

# Butterworths Property Law Service

## Bulletin Editor

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## I. FREEHOLD CONVEYANCING

### **Boundary dispute – conduct of the parties as admissible evidence**

*Norman v Sparling* [2014] EWCA Civ 1152 concerns a boundary dispute. As is usual in such cases, it very much turns on its own facts. Of more general importance is the Court's affirmation of the point decided in *Watcham v A-G East African Protectorate* [1919] AC 533 and applied in its own decision of *Liaquat Ali v Lane* [2006] EWCA Civ 1532 (and subsequent cases) to the effect that the subsequent conduct of the parties to the conveyance can be admissible extrinsic evidence as to the meaning of a disputed conveyance.

### **Deemed order for costs on withdrawal of mortgage possession proceedings – whether costs should be on standard or indemnity basis – whether costs should be added to the security**

*Co-Operative Bank plc v Phillips* [2014] EWHC 2862 (Ch) generally affirms (under the CPR) the approach as to when a mortgagor should have to pay the mortgagee's legal costs that had previously been applied by *Gomba Holdings Ltd v Minorities Finance* [1993] Ch 171 (under the RSC).

The Claimant Bank (CB) had taken possession proceedings against the Defendant (P) under mortgages of two farms. CB had a second charge, and P was attempting to agree an IVA. Although P argued at an early stage that the farms were already in negative equity under the prior charges and so the proceedings would serve no commercial purpose, CB persisted with the proceedings, until eventually they served notice of discontinuance. Under

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CPR 44.9 it was thereby deemed that, subject to any contrary order, an order for costs had been made against CB on the standard basis. P sought that the order be on an indemnity basis, on the basis that CB was seeking the order for a collateral purpose or alternatively because the proceedings were an abuse of the process of the court. Although Morgan J entertained some doubts as to whether he should consider this issue, he ultimately decided that he should. Having decided that the proceedings had not been undertaken for a collateral purpose, and were not an abuse of process, it followed that the standard basis remained the appropriate basis for costs.

CB, however, having been made liable to pay P's costs on the standard basis under the deemed order, went on to claim that those costs and their own should be added to the security under the usual express provisions contained in the mortgage deed. Morgan J construed those provisions in the same way as had the Court of Appeal in *Gomba Holdings* (which was of course under the RSC), with the result that CB had to bear its own costs.

### **Solicitor failing to appreciate shortcomings of evidence on established use for planning purposes – whether negligent**

*Flattery v Newman and Maxwell (a firm)* [2014] EWHC 3006 (Ch) well illustrates the sort of planning problems which can trip up a conveyancing solicitor who is acquainted with, but not a specialist in Planning Law. A solicitor in the defendant firm was instructed to act on the purchase of land which the claimant intended to use as a scrap yard. The vendor produced a letter – then nearly 11 years old – from the council confirming its use ‘for the storage of scrap’. The defendant treated this as tantamount to establishing the lawful use of the land, but ultimately the Planning Inspector refused a certificate of lawful use and his refusal was upheld by the court. The defendant had not appreciated that the letter was not as good as a certificate; that use ‘for the storage of scrap’ would not permit the full range of scrap-yard activities; and that if use lapsed subsequent to the date of the letter it would thwart the issue of a certificate. The defendant firm was held liable, though Mr Robert Englehart QC (sitting as a Deputy Judge of the Chancery Division) held that the claimant was contributorily negligent to the extent of 2/3, on the basis that he was well-acquainted with the certificate of lawful use procedure and had nevertheless instructed the defendants to proceed with the purchase without one.

### **Restrictive covenant requiring consent of neighbours before planning application submitted – application submitted before this was obtained – whether consent unreasonably withheld – balance of convenience with interim injunction**

*Hicks v 89 Holland Park (Management) Ltd* [2014] EWHC 2962 (Ch) exemplifies a case where an application for an interim injunction to enforce

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restrictive covenants raised difficult issues of where the balance of convenience lay. Previous proceedings, *89 Holland Park (Management) Ltd v Hicks* [2013] EWHC 391 (Ch) (discussed in Bulletin No 134) had held that restrictive covenants requiring that plans be approved, prior to the submission of planning permission for the redevelopment of a plot of land, could be enforced both by the Management Company as owner of the freehold of the neighbouring land, and by the individual lessees, but that the approval was, in the circumstances, subject to an implied proviso that it was not to be unreasonably withheld.

By the time the judgment in the previous proceedings was issued in February 2013, H, the present claimant, had submitted an application for planning permission which had been refused. In June 2013 H began some excavation works, which D (the Management Company) argued required planning permission an approval under the covenant: H denied this, arguing they were purely exploratory. After correspondence and a dispute, the excavations were backfilled. On 20 November 2013 the Management Company refused approval of further plans. After further correspondence, H started court proceedings, claiming that the refusal was unreasonable, and seeking a declaration that she was entitled to make an application for planning permission without being in breach of the covenant which had been previously upheld. The Management Company thereupon made an application for an interim injunction restraining the making of a planning application.

At the hearing of this application before Rose J it was accepted by both parties that the ordinary *Cyanimid* test for the grant of an interim injunction applied, and that the issues on the pleadings raised a triable issue of whether the refusal of 20 November 2013 was reasonable. The judge held that the balance of convenience lay in refusing the injunction, though she was heavily influenced by the fact that H undertook that, if she lost at the trial of the substantive issue, she would immediately withdraw any pending application for planning permission, and that if planning permission were granted, she would not act upon it until the trial had determined the substantive issue; and if she lost at the trial, she would not implement the permission. H further undertook not to dispose of the property to a third party without procuring that they entered into similar undertakings.

An interesting piece of background information is the huge growth in the number of applications submitted to the Royal Borough of Kensington and Chelsea for subterranean basement developments: up from 46 in 2001 to 450 in 2013. As a result of this, the Council is considering an imminent tightening of its guidelines, and this was one of the reasons why H was keen promptly to submit her own application.

### **Standard Conditions of Sale – General Condition providing that all sums were exclusive of VAT – VAT not asked for at completion – whether seller could subsequently claim VAT**

*CLP Holding Co Ltd v Singh* [2014] EWCA Civ 1103 is a case which is likely to be of particular relevance to the generalist practitioner. The Claimant

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Vendor had agreed to sell a property to the Defendant Purchaser for £130,000. V was registered for VAT and had given notice to HM Customs and Excise in 1989 to waive the exemption from VAT on the property. The sale was exchanged and completed on the same day in August 2006, in the sum of £130,000. V subsequently sued P for VAT on the transaction in the sum of £22,500.

The contract contained the usual provision that the standard conditions – in this case the Standard Conditions of Sale (4th edn) – should be incorporated, but if they were inconsistent with the express terms of the Agreement, the latter should prevail. General Condition 1.4.1 provided that an obligation to pay money included an obligation to pay VAT on it, and GC 1.4.2 stated that all sums payable by the contract were exclusive of VAT. On an application for summary judgment, the Deputy District Judge held that these provisions were determinative of the position, and gave judgment for V. HHJ Oliver-Jones QC then allowed an appeal, holding that the DDJ had failed to recognise that there was indeed a conflict between the General Conditions and the Special Conditions of the Agreement, and that the reference to £130,000 as the purchase price in the Special Conditions had to be construed as a price inclusive of VAT. V drew support from the cases of *Hostgilt Ltd v Megahart Ltd* [1999] STC 141 and *Wynn Realisations Ltd (in admin) v Vogue Holdings Inc* [1999] STC 524, where purchase prices stated in contracts were held to be exclusive of VAT. Indeed, the DDJ had held that he was bound by these cases. The Court of Appeal (Arden, Kitchin and Gloster, LJJ) agreed with the Circuit Judge that this overlooked the meaning of the Special Conditions, which had to be construed against all the factual background. The cited cases were commercial transactions where clearly VAT was potentially an issue. In the instant case, although the premises were commercial, and V was a company, there was nothing to suggest that P were ever aware that the transaction might be subject to VAT. Giving the judgment of the Court, Kitchin LJ distinguished the instant case from the cited cases on this basis. The judgment of HHJ Oliver-Jones QC dismissing V's claim was therefore upheld.

It is difficult to avoid the conclusion that the likely explanation for the dispute is that V and/or their solicitors forgot that an election to waive the exemption from VAT had been made in 1989. Although the Court of Appeal appears to have done justice on the facts, some of the reasoning seems decidedly *ex post facto*: for example, can a reference in replies to requisitions that the amount payable on completion was given baldly as 'Balance of purchase moneys' really form part of 'the relevant facts surrounding the transaction as known to [the parties]' ([24], [33])? In a 'normal' transaction the contract would by this stage have already been concluded. It can be justified on the facts of the instant case, on the basis that contracts had not been exchanged when the reply was given. But one hopes that transactions where there is a simultaneous exchange and completion still form the majority. Would it have made a difference if contracts had been exchanged *before* replies were given to requisitions?

In practical terms, the decision does at least encourage some finality: it would seem manifestly unjust if, nearly six years after willingly completing a conveyancing transaction, V could claim that VAT of 17½% remained payable on the purchase price.

### **Claim for beneficial interest in a property – conflict of interest of litigation friend should have been resolved before hearing for summary judgment – duty of court**

In *Zarbafi v Zarbafi* [2014] EWCA Civ 1267 the Court of Appeal allowed an appeal against the Deputy Judge (Mr Charles Hollander QC) who had granted summary judgment. The Claimant was acting on her own behalf and as litigation friend for her father in claiming beneficial interests in a family property. The Court of Appeal held that, in view of her potential conflict of interest, she ought not to have been also acting on her father's behalf. The question of the conflict of interest ought to have been decided at the outset. A more general point is made that it does not matter that no other party has objected to the appointment of someone as a litigation friend. If he or she is 'conflicted' the court has a duty, of its own motion, to see that the requirements of CPR 21 are complied with.

### **Option to purchase – whether written agreement included all the express terms of the agreement**

*Farshmeshani v Zaiwalla* [2014] EWHC 3294 (Ch) is a dispute involving an option to purchase. The beneficial owners of a property (which was registered in the name of M, but held on trust for her and for S, who was the claimant's father) had in 2008 granted the claimant F an option for three years to purchase a property at a fixed price, on various terms, including that he should pay the mortgage instalments and all outgoings on the property. He was also entitled to occupy and improve the property. F claimed to have exercised the option in 2010, but the first defendant, M's administrator, disputed this. Although the option – which was not, apparently, the subject of a notice at the Land Registry – was in writing, the first defendant successfully argued before Mr Kevin Prosser QC (sitting as a Deputy Judge of the Chancery Division) that a condition of the oral agreement preceding the written Option Agreement was that M would have the chance to let her solicitor approve the Agreement. This had not been done. The written Agreement did not therefore comply with s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 and embody all the terms expressly agreed between the parties. (An argument that there was a constructive trust failed.)

The first defendant also argued that as F had failed to pay the mortgage repayments and the insurance he was in fundamental breach of the contract and that M had therefore terminated the Agreement. The judge accepted that there was a fundamental breach, but not that the Agreement had been terminated, as, despite knowing about the breaches, M had taken no steps to terminate it.

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In the alternative the judge found that, even if the Option Agreement were valid, it was procured by F's undue influence, that M was therefore entitled to avoid it, and she had in fact done so in May 2010.

### **Claim for interference of goods – dispute arose in context of protracted mortgage possession dispute**

The issue technically before Mr Andrew Sutcliffe QC (sitting in Leeds as a Deputy Judge of the Chancery Division) in *Campbell v Redstone Mortgages Ltd* [2014] EWHC 3081 (Ch) was a claim for interference with goods, and so would normally lie outside the purview of this Bulletin. As, however, it arises in the context of a mortgage repossession, it will be briefly noted.

The first 57 paragraphs of the judgment are devoted to the recital of a remarkable history of successive possession orders, applications to suspend warrants, etc. When the warrant was finally executed in January 2014 the mortgagee's bailiffs left notices requiring the mortgagor and the other claimants to remove their effects. Three orders were made permitting and regulating this, but when the claimants did eventually enter to remove their chattels, they barricaded themselves in to part of the property and refused to leave. Unsurprisingly, against this background their subsequent claim for unlawful interference with the chattels which the mortgagees did ultimately dispose of was unsuccessful. As with some other cases involving a determined litigant in person, the variety and ingenuity of the various delaying applications that were made en route is quite remarkable!

### **Separate mortgages of farm house and holiday cottages – whether lender estopped from relying on an 'all monies' clause**

*Commercial First Business Ltd v Munday* [2014] EWCA Civ 1296 raises some interesting points of law against a scenario which must be increasingly common. M (who were mother and son) had in 2006 raised separate mortgages on a farmhouse and on some neighbouring barns which were being converted into holiday cottages. Separate charge deeds were executed in respect of each loan. There was the usual 'all monies' clause. M fell into arrears on both loans, and in 2007 CFB took separate proceedings in respect of each. Possession orders were made, but both were suspended. M was unable to keep up the repayments on both, and in May 2009 CFB took possession of the Cottages. There were further proceedings in respect of the 'House' mortgage, but in 2008 M sold some farm land, which was used to reduce the indebtedness under the 'House' loan.

By September 2011 it was clear that the Cottages were worth less than the loan secured on them, and CFB endeavoured to secure the shortfall by making an application for a charging order over the House. This was opposed by M, on the basis of procedural defects, and because they claimed to have a counterclaim against CFB, who had effectively 'mothballed' the Cottages, so that no income was being derived from them. (CFB alleged in turn that, by raising access problems, M was obstructing the completion of



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the conversion works, but no facts had been found on these disputed matters.) CFB eventually abandoned its application for a charging order, and thereupon indicated that it would rely on the 'all monies' clause in the mortgage of the House and look to it as security for both debts.

When the matter came before the Deputy District Judge, he treated it as straightforward: the 'all monies' clause was a sufficient answer to M's objections. M appealed to HHJ Cotter QC, who found in favour of M, holding that, as the loans had been structured as separate transactions, and as the parties had throughout treated them as such, there was an 'estoppel via the course of dealing, whether by representation or convention' ([16] of the present judgment, quoting [37] of his); what particularly supported this view was the fact that, in making their application for a charging order, CFB were acting inconsistently with reliance upon an 'all monies' clause.

The Court of Appeal (Patten, Underhill and Briggs LJJ) did not agree that this was a case of an estoppel by convention: although there may have been a shared understanding that the loans would be treated as separate, M could not point to anything as strong as a representation that CFB would not rely on the 'all monies' clause, [26], and it was difficult to see how they had acted to their detriment. Although M might argue that they would not have taken points about the effect that the proposed new access to the Cottages would have on the House, if they had realised that CFB would be looking to the security on the House for the shortfall on the loan, this did not necessarily involve the necessary elements of reliance and detriment, [29]. Giving the sole reasoned judgment, Patten LJ could not agree with the judge below that there was an estoppel by convention here, [28]. The Court did, however, find a 'cause of action estoppel', [36], based on the established principle that, once judgment is given in an action, the contract merges in the judgment, so that the claimant cannot sue again on the contract, [37]. However, following *Director General of Fair Trading v First National Bank plc* [2001] UKHL 42 at [3]-[4], this would cover only the principal of the 'Cottages' loan, and not the continuing interest on it, [37]. But '[t]he existence of the judgment in the Cottages loan action is not therefore a bar in itself to the recovery of the post-judgment interest on that loan in subsequent proceedings against the defendants. Nor is the judgment obtained in the Farm House action. The interest in question has continued to accrue post-judgment on both loans and, on established principles, would be recoverable by action against the defendants', [42]. The Court of Appeal having determined that the 'all monies' clause was a standard form which was properly construed as such, [45], M's only defence would be to show a collateral contract ie an agreement that CFB had agreed in 2008 not to enforce its rights under the House charge so long as the interest payments on that loan were maintained, [47]. The DDJ had rejected this argument, and HHJ Cotter QC had not had to address it, in view of his finding of estoppel by convention. The Court of Appeal therefore felt that it could not finally resolve the issue; it therefore confined itself to upholding the Circuit Judge's decision to suspend the warrant of possession (though for different reasons), and remitted the issue of any collateral contract, and the finding of any necessary facts, to the County Court, [53].

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### **Dispute as to ownership of pillars and gates – whether a right to hang gates might exist as an easement – suggested order at case management stage to encourage mediation**

*Bradley v Heslin* [2014] EWHC 3267 (Ch) is a neighbour dispute involving the contested ownership of pillars and a pair of gates, and the rights of those using them to secure a right of way. As is common, it contains the usual exhortation from the judge (Norris J) that such cases ought to be mediated whenever possible: the fact that it was not, does, however, offer guidance on some intriguing points of law.

The position on the ground was that a bungalow had been built on a paddock behind a large Edwardian house in Formby. Access to the bungalow was along a driveway running alongside the house. A slightly unusual feature of the legal set up was that – because the original owner of the house had had the bungalow built – the entire length of the driveway belonged to the owner of the bungalow. When selling off the house to its new owners, a right of way had been granted along the driveway to them, to give access to the garages behind the house. The present dispute arose when the owners of the house (B) began to shut the gates, and the owners of the bungalow (H) objected, because of the inconvenience caused to them by having to park and then open the gates each time that they drove in or out of their property. H claimed to own the northernmost pillar (ie the pillar furthest from the house) and therefore the gate, and padlocked it open. By the time of the hearing each party claimed to own the pillars and the gates. (A complicating factor was that the northernmost pillar was erected on land which was not within the title of either property, so whoever owned it was likely to have acquired title by adverse possession.)

As one would expect, much of the judgment is taken up with the judge's disentangling of conflicting accounts of the history, and forming a coherent account of what had actually happened. The ultimate result was that he held that B owned the southernmost pillar (which was on their land) and had acquired the northernmost by adverse possession, [58], [63]. It therefore followed that the gates also belonged to them, [64]. This, however, had the curious result that while B owned the pillars and gates, the land comprising the right of way itself (and over which B enjoyed an easement) clearly belonged to H. The case therefore involved the question of *whether there could exist as an easement a right to hang a gate over airspace belonging to another*. Norris J held that this was possible, [69]. Further, it was not an illusory right if it was not accompanied by a correlative duty on the part of H to close the gates after them (B did not argue that H was under such an obligation, though it is not unknown to the law). The judge, however, found that an easement to hang the gates could not be established either under the doctrine of lost modern grant or 'by prescription' (presumably meaning the Prescription Act 1832). He did, nevertheless find that an equitable easement had been acquired by proprietary estoppel. If the owner of the bungalow had stood aside while the owner of the house was erecting the gates, and then



attempted to insist that they should always be kept open, the minimum necessary for the court to satisfy the equity and do justice between the parties would have been ‘a right to close and open the gates for all purposes connected with the reasonable enjoyment of [the house] provided such use did not substantially interfere with the reasonable enjoyment of [the bungalow]’. As any rights acquired by proprietary estoppel would bind successors in title (as overriding interests) the judge proposed an order reflecting this. He suggested that, in the slightly longer term, the rights of the parties could best be reflected by having remotely operated electric gates. Indeed, he suggested, [21], that this obvious solution ought to have been adopted when the dispute arose, as this would have saved the costs of protracted litigation.

Of interest to those who are faced with advising on or adjudicating upon neighbour disputes involving disputes over boundaries or rights of way is the judge’s suggestion at [23]. It is worth setting out his words in full:

‘If in any boundary dispute or dispute over a right of way, where the dispute could not be disposed of by some more obvious form of ADR (such as negotiation or expert determination) and where the costs of the exercise would not be disproportionate having regard to the budgeted costs of the litigation, any District Judge (a) imposed a 2 month stay for mediation and directed that the parties must take all reasonable steps to conduct that mediation (whatever the parties might say about their willingness to engage in the process) (b) directed that the fees and costs of any successful mediation should be borne equally (c) directed that the fees and costs of any unsuccessful mediation should form part of the costs of the action (and gave that content by making an “Ungley Order”) and (d) gave directions for the speedy further conduct of the case only from the expiration of that period, for my own part (recognising that certainly others may differ) I think that such a case management decision would be difficult to challenge on appeal’.

### **Legal charge deed providing power of sale to arise in case of mental incapacity of mortgagor – whether receiver properly appointed – relationship with Equality Act 2010**

*Graves v Capital Home Loans Ltd* [2014] EWCA Civ 1297 raises some interesting points in relation to mortgagors who are suffering from mental health problems. The borrower G had obtained an interest-only buy-to-let mortgage from CHL. The legal charge deed contained a provision (9.1.6) that the power of sale should immediately become exercisable if the borrower should become incapable by reason of mental incapacity of managing his affairs. There was a long history of arrears, which had in 2009 been capitalised. The arrears continued to increase, and it then came to CHL’s attention that he was in hospital and unable to collect the rent of the property. To establish the extent of G’s problems, CHL sent to the hospital a Debt and Mental Health Evidence Form, a consent form agreed between the Royal College of Psychiatrists and various credit agencies, and approved by

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the OFT, as an appropriate way of obtaining information about a patient's health. On 11 May 2012 a consultant at the hospital wrote to CHL that G remained sectioned but that he was expected to regain capacity to manage his affairs in the near future. CHL took the view that they could not wait any longer and proceeded to appoint a receiver pursuant to 9.1.6 of the legal charge deed. On 29 May the consultant wrote again to say that although G remained at the hospital he was no longer sectioned and was able to manage his financial affairs.

The receivers assessed the property, which had by then become vacant. CHL then requested them to resign, so that it could sell the property as mortgagee in possession. The property was sold, leaving a shortfall on the account. Shortly before contracts were exchanged G issued proceedings to recover possession of the property. They were incorrect in that he had used the form applicable to obtain an interim order against trespassers. By the time full particulars of claim were given the properties had been sold. The DDJ struck out the claim on the basis that the claim for interim possession was bound to fail as the property had already been sold. On appeal HHJ Holt allowed the claim to continue on the basis that it included a viable claim for damages for trespass. G disputed that the mortgage had been in arrears; he alleged that the receivers were not validly appointed as by that time he was fit to manage his financial affairs; and he claimed that CHL had breached financial industry guidelines. HHJ Holt rejected all three claims. First, he agreed with CHL's calculations of the arrears. Second, he said that the arrears would in themselves justify the appointment of receivers; and that, in the alternative, G's mental incapacity meant that receivers could be appointed, even if he had in fact recovered by the time that they were actually appointed. After he had given judgment, G raised the applicability of ss 140A and 140B of the Consumer Credit Act 1974 (CCA 1974), but HHJ Holt said that they would not have made any difference to his decision.

G obtained and sought leave from the CA for an appeal, but on grounds limited to those sections of the CCA 1974. Giving the sole reasoned judgment, Patten LJ held that the short answer would be that it was too late to raise the ground only after HHJ Holt's judgment. To avoid any further appeals, however, the court heard argument and dealt fully with that issue. It was accepted that the real issue was not the fairness of *including* 9.1.6 in the legal charge deed, but as to the manner of its exercise. Patten LJ pointed out that, but for the provision, a mortgagee would have no power to appoint a receiver, and the provision was likely to be in the interests of the mortgagor as well as the mortgagee. In any event, G's claim did not, on closer analysis, really relate to the appointment of receivers. There was no evidence to show that they had in any sense mismanaged the property, and in fact CHL had exercised the power of sale. Patten LJ further held that CHL had complied with the various guidance which was applicable to dealing with those with mental incapacity (it was, for example, clearly impracticable to send an Independent Mortgage Arrears Counsellor to visit G when he lacked capacity).

A point raised for the first time before the CA was the applicability of s 6 of the Equality Act 2010 (EA 2010). The Court held that, as there was no

evidence to suggest that the mental incapacity amounted to a long-term disability, G could not rely on s 6, and it was too late to raise the issue before the CA when the court below had not had the opportunity to make any relevant findings of fact.

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#### **Possession action by private landlord – whether Article 8 of ECHR has horizontal applicability**

*McDonald v McDonald* [2014] EWCA Civ 1049 is the clearest indication that we yet have that Article 8 of the ECHR cannot be employed horizontally, so as to enable issues of proportionality to be raised in a dispute between a tenant and a *private* landlord. In *Manchester CC v Pinnock* [2010] UKSC 45, it was finally accepted that Article 8 was relevant to possession disputes between a public sector landlord and a tenant, but Lord Neuberger (at [50]) expressly left open the question of whether Article 8 could be invoked by a tenant in a claim for possession by a private landlord, on the basis that the court itself was a public authority and therefore was bound to ensure that its orders complied with Article 8. Related issues arose in *Malik v Fassenfelt* [2013] EWCA Civ 798 (see Bulletin No 136), and while the majority found it unnecessary to address them, Sir Alan Ward, in his valedictory judgment, gave considerable encouragement to private tenants who would seek to rely on Article 8. The instant case holds that Article 8 does not apply to disputes between landlords and tenants in the private sector, although there is of course every likelihood that this case, or a similar one, will soon go to the Supreme Court.

The facts of the case were that Mr and Mrs McDonald had purchased with the aid of a mortgage a property for their daughter M to occupy. M suffered from mental health problems and had been evicted from social housing in the past. The McDonalds had granted M an assured shorthold tenancy (AST) of the property. Her rent was paid by housing benefit. So long as the McDonalds had kept up the mortgage repayments there had been no problem, but they had fallen into arrears, and the mortgagee had appointed receivers, who had given notice to M, and then applied for a possession order. Acting by her litigation friend, M had unsuccessfully tried to defend the proceedings before HHJ Corrie in the Oxford County Court on two grounds, which subsequently formed the grounds of her appeal to the Court of Appeal.

One ground had nothing to do with the Human Rights Act 1998: M argued that the receivers did not have power to serve a notice under s 21 of the Landlord and Tenant Act (LTA) 1988 on her, and that it should have been served instead by the landlord (ie her parents) or the mortgagee. Giving the lead judgment of the Court of Appeal, Arden LJ (with whom Tomlinson and Ryder LJ agreed) held that the mortgage conditions had to be construed purposively and, as they included a specific power to take possession of the property and sell it, they must be taken to include also all necessary powers to achieve those ends, [65]: ‘the agency of the receivers must encompass the powers to enforce the security which the receivers are empowered to exercise’.

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The ECHR ground is obviously of wider importance. It was agreed by both parties that Article 8(1) was engaged as the property in question was undoubtedly M's home, even if her tenancy had been determined, [12]; and that the court was a public authority, [13]. Arden LJ noted that the question of whether art 8 would therefore apply when the Court was adjudicating on a dispute between a private landlord and a tenant had been expressly left open in *Pinnock*, [50]. In spite of several decisions in the ECHR, suggesting that Article 8 might apply in these circumstances, Arden LJ held that there could not be said to be any 'clear and constant' jurisprudence of the Strasbourg Court to the effect that proportionality had to be taken into account in deciding whether a possession order should be made, when s 21 of the LTA 1988 itself required that a court should automatically make a possession order if certain criteria were satisfied. Arden LJ pointed out that the various Strasbourg cases upon which M relied could be explained as cases where either the point had not been raised and argued, or they could be explained on the basis that eg the tenancy had originally been granted by a public authority. Further, none of the decisions was by a Grand Chamber, [41]. There was therefore no applicable 'clear and constant' jurisprudence to follow, and the Court of Appeal was accordingly bound by its earlier decision in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595 to the effect that s 21(4) of the LTA 1988 was compatible with art 8.

The Court of Appeal accordingly upheld HHJ Corrie on both points. However, having decided that art 8 did not apply, the first instance judge had gone on to hold that, if it did, then he would take the view that M's circumstances were sufficiently exceptional to justify dismissing the claim for possession on the basis that the making of a possession order would be disproportionate. The factors that influenced the judge were M's 'palpable disability and fragility'; the fact that mortgage arrears were never very substantial; and that there was no element of deception or dishonesty in the mortgage application (in the light of the comments of Tomlinson LJ at [67], noted below, the latter is a curious finding). Arden LJ disagreed with HHJ Corrie's selection of factors. The McDonalds' initial honesty was not relevant; and the level of arrears was not particularly relevant, as the lender was entitled to recover its capital, [47]. Moreover he failed to direct himself that the standard required to interfere with the rights of a landlord in a public sector case was very high, and it could hardly be lower in a case involving a private landlord, [48]. 'Where the right of a former tenant to respect for his home has to be balanced against the rights of a landlord, the balance is almost always going to be struck in the landlord's favour because the landlord is enforcing his property right to return of the property' [50].

Tomlinson LJ noted that, while M's predicament might attract sympathy, the McDonalds were in 'egregious breach' of the mortgage conditions in granting the tenancy. It had been noted by Arden LJ that the mortgage conditions prohibited the grant of a tenancy to someone dependent on benefit, or to a relative; and that, in any event, the permission of the mortgagee had to be obtained to any letting. The McDonalds breached all three conditions in letting without consent to M.

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If the decision had gone otherwise, then any suggestion that landlords may have difficulty in recovering possession from tenants under ASTs would have sent shock waves through the private rented sector: as Arden LJ notes, ASTs are a very popular form of tenancy in both the private and the public sector, [1] (though not necessarily with tenants!), and she also notes that Lord Woolf had observed in *Poplar* (at [69] of that case) that they were deliberately created by Parliament in 1988 so as to give a limited role to the courts.

The case offers yet another example (compare, eg, *Corby Borough Council v Scott* [2012] EWCA Civ 276; *Birmingham City Council v Lloyd* [2012] EWCA Civ 969; and *Southend-on-Sea BC v Armour* [2012] EWHC 3361 (QB) of the difficulty that the *Pinnock* test seems to be causing in the County Courts. Although it was clearly intended to set a high bar, which would rarely be satisfied, in this case at first instance a highly experienced Circuit Judge would have held, if art 8 had applied, that a possession order was disproportionate. Arden LJ and her colleagues in the Court of Appeal, on the other hand, were in no doubt that it, even if the court had had jurisdiction to review the proportionality of the making of a possession order, M would not have satisfied the test.

(case noted at: NLJ 2014, 164(7621), 11–12; and HLM 2014, Sep, 7–12)

### **Block managed by Residents' Management Company – application for appointment of manager under Part II of the LTA 1987 refused – whether FTT had given sufficient reasons**

*Hill v Sorrento Management Association Ltd* [2014] UKUT 0349 (LC) is an appeal by leaseholders against the refusal of the First-tier Tribunal to appoint a manager of the property in question. An unusual feature of the application is that the respondent landlord is a Residents' Management Company which represents the leaseholders. The appellants leaseholders were, however, unhappy at the way their block was being managed, and applied to the FTT both for rulings that service charges had not been reasonably incurred and for the appointment of a manager under Part II of the LTA 1987. The appellants had succeeded on some of their complaints relating to the service charge, principally the amount of legal costs that had been incurred due to the frequency with which the management company had consulted their solicitors, when the FTT had thought that the experienced managing agents would have been able to deal with the matters themselves. Having decided that some of the service charges had not been reasonably incurred, the FTT had stated that they were not satisfied that there had been any material breach of the Landlord's obligations for the purposes of the application for the appointment of a manager. The Upper Tribunal (Mr Martin Rodger, QC, Deputy President) felt that this was inconsistent with the FTT's findings on the service charge issue. Further, the FTT had simply stated that they were not satisfied that it would be just or convenient to appoint a manager, and had not given any reason for this.

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The Deputy President took the view that the parties were entitled to have fuller reasons for both these decisions. The case was accordingly remitted to the FTT for further consideration. It should perhaps be pointed out that there is nothing in the decision to suggest that a finding of breach of covenant on the landlord's part should automatically lead to the appointment of a manager: the Deputy President simply points out that the appointment of a manager involves the application of a discretion, and that the parties are entitled to an explanation of how the FTT came to exercise its discretion in the way that it did.

### **Costs incurred in service charge dispute – whether recoverable on basis that resolution was a prerequisite to the taking of forfeiture proceedings**

*Barrett v Robinson* [2014] UKUT 0322 (LC) in the words of the Deputy President (Mr Martin Rodger, QC) 'concerns a large legal bill incurred in a dispute about a small service charge'. It also concerns the conflict between the intention that service charge disputes should be subject to a largely 'no costs' regime, while forfeiture operates under the traditional 'loser pays' regime.

B, the tenant of a long leasehold flat over a shop, was required to contribute towards the insurance premiums on the building of which it formed part. She objected to paying half. The first LVT upheld the method of apportionment, though her share of the premiums was reduced for other reasons. A second LVT then determined that she was bound to pay £6,250 in costs incurred by her landlord R in connection with those proceedings. B appealed to the UT against the second determination. The contribution towards insurance payable by B was described as 'insurance rent' but it was not reserved as rent. Further, it was the only contribution that B was required to make: there was no further service charge as such, because B was required to maintain her own half of the building. There was, however, a clause in the lease which required B to pay all costs etc incurred 'in or in contemplation of any proceedings or the preparation of any notice under [s 146 LPA 1925].' The second LVT had considered that it was bound by the decision of the Court of Appeal in *Freeholders of 69 Marina v Oram* [2011] EWCA Civ 1258 (discussed in Bulletin No 127), which had decided that a notice under s 146 had to be served on a tenant for failure to pay a service charge, even if the service charge was reserved by way of rent. It therefore accepted an argument on behalf of R that the first LVT proceedings were, in effect, a prerequisite to the eventual taking of forfeiture proceedings.

Although the Deputy President clearly shares the doubts (see [55]–[56]) of commentators (including the present editor) as to whether *69 Marina* was correctly decided, he was able here to distinguish it by pointing out that the terms of the clause in the present lease did not provide a general indemnity against all legal costs which might be incurred by the landlord: they were restricted to those incurred in connection with s 146: see [46]–[47]. This would apply only if forfeiture were 'avoided otherwise than by relief granted by the court'. This necessarily implied that there were good reasons to forfeit, and



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here there would not have been. Further, the amount that was allegedly due was £301.91, which fell below the amount of £350 prescribed under the Rights of Re-entry and Forfeiture (Prescribed Sum and Period) (England) Regulations 2004. It would not therefore have been possible for R to forfeit for non-payment of the insurance premium, and the proceedings before the first LVT could not be said to fall within the contemplation of the service of a s 146 notice.

### **FTT's difficulty in interpreting lease – confirmation that there was no 'burden of proof' to satisfy**

*One Housing Group v Leaseholders of 29 flats in the building known as Navigation Court* [2014] UKUT 0330 (LC) concerns the eponymous block in London's Docklands. The LVT had found difficulty in interpreting the extent of 'the Estate' (the service charge distinguished between expenditure on the Estate and that on the Block) and appeared to have approached the problem on the basis that the onus lay upon the landlord to establish the definition and the reasonableness of the service charge costs. In the Upper Tribunal, HHJ Cousins rejected this approach. Although he described the relevant provisions as 'various and somewhat convoluted', [54], 'the Estate' was defined in the relevant underlease, and that was clearly the intention of the parties at the time. The case was therefore remitted to the FTT for determination of the service charge due on that basis.

### **Interpretation of 'the Estate' in Right to Buy lease – relevant that tenant would have been familiar with physical layout**

One of the issues that arose in *One Housing Group Ltd v Kingham* [2014] UKUT 0231 (LC) also concerned the extent of 'the Estate' for service charge purposes. Again, the decision turns largely on the interpretation of the lease in question, and is thus of limited relevance (though as it concerns the standard 'Right to Buy' Lease used by the London Borough of Tower Hamlets it is arguably of fairly wide interest). A point of potentially wider interest is the point made by the Deputy President (Mr Martin Rodger, QC), that the Right to Buy leases in the instant case were granted to persons who, *ex hypothesi*, had been tenants of their properties for at least two years prior their purchasing, and that they should therefore be taken as having some familiarity with the layout 'on the ground': subsequent purchasers could then be expected to raise the appropriate enquiries. The case also raised issues on the charging for the repair and maintenance costs of a communal district heating system which very much turns on its own facts.

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### **Renewal of lease under Part II of the LTA 1954 – whether breach of implied covenant to use in a tenant-like manner could amount to a breach of s 30(1)(a) – breach of access covenant and positive user covenant as breaches of s 30(1)(c)**

*Youssefi v Mussellwhite* [2014] EWCA Civ 885 raises some unusual points on the renewal of tenancies under the LTA 1954. L had opposed T's application to renew her tenancy on various grounds, and in the county court had succeeded on Ground A (s 30(1)(a)) – failure to comply with repairing obligations; and Ground C (s 30(1)(c)) – other substantial breaches. T appealed to the Court of Appeal.

The only allegation of disrepair on which L had succeeded in the county court was T's failure to control plant growth – the growth of creeper – on the wall, downpipe, eaves and roof of the property. While it was accepted that this was not a breach of any repairing obligation per se on the part of T, the Recorder did hold it to be a breach of T's implied covenant to use the property in a tenant-like manner, which thus fell within s 30(1)(a). The Court of Appeal disagreed. It is not entirely clear whether breach of what is generally accepted to be an implied tenant's covenant could put the tenant in breach of s 30(1)(a), as the Court held that, as L covenant to repair the exterior, on the facts this could not be a breach on the part of T, [34]: further, as it would cost only £350 to remove the creeper, it could not be said to be a substantial breach, [35].

T's appeal nevertheless failed overall, as the CA held that T was in breach of the usual covenant in the lease requiring T to allow L and her agents reasonable access to inspect the premises, [38]–[42], and also in breach in not using the premises for Class A1 or A3 retail use. Although there was no express 'keep open covenant' the CA agreed with the trial judge that the lease imposed a positive and not merely a negative user covenant, [47]. T was in breach of this obligation; although L did not own any other property in the vicinity which would be adversely affected by T's breach, and L had not adduced any evidence of quantifiable loss to the reversion, the judge was entitled to conclude that the failure of T to conduct a business on the premises was prejudicial to L's legitimate interests, [49]. In view of the 'exceptionally difficult' relationship between L and T, characterised by the two breaches within s 30(1)(c), the judge was right to hold that a new tenancy should not be granted.

(case noted at: [2014] Comm Leases 2082–2084; and NLJ 2014, 164(7623), 18)

### **Articles of Association of Residents' Management Company – whether provided for one vote per share or one vote per member**

*Sugarman v CJS Investments LLP* [2014] EWCA Civ 1239 is the first case which the present editor is aware of in which the Court of Appeal has had to

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rule on the meaning of a provision for voting rights contained in the Articles of Association of a Residents' Management Company. Although it would normally be considered to be a company law case, it is noted here because of its likely interest to those whose practice extends to leasehold flats. The dispute involved the problem, which is a familiar one in this area, as to whether voting at General Meetings should be on the basis of one vote per member, or one vote per flat. The issue was of particular importance here, because, of the 104 flats in the development, 66 were owned by one company (the First Defendant), and a further six by another. Most of the rest were owned by individuals who owned just one flat.

The company was limited by shares, so normally one would expect that votes would follow the number of shares, which would give the First Defendant a majority of votes at all meetings. This was the conclusion of HHJ Raynor QC (sitting in Manchester as a Deputy Judge of the Chancery Division). The Articles were, however, particularly badly drafted. Section 284(1)–(4) of the Companies Act 2006 provides that, in the case of a company limited by shares, normally each share carries one vote, and otherwise each member has one vote. This may, however, be disapplied by express provisions in the Articles. Regulation 54 of Table A – the model articles applicable to present company – follows this section, but one of its 'bespoke' articles disapplied it. In particular, art 13 read:

'(a) Subject as hereinafter provided, every Member present in person or by Proxy shall have one vote, provided that where a dwelling has no dwellingholder those members who are subscribers to the Memorandum of Association or who have been nominated Members under Article 4(a) shall have such number of additional votes each that when taken collectively form a three quarters majority of the votes cast.

(b) Regulation 54 and 55 in Table A shall not apply to the Company ... .'

As Floyd LJ observed, delivering the main judgment of the Court of Appeal, the opening words appear to give each member one vote (so nullifying the default position with companies limited by shares); but does not make the distinction made by s 284 and reg 54 of Table A between votes taken on a show of hands and votes taken on a poll; and it then further makes special provision for cases where a dwelling has no 'dwellingholder' (as defined).

Space does not permit a detailed analysis of all the arguments deployed by each side, but essentially the Claimants/Appellants argued that, in spite of the inevitable difficulty in construing art 13, it clearly assumed that each member would have only one vote, [15]; the Defendants/Respondents, on the other hand, stressed the 'uncommercial' consequences of this interpretation, and went so far as to argue that this interpretation would lead to commercial absurdity, [17].

Following *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, Floyd LJ saw the role of the Court as to enquire whether 'the main voting provision in art 13(a) is capable of bearing the meaning contended for by the Respondents, or whether, as the Appellants submit, it is clear and unambiguous'. The

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Court of Appeal came down on the side of holding that art 13 was ‘clear and unambiguous’, [38], and could not be said to ‘flout common sense’ or to result in ‘commercial absurdity’. In a separate, concurring judgment Briggs LJ made the interesting point that, in effect, discriminating against multiple as opposed to single owners could be seen not as a commercial absurdity but perhaps ‘even an intentional disincentive to the concentration of ownership of an excessive number of flats in a single investor’, [49]. Practitioners in this field will be aware that that can result in the owners of individual flats feeling that they have, in effect, an ‘outside’ ground landlord rather than an RMC that they control.

### **Possession order against person suffering from a mental health condition who was refusing to leave accommodation provided for him on a temporary basis – whether test for discrimination under s 15 of the Equality Act 2010 involved the same high threshold as under the Human Rights Act 1998**

*Akerman-Livingstone v Aster Communities Ltd (formerly Flourish Homes Ltd)* [2014] EWCA Civ 1081 deals with the interrelationship of the duties owed to a homeless person with the EA 2010. A-L was suffering from a ‘severe prolonged duress stress disorder’ and was also homeless. The local authority agreed that it owed a duty to him, which it had satisfied by securing temporary housing for him with Aster. Aster wished him to move from that temporary accommodation to more permanent accommodation, but A-L declined on the basis that he could not cope with what this would entail. Eventually the local authority argued that they had discharged their duty to him, as he had failed to accept suitable accommodation, which was one of the events which is specified as bringing their duties to an end. A-L argued that the bringing of possession proceedings against him amounted to discrimination against him as a disabled person under s 15 of the EA 2010. HHJ Denyer in the Bristol County Court refused to let the matter go to a full trial, on the basis that he did not have a seriously arguable case. Cranston J agreed with this order, and A-L appealed to the Court of Appeal.

The Court of Appeal held that the test applicable to a defence based on disability discrimination under the EA 2010 should be approached in the same way as one would approach a defence based on Article 8 of the ECHR. As the Supreme Court in *Pinnock and Powell* had set a high threshold there, the same test should apply in cases where discrimination under the EA 2010 was raised. The judge’s refusal to let the case go forward for full argument should therefore stand.

The case is discussed only briefly as permission has already been granted for an appeal to the Supreme Court, which is listed for hearing on 11 December 2014.

(case noted at: HLM 2014, Sep, 7–12)

**Warrant for possession – permission of judge required if exercised more than six years after possession order made – claims for conspiracy and misfeasance in public office made out against Council officers**

*AA v Southwark LBC* [2014] EWHC 500 (QB) is a disturbing case to have to note. The main point of law to be noted is that HHJ Anthony Thornton QC (sitting as a Deputy Judge of the QBD) affirmed and applied the principle that one cannot apply for warrant for possession after more than six years have elapsed since it was made, except with the permission of the judge. This was in the context of a claim by AA for unlawful eviction and unlawful interference with his goods: when he was evicted from his one-bedroom flat his furniture and belongings including his passport, lap-tops, papers and personal possessions were sent to a refuse disposal facility for destruction. The disturbing feature of the case is that it included not only successful claims for unlawful eviction, unlawful homelessness and the unlawful destruction of his possessions, but also the torts – committed by council officers, for whom the council was vicariously liable – of conspiracy, negligence, misfeasance in a public office, and claims under Article 8 of the ECHR. Named officers had conspired to short-circuit the proper procedures and had then further conspired to cover up the unlawful nature of their original actions.

The trial on the issues of liability only took place in November/December 2013 but judgment was not handed down in open court until 13 October 2014. Although it dealt with issues of liability only, it would appear that issues of remedies and damages were dealt with by means of an out of court settlement. (The judgment runs to 299 paragraphs; it is preceded by a nine-paragraph summary by the judge, which does not form part of the judgment itself.)

**NOTES ON CASES**

*Anders v Haralambous* [2013] EWHC 2676 (QB): SJ 2014, 158(31), 28 (noted in Bulletin No 136)

*Birmingham CC v Beech* [2014] EWCA Civ 830: JHL 2014, 17(5), D98–D99 (noted in Bulletin No 139)

*Boots UK Ltd v Goldpine Estates Ltd* (CA (Civ Div)): EG 2014, 1433, 51

*Coventry v Lawrence (No 2)* [2014] UKSC 46: NLJ 2014, 164(7620), 12 (noted in Bulletin No 139)

*Marks & Spencer plc v Paribas Securities Service Trust Co (Jersey) Ltd* [2014] EWCA Civ 603: NLJ 2014, 164(7618), 8–9 (noted in Bulletin No 139)

*Martin Retail Group Ltd v Crawley BC* (CC (Central London), unreported, 24 December 2013): [2014] Comm Leases 2075–2077

*Mount Eden Land Ltd v Bolsover Investments Ltd* (Ch D) (landlord could not use covenant against alterations to block possible enfranchisement claim): Estates Gazette, 6 September 2014, 96; and [2014] Comm Leases 2080

## ARTICLES OF INTEREST

*Pillar Denton Ltd v Jervis (Re Games Station Ltd)* [2014] EWCA Civ 180: SJ 2014, 158(31), 30–31 (noted in Bulletin No 138)

*Qdime Ltd v Bath Building (Swindon) Management Co Ltd* [2014] UKUT 0261 (LC): JHL 2014, 17(5), D97–D98 (noted in Bulletin No 139)

*R (on the application of Trafford) v Blackpool BC* [2014] EWHC 85 (Admin); NLJ 2014, 164(7620), 16–17 (noted in Bulletin No 138)

*Schroder Exempt Property Unit Trust v Birmingham City Council* [2014] EWHC 2207 (Admin): [2014] Comm Leases 2078–2079

*Southend-on-Sea v Armour* [2014] EWCA Civ 231: JHL 2014, 17(5), 98–102 (noted in Bulletin No 138)

*Westbrook Dolphin Square Ltd v Friends Life Ltd* [2014] EWHC 2433 (Ch): EG 2014, 1436, 98–99 (case noted in Bulletin No 139)

## ARTICLES OF INTEREST

*A clean break* (increasing popularity of warranty and indemnity insurance in real estate transactions) EG 2014, 1436, 90–92

*A New Model for Speeding Up Letting* (new model form of commercial lease)

*Another blow for AST landlords (Gardner v McCusker, unreported)*, May 2014 (CC (Birmingham)) EG 2014, 1432, 53

*Are estate agents liable if they pick the wrong conveyancer?* SJ 2014, 158(33), 17

*Breaking up is hard to do* (effective exercise of a break clause) NLJ 2014, 164(7618), 8–9

*Check up or pay up* (requirement on landlords to check tenants' immigration status) EG 2014, 1436, 93

*Comparing mortgage law in England and Ireland* [2014] Conv 294–316

*Concurrent fees simple and the Land Registration Act 2002* [2014] LQR 587–607

*Conservation covenants: a proprietary analysis* [2014] Conv 328–339

*Contributions please!* (How the Civil Liability (Contribution) Act 1978 affects property professionals) Estates Gazette, 6 September 2014, 94–95

*Courting disaster* (recent landlord and tenant cases in the Court of Appeal) EG 2014, 1433, 48–49

*Damage limitation* (damage to properties between exchange and completion) EG 2014, 1434, 49

*Don't get in a fix over fixtures* (tenants' trade fixtures) NLJ 2014, 164(7616), 15–16

*Fairweather or Foal – Can a squatter acquire title to leasehold property?* (effect of *Fairweather v St Marylebone Property Co Ltd*) [2014] L&T Rev 129



*Gypsy and Traveller Law Update – Part 2* Legal Action, July/August 2014

*Housing Benefit Law Update 2014* Legal Action, July/August 2014

*How early is too early?* (options to renew leases) EG 2014, 1434, 52

*In Practice: Legal Update: Commercial Property: Competition and Use* (commercial property lawyers and the Competition Act 1998) Law Society Gazette, 28 July 2014

*Insurance and the conveyancer* [2014] Conv 286–293

*Keeping control* (donationes mortis causa of land) T & E L & TJ Sept 2014, 4

*Landlord and Tenant Act 1987* [2014] Conv 340–343

*Marshalling arguments: the relationship between a debt and a charge* [2014] Conv 344–351

*MEE time* (Minimum Energy Efficiency Standard Regulations for Non-domestic Properties in England and Wales) EG 2014, 1432, 52

*Navigating the boundaries* (implied grant and reservation of easements) EG 2014, 1432, 46–48

*On borrowed time* (whether lenders have duty not unreasonably to delay consents) Estates Gazette, 6 September 2014, 97

*Please sir, can I have a new tenancy?* (grounds of opposition under LTA 1954) EG 2014, 1431, 47

*Recent Developments in Housing Law* Legal Action, July/August 2014

*Rent Lawfully Due* (need for rent increases to accord with contractual provisions of tenancy agreement) Legal Action, July/August 2014

*Right to Manage: Ironing out the kinks* [2014] L&T Rev 133

*Riparian rights* (especially with reference to flood prevention works) EG 2014, 1434, 50–51

*SDLT – it's not stamp duty*: EG 2014, 1432, 50–51

*Split ownership of a combined property* EG 2014, 1431, 48–49

*Tenant insolvency – landlord's obligation for empty property rates* [2014] Comm Leases 2078–2079

*The advantages of thinking ahead* (drafting of reversionary leases) EG 2014, 1434, 53

*The key to change* (attempts to improve the eviction process) NLJ 2014, 164 (7619), 13–14

*The simpler the better? The future of renting homes.* JHL 2014, 17(5), 103–108

*The unknown unknown* (liability to repair hidden defects) EG 2014, 1435, 66–67

*Timely consent to assign* (effect of LTA 1988) EG 2014, 1435, 65

## NEWS AND CONSULTATIONS

*To Make a House a Home: Best v Chief Land Registrar* [2014] Conv 351–357

*Trading premises get an upgrade* (VAT treatment of transfer of business as a going concern) EG 2014, 1433, 47

*Using Public Law Arguments to Resolve HB Issues and Possession Proceedings* Legal Action, July/August 2014

*Vague and regression* (contracting out procedure under LTA 1954) EG 2014, 1435, 62–64

*What is a reversion upon a lease?* [2014] LQR 635–647

### NEWS AND CONSULTATIONS

The **Competition and Markets Authority** is conducting a **consultation** into **residential property management services**. The consultation is open until 19 September 2014: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/339932/Update\\_Paper\\_August\\_2014.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/339932/Update_Paper_August_2014.pdf).

A **Welsh Government** consultation seeks views by 13 October 2014 on **draft guidance** in respect of **notifiable events for registered social landlords**: [wales.gov.uk/docs/desh/consultation/140314-guidance-on-notifiable-event-for-rsl-en.pdf](http://wales.gov.uk/docs/desh/consultation/140314-guidance-on-notifiable-event-for-rsl-en.pdf).

**DEFRA** is consulting on a scheme for **fairer compensation for agricultural tenants** when their tenancies end. Comments are requested by 10 October 2014: [https://consult.defra.gov.uk/ahdb-sponsorship-and-agricultural-tenancies/consultation-on-modernising-agricultural-tenancies/supporting\\_documents/Consultation%20document.pdf](https://consult.defra.gov.uk/ahdb-sponsorship-and-agricultural-tenancies/consultation-on-modernising-agricultural-tenancies/supporting_documents/Consultation%20document.pdf).

**UK Visas and Immigration** has issued a Factsheet on the requirements upon landlords under the Immigration Act 2014 to check renting **tenants' immigration status**: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/341876/Factsheet\\_Landlords\\_Aug\\_14.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/341876/Factsheet_Landlords_Aug_14.pdf).

The **Department for Communities and Local Government** is consulting in its **Housing Standards Review** on changes to the **Building Regulations**. In particular, it is considering standards to improve home security, optimise water use and to meet the needs of older and disabled people. Responses are invited by 7 November 2014: see [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/354154/140911\\_\\_HSR\\_CONSULTATION\\_DOCUMENT\\_-\\_FINAL.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/354154/140911__HSR_CONSULTATION_DOCUMENT_-_FINAL.pdf).

The **Welsh Government** has opened a consultation into proposed amendments to the **legislation on easements**. The proposals would allow easements to be overridden permanently if land is acquired for planning purposes, and not merely temporarily as at present. Responses must be received by 16 January 2015: [wales.gov.uk/consultations/planning/amendments-to-easements-and-other-rights/?lang=en](http://wales.gov.uk/consultations/planning/amendments-to-easements-and-other-rights/?lang=en).

### OFFICIAL PUBLICATIONS

The **Department for Communities and Local Government** on 11 August 2014 published a policy paper setting out details of **directions to cap charges to**

**council leaseholders for improvement works** funded by the government: the Social Landlords Mandatory Reduction of Service Charges (England) Directions 2014 and the Social Landlords Discretionary Reduction of Service Charges (England) Directions 2014. See: [www.gov.uk/government/publications/social-landlords-reduction-of-service-charges-mandatory-and-discretionary-directions-2014](http://www.gov.uk/government/publications/social-landlords-reduction-of-service-charges-mandatory-and-discretionary-directions-2014); [www.gov.uk/government/news/flos-law-new-cap-for-council-house-repairs-comes-into-force](http://www.gov.uk/government/news/flos-law-new-cap-for-council-house-repairs-comes-into-force).

### PRACTICE GUIDES ETC

**HM Land Registry** has issued revised versions of **Practice Guide 16**, on profits a prendre; **26**, on determining a registered lease; **18**, on franchises; **75**, on transfers under a chargee's power of sale; and **77**, on altering the register by removing land from a title plan.

The **Law Society** on 1 August 2014 issued revised **guidance on combatting mortgage fraud**: [www.lawsociety.org.uk/advice/practice-notes/mortgage-fraud/](http://www.lawsociety.org.uk/advice/practice-notes/mortgage-fraud/).

The **Legal Ombudsman**, working with the **Solicitors Regulation Authority**, has issued a Guidance Note for solicitors and others on using SDLT avoidance schemes: [www.legalombudsman.org.uk/downloads/documents/publications/Tax-avoidance-schemes-Guidance-140929.pdf](http://www.legalombudsman.org.uk/downloads/documents/publications/Tax-avoidance-schemes-Guidance-140929.pdf).

### PRESS RELEASES

**TPO backs Client Money Protection** and calls for more landlords to seek the greatest protection rather than the cheapest fee when choosing a letting agent: [www.tpos.co.uk/news-14.htm](http://www.tpos.co.uk/news-14.htm).

The **Department for Communities and Local Government** has announced that a new **Model Tenancy Agreement** will be introduced for private tenants: see [www.gov.uk/government/news/a-better-deal-for-hardworking-tenants](http://www.gov.uk/government/news/a-better-deal-for-hardworking-tenants).

Ministers at the **Department for Communities and Local Government** have announced their backing for a **Private Member's Bill** introduced by Sarah Teather MP which would outlaw **retaliatory evictions** of tenants who request repairs: see [www.gov.uk/government/news/stephen-williams-vows-to-outlaw-revenge-evictions%20](http://www.gov.uk/government/news/stephen-williams-vows-to-outlaw-revenge-evictions%20).

### STATUTES, ETC

The **Housing (Wales) Act 2014** reforms certain aspects of housing in Wales, including compulsory registration and licensing of landlords, letting and management agents, the law relating to homelessness, and the provision of sites for gipsies and travellers, and introduces a set of standards for LAs in the social housing sector. It also provides for more than the standard council tax to be levied on properties which are left empty long-term.

### STATUTORY INSTRUMENTS

The **Town and Country Planning (Development Management Procedure) (Wales) (Amendment) Order 2014**, SI 2014/1772 came into force on 1 September 2014 (Wales only).

## STATUTORY INSTRUMENTS

The **Mobile Homes (Selling and Gifting) (Wales) Regulations 2014, SI 2014/1763** came into force on 1 August 2014 (Wales only).

The **Mobile Homes (Site Rules) (Wales) Regulations 2014, SI 2014/1764**, come into force on 1 October 2014 (Wales only).

The **Building (Amendment) Regulations 2014, SI 2014/2362** update the list of bodies authorised by the Secretary of State to register individuals as competent to certify compliance with certain requirements of the Building Regulations 2010.

The **Financial Services Act 2012 (Consequential Amendments) Order 2014, SI 2014/2371** updates **form CIT in the Land Registration Rules 2003** to include references to the Financial Conduct Authority and the Prudential Regulation Authority.

The **Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc) (England) Order 2014, SI 2014/2359** requires those who engage in the work described to belong to a redress scheme which deals with complaints.

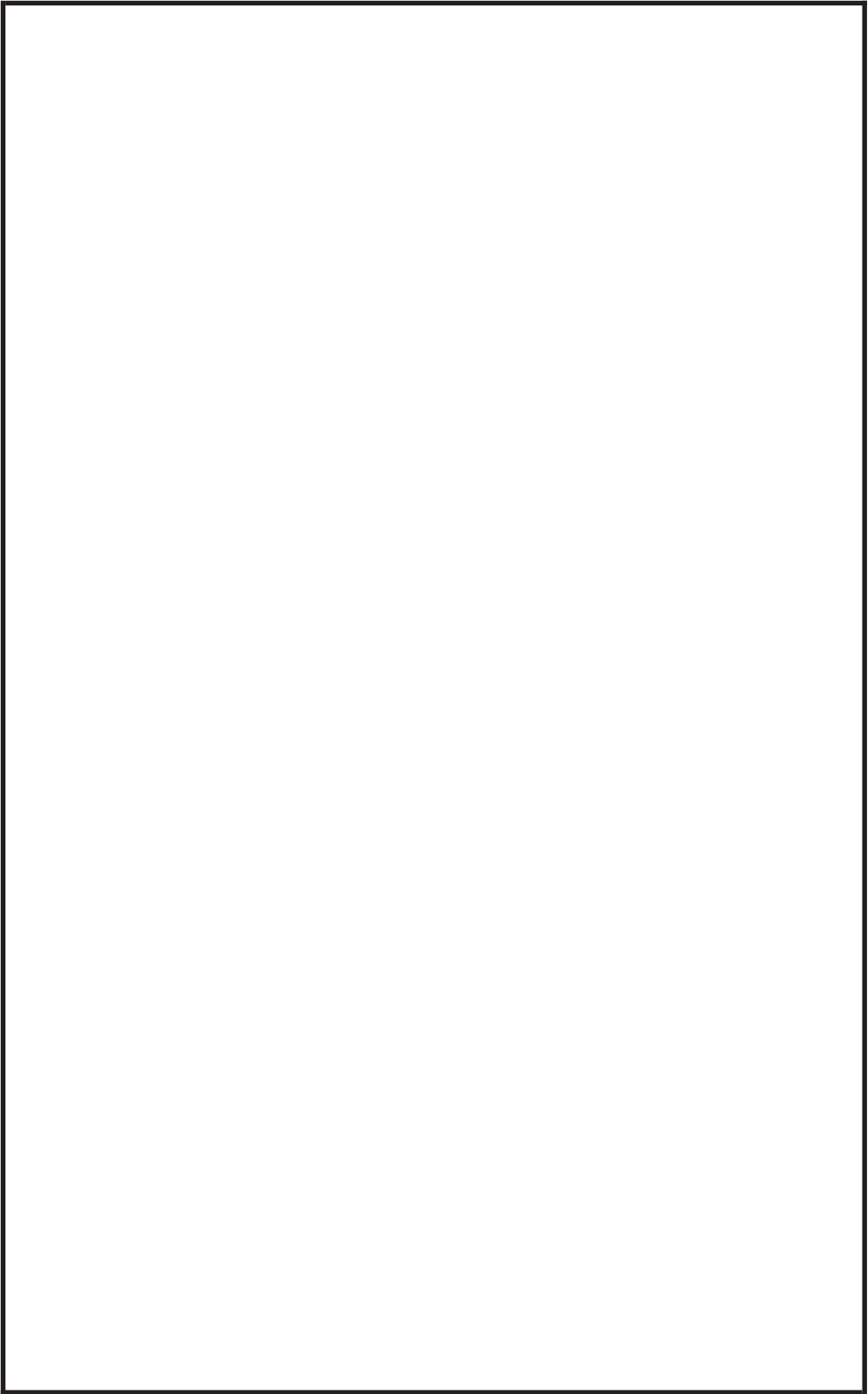
The **Absolute Ground for Possession for Anti-social Behaviour (Review Procedure) (England) Regulations 2014, SI 2014/2554** allow secure tenants convicted of anti-social behaviour offences, to request a review of their landlord's decision to seek a new absolute ground for possession on their property. The provisions came into force (in England only) on 2 October 2014.

The **Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No 7, Saving and Transitional Provisions) Order 2014, SI 2014/2590** came into force on 20 October 2014, and introduces the new absolute ground for the possession of a dwelling and the new Criminal Behaviour Orders.









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