurst Park (Mangal) Properties Ltd* [1964] 2 QB 480 (CA) 503. *National Westminster Bank plc v Rushmer* [2010] 2 FLR 362. S. Sime, n 138 above, 158 - 159. R. Munday, *Agency: Law and Principles* (3rd edn, OUP 2016), 71.

[177] *Waveney* n 37 above.

[178] CPR 1.4 (1), (2) (a) (f). CPR Part 36.

[179] CPR 26 (4) (1) (2A) (3). 26 PD 3.1 (1) (a) (b) (2) (3). Core provisions relating to stays: CPR 3.1(2) (b)(f), CPR 15.10(3)(4) (defence is that money claim has been paid), CPR 26.4 (stay to allow for settlement of the case), CPR 36.11(1) (Part 36 offer accepted), 52.7 (stay of order of lower court pending appeal), 54.10 (stay of judicial review claim). 26 PD 2.2 (1), (2) (a) (b), (3). *Dunn v British Coal Corp* (CA 5 March 1993) (disclosure of medical records/abuse of process). *The White Book* n 136 above, paras 9A-161 and 9A-59. Sime n 138 above, 158 - 159. A stay may be ordered at the request of one of the parties to pursue a means of settlement, where all the parties agree to a one-month stay, or where the court considers that a stay would be appropriate. Courts have the power to stay for one month, or for such other periods as considered appropriate, and this may be extended where the parties agree. This is facilitated by the Practice Directions and the associated claim and defence forms which allow for the parties to give the court information which is believed to be relevant and helpful to case management, such as the intention to apply for an order that may dispose of the case, or to reduce the amount in dispute.

[180] *Matthews* n 1 above, [12].

[181] *ibid,* [13].

payment at the date of delivery, provided that the cheque subsequently clears on first presentation.[182] Thus, where a court sees acceptance of a conditional payment, it should not initially treat outstanding rent as unpaid for the purposes of Ground 8 HA 1988. If it does, possession orders may subsequently be set aside, as delivery and acceptance of a cheque constitute payment subject to a subsequent condition.[183] However, conditional payment is not a complete defence. If a cheque is not met on first presentation, then an order for possession must be made at the subsequent hearing, and the date of the hearing for the purpose of Ground 8 will be the date of the initial hearing that was adjourned.[184]

It is suggested that the legitimacy of adjourning to facilitate an accord and satisfaction, or a conditional payment, is ultimately derived from a landlord's express or implied agreement to an alternative arrangement in relation to the method and/or time frame of payment. In this way, either bases may be viewed as forms of waiver by contract or estoppel that serve to qualify a landlord's statutory right to an immediate possession order. This prevents a landlord from acting to the detriment of a tenant by resiling from an alternative payment arrangement and claiming immediate possession. As payment by cheque is not an instantaneous process, a court cannot be satisfied that a landlord is entitled to a possession order until a cheque has cleared, and so it is necessary to stay or adjourn possession proceedings in order to safeguard the position of the tenant during the interim.[185]

APA (MPTL) have an equivalence with conditional payment, and accord and satisfaction, as they may be said to be premised on a landlord's express or implied agreement to an alternative and non-instantaneous form of payment. This requires a stop-gap measure to modify the effect of Part 1 of Schedule HA 1988 that otherwise confers priority to a landlord.[186] Here, it is argued that pursuant to an APA (MPTL), rent should not be treated as unpaid for the purposes of Ground 8. Consequently, adjourning in order to allow settlement and payment of UC (HCE) pursuant to an APA (MPTL) should be regarded as legitimate, particularly where they are requested by landlords, and despite any 'procedural defects' on the part of the DWP. Again, a court adjourning pursuant to an APA (MPTL) may not be construed as being for the purpose of changing the substantive position of the parties, given that it constitutes evidence that the parties have varied the contractual position themselves, or at least intend or expect to do so. The authorities suggest that Courts can adopt a flexible approach to adjournments to allow intermediaries, which may be treated as agents, to process a payment into a landlord's account. Inquiry into the efficacy of a conditional payment arrangement 'is not particularly complex', and County Courts are best-placed to decide the merits of adjourning on a case-by-case basis.[187] The same can be said for APA (MPTL) where they suggest that housing costs are likely to be honoured by the DWP.

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[182] *Coltrane* n 25 above, [8] [11]. *Homes v Smith*, (2000) Lloyd's Rep Banking 139, [35] (Lord Woolf). *Marreco v Richardson* [1908] 2 KB 585, 593 (Farewell LJ).
[183] *Coltrane, ibid,* [18] [19]
[184] *ibid,* [11].
[185] *ibid,* [7] - [10] [19].
[186] *ibid,* [9] [10].
[187] *ibid,* [25].

Set-off

In focusing on repair costs being used to off-set rental arrears, the Court of Appeal in *Matthews* construed the issue of set-off narrowly, and in doing so, it failed to take into account more pertinent issues that may arise where a public authority pays benefits directly to a private landlord on behalf of their tenant(s). In *Waveney*, a benefits authority made an overpayment of housing benefit on one part of a private landlord's property portfolio, and then subsequently tried to off-set this by making subsequent deductions on another part of the landlord's property portfolio. Here, the Court of Appeal found that a public benefits authority may invoke the defence of set-off in order to defeat a private landlord's claim to recover a shortfall in rent.[188] In particular, where off-set procedures are exercised unlawfully, e.g. there are procedural defects, then the appropriate course of action may be for a landlord to bring an ordinary action in debt recovery against a benefits authority in County Court to recover a shortfall in rent.[189] Conversely, where off-set procedures are exercised lawfully by a public benefits authority, then a landlord has no course of action against the benefits authority for debt recovery, or an arguable challenge by way of judicial review. This indicates that the question of 'procedural defects' falls within the ambit of administrative wrongs under public law, and may also constitute 'maladministration'. Furthermore, it indicates that the payment of rent directly to private or public landlords by a benefits authority may be relevant to the question of rental arrears, and whether a private or public landlord is entitled to a possession order against their tenant(s). For example, it may be considered manifestly unjust, and/or an abuse of process, for a private or public landlord to start mandatory possession claims against tenants living in property that was subject to the lawful deduction of direct rent payments following a previous overpayment, and who are in no way at fault insofar as the lawful or unlawful use of off-set procedures are concerned.[190] A blanket restriction on administrative discretion to adjourn possession claims arising out of alleged 'procedural defects' in such instances may be incongruent with a court's general case management powers to adjourn, stay, or strike out claims. Given that private and public landlords have opportunities for protection against benefits authorities under both public and private law in relation to any 'procedural defects' in the determination and/or payment of housing costs, then it may not be just and appropriate for a court to be satisfied that a landlord is entitled to a possession order against a tenant until this type of underlying set-off issue has been determined. Accordingly a stop-gap in the form of an adjournment or stay may be just and appropriate where there is an APA (MPTL), and a court is made aware of any 'procedural defects' on the part of the DWP in the exercise of its public functions, particularly in relation to deductions.[191]

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[188] *Waveney* n 37 above.
[189] *ibid.*
[190] CPR 3.4 (2) (b) (A court may strike out a statement of case if it appears to the court that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings).
[191] *ibid.* Rutledge n 143 above, 13.

Exceptional Circumstances

Instead of applying the balance of prejudice test affirmed by the Court of Appeal in *Kingcastle,* the Court of Appeal in *Matthews* qualified its principle by acknowledging that there are 'circumstances where the refusal of an adjournment would be considered to be outrageously unjust by any fair-minded person'.[192] The application of this subjective test is problematic as no authority was cited in support of its application, and the Law Commission had previously stated that it seems 'harsh and unjust' that mandatory possession orders must be granted in cases where arrears are attributable to administrative error beyond the tenant's control.[193] No objective or authoritative definition of 'exceptional circumstances' was provided, and *Matthews* offers limited guidance for consistent decision-making. The Court merely provided the following two 'extreme examples', again without authority, and without stating whether they are exhaustive. Namely, a tenant is robbed on the way to a possession hearing, and a 'computer failure' on the part of a benefits authority delays the payment of arrears until the day after the possession hearing.[194]

Other than saying that it represents a 'sad' and 'widespread feature of contemporary life',[195] *Matthews* does not provide a reasoned discussion as to why administrative wrongs outside the occupier's control which lead to rental arrears do not fall within the ambit of exceptional circumstances. This is concerning as it implies that exceptional circumstances are those which are rare and unlikely, as opposed to those which affect the ability of a tenant to perform their obligations, are out of their control, and which are likely to cause great hardship without reasonable adjustments.[196] Despite preceding the introduction of the Equality Act 2010, *Matthews* proceeded *Kingcastle.* It is therefore remarkable that the Court did not consider or properly apply the balance of prejudice test, and factor serious health conditions or disabilities into the reasoning behind a rule that is blanket in nature. Instead, it set-out two 'extreme examples', which do not withstand logical scrutiny when viewed against its conclusion.

Conceptually-speaking, there is no sound basis for distinguishing between a tenant being robbed on their way to a possession hearing, and unlawful delays or errors to direct or indirect rental payments. In both cases, payment is in train, but is blocked by a wrongful third party act, and the former is as easily evidenced as the latter. If a distinction were to be drawn, it would be that adjourning in the latter scenario may stand a more realistic prospect of resolution given that the underlying procedural defects may be open to challenge by way of mandatory reconsideration,

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[192] *Matthews* n 1 above, [32].

[193] Law Commission, *Renting Homes 1: Status and Security* (Law Com no 162, 2002), para 7.40.

[194] *Matthews*, n 1 above, [31].

[195] *ibid,* [32].

[196] J. Bates, A. Dymond, 'Housing During Lockdown' (2020) Journal of Housing Law, 23(4), 68-71: who suggest that Courts will have to revisit *Matthews* in view of Ground 8 possession claims that arise out of the Covid19 pandemic. In particular, it is suggested that tenants who have fallen into arrears because of the effects on their health, employment or business may seek to argue that the pandemic itself provides exceptional circumstances, or they may seek to distinguish maladministration by a housing benefit department in normal times from failure by the DWP to process a claim for universal credit, or failure on the part of a bank to advance a loan, at a time when an exceptional number of applications for financial assistance have to be processed and are subject to delays.

judicial review, or statutory appeal. It is unclear whether an adjournment would enable a tenant to recover the proceeds of crime, but if this opportunity is available in relation to criminal activity, then there are no sensible grounds for precluding this in relation to the unlawful exercise of public functions.

Conceptually-speaking, there is no proper articulation of what constitutes a 'computer failure', and this risks bizarre and arbitrary results in practice. This is because no sound basis is posited on which computer failure may be distinguished from human or organisational failures, e.g. refusing to modify the UC system for calculating earnings and making adjustments where there is a clash between calendar paydays and UC earning assessment dates resulting in deductions. Whilst the former may be a free standing issue, e.g. an extraneous computer network attack, it is equally likely that it may flow from the latter, and *vice-versa*. As noted above, *Matthews* failed to recognise that the unlawful exercise of public functions, which may be synonymous with 'maladministration', can be designed into a computer system so that it is set-up and/or operated in such a way as to fail, in terms of producing unlawful results. Where such failures are challengeable by way of mandatory reconsideration, judicial review, or statutory appeal, then possession proceedings that arise as a consequence may legitimately attract a court's general case management powers to adjourn or stay pending the outcome. That said, there is no sound basis for excluding wrongs emanating from human or organisational failures, either from the ambit of legitimate case management reasons, or from the ambit of exceptional circumstances, unless the opportunities for effective remedies otherwise available for tenants claiming benefits are to be denied.[197]

Matthews and the Equality Act 2010

It is suggested that conclusion in *Matthews*, and the principle on which it is based, need to be reconsidered in view of the Equality Act 2010, as this allows the courts discretion to consider the proportionality of granting a mandatory possession order where the tenant has a protected characteristic under the Equality Act 2010 ('EA').[198]

Public and private sector landlords

Under the EA, both public and private sector landlords, as service providers, may be required to accommodate or make reasonable adjustments for tenants with protected characteristics, such as disabilities.[199] This includes scenarios such as where tenants suffer from mental health issues

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[197] *R (C&W) v SSWP* [2015] EWHC 1607 (Admin) (SSWP has a duty to make and review its decisions within a reasonable time). CPR: courts have power to stay for such a period as considered appropriate to allow settlement. The time scale stated in *Matthews* (computer failure being resolved the day after the hearing) has no basis in law and is arbitrary.

[198] *Matthews* n 1 above, [34]. *Akerman-Livingstone* n 161 above, [25].

[199] *Akerman-Livingstone, ibid.* Equality Act 2010, s.4: protected characteristics include disability, sex, race, and religion; s.6: a disabled person is 'a person which a physical or mental impairment which has a substantial and long-term effect on [their] abilities to carry out day-to-day activities'.

which make it difficult or impossible for them to manage their finances and make direct rent payments to their landlord under UC. Therefore, even where a landlord has an unqualified right to possession on Ground 8, the EA enables a disabled tenant to raise the defence that the grant and execution of an immediate possession order would constitute disability discrimination contrary to sections 15 and 35(1)(b) EA.

More specifically, in cases where it is 'genuinely disputed' and 'seriously arguable' that a possession claim is based on something arising in consequence of the claimant's disability, then a court need not be satisfied that the landlord is entitled to an immediate possession order.[200] For instance, this could occur where a disabled tenant incurs rental arrears because they struggle to understand or communicate with the DWP in relation to making claim for UC or migrating to UC; where the DWP's communication with a disabled claimant is unclear or not sufficiently tailored to their needs and abilities; or where the DWP have made errors or caused excessive delays in the determination or payment of a benefits claim, or an application for an APA (MPTL) based Tier 1 factors, as discussed above. Were a landlord to know about this, or where it is reasonable to expect them to know that rental arrears arose in consequence of their disability, and despite this they proceed to issue a mandatory possession claim, then a disabled tenant may claim that this decision is potentially discriminatory, i.e. it was made in consequence of their disability. A disabled tenant's rights to equal treatment and protection from non-discrimination may arise where landlords are informed of a disabled tenant's circumstances and needs on the tenant's defence form for rented residential premises. Alternatively, a landlord may be notified of the start of a 'breathing space' under the Debt Respite Scheme, discussed below.

Where a 'seriously arguable' defence of discrimination is raised, it is for the landlord to demonstrate that the grant of a possession order would be 'a proportionate means of achieving a legitimate aim'.[201] To do this the landlord must satisfy the court that there were no less drastic means available, and that the effect on the tenant was outweighed by the advantages to the landlord. It cannot be presumed that the aim of vindicating the landlord's right to possession will automatically make it proportionate.[202] For instance, where a landlord has been informed that rental arrears are attributable to benefits issues arising in consequence of a tenant's disability, then they may be required to accommodate these by first pursuing a means less drastic than eviction, such as by requesting or allowing for direct payments under an APA (MPTL), and/or settling the arrears by applying to the DWP for deductions from a tenants UC.[203] Where a disabled tenant

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[200] Equality Act 2010, s.15 (1) and (2). Thus, this provides broader protection given that a breach of PSED may be used as a defence to possession claims in so far as they are brought by public authorities: *Metropolitan Housing Trust v TM* [2021] EWCA Civ 1890, *London & Quadrant v Patrick* [2019] EWHC 1263 (QB).

[201] *Akerman-Livingstone* n 161 above*,* [56] (Lord Neuberger): the Equality Act provides 'an extra, and a more specific, stronger, right afforded to disabled occupiers over and above the Article 8 right'. See also paras [18] [20]-[22] [36] [52] [60]. Equality Act 2010, s.15 (1) and (2)

[202] *ibid,* [18] [34].

[203] *ibid,* [31] [55]-[58]. Equality Act 2010, s. 15. S. Garner and A. Frith, *A Practical Approach to Landlord and Tenant* (8th edn, Oxford University Press 2017), 339. *Second WRVS Housing Society Ltd v Blair* (1987) 19 HLR 104 (CA): an arrangement for direct payments to the landlord is a 'very important factor' that courts should take into account. Form N11R: 'Defence Form': questions 11 - 15 and 29.

claims that the landlord's decision to bring possession proceedings is potentially discriminatory, then adjournments may be required so that the proportionality of granting a possession order can be adequately assessed at a full hearing, for instance by allowing time for disclosure, gathering expert evidence, or allowing an APA (MPTL) application to be processed.

The public sector equality duty of the courts (PSED)

A breach of PSED is not solely a defence to possession claims issued by public authorities. PSED also requires the courts *qua* public bodies to have due regard *inter alia* to the need to eliminate discrimination, and to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it. In relation to the latter, courts are to have due regard to the need to remove or minimise disadvantages suffered by persons who share a protected characteristic, and to take steps to meet their needs. For instance, where a tenant raises a seriously arguable defence of disability discrimination under the EA, and/or an interrelated claim against a public authority of unlawful discrimination under section 14 ECHR in the context of possession proceedings, then a possession claim may not be amenable to a summary grant of possession without breaching PSED and causing prejudice to a tenant. This may be the case, for example, where there are questions concerning a tenant's capacity to understand the nature and effect of possession proceedings and to make decisions about legal matters.[204] Given that PSED is a continuing duty, claims that trigger a court's equality duties may require it to make reasonable adjustments, such as adjourning possession proceedings, or staying the execution of possession orders in order to undertake its equality duties conscientiously, with rigour and with an open-mind before a decision is made. For example, it is suggested that adjournments could legitimately be granted for the purpose of allowing a disabled tenant time -

- to obtain the maximum level of benefits that they are entitled to in view of their circumstances and/or medical condition, or
- to request an APA (MPTL), or
- to challenge and resolve what is claimed to be an erroneous or unlawful UC decision, e.g. in relation to shortfalls between the amount of benefit and rent owing due to deductions,[205]

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[204] Section 149 Equality Act 2010. See also *Akerman-Livingstone* n 161 above. *Metropolitan Housing Trust v TM* [2021] WECA Civ 1890, [6] [37]; *Bracking v SSWP* [2013] EWHC 1345, [26] and [69]; *Luton Community Housing Ltd v Durdana* [2020] EWCA Civ 445 [27]: PSED is a duty to carry out a proper process, not to procure any particular outcome. It must be exercised in substance, conscientiously, with rigour and with an open mind. Garner, *ibid.*

[205] For instance, where there are errors or disputes in relation to the interpretation or application of rules relating deductions and exemptions under the Housing Benefit (Amendments) Regulations 2012 concerning the social size criteria (the 'bedroom tax'), the Local Housing Allowance restrictions, the benefit cap, deductions for non-dependents or overpayments, and service charges. In relation to the 'bedroom tax', see *JD and A v UK* Application Nos 32949/17 and 34617/17, Merits and Just Satisfaction (24 October 2019), [9] [32] [105] : the UK's 'bedroom' tax was found to be discriminatory under Article 14 ECHR given that the applicant had vulnerable status as a victim of domestic abuse and was eligible under the 'Sanctuary Scheme' to convert a spare room into a panic room. Given the applicant's vulnerable situation, the UK failed to reasonably justify the levying of the bedroom tax on someone who fell within a

unlawful discrimination, or where the benefit is not in payment at all due to ongoing questions of entitlement. [206]

The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020.

The Debt Respite scheme may be regarded as another subsequent development which has the effect of tempering, or even precluding the otherwise restrictive effect of the conclusion in *Matthews*. This scheme gives anyone who cannot or is unlikely to be able to repay their debts the opportunity to apply to a debt adviser for legal protections from creditor actions for up to 60 days where they can benefit from a 'standard breathing space', or where there is a mental health crisis, a breathing space that lasts as long as the person's mental health crisis treatment, provided that an Approved Mental Health Professional certifies that they are receiving mental health crisis treatment.[207] During any 'breathing space' moratorium that has been granted, proceedings based on any debts included in the moratorium cannot proceed, and rent is a qualifying debt for this purpose. This means that a landlord cannot serve a notice of possession, issue a possession claim, or enforce a possession order during such a moratorium. Consequently, County Courts must, unless ordered otherwise, ensure that possession proceedings do not progress, and that no possession order is made. Accordingly, it is arguable that the Debt Respite scheme may allow for an adjournment, or at least a delay in enforcement action, which could enable a tenant to remedy any serious arrears caused by, for example, the payment of benefits in arrears, or maladministration.

'small and identifiable group'. See also *SSWP v RR* (HB) [2018 UKUT 425 (AAC) and *M v SSWP* [2017] UKUT 443 (AAC).

[206] For instance, where there are disputed periods of absence from the home; where there is a dispute about eligibility for HB, UC or managed migration from HB to UC; where there are problems or delays in claims being processed or determined; where there are disputes about compliance with 'claimant commitments', right to reside, student status etc; where there are disputes about backdating benefits for periods were benefits for housing costs were not claimed or paid. In relation to unlawful discrimination, see *R (TP and AR No.3 v SSWP* [2022] EWHC 123 (Admin) [147] - [240]

[207] The Insolvency Service, *Guidance: Debt Respite Scheme (Breathing Space) - Guidance for Creditors* (Updated 7 September 2021): A breathing space can only be started by a debt advice provider who is authorised by the Financial Conduct Authority (FCA) to offer debt counselling, or a local authority (where they provide debt advice to residents). In addition to the debtor, the following people can apply to a debt adviser on behalf of a debtor for a mental health crisis breathing space: any debtor receiving mental health crisis treatment, the debtor's carer, Approved Mental Health Professionals, care co-ordinators appointed for the debtor, mental health nurses, social workers, independent mental health advocates or mental capacity advocates appointed for the debtor, a debtor's representative. Enforcement action is *inter alia* where a creditor or their agent serves a notice to take possession of a property let to the debtor on the grounds of rent arrears due up to the start of the breathing space; or take possession of a property let to the debtor having served such a notice prior to the start of the breathing space. Unless a court or tribunal gives a creditor permission otherwise, a court or tribunal must ensure that any action to enforce a court order or judgment about a breathing space debt stops during the breathing space. This includes actions such as possession hearings, granting possession orders or warrants for possession. A creditor must apply all of the breathing space protection for a debtor after being notified about a breathing space, and if they do not, any action is null and void, and they may be liable for the debtor's costs.

Conclusions - sacrificing fairness on the altar of efficiency?

The conclusion in *Matthews* is of its nature blanket in character, which now renders it rather untenable. It constitutes a restrictive interpretation of the HA 1988, which does not follow from its ordinary meaning, its context, or its object and purpose, which is to prioritise landlords claiming possession on mandatory grounds *once a court is satisfied* of their entitlement.[208] It goes as far as to say that there are no circumstances involving arrears caused by public benefits maladministration where it would be proper to grant an adjournment. This is quite remarkable given that the premise of the conclusion, maladministration, and related wrongs such as illegality and substantive mistake, do not receive any proper definition or analysis, rendering the conclusion vague and distinguishable.[209] This blanket restriction on the administrative discretion of County Court judges operates to steer possession claims that are attributable to benefits issues towards summary hearings and immediate possession orders. This is problematic as it prevents County Court judges from managing interrelated claims in accordance with a broader framework of substantive and procedural rules, including the balance of prejudice test.[210] These factors undermine the decision-making procedures and procedural safeguards that undergird a tenant's security of tenure.[211] The conclusion is also incompatible with the EA 2010 insofar as defences of discrimination are concerned, as well as the Debt Respite Scheme. It also eschews the real and substantial nexus between rental arrears and maladministration as well as other wrongs that may exist in cases where a benefits authority pays rent directly to private landlords.[212]

Overall, there is currently a lack of a coherent and joined-up approach to the intersecting issues of rental arrears and public benefit maladministration. The blanket restriction imposed in *Matthews* constitutes a disproportionate restriction on the procedural rights of tenants *qua* welfare applicants as it does not strike the correct balance between dealing with cases both proportionately and justly. As discussed, it may disproportionately affect individuals who are situationally vulnerable, i.e. physical, emotional, or mental harm or loss of opportunity that is caused or

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[208] *FJM v UK* App no 76202/16 (ECHR, 6 November 2018), [33]-[36] possession claims based on s. 21 Housing Act 1988 in situations where tenancy contracts have ended, as opposed to determining current tenancy contracts. *Salontaji-Drobnjak v Serbia* App no 36500/05 (ECHR, 13 October 2009), [133] [144]. I. Loveland, 'Twenty Years Later - assessing the significance of the Human Rights Act 1988 to residential possession proceedings' (2017) Conveyancer, 174.

[209] C. Hunter, D. Cowan, A. Dymond, S. Halliday, 'Reconsidering Mandatory Reconsideration' (2017) Public Law 215 - 234.

[210] S. Gardner, 'The Remedial Discretion in Proprietary Estoppel – Again' (2006) 122 Law Quarterly Review, 504-505, 507. *Kingcastle* n 126 above. *Martin* n 128 above. L. Whitehouse, S. Bright, M. Dhami, 'Improving procedural fairness in housing possession cases' (2019) 38(3) Civil Justice Quarterly, 372 - 375.

[211] Art 6 ECHR complements Art 8, and to be engaged in this way does not necessarily require or presuppose a substantive breach of A8: *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] AC 557, [10] (Lord Nicholls). *Salontaji-Drobnjak* no 208 above, [142]. *Elsholz v Germany* App no 25735/94 (ECHR, 2000), [49]. *Sahin v Germany* App no 30943/96 (ECHR, 11 October 2001), [46]. J. Roberge, 'Justicial judging: towards a renewal in problem-solving access to justice' (2019) Civil Justice Quarterly, 38(1), 32 - 43.

[212] *Waveney* n 37 above. *Blair* n 203 above.

aggravated by personal, social, political, economic, or environmental situations, [213] by exposing them to a greater risk of the severe consequences of eviction where they are not at fault.[214]

More generally, the blanket restriction in *Matthews* may be seen to go beyond what is necessary to safeguard the rights of landlords.[215] In practice, the effect of *Matthews* has been altered in a way that has brought about a significant difference in treatment, potentially on the ground of 'other status' for the purposes of Article 14 ECHR, namely in relation to the different levels of procedural protection available to those tenants of social landlords and those tenants of private landlords who nevertheless all rent under the very same HA 1988. Furthermore, this difference in treatment appears not to have a wholly objective and rational justification which can be deemed proportionate. It is suggested that this radical claim may be more arguable following the introduction of the Pre-Action Protocol for Possession Claims by Social Landlords by the Ministry of Justice. This Protocol provides enhanced procedural protection to tenants of social/public landlords, but not to their analogous comparators in the private rented sector who are also in need of support with housing costs, despite no such distinction being made in the HA 1988.[216] Furthermore, in practice there may be little practical distinction between hybrid-public authorities, such as housing associations that provide affordable assured tenancies for those who cannot afford to rent on the private free market, and large-scale private landlords, particularly where they receive a large amount of rental income either directly or indirectly from public funds because their assured shorthold tenants can neither afford to rent on the private free market without support, nor access affordable housing in the social/public sector.[217] Finally, the creation and

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[213] So Yeon Kim, 'Les Vulnérables: evaluating the vulnerability criterion in Article 14 cases by the European Court of Human Rights', Legal Studies (2021), 625 - 629. Mackenzie *et al,* 'Introduction' in C. Mackenzie *et al* (eds.) *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2013), 1, 7. A.N. Whitehead, *The Function of Reason* (Beacon Press, 1929), 8. M. A. Fineman 'Vulnerability and Social Justice' (2019) Valparaiso Law Review, 356. B. Hoffmaster, 'What does vulnerability mean?' (2006) 36 Hastings Centre Report, 42.

[214] 'Rose Arnall' at York County Court, 2 July 2020: which found that a 'No DSS policy' placed disabled households at a disadvantage compared to non-disabled households as the former are five times more likely to rely on Housing Benefit, and thus be excluded by a 'No DSS policy'. Furthermore, it was found that women are substantially more likely than men to claim Housing Benefit, and are thus more likely to be adversely affected by a 'No DSS policy'. Accordingly, the 'No DSS' policy was found to amount to indirect discrimination contrary to s.19 Equality Act 2010 on the basis of disability and sex.

[215] *Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries and Food* [1999] 1 AC 69, 80.

[216] For instance, both may have assured or assured shorthold tenancies under the HA 1988, both may have landlords who have loan covenants with private sector financial institutions, both may have arrangements that their housing costs be paid directly to their landlords by the DWP, both may encounter a range of administrative wrongs on the part of the DWP beyond their control. Law Com no 297 n 2 above, para 1.45. Contrast position of mortgagors: Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property, paras 6.1 - 6.4. *Norgan v Cheltenham and Gloucester Building Society* [1996] 1 WLR 343. See also Mortgage Repossessions (Protection of Tenants Etc.) Act 2010 re 'unauthorised' tenants. *Freitas* n 215 above, [80] (Lord Clyde) (three stage test). *Michalak v Wandsworth* [2002] 1 WLR, 617, [20]. *Ghaidan v Godin-Mendoza* [2004] 1 A.C. 983.

[217] Note, in this context, there may be little to distinguish hybrid-public authorities and large-scale private landlords receiving direct payments from the DWP. Private landlords may be perceived as providing a public service, for instance where they provide high volumes of accommodation to situationally vulnerable individuals and are in a close relationship with the DWP under new or existing APA (MPTL) agreements. Law Com no 162 n 193 above, para 7.37. *Waveney* n 37 above (large-scale private landlords in receipt of direct rent payments from a benefits authority). *R (Weaver) v London and Quadrant Housing* [2009] EWCA Civ 587. *R (on the application of Macleod) v The Governors of the Peabody Trust* [2016] EWHC 737 (Admin). *Matthews* n 1 above, [49]-[50]. S. Murdoch, 'Down to the Ground'

implementation of the Pre-Action Protocol by the Ministry of Justice indicates that the question of procedural safeguards for tenants renting under the HA 1988 is *a fortiori* not exclusively within the remit of Parliament to resolve, as previously stated by Dyson LJ, as he then was, but is also within the administrative remit of the civil justice system. [218]

Given the reliance on pragmatic considerations, which all went one way, and in view of the drastic and irreversible nature of possession orders, as well as the frequent involvement of the DWP in paying housing costs on behalf of private tenants, it is argued that the decision in *Matthews* is too heavily weighted in favour of the CPR overriding objective of proportionality. As such, it is argued that proportionality was not adequately balanced against the countervailing overriding objective of justice. This undergirds the call for *Matthews* to be reconsidered. Whilst the approach taken may have been tenable at the time the Housing Benefit Regulation 1987 was in force, it has since become frustrated in that systemic features of Universal Credit combine with *Matthews* to render mandatory possession proceedings systemically unfair to welfare claimants who fall into arrears through no fault of their own, but rather due to failures on the part of the DWP and/or SSWP.[219] In this regard, it is suggested that the impact of welfare reform was not assessed properly in relation to the housing of situationally vulnerable individuals that require support with housing costs, and who are less capable of managing direct UC (HCE) payments. Indeed, the Government did not commission an independent evaluation into UC direct payments prior to roll out. [220] It is

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Estates Gazette (2005), 165. In relation to unlawful discrimination, see *R (TP & AR No.3) v SSWP* [2022] EWHC 123 (Admin) [147] - [240].

[218] This Protocol seeks to encourage landlords and tenants to resolve rental arrears before making possession claims on discretionary grounds (ie Grounds 10 and 11), for instance, by working together to resolve universal credit (housing element) problems and to come to an agreement for the payment of the arrears.It stresses that claims on discretionary grounds should not be started against tenants who have provided all the evidence required to process a universal credit (housing element) claim, and who have a reasonable expectation of eligibility. If a landlord unreasonably fails to comply with the terms of this Protocol, then a court may adjourn. This Protocol steers landlords away from possession claims on discretionary grounds, and also avoids arrears reaching mandatory thresholds. Where they do escalate in this way, landlords should explain their intention to commence mandatory possession proceedings and should ascertain the personal circumstances that a tenant wishes the landlord to take into account before issuing a mandatory claim. Pre-Action Protocol n 96 above, paras 2.1 - 2.6, 2.14. Para 1.5: social landlords should also comply with guidance issued from time to time by the Regulator of Social Housing, the Ministry for Housing, Communities and Local Government and, in Wales, the Welsh Minister. Pre-Action Protocol Part 3: this Protocol provides that if a landlord demonstrates a mandatory ground, then the court must in principle grant possession. That said, courts have the discretion to consider 'any relevant documents [...] in relation to the proportionality of the landlord's decision to bring the proceedings'. Arguably, this broadens the scope of proportionality beyond seriously arguable discrimination defences under the EA, and allows courts to consider, for instance, whether an immediate possession order against the tenant goes beyond what is necessary to vindicate the landlord's property rights. This indicates that although the courts may not consider the reasonableness of granting a possession order on mandatory grounds, they may still consider that granting a mandatory possession order is disproportionate, for instance, where a landlord has not complied with the terms of the Protocol from the earliest stage possible, or has not attempted to come to an arrangement for the payment of arrears and/or future direct payments from the DWO under an APA (MPTL), and this non-compliance has led to possession proceedings which might otherwise not have needed to be commenced.

[219] Housing Benefit (General) Regulation 1987, SI 1987/1971, reg. 76(3).

[220] United Nations Economic and Social Council, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland* (14 July 2016) UN Doc E/C.12/GBR/CO/6, paras 18-19, 20-21, 40 - 42, 49 - 50, 51-52. United Nations Office for the High Commissioner for Human Rights, *Mandates of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on the rights of persons with disabilities; the Special*

proposed that this supervening state of affairs requires a proper review and mitigation on grounds of procedural fairness.

It is suggested that this could be achieved without Parliamentary intervention by amending the Pre-Action Protocol for Possession Claims by Social Landlords and Practice Directions 55 and 55A relating to possession claims.[221] For instance, the Pre-Action Protocol should be broadened to cover private landlords, particularly where direct rent payments from the DWP to the landlord is a relevant issue. The Government proposed that it would work with the Master of the Rolls to widen this Protocol 'to include private renters and to strengthen its remit' by encouraging 'necessary engagement between landlords and tenants to resolve disputes'.[222] This would give guidance to landlords and tenants on identifying and resolving benefits issues prior to issuing possession claims, and it would allow courts to order stays or adjournments for non-compliance. Furthermore, changes to Practice Directions 55 and 55A, as indicated above, could bolster the Protocol by providing guidance to the courts relating to the filing of documentation and relevant information for the purposes of both adjournments and listing decisions in cases where serious rental arrears are attributable to procedural defects on the part of the DWP. In relation to listing, this would allow court officers and/or reviewing judges to screen out possession claims where there are pending or outstanding benefits issues that are subject to administrative or legal challenge. This type of administrative filtering would not only encourage disclosure, settlement and resolution without resorting to eviction, but would also promote the better use of court resources as it minimises the need for subsequent adjournments by ensuring that cases are better-

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Rapporteur on extreme poverty and human rights; and the Special Rapporteur on the right to food (8 April 2016) UN Doc AL GBR 1/2016, 4 12. *R v Secretary of State for Work and Pensions* [2015] UKSC 16, [180] (Lady Hale): 'Claimants affected by the [benefit cap under Welfare Reform Act 2021 sections 96 and 97] will, by definition, not receive the sums of money which the state deems necessary for them adequately to house, feed, clothe and warm themselves and their children'. Regarding the impact of the removal of landlord payments, see Hickman *et al* n 7 above, 4 - 8, 11 -12, who state that direct payments were not introduced because there was compelling evidence demanding its implementation, but rather to encourage 'responsibilisation' in welfare claimants to manage their finances and income. See also P. Hickman, K. Reeve, P. Kemp, I. Wilson, S. Green, (2014) *Direct Payment Demonstration Projects: Key findings of the programme evaluation – Final report. Research Report 890* (London: Department for Work and Pensions). M. Donaldson, 'Lost Benefits', Inside Housing (27 February 2004), 21.

[221] As a question of procedural jurisdiction and an issue of case management, this can and should be resolved through amendments to the Pre-Action Protocol for Possession Claims by Social Landlords and Practice Direction 55A relating to possession claims. Pre-Action Protocol and Practice Directions that supplement CPR do not need Parliamentary approval to be amended or updated as they already have it, and so they just need to be made by the Lord Chief Justice, or his nominee and approved by the Lord Chancellor. Civil Procedure Act 1997, s 5 (1) (2). Constitutional Reform Act 2005, Schedule 2, Part 1, para. 2(2). CPR 51.2: Practice directions may modify or disapply any provision of these rules – (a) for specified periods; and (b) in relation to proceedings in specified courts, during the operation of pilot schemes for assessing the use of new practices and procedures in connection with proceedings. Bates n 196 above, 71.

[222] *Communities and Local Government Select Committee, Protecting rough sleepers and renters: Interim Report* 22 May 2020: https://www.gov.uk/government/news/complete-ban-on-evictions-and-additional-protection-for-renters [accessed 22 December 2021]. See also Bates and Dymond n 196 above, who note that a pre-action protocol cannot fully address the problem as it cannot prevent a landlord from obtaining possession on a mandatory ground (i.e. the rules cannot override the Housing Act 1988).

prepared before they are listed for hearing.[223] Although not entirely necessary,[224] in terms of legislative amendments, it is suggested that the HA 1988 and/or the CPR Parts 55 and 58 could expressly provide for a 'clause 88' type mitigation that allows courts to manage interrelated claims and preserve the position of the parties where serious rental arrears are bound up with benefits issues that are subject to mandatory reconsideration, judicial review or statutory appeal, or where there are seriously arguable challenges based in private law or equality law.[225] Other proposals include making Ground 8 HA 1988 subject to a reasonableness assessment, which is a reasonable proposal as it can avoid the downstream costs to individuals and society that can arise from homelessness and emergency housing where no-fault rental arrears constitute a mandatory ground for possession.[226]

[223] Whitehouse *et al* n 132 above, 369 - 375. See also A. Arden, 'Fair housing for all - an aspirational agenda' (2021) Journal of Housing Law 24(3), 45-53.

[224] Civil Procedure Act 1997, s. 5 (1) (2). Constitutional Reform Act 2005, Schedule 2, Part 1, para. 2(2). CPR 51.2: Practice directions may modify or disapply any provision of these rules – (a) for specified periods; and (b) in relation to proceedings in specified courts, during the operation of pilot schemes for assessing the use of new practices and procedures in connection with proceedings.

[225] Regarding 'Clause 88': a proviso at the end of ground 8, that no order for possession should be made under that ground if the court was satisfied that prior to the date of the hearing the tenant had made a claim for housing benefit in respect of the period to which the arrears relate which had not been finally determined by the local housing authority. See also Law Commission, *Renting Homes* (Law Com no 284, 6 October 2003), para 3.39. Law Com no 162 n 193 above, paras 1.9, 7.40 - 7.44. Civil Procedure Act 1997, s. 2. The Civil Procedure Rule Committee makes amendments to CPR subject to approval by the Lord Chancellor and the negative resolution procedure, i.e. amendments are deemed approved unless a MP tables an objection.

[226] Communities and Local Government Select Committee, *Protecting rough sleepers and renters: Interim Report* (22 May 2020), see also the Draft Coronavirus (Protection of Assured Tenants) Bill, annexed to this Report https://publications.parliament.uk/pa/cm5801/cmselect/cmcomloc/309/30902.htm [accessed 22 December 2021].