

RESEARCH-BASED CLINICAL LEGAL EDUCATION: A CONTRADICTION IN TERMS OR A WIN-WIN? LESSONS FROM A UK PILOT STUDY.*

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INTRODUCTION

This article provides an account of a project (funded by the Ferens Education Trust) which is designed to enhance clinical legal education (CLE) provision within my own institution, develop networks with local stakeholders, promote civic engagement, supplement over-stretched advice provision and elicit valuable research data. The intention in providing a ‘warts and all’ account of how this project developed is to offer an insight into the trials and tribulations of setting up such a scheme, to offer comfort to those who, like me, are new to this kind of task and, to assist in efforts to avoid reinventing the wheel. Perhaps more importantly, it aims also to highlight the potential for CLE schemes to facilitate research.

It would seem that in many UK law schools, CLE is perceived as being beneficial for students, communities and stakeholders but rarely is it expected to give rise to substantive research. This has the potential to ghettoize CLE, to make it the preserve

* Thanks are due to the anonymous reviewer for their helpful comments on an earlier version of this article.

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of non-research active colleagues and a task separate (often physically and metaphorically) from the rest of the academic community. In an effort to broaden interest in and thereby increase the provision of CLE, with all its associated benefits² this article offers a case study of how CLE can derive from and give rise to research in all its forms (i.e., data, outputs and 'impact').³

The project in question focuses on the issue of housing possession and derives from my earlier research which suggested that a high percentage of possession cases are adjourned for reasons including unresolved housing benefit claims,⁴ and that, due to a lack of accessible legal advice, occupiers may be missing out on measures designed to protect them against eviction.⁵ The aim therefore was to find a way of addressing these issues by drawing on available resources, most notably, the student cohort. The initial idea was to better prepare occupiers threatened with loss of home for

² For an account of the benefits of CLE see, for example, Marson, J., Wilson, A. & Van Hoorebeek, M. 'The Necessity of Clinical Legal Education in University Law Schools: A UK Perspective' (2005) 7 *Int'l J. Clinical Legal Educ.* 29 and Thanaraj, A. 'Understanding How a Law Clinic Can Contribute towards Students' Development of Professional Responsibility', (2016) 23 *Int'l J. Clinical Legal Educ.* 89.

³ Research impact is defined as "... an effect on, change or benefit to the economy, society, culture, public policy or services, health, the environment or quality of life, beyond academia." REF2021, *Draft Guidance on Submissions*, REF 2018/01 (July 2018), Annexe C, para. 4.

⁴ See, for example, Whitehouse, L., Bright, S. & Dhami, M. K. 'Improving Procedural Fairness in Housing Possession Cases', (2019) 38:3 *CJQ* 351 and Whitehouse L., Bright, S., Dhami, M. K. & Connor Desai, S. *Judicial Decision-Making in Housing Possession Cases*, https://www.law.ox.ac.uk/sites/files/oxlaw/judicial_decision-making_bulletin.pdf.

⁵ See, for example, Bright, S. & Whitehouse, L. *Information, Advice and Representation in Housing Possession Cases*, (April 2014) available at https://www.law.ox.ac.uk/sites/files/oxlaw/housing_possession_report_april2014.pdf and Bright, S. & Whitehouse, L. 'Does the current housing possession process provide effective access to justice?' (2014) 164.7611 *New Law Journal* 16-17.

their court hearing through the provision of a regular 'Clinic on Evictions and Repossessions' (the CLEAR).

While CLE remains an emerging feature of UK law schools,⁶ it was possible to draw on the experience of similar projects undertaken at other institutions, including the University of Sheffield (where students participate in the local court's Personal Support Unit)⁷ and UCL's Integrated Legal Advice Clinic based in Stratford.⁸ The original plan was to staff the CLEAR with Hull Law School students (particularly those involved in the Law School's 'Legal Advice Centre'),⁹ representatives of local advice agencies, mental health support workers and representatives of the Housing Possession Court Duty Scheme (HPCDS). The aim being to inform, support and advise occupiers so that they could engage fully with the legal process and, where possible, assist them in avoiding loss of home.

In addition, the project was designed to gather quantitative data on the impact of the CLEAR (including the number of hearings and the outcomes arising from them both before and after the introduction of the CLEAR) and qualitative data on the experience of occupiers of the arrears and possession process (through the completion of a questionnaire and/or interviews). Ultimately, the hope was that the CLEAR would enhance access to justice for occupiers by offering them free multi-

⁶ See, for example, Marson, et al. (n.2), pp.29.

⁷ See <https://www.sheffield.ac.uk/law/about/psu>.

⁸ See <https://www.ucl.ac.uk/access-to-justice/what-we-do/ucl-integrated-legal-advice-clinic-ucl-ilac>.

⁹ See <https://www.hull.ac.uk/faculties/fblp/slp/more/legal-advice-centre.aspx>.

agency advice while ensuring the more effective use of judicial time by, for example, avoiding the holding of hearings that were certain to lead to an adjournment. This scheme seemed particularly timely given that moves to simplify access to the legal system through the proposed “Online Court” will not apply to possession hearings,¹⁰ the specialist “housing court” proposed by the Government is still in the embryonic stage,¹¹ and the “Breathing Space” initiative (designed to give individuals in debt more time to resolve their financial difficulties) will not apply to “ongoing liabilities” such as rent or mortgage payments.¹² Also, with 21.9% of its population “struggling with debt”,¹³ the recent and continuing closure of advice providers such as the Community Legal Advice Centre (which closed in March 2013),¹⁴ and the roll out of Universal Credit, Hull seemed a particularly apt locality for this project.

In offering evidence of the potential for CLE initiatives to serve not only the interests of students and the public but also researchers, this article begins by establishing the

¹⁰ Lord Justice Briggs, ‘Civil Courts Structure Review: Final Report’ (2016), para. 6.95., <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>.

¹¹ See <https://www.conservatives.com/sharethefacts/2017/10/sajid-javid-fixing-injustices-in-our-housing-market> and Smith, D. ‘We need a Housing Court’, *Law Society Gazette* (26.02.2018) at <https://www.lawgazette.co.uk/practice-points/we-need-a-housing-court/5064909.article>.

¹² HM Treasury, Breathing space scheme: response to policy proposal, June 2019, para. 3.31, see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810058/____17June_CLEAN_response.pdf

¹³ Money Advice Service, ‘Press Release: One in six adults struggling with debt worries’, (10.03.2016), <https://www.moneyadviceservice.org.uk/en/corporate/one-in-six-adults-struggling-with-debt-worries>.

¹⁴ See <https://www.lawgazette.co.uk/law/laa-acts-after-firms-withdrawal-leaves-legal-aid-gap-in-hull/5054621.article>.

context of the project and how my previous research identified issues within housing possession cases that could potentially be 'solved' through the introduction of a CLE scheme. This is followed by a chronological exposition of the background, aims and methodology of the project and the progress made to date. In particular, it focuses on how the information gathered during the initial stages of the project impacted on thoughts regarding the viability and potential usefulness of the CLEAR. The article concludes by arguing that CLE should no longer be viewed as a largely non-research based activity but rather as the means by which we can generate substantial and significant research data.

THE 'PROBLEM' – INFORMATION DEFICITS IN HOUSING POSSESSION CASES

A summary of the legal process of housing possession

In 2018 there were 19,508 claims for possession issued by mortgagees, 23,422 by private landlords and 74,980 by social landlords in England and Wales.¹⁵ While possession may be sought for a number of reasons, the vast majority of these cases will arise as a result of missed mortgage or rent payments.¹⁶ The procedures and

¹⁵ Ministry of Justice, 'Mortgage and Landlord Possession Statistical Tables: January to March 2019'.

¹⁶ See, for example, Whitehouse, et al., (n.4), pp.353. A postal survey of social landlords in 2002/3 found that almost 98% of actions entered in court were due to rent arrears, see Pawson, H., Sosenko, F., Cowan, D., Croft, J., Cole, M. & Hunter, C. *The Use of Possession Actions and Evictions by Social*

rules that apply to these cases vary depending on the type of claimant involved. When a mortgagee is seeking possession, which they must now do via a court order,¹⁷ the court may adjourn, suspend or postpone possession if the mortgagor is likely to be able to pay any sums due under the mortgage within a reasonable period.¹⁸ If not, immediate possession must be ordered, which means possession typically within 28 days.

If the claimant is a social landlord then the court has discretion to make an order for possession “if it considers it reasonable”, provided there is unpaid rent,¹⁹ or (for housing associations) if “some rent lawfully due is unpaid” or “the tenant has persistently delayed paying rent”.²⁰ If the judge decides that possession may be appropriate there is also discretion as to whether to order outright possession or to postpone or suspend it, and, if so, upon what terms.²¹ Housing Associations can claim possession under a mandatory ground if there are at least eight weeks rent arrears,²² but the use of Ground 8 is controversial and many housing associations

Landlords (London: ODPM, 2005), pp.40. See also Neuberger, J. *House Keeping: Preventing homelessness through tackling rent arrears in social housing* (London: Shelter, 2003), pp.12.

¹⁷ Consumer Credit Act 1974, s 126.

¹⁸ Administration of Justice Act 1970, s 36.

¹⁹ Housing Act 1985, Sched 2, Ground 1 (local authority) and Housing Act 1988 Sched 2, Part II, Ground 10 (Housing Association).

²⁰ Housing Act 1988, Sched 2, Part II, Grounds 10 and 11

²¹ Housing Act 1985, s 85 (local authority) and Housing Act 1988, s 9 (housing associations).

²² Housing Act 1988, Sched 2, Part II, Ground 8 – the 8 weeks applies to weekly or fortnightly tenancies.

appear not to use it.²³ They may also use the accelerated possession procedure under s. 21 of the Housing Act 1988 (HA 1988) in order to recover possession of an “assured shorthold tenancy” (provided that there was a written tenancy agreement and two months’ notice was given and has expired). However, it seems that many social landlords choose not to use this process, with Shelter noting that “this procedure is almost exclusively used in the private rented sector, although a small proportion of social tenancies may also be dealt with in this way.”²⁴

It is private landlords therefore who tend to make use of this opportunity to obtain an order for possession without the parties having to attend court and have a hearing. In effect, possession is automatic under s. 21 of the HA 1988 if it is an assured shorthold tenancy that has been in effect for at least six months, any fixed contractual term has expired, and the correct notice has been given (neither default nor rent arrears are necessary). While there are moves to reform the s. 21 procedure, it will take time for those changes to be implemented.²⁵

²³ A study in 2005 found that about one-third of housing associations, and one-half of London based housing associations, were making some use of Ground 8, see Pawson, et al, (n.17), pp.40, ch.5.

²⁴ Shelter, *Eviction Risk Monitor*, (December 2012), pp.5. See https://england.shelter.org.uk/professional_resources/policy_and_research/policy_library/policy_library_folder/eviction_risk_monitor_2012.

²⁵ See for example, Cross, M. ‘Government promises private tenancy law reform - but does not say when’, *Law Society Gazette* (15.04.2019) available at <https://www.lawgazette.co.uk/law/government-promises-private-tenancy-law-reform-but-does-not-say-when-/5069991.article> and Ministry of Housing, Communities & Local Government, ‘Government announces end to unfair evictions’ Press Release 15.04.2019, available at <https://www.gov.uk/government/news/government-announces-end-to-unfair-evictions>.

Defences to a possession claim

Defences to a claim for possession are relatively rare given that they are limited to situations in which the mortgage contract can be shown to be unlawful or unenforceable, for example, where fraud or undue influence was used to secure the agreement of the mortgagor. The position is different, however, in relation to the Equality Act 2010 (EA 2010), European Convention on Human Rights (ECHR) and the Human Rights Act 1998 (HRA 1998). Claims arising under these provisions do constitute a defence to possession for the reason that, as Lord Bingham of Cornhill explains, “Parliament has enacted that discriminatory acts... are unlawful. The courts cannot be required to give legal effect to acts proscribed as unlawful. But I would not expect such a defence, in this field, to be made out very often.”²⁶

Similarly, in respect of social landlords, an Article 8 defence under the HRA 1998 (requiring a right to respect for the home) or a defence under the EA 2010 (e.g. a disabled person facing eviction because of something arising in consequence of his or her disability)²⁷ requires the court to consider the ‘proportionality’ of ordering possession.²⁸ According to *Manchester City Council v Pinnock & Ors* [2010] UKSC 45,

²⁶ *Lewisham LBC v Malcolm* [2008] UKHL 43 at 19. See also *Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15 at 17 per Lady Hale.

²⁷ Equality Act 2010, ss 15 and 35. Proportionality may also need to be considered if a defence under Article 8 of the Human Rights Act 1998 is raised and found to be seriously arguable: *Hounslow LBC v Powell* [2011] 2 AC 186.

²⁸ See, for example, *Aster Communities Ltd v Akerman-Livingstone* [2015] 2 A.C. 1399.

Article 8 need only be considered by the court if it is raised by or on behalf of the defendant.

The importance of information

This very brief summary of the legal rules relating to possession claims highlights a particular theme within housing possession cases which is that, in many cases, judges have discretion to delay or deny possession but only where they have information sufficient to enable them to exercise that discretion. That information must be relevant to the decision which, in relation to mortgage cases, must relate to the mortgagor's ability to repay the arrears within a reasonable period, and in relation to social landlord cases it should relate to "all relevant factors".²⁹ In relation to the latter this might, for example, include the length of occupancy, the age of the tenant and any health difficulties.³⁰

The occupier has two opportunities to supply this type of information to the court: through the completion of the defence form,³¹ which can be submitted online,³² or by

²⁹ *Bracknell Forest BC v Green* [2009] EWCA Civ 238 [22] and *Holt v Reading BC* [2013] EWCA Civ 641 [18].

³⁰ *Woodspring DC v Taylor* [1982] 4 HLR 95.

³¹ For social landlord cases this is N11R available at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/688414/n11r-eng.pdf and for mortgage cases it is N11M available at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702924/n11m-eng.pdf.

attending the hearing. Empirical studies into the practical operation of the housing possession process, while still relatively small in number and scale, have found evidence that gives rise to concerns regarding the extent to which occupiers take advantage of these opportunities.³³ As regards the submission of information via the defence form, while the Ministry of Justice (MOJ) produces statistics on the number and type of possession claims there is no published data on the number and quality of defence forms submitted. Reference to the small number of empirical studies available on this issue, however, suggest that the proportion of occupiers who file defence forms is low.³⁴ Nixon et al, for example, found that defence forms were completed in fewer than 25% of cases,³⁵ Bright and Whitehouse found that fewer

³² CPR, Part 55 – Possession Claims, 55(14)(1)(b).

³³ See for example, Bright and Whitehouse, (n.5); Burns, A. & Hadfield, T. 'A qualitative research investigation of the factors influencing the progress, timescales and outcomes of housing cases in county courts' (London: MHCLG, Nov 2018); Nixon, J., Hunter, C., Smith, Y. & Wishart, B. 'Housing Cases in County Courts' (Bristol: The Policy Press, 1996); Blandy, S., Hunter, C., Lister, D., Naylor, L. & Nixon, J. 'Housing Possession Cases in the County Court: Perceptions and Experiences of Black and Minority Ethnic Defendants' (London: Department for Constitutional Affairs 11/02, 2002); and Hunter, C. Blandy, S. Cowan, D., Nixon, J., Hitchings, E., Pantazis, C. & Parr, S. 'The Exercise of Judicial Discretion in Rent Arrears Cases' (London: Department for Constitutional Affairs, Research Series 6/05, October 2005).

³⁴ The 2018 Burns and Hadfield study suggests that "in most cases, the tenants do not submit a defence or attend the hearing" see Burns and Hadfield, (n.33), para. 3.1.2.10. Similarly, the 1996 Nixon study found that only 22% of defendants (borrowers and tenants in arrears cases) used the Right of Reply Form, and a further 14% made other written submissions, see Nixon, et al, (n.33), pp.20. The 2005 Hunter Study reports that 3% used *only* written submissions as their form of participation; a further 8% used a written response in addition to attending, Hunter, et al, (n.33), pp.17.

³⁵ Nixon, et al, (n.33), pp.20.

than half of defendants filed a defence form,³⁶ while Whitehouse et al found that forms were submitted in only 15% of the cases they studied.³⁷

Even if the occupier does not submit a defence form in advance of the hearing, they still have the opportunity to inform the judge of their circumstances through attendance at the hearing. Evidence suggests once again, however, that attendance rates are low. Findings published by the MOJ, for example, suggest that “the defendant is often absent on the day of the hearing: evidence from recent court visits suggests that only 50% of tenants attend rent arrears hearings... Consequently, the majority of cases are decided without any defence being presented.”³⁸ These findings were supported by the preliminary report for the Jackson review which described the proportion of tenants attending possession hearings as “depressingly low”.³⁹ Beyond this, official data regarding the number of defendants who attend and whether they are represented is not available. Nixon et al, however, found that only 33% of tenants actively participated in the court proceedings they studied,⁴⁰ while Whitehouse et al found that tenants were present in 41% of the cases they studied.⁴¹

³⁶ Bright and Whitehouse, (n.5), pp.39.

³⁷ Whitehouse, et al, (n.5).

³⁸ Ministry of Justice, *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system*, March 2011, CP6/2011, Cm 8045, para 98. For other studies reporting attendance rates, see Hunter, et al, (n.33), and references therein 16-17 and 24-25.

³⁹ Ministry of Justice, *Review of Civil Litigation Costs, Preliminary Report, Vol 1*, (May 2009), ch.31 para 2.12.

⁴⁰ Nixon, et al, (n.33), pp.18.

⁴¹ Whitehouse, et al, (n.3).

While anecdotal, an Income Officer from a local social landlord recently told me that there is approximately a 50% attendance rate in Hull.

The importance of participation

The question that arises here is whether the completion of the defence form or attendance at the hearing would supply the court with information relevant to the decision. Taking the defence form, for example, there is little in the way of 'joined up thinking'⁴² here for it fails to elicit information that might be crucial to the question of ordering possession. There is, for example, no mention of whether the defendant has a disability or other protected characteristic (which may give rise to a defence under the EA 2010).⁴³ As many occupiers will not have sought legal advice prior to the hearing,⁴⁴ it is highly unlikely that they will be aware of the type of information that they would need to include within the defence form in order to assist them in avoiding possession.

⁴² See Bright and Whitehouse, (n.4), pp.3.

⁴³ See the illuminating account of such a case in practice, albeit based on a mandatory ground for possession, by Loveland, I. "'Human rights' Defences in Residential Possession Proceedings: A Cautionary Tale' (2017) 28 *Kings LJ* 130.

⁴⁴ For an account of the decline in housing work starts since the introduction of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 see Ministry of Justice and Legal Aid Agency, *Legal Aid Statistics quarterly, England and Wales, July to September 2017*, 7-8 and Bright and Whitehouse, (n.5), Ch.4 and pp.66-67.

As regards attendance, several studies suggest that it has potential to impact significantly on the outcome of the case.⁴⁵ The importance of attendance may derive from the ability on the part of the tenant to access free legal advice and representation at the court from the HPCDS.⁴⁶ The changes to legal aid implemented by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) mean that for many occupiers, attendance at the court on the day of their hearing may be their first and only encounter with a legal advice provider. Described as “catastrophic”⁴⁷ and “a denial of justice”,⁴⁸ LASPO 2012 removed several areas from the scope of legal aid, including welfare benefits, debt (unless it relates to housing debt and the home is at immediate risk), and housing law disrepair.⁴⁹ Households threatened with a court order for possession remain eligible to apply for legal aid under the debt category,⁵⁰ but access to early advice on matters such as managing debt has been severely curtailed.⁵¹ Prior to April 2013, occupiers who qualified for

⁴⁵ See, for example, Bright and Whitehouse, (n.5), pp.46-48; Blandy, et al, (n.33); Ford, J. Kempson, E. & Wilson, M. ‘Mortgage Arrears and Possessions; Perspectives from Borrowers, Lenders and the Courts’ (London: HMSO, 1995); Hunter, et al, (n.33); Nixon, et al, (n.33) ; and Whitehouse, L. ‘A Longitudinal Analysis of the Mortgage Repossession Process 1995-2010: Stability, Regulation and Reform’ in Bright, S. (ed) *Modern Studies in Property Law* (Oxford: Hart Publishing, 2011), pp.151-174.

⁴⁶ For an account of the HPCDS see Bright and Whitehouse, (n.4), pp.59-68.

⁴⁷ Cleghorn, M. ‘LASPO 2012 and Housing Law’ (17 December 2012) Garden Court North Chambers, Housing law resources.

⁴⁸ Civil Justice Council, ‘Written evidence from the Civil Justice Council - LAS 80’ (April 2014), para 19, at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2010/laspo/?type=Written#pnlPublicationFilter>.

⁴⁹ LASPO, Sched 1, Parts 1 and 2.

⁵⁰ LASPO, Sched 1, Part 1, para 33(1).

⁵¹ See evidence from Citizens Advice Bureaux, Civil Justice Council and Shelter at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2010/laspo/?type=Written#pnlPublicationFilter>.

legal aid could access civil representation from Law Centres,⁵² or solicitors that held legal aid contracts. There has, however, been a downward trend in the number of these providers. Evidence to the Justice Select Committee on the impact of LASPO reported that in the first year since its introduction, ten Law Centres closed,⁵³ and there was a downsizing of solicitor's firms doing legal aid work⁵⁴ leading to a growth in "advice deserts".⁵⁵ The inability of occupiers to access legally aided advice prior to their court hearing is likely to undermine their ability to identify and access defences to possession. An Article 8 defence on the grounds of lack of proportionality, for example, must be pleaded and sufficiently particularised to show that it reaches the high threshold of being seriously arguable.⁵⁶ It is unlikely, in the few minutes that HPCDS representatives have during busy possession lists⁵⁷ that they will be able to elicit information from the occupier sufficient to enable them to identify a potential defence.

⁵² For more information on Law Centres see <http://www.lawcentres.org.uk/>.

⁵³ Law Centres Network, 'Review legal aid to ensure access to justice: our response to JSC report', (12.03.2015), available at <http://www.lawcentres.org.uk/policy/news/news/review-legal-aid-to-ensure-access-to-justice-our-response-to-jsc-report>.

⁵⁴ Sandbach, J. 'Justice Select Committee evidence on LASPO impacts' (16.05.2014) *Legal Voice*, available at <http://perma.cc/V5ZC-WCGU>.

⁵⁵ Citizens Advice, 'Geography of Advice: An Overview of the Challenges Facing the Community Legal Service' (London: Citizens Advice, 2004), para. 1.6 and Law Society, 'Lack of housing legal aid services is leading to nationwide advice deserts', (27.07.2016).

⁵⁶ *Thurrock Borough Council v West* [2012] EWCA Civ 1435.

⁵⁷ For an account of the manner in which possession cases are listed see Bright and Whitehouse, (n.5), pp.40-45 and Hunter, et al., (n.33), pp.29.

Attendance is significant also for the reason that it provides an opportunity for the occupier to inform the judge about his or her personal situation. As a quote from a judge taken from Bright and Whitehouse's report makes clear, the circumstances of the occupier are,

... absolutely essential... it goes to the issue of reasonableness at the end of the day, what somebody's personal circumstances are, if they've had an awful situation with one of their kids being taken into care, or they've got problems that one of their children has mental health issues. I mean, mental health issues are a big issue because then it's very difficult for people to manage their affairs at all. So yes, I think they are very important.⁵⁸

The concern therefore is that the low level of participation by occupiers coupled with their inability to access legal advice prior to their hearing means that they might not be accessing the full range of protective measures available to them.

In terms of trying to understand why occupiers do not engage in this process, evidence is relatively scant. For some occupiers, acknowledging the problems they are experiencing (which can include not only debt but also bereavement, unemployment, relationship breakdown, mental health issues, etc.)⁵⁹ can prove

⁵⁸ Bright and Whitehouse, (n.5), pp.32.

⁵⁹ Paths to Justice research has found that justiciable problems tend to come in clusters so that occupiers with financial problems are also likely to be experiencing relationship breakdown,

difficult, resulting in a failure to respond to their landlord or lender's attempts at communication. The MOJ observes that "individuals in debt are a group that is difficult to access, and they behave in unpredictable ways; they rarely seek advice and information from the sources that can help"⁶⁰. Some describe this as the "ostrich effect"⁶¹, with a Shelter/YouGov survey finding that 18% of those surveyed said they would not open their post in case it was a bill or a late payment reminder⁶².

Adjournments

In addition to the apparent non-engagement of a large number of occupiers in housing possession cases there is also evidence to suggest that a large number of hearings are adjourned.⁶³ Whitehouse et al.'s recent study, for example, found that 37% of the cases they studied resulted in an adjournment.⁶⁴ This suggests that a considerable amount of time and resources, for the judiciary, parties, court staff, and

consumer problems and ill health. See, for example, Genn, H. *Paths to Justice: What People Do and Think About Going to Law* (Oxford: Hart Publishing, 1999) and Pleasence, P., Balmer, N. J., & Sandefur, R. L. 'Paths to Justice: A Past, Present and Future Roadmap' (London: UCL Centre for Empirical Legal Studies, 2013), pp.36-37.

⁶⁰ Ministry of Justice, 'Solving disputes in the county courts: creating a simpler, quicker and more proportionate system', Cm 8045, para 100.

⁶¹ Shelter/YouGov, 'One in 11 Brits worry they can't pay the rent or mortgage this January' (Shelter/YouGov Survey, 6 January 2014), available at <<http://perma.cc/R8R2-Z6RY>>.

⁶² Shelter/YouGov, '1.4 million Britons falling behind with the rent or mortgage' (Shelter/YouGov Survey, 4 January 2013) available at http://england.shelter.org.uk/news/january_2013/1.4_million_britons_falling_behind_with_the_rent_or_mortgage.

⁶³ See, for example, Whitehouse, et al, (n.4) above; Nixon, et al, (n.33), pp.52-53 and Hunter, et al. (n.33), Table 5, pp.18.

⁶⁴ Whitehouse, et al. (n.4)

representatives, may be being spent on cases that are not resolved. As regards the reasons for adjournments, Hunter et al found that they related to unresolved housing benefit issues;⁶⁵ tenant representation;⁶⁶ a strategy to gain more time for decision-making (in particular to obtain further evidence);⁶⁷ and as a 'standard order' in preference to a suspended possession order, perhaps to support an agreement made between the landlord and the tenant.⁶⁸ Whitehouse et al found that the most common reason related to the issue of housing benefit.⁶⁹ The question arises therefore as to whether the resolution of information deficits prior to the first hearing could avoid the need for a hearing that is very likely to be adjourned.

The themes underlying this evidence are summarised in this quote from a housing advice representative, "Some judges are... becoming frustrated by repeat adjournments, by an increase in litigants in person, and by the inability of defendants to access help before they attend court"⁷⁰. It is these issues that are the driving force behind the CLEAR project and it is these questions in particular that it seeks to answer:

1. Why do occupiers threatened with loss of home not engage with their lender or landlord?

⁶⁵ Hunter, et al. (n.33), pp.18.

⁶⁶ Ibid, (2005).

⁶⁷ Ibid, (2005), pp.106.

⁶⁸ Ibid, (2005), pp.18-19.

⁶⁹ Whitehouse, et al, (n.4).

⁷⁰ Bright and Whitehouse, (n.5), pp.67.

2. Why do occupiers threatened with loss of home not engage in the legal process?
3. What measures might encourage them to engage or to resolve information deficits?

THE 'SOLUTION'?

Initial thoughts

In order to answer the questions posed above and in particular to test whether earlier access to information and support might enhance access to justice, this project aimed initially to offer occupiers attending Hull Combined Court a “one stop shop” of information with the opportunity to talk to Law students, duty solicitors and a range of other relevant agencies, for example, the local Citizens Advice Bureau (CAB) and mental health support workers. The hope was that the CLEAR would identify issues that could usefully be addressed or resolved prior to the hearing and allow occupiers, supported by duty solicitors, to present the judge with the information he or she needs in order to make a fully informed decision. This was intended to lead to the more effective use of judicial time and enhance access to justice for occupiers by offering them free and confidential multi-agency advice.

METHODOLOGY

The project is being implemented in three stages. The first was the feasibility stage (September 2017-September 2018). The second involved the implementation of a pilot study designed to test the viability and effectiveness of the CLEAR (September – October 2018). The third will involve the implementation of a full-scale version of the CLEAR and its adoption within the curriculum during the 2020/21 academic session. This article offers an account of the first two stages.

As regards the research methodology to be adopted, the intention was to gather qualitative data (in respect of why occupiers do not participate in the legal process) through the distribution of a questionnaire and/or interviews. Occupiers attending the CLEAR would be asked to complete a questionnaire (in writing or online) or to participate in an interview (e.g. immediately after their interaction with the CLEAR or via a telephone interview at a later date).

It was the intention also to gather quantitative data regarding the impact of the CLEAR on the number and outcome of possession cases. The plan was to access data on cases heard at Hull Combined Court prior to the introduction of the CLEAR and those heard during and following its implementation. Information received from the MOJ indicates that while the number and outcome of possession claims is publicly

available,⁷¹ other relevant data (e.g. did the occupier attend, were they represented, what was the level of arrears, what was the reason for the outcome including adjournments, etc.) is only available in the court file. It will be necessary therefore to complete a Data Collection and Research application and submit it to the MOJ in order to obtain permission to access the court records. As regards the monitoring of the impact of the CLEAR on cases during its implementation, the possibility of judges completing a very short pro-forma (in writing or possibly online) and submitting that to the research team at the end of each possession list is being explored.

PROGRESSING THE PROJECT

The project began with the appointment of a research assistant (Dr Rachel Dixon, her help has proved invaluable throughout). During the first six months of the project, a number of meetings and observations were conducted including meetings with representatives of the CAB (who run an advice service at Hull court), Registered Social Landlords (RSLs), a High Court Enforcement Officer, a member of the Residential Landlords Association and local judges and court employees. The research team was also able to observe a possession list at Hull Combined Court and the CAB helpdesk held at the court. I was also able to gain valuable guidance on the

⁷¹ Ministry of Justice, 'Mortgage and Landlord Possession Statistics' available at <https://www.gov.uk/government/collections/mortgage-and-landlord-possession-statistics>.

project as a result of a number of presentations at conferences attended by academics and legal practitioners⁷². The insights, information and advice offered during these events proved invaluable in highlighting and addressing the various strengths, weaknesses, opportunities and threats relating to this project. Arising out of these meetings and observations were a number of recurrent themes including: engagement, timing and 'added value', explored in more detail below.

THEMES AND CHALLENGES

How do we get occupiers to engage with the project?

Of the various challenges posed by this project, accessing occupiers who are unable or unwilling to engage with their lender, landlord or the legal process poses perhaps one of the greatest. Solutions to this might have included marketing material designed to entice occupiers to make contact with the CLEAR. This could have been promoted in locations frequented by those in debt or with other issues that tend to be associated with debt such as mental health issues⁷³, e.g. food banks, GPs surgeries

⁷² Including a presentation at Oxford University, see <https://www.law.ox.ac.uk/events/beyond-ivory-tower-case-study-housing>.

⁷³ See for example, Libman, K., Fields, D. & Saegert, S. 'Housing and Health: A Social Ecological Perspective on the US Foreclosure Crisis' (2012) 29.1 *Housing, Theory and Society* 1; Nettleton, S. and Burrows, R. 'When a Capital Investment Becomes an Emotional Loss: The Health Consequences of the Experience of Mortgage Possession in England' (2000) 15:3 *Housing Studies* 463; Royal College of Psychiatrists, 'Debt and Mental Health: What Do We Know? What Should We Do?' (2010) 3, 8; and StepChange, 'Locked Out: How Problem Debt Affects People's Housing Situations', November 2018 available at <https://www.stepchange.org/policy-and-research/locked-out-debt-and-housing.aspx>

(the local CAB offers advice services in GP surgeries which we might have utilised for the purpose of promoting our initiative), debt advice centres, etc. Alternatively, some RSLs indicated a willingness to send material relating to the CLEAR to their tenants in arrears which would have ensured a more targeted campaign that might have encouraged some tenants threatened with eviction to approach the CLEAR.

Ethical considerations

Stage 1 of the project involved general discussions with or observations of members of the “elite” (e.g. judges) and other professionals in respect of their roles and how the CLEAR might add value to the arrears and evictions process. Ethical considerations were therefore relatively minimal at this stage. Stages 2 and 3 however involve students (supervised by a member of the Law School in a manner similar to the Legal Advice Centre) dealing directly with members of the local community who seek support from the CLEAR. This gave rise to more substantial ethical considerations which were addressed as part of the University of Hull’s ethics process (ethics approval was received early in the process). As part of that process, issues relating to accessing people in arrears, data protection, the role of students in the CLEAR, ensuring confidentiality and anonymity, and whether there is the potential for ‘harm’ to students, researchers and participants were discussed. It was decided that provided measures were put in place (e.g. storing data securely,

ensuring that the students receive appropriate training and are adequately supervised, etc.) no significant ethical issues were raised by this project.

We were aware that students would not be able to give legal advice (neither they nor their supervisors held practice certificates or a legal aid contract). They would instead gather information from those who contacted the CLEAR so that the clients could be directed to relevant agencies or provided with targeted information. Insurance was also a further issue which was resolved by linking it to the Legal Advice Centre policy.

Timing

Perhaps one of the most vexing issues concerned the timing of the 'intervention'. The initial thought was that we would hold the CLEAR in the court building on the day of possession hearings. The issue with this is that it would require the court to reschedule its lists so that they are held in the afternoon and it may not be possible to fit all the hearings into this session. Second, for some occupiers this will be too late in the process (e.g. arrears may have accumulated to such an extent that possession is inevitable). Third, the hearing will have already been scheduled and claimants will be entitled to say that they want their 5 minutes⁷⁴ in court, particularly given the fee

⁷⁴ Bright and Whitehouse, (n.5), pp.40-45 and Hunter, et al. (n.33), pp.29.

they will have paid. One local RSL indicated that they pay £325 for every court hearing so once a hearing has been initiated, they would not want to halt the proceedings. Therefore, even if the CLEAR identified cases that were very likely to lead to an adjournment, they would still be heard in any event and even if the hearing is avoided, the occupier will still have endured the 'threat' of court action for several weeks prior to the hearing.

Early intervention therefore seems to be key in preventing 'unnecessary' hearings but as one judge explained it is often only the threat of court action that encourages some occupiers to engage. The question therefore comes back to how do we (with the resources we have) encourage occupiers to engage with us *before* a possession claim is initiated in the court? One RSL did indicate a willingness to send material relating to the CLEAR to their tenants prior to or at the time of serving a 'notice seeking possession'⁷⁵ (the court date is then usually set about six to eight weeks after this).

⁷⁵ For more information see Citizens Advice at <https://www.citizensadvice.org.uk/debt-and-money/rent-arrears/you-are-taken-to-court-for-rent-arrears/#h-notice-to-leave-your-home> and Ministry of Justice at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806818/Form_6A_INTERACTIVE.pdf

Civic Engagement and adding value?

Another key challenge of this project related to how we 'add value' to the provision already being made by advice services in the locality. If we are attempting to offer advice to occupiers before a claim for possession is initiated, how does that differ from what agencies such as the CAB and charities are already offering? What resources can we draw on that would allow us to offer something of value to current provision? In answering these questions we kept returning to the thought that our 'unique selling point' derived from our students. The students' ability to assist members of the local community by offering them free independent information and support (supervised and supported by appropriate academic colleagues) seemed to be a valuable contribution to the much under-resourced and over-stretched advice providers in Hull. It might also, in particular, enable the students, given their legal knowledge, to identify evidence which would support a defence to possession. As regards the potential benefit to the students, the ability to contribute to and enhance their CLE by offering them a unique opportunity to participate in real cases seemed like an opportunity not to be missed. As Marson et al note, "Clinical legal education... provides numerous advantages to the student cohort and establishes an opportunity for the students to gain important practical experience, whilst enabling them to offer a valuable service to the local community"⁷⁶.

⁷⁶ Marson, et al., (n.2), pp.29.

The benefits of CLE, however, are enjoyed not only by the students taking part and the clients who benefit from their support but by others as part of a symbiotic relationship in which “diverse groups are coming together where there is mutual gain”⁷⁷. In respect of this study, there is the potential for under-resourced advice providers to benefit from the transference of workload away from them and towards the CLEAR. Additionally, this study has the potential to benefit researchers, a point explored in greater detail below.

Location

An important issue in terms of encouraging occupiers to engage with advice providers and the legal process concerned the location of the CLEAR. The original plan to hold it in the court building was rejected for the reason that it was likely to prove daunting for some. Similarly, holding it in a location that required clients to travel might also deter those who cannot afford the time or the additional cost of transport. We could have held the CLEAR at the University which is relatively central to some of the areas that give rise to the largest number of tenant evictions but it might still have proven too daunting for some. We could perhaps have held the CLEAR on a peripatetic basis (e.g. a community space, a supermarket, doctors’

⁷⁷ Boothby, C. ‘Duty Bound - Court Possession Schemes and Clinical Education’, 7 *Int’l J. Clinical Legal Educ.* 58 (2005), pp.59.

surgeries, etc) but this would have involved logistical issues including cost, privacy, security and so on.

THE PILOT STUDY

Following the feasibility study during which these issues were considered, a pilot version of the CLEAR was implemented during September and October 2018. It was decided that the most effective option in terms of the locality of the CLEAR was to offer a 'remote' clinic. This would give occupiers the opportunity to phone or use technology such as Skype to provide information to the students staffing the CLEAR. The students could then direct the occupiers to a relevant agency for advice or provide (under supervision) information and support directly to the occupier. This also allowed students to monitor and respond to CLEAR correspondence remotely, a useful aspect given that the pilot ran outwith semester time.

In order to run the CLEAR on a remote basis it was necessary to obtain two mobile phones, one for the students to use in order to access and respond to answer phone messages and texts left by clients. The other was for the 'supervisor' so that they could be contacted by the students during office hours. It was also necessary to set up a secure storage facility for documents, both physically and online. This was achieved using lockable filing drawers in the CLEAR office and through FileStream,

a password protected online storage facility accessible only by using a University of Hull imaged computer or laptop.

We were fortunate enough to secure the participation of two of the largest providers of social housing in the region. They distributed a leaflet advertising the CLEAR to their tenants who were in receipt of a notice seeking possession (up to a maximum of 100 tenants). This ensured that only those tenants in arrears were made aware of the CLEAR. We deliberately kept the numbers small as we wanted to ensure that we had the resources necessary to meet demand. The social landlords also referred clients to the CLEAR using a 'letter of authorisation' which we drew up stating that:

"I authorise the Clinic on Evictions and Repossession (the CLEAR), University of Hull, to make enquiries and correspond on my behalf. The CLEAR can receive information relating to my circumstances including computer generated information which may be disclosed to third parties. I request that a copy of all correspondence in connection with my case, be forwarded to them also. I agree to my case file being used for the purpose of audit checks with [social landlord]."

My research assistant, one of our CAB trained students and myself monitored the CLEAR email, landline and mobile phones on a rota basis for 8 weeks. Following contact by a client, we phoned them back within three working days and asked them

a set list of questions including, “What are the reasons for the arrears?”, “Are you in receipt of benefits?”. We then met as a team to discuss the information and support we could provide and sent this in writing to the client (using a template letter) within 3 working days. We then contacted the client again two weeks later to follow up on any outstanding issues (e.g. “have your Universal Credit payments started?”) and to offer additional support where appropriate.

Having taken some time to analyse the development and progress of the pilot study, it seems that the process arrived at offers a workable means of offering support to the local community and has the potential to be extended to all occupants in Hull and the East Riding (e.g. advertised generally rather than limited to some social tenants). The plan is to initiate Stage 3 of the project by integrating the CLEAR into the curriculum as a credit bearing module for the 2020/21 academic session. This is to be combined with a family mediation pathway and a Legal Advice Centre pathway so that the students can, in essence, experience working in general legal practice. Assessment will include a mix of self-reflection and observation of their CLE skills, e.g. talking to clients on the phone, researching information and support, letter writing, etc.⁷⁸

⁷⁸ For an insight into how we might assess CLE see Anon, J. G. ‘How Do We Assess in Clinical Legal Education: A Reflection about Reflective Learning’, *23 Int’l J. Clinical Legal Educ.* 48 (2016).

To this extent, I would argue that this scheme does qualify as CLE. Taking Boone et al's definition, it is "a curriculum-based learning experience, requiring students in role, interacting with others in role, to take responsibility for the resolution of a potentially dynamic problem"⁷⁹. In particular, it involves (i) active participation on the part of students (they are not passive observers); (ii) interaction in role (as a support worker); (iii) dynamic nature of the problem (the clients' circumstances are not known in advance nor can they be predicted); (iv) student responsibility for outcome (the students take responsibility for researching the information needed to support their client); and (v) relation to the curriculum (the assessment process offers a formal opportunity for reflection and analysis).⁸⁰ In addition to qualifying as CLE, however, the scheme is designed also to serve research aims.

Gathering research data

CLE has given rise to substantial research for many years.⁸¹ That research, however, has tended to focus on CLE as the subject of analysis, questioning, for example, the

⁷⁹ Boone, A., Jeeves M. & MacFarlane, J. 'Clinical Anatomy: Towards a Working Definition of Clinical Legal Education', 21 *Law Tchr.* 61 (1987), pp.68

⁸⁰ *Ibid.*, (n.79), pp.65-68.

⁸¹ See, for example, Binder, D. A. & Bergman, P. B. (2003) 'Taking Lawyering Skills Training Seriously' *Clinical Law Review* Vol. 10, Fall 301; & MacCrate, R. (2004) 'Yesterday, Today and Tomorrow: Building the Continuum of Legal Education and Professional Development' *Clinical Law Review*. Vol. 10, Spring.

methods used and their usefulness.⁸² Unusually, this scheme was not intended to be the subject of research but rather to facilitate the collection of substantive research data as the basis for research outputs. The hypothesis underlying the research aspect of this project is that meaningful communication between households and housing providers early in the arrears process reduces the likelihood of court proceedings and eviction. This hypothesis will be tested through the implementation of three broad approaches: exploratory, descriptive and causal. Given that little is known about the experience of occupiers of the arrears process, the work will, by its very nature, be exploratory. The gathering of data on this issue is intended to offer a robust description of the causes of housing debt, how occupiers experience arrears and the threat of eviction and whether there is a causal relationship between early engagement and the avoidance of court action and eviction.

The research project, while employing a mixed-methods⁸³ research approach (with the secondary analysis of social science material and available data being supplemented by the collection of unique primary data, both quantitative and qualitative) focuses mainly on the collection of qualitative data from occupiers. In

⁸² See for example, Blandy, S. 'Enhancing Employability through Student Engagement in Pro Bono Projects', 26 *Int'l J. Clinical Legal Educ.* 7 (2019), and Yackee, J. W. 'Does Experiential Learning Improve JD Employment Outcomes?' (2015) *Wis. L. Rev.* 601.

⁸³ See, for example, Leavy, P. (ed), *The Oxford Handbook of Qualitative Research* (Oxford: OUP, 2014) and Nielsen, L.B. 'The Need for Multi-Method Approaches in Empirical Legal Research' in Cane, P. & Kritzer, H. M. (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, Oxford, 2010), pp.951-975.

order to elicit both quantitative (e.g. age, socio-economic status, ethnicity, etc.) and qualitative (e.g. the impact of Universal Credit) data via random voluntary sampling,⁸⁴ a regional online survey will be distributed. This brings to the fore the difficulties associated with obtaining a sufficient sample size. No incentives or benefits will be offered but efforts will be made to encourage potential respondents to complete the survey through general marketing activities (e.g. posters in food banks, GP's surgeries, etc.) as well as targeted campaigns with relevant agencies (e.g. debt advice agencies, charities, legal practitioners, etc.). The intention is to obtain a minimum of 50 responses. Concerns regarding this form of data collection (e.g. item non-response and measurement error) have been addressed through the careful design of the online questionnaire.⁸⁵

In addition to the regional online survey, the aim is to conduct a degree of "purposeful sampling"⁸⁶ by requesting data from occupiers who approach the CLEAR. This generates specific ethical considerations including ensuring that potential participants are aware of the research element of the project, are able to offer fully informed consent before taking part and do not feel compelled or obliged

⁸⁴ See, for example, Murairwa, S. 'Voluntary Sampling Design' (2015) 4:2 *International Journal of Advanced Research in Management and Social Sciences* 185-200.

⁸⁵ See, for example, Kuha, J. et al, 'Latent variable modelling with non-ignorable item non-response: multigroup response propensity models for cross-national analysis', (2018) 181:4 *Journal of the Royal Statistical Society: Statistics in Society, Series A*, 1169.

⁸⁶ See, for example, Emmel, N. *Sampling and Choosing Cases in Qualitative Research: A Realist Approach* (London: Sage, 2013), Chapter 2.

to participate. In particular it is necessary to ensure that the support offered by the CLEAR is not perceived as being dependent upon the clients' participation in the research. The CLEAR is in essence simply a means of making contact with a hard to reach demographic. In order to make potential clients aware of the research element of the project, a Participant Information Sheet and Consent Form have been designed in such a way as to ensure that consent is freely given and fully informed. In addition, the CLEAR leaflet includes the following statement:

"The CLEAR is a new service run by students and staff at the University of Hull. We are not able to provide legal or debt advice but we can provide other means of support such as helping you to fill in forms. In order to help us understand more about the experience of tenants in arrears, we will ask you to answer a few questions as part of a research project. This is entirely voluntary and refusal to take part in it or to withdraw from it at a later date will involve no penalty or loss. Any information you provide will be kept entirely confidential."

In deciding how best to gather the research data from CLEAR clients, the original plan, to hold interviews immediately after a client visited the CLEAR, became untenable following the decision to hold a remote CLEAR. It was decided instead to request a telephone interview at a time to suit the client or to request that they complete an online survey, with the link to be sent to clients after the follow up correspondence checking on the progress of their case.

The questions posed during the interview and in the questionnaire relate to the occupier's circumstances (e.g. age, ethnicity, income, etc.), their housing (e.g. private landlord, public landlord or mortgagor) and their experience of the arrears process (e.g. level of arrears, did they engage with their lender or landlord and if so at what point and by what means, if not, why not and so on). The hope is that in combination, the regional and CLEAR online surveys will generate responses sufficient to give rise to credible data on the experience of occupiers in arrears.

CONCLUSIONS

This paper has detailed the background to and progress of a pilot study designed to enhance access to justice for occupiers threatened with loss of home. I hope you will forgive the 'thinking aloud' and chronological nature of the commentary but I think it useful to offer an insight into how projects of this kind develop. The funding kindly provided by the Ferens Education Trust allowed us precious time to investigate how best to achieve the aims of this project. The hope is that this article serves as evidence of the potential for schemes designed to enhance the CLE of students to also give rise to benefits in terms of both civic engagement and research. Given the current push towards 'research impact', such schemes must surely be a win-win for all concerned.