Butterworths Property Law Service

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I. FREEHOLD CONVEYANCING

Claim re: conversion of goods by mortgagee – duties of an involuntary bailee – whether provisions of Mortgage Conditions were prescriptive or illustrative

Da Rocha-Afodu v Mortgage Express Ltd [2014] EWCA Civ 454 involves a claim in conversion but it is noted briefly here because it arises out of a mortgage repossession. A suspended possession order had been made against the appellants in October 2005. They were eventually evicted on 9 September 2006. Their notice of eviction, and previous correspondence, had reminded them of their duty to remove their belongings from the property. When they left the property, a considerable quantity of their possessions remained. They returned three times to collect possessions: the mortgagees had put up notices stating that if the chattels were not removed within 14 days, they would be disposed of in an appropriate manner. By the time the appellants returned on a fourth occasion the property had been cleared and the chattels disposed of. The appellants appealed both against the District Judge's decision that there had been no conversion, and against her determination of the damages that would be payable if she were wrong on the former point.

The Court of Appeal approved the finding of Mr David Kitchin QC in *Scotland v Solomon* [2002] EWHC 1886 (Ch) that a mortgagee in these circumstances was an involuntary bailee whose duty was to do what was right and reasonable. The appellants argued that the section of the Mortgage Conditions which dealt with the disposal of chattels prescribed an exclusive code which the mortgagees had to follow. The mortgagee, on the other hand, argued that the conditions were illustrative of what would be a reasonable course for it to take in order to satisfy the requirements imposed upon an involuntary bailee. If the appellants' arguments were upheld it would have

meant that the mortgagee could not dispose of the contents of the property in situ but would have had to have first taken them into store. This would often not be a sensible course of action to take.

The appellants had originally claimed a total of £800,000 as the value of their possessions. The District Judge held that they had entirely failed to prove this loss and would have awarded – if there had been liability in conversion – a 'fairly nominal' £5,000. In view of the finding of the Court of Appeal on the liability issue this ground of appeal did not need to be considered.

Adverse possession – whether adverse possessor had prescribed on constructive trust for another – whether Register could be rectified for mistake by removal of the adverse possessor on the application of someone who claimed no interest in the land

Balevents Ltd v Sartori [2014] EWHC 1164 (Ch) is the retrial of the action reported as [2011] EWHC 2437 (Ch) and noted in Bulletin No 126. The scenario is unusual that the defendant had prior to the original action obtained from Birmingham City Council a strip of land between the highway and a lap-dancing club. The defendant had been involved in the management of the club, and the owners of the club alleged that they, rather than the defendant, had been in adverse possession. Kitchin J had dismissed their claim for rectification, holding that the defendant had been in possession on his own account and not on behalf of the claimants. In a lengthy judgment Morgan J reviewed the extensive factual evidence – including some that had not been given at the original trial – and dismissed the primary claim by the claimants, based on a constructive trust. During the course of submissions, however, the claimants put forward an alternative claim, namely that the register should still be rectified so as to remove the defendant from the Register (with the effect that Birmingham City Council would be restored as the registered proprietors).

Most of the judgment is based on a detailed consideration of the factual evidence, applies well-established law on adverse, and is not of wider significance, though it does illustrate that, however long adverse possession has been going on for, it has to be continuous. The claimants failed again to establish that the defendant was holding the land on constructive trust for them. The upshot of this was that it became clear that the defendant had not in fact been in adverse possession for the period which he had alleged in order to secure his registration by adverse possession, and Morgan J had to consider how to deal with the claimants' subsidiary claim that the register should be rectified by removing the defendant. The latter part of the judgment ([157]–[182]) offers useful guidance on the principles to be applied in these unusual circumstances. Paragraph 2 of Sch 4 of Land Registration Act (LRA 2002) permits the register to be rectified to correct a 'mistake' and the Court of Appeal had decided in *Baxter v Mannion* [2011] EWCA Civ 1013 that if it turned out that an adverse possessor had not in fact been in possession for the requisite period, that amounted to a mistake (the instant

case, [159]). Further, it had been held in a number of cases at first instance that it is not necessary for a party applying for rectification to show an interest in the land, most notably *Walker v Burton* [2012] EWHC 978 (Ch); although the point of *locus standi* was not raised on appeal the CA had cast no doubt on the point (see [2013] EWCA Civ 1228 at [31]) and the parties to the instant case accepted that it represented good law. Indeed, Morgan J pointed out (at [158]) that, if the court has power to make an order under para 2 (of LRA 2002, Sch 4) then it ***must*** do so, unless there are exceptional circumstances: see para 3(3). In considering whether 'exceptional circumstances' existed he followed *Paton v Todd* [2012] EWHC 1248 (Ch), which had considered the similar words of para 6(3): the circumstances had to be 'out of the ordinary course, or unusual or special, or uncommon' but not 'unique or unprecedented or very rare' ([163]). Morgan J considered that there were such exceptional circumstances here ([177]), but they were not such as to justify a refusal to order rectification ([178]–[181]). The defendant was in possession of part of the land through a tenant, but the restrictions on rectifying the register against him did not apply as he had for the purposes of Sch 4, para 3(2)(a) of the LRA 2002 caused or substantially contributed to the mistake (ie his registration as proprietor by adverse possession) by fraud and/or lack of care (see [175]). The latter part of the judgment contains useful guidance on the application of these tests and of who bears the burden of proof at each stage.

Priority of charges – whether facility letters altering terms of previous loans amounted to a deemed repayment and new (further) advance

Re Black Ant Co Ltd (*in administration*) [2014] EWHC 1161 (Ch) raises some short points on what is meant by a 'further advance'. The instant case was a dispute between two lenders, D and U, as to which lender's advances had priority. D had what was apparently a first charge, and U a second, but U argued that its charges should in fact have priority. Its argument was essentially that after D had registered its charge, and U its second charge, D had issued various new facility letters to the borrowers (several loans were affected) which stated 'This offer is in substitution of and not in addition to all our previous Facility letters to you which shall be deemed cancelled'. U argued that this had the effect of deeming the previous loans repaid, and a new one made, which was therefore a further advance, and would take priority after U's registered charge. Mr N Strauss QC (sitting as a Deputy Judge of the Chancery Division in the Leeds District Registry) rejected this argument, holding that it amounted to no more than a variation of the terms of an existing loan, and not a repayment and granting of a new loan. D's accounts did not show any notional repayment and re-advance; the facility letters did not indicate that they would give rise to a deemed repayment and further advance; such a deeming would not serve any useful commercial purpose, and its sole effect would be detrimental to D.

The judge also rejected an argument from U that D's actions in rolling up unpaid interest and various fees amounted to a 'further advance' and therefore ranked after U's second charge: they remained secured as part of the original first charge.

Adverse possession – whether criminalisation of residential trespass prevented an adverse possessor from succeeding

Best v Chief Land Registrar [2014] EWHC 1370 (Admin) raises a short but important point on adverse possession: does the criminalisation of trespass of residential property by s 144 of the Legal Aid, Sentencing and Punishment of Offenders (LASPOA 2012) prevent an adverse possessor who is committing such a criminal offence from obtaining title by adverse possession? It had come to the attention of B, the Claimant in the instant case, that a property had been apparently abandoned in 1996, and from 2000 onwards he had done extensive work on the property to make it habitable. He claimed to have treated it as his own since 2001, and to have moved in, in January 2012. In November 2012 he applied to the Defendant CLR for the property to be registered in his name, but the CLR had refused his application, placing considerable weight on the decision of HHJ Pelling QC (sitting as a High Court judge) in *R* (*Smith*) *v Land Registry* [2009] EWHC 328 (Admin): that case involved asserted adverse possession of land forming part of a highway, which relied upon acts which would amount to an obstruction, contrary to the Highways Act 1980.

The primary argument of B was that s 144 of the LASPOA 2012 had no effect on the 'carefully structured and balanced provisions of [Sch 6 of] the 2002 Act'. Ouseley J's discussion of the respective arguments is thorough and wide-ranging. He accepts the existence of the *ex turpi causa* principle as one of public policy, but eventually comes down in favour of the view favoured by B, that it was a policy, not an absolute or unyielding rule (see [45]). It had to be weighed against competing policies, and Parliament had clearly shown its intention, in the LRA 2002, to retain adverse possession of registered land, within closely confined conditions, because of the public policy consideration of ensuring that title could be aligned with possession, and so ensuring that land remained marketable (see [19], [52]). This policy would be defeated if s 144 of the LASPOA 2012 had the effect argued for by CLR, whereas allowing someone in B's possession to make use of adverse possession would not have any deleterious effect on the aims of s 144, which were to enable dispossessed residential occupiers readily to have the back-up of the police and criminal law in vindicating their rights. Ouseley J subjected *R* (*Smith*) *v Land Registry* to close scrutiny and noted that, while at first instance HHJ Pelling QC had relied upon the fact that obstruction would be an offence under the Highways Act 1980, the Court of Appeal had preferred to decide the case on the basis that, even if the adverse possession were accepted, the land would not lose its status as land dedicated as highway. Ouseley J in the instant case thought that the general principle underlying *Bakewell Land Management Ltd v Brandwood* [2004] UKHL 14 suggested that here, as in

Brandwood, the illegality would have been remedied had the owner granted B permission to be present, whereas in *Smith* even the Highway Authority could not have authorised the obstruction. His judgment also considers some of the practical difficulties that would result if one were to accept the stance taken by the CLR: given that only trespass to a residential building, and not to its curtilage, is criminalised, stationing a caravan or tent on the curtilage of residential property would remain unaffected by s 144; possession of a residential property which did not involve 'living in' it, would also be unaffected, as would trespassory 'living in' non-residential property (see [81]). It was unlikely that Parliament could have intended that the CLR would have to decide such complex issues.

Ouseley J accepted a subsidiary argument of B that acts of adverse possession falling short of 'living in' a building and which were not therefore criminalised might still ground a claim to title, even if B had failed on his principal argument: but, in view of his primary findings, he did not find it necessary to determine what acts of possession might constitute lawful acts (see [91]).

Ouseley J also considered a third line of argument, that s 144 would breach B's rights under Article 8 of the ECHR and Article 1, Protocol 1 of ECHR. On the facts found, it was not necessary for these arguments to be considered, but he expressed the view that Article 8 was not engaged by the CLR cancelling B's application. He did nevertheless offer some guidance on how s 144 might need to be 'read down' to comply with the ECHR if that were deemed necessary.

(It has been reported that permission to appeal has been granted to the Chief Land Registrar in this case.)

(case noted at: EG 2014, 1421, 95; SJ 2014, 158(21), 18–19, 21; and JHL 2014, 17(4), D71)

Easements implied under s 62, LPA 1925 – whether prior diversity of occupation was always required – whether right was 'enjoyed with' the land

Wood v Waddington [2014] EWHC 1358 (Ch) is a dispute involving easements. The factual background is complex, and the judgment is lengthy. For present purposes it will suffice to say that the main point of law which was raised was whether prior diversity of occupation was necessary before an easement could be implied under s 62 of the Law of Property Act 1925 (LPA 1925). The Defendant argued – relying on dicta in *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] AC 144 – that it was, but Morgan J held that the result of, inter alia, the Court of Appeal decisions in *P & S Platt Ltd v Crouch* [2003] EWCA Civ 1110 and *Alford v Hannaford* [2011] EWCA Civ 1099 was there was no absolute requirement that there needed to be prior diversity of occupation ([133]). The ultimate question was whether the advantage in questions was 'enjoyed with' the land conveyed. He appeared to doubt ([132]) whether requiring that the existence of the right had to be 'continuous and apparent' was an improvement on the statutory

wording which was that the right had to be 'enjoyed with' the land (though the 'continuous and apparent formulation' was used in the two recent Court of Appeal cases just cited); and further it was clear that the easement claimed had to be enjoyed as part of the putative dominant rather than as part of the land when it was in common ownership ([132]). Unlike with the implication of easements under the Rule in *Wheeldon v Burrows,* however, there was no necessity for the right to be 'reasonably necessary' for the enjoyment of the dominant tenement ([132]).

It should perhaps be noted that, if the Court of Appeal is correct, and there is no need for prior diversity of occupation, then as the test in s 62 is easier to satisfy than that in the Rule in *Wheeldon v Burrows*, it becomes difficult to imagine cases where one would ever need to use the Rule in *Wheeldon v Burrows,* apart from cases where one is implying an easement into a contract, rather than a deed.

Agreement requiring party to 'exchange contracts' – extent to which this implied obligation on the other party to provide usual documentation

Gateway Plaza Ltd v White [2014] EWCA Civ 555 raises the intriguing question of what is meant when an agreement refers to an exchange of contracts. The defendant, W, had agreed to purchase a new flat in a development being built by the claimants GP (the present appellants). He had failed to complete, his deposit had been forfeited, and the claimants had sued him for damages. Those proceedings were compromised by an agreement which provided that the claim against him should be discontinued (and the deposit which had been forfeited would be credited to him) if he were to exchange contracts on another flat by a given date. GP's solicitors sent a further set of contract documentation, but it needed minor amendments. They also failed to send what was referred to as a CML form (the CML Disclosure of Incentives Form) in W's correct name. The time for exchanging contracts passed, and GP proceeded again with their claim. W defended the proceedings on the basis that the requirement that he should 'exchange contracts' necessarily implied co-operation on the part of the other side, including – on the seller's part – the provision of the usual pre-contractual documentation. The Recorder in Sheffield County Court tried, as a preliminary issue, whether the compromise agreement between the parties was legally binding, and, if so, whether GP was in breach of it. GP conceded that there was a binding agreement, but denied being in breach of it. The recorder found that GP were in breach, and GP appealed. The CA (Rimer and Vos, LJJ, and Sir Timothy Lloyd) dismissed the appeal, in essence adopting the same arguments as the Recorder. To insist that W could have exchanged contracts would be to give the compromise agreement a purely black-letter, over-narrow meaning. To give it business efficacy it was necessary to imply into it the commonsense meaning that GP would co-operate in the usual way in the customary pre-contract conveyancing processes.

It was stressed that this was not a case where W was required to complete: he could have declined to complete, and allowed the original claim to continue.

Solicitor acting for a 'land banking' company – whether also acting for purchaser, and so liable in contract and/or tort – whether liable as joint tortfeasor in making representations to the purchaser

Parker v Walker [2014] EWHC 1571 (Ch) lies somewhat outside the core areas of interest covered by the principal work, but it is briefly noted because of its potential interest to property lawyers. It involved a claim by P against W, a solicitor, who had acted on behalf of a series of companies which were involved in 'land banking' transactions, whereby the company purchased land with little or no development potential, and then sold if off as individual plots to 'investors'. P lost in excess of £600,000 in paying inflated prices for such plots at these. The various companies had been struck off or were subject to insolvency proceedings, so this action was by P against W, the solicitor to the various companies. The various companies suggested that their customers might wish to take advantage of a 'free legal service' and thus save the cost of engaging their own solicitors. P took advantage of this offer. He failed, however, to establish that W was actually acting for him, so as to ground a claim in contract. In spite of the suggestion set out above, the evidence was that W had never encouraged P to consider that he was acting for him, but indeed had punctiliously avoided doing so, referring always to the companies as his clients, and suggesting that P take independent advice before committing himself to the various transactions. P's claims against W in tort, alleging breach of a duty of care in tort, also failed. P did, however, succeed in establishing a claim against W, as joint tortfeasor, in misrepresentation. It was clear from the evidence that those controlling the companies had made some serious misrepresentations to P. Although W had not actually made any such misrepresentations to P, it was clear from the way that he had conducted himself that he was a party to the companies' overall common design, and was therefore liable.

The case report does contain some useful observations on what solicitors need to do, when dealing with an unrepresented party, so ensure that they do not find themselves undertaking the responsibility of acting for both sides.

Professional negligence – solicitor failing to advise on existence of onerous restrictive covenants: then advising when a conflict of interests had arisen

Joyce v Darby & Darby [2014] EWCA Civ 677 is essentially a decision on issues of causation in a professional negligence action. Although the damages were reduced for this reason on appeal, they were still substantial. It is worth noting briefly in this Service as offering salutary lessons to conveyancers in that the firm of solicitors in question (a) failed to advise a client of the existence of onerous restrictive covenants; (b) offered advice on the ensuing neighbour dispute without identifying that the inevitable conflict of interests should have precluded them from acting; and (c) failed to keep attendance notes throughout.

Solicitor failing to advise on discrepancy between current valuation and recent 'price paid' at Land Registry – liability for contribution to damages paid by valuer

E Surv Ltd v Goldsmith Williams Solicitors [2014] EWHC 1104 (Ch) is also a professional negligence action – or more precisely, an action for a contribution by surveyors who had settled a claim – but it is noted briefly because of its implications for conveyancers. The defendant solicitors had failed to point out to their lender clients that the valuation for mortgage purposes (£725,000) was substantially more than the 'price paid' figure in the Land Registry when the property had been acquired by the borrower less than six months previously (£390,000). Although the claimant valuers accepted that they were partially liable, and had settled with the lenders for £200,000 they sought a contribution from the defendant solicitors. It was held by HHJ Stephen Davies (sitting as a Deputy High Court Judge in the Manchester District Registry) that a 'Bowerman duty' (*Mortgage Express v Bowerman* [1996] 1 PNLR 62) existed, and the defendants were required to make a contribution of half of the settlement figure. There are some useful observations on how far duties can be implied in addition to the duties specifically imposed on conveyancers by the CML Lenders Handbook.

(case noted at: EG, 2014, 1419, 120)

Legal charge signed but not attested – whether borrowers estopped from raising point – whether effective as an equitable charge

Bank of Scotland plc v Waugh [2014] EWHC 2117 (Ch) raises some interesting points on the execution of deeds. The Bank was attempting to rely upon a legal charge deed which had been signed by the trustees of a settlement and the Bank, but the signatures had not been attested. In spite of this the charge had been duly registered, and the trustees then made an application to rectify the register, on the basis of the lack of attestation. Although the Bank initially argued that the case was 'on all fours' in *Shah v Shah* [2001] EWCA Civ 527 (noted in the principal work at I-467 and I-951), and that the trustees were accordingly estopped from challenging its validity, the recent case of *Briggs v Gleeds* [2014] EWHC 1178 (Ch) suggests that *Shah* should not apply where it was clear on the face of the document that it had not been validly executed.

The matter came before HHJ Behrens (sitting as a Deputy Judge of the Chancery Division in the Leeds District Registry) on cross-applications for summary judgment on various parts of the claims. He held that the trustees were not estopped from relying on the point about lack of due execution as a deed, but, as the document had been signed by all the parties and contained all the terms, it could take effect as an equitable charge. The judge reserved for further hearing whether the Court should accordingly order the trustees to perfect the security, or order an officer of the court to do so on their behalf.

II. EXISTING LEASEHOLDS

Proposal to erect new flats over garage blocks – whether roofs of garages and airspace over the garages were included in the demises of the existing flats and garages – whether covenant against further development could be implied

At a time when ground landlords are keen to exploit opportunities to add new storeys to existing buildings, and to build, where possible, with the curtilage of developments, *H Waites Ltd v Hambledon Court Ltd* [2014] EWHC 651 (Ch) is a particularly interesting case. It involves a block of 12 flats in Ealing which were let on 999-year leases in the early 1960s. Each lease also included a garage in one of two garage blocks to the rear. In 2007, when the freehold had been owned by an 'outside' ground landlord, a lease of the airspace over the garage, with associated development rights, had been granted to an associated company of the ground landlord, so that a flat could be constructed over each of the garages. As some of the leaseholders did not consent to the rebuilding of their garages, each of the flats would have been structurally separate from the garages, supported by beams resting on external columns. Since the 2007 lease had been granted, some of the leaseholders had collectively acquired the freehold under the Leasehold Reform, Housing and Urban Development Act 1993 (LRHUDA 1993), which was now owned by the first defendant.

Five issues arose in the proceedings: (1) whether the premises demised to the leaseholders included the roof of the garages; (2) whether the demised premises included the airspace over the garages; (3) whether the court should imply into the leases a covenant not to construct further flats on the Estate; (4) whether the claimant, the lessee under the 2007 lease is entitled to erect columns external to the garage blocks to support the proposed flats; and (5) whether the lessor had unreasonably withheld consent to the erection of staircases to serve the proposed flats.

The first issue – whether the roofs of the garages were demised to the leaseholders – turned, of course, on the wording of the leases, but the decision is of broader interest, as the wording of the demise followed a pattern which is commonly encountered: the demise of each flat excluded 'the roof foundations and external and main structural parts of the said building' but each garage was afterwards referred to simply as 'the Garage shown coloured red … on the said plan'. Morgan J rejected the claimant's argument that the words of exclusion applied also to the garages. This conclusion is perhaps unsurprising, but the claimant did attempt to draw some support for its contention from the interrelationship of the parties' respective repairing obligations. The judge did not feel that the fact that the roof covering each garage block formed a single structure prevented the conclusion that each leaseholder would therefore be bound to repair his own section of the roof.

Having decided that the roofs of the garage blocks belonged to the leaseholders, the question then arose as to whether the airspace would also be included

in the demise. The judgment contains a useful review of the recent case law on this, from *Kelsen v Imperial Tobacco Ltd* [1957] 2 QB 334 onwards. Although the judge seems to have stopped short of saying that there was a presumption to be applied, he took the view that, where one is dealing with a demise of a building, and there is vertical, rather than horizontal division, it is natural not to apply a horizontal cut-off which excludes the airspace over the building (or the sub-soil below it) (see [50]).

On the third issue – the alleged implied covenant not to construct further flats – the claimant prayed in aid *Hannon v 169 Queen's Gate Ltd* [2000] 1 EGLR 40 and the defendants relied on *Devonshire Reid Properties Ltd v Trenaman* [1997] 1 EGLR 45. The judge did not consider either decision was determinative of the position in the instant case, and went on to hold that the alleged covenant could not be implied here. If the development were to proceed then if necessary the court could (relying on *Finchbourne Ltd v Rodrigues* [1976] 3 All ER 581: see [69]) imply a term to the effect that the cost of services would be recoverable only to the extent that they are fair and reasonable, and it would clearly not be reasonable for the proportions paid by the leaseholders to ignore the existence of additional flats.

On the fourth issue Morgan J held that, on the wording of the 2007 Lease, the claimant would be entitled to erect columns external to the garage blocks to support the new flats, but that, having decided that the earlier leases included the airspace over the garages, this part of the decision was for the time being, academic as that lease could take effect only in reversion to the leases of the existing leaseholders.

As the fifth issue had not been fully argued, no decision was reached on this point.

Although any such decisions must always rely on the wording of the leases in question, the approach of Morgan J will no doubt be welcomed by leaseholders who are concerned that developers may wish to intrude further flats into existing leasehold schemes.

Business tenant remaining in occupation following expiry of contracted-out tenancy – held to be holding under a tenancy at will rather than an annual periodic tenancy

Barclays Wealth Trustees (*Jersey*) *Ltd v Erimus Housing Ltd* [2014] EWCA Civ 303 arose in the context of the intended renewal of a lease and offers guidance on when a tenancy at will rather than an annual tenancy will be inferred. A business lease which was contracted out under the Landlord and Tenant Act (LTA) 1954 came to an end on 31 October 2009. Prior to that date the parties had begun discussions on the terms of renewing the lease, but nothing was concluded, and the tenant continued to occupy the premises and to pay the rents reserved under the expired lease. This state of affairs carried on until June 2011 when the terms of a new lease were agreed, with a target date for its execution of 1 July 2011. The lease was not executed on that date,

and by the end of August 2011 the tenants were indicating that they wished to vacate the premises, as they had the opportunity to purchase a more suitable building.

The landlords sought a declaration that the tenants had continued to occupy the premises after October 2009 under an annual tenancy. Mr John Jarvis QC (sitting as a deputy judge of the Chancery Division) granted that declaration, but the tenant appealed. The Court of Appeal (Longmore, Patten and Christopher Clarke LJJ) allowed the appeal, holding that the parties were still engaged in negotiations, albeit desultory and lacking in impetus, with the intention of concluding a new contracted out lease, and it was therefore wrong to impute to them an intention to create a periodic tenancy, which would have to be an annual periodic tenancy. Further, it was far from clear at what point any such tenancy would have come into existence. The CA therefore followed the reasoning that it had adopted in *Javad v Ali* [1991] 1 WLR 1007 and *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 1 WLR 368. The facts in the instant case were distinguished from those in *Walji v Mount Cook Land Ltd* [2002] 1 P&CR 13 where agreement was reached on the terms of a new lease but then the parties for years did nothing about executing it. In the instant case the tenant was occupying as a tenant at will.

(case noted at: LSG 2014, 111(13), 20; [2014] Comm Leases 2046–2047; SJ 2014, 158(16), 38–39; and [2014] L & T Review 60–61)

LTA 1988 – consent to assignment – whether conditions as to remedying alleged breaches of covenant had been reasonably imposed

Singh v Dhanji [2014] EWCA Civ 414 is an unsuccessful appeal against the decision of the judge in the County Court that the landlord had unreasonably withheld consent to the proposed assignment of a lease of a dental surgery, and was accordingly liable in damages in the sum of £183,000 (plus interest of £31,000) to the tenant. There was a considerable 'background' to the instant case, including a dispute over the terms of the original sale of the practice to the tenant, an extra-judicial forfeiture by the landlord, an injunction to restore the tenant to possession, and ultimately a successful application by her for relief from forfeiture. Shortly after this the landlord served notices under s 146 of the LPA 1925 alleging various breaches of covenant. When the tenant then sought consent to assign her lease to a cousin, the landlord granted consent, but only conditional upon the alleged breaches of covenant being remedied. The landlord claimed possession, based on the s 146 notices, and the tenant claimed a declaration that the landlord's conditions for granting consent to an assignment were unreasonable and seeking damages.

It was accepted that the test to be applied (relying on *Ashworth Frazer Ltd v Gloucester City Council* [2001] UKHL 59) was whether the landlord's conclusions were ones which a reasonably landlord in the circumstances might have reached. The judge at first instance had (for the purposes of the possession action) found that the alleged breaches of covenant had not been proved. The

landlord nevertheless argued that, in assessing the reasonableness of the conditions that he sought to impose, the court should have had regard for whether he had reasonable grounds for thinking that there had been breaches. This was not, however, how the case had been argued in the county court, where the judge had found that, even if the breaches had covenant had been proved, they were not of so serious a nature to require that they be remedied before the lease could be assigned. The Court of Appeal agreed with the judge on this point.

The appeal on the quantum of damages was also dismissed, principally on the basis that the appellant was attempting to raise issues of fact which had not been properly aired in the county court, and which would require that the question of the assessment of damages be remitted to the county court for redetermination. It was stressed that the Court of Appeal did not readily allow points to be run which had not been properly run below.

(case noted at: [2014] Comm Leases 2057–9)

Provision for demand for service charge to be served by registered post or recorded delivery – whether prescriptive requirement

G & O Investments Ltd v Khan [2014] UKUT 0096 (LC) raises a short though – on the facts – crucial point on the interpretation of a lease. In a service charge dispute, the First-tier Tribunal (Property Chamber) had determined that a lease required that service charge demands be served by registered post or recorded delivery, and that as they had been sent by ordinary second class post, service charges due from 2007 to 2010 were not payable at all, so there was no need to consider their reasonableness. The Upper Tribunal had given permission to appeal, limited to this point of construction, and HHJ Edward Cousins determined on written representations that the clause in question only prescribed a procedure which, if followed, would result in service being deemed: it did not displace the possibility that actual service might be proved. Although the decision of course turns on the construction of the clause in question, it is a point which is worth bearing in mind.

Service charge dispute – FTT (PC) making use of its own knowledge and experience – restrictions on when and how it should do so

Red Kite Community Housing Ltd v Robertson [2014] UKUT 0134 (LC) is a service charge dispute involving whether service charges in respect of cleaning were reasonably incurred, and reviews the issue of how far the First-tier Tribunal, as an expert tribunal, may use its own knowledge in adjudicating upon disputes. Following a large-scale voluntary transfer of housing stock from the local authority to the appellant, the element in the service charge for cleaning of the common parts had increased from £193 pa to £321 pa. It was suggested that there had been an element of subsidy when the local authority had been responsible, but that was not established on the facts. The FTT had reduced the sum from £321 to £225, relying in part on its knowledge and

experience as an expert tribunal. The appellants appealed on the basis that it was unclear whether this decision had been reached on the basis that the service provided was adequate, but too expensive, or inadequate, and therefore too expensive. The appellants had produced extensive evidence as to how the work was cost and monitored, but the FTT had not explained if this evidence had been accepted, or, if not, which part or parts had not been accepted.

The Upper Tribunal (Miss Siobhan McGrath, President of the FTT (PC), sitting as a judge of the UT (LC)) allowed the appeal. The correct approach to the admission of the FTT's own knowledge and expertise was as set out in the guidance of the President of the UT in *Arrowdell Ltd v Coniston Court* (*North*) *Hove Ltd* [2007] RVR 39 (see [21]–[25] of the instant case). The reasons given by the FTT were not adequate, so the appeal was allowed and remitted to the FTT for reconsideration.

(case noted at: EG 2014, 1427, 90)

Break clause 'to be given under s 24(2) of LTA 1954' – whether requirement had to be strictly complied with in order to exercise break

Friends Life Ltd v Siemens Hearing Instruments Ltd [2014] EWCA Civ 382 is the successful appeal against the decision of Mr Nicholas Strauss QC, sitting as a Deputy Judge at first instance (reported as [2013] EWHC 815 (Ch) and noted in Bulletin No 135). It raised some issues on the meaning of a somewhat ill-conceived clause which seems to have been fairly widely adopted around the time when it was thought to be uncertain whether a tenant could simultaneously exercise a break clause and apply for a new tenancy under s 26(2) of the LTA 1954, a course of action which might be attractive in a falling market. The wording of the relevant clause of the lease had been evolved in an attempt to cover the potential loophole in the law (which *Garston v Scottish Widows Fund* [1996] 1 WLR 834 had held did not in fact exist) and required T, when serving a break notice, *to state that it was being given under s 24(2) LTA 1954*. T purported to serve a break notice, but failed to refer to s 24(2) (though it did not combine the notice with any step seeking a new tenancy). L contested the validity of the notice. At first instance Mr Strauss QC had rejected T's suggestion that the relevant clause was meaningless: one could draft a break notice so that it was expressed to be compliant with s 24(2), even if it was not strictly possible to serve a notice 'under' that subsection. T's break notice did not therefore comply with the relevant clause, but he went on to decide that this did not serve to invalidate the notice.

Giving the only judgment of the Court of Appeal, Lewison LJ (with whom Black LJ and Sir Timothy Lloyd agreed) held that a break clause, like an option, was a unilateral or 'if' contract. There can therefore be no room for any enquiry as to whether the event that gives rise to the new contract has occurred: in taking this strict line, he relied on the decisions of Diplock LJ in *United Dominions Trust* (*Commercial*) *Ltd v Eagle Aircraft Services Ltd* [1968]

1 WLR 74, 83, which he then referred to when sitting in the House of Lords in *United Scientific Holdings Ltd v Burnley BC* [1978] AC 904, 929. The more liberal approach applied in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 949 did not therefore apply here. Having found that T's break notice did not comply with the relevant clause, Mr Strauss QC should have gone on to hold that it was invalid.

(case noted at: EG 2014, 1417, 119; [2014] Comm Leases 2051–4; [2014] L & T Review 96–101; and [2014] L & T Review, 18(3), D21–D22)

Business tenancy – whether right of way formed part of a 'holding' for the purposes of the LTA 1954, Part II – whether repeated and protracted litigation could amount to 'any other reason' for the purposes of Ground (c) under s 30(1) LTA 1954

Horne and Meredith Properties Ltd v Cox [2014] EWCA Civ 423 is an unsuccessful appeal by a tenant against the decision of the judge in the county court that a 16-year history of litigation between the parties amounted to 'any other reason connected with the use or management of the holding' under s 30(1)(c) of the LTA 1954 and thus justified the landlord's refusal to renew the tenancy. The Court of Appeal followed its previous decision in *Beard v Williams* [1986] 1 EGLR 148 and confirmed that it was not necessary for there to have been any breach of covenant on the part of the tenant for ground (c) to come into play, as the second part of the ground – upon which the landlords here relied, but landlords have seldom resorted to – was separated from the first by an 'or'. The previous litigation between the parties had all been initiated by the tenants and involved alleged infringements of their use of a right of way. The judge had found that the tenants had conducted the repeated litigation unreasonably, and had involved the landlords in a great deal of trouble and expense: indeed, it had reached the point where a limited civil restraint order had been imposed upon the defendants. In dismissing the tenants' appeal Lewison LJ confirmed that a 'holding' for the purposes of the LTA 1954 included not only the physical property included in the demise, but also appurtenant rights, such as rights of parking and rights of way, the latter having been the subject matter of the protracted litigation.

(case noted at: EG 2014, 1415, 73; [2014] Comm Leases 2055–7; and [2014] L & T Review 146–148)

Appeal against decision of RAP to set rent of a secure periodic tenancy – how Panel should approach improvements carried out by the tenant

Preston v Area Estates Ltd [2014] EWHC 1206 (Admin) is an appeal to the Administrative Court against a decision of the London Rent Assessment Panel setting a rent for a flat which was held under a secure periodic tenancy.

The respondent landlord had proposed an increase in the rent from £338 pcm to £1,050 pcm. The tenant had referred that increase to the RAP, which had set a rent of £1,020 pcm.

The tenant claimed to have carried out substantial works to render the flat habitable. The RAP had accepted this in its judgment, but had failed to make any determination as to what the rent should be for the property in its current state, and how much this should then be reduced, having disregarded the improvements. HHJ Karen Walden-Smith (sitting as a deputy High Court judge) held that, following the decision of Goldring J in *Rowe v South West Rent Assessment Panel* [2001] EWHC 865 (Admin), this procedure was mandatory. The RAP had also stated that they were setting the rent by reference to their expert knowledge of rents in the area. HHJ Walden-Smith emphasised that it was well established that if a tribunal said this and nothing more it was a breach of natural justice, as the tribunal should give the parties an opportunity to consider and comment upon any such evidence that it was proposing to rely upon.

(case noted at: JHL 2014, 17(4), D72–D73)

Assured shorthold tenancy – notice under s 21 of the HA 1988 served immediately – whether void as deposit had not by then been protected – limited scope for judicial review of an appellate court's refusal to allow a second appeal

R (*on the application of Tummond*) *v Reading County Court* [2014] EWHC 1039 (Admin) stresses the limited scope that exists for judicial review of an appellate court's refusal to grant permission for a second appeal. The claimant tenant, T, entered into an agreement on 18 December 2012 for an assured shorthold tenancy for a term expiring in June 2013. On the same day the landlord L served T with a notice under s 21 of the Housing Act (HA) 1988 notifying him that she would require possession at the end of the fixed term. T's deposit was secured with an approved scheme: the Tenancy Deposit Certificate recorded that the tenancy had commenced on 20 December 2012 that the deposit had been received on 22 December 2012, and had been protected from 2 January 2013. T defended the possession proceedings on the basis that, at the time when the s 21 notice was served, the deposit was not held in an authorised scheme, and accordingly under s 215(a) of HA 2004 L could not rely on the notice (an argument to which, in their commentary to the section at 1–4182.268.2, the editors of the *Encyclopaedia of Housing Law and Practice* would seem to have lent credence). The District Judge struck out the defence, and another District Judge struck out T's application to set aside the order for possession. T then appealed to the Circuit Judge, who held that the deposit had been 'held in accordance with an authorised scheme', refused the appeal, and refused permission for a further appeal. T attempted to appeal to the Court of Appeal, which pointed out that his only redress was to apply for judicial review of the refusal, so giving rise to the instant case.

The Administrative Court (Hamblen J) pointed out that the Court of Appeal was of the view in *Moyse v Regal Mortgages Ltd* [2004] EWCA Civ 1269 that s 54(4) of the Access to Justice Act 1999, had left very little scope for judicial review in such circumstances. These were considered in *R* (*Sivasubramaniam*) *v Wandsworth County Court* [2002] EWCA Civ 1738 to include only jurisdictional error (in its narrow sense) and procedural irregularity which constituted a denial of the applicant's right to a fair hearing. In particular, as stated in *Gregory v Turner* [2003] EWCA Civ 183, these circumstances would not include an error of law as such. Hamblen J therefore held that T could not bring himself within the exceptional circumstances, and his application therefore failed ([24]).

He nevertheless – in case that conclusion be incorrect – considered the merits of T's interpretation of s 215(1)(a) of the HA 2004, and rejected it, holding that it was possible to 'hold' the deposit 'in accordance with an authorised scheme' before it was actually protected ([43]), in that, from the moment it was held, L was under a contractual obligation to ensure that it was protected. T's further argument under s 215(2) failed, because there clearly had not been a failure on the part of L to comply with s 213(6), as L was allowed 30 days within which to comply.

(case noted at: JHL 2014, 17(4), D85–D86)

Scheme of Management under Leasehold Reform Act 1967, s 19 – breadth of factors that (former) landlord exercising powers under Scheme could consider – whether consent could put (former) landlord in breach of covenant for quiet enjoyment under a continuing lease

Shebelle Enterprises Ltd v Hampstead Garden Suburb Trust Ltd [2014] EWCA Civ 305 is the appeal against the judgment of Henderson J reported as [2013] EWHC 948 (Ch) and noted in Bulletin No 135. It raises an apparently novel point on the operation of Schemes of Management under s 19 of the Leasehold Reform Act 1967 (LRA 1967). These, where approved by the High Court, allow a former landlord to exercise over enfranchised properties certain controls which were formerly contained in the leases.

Powers under the Scheme of Management in question were exercised by the defendants, and related principally to the 'use, appearance and maintenance of enfranchised properties'. The owners of an enfranchised property had sought approval of building plans which included the construction of a basement swimming pool in the rear garden. The claimant company, S (the present appellants), who were their immediate neighbours, and who held their property from the defendant Trust (the present respondents) under a 999-year lease granted in 1931, objected on the basis that the disruption to ground water movement might cause flooding or other damage to their property. They therefore sought a *quia timet* injunction against the defendant Trust, restraining it from granting consent for the works until it had received

a 'basement impact assessment' and taken other steps. The Trust cross-applied for summary judgment against the claimants. The two main preliminary points that arose at first instance were (a) whether the Trust was entitled to withhold consent on the basis of a risk of flooding and (b) whether the claimants could establish that granting of consent might put the Trust in breach of the usual covenant for quiet enjoyment contained in the claimant's lease.

On the first preliminary point, the Trust argued that the scope of the Scheme of Management was restricted solely to matters relating to the use, appearance and maintenance of enfranchised properties, other matters being for the local planning authority. Henderson J had rejected (at [40] of the first instance judgment), this argument, holding that the scope of the Scheme was not as narrow as the Trust contended, and it could take into account wider considerations, though clearly the main focus of the Scheme should be, [42], the 'use, appearance and maintenance of enfranchised properties'. There was no appeal or cross-appeal on this point.

On the second preliminary point, Henderson J had found in favour of the Trust, and therefore dismissed the claimant's application and gave summary judgment for the Trust. S appealed on this second point. The Court of Appeal (Arden, Kitchin and McCombe LJJ) dismissed the appeal, the only judgment being given by Kitchin LJ.

S had argued at first instance that clause 15 of their lease, a standard form of an express covenant for quiet enjoyment, prevented the Trust from consenting to the application by the owners of the neighbouring enfranchised property. S argued on appeal that Henderson J had fallen into error (a) in construing the 1931 Lease by reference to the LRA 1967; (b) in treating the Trust as if it were a public body when it was in fact a private company; (c) by concluding that the Trust's status effectively overrode S's covenant for quiet enjoyment; and (d) by accepting the Trust's alternative case that it had a defence of statutory duty to S's claim.

Kitchin LJ began by reviewing the familiar case law on the nature of a covenant for quiet enjoyment and the related principle of non-derogation from a grant. He went on to deal together with the related issues which formed the appellant's grounds of appeal. Although the parties to the 1931 Lease could not have foreseen the enactment of the LRA 1967, and its provision for Estate Management Schemes ([41]), they would not have thought that 'the proper and bona fide performance by the Trust of its duties under an arrangement such as the Scheme could amount to a breach of the covenant for quiet enjoyment'. Although the Trust was not a public body, it was exercising powers which have been approved by the High Court under a statutory scheme ([53]) and was doing so in the public interest for the benefit of the Suburb as a whole ([43]). S had never suggested that the Trust was exercising its duties in anything other than a proper, bona fide and reasonable way ([41]). The appeal was accordingly dismissed.

(case noted at: JHL 2014, 17(4), D73–D74)

Collective enfranchisement under LRHUDA 1993 – whether covenant restricting use of basement flat to use as a caretaker's flat could be released – whether this should affect the price to be paid

Judgment in *Money v Cadogan Holdings Ltd* [2013] UKUT 211 (LC) was given in June 2013 but it seems to have been given wider attention after having been cited in *Padmore v Trustees of the Barry and Peggy High Foundation* [2013] UKUT 0646 (LC) (see Bulletin No 104). The former case – a decision of Sir Keith Lindblom, P, and Mr N J Rose FRICS – also concerned a collective enfranchisement under the LRHUDA 1993. Four long leaseholders in a house converted into flats wished to acquire their freehold. The basement flat was occupied as a caretaker's flat, and the issue arose of whether the prospect of releasing the covenant in the lease so restricting its use should form part of the marriage value. Because the lease of the basement flat was for an unexpired term exceeding 80 years, it was common ground that it could not be taken into account as part of the marriage value under para 4, Sch 6 of LRHUDA 1993. The nominee purchaser argued on appeal that the LVT had erred, in that it was also impermissible to increase the prospect of releasing the covenant as part of the valuation of the freeholder's interest under para 3. The Upper Tribunal rejected this contention, holding that the underlying principle of valuations under LRHUDA was that 'no legitimate portion of value should be left out of account, and none should come in more than once' ([69]). The price paid for enfranchisement should reflect the opportunity that the enfranchising leaseholders would have to dispose of the basement flat on a long lease subject only to a covenant for ordinary residential lease. The matter was, however, remitted to the LVT for a further hearing, as their valuation had been flawed in other ways.

Costs incurred by landlord on applications for RTM which were withdrawn – how the tribunal should approach the assessment of those costs

Columbia House Properties (*No 3*) *Ltd v Imperial Hall RTM Co Ltd* [2014] UKUT 0030 (LC) is a decision of HHJ Alice Robinson in the Upper Tribunal which illustrates how one should approach disputes as to whether costs have been reasonably incurred. The costs here involved three notices claiming the Right to Manage. The first had been served in 2006: it had been withdrawn at a hearing, and the LVT had ordered the RTM Co to pay the Landlord's costs. A further claim had been made in February 2010, and a further claim – without prejudice to the former – had been made in August 2010. That had been compromised on the basis that the RTM Co would acquire the RTM from an agreed date, and would pay £6,313 in full and final settlement of surveyors' and legal costs arising out of the February claim notice. In August 2011 the Landlord sought to recover further costs under s 88 of the Commonhold and Leasehold Reform Act (CLRA 2002) from the

RTM Company, subsequently reducing its claim to one for £15,036. These costs arose out of work done by its Managing Agents, and so fell outside the scope of the agreement as to costs.

Costs relating to the 2006 Notice were disallowed by the LVT on the basis that the RTM's liability for those costs had been finally determined. The Landlord did not appeal against this part of the decision. The LVT rejected the Landlord's claim for costs in respect of the other two claims, but, in the view of the UT, the reasons given would have justified a finding that the costs were *unreasonable*, but not that they should be entirely *irrecoverable*. Such a finding might be justified if it were determined that the claim was, in effect, fraudulent, but that should not be inferred from the judgment of an LVT without a very clear finding of fact to that effect (see [30]). There was no such finding in the instant case. The issue of reasonableness was therefore remitted to the LVT for further determination.

Clause in long residential lease stating that lessor's surveyor's apportionment of service charges between contributors should be 'final and binding' – whether void under s 27A(6) of LTA 1985 and tribunal should determine apportionment

Windermere Marina Village Ltd v Wild [2014] UKUT 163 (LC) addresses for the first time some issues under s 27A of the LTA 1985 on which, surprisingly, there appears to have been no clear authority: essentially the validity of a clause, commonly found in service charge provisions, which stated that the apportionment of service charge costs shall be apportioned by the lessor's surveyor 'whose determination shall be final and binding'. The Upper Tribunal (Mr Martin Rodger QC, Deputy President) had to determine whether the clause was void under s 27A(6), which renders void agreements (other than post-dispute arbitration agreements) for the resolution of matters which may be determined under s 27A in any particular manner (ie so depriving the First-tier Tribunal of jurisdiction).

The factual background to the case was that the leases in question – unsurprisingly, of properties within a marina on the shore of Windermere – had been granted in 1965 and included the provision mentioned above. The intention had always been to expand the marina, hence the Landlord (L) had not stipulated fixed proportions. It would seem that until 2007 the apportionment of the service charges had been uncontroversial, as the service charges for 'boathouse apartments' such as that leased to the respondent W had covered only drainage and sewerage. As the marina grew, however, it included a variety of mixed uses – commercial premises, holiday cottages, boat moorings, etc – and from 2007 onwards L had sought to recover certain costs, including lighting and security costs, via the service charge. It had engaged a Chartered Surveyor, Mr P, to make an apportionment of costs in accordance with the lease. He had adopted a recommended RICS methodology and

produced a report: the LVT praised him for his 'professionalism and diligence'. W and other residential occupiers, however, objected to his assessment of the comparative benefit that they and those who used the boat moorings derived from the security provisions, and commissioned an alternative report from a Mr G-H. The LVT confined itself to the respective merits of the two reports, coming down in favour of the latter. On appeal, the issue of principle was raised as to whether the apportionment of Mr P ought to have been accepted, or whether the LVT did indeed have jurisdiction to make its own apportionment.

The Deputy President reviewed the provisions of s 27A, and a number of familiar cases on s 19 and s 27A. None of these cases directly addressed the issue, although its existence had been recognised by Morgan J in *Brent LBC v Shulem B Assocn Ltd* [2011] EWHC 1633 (Ch). The Deputy President held that, while it was well-recognised that parties to a contract might provide that an important term – such as the price, or whether a party had satisfactorily performed its part of the bargain – could be left to the determination of a third party, a term providing for a mechanism such as that contained in the instant lease clearly fell within the scope of s 27A(6), which was an anti-avoidance provision (see [44]).

The Deputy President then went on to consider the subsidiary issue of whether the LVT should have approached the issue by determining whether Mr P's apportionment was fair, or whether the effect of s 27A(6) was that his determination was of no effect, so the Tribunal ought to have approached the matter afresh. This was an important point here, as both the LVT and the UT recognised the difficulty of apportioning service charges in complex, mixed-use developments, and, the very different apportionments adopted by Mr P and Mr G-H could each be seen as 'fair': and, if Mr P's apportionment was viewed as fair, the LVT would then have no reason to reject it. The Deputy President held that, as the effect of s 27A(6) was to make Mr P's apportionment void, the Tribunal had been obliged to consider the matter afresh.

A third issue was whether there was sufficient evidence to support the LVT's conclusions, and whether they were sufficiently reasoned. As the LVT had clearly engaged with the issues, preferred the approach of Mr G-H to that of Mr P, and stated their reasons for doing so, this ground of appeal clearly failed.

One suspects that the approach adopted by the UT is what FTTs have generally been adopting in practice, but it is useful to have it endorsed by a well-reasoned judgment of the Deputy President. It seems implicit in the judgment that, although both the FTT and the UT are expert tribunals, when either is required to rule on the reasonableness of an apportionment, it is likely to need the assistance of expert evidence to help it to determine that apportionment, especially if the service charge relates to a complex multi-use development.

(case noted at: EG 2014, 1428, 95)

Interpretation of leases – whether demise included space between ceiling and floor of flat above – whether another clause gave right to reposition gas pipes

Yeung v Potel [2014] EWCA Civ 481 raises some minor though interesting points on the interpretation of leases. It is perhaps surprising that there are not more reported cases involving scenarios such as this, given the tendency of some long leaseholders of flats to proceed as if their ownership was entirely unfettered. The property in this case was a 19th century building which had been divided into four flats, one on each floor. Y, the defendant and appellant, held Flat 3 under a 999-year lease. Without obtaining the consent of the ground landlord (a company owned by the four leasehold owners) or consulting with his neighbours he had proceeded to carry out extensive internal alterations to his flat, including the removal of internal walls, the insertion of a steel beam, and the raising of the ceilings in the flat. He could do the latter because, somewhat unusually, the ceilings of his flat (on the first floor) were attached to one set of joists, and the floorboards of the flat above rested upon and were attached to a separate set of joists. He had therefore removed the lower set of joists, and intended to affix a new ceiling to a metal framework attached to the existing upper joists. The claimants (the respondents to the present appeal) succeeded in a claim for substantial damages in trespass and nuisance. Although leave was given to appeal on the quantum of damages, the Court of Appeal (Arden, Jackson and Sharp LJJ) were satisfied that in this respect the District Judge's long and careful judgment could not be challenged. Y also appealed on the basis that his works did not trespass on the property of P, the claimants. Jackson LJ, giving the only judgment, was satisfied that the DJ had been correct in finding there had been a trespass. A slightly tricky issue here was rather glossed over: the Court of Appeal held that the DJ was right on this point, or alternatively it might have been the case that the gap between the two sets of joists was retained by the freeholder ([54]). The wording of the leases would seem to point ineluctably towards the latter conclusion; but the DJ's judgment is nonetheless unimpeachable if she was intending to say no more than that for Y to affix a ceiling onto floor joists which were demised to P would be a trespass.

The issue which the CA had to consider most closely was whether Y under his lease had a right to relay the gas supply pipe and his gas meter in a position which was more convenient, given the raising of the ceiling. He relied on the fact that the High Court in *Trailfinders v Razuki* [1998] 2 EGLR 46 distinguished the CA authority in *Taylor v British Legal Life Assurance Co* (1925) 94 LJ Ch 284 on the basis that in the former case a reservation clause in a lease expressly referred to drains, pipes and wires which 'may hereafter during the term granted be in under or over the said premises'. Similar wording was used in the leases in the present case, but only in the words of grant, not in the words of reservation. The CA declined to read the necessary words of reservation into the lease of the upper flat. It held that the wording of the leases might be viewed as giving rise to an anomaly, and it might be desirable to improve it, but it could not be seen as raising an issue of

necessity, and the courts were traditionally reluctant to imply words of reservation into leases where there were none ([46]–[48]). The court therefore declined to order P as the lessees of Flat 4 to allow Y access to their flat for the purpose of temporarily turning off the gas supply to that flat, so that the pipes serving Flat 3 could be relaid. It was also made clear in the judgment that Y could not relay the pipes either within the floor joists under Flat 4 (ie above any new ceiling to Flat 3) or within the area which formerly lay between the floor of Flat 4 and the old ceiling of Flat 3 (see [58]).

The Court observed that the upshot of the case was somewhat curious ([56]), in that, although the DJ had held that Y was trespassing in maintaining his ceiling at a higher level, Y had not been required to reinstate the former ceiling, so Y was, in effect, in de facto occupation of an area which was not demised to him: but he was not, apparently, entitled to run gas pipes in it.

(case noted at: SJ 2014, 158(25), 32–33; and JHL 2014, 17(4), D81–D82)

Computation of commercial service charge when substantial works were begun after tenant's break clause was exercised, but during the final relevant accounting year

Friends Life Management Services Ltd v A & A Express Building Ltd [2014] EWHC 1463(Ch) raised various tricky issues on the computation of a service charge. It should be noted that the service charge in dispute was, as the title of the case suggests, a commercial one, so was unaffected by the LTAs; and further the resolution of the dispute did very much involve, as always, the interpretation of the specific provisions of the lease.

T held commercial premises under a lease which ran to 24 March 2013. The accounting period for the service charge under the lease ran with the calendar year, unless L nominated a different date, which it had not. The service charge clauses contained the usual provisions to allow L to include within each year's service charge a provision for anticipated necessary future expenditure. Over four years a total of £875,000 had been set aside in this way. T determined the lease by a break clause which took effect on 24 March 2010, ie, part way through the 2010 accounting period. In September or October 2010 L embarked on a major programme to improve the facilities in the building: it was accepted that they fell within the scope of the service charge provisions. Some of the costs of these major works were incurred in 2010, the remainder in 2011. The total cost of the major works came to £1,046.691. Several questions arose as to how this should affect T's liability to pay the service charge.

As stated, the decision of Morgan J is very much based on the interpretation of the service charge provisions of the lease. He rejected T's contention that it had no liability for works carried out after its exercise of the break clause had become effective: the accounting year ran with the calendar year, and L had not nominated any other date. The lease expressly envisaged that an accounting period might extend beyond the duration of the lease, and rejected T's

contention that this should be taken as applying only if the lease were forfeited: its wording could clearly also cover the situation here, where a break clause had been exercised. T did not, however, have any liability for that part of the expenditure on major works incurred after the end of the financial year to 31 December 2010. Perhaps of more general applicability is Morgan J's determination that the service charge for the year 2010 ought then to be apportioned on a daily basis even though there was no express provision for this made in the lease. He further determined that credit had to be given to T for the £875,000 collected on account of the works in previous year, and – in calculating T's overall liability – at which stage of the calculations this sum should have been credited.

(case noted at: EG 2014, 1425, 78; and [2014] Comm Leases 2072–2074)

Whether apportioned part of rent should be refunded following exercise by tenant of break clause

Marks & Spencer plc v Paribas Securities Service Trust Co (Jersey) Ltd [2014] EWCA Civ 603 is the successful appeal against the decision of Morgan J reported as [2013] EWHC 1279 (Ch) and discussed in Bulletin No 135. T had exercised a break clause, and to ensure that it could successfully do so in compliance with the relevant case law, it had paid up in advance rent, service charge, insurance rent and parking fees for the period which straddled the operative date of the break. Following its successful exercise of the break, it had then sought to recover an apportioned part of the rent and other charges. There was no express provision made in the lease. Morgan J rejected T's arguments based on the express wording of the lease, restitution and a total failure of consideration, but T succeeded with an argument that a term to that effect should be implied.

On appeal, the Court of Appeal (Arden, Jackson and Fulford LJJ) allowed L's appeal in respect of the basic rent, insurance rent and the parking charges (L had conceded the position with regard to the service charges), and held that T was not entitled to a refund of a proportionate part. Although Morgan J had correctly held that the test for implying terms set out in *Belize v Belize Telecom Ltd* [2009] UKPC 10 was applicable here, he had not correctly applied it, in that he should have been satisfied that the parties to the lease *would* have intended that the term in question would have been included. This could not be said here, particularly as the lease did, in other respects, make express provision for the consequences of the T exercising the break clause. Nor was the term – contrary to Morgan J's finding – necessary to give business efficacy to the lease.

Some commentators have suggested that, as a result of this ruling, tenants will attempt to ensure that any break date falls as close as possible before a quarter day, so they do not end up paying rent for premises that they do not wish to occupy. Alternatively, there is nothing in the case that suggests that an express apportionment clause would not be upheld.

(case noted at: EG 2014, 1422, 85; EG 2014, 1423, 78; [2014] Comm Leases 2070–2071; and (with others) at EG 2014, 1422, 79)

Residential service charge – whether charge in respect of repairs should be reduced if repairs could have been carried out more timeously

Daejan Properties Ltd v Griffin and Mathew [2014] UKUT 0206 (LC) raises an issue which often arises in service charge disputes, especially in residential disputes in which s 19 of LTA 1985 is invoked: namely whether repair costs are reasonably incurred if – as is sometimes allegedly – the disrepair had been more timeously undertaken, with the result that the costs would have been cheaper. The factual background to the instant case was that the premises dated back to the 19th century, and consisted of a block of 18 flats over a row of nine shops. Access to the flats was via first floor walkway. The walkway was supported on three rows of steel beams which had corroded and were dangerous. The need for the work became apparent only when one of the outer beams failed, and the brickwork forming the parapet which was built on it, moved and threatened the footpath below. The LVT had disallowed around 13% of the cost, on the basis that some of the beams ought to have been replaced as long ago as the 1960s; one beam had been replaced 20 to 30 years ago; and that if the work had been carried out at the time, it would have been cheaper as emergency safety measures would not have been necessary. The landlord successfully appealed.

In a long and detailed judgment, the UT (Mr Martin Rodger QC, Deputy President, and Mr PD McCrea, FRICS) followed the previous judgment of the Lands Tribunal (HHJ Rich QC) in *Continental Ventures v White* [2006] 1 EGLR 85 and reiterated that an allegation of historic neglect *per se* does not impinge upon the question posed by s 19(1)(a) of LTA 1985, ie whether costs of remedial work had been reasonably incurred ([88]). The only route by which such an allegation could be relevant, is that it might 'provide a defence to a claim for service charges … if it can be shown that, but for a failure by the landlord to make good a defect at the time required by its covenant, part of the cost eventually incurred in remedying that defect, or the whole of the cost of remedying consequential defects, would have been avoided'. This would be on the basis that T would have a claim for damages for breach of covenant which could be set off against the cost of the remedial work. Such damages would include (a) the amount by which the cost had increased owing to L's failure to act in time; and (b) any general damages for inconvenience etc ([89]). In assessing whether T would have a claim for damages the tribunal would need to have regard to the general law relating to repairs including whether L needed to be aware of the disrepair before it could be under any liability, whether L could be liable for disrepair existing when the reversion was assigned to it, and whether T could sue for disrepair which existed before the lease was assigned to them. Applying all these factors, the repair costs incurred by L had been reasonably incurred, and the LVT's determination was varied.

(case noted at: EG 2014, 1430, 59)

Section 20B of LTA 1985 – when cost of water supply was 'incurred' when water authority had been sending invoices to the previous landlord

Ground Rents (*Regisport*) *Ltd v Dowlen* [2014] UKUT 0144 (LC) has certain similarities with the case of *Burr v OM Property Management Ltd* [2013] EWCA Civ 479, [2013] 1 WLR 3071 (see Bulletin No 135). In the instant case the developer had entered into a contract with Thames Water for the supply of water to a development consisting of three blocks of flats: each block had a communal meter. When the freehold was sold to the current ground landlord Thames Water billed the new landlord for one of the blocks, but, in respect of the other two, continued to send bills (and reminders) to the developers for the period between June 2005 and April 2011. In the meantime the current ground landlords assumed that the water bill that was being sent to them related to all three blocks, and so apportioned it accordingly. When the mistake came to light the current ground landlord attempted to recover from the leaseholders the arrears that had built up, but the leaseholders argued that they could claim the protection of s 20B of the LTA 1985, which renders irrecoverable costs incurred more than 18 months before the relevant accounting period.

By the time that the appeal came before the Upper Tribunal the Court of Appeal had ruled in the case of *Burr* (see above) that relevant costs could not be said to be 'incurred' merely because services had been supplied: 'incurred' implied that liability for the costs had crystallised, in that an invoice had been rendered to the landlord. The Upper Tribunal (Mr Martin Rodger QC, DP) extrapolated from this (see [33]) that it was also necessary for the invoice to be rendered to the 'correct' landlord: ie here, Regisport. The invoices rendered to the original developers did not cause a liability to be incurred. The current landlord became liable for the costs only when the mistake came to light and the invoices were re-submitted to it.

A further point arose as to whether the leaseholders could rely on a provision in the lease which made the landlord's certificate as to the amount of the service charge conclusive, save in the case of manifest error. The Tribunal held that the leaseholders could not claim the benefit of this here, as the landlord was not attempting to re-open the service charge accounts for the previous years: it was claiming to add the arrears of charges to the accounting year to 30 June 2011, which had not been finally certified when the issue arose.

The original agreement between Thames Water and the developers had provided that it could not be assigned without consent, but counsel for Thames Water indicated that it would claim the benefit of provisions in the Water Industry Act 1991 which entitle a water undertaker to recover the cost of supplying water from the occupier: it would argue that the ground landlord was an occupier for the purposes of that Act. This in turn raised the issue of whether the claim by Thames Water against Regisport would, at least in part, be statute-barred under the general law on limitation, but the UT considered that this would be a matter for separate proceedings.

The appeal by Regisport was therefore allowed: as the UT had insufficient information to determine the matter, the quantification of the claim was remitted to the First-tier Tribunal for rehearing.

Insurance of a block of flats – whether requirement to insure against 'explosion' implied a requirement to insure against 'terrorism' – whether it was a reasonable exercise of the landlord's discretion

Qdime Ltd v Bath Building (*Swindon*) *Management Co Ltd* [2014] UKUT 0261 (LC) raises a short point which may well be of wider significance. Q, the Landlord under a tripartite lease, was required to arrange the insurance for a block of flats in Swindon. The management company, which arranged other services, and levied the service charge, objected together with 11 of the 13 leaseholders to the inclusion in the insurance of insurance against terrorism. At the LVT they succeeded, and the lessor appealed to the Upper Tribunal.

Q was required to insure 'against loss or damage by fire and the usual comprehensive risks in accordance with the CML recommendation in that respect from time to time and such other risks as the Landlord may in its reasonable discretion think fit to insure against … .' The Council of Mortgage Lenders recommended insurance against 'explosion' but not specifically against 'terrorism'. Q relied on the case of *Enlayde Ltd v Roberts* [1917] 1 Ch 109 to argue that the requirement was to insure against ***an event***, regardless of the particular ***method*** by which an explosion might be caused. The Upper Tribunal (HHJ Edward Cousins) accepted this argument and held that the LVT had erred in law in deciding otherwise.

In the alternative the UT decided that, even if not actually included in the CML recommendations, the decision to insure against terrorism was a reasonable exercise by Q of its discretion. The UT determined that the issue was whether it was a decision within the range of reasonable decisions which Q might make: it was not for the LVT to form its own opinion that there was no evidence of any particular terrorist threat. Further, the RICS Code of Management Practice suggested that serious consideration should be given to insuring against terrorism. This Code had received the approval of the Secretary of State under s 87 of the LRHUDA 1993, so the exercise of a discretion in accordance with this Code would be a reasonable exercise of discretion.

Repair or Replacement of Windows – Whether Consultation Notices were sufficiently clear

Southwark LBC v Oyeyinka [2014] UKUT 0258 (LC) is a successful appeal by the Council against a decision of the LVT which had disallowed most of the cost of replacing windows on the basis that the consultation requirements of s 20 of LTA 1985 had not been complied with. The dispute arose because the original consultation notices had referred to the repair or replacement of the windows and the applicant (the current respondent) had argued that the

windows had actually been replaced, and this was considerably more expensive than the repair option which had been mentioned in the original notices. The UT (HHJ Nigel Gerald) held that the original consultation notices had made it adequately clear that the alternatives of repair and replacement were both under consideration, and that it would not be known until the works had commenced whether the cheaper option of repair would be feasible. The UT therefore allowed the appeal and required O to pay his share of the cost of replacement windows.

Section 41A LTA 1954 – whether general medical practice was to be carried on by only one of the members of a partnership – grant of tenancy by one member of a business partnership to himself and another partner – Rye v Rye (1962) followed

Lie v Mohile [2014] EWCA Civ 728 represents the second visit to the Court of Appeal (see further *Lie v Mohile* [2013] EWCA Civ 1436, which was discussed in Bulletin No 137) by two general medical practitioners who would appear still to be conducting a practice in partnership with each other. The medical centre in which they practised was owned by Dr M but was let to himself and Dr L as partners. As a result of disagreements Dr M served notice on Dr L purporting to terminate their partnership and the periodic tenancy. The notice terminating the partnership was held to be ineffective in the previous proceedings. Dr L issued an application under s 24 of the LTA 1954 seeking the grant of a tenancy to himself alone, which Dr M opposed under s 30(1)(g) on the basis that he wished to continue to practise at the premises without Dr L. At the previous hearing in the Court of Appeal Rimer LJ raised the question of whether an application for a new tenancy – which would have to be under the provisions of s 41A, which made provision for such applications by some, but not all, of the joint tenants, in the case of partnerships – could be made by Dr L alone. This matter was then raised in the 1954 Act proceedings, and, sitting in the Central London County Court, HHJ Karen Walden-Smith heard it as a preliminary issue. She determined that the first three of the conditions in s 41A(1) were satisfied, but not the fourth, because it could not be said that the business was carried on 'by one or some only of the joint tenants': both Dr L and Dr M continued in practice as partners. Dr L appealed against this finding, arguing that Dr M was not capable of granting a tenancy to himself, even jointly with Dr L, and so Dr L was in effect the sole tenant. This argument was rejected by the CA (Patten, Underhill and Vos LJJ): s 82 of the LPA 1925, as interpreted in *Rye v Rye* [1962] AC 496 made it clear that A could grant a valid tenancy to A and B; further, if Dr L's argument were correct, then s 41A would not be engaged at all. The appeal was therefore dismissed.

(case noted at: [2014] Comm. Leases 2068–2069; and [2014] L & T Review, 18(4), D28)

Notice to quit given by secure tenant – whether subject of undue influence – whether failure to obtain a formal assessment of mental capacity gave rise to a public law defence

Birmingham CC v Beech [2014] EWCA Civ 830 is an unsuccessful appeal against the judgment of Keith J reported as [2013] EWHC 518 (QB) and discussed in Bulletin No 134. The appellant B was the adult daughter of a secure council tenant (W); W was tenant of a house which included three bedrooms and two living rooms. W was the survivor of joint tenants, so (prior to the amendments brought about by the Localism Act 2011) under ss 87 and 88 no succession to the property was permitted. In November 2007 B moved back to live with W, and was joined by her new partner, whom she later married. B and her partner sought a council tenancy in Birmingham, but turned down the properties that they were offered. B then sought to become a joint tenant with W, but this was turned down, as the council's policy was to permit cross-generational joint tenancies only in exceptional circumstances. In October 2009 W went into hospital for an operation and was discharged into a care home. B requested that the tenancy be transferred into the names of herself and her partner, but a council officer visited W and got her to sign a notice to quit. B again sought the tenancy; while the request was being considered, W died, in June 2010; the request for the tenancy was again refused; there were further reviews and an internal appeal. The Council thereupon commenced possession proceedings in the County Court. These were challenged on several grounds: (1) whether W had validly given notice to quit: this was challenged on the basis (a) that W had not had mental capacity at the relevant time, or (b), in the alternative, was procured by the Council by undue influence and unconscionable behaviour; (2) a public law challenge to the Council's refusal to add B's name to the tenancy; (3) a public law challenge to the Council's refusal to grant the tenancy to B and her partner; (4) a defence under Article 8, on the basis that the council was acting disproportionately in seeking to evict B from what had become her home; and (5) a further argument under the Human Rights Act 1998 (HRA 1998) that the statutory succession scheme itself under s 88 was itself not compliant with the Act. In view of the complexity of the defence, and the HRA issues, the case was transferred to the High Court.

Permission to appeal to the CA was given only on (1) whether there was a presumption that the signing of the notice to quit by W had been procured by the undue influence of the Council officer and (2) whether the Council's decision to take possession proceedings was liable to a public law challenge on the basis that it should have procured a formal assessment of her mental capacity before she signed the notice. The appeal failed on both grounds. Essentially the Court of Appeal (Etherton, C, and Underhill and Briggs, LJJ) confined presumed undue influence to its traditional cases (parent and child, trustee and beneficiary, solicitor and client, medical adviser and patient) and declined to extend it to a scenario where a frail elderly person was dealing with a person whom she would perceive to be in authority. Although it could be argued that this takes a rather narrow view of the reality of the situation

here, it should be noted (see [75]) that, if W had not signed the notice to quit, then there would have been nothing to stop the Council from serving their own notice, as W was not in occupation, and so was no longer a secure tenant. The Court also found no merit in the second ground of appeal. Mental capacity is presumed under the Mental Capacity Act 2005 until disproved. There was no evidential basis to suggest that, if a formal assessment had been carried out, it would have found that W had insufficient capacity to give the notice to quit ([83]). Any public law challenge to the decision of the council to rely on that notice to quit was 'plainly untenable' ([85]).

(case noted at: HLM 2014, Jul/Aug, 10–12)

Withdrawal of application for RTM – whether LVT should have dismissed the application so as to allow it to make an order for costs

R (*on the application of O Twelve Bay Tree Ltd*) *v The Rent Assessment Panel* [2014] EWHC 1229 (Admin) raises a short point on the powers of the former LVTs when dealing with an application to determine whether a company set up as an RTM Co is entitled to exercise the Right to Manage. The RTM Co (which was joined as an Interested Party, but did not participate in these judicial review proceedings) had given a notice under s 79(1) of the CLRA 2002 claiming the RTM, which the landlord had contested by serving a counter notice under s 84(2)(b). The RTM company had thereupon issued an application to the LVT under s 84(3) for a determination to be made. Following the service of a statement and a reply, and exchange of documents, the RTM Company's solicitor had written to the LVT asking for the application to be withdrawn. The LVT had considered that it had no choice but to accede to this request, and had not accepted an argument put to it in a letter from the ground landlord to the effect that, once made, the application under s 84(3) remained current until dismissed by the LVT. The landlord had therefore commenced these judicial review proceedings. The landlord was of course keen to have an opportunity to seek an order for costs in its favour.

Lewis J, sitting in the Administrative Court, accepted the ground landlord's argument. Although the CLRA 2002 was not explicit on the point, the scheme of the Act pointed in favour of a landlord being able to seek costs in circumstances such as these. If the RTM company did not wish to proceed with its application, then generally the LVT should accede to its request, and formally dismiss the application, which would clearly give the tribunal standing to deal with costs under s 88(3); a landlord would generally be entitled to be awarded costs, though there might exceptionally be rare occasions when it would be desirable for a tribunal to determine the underlying issue (see [43]).

It should be noted that the jurisdiction of the LVT in these matters has of course been transferred to the First-tier Tribunal (Property Chamber), and that Rule 22(3) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber Rules 2013) now provides that if an applicant serves a notice of

withdrawal, such a notice does not take effect without the consent of the Tribunal. The instant case therefore confirms that the new Rules correctly reflect the proper interpretation of the CLRA 2002 ([44]).

(case noted at: EG 2014, 1426, 123; and JHL 2014, 17(4), D82–D83)

Whether tribunal may amplify its original reasons in response to an application for permission to appeal

Chowdhury v Bramerton Management Co Ltd [2014] UKUT 260 (Ch) may be noted briefly as an application of the principle – as held in *Havering LBC v MacDonald* [2012] UKUT 154 (LC) – that a lower tribunal may, in response to an application for permission to appeal, amplify the reasons which it originally gave, provided that 'those reasons were properly within the mind of the LVT at the time the decision was made and formed the basis (or at least part of the basis) for the decision being reached'. (The instant case was heard before the coming into force of s 9 of the Tribunals, Courts and Enforcement Act 2007 which gives the First-tier Tribunal an express power to review its decisions and to amend its reasoning.)

Conflict between repairing covenant and covenant not to derogate from grant – whether interim injunction should be granted – balance of convenience test

Century Projects Ltd v Almacantar (*Centre Point*) *Ltd* [2014] EWHC 394 (Ch) raises the issue of how to resolve a possible conflict between a repairing covenant and a covenant not to derogate from the grant, or in the alternative a covenant for quiet enjoyment. The instant case involved the repair of Centre Point in London, which the landlords proposed to carry out with scaffolding covered with plastic screening. The tenants, who ran a restaurant with a viewing gallery on the 31st to 33rd floors of the tower objected, claiming that this method of repair would obscure their panoramic views for a period of four to six months and thus severely affect their business. They produced an expert's report suggesting that the repairs could be appropriately effected using cradles suspended from the roof. It was noted that, *Goldmile Properties Ltd v Lechouritis* [2003] EWCA Civ 49 permitted a landlord to comply with a repairing covenant without being in derogation of his grant or in breach of the covenant for quiet enjoyment, provided that he acted reasonably. In spite of this case, according to Nugee J there was a serious issue here to be tried as to whether – as one would normally expect – the landlord should be allowed to determine how to perform its repairing covenant, or whether this might have to give way to the tenant's commercial interests. That, however, was a matter for the trial, and not for this interim application. On this application, the balance of convenience lay in refusing an injunction, as, if an injunction were granted, there was a serious risk of the landlord incurring substantial uncompensatable loss.

(case noted at: EG 2014, 1429, 89)

Private nuisance – whether landlords had authorised and/or participated in it

Coventry v Lawrence (*No 2*) [2014] UKSC 46 is a supplemental judgment to the judgment in the important case in nuisance which the Supreme Court gave in February ([2014] UKSC 13). The issues addressed by the earlier judgment were whether one can acquire a right by prescription to commit what would otherwise be a noise nuisance; to what extent it is a defence to say that the defendant 'came to the nuisance'; the relevance of the actual use of the defendant's property to determining the nature of the locality; the relevance of a grant of planning permission in considering the question of nuisance; and the approach to be adopted in deciding whether to grant an injunction, or damages in lieu. All these may be matters of general interest to the property lawyer, but lie outside the main focus of the principal work. The supplemental judgment, however, is of more direct concern, as one of the issues left unresolved by the first judgment was whether the landlords of the Stadium and Track used for various form of motor racing should be liable, along with the principal occupiers, for the substantial damages and costs involved. It is regrettable that the Landlords do not seemed to have raised the relevant issues on the pleadings, and were appearing by the same Counsel, but this issue then arose at trial, and the judge dismissed the claims against the landlords. The Court of Appeal held that there was no nuisance, so no determination needed to be made there on the liability of the landlords, but, as the Supreme Court restored the first instance judgment, the issue of whether the landlords should be liable resurfaced.

The Supreme Court was divided on this issue. The majority (whose opinion was expressed by Lord Neuberger, with whom Lords Clarke and Sumption agreed) applied the well-known principle explained by Lord Millett in *Southwark LBC v Mills* [2001] 1 AC 1, that 'the … persons directly responsible for the activities in question are liable; but so too is anyone who authorised them', but as for landlords '[i]t is not enough for them to be aware of the nuisance and to take no steps to prevent it'. To be liable, they 'must either participate directly in the commission of the nuisance, or they must have authorised it by letting the property'. Lord Neuberger, like Lord Millett, approved, [13], of the dicta of Pickford LJ in *Malzy v Eichholz* [1916] 2 KB 308, 319 '[a]uthority to conduct a business is not an authority to conduct it so as to create a nuisance, unless the business cannot be conducted without a nuisance'. He rejected the suggestion that the law had substantially moved on during the near century since that case was decided, noting that the tests in it had been expressly approved in *Mills.* The claimants argued that one case which suggested that the law might have developed was *Sampson v Hodson-Pressinger* [1981] 3 All ER 710. Lord Neuberger seemed to have shared the doubts of Lord Hoffmann in *Mills* (at pp14–15) as to whether *Sampson* was rightly decided, [14], unless its ratio was that 'the ordinary residential user of the neighbouring flat which they had let would inevitably have involved a nuisance as a result of the use of that flat's balcony'. If that was indeed the ratio, it is difficult to see why *Mills* was decided as it was. Lord Hoffmann fortunately had explained himself in more detail. He emphasised, at p 15,

that he thought *Sampson* was reconcilable with earlier precedents only if, when the long lease of the lower flat was drafted, the roof over its living room did not form the roof terrace of the flat above ('this argument depends entirely upon the adaptation of the terrace taking place after the grant of the plaintiff's lease'): whether or not it did is not clear from the report. Another case which suggested that the law had developed was *Chartered Trust plc v Davies* [1997] 2 EGLR 83, but this involved the slightly different situation where, although another tenant was creating the nuisance, it was on the common parts, which were vested in the landlord, and so were under its control. As it would clearly have been possible for the Stadium and Track to have been used as such *without* creating a nuisance, it could not be said to have been the inevitable consequence of the letting, [15]. The trial judge had found against the landlord being liable, but he had relied on covenants in the lease, which Lord Neuberger thought he had misconstrued, [16], and Lord Neuberger did not think they were relevant anyway, [17].

Lord Carnwath, with whom Lord Mance concurred in a short judgment, dissented on this point. The dissent is unusual, in that neither dissentient adopts a substantially different test from the majority, nor does either take a different view of the law. Lord Carnwath rejects the less stringent test found in *Tetley v Chitty* [1986] 1 All ER 633 –whether a nuisance was 'likely' or 'foreseeable' – as unsupported by earlier or later authority and insufficiently rigorous. Nevertheless, while in theory applying the same tests as Lord Neuberger, he and Lord Mance come to a different conclusion, taking a broader view of a series of facts which led them to the conclusion that the landlords were actively participating in the nuisance, [59]–[60], in particular by taking the lead in negotiations with the local Council, and in trying to prevent it from serving a noise abatement order on those occupying the premises and running the events. Lord Neuberger considered the series of events in detail, and came to the conclusion that they did not show any more participation than one would expect of a landlord who was concerned to protect the value of his reversionary interest, [20]–[30]; Lord Carnwath, on the other hand, reviewed the same events, [60]–[66], and decided that they showed that the landlords had 'gone far beyond the ordinary role of a landlord protecting and enforcing his interests under a lease'.

The upshot of the case is that the law as it stood as a result of *Malzy* and *Mills* has been broadly affirmed. The dissent of Lords Carnwath and Mance may, however, have a slightly unsettling effect on the law. Although the inferences to be drawn from the facts can be the subject of appeals, appellate judges are naturally reluctant to interfere with the inferences drawn by those beneath them in the hierarchy. The fact that the Supreme Court was having to undertake this process for the first time demonstrates how judicial opinions may simply differ.

Finally, it should be noted that the respondents raised an issue on costs and the HRA 1998, arguing that the size of the appellants' bill of costs which they were facing (which included their lawyer's success fee, or uplift, and the premium for after the event insurance), raised issues under Article 6 and Article 1 of Protocol 1 of the ECHR. Lord Neuberger and the other judges

clearly had some sympathy with this argument, but directed that, if the respondents wished to pursue it, they would have to join the Attorney-General and the Ministry of Justice as parties, as a possible outcome could be the making of a declaration of incompatibility in respect of the regime for recovery of costs contained in Pt II of the Access to Justice Act 1999, and such a declaration could not be made unless the Government was before the Court.

Application for collective enfranchisement – whether applicants were associated companies – whether structure set up was a sham – whether objection based on proportion of non-residential use could be raised at the hearing (and treating of serviced lettings) – criteria which the purchase price proposed by the tenants should satisfy

Westbrook Dolphin Square Ltd v Friends Life Ltd [2014] EWHC 2433 (Ch) is a lengthy and important judgment (455 paragraphs) which – in view of the several principles at stake and the value of the property – would seem destined to go higher. The preliminary skirmish in the litigation has already appeared in the law reports. The current claimants (WDS) had originally served an initial purchase notice under s 13 LRHUDA in September 2007, but, in view of the fall in the property market, had discontinued the subsequent proceedings five days before a High Court hearing was due to begin. Two and a half years later in April 2010 WDS then served a further initial purchase notice, and claimed (in the present proceedings) a declaration that they were entitled to acquire the freehold. The defendant freeholders, Friends Life (FL) succeeded in the High Court in getting the proceedings struck out on the basis that the claim was substantially the same as the one that had been discontinued, but this decision was reversed by the Court of Appeal ([2012] EWCA Civ 66: see Bulletin No 130). It is thus the phase of the litigation which began in 2010 which has come before Mann J in the High Court.

The background to this case is the convoluted legal structure of Dolphin Square, the well-known estate of 1,223 flats in Pimlico. The freehold was owned by Friends Provident (FP), subject to a headlease to Tannenberg (T) and an underlease to WDS. T and WDS (which are both in the American Westbrook group (W)) had acquired the headlease and underlease in January 2006. Although the freehold purchase was to take the form of collective enfranchisement under the LRHUDA 1993 ('the Act'), it was in reality an attempt by W compulsorily to acquire the freehold following the abolition of the residence requirements for enfranchisers under the CLRA 2002: in order to attempt to qualify for enfranchisement WDS had created 1,223 under-leases (each subject to any existing tenancies of the flats) to 612 'special purpose vehicles' (SPVs), companies incorporated in Jersey, each of which owned the underleases of two flats (or in one case, only one). Slightly simplifying the facts, all but 165 of the flats were and are let to residential

tenants paying market rents; the remaining 165 are let by the relevant SPVs to a company, Mantilla Ltd (M) which in turn let them out on short term (up to 89 days) furnished and serviced occupancies. The present proceedings are therefore an attempt by the lessee and underlessee of the whole building to obtain the freehold of the estate, and is far removed from the usual scenario when owner-occupier and/or small-scale buy-to-let leaseholders wish to enfranchise.

The case raises and decides several issues, [42]: almost any one of them, taken on its own, would make for an important case.

(*1*) *Is each of the SPVs a qualifying tenancy, or are they precluded from being so by virtue of their being 'associated companies' within the meaning of s 5 of the Act?* (See [71]–[97].)

Under s 5(5) of the Act a person may be a 'qualifying tenant' for the purposes of collective enfranchisement if he is the owner of not more than two flats in a building. For this reason, the lease of each SPV contained only two flats. In an attempt to prevent abuse, where a flat is let to a body corporate, under s 5(6) a flat let to an 'associated company' shall be treated as if it were let to that first company. The definition of 'associated company' in s 1159 of the Companies Act 2006 is adopted for these purposes. To summarise a complicated position, although each SPV was clearly 'associated' in the loose sense, none of them fell within the statutory definition as 50% of the voting rights in each was held by two companies which were nominally not associated.

(*2*) *Is W prevented from enfranchising because the corporate and leasehold structure which has been set up is an artificial device to permit enfranchisement where it would not otherwise be possible, and is thus a 'sham'?* (See [98]–[142].)

Although the issue in the notices and pleadings seemed to rely on the doctrine of sham, in the hearing the arguments partook more of the *Ramsay* principles (*Ramsay v IRC* [1982] AC 300) as applied to tax schemes. Again, it is not possible to do justice to the intricacies of the arguments for and against in a note of this nature, but Mann J summarised FL's submissions as amounting to an argument that 'if Parliament had appreciated that this sort of thing could happen, it would have legislated to prevent it', [139]. Even if this were the case, the logic of *Jones v Wrotham Park Estates* [1980] AC 74, a case under the LRA 1967, was that such a highly purposive interpretation ought not to succeed. This argument of FL also failed.

(*3*) *Would enfranchisement infringe FL's rights under the HRA 1998?* [143]–[149].

FL raised an argument based on Article 1, Protocol 1, supported by the non-discrimination provisions of Article 1, though – in view of *James v UK* [1986] EHRR 123 and *Earl Cadogan v Sportelli* [2010] 1 AC 226 did not argue that the overall scheme of Pt 1 of the Act infringed the Convention. Mann J had little difficulty in holding that any Convention rights of FL had not been infringed.

(4) *Is FL entitled to raise the point in these court proceedings that the building contains more than 25% of space which is occupied for non-residential purposes, given that the point was not raised in its counter-notice?* (See [150]–[175].)

It is surprising that there has been so little previous authority on this point. Under s 21 of the Act the reversioner 'shall' give a counter-notice (sub-s (1)) which 'must' comply with certain requirements (sub-s (2)). W argued that the clear implication of this was that FL could not raise later an objection which had not been raised in its counter-notice. Similar arguments on analogous provisions of the Act had been accepted in reported county court decisions. FL, on the other hand, pointed to dicta of Auld LJ in *Cornwall Crescent London Ltd v Kensington & Chelsea* [2006] 1 WLR 1186 (CA) which suggested otherwise, and to the fact that the Act – unlike s 30 of the LTA 1954 – did not specifically provide that a landlord could resist an application only on grounds which had already been specified in a notice. Further, if a landlord failed to serve a notice at all, s 25(3) of the Act still required the participating tenants to satisfy the court that they were entitled to exercise the right to collective enfranchisement. Mann J therefore found in favour of FL on this point, pointing out that it was consistent with the construction of similar provisions in the CLRA 2002 on the RTM which the Upper Tribunal had recently adopted.

(*5*) *If FL is entitled to raise the point about non-residential use, does the building in fact contain more than 25% of such space?* (See [176]–[285].)

Much of the discussion about this was specific to the particular physical layout of Dolphin Court, but some points of more general importance were decided. The point which is likely to be of most general application is the discussion of what is meant by 'residential' and 'non-residential' use. The fact that some 165 of the flats were occupied on serviced occupancies not (generally) exceeding 89 days led FL to argue that their use was 'non-residential' and the proportion in question – taken with parts which were by any test 'non-residential – would therefore have the effect of excluding the block from the scope of the Act. Again, there was much detailed discussion, but Mann J held that there was no longer any requirement that a flat should be a person's home or principal residence, and that the flats remained 'residential' in spite of the fact that some hotel-like services were provided for them. A further 36 flats were referred to as 'corporate housing' and were let for longer periods of occupation tenancies – the average was 309 days – but, like the 165 flats, were let furnished and with some hotel services. Again, these were held to be 'residential'. The remainder of the discussion involved the treatment of various areas which arguably formed part of the common parts.

(6) *Is W's notice ineffective because it does not 'specify the proposed purchase price'? – the argument being whether the price put forward by the tenants in their initial notice should be objectively or alternatively subjectively justified in valuation terms, and not merely a nominal figure.* (See [286]–[328].) *If the price has to pass any such test then the question would arise of whether W's offer did in fact do so*) (see [329]–[393]).

Again, it is perhaps surprising that there was no clear existing precedent on this issue, which is in certain respects related to that in Issue 4 (above). The figure put forward in W's initial notice was £111.66m and FL argued that this was not a bona fide proposed purchase price and the notice was not therefore valid. Mann J stated that, in spite of the arguments of W to the contrary, he felt constrained by *Cadogan v Morris* [1999] 4 EGLR 59 (CA) and *Cornwall Crescent London Ltd v Kensington & Chelsea* [2006] 1 WLR 1186 (CA) to hold that the proposed purchase price put forward by the participating tenants in their initial notice had to satisfy *some* criteria, not least because, if the reversioner failed to respond, it might become the price at which its interest might be acquired: the question was what they were. After lengthy consideration Mann J reached the view that the tenants' figure must be a 'genuine opening offer' and not merely a 'nominal' figure, [325]: requiring this would protect the landlord from the danger of having to sell at an absurdly low valuation. W's offer, though clearly on the low side, was 'bona fide in the sense that it was a real offer which was intended to be taken seriously as such and which no reasonable landlord would dismiss as patently absurd or nonsensical even if it was unlikely to be accepted'; it thus 'passes every aspect of the correct test', [328].

Part of Mann J's thinking in deciding that the figure to be put forward could be an 'opening shot', and not a figure which was carefully calculated, was that it could not have been Parliament's intention that the court should have to consider detailed valuation evidence at the stage of determining eligibility, only for such evidence to have to be given again if the price then had to be referred to a valuation tribunal. Nevertheless, he did consider the offer in detail, in case an appeal on the test to be applied should succeed, and apply a more stringent test. This inevitably took him into an analysis of detailed valuation issues. He reached the conclusion on this that, if the figure in the initial purchase notice had to satisfy some criterion that it was within a range that a reasonable valuer could propose and reasonably justify, the figure of £111.66m would still satisfy it, albeit that the figure would be right at the bottom of that range, [393].

(7) *If the enfranchisement scheme would otherwise operate against FL, whether it can claim to be a victim of a transfer at an undervalue under s 423 of the Insolvency Act 1986*. (See [394]–[454].)

FL's argument on this point was that the creation of the various SPV leases (for which actual consideration was paid) were transactions at an undervalue, that FL was the 'victim' of these transactions, and that therefore it could call for them to be set aside under s 423 of the Insolvency Act 1986 as transactions defrauding creditors. Unsurprisingly, Mann J was unconvinced by each of the stages of FL's arguments on this point.

The judgment, therefore, was that W was entitled to enfranchise, although it seems highly likely that the matter will go again on appeal. Just as the removal of the residence qualification for the enfranchisement of houses under the LRA 1967 has led to some rather unlikely lessees taking advantage of its provisions, the removal by the CLRA 2002 of the residence qualifications under the LRHUDA 1993 would seem to have opened the door,

notwithstanding s 5(5) and (6) of the Act, to a collective enfranchisement which can hardly have been within the contemplation of Parliament when passing the CLRA 2002. But, as found at (2) above, this has been held to be an insufficient argument.

PERMISSION TO APPEAL

The Leasehold Advisory Service (LEASE) reports on its website that the appeal in *Phillips v Francis* [2012] EWHC 3650 (Ch), the controversial decision of the former Chancellor on how the consultation requirements under s 20 of LTA 1985 should be interpreted (see Bulletin No 133), which had been listed for hearing by the Court of Appeal for 14 and 15 May 2014, has now been adjourned to 13–15 October 2014.

The appeal to the Supreme Court in *Sims v Dacorum BC* [2013] EWCA Civ 12 (see Bulletin No 134) was heard on 23–26 June 2014. It was heard together with an appeal in *R* (*on the application of CN*) *v Lewisham LBC; R* (*on the application of ZH* (*a child by his litigation friend*)) *v Newham LBC* [2013] EWCA Civ 804 (noted in Bulletin No 135). Judgment is awaited.

Permission to appeal has been granted by the Upper Chamber (Mr Martin Rodger, QC, DP) in the case of *an application by Mr JW Fisher* (RAP/19/2013, 14 April 2014). An application to register a fair rent for a property on the Howard de Walden Estate in W1 was capped – in fact reduced by more than 50% – because of the effect of the Rent Acts (Maximum Fair Rent) Order 1999, which capped the increase in the registered rent by RPI plus 5%. The Rent Officer and the FTT had used as the base the previous registered rent, which included a sum for services. Having a separate element for services was no longer appropriate, as a separate heating system had been installed. The tenant was granted permission to appeal on the basis that it was an arguable proposition that the base rent for recalculation purposes should have been the previously registered rent, less the element for services. The Deputy President made the point that appeals from LVTs and residential property tribunals were governed by s 175 of the CLRA 2002 and s 231 of the HA 2004, which permitted appeals more widely than on points of law; appeals from the Rent Assessment Committee were confined to points of law, under s 11 of the Tribunals, Courts and Enforcement Act 2007. This distinction had been preserved following the transfer of jurisdiction of all these tribunals to the FTT (Property Chamber). However, the application to appeal in the instant case clearly involved a point of law.

NOTES ON CASES

Bolton v Godwin-Austen [2014] EWCA Civ 27: JHL 2014, 17(3), D61–D62; and EG 2014, 1423, 79

Bywater Properties Investments LLP v Oswestry Town Council [2014] EWHC 310 (Ch) [2014] Comm Leases 2030–2031 (noted in Bulletin No 138)

Ceballos v Southwark LBC [2014] EWHC 1450 (QB): JHL 2014, 17(3), D66–D67

Century Projects Ltd v Almacantar (*Centre Point*) *Ltd* [2014] EWHC 394 (Ch); *Fitzwilliam v Richall Holdings Services Ltd* [2013] EWHC 86 (Ch), [2013] 1 P & CR 19 (Ch D): NLJ 2014, 164(7614), 11–12

Corscombe Close Block 8 RTM Co Ltd v Roseleb Ltd [2013] UKUT 81 (LC), [2013] L & T Review 16: [2014] L & T Review 150–152 (noted in Bulletin No 134)

Coventry (*t/a RDC Promotions*) *v Lawrence* [2014] UKSC 13, [2014] 2 WLR 433: [2014] CLJ 247–250

Daejan Investments Ltd v Benson [2013] UKSC 14: NLJ 2014, 164(7603), 13 (noted in Bulletin No 134)

Di Marco v Morshead Mansions Ltd [2014] EWCA Civ 96: JHL 2014, 17(3), D62–D63; and EG 2014, 1414, 91 (noted in Bulletin No 138)

Furlonger v Lalatta [2014] EWHC 37 (Ch): JHL 2014, 17(3), D62 (noted in Bulletin No 138)

Re Games Station Ltd [2014] EWCA Civ 180 (see *Pillar Denton Ltd v Jervis*, below)

Grove Investments Ltd v Cape Building Products Ltd [2014] CSIH 43 (efficacy of a terminal *Jervis v Harris* clause): EG 2014, 1427, 88

Helman v John Lyon Free Grammar School [2014] EWCA Civ 17: JHL 2014, 17(3), D60–D61 (noted in Bulletin No 138)

HKRUK II (*CHC*) *Ltd v Heaney* [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15: EG 2014, 1416, 81

Iceland Foods Ltd v Castlebrook Holdings Ltd [2014] PLSCS 95 (Chester County Court) (tenant required to take longer term than requested), [2014] Comm Leases 2063–2065

Innerspaces Self Storage Ltd v Harding [2014] EWCA Civ 46: [2014] Comm Leases 2041–2042 (noted in Bulletin No 138)

Lloyd v Browning [2013] EWCA Civ 1637: EG 2014, 1420, 86–88 (noted in Bulletin No 138)

Martin Retail Group Ltd v Crawley BC (CC (Central London)) (unreported, 24 December 2013): LSG 2014, 111(27), 21; EG 2014, 1420, 95; and [2014] L & T Review 152–154

Masih v Yousaf [2014] EWCA Civ 234, [2014] All ER (D) 56 (Feb): [2014] L & T Review 148–150; and JHL 2014, 17(3), D45 (noted in Bulletin No 138)

Nelson v Circle Thirty Three Housing Trust Ltd [2014] EWCA Civ 106: JHL 2014, 17(3), D66 (noted in Bulletin No 138)

Pavilion Property Trustees Ltd v Permira Advisers LLP [2014] EWHC 145 (Ch): [2014] Comm Leases 2033–2034; and EG 2014, 1413, 101

Peel Land and Property (*Ports No 3*) *Ltd v TS Sheerness Steel Ltd* [2014] EWCA Civ 100: NLJ 2014, 164(7616), 15–16: [2014] Comm Leases 2034–2036; [2014] L & T Review 54–55; and SJ 2014, 158(12), 15 (noted in Bulletin No 138)

Pillar Denton Ltd v Jervis (*Re Games Station Ltd*) [2014] EWCA Civ 180: NLJ 2014, 164(7602), 11–12; [2014] Comm Leases 2039–2041; [2014] L & T Review, 18(3), D20–D21; and LSG 2014, 111(14), 20 (noted in Bulletin No 138) (NB *first instance* decision discussed at [2014] L & T Review 43–47)

R (*on the application of Trafford*) *v Blackpool BC* [2014] EWHC 85 (Admin): [2014] Comm. Leases 2037–2038 (noted in Bulletin No 138)

Santander (*UK*) *plc v RA Legal Solicitors* [2014] EWCA Civ 183: EG 2014, 1415, 75; (2014) 5 Journal of International Banking and Financial Law 330 (noted in Bulletin No 138)

Southend-on-Sea BC v Armour [2014] EWCA Civ 231: NLJ 2014, 164(7605), 16–17; SJ 2014, 158(28), 18–19, 21; and JHL 2014, 17(3), D59–D60 (noted in Bulletin No 138)

Taylor v Spencer [2013] EWCA Civ 1600: [2014] L & T Review 51–53 (noted in Bulletin No 137)

Topland Portfolio No 1 Ltd v Smiths News Trading Ltd [2014] EWCA Civ 18: [2014] Comm Leases 2031–2032; [2014] L & T Review 63–65; and [2014] L & T Review 69–75; and EG 2014, 1417, 118 (noted in Bulletin No 138)

Trafford Housing Trust Ltd v Rubinstein [2013] UKUT 0581 (LC): [2014] L & T Review D16–D17 (noted in Bulletin No 137)

Xenakis v Birkett Long LLP [2014] EWHC 171 (QB): [2014] Comm Leases 2048–2050 (noted in Bulletin No 138)

ARTICLES OF INTEREST

A distressing new world? (abolition of distress and introduction of CRAR) EG 2014, 1413, 95

A new Act to validate inaccurate break notices? [2014] L & T Review 41–42

A new model for speeding up lettings EG 2014, 1428, 86–87

A not so quiet revolution? (possibility of use of deeds of easement to authorise the generation of noise) EG 2014, 1413, 96

A tale of two systems (leasehold and commonhold) EG 2014, 1429, 83

A tough break (need for strict compliance with break clauses) EG 2014, 1417, 119

A VAT headache for property owners EG 2014, 1428, 94

Agricultural tenancies: don't come a cropper EG 2014, 1422, 80–81

Arbitration: determining the future? (arbitration service to be offered by Falcon Chambers) EG 2014, 1414, 89

ARTICLES OF INTEREST

Assessing housing conditions: the HHSRS past, present and future JHL 2014, 17(4), 84–89

Auctions comment: few people are talking about it, yet minimum energy performance standards will ram sustainability home for the whole property industry EG 2014, 1428, 50

Beware the costs of holding over (SDLT liabilities) EG 2014, 1421, 91

Boom time for property tribunals EG 2014, 1424, 88–90

Breaking bad – tenants disappointed again (recent cases on tenants' break clauses) [2014] L & T Review 127–128

Can the winner take all? (recovery of litigation costs by ground landlords) EG 2014, 1423, 77

Chancel repair changes LSG 2014, 111(12), 24

Changes on the green scene (town and village greens) EG 2014, 1413, 92–94

Changes to Chancery cases in the County Court (increase in equity jurisdiction from £30,000 to £350,000) SJ 2014, 158(14), 27

Changing structure, maintaining security (effect on security of tenure of converting to an LLP during the course of a lease) EG 2014, 1424, 95

Claims against noisy neighbours – Part 2 Legal Action 2014, May, 17–19

Clarifying counter-notices EG 2014, 1423, 79

Closing the door on anti-social behaviour EG 2014, 1418, 89

Commercial property update SJ 2014, 158(20), 33–34; and SJ 2014, 158(27), 33–34

Compensating business tenants (for disturbance and improvements) EG 2014, 1416, 82–83

'Condemnation and indignation'; what should the courts consider in awarding damages under the tenancy deposit scheme? JHL 2014, 17(3), 50–55

Contract and equity, forfeiture and phones [2014] Conv 164–175

Conveyancers: join our campaign to reduce delays to leasehold property purchases SJ 2014, 158(11), 15

Conveyancers unite against stress and frustration of dealing with management companies SJ 2014, 158(17), 17

Covenants versus development rights EG 2014, 1424, 91

Cutting the red tape (regulation of residential letting agents) EG 2014, 1425, 79

Damages for breach of contract to purchase land: getting the principles right [2014] Conv 147–156

Damages under the Housing Act 1988 [2014] L & T Review 105–107

Disrepair, default judgments and debarring orders. SJ 2014, 158(27), 28.

'Does the key fit the lock?': an analysis of the speeches in Mannai v Eagle Star [2014] L & T Review 82–86

Don't get caught out (energy efficiency schemes) EG 2014, 1421, 86–88

Erimus Housing re-visited: undocumented occupiers beware! [2014] L & T Review 109–111

Estate Management Schemes (challenging unreasonable charges) EG 2014, 1418, 85

Exclusively yours – a look back at Street v Mountford [2014] L & T Review 92–95

Faith and understanding: the principle of indemnity (Land Registration) SJ 2014, 158(20), 15

Fitness for residential purpose? A consumer approach to disrepair [2014] L & T Review 79–81

Getting connected (IT and Telecommunications in tenancies) EG 2014, 1418, 90

Getting notices right (effect of Leasehold Reform (Amendment) Act 2014): EG 2014, 1417, 115

Homing in on mixed-use challenges EG 2014, 1414, 86–87

Housing Boom (*or Bust*)*?* (failure to follow rules can be costly for conveyancing firms) NLJ 2014, 164(7608), 16

How to deal with conveyancing when a client loses capacity SJ 2014, 158(19), 28

How to exercise a tenant break option (practitioner's page) [2014] L & T Review 159–161

Ignoring intention to create legal relations: the test of commerciality JHL 2014, 17(3), 56–61

In Practice: Complaints Clinic: Your duty on Stamp Duty Law Society Gazette, 12 May 2014

In Practice: Practice Points: Chancel Repair Liability Law Society Gazette, 5 May 2014

Is talk cheap? After Daejan Investments Ltd v Benson can landlords buy themselves out of consulting with tenants under s 20 of the Landlord and Tenant Act 1985 and what should be the price of doing so? [2014] Conv 156–164

Indemnity and the Land Registration Act 2002 [2014] CLJ 250–253

Introducing the MCL (Model Commercial Lease) EG 2014, 1428, 88

Land registration and time travel (proposals for privatisation of delivery of Land Registry services) [2014] Conv 189–192

ARTICLES OF INTEREST

Land registry, electronic conveyancing and harmonisation: a review of current practice [2014] Conv 106–122

Landlord and tenant update SJ 2014, 158(16), 30, 33; and SJ 2014, 158(30), 35–36

Leasebacks – what is the landlord entitled to? [2014] L & T Review 102–104

Lender Exchange conveyancing portal 'will benefit law firms' Solicitors Journal, 21 March 2014 (Online edition)

Liability for council tax – statutory periodic tenant [2014] L & T Review 107–109

Lies, lies & damned lies (recent fraud cases) NLJ 2014, 164(7606), 14–15

Losing a home (discussion of report into housing repossession cases) NLJ 2014, 164(7611), 16–17

Measure twice, cut once (tenancy deposit schemes) HLM 2014, Jul/Aug Supp (Social Housing Bulletin), vi–viii

Mind the gap (removal of the statutory breach of tenancy injunction from the Anti-social Behaviour, Crime and Policing Act 2014) NLJ 2014, 164(7607), 11–12

Minor tenants – Part 2, liability and grounds for possession JHL 2014, 17(3), 62–67

Mortgage fraud update SJ 2014, 158(11), 33–34

Mortgage Market Review is a good move SJ 2014, 158(21) Supp (Property Focus), 15, 17

Moving the goalposts (residential boundary disputes) Sol Jo, Expert Witness Supplement, Winter 2014

Nothin' goin' on but the rent (Commercial Rent Arrears Recovery Scheme) NLJ 2014, 164(7599), 11–12

Obtaining absolute titles when leases were granted before TLATA 1996 SJ 2014, 158(15), 28

Off the hook: protecting your firm against mortgage fraud SJ 2014, 158(13), 18–19, 21

Off-plan buyers beware EG 2014, 1430, 50–52

Parliament to probe manorial rights Law Society Gazette, 20 June 2014 (Online edition)

Past its Shelfer life (injunctions and damages in lieu) EG 2014, 1412, 84–86

Practice & Law: Analysis (decision in *Martin Retail Group Ltd v Crawley Borough Council* [2014] EGILR 17, holding that user covenants breached the Competition Act 1998) EG 2014, 1418, 88

Practice & Law: Legal Notes (possible conflicts that may arise on entering an express tenancy at will) EG 2014, 1418, 91

Practice Points: Chancel Repair LSG, 31 March 2014

Practitioner page: mixed use development – residential jargon [2014] L & T Review 115–124

Preserving our architectural heritage (important changes on the law on listed buildings) EG 2014, 1427, 86–87

Property law in the digital age SJ 2014, 158(21) Supp (Property Focus), 5, 7

Property mediation in the post-Jackson and Mitchell world SJ 2014, 158(21) Supp (Property Focus), 11, 13

Protecting rights to light SJ 2014, 158(21) Supp (Property Focus), 27

Public law and art 8 defences in residential possession proceedings [2014] Conv 262–272

Questions and answers: claim to surface void created by open-cast mining – disappearance of subject-matter of lease – frustration [2014] L & T Review 155–158

Questions and answers: condensation dampness – landlord's covenant to maintain flat in good condition and repair [2014] L & T Review 66–68

Questions and answers: validity of notice – section 146(1) of the Law of Property Act 1925 [2014] L & T Review 112–114

Re Games Station Ltd: a salvaged salvage principle [2014] Conv 249–262

Reasons to be cheerful … (upturn in conveyancing and property market) NLJ 2014, 164(7616), 29

Recent developments in housing law Legal Action 2014, Mar, 20–25

Right to manage: ironing out the kinks (recent cases on RTM) [2014] L & T Review 133–138

SDLT on multiple transactions [2014] Conv 193–201

SDLT: simplification to the lease regime [2014] L & T Review 48–50

Section 84(1) of the Law of Property Act 1925: a legal science renaissance [2014] Conv 143–146

Selective licensing – residents, landlords and community engagement: the perspectives of scheme managers JHL 2014, 17(4), 72–77

Service charges [2014] Conv 237–248

Sham transactions (focussing on charges over property) NLJ 2014, 164(7610), 13

Shortfalls and reversions EG 2014, 1429, 87

ARTICLES OF INTEREST

Should professionally drafted half-secret trusts be extinct after Larke v Nugus? [2014] Conv 229–236

Silver screen dreams? (hiring out of premises for filming and photoshoots) EG 2014, 1417, 110–112

Society urges pause in Land Registry plans: Law Society Gazette, 7 July 2014 (Online edition)

Stability and innovation in conveyancing SJ 2014, 158(25) 42–43

Statutory undertakers and compulsory powers EG 2014, 1425, 76–77

Tackling rogue landlords: Housing Act 2014, Parts 2 and 3 JHL 2014, 17(4), 78–83

Tailoring information to a client's needs SJ 2014, 158(11), 28

Taking the green lead (inclusion of sustainability services in leases) EG 2014, 1419, 6

Tenants must know where they can reach their landlords (effect of s 48 of LTA 1987) SJ 2014, 158(27), 15.

Tenants' new routes to redress (schemes relating to managing and letting agents) EG 2014, 1430, 58

Testing times for tenants (overview of recent cases on break notices) EG 2014, 1428, 90–91

The chancel repair change EG 2014, 1419, 121

The Deposit! Don't let this happen to your client (dangers if client cannot complete on time) NLJ 2014, 164(7608), 13

The flat above the shop (whether mixed use tenants have security of tenure) EG 2014, 1418, 86–87

The future of the private rented sector JHL 2014, 17(4), 69–71

The law cracks under the pressure (proposals to allow fracking without landowners' consent) EG 2014, 1427, 89

The modern renewal game (tactics which tenants should adopt in deciding whether to renew a lease) EG 2014, 1418, 82–84

The new Anti-social Behaviour Act 2014 – what it means for landlords and tenants [2014] L & T Review 87–91

The politics of fracking SJ 2014, 158(21) Supp (Property Focus), 29–30

The practicalities of recovering costs (ie of service charge disputes before the FTT (PC)) EG 2014, 1415, 74

The rise and fall of the Landlord and Tenant Act 1954 SJ 2014, 158(21) Supp (Property Focus), 19, 21

The sound of silence (commentary on *Coventry* (*t/a RDC Promotions*) *v Lawrence* [2014] UKSC 13) [2014] Conv 79–84

The transitional function of tenancies at will [2014] Conv 272–277

Time to take notice (treatment of various defective notices) EG 2014, 1421, 89

Title in ejectment [2014] Conv 123–142

Turnover rents: Part 2 [2014] Conv 85–94

Two professions divided by a common language? (meaning of 'accrued' to lawyers and accountants, in context of service charges) EG 2014, 1429, 84–85

What do tenants really, really want? (retail tenants' ideal terms) EG 2014, 1427, 82–84

Where are all the service charge disputes? (commercial service charge disputes in 2013) EG 2014, 1420, 93

Whistleblowing and workers EG 2014, 1429, 88

Why are we waiting (need for legislative reform to remove uncertainty over rights of light) EG 2014, 1417, 113

Working with Sharia (Islamic finance) EG 2014, 1417, 82

Your duty on stamp duty: LSG 2014, 111(17), 25–26

NEWS AND CONSULTATIONS

The **Department for Communities and Local Government** has issued **Guidance** to help landlords and those selling properties to understand their responsibility for making Energy Performance Certificates (EPCs) available when renting or selling domestic property. It takes account changes to the relevant regulations. See www.gov.uk/government/uploads/system/uploads/attachment_data/file/307556/Improving_the_energy_efficiency_of_our_buildings_-_guide_for_the_marketing__sale_and_let_of_dwellings.pdf.

The Government has published its Response to the **Land Registry's consultation** on its being given wider powers, including responsibility for **Local Land Charges**. The proposal for a 15-year cut-off has been dropped. Although it is conceded that some opinions did not support its proposals, the response suggests that the Government proposes to go through with the extension of the Land Registry's powers when legislative time permits. See www.gov.uk/government/uploads/system/uploads/attachment_data/file/320525/Govt_Response_Report_on_Wider_Powers__LLC_Consultation_16_6_14.pdf.

The **Competition and Markets Authority** has issued **Guidanc**e to **letting and managing agents** and other property professionals on compliance with certain relevant **consumer protection provisions**: www.gov.uk/government/uploads/system/uploads/attachment_data/file/319820/Lettings_guidance_CMA31.PDF.

The **Department for Business, Innovation and Skills** announced on 14 July 2014 that the Government will conduct a **further consultation on any proposed changes to the Land Registry's business model**: www.gov.uk/government/uploads/system/uploads/attachment_data/file/328872/bis_14_949_Introduction_of_a_Land_Registry_Service_Delivery_Company.pdf.

A **Welsh Government consultation** seeks comments by 14 October 2014, on the **renting homes illustrative model contract** and supporting guidance. See: www.wales.gov.uk/docs/desh/consultation/140723-illustrative-model-contract-consultation-en.pdf.

OFFICIAL PUBLICATIONS

The **Response** of the **Law Society** to the **Land Registry's proposal that it should have wider powers, including the registration of local land charges**, was published on 17 March 2014 at: www.lawsociety.org.uk/representation/policy-discussion/documents/land-registry–wider-powers-and-local-land-charges-law-society-response-march-2014/.

The **Response** of the **Chartered Institute of Legal Executives** was published on 27 March 2014 and is to be found at: www.cilex.org.uk/pdf/LR%20wider%20powers%20and%20local%20land%20charges%20final.pdf.

Tenants' deposits – a Commons Library Standard Note, explaining landlords' obligations, and how tenant deposit schemes operate, was published 30 April 2014 (SN/SP/2121): www.parliament.uk/briefing-papers/SN02121.pdf.

Land Registry – a Commons Library Standard Note published 9 May 2014 discusses proposals to separate the policy and delivery functions of the Land Registry (SN/SP/6885): www.parliament.uk/briefing-papers/SN06885.pdf.

The **Property Ombudsman** has issued a revised **Code of Practice for Residential Letting Agents**, which is effective from **1 August 2014**. It is available on his website: www.tpos.co.uk/.

The **Property Ombudsman** has also issued a revised **Code of Practice for Residential Estate Agents**, which is effective from **1 August 2014**. It is available on his website: www.tpos.co.uk/.

The **Department for Communities and Local Government** has issued **Your Right to Buy Your Home: A guide for tenants of councils, new towns and registered social landlords including housing associations**, a revised guide which takes account of changes noted under 'Statutory Instruments' in this Bulletin, and earlier changes: www.gov.uk/government/uploads/system/uploads/attachment_data/file/336606/Your_Right_to_Buy_Your_Home_A_Guide_July_2014.pdf.

REPORT

The **Law Commission** has published its **Report** setting out its proposed scheme for **Conservation Covenants** (LC No 349): see www.lawcommission.justice.gov.uk/areas/conservation-covenants.htm.

PRACTICE GUIDES ETC

HM Land Registry has issued revised versions of **Practice Guides 33** and **56** to take account of the new Land Registration Fee Order 2013; new versions of **Practice Guides 40** (including **Supplement 2**), **41** and **71** to reflect enhancements to the electronic Document Registration Service; a new version of **Practice Guide 10** to include the use of **Map Search**, a new digital service for

an online version of the Land Registry's Public Index Map; and also new versions of **Practice Guides 12, 19**, **72**, **33**, **67**, and **75.**

HM Land Registry has issued details of accessing its **database of 3.2 million commercial and corporate records of freehold and leasehold property** in England and Wales: www.landregistry.gov.uk/market-trend-data/public-data/corporate-and-commercial-ownership-data.

HM Land Registry has issued revised versions of **Practice Guide 6**, on devolution on the death of a registered proprietor; **14**, on Charities; **19**, on notice, restrictions, and the protection of third party interests (to clarify the requirements for an application to withdraw a restriction); **20**, on applications under the Family Law Act 1996; **24**, on private trusts of land; **27**, on Leasehold Reform transactions; **29**, on the registration of legal charges and deeds of variation of charge; **38**, on Costs; and **66**, on certain overriding interests losing automatic protection in 2013.

HM Land Registry has removed **Practice Guides 45**, **46**, **51** and **59** from their guidance pages as the information is available elsewhere.

HM Land Registry has also issued a revised version of **Practice Guides 4** and **5**, on **adverse possession** to registered and unregistered land respectively. These are noted separately, as they confirm that the Land Registry will now accept applications for title based on illegal possession of land which forms part of the highway, though any such titles will remain subject to public rights of way.

HM Land Registry on 13 May 2014 announced that owners who do not live at their registered property, and registered proprietors which are companies, can help guard against **property fraud** by asking the Registry to enter restrictions as additional security measures: see www.landregistry.gov.uk/public/property-fraud#m3.

PRESS RELEASES

Land Registry has launched a new Online owner verification service.

The Ethical Property Foundation is inviting responses to its Charity Property Survey 2014: www.charitycommission.gov.uk/news/charity-property-survey/.

The Mortgage Market Review Rules came into force on 26 April 2014: www.lawsociety.org.uk/advice/articles/new-mortgage-rules-come-into-force-on-26-april-2014/?utm_source=emailhosts&utm_medium=email&utm_campaign=PU+-+03%2F04%2F14.

The Department for Communities and Local Government on 15 April 2014 published a Press Release: Stronger protections for tenants and leaseholders giving details of government plans later this year to require all letting and property management agents to join an 'approved redress scheme': https://www.gov.uk/government/news/stronger-protections-for-tenants-and-leaseholders

PRESS RELEASES

The Ministry of Defence on 1 April 2014 announced the launch of a new Forces Help to Buy Scheme: https://www.gov.uk/government/news/forces-help-to-buy-scheme.

The Department for Communities and Local Government announced on 13 May 2014 that letting agents will be required to publish full details of the fees that they charge, under an amendment to the Consumer Rights Bill: see www.gov.uk/government/news/fees-transparency-to-ensure-a-fair-deal-for-landlords-and-tenants.

With effect from 30 June 2014, HM Land Registry will no longer require to be sent any original documents on an application to change the register. Certified copies may be sent instead. Either the applicant, a conveyancer or someone signing on behalf of the applicant will be able to certify a document as a true copy. The change is intended to bring the procedure for postal applications in line with the procedure which already applies to electronic applications. Original documents may still be sent to the Land Registry after 30 June, but originals and certified copies will be destroyed after they have been scanned and acted upon. (Original documents must still be sent on an application for first registration.) See www.landregistry.gov.uk/announcements/2014/new-guidelines-for-supporting-documents/supporting-documents-questions-and-answers.

The Law Society has once again urged cohabiting couples and friends who acquire property together to get their solicitor to draw up a declaration of trust. They use the odd strapline of 'ring-fencing the deposit': www.lawsociety.org.uk/news/press-releases/law-society-urges-homebuyers-to-ringfence-their-deposit/.

The Land Registry announced on 16 June 2014 that it is to become the sole registering authority for Local Land Charges in England and Wales, and that it hopes thereby to introduce an improved, standardised digital service. The change will take effect in 2015: www.landregistry.gov.uk/media/all-releases/press-releases/2014/land-registry-to-widen-powers-and-take-on-local-land-charge-searches.

The Department for Communities and Local Government on 8 July 2014 issued a Press Release on Support to resolve social tenants' complaints: www.gov.uk/government/news/support-to-resolve-social-tenants-complaints.

The Law Society's Press Release: Simpler house-buying – Joint Venture for Conveyancing Portal announces the creation of a portal to allow smaller firms to gain access to platforms and conveyancing tools normally available only to larger firms. The portal will also enable professionals to communicate with each other and with their clients: www.lawsociety.org.uk/news/press-releases/simpler-house-buying-joint-venture-for-conveyancing-portal/.

The Law Society is to postpone the launch of its new CON 29 and CON 290 forms from October 2014 to April 2015: www.lawsociety.org.uk/news/stories/conveyancing-forms-release-date/.

STATUTES, ETC

The **Leasehold Reform (Amendment) Act 2014** received the Royal Assent on 13 March 2014 and comes into force on 13 May 2014. The effect of this brief Act is that, as regards England (but not Wales) the requirement of s 99(5)(a) of LRHUDA 1993 is abrogated, so that a notice under s 13 (collective enfranchisement) or s 42 (lease extension) no longer has to be signed by the tenant personally but may be signed by e g an attorney or a solicitor. The Act therefore effects a statutory reversal of the inconvenient decision in *St Ermins Property Co v Tingay* [2002] EWHC 1673 (Ch).

The **Immigration Act 2014** received the Royal Assent on 14 May. Its chief importance to property lawyers is that it requires private landlords to check the immigration status of tenants: they may become subject to a civil penalty if they fail to do so.

STATUTORY INSTRUMENTS

The **Tribunals, Courts and Enforcement Act 2007 (Commencement No 11) Order 2014**, **SI 2014/786**, brought into force on 6 April 2014 all but one of the remaining provisions of Part 3 of the 2007 Act, including provisions for the new Commercial Rent Arrears Recovery (CRAR) procedure to replace distress for rent, in respect of commercial lettings only. The exception is s 85, which provides for contractual terms that grant similar rights to distress for rent or CRAR to be void. The present Order commences s 85, but not in respect of licences to occupy land as commercial premises, so the effect is to allow terms analogous to CRAR to be included in such licences.

The **Prevention of Social Housing Fraud (Detection of Fraud) (Wales) Regulations 2014**, **SI 2014/826** came into force on 28 March 2014.

The **Assured Tenancies and Agricultural Occupancies (Forms) (Amendment) (Wales) (No 2) Regulations 2014**, **SI 2014/910 (W 89)** make amendments to certain Welsh language forms, and came into force on 4 April 2014.

The **Housing (Right to Buy) (Limit on Discount) (England) Order 2014**, **SI 2014/1378** increases the maximum discount limit to £102,700 for properties within the area of the GLA, and to £77,000 for properties elsewhere in England. The Order took effect on **21 July 2014**.

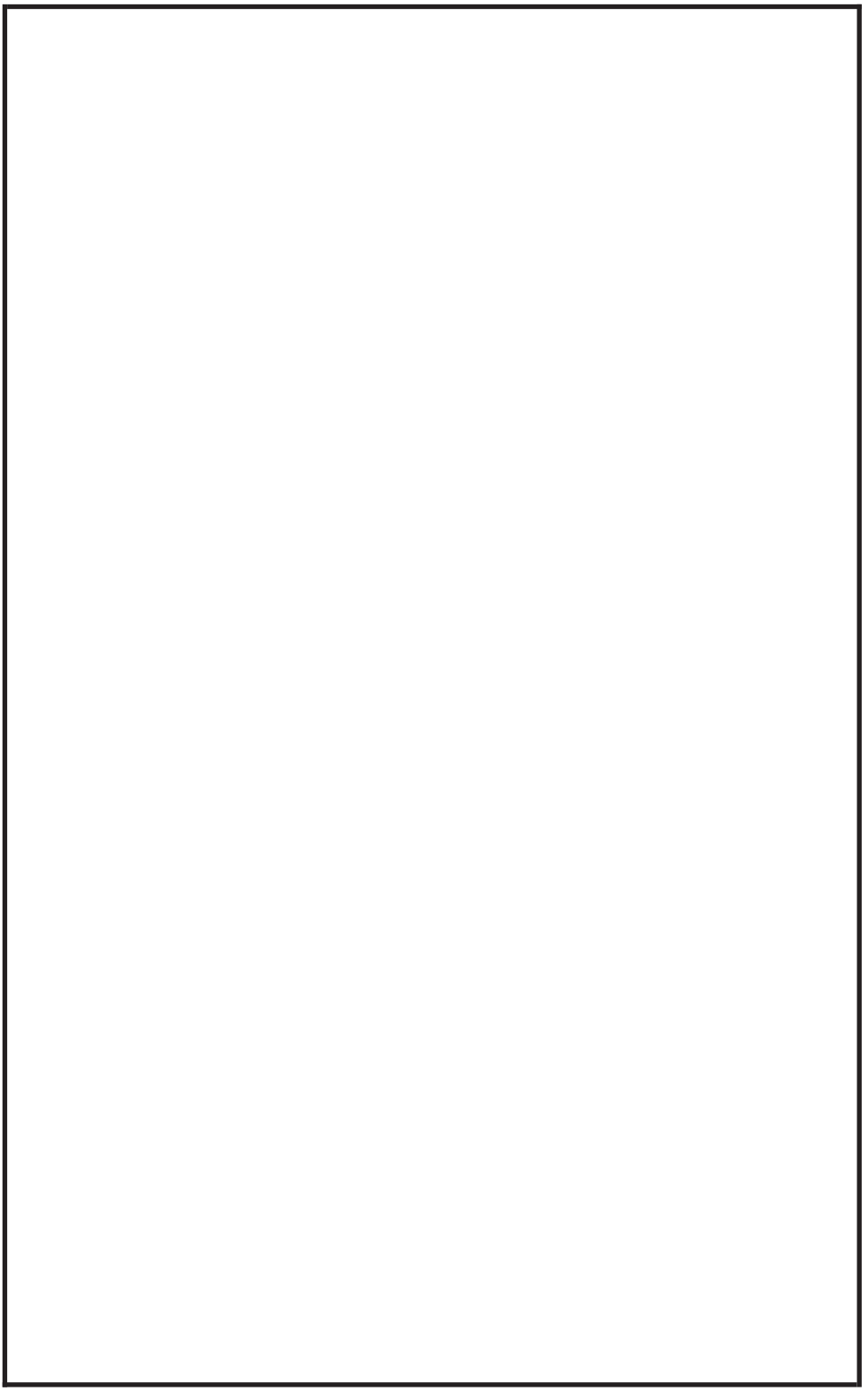
The Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc) (England) Order 2014 (Draft): this ***draft*** order, to be made under the Enterprise and Regulatory Reform Act 2013, would require persons involved in lettings agency work and persons who engage in property management work to belong to a redress scheme for dealing with complaints in connection with that work: see www.legislation.gov.uk/ukdsi/2014/9780111116821/pdfs/ukdsi_9780111116821_en.pdf.

Housing (Right to Buy) (Prescribed Forms) (Amendment) (England) Regulations 2014, SI 2014/1797 come into force on 4 August 2014 (for England only) and prescribe a new form for tenants to claim the Right to Buy, which is intended to be easier to complete.

Housing (Right to Buy) (Maximum Percentage Discount) (England) Order 2014, SI 2014/1915, increased the maximum discount on houses to 70% with effect from 20 July 2014.

Mobile Homes (Written Statement) (Wales) Regulations 2014, SI 2014/1762 specifies additional information to be contained in agreements between occupiers of mobile homes and site managers; and it must be in the form specified in the regulations (effective 1 October 2014).

Mobile Homes (Pitch Fees) (Prescribed Form) (Wales) Regulations 2014, SI 2014/1760 specifies the form of the document which must accompany a proposed pitch fee review (effective 1 October 2014).



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