Butterworths Property Law Service

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This Bulletin includes material available up to 31 October 2012.

I. FREEHOLD CONVEYANCING

Application for specific performance of contract – enforcement of charging order imposed on purchaser's existing property – setting of minimum price – chargee's responsibility for contents of existing property

Taylor v Diamond [2012] EWHC 2900 (Ch) is the judgment given by Norris J in Manchester (after a hearing in the Newport (Isle of Wight) County Court) on a multiplicity of applications and appeals. The initial transaction would seem to have had disastrous consequences both for vendor and purchaser. In February 2010 Ms D contracted to purchase at auction a property which she intended to modify as disabled accommodation for herself but was situated on the top of a cliff in Torquay, and which information provided by the auctioneers made clear would probably have to be demolished due to structural problems. After exchange of contracts a landslip in the vicinity made the dwelling even more uninhabitable. The seller, T, in May 2010 applied for and obtained an order for specific performance, which D would not obey and T subsequently in March/April 2011 obtained a charging order – to secure an award of damages – against D's substantial Chiswick home (which was however blighted by incomplete building works).

The case is a graphic illustration of the difficulties of conducting protracted litigation when one party is acting in person, she claims to have moved and thus had not been served with proceedings, and was – at least for part of the time – suffering from mental health problems. It is impossible, with the limitations of this Bulletin, to give a detailed account of the proceedings – which do not address any novel points of law – though the case does address

and offer some useful guidance on the practical issues that arise (a) when there is a charging order and the chargor disputes the minimum asking price which the court has set; (b) when there is a dispute as to the chargee's responsibilities for looking after the chargor's chattels, after they have been removed from a property to allow a sale with vacant possession; and (c) when a judge is faced with a litigant in person who attempts to insist on going through mass of often irrelevant and repetitious documentation at a hearing for which only one day has been allowed.

Application under s 84(1) in respect of 1931 restrictive covenants – where burden of proof lay

Trustees of the Coventry School Foundation v Whitehouse [2012] EWHC 2351 (Ch) offers an interesting example of local residents using a fairly old restrictive covenant to prevent an unwelcome development. The restrictive covenant was contained in a 1931 conveyance and indeed title to the land which was the subject of the case was still unregistered. TCSF had applied to build a new school on part of its land and, during the consultation on its planning application, it became clear that up to 1,200 or so neighbouring houses might have the benefit of the covenant.

The owners of four such houses were joined as representative defendants to TCSF's application under LPA 1925, s 84(1) for declarations (1) that the defendants were not entitled to the benefit of the covenants and (2) that the proposed development would not amount to a breach of the covenants. The covenants in question prohibited the erection of buildings 'for any noisy …pursuit or occupation or for any purpose which shall or may be or grow to be in any way a nuisance damage annoyance or disturbance to the Vendors and their successors in title'.

There was a dispute as to the extent of the 'retained land' which took the benefit of the covenants, but HHJ Simon Barker QC (sitting as a judge of the Chancery Division) held that three of the four defendants were owners of parts of the land which was intended to benefit. He therefore declined to make the first declaration sought by TCSF. He took the view that, as the 1931conveyance envisaged that there might be building on the land burdened with the restrictive covenant, the remaining defendants could not object on the basis that the works *per se* would amount to a nuisance; nor did he think that the operation of a school itself would breach the covenant. He did, however, take the view that the increased traffic generated by the school might 'be or grow to be … a nuisance damage annoyance or disturbance' to the defendants. He therefore declined to make the second declaration as well.

The parties disagreed as to where the burden of proof in the application lay. The judge held that, as TCSF had brought the application, it was for them to prove on the ordinary civil standard of proof that they were entitled to the negative declarations, not for the defendants to prove that they were entitled to the benefit of the covenants and that the development would amount to a breach. Insofar as no case law was cited by either side, this may amount to a precedent on a novel point.

Boundary dispute – whether this and answers in a Property Information Form amounted to misrepresentations – rescission of contract

Harsten Developments Ltd v Bleaken and others; Devlin and another v Harsten Developments Ltd [2012] EWHC 2704 (Ch) concerns two inter-related disputes which were heard together by Morgan J. The latter was a County Court action over a boundary dispute; the former an action brought in the High Court for the rescission of an auction contract for the purchase of a building plot.

The boundary dispute concerned the legal demarcation of the line of a boundary which was marked on the ground by a wide hedge. The case involved the usual investigation of the historic position, and the conveyancing history of the plots, it being eventually held that the legal boundary ran along the centre line of the hedge. The case followed the ratio of the House of Lords decision in *Alan Wibberley Building Ltd v Insley* [1999] 1 WLR 894, [1999] 2 All ER 897, namely that the 'hedge and ditch' presumption of some antiquity (ie that a legal boundary runs along the *outer* edge of the ditch) can have no application where the hedge existed before the creation of the legal boundary ([26]).

The result of this ruling on the boundary was relevant to the High Court action for rescission of the contract, in that the purchasers seeking rescission (HD) had relied upon the representation in the auctioneer's particulars that the whole width of the hedge was included in their building plot; they had therefore assumed that they would be able to remove it to give them sufficient land to implement their building plans.

The case serves as a reminder of the care that needs to be taken when a Seller's Property Information Form is completed, whether the sale is by private tender or (as here) by auction. In an era of registered conveyancing, disputes as to title may be rare, but the SPIF has become a crucial document. Morgan J here held that HD were entitled to rescind their contract with B because of various misrepresentations. Besides the misrepresentation as to the boundary already mentioned, he held that the answers given in the SPIF contained further misrepresentations in that the sellers B had failed to warn HD of (a) the existence of a drain through which the owners of neighbouring land had a right to drain their property; and (b) the rights of entry that would be associated with this easement. These rights were particularly significant as they would restrict the scope for development on a confined plot. Moreover, although he held that it was not a misrepresentation for the plot to be described as a 'building plot' (as some other development might be possible), he held that there was a further misrepresentation in that the auction particulars had described the plot as being sold with the benefit of a certain planning permission, and the judge determined that, because of the discrepancies over the boundaries and the existence of the drain, it would not have been reasonably possible to implement that agreement.

The judge rejected B's argument that HD had affirmed the contract by completing the purchase and subsequently making their own application for

planning permission, on the basis that HD had not been aware of the problems at the time. He also rejected B's argument that HD's remedy should be restricted to damages: the usual remedy for misrepresentation was rescission, though HD was in addition awarded damages under Misrepresentation Act 1967, s 2(1) to cover out of pocket expenses.

Financial Services Compensation Scheme – whether loss caused by faulty advice to remortgage or by related purchase of a property in Spain

Emptage v Financial Services Compensation Scheme Ltd [2012] EWHC 2708 (Admin) lies outside the usual scope of this work but a summary may be of interest to practitioners. It involved what Haddon-Cave J described as the 'labyrinthine' provisions governing the Financial Services Authority's regulation of the mortgage market.

Put briefly, the claimant and her partner had sought advice on remortgaging their home in England, and had been advised to enter into a remortgage arrangement which included the acquisition of a holiday home in Spain. The value of the latter crashed, the claimant and her partner were left owing over £70,000 more than they had done previously on their English property, and the Spanish property turned out to be virtually worthless. FSCS offered her compensation amounting to some £11,500, on the basis that the larger part of her claim related to the poor financial advice that she had received to purchase the property in Spain (which therefore lay outside the scope of FSCS).

The Administrative Court quashed this decision, holding that FSCS had placed undue emphasis on the Spanish element of the advice that had been given: the fundamental flaw in the advice was that the claimant had been advised to increase her mortgage substantially beyond what she could afford to repay. FSCS was directed to reconsider her application for compensation.

II. EXISTING LEASEHOLDS

Appeal to UT on service charge dispute – whether LVT should have ruled on issue not raised by the leaseholders

Birmingham CC v Keddie [2012] UKUT 323 (LC) is another example (cf. *Regent Management Ltd v Jones* [2012] UKUT 369 (LC), mentioned in the judgment, *Fairhold Mercury Limited v Merryfield RTM Company Limited* [2012] UKUT 311 (LC), mentioned below, and *Beitov Properties Ltd v Martin* [2012] UKUT 133 (LC), mentioned in Bulletin No 130) of an appeal which was brought to the Upper Tribunal because an LVT embarked upon ruling on an issue which the parties did not see the need to resolve. The dispute involved the replacement of windows in a former council flat which was held by the Respondents under a 'Right to Buy' lease. The Appellant local authority had replaced the windows and passed on the cost to the Respondents under the service charge. The respondents had not owned the flat prior

to the works being carried out, and they disputed the charge on the basis that the works had not been completed to a reasonable standard of workmanship, and so the charge was not reasonable. Following an inspection, the LVT purported to disallow the cost on the basis that there was no evidence that the existing windows had needed replacing, an issue which the respondents had not raised, and did not wish to pursue. The appellant challenged the LVT's ruling on the basis that it was a breach of natural justice, in that it had not had an opportunity to address the issue upon which the LVT had based its decision, and the decision was in any event perverse, as it was not a matter which the respondents had raised by way of complaint.

In the Upper Tribunal HHJ Gerald allowed the appeal, and invited the parties to reach agreement on the amount recoverable, which they did. He also made an order under LTA 1985, s 20C in relation to the local authority's costs.

The judgment deserves attention as HHJ Gerald gives guidance on the statutory basis of LVTs' jurisdiction over service charge disputes, and the procedure that they should normally adopt in approaching their task. He stresses ([13]–[18]) that LVTs are not inquisitorial tribunals: they should confine themselves to resolving matters which are in dispute between the parties, and not indulge in ruling on matters which have not been raised. If, exceptionally, some other issue should arise which the LVT considers it is necessary that it should resolve in order fairly to dispose of a case, the LVT should always raise it with the parties and give them both an opportunity of addressing it ([20]) otherwise it would be a breach of natural justice which could be the subject of challenge by either party.

Appeal to UT on administration charge dispute – whether LVT should have ruled on issue not raised by the leaseholders – whether fee could be imposed as condition for consent – whether fee was reasonable

Crosspite Ltd v Sachdev [2012] UKUT 321 (LC) is yet another example of an appeal having to be made to the UT because an LVT had raised of its own motion an issue which was not in dispute between the parties. The Respondents had sub-let without consent a flat which they held under a lease containing a covenant on their part "not to underlet the whole of the Premises without first obtaining the written consent of the Lessor such consent not to be unreasonably withheld". When the ground landlord found out it required the Respondents to apply retrospectively for permission, for which it charged its standard fee of £165. The respondents applied to the LVT under CLRA 2002, Sch 11, para 1 to the for a ruling that this was an unreasonable administration charge: they conceded that they did not object to paying a fee as such for consent, but suggested that their ground landlords' standard fee of £165 on an initial application, and £130 on annual renewal was too high, and suggested that a one-off fee of between £50 and £100 would have been reasonable. The matter was dealt with by the LVT by a paper hearing, which determined that the ground landlord was not entitled to

charge a fee at all (on the basis that there was no provision in the lease entitling the landlord to make a charge); and that, if a fee was chargeable, a reasonable fee would have been £135.

Sitting in the UT, HHJ Gerald allowed the landlord's appeal. He firstly noted that the LVT ought not to have considered at all the question of whether the landlord was entitled to charge: it had not been raised by the respondents, so the LVT had no jurisdiction to consider it. In any event, it was clear law that, if a consent were required under a qualified covenant, the landlord was entitled to make a reasonable charge for it. This established principle was implicit in s 19(1)(a) of the LTA 1927 and is expressly preserved in the final clause of LPA 1925, s 144.

The UT therefore had to consider the reasonableness of the amount of the fee charged by the Landlord. The burden of proof of the reasonableness of an administration charge lay on the landlord, and there was little evidence either way. But as the respondents had adduced no evidence to show that it was too high, the UT would uphold the fee, particularly as it was a retrospective application and had thus involved additional work.

HHJ Gerald concluded ([29]) by reiterating his remarks in *Birmingham CC v Keddie* (above) to the effect that LVTs should not, save in exceptional circumstances, purport to rule on issues which the parties themselves had not raised and were not in dispute between them: the LVT simply did not have jurisdiction to do so.

It may be noted that the figure allowed here (£165) as a reasonable fee for the landlord to consent to a sub-letting (albeit on a retrospective application) is considerably higher than the fees allowed in *Holding & Management* (*Solitaire*) *Ltd v Norton* [2012] UKUT 1 (LC) (see Bulletin No 129 and Division IV, paras [575] & [575.5] in the main work) where Mr George Bartlett QC disallowed fees of £105 on two advance applications and £135 on two retrospective applications and substituted fees of £40 in each case. Bearing in mind the work involved if such applications are considered properly (eg checking that the (sub-)tenancy agreement is consistent with the lease), the fee allowed here would seem more realistic.

Appeal to UT on service charge dispute – whether LVT should have ruled on quantum of management charge when issue not raised by the leaseholder

Wales & West Housing Association Ltd v Paine [2012] UKUT 372 (LC) is the fourth example (see above; and *Fairhold Mercury Limited v Merryfield RTM Company Limited,* below) to be noted in this Bulletin of an appeal succeeding in the UT because an LVT had adjudicated on a matter which had not been raised by the parties before it. The leaseholder P had raised objections across the board to the service charge levied by the landlord Association under her 'Right to Buy' lease, and in the Scott Schedule which the LVT had directed, she had objected to L's management charge on the basis that, as a 'Right to Buy' leaseholder, she ought not to have to pay it. The landlord had answered this objection, but the LVT went on of its own motion to consider that the

charge was too high and to reduce it from £292 for the year to £200. The LVT purported to do so, 'applying our knowledge as an expert tribunal' and by comparison with charges made by commercial managing agents.

The landlord appealed, and Mr George Bartlett QC, President, in the UT, upheld the appeal. He held that, although an LVT might itself raise the question of the reasonableness of an item of the service charge, it should be slow to do so, as essentially the LVT should resolve *inter partes* disputes: here P was objecting to having to pay a management charge at all, not disputing its amount, and the landlord had not had the opportunity to prepare its case with a view to justifying the quantum rather than the principle.

The LVT had not followed the guidance given by the Lands Tribunal in *Arrowdell Ltd v Coniston Court* (*North*) *Hove Ltd* [2007] RVR 39, which, whilst it allowed a tribunal to make use of its own expert knowledge, had emphasised that (1) the LVT had to proceed on the basis of evidence; (2) it should expose any evidence for the comment of the parties; and (3) it had to give reasons for its decisions. If, in the instant case, the LVT had had any specific comparables in mind, it should have specified them and invited the landlord and the leaseholder to comment on them, and then given its reasons for reducing the amount of the management charge.

Addition of land to lease – construction of memorandum – amount of rent payable on arbitration

In *Spencer v Secretary of State for Defence* [2012] EWCA Civ 1368 the Court of Appeal upheld an appeal from Vos J, reported as [2012] EWHC 120 (Ch), reversing the decision of the judge in the Salisbury County Court (see the note of the Chancery Division hearing in Bulletin No 128 for the facts).

The appeal was on the point of the construction of the memorandum only, it being accepted by both parties in the Court of Appeal that the addition of 1.3 acres to a total holding of 257 had the result of effecting at law a surrender and re-grant and thus the creation of a new lease.

Collective Enfranchisement – effect of cap in rent review provisions in lease on price to be paid

Sinclair Gardens Investments (*Kensington*) *Limited v 31 Croydon Road Limited* [2012] UKUT 310 (LC) raises a short but interesting point of interpretation of a lease which arose in the context of a valuation for the purposes of collective enfranchisement, but which would still be of relevance if the question were simply the amount of rent that was payable.

The valuation was required in connection with the collective enfranchisement of a building comprising five flats. The 99-year leases – which were in identical terms and made in 1985 – incorporated provisions for the review of the rent after 33 years, subject to a familiar form of wording intended to cap any increase in the rent so as to ensure that the reviewed rent did not exceed two-thirds of the rateable value and thus cause the tenancy to become a

regulated tenancy under the Rent Act 1977. The proviso in the lease specifically recited that it had been inserted so as to comply with Housing Act 1980, s 78.

The enfranchising leaseholders argued, and the LVT accepted, that the effect of the proviso was to cap the rent payable (and thus to reduce the price payable for the reversion) notwithstanding the fact that s 78 had been repealed so far as it might affect the leases in question. On appeal the landlord argued, and in the UT HHJ Gerald accepted, that the proviso did not take effect as a cap, now that s 78 was no longer relevant to the leases. The LVT had taken the view that the reference in the proviso to s 78 operated as a recital; HHJ Gerald took the view that this was not consistent with established canons of interpretation of leases to the effect that "parties are presumed to have included words contained in the operative part of a lease with the intent that they have contractual effect and force otherwise they would not have been included and would be mere surplusage" ([12]). The rent from 2017 onwards would therefore be reviewable, without being subject to the cap, and the price payable on enfranchisement had to be calculated on that basis.

The price to be paid was remitted to the LVT to be revalued accordingly, but it would appear that the effect of the decision would be to increase the price payable from £45,632 by some £15,000.

Enfranchisement – meaning of 'house' under Leasehold Reform Act 1967, s 2(1)

What is a 'house'? The Supreme Court was faced with this issue for the first time in *Day v Hosebay Ltd, Howard de Walden Estates Ltd v Lexgorge Ltd* [2012] UKSC 41, though the point on LRA 1967 s 2(1) had come before the House of Lords on at least three previous occasions. The present difficulties arose out of the amendments made to the LRA 1967 by the Commonhold and Leasehold Reform Act 2002. Prior to those amendments, the former residence requirement before a tenant could enfranchise made it impossible for the tenant of a 'house' used exclusively for commercial purposes to be eligible to acquire the freehold. The apparently unforeseen result of the removal of the residence requirement – which was intended to allow eg second home owners and 'buy to let' investors to take advantage of the LRA 1967 – was that certain tenants of what would generally be seen as commercial properties became eligible, according to the Court of Appeal, to acquire their freeholds under the Act.

In *Day v Hosebay Ltd* the three properties had originally been constructed and occupied as terraced houses, but were currently used as what was described by the first instance judge as a 'self-catering hotel': a collection of serviced self-catering rooms which were let out on a short-term basis to visitors to London. In *Howard de Walden Estates Ltd v Lexgorge Ltd* the property had been constructed as a substantial five-storey house, but since around 1888 it had been used as commercial offices. It was occupied as offices when the tenant originally served its notice under the LRA 1967

(although by the time of the hearing two upper floors were used for residential purposes). The Court of Appeal (per Lord Neuberger MR) had upheld the first instance decisions and held that in both cases the properties could be enfranchised. In the former case the properties had been 'adapted for living in' and in the latter case the property had been 'designed or adapted for living in' and (in both cases) the properties could (following Lord Roskill in *Tandon v Trustees of Spurgeons Homes* [1982] AC 755) reasonably be called 'a house' even though one might equally reasonably call them something else. Lord Neuberger reached his conclusions with reluctance, holding that he was bound to interpret s 2(1) in this way, although he felt certain that Parliament, in passing the CLRA 2002, had not intended to extend compulsory enfranchisement to exclusively commercial premises.

Lord Carnwath, delivering the sole judgment of a seven-judge court, in both cases overruled the Court of Appeal. He stated (at [8]) that the definition in s 2(1) raised 'two separate but overlapping questions: (i) is the building one "designed or adapted for living in"? (ii) is it a "house … reasonably so called"?' Both questions remained live in *Hosebay*; in *Lexgorge* the first had been conceded in favour of the lessees.

Lord Neuberger, giving the lead judgment in *Boss Holdings Ltd v Grosvenor West End Properties Ltd* [2008] UKHL 5 had suggested (at [18]) that the 'designed or adapted for living in' test would be satisfied if either the property had originally been designed for that purpose or – as a result of subsequent alterations – was currently adapted for that purpose. But, when hearing *Hosebay* in the Court of Appeal ([2010] EWCA Civ 788), he had drawn back from this proposition, preferring as the test that an adapted building would have still to remain 'adapted for living in' to satisfy the test ([40]). Lord Cornwath in the Supreme Court preferred this later formulation, though he did not call into doubt the actual decision in *Boss Holdings:* he held its ratio to be ([36]) that the upper floors, which were designed for living in, and had not been converted for any other purpose had not lost that quality by reason of their being out of repair and dilapidated.

Turning to the appeals under consideration, Lord Carnwath expressed no concluded view on whether the properties in *Hosebay* ([44]) were 'adapted for living in'. Unlike Lord Neuberger, he did not think the fact that they were 'adapted for *staying* in' necessarily satisfied that wing of the test, though he conceded that the position was arguable, as their current configuration might have originated in when they were adapted for longer-term occupation, and the rooms might still equally well be suitable as year-round or term-time student accommodation. He did not feel the need to decide the detailed factual issues as (on question (ii), above) he was satisfied that a property which had been converted into a 'self-catering hotel' could no longer reasonably still be described as a 'house' ([43]). Similarly in *Lexgorge* he did not think a property which had been converted into offices could reasonably still be described as a 'house' ([45]). He implies (at [45]) that, on his interpretation of *Boss Holdings*, it is arguable that the landlords need not have made the concession that the property was indeed 'designed or adapted for living in'.

Of particular significance is Lord Carnwath's emphasis (at [25], [45]) that the LRA 1967 is concerned with houses as buildings to live in, and the fact that eg English Heritage or an architectural historian might reasonably refer to a building as a 'house' does not mean that it is reasonable to do so when considering the concept of a 'house' for the purposes of the LRA 1967. He maintains that one would not describe a 'self-catering hotel' or an office building as a 'house'. This does not, however, detract from cases such as *Lake v Bennett* [1970] 1 QB 663 (CA) or *Tandon,* which were correctly decided in that one might equally reasonably refer to the premises there as 'house with a shop below, or as a shop with a dwelling above'.

One must have sympathy for Lord Carnwath's actual decision, as he makes a convincing case that Parliament did not intend purely commercial tenants to have the benefit of the LRA 1967, and, it is not easy to justify why certain commercial tenants should be given the benefit of favourable treatment which was intended to allow tenants to enfranchise their homes. Nevertheless it is difficult to avoid the conclusion that Lord Carnwath has adopted a highly purposive approach – as arguably Lord Roskill did in *Tandon* – and, in effect, held that it is reasonable to call a property a house if one considers it is reasonable for the tenant to be able to enfranchise. The amendment of the LRA 1967 by the CLRA 2002 has therefore led to a more restrictive interpretation of s 2(1). This of itself raises interesting broader issues on statutory interpretation: when trying to ascertain Parliament's intention, does one consider what Parliament meant by a 'house' in 1967 or modify one's view on that, based on what would seem to have been Parliament's overall intention in 2002? But this is a discussion for another forum.

(Case noted at: 162 NLJ 130; and S.J. 2012, 156(40), 12–13)

Forfeiture of lease – whether application for relief should be adjourned until after application for rent to be treated as an administration expense

Lazari GP Ltd v Jervis [2012] EWHC 1466 (Ch) involved two applications in the Companies Court, relating to premises in London's Oxford St. An application by the landlord for a ruling as to whether the last instalment of rent should be treated as an expense in the administration stood adjourned to the first open date after 31 May 2012. The other application was one by the landlord for permission to forfeit the lease. The administrators applied for an adjournment of the latter application, on the basis that the two applications should be heard together. Briggs J rejected this, and so went on to hear the forfeiture application. Although the administrators had arranged a sale of the tenant's undertaking, including the lease in question, to another company, the landlord appeared for good reason to be unwilling to grant licence to assign to them, and had an established retail chain willing and able to take the premises at a higher rent than that under the current lease, provided that solicitors were instructed by 28 May. Applying 'the settled principles laid down by the Court of Appeal in *Re Atlantic Computer Systems* [1992] Ch 505' permission to forfeit was given. No condition was imposed requiring that forfeiture be by court proceedings.

Landlord and Tenant Act 1954 Pt II – introduction of service charge under s 35

Edwards & Walkden (*Norfolk*) *Ltd and others v City of London* [2012] EWHC 2527 (Ch) is the trial of two preliminary issues arising out of the applications for various tenants at Smithfield Market for the renewal of their leases. The City Corporation, as landlord, was prepared to grant new leases of the maximum 15 years, but the parties were not agreed on how the rents should be calculated.

The first preliminary issue raised a point under the Metropolitan Meat and Poultry Markets Act 1860 and is thus of limited interest. In essence the traders were arguing that the terms of the Act required that the rental income from office blocks that the Corporation had erected in the 1990s over parts of the Market should be set against the rents charged to the market tenants, thus reducing them. Sales J rejected this argument.

The second preliminary issue was of considerably more general interest. The leases which were the subject of the renewal applications had included an 'all in' rent, inclusive of repairs, maintenance, and the substantial common services provided by the Corporation (*inter alia*, the overhead 'meat rail', refrigeration, security and cleaning). The tenants wished this arrangement to continue, whereas the Corporation argued that there should instead be a lower rent, plus a variable service charge. The tenants of course relied upon the House of Lords' decision in *O'May v City of London Real Property Co. Ltd* [1983] 2 AC 726 to argue that the terms of the lease should not be varied and that a change such as this ought not to be introduced against their wishes. The decision – to the present editor surprising, at first sight – of Sales J was that the new rents should indeed be structured as a basic rent plus a service charge. On closer consideration the decision was perhaps not so unorthodox. A relevant factor was that the leases granted in the Market in or about 1981 had included service charges, but there had been a change during the period of the reconstruction of the market in the 1990s so that the tenants paid an 'all in' rent. The Corporation argued that this had been intended to be a temporary measure, but a failure to agree on this following reconstruction resulted in the 2001 leases continuing the practice of having the 'all in' rents. A further complication – which takes this case somewhat out of the realm of the typical – is that here the proposed service charge covered the provision of facilities (e.g. refrigeration, the 'meat rail', and, arguably, the extent of cleaning required here) which were properly treated (see [91]) as overheads of the tenants' businesses rather than the preservation of a capital asset for the landlords.

The decision may therefore turn on this rather unusual factual background, though Sales J does cite (at [89]) with apparent approval dicta of Sachs LJ in *Hyams v Titan Properties Ltd* (1972) 24 P & CR 359, 363 to the effect that a basic rent plus a variable service charge was becoming the norm for commercial tenancies. If that was true in 1972 it is surely even more true today! But of course, in *Hyams*, prior to renewal the rent took the form of a basic rent plus a *fixed* service charge. Since *O'May*, *Hyams* has generally been treated as

authority only for the limited proposition that, if the rent under the original lease included a fixed service charge as a separate element, on renewal under the 1954 Act the service charge should be variable rather than fixed. This must nowadays apply in few, if any, cases.

(Case noted at: EG, 22 Sept 2012, 91)

Price to be paid on collective enfranchisement – approach to be adopted when some leases had very short unexpired terms (4.74 years) – 'hope value'

Carey-Morgan and another v Sloane Stanley Estate [2012] EWCA Civ 1181 is an appeal by C-M, the nominee purchaser, against a decision of the Upper Tribunal (Lands Chamber) on the price to be paid for a freehold on the collective enfranchisement of a block of 25 flats under the Leasehold Reform, Housing and Urban Development Act 1993.

The case raised slightly unusual issues in that the flats included six with unexpired terms of only 4.74 (17 had terms with unexpired terms of between 70 and 96 years, and two would be subject to lease-backs). *Sportelli* ([2008] UKHL 71) did not seek to identify a generic deferment rate for leases with unexpired terms of below 20 years. *Cadogan Square Properties Ltd v Earl Cadogan* [2011] 1 EGLR 155 had attempted to clarify how the *Sportelli* guidelines should be applied to leases where 10 – 20 years was unexpired, and indeed for terms with less than 10 years unexpired, but it had left open the possibility that net rental yields might be used as a guide to the deferment rate in the case of very short unexpired terms. The present case clearly raised this question.

In considering the treatment of the element of the value of the freehold reversion which lay behind the six leases where very short terms of 4.74 years were left unexpired, the Upper Tribunal (Mr George Barlett, QC, President, and Mr Paul Francis, FRICS) had adopted an approach based on the net rental yield. This included taking valuations on the basis that the reversioner would obtain vacant possession when the leases expired. No objection was taken to this approach by the advocate for the nominee purchaser at the hearings before the LVT and the UT, but before the Court of Appeal the nominee purchaser attempted to argue that this concession should not have been made, because of the possibility that, when the leases expired, the tenants would have the right to remain as assured periodic tenants under s. 186 of the Local Government and Housing Act 1989. He argued that, as this was a point of pure law, it could be taken by the CA. The CA rejected this argument, holding that this was a new point, and if it were allowed to be taken, it would require that the case be remitted to the UT for further directions for determination of whether the 1989 Act would in fact apply, this depending on the likely rental value. The Court of Appeal therefore determined the procedural point, but, in effect, left the substantive point open.

A further ground of appeal was that the UT had, by its approach, effectively valued the component parts of the reversion rather than arriving at a figure for the single freehold interest. The Court of Appeal rejected this argument.

A final ground of appeal involved the treatment of hope value. C-M argued that, in assessing this, instead of assessing the hope of a tenant coming forward to negotiate for an extended lease (though without having any statutory entitlement to one), the UT had assessed the hope of a tenant coming forward who had such an entitlement (under Ch II of the 1993 Act). The CA took the view that, whilst it would clearly be wrong for hope value to be assessed in this way, the UT's lengthy judgment made it clear, in its context, that it was the former hope which was being assessed. The appeal was therefore dismissed.

(Case noted at: EG, 6 October 2012, 113)

Proof of Landlord's debt for cost of reinstatement and disrepair following surrender of lease – construction of deed of surrender – whether LTA 1927, s 18(1) limited disrepair claim

Re Teathers Ltd [2012] EWHC 2886 (Ch) involves the rejection by the liquidators of a proof of debt submitted by a landlord following the surrender of four leases. The company – now in liquidation – had been the tenant of the fifth floor of an office building. The tenant had been granted licence to make various alterations, subject to an obligation to reinstate at the end of the term. The liquidators had agreed with the landlord for the surrender of the leases, on terms that, on surrender, the liquidators and the landlord released each other from all obligations arising under the leases 'whether arising on or after, but not before, the date of this Surrender'. The landlord subsequently put in a proof of debt to recover (a) the cost of the reinstatement works and (b) the cost of putting the premises in repair. The liquidators rejected the proof and the registrar directed that the question be tried as a preliminary issue.

Morritt C rejected the part of the proof dealing with the cost of the reinstatement works. The obligation to reinstate did not arise until the end of the term, so it was released by the express terms of the surrender.

The landlord had calculated its loss arising from failure to repair based on the reductions to the rent that it had had to make in order to mitigate its loss and immediately to re-let the premises. Morritt C rejected that basis of calculation, ruling that it was a claim to which LTA 1927, s 18(1) applied, which restricts the damages in such cases to the amount by which the value of the freehold reversion had been diminished by the lack of repair. Whilst there might therefore be some claim, the landlord's proof as it stood could not be accepted. (It may be noted that Leasehold Property (Repairs) Act 1938, s 1(2) means such claims can rarely be brought, as they can usually be brought only in the last three years of the term, but s 18(1) would apply here).

II. EXISTING LEASEHOLDS

Right to Manage – costs of landlord on an abortive RTM application – whether costs of legal advice incurred with a non-solicitor were recoverable

Fairhold Mercury Limited v Merryfield RTM Company Limited [2012] UKUT 311 (LC) raises a short point on the liability of an RTM company for costs incurred by a landlord. The RTM company had served a notice claiming the Right to Manage; the landlord had served a counter-notice, and the RTM Company had not proceeded with its application. The landlord claimed for the costs incurred on considering the notice and preparing the counter-notice.

The LVT had rejected the claim, on the basis that the costs had been incurred by a limited company which deals inter alia with RTM claims, and that, in effect, only costs incurred by a solicitor would have been recoverable. Mr George Bartlett, QC, President, quashed this ruling on the basis that the landlord had not been given an opportunity to answer the objection. He further determined that the costs were reasonable and recoverable, as there was nothing in the Solicitors Acts which reserved the relevant activities to solicitors.

Further, he reiterated the point – made recently in *Beitov Properties Ltd v Martin* [2012] UKUT 133 (LC) (see Bulletin No 130), and in the several cases already noted in this Bulletin, that LVTs should not take of their own motion technical points such as these which had not been raised by the parties.

Right to Manage – meaning of 'self-contained building' and whether an RTM can manage 'appurtenances' which also benefit other properties

Gala Unity Ltd v Ariadne Road RTM Company Ltd [2012] EWCA Civ 1372 is the unsuccessful appeal by the landlords against the decision of Mr George Bartlett QC (President) in the Upper Tribunal ([2011] UKUT 425 (LC)). The dispute involved the application of the Right To Manage under CLRA 2002, ss 71–113 where the RTM Company wishes to manage areas which, although they may be 'appurtenances' to the blocks in question, are also used by other blocks or properties which the landlord retains the right to manage (and indeed remains liable to manage). Given the increasing complexity of many modern developments, with perhaps several blocks sharing common private roadways, parking areas and landscaped areas, this is an issue that is frequently encountered. Essentially, in a brief judgment, the Court of Appeal (Sullivan, Patten and Arden LJJ) upheld the UT.

Giving the sole judgment, Sullivan LJ rejected the argument of the landlords that, in the circumstances, the blocks which sought the RTM were not self-contained: s 72(2) states that 'A building is a self-contained building if it is structurally detached' and the court was not entitled to look behind this definition and say that a structurally detached building was not 'self-contained' for some other reason ([13]–[14]). Further, s 72(1)(a) allows the right to manage to extend to 'appurtenant property' which is itself defined in s 112(1). Essentially, an RTM company is entitled to manage appurtenant

property even if that property includes land over which other freehold or leasehold owners also enjoy rights, and those other owners are not eligible to join the RTM company. The upshot of the decision in this case was that the RTM company was entitled to manage a bin area, access road and gardens, even though the leasehold owners of two flats each in a freestanding building described as a 'coach house' also enjoyed rights over them, and the ground landlord remained liable to provide services in respect of them.

In the instant case the owners of the two 'coach house' flats seemed quite content for the RTM company to be responsible for managing facilities which they enjoyed: but Sullivan LJ accepted that 'The prospect of dual responsibility for the management of some of the appurtenant property in this and other similar cases is not a happy one.' He commended the suggestion of Mr Bartlett QC in the UT (at [17]) that, if an RTM Company assumed responsibility for the management of common parts over which other properties enjoyed rights, and for which the ground landlord remained responsible, it would be up to the RTM Company and the ground landlord to reach agreement on this; and that, if the ground landlord insisted upon providing services for its leaseholders which duplicated those supplied by the RTM Company, then its leaseholder might well be able to argue under s 19 LTA 1985 that the costs were not reasonably incurred.

Whilst the outcome may be satisfactory in this particular case, it is perhaps regrettable that neither party was legally represented in the Court of Appeal, and that some of the broader implications of the dispute were not brought to the Court's attention. Here, it would seem that the residents of *two* self-contained blocks had set up the RTM Company, and were exercising the RTM jointly: whilst sensible for all concerned, there would seem to be no clear legal basis for this to happen (this situation would seem not to fall within the scenario covered by *Craftrule Ltd v 41–60 Albert Palace Mansions* (*Freehold*) *Ltd* [2010] EWHC 1230 (Ch)). Further, the judgment offers no guidance on what should happen if several freestanding and thus self-contained buildings occupy the same communal grounds, and more than one wishes to exercise the RTM, either simultaneously, or successively. Nor does the sensible suggestion that an RTM Company and a ground landlord might have to cooperate in avoiding duplication of services address such practical issues as how the RTM Company would recover costs from other users of the 'appurtenances' it manages, and how compliance would be achieved with the consultation requirements of LTA 1985, s 20. It seems inevitable that at some point Parliament will have to revisit the Right To Manage, in spite of the complexity of the undertaking.

Variation of Leases under LTA 1987, s 37 – amendments resulting from withdrawal of communal heating system – whether landlords entitled to 'non-consequential amendments' relating to their legal costs and the service charge

Shellpoint Trustees Ltd v Barnett [2012] UKUT 245 (LC) is another rare instance (cf *Dixon v Wellington Close Management Ltd* [2012] UKUT 95

(LC) – noted in Bulletin No 129) of an appellate decision offering guidance on the workings of the discretionary jurisdiction of the LVTs to vary leases under LTA 1987, s 37. (This is, of course, the provision that allows for the variation of a lease to meet an object which is supported by a 'super-majority' (75%) of the parties; s 35, on the other hand, is confined to applications on one of the mandatory grounds itemised in s 35(2), intended to remedy substantial defects in leases). The principal object of the variation sought by this s 37 application was a familiar one: the scrapping of an antiquated communal heating system installed over 70 years ago and its replacement with individual heating systems for each flat. The factual matrix was potentially complicated by the fact that the 365 flats were spread over three blocks, and the two relevant landlords each owned blocks in each of the three, but in the event nothing turned on that: the proposed variations had the support of the owners of 299 flats, and were opposed by only 17, so the requisite numbers were clearly satisfied; the owners of only three flats actively opposed the variations at the LVT hearing. Further, the variations had the support of the Residents' Association (a tenants' association recognised under the LTA 1985, s 29).

The variation of the leases to amend their provisions with regard to the supply of heating naturally involved various consequential amendments to the service charge provisions. The point of difficulty that arose in the case was that the landlords would appear to have gone along with the leaseholders' wishes to amend the heating covenants on condition that the leaseholders also accepted, as a sort of package deal, three other amendments to the leases. These were referred to in the LVT and UT as the 'non-consequential amendments'. Although of a fairly technical nature, their effect was to ensure that the service charge account would be debited with: (1) any irrecoverable costs incurred by L on a forfeiture application; (2) any irrecoverable costs incurred by L in enforcing covenants against one leaseholder at the request of another; and (3) any irrecoverable costs incurred by L in enforcing payment of the service charges. If allowed these would pass the burden of bearing irrecoverable costs, and thus all the risk involved in proceedings intended to enforce lessees' covenants, from the landlords to the leaseholders generally.

The LVT had made an order varying the leases to make provision for individual systems rather than a communal heating system (with the consequential amendments to the service charge regime), but had declined to make the 'non-consequential amendments' on the basis that no evidence had been adduced to support the need for them. There was no appeal relating to the new heating system, but the landlords appealed to the UT against the refusal of the LVT to make the 'non-consequential amendments' which improved the landlords' position on the recovery of costs. One of the landlords' grounds of appeal was that the LVT ought not to decline to make a variation which had the support of an overwhelming majority of the leaseholders and had been accepted by the landlords as *quid pro quo*. The UT upheld the LVT and rejected this argument, holding that there was no real evidence that the non-consequential amendments were needed, or satisfied the statutory test under s 37, or that the leaseholders had genuinely supported them: they had

been offered the amendments as a 'package deal' which they had supported in order to achieve their principal objective of updating the heating provisions. (Although the leaseholders and their association had supported the original applications, they had not joined with the landlords in making the appeal). The UT also observed that there was not really an element of *quid pro quo* here: updating the provisions for the supply of heating was in the interests of the landlords as well as of the leaseholders.

Whilst the decision of the UT is clearly a just one on the facts, it does raise some potential difficulties. If it is proposed to vary a standard form lease in several respects – and this will often be the case – does this mean that a separate vote has to be taken on each and every proposed amendment? Such a strict line would not recognise the fact that, in many proposals to vary leases, whether by deeds by consent, or by an application to the LVT, there will often be an element of negotiation and horse-trading, and the resulting package of amendments may represent a hard-won compromise designed to be acceptable to the necessary majority of parties.

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Bower Terrace Student Accommodation Ltd v Space Student Living Ltd [2012] EWHC 2206 (Ch): [2012] Comm Leases 1862–1865 (noted in Bulletin No 131).

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Greene King Plc v Quisine Restaurants Ltd [2012] EWCA Civ 698: [2012] Comm Leases 1850–1852; and P.L.J. 2012, 295, 23–24 (noted in Bulletin No 130).

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Westbrook Dolphin Square Limited v Friends Provident Life and Pensions Limited [2012] EWCA Civ 66: P.L.J. 2012, 295, 23 (noted in Bulletin No 130).

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Daejan Investments Ltd v Benson & Ors [2011] EWCA Civ 38 (see Bulletin No 123 and Division IV paras [567.4] and [567.9] in the main work): appeal

regarding consultation on service charges under LTA 1985, s 20 and dispensation under s 20ZA is due to be heard by the Supreme Court on 4 December 2012.

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A drought of information (*finding out about flood risks*) EG, 29 September 2012, 116–117.

A south coast storm in a tea cup (*passing off action by management company which did not recognise a residents association and objected to material on its website*) EG, 20 Oct 2012, 131.

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Acting for buyers of repossessed property S.J. 2012, 156(35), 21.

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Boundary disputes: "a tale of two plans" [2012] Conv 429–436.

Built to last (*NHBC Buildmark*) P.I.P. 2012, 40(Sep), 18.

Careless talk causes comparables (*Humber Oil Terminals Trustee Ltd v Associated British Ports* [2011] EWHC 1184 (Ch)) EG, 6 October 2012, 106–108.

Challenge Goldacre and Give Beleaguered Retail Sector a Shot in the Arm (*Goldacre* (*Offices*) *Ltd v Nortel Crossing the Boundary* (*recent cases on general boundaries*) EG, 25 August 2012, 46–47.

Does secure mean risk free? (*investment in ground rents and consultation on service charges*) EG, 29 September 2012, 115.

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Finding fault (*10 most common causes in residential conveyancing of professional negligence claims*) P.I.P. 2012, 40(Sep), 14–16.

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In Practice: Benchmarks: Home Truths (*possession claims based on unpaid service charges*) (2012) LS Gaz, 13 September 2012, 26.

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Landlords Fighting the Big Squeeze EG, 25 August 2012, 38–41

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Let's get started (*RICS Small Business Lease*) EG, 15 September 2012, 120–122

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Localism gets real EG, 8 September 2012, 95.

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Taking notice (*pitfalls in serving notices in enfranchisement, etc. cases*) P.I.P. 2012, 40(Sep), 20–22.

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Worries about waiver EG, 15 September 2012, 123.

Your Space or Mine? (*includes Kettel v Bloomfold Ltd [2012] EWHC 1422* (*Ch*) – noted in Bulletin No 131 162 NLJ 1116.

Your Place or Mine? (new offence of residential squatting) 162 NLJ 1209.

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The Regulatory Framework for Home Buying and Selling: Government response to consultations on the Estate Agents Act and the Property Misdescriptions Act (*Sept 2012: Dept for BIS*): http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/r/12–1006-response-estate-agents-and-property-misdescriptions

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Advice on dealing with squatters in your home (Ministry of Justice and DCLG, issued 1 Sept 2012):
http://www.communities.gov.uk/documents/housing/pdf/2208971.pdf

Dealing with Rogue Landlords: A Guide for Local Authorities (issued 31 August 2012):
http://www.communities.gov.uk/documents/housing/pdf/2206919.pdf

HM Land Registry have published new Practice Guides on: *Personal Insolvency* (No 34); *Corporate Insolvency* (No 35); *Administration and Receivership* (No 36); *Receivers appointed under the provisions of the Law of Property*

Act 1925 (No 36A); *Return and rejection of applications for registration* (No 49); and *Requisition and cancellation procedures* (No 50).

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Housing (*Empty Dwelling Management Orders*) (*Prescribed Period of Time and Additional Prescribed Requirements*) (*England*) (*Amendment*) *Order 2012, SI 2012/2625* comes into force 15 November 2012 (England only).

Housing (*Wales*) *Measure 2011* (*Commencement No 2*) *Order 2012, SI 2012/2091* (brings into effect the provisions of the Housing (Wales) Measure 2011 relating to the suspension of the Right to Buy, with effect from 3 September 2012) (Wales only).

Town and Country Planning (*General Permitted Development*) (*Amendment*) (*Wales*) (*No 2*) *Order 2012, SI 2012/2318*: amends the 1995 General Development Order so as to permit, with effect from 5 October 2012, the installation of specified microgeneration equipment on buildings on agricultural or forestry land and within the curtilage of buildings other than dwellinghouses and blocks of flats (Wales only: similar provision has already been made for England).

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