Butterworths Property Law Service

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I. FREEHOLD CONVEYANCING

Adverse possession – facts to be established – extent of deference to be shown to Adjudicators' findings of fact

Dyer v Terry [2013] EWHC 1889 (Ch) is D's appeal to the Chancery Division against the Deputy Adjudicator's decision to amend the Land Register on the

basis that T had established title by adverse possession to certain parcels of land, which were open land at the side of the metalled surface of a road or track. Four of the six parcels were the subject of the appeal, and D succeeded in respect of all of one and part of another. It was alleged that adverse possession had been completed before 2003, so the applications were governed by the Land Registration Act 1925, s 75. The decision, by Mr Richard Millett QC, sitting as a deputy judge, is chiefly of interest because he usefully brings together (at [14]) the ten main principles to be drawn from the leading cases on what has to be established to show adverse possession. He also affirms (at [16]) the view of Mummery LJ in *Wilkinson v Farmer* [2010] EWCA Civ 1148 (at [25]) that the Adjudicators and Deputy Adjudicators to the Land Registry had relevant expertise in finding the facts of adverse possession disputes, and appellate courts should accord 'a measure of weighted deference' to their findings. Mr Millett, however, nevertheless allowed D's appeal in part.

Application under s 84(1) in respect of 1931 restrictive covenants – whether increased traffic amounted to a nuisance on the burdened land

Trustees of the Coventry School Foundation v Whitehouse [2013] EWCA Civ 885 is the successful appeal by the school trustees from the decision of HHJ Simon Barker QC reported as [2012] EWHC 2351 (Ch) and noted in Bulletin No 132. It will be recalled that the case involved a restrictive covenant contained in a 1931 conveyance which prohibited the erection of buildings 'for any noisy …pursuit or occupation or for any purpose which shall or may be or grow to be in any way a nuisance damage annoyance or disturbance to the Vendors and their successors in title'. TCSF proposed to build a school, and, in response to local opposition, made an application under s 84(1) LPA 1925 for declarations (1) that the defendants were not entitled to the benefit of the covenants and (2) that the proposed development would not amount to a breach of the covenants. The appellant trustees disputed the judge's finding as to whether the benefit of the covenant had become annexed to the defendants' land, and also the judge's finding that the increased traffic generated by the school might 'be or grow to be … a nuisance damage annoyance or disturbance' to the defendants. (He had found that the erection and operation of the school *per se* would not be a nuisance, and there was no respondents' notice challenging this).

In the Court of Appeal, Mummery LJ (with whom McCombe and Beatson LJJ agreed) held on the nuisance point that any increased traffic caused by the operation of the school would be lawful use of the public highway and was not therefore caught by the covenant, which was 'directed at prohibiting activities that take place *on the burdened land*' ([58]). The dispute was therefore 'about traffic issues on the public highway that do not go to the activities of the Foundation on the burdened land or its user of it' ([60]). Having decided against the defendant objectors on this issue, the Court did not go on to consider the annexation point.

Mummery LJ stressed that the covenant was directed against activities on the burdened land rather than the repercussions those activities might have elsewhere. This could have the result of encouraging a yet more 'torrential' style of drafting of restrictive covenants.

(noted in Solicitors Journal, July 23, 2013 (Online edition))

Bankruptcy – home protection plan – whether mortgages regulated under CCA 1974 – extent of solicitors' duties

Consolidated Finance Ltd v Collins and others [2013] EWCA Civ 475 lies a little outside the general scope of this work, but it is worth noting as it has implications for solicitors' practice in conveyancing. A company called Bankruptcy Protection Fund Ltd ('Protection) offered to help bankrupts who were home-owners to avoid losing their homes. They offered to obtain the annulment of the bankruptcy by making a short-term loan secured on the bankrupt's home, on a 'no-win, no-fee' basis, and claimed a 100% success rate for this. But, as Sir Stanley Burnton (sitting in the Court of Appeal) pointed out ([57]), this was a rather hollow claim, as Protection accepted cases only where there was sufficient equity in the home, so the annulment of the bankruptcy was virtually a foregone conclusion. Further, the scheme's customers – who had entered the scheme largely to retain their homes – seemed unaware that the upshot of their 'success' would be the existence of a legal charge over their home, securing a loan which, though secured, bore interest at 4% per month and was therefore at the sort of rate more commonly encountered with a short-term unsecured loan. Although the short-term loan bought the bankrupt a little time, he or she was then in no better a position to obtain longer term mortgage finance, and had incurred considerable fees, legal costs and interest. HHJ Hazel Marshall QC in the Central London CC had given judgment for the claimant ('Consolidated'), an associated company of Protection, and the claimants appealed.

The first issue was whether the loan was by Consolidated or Protection. Clearly the claim could succeed only if Consolidated were the proper claimant, and the County Court was upheld on this point. The second issue, however, was whether the agreement was a regulated agreement under the Consumer Credit Act 1974, or exempt. In the County Court it was held to be an exempt agreement. The careful judgment on this aspect is clearly relevant to those who practise in the field of consumer credit, but for the more general reader suffice it to say that it was held to be regulated. This had the effect that the loans were unenforceable, as default notices had not been served under CCA 1974, s 87.

The point which is perhaps of broader concern to solicitors is that Protection introduced the bankrupts to Lupton Fawcett, a firm of solicitors who dealt with the annulment of the bankruptcy, and then acted on their behalf in on the completion of the legal charge. Their retainer letter, however, excluded responsibility for advising the client on whether the transactions were to their advantage. Sir Stanley Burnton thought ([59]) that the transaction here was

obviously to the defendant's disadvantage. As the firm was not represented before the court, he confined himself to questioning whether 'in such circumstances a solicitor can properly avoid a duty to advise his client by excluding that duty from his retainer'. He thought that, at the least, a solicitor should here advise a client in the strongest terms to seek independent legal advice. Here it had been mentioned, but not pressed. In practice someone in the defendant's position might well not be able to afford to take independent legal advice. He raised the possibility that the solicitors had put themselves in the position where they faced an irreconcilable conflict of interests.

Discharged bankrupt – unsuccessful claim to an interest in house property by proprietary estoppel or a constructive trust as any beneficial interest would have vested in trustee in bankruptcy

Walden v Atkins [2013] EWHC 1387 (Ch) raises a short but interesting point on the interrelationship between claims based on proprietary estoppel or a constructive trust and bankruptcy. The factual background is complex, but fortunately it is not necessary to go into it in detail to address the point of law. Suffice it to say that the claimant in a family dispute claimed an interest in house property either on the basis of proprietary estoppel or a constructive trust. The defendant included in his defence a plea that, as the claimant had been declared bankrupt after the interest arose, then, even though he had been discharged from the bankruptcy, he did not have *locus standi* to pursue the claim, as if he had acquired an equitable interest in the property, it would have vested in the trustee in bankruptcy, and did not re-vest on discharge. This was dealt with by HHJ Simon Barker QC (sitting as a Deputy Judge of the Chancery Division) as a preliminary issue, and as he agreed with the defendant's contention, the claim was struck out.

Dismantling of steelworks – whether items of heavy plant were fixtures and/or tenant's fixtures – whether requirement for licence to make alterations displaced tenant's right to remove tenant's fixtures

See *Peel Land and Property* (*Ports No 3*) *Ltd v TS Sheerness Steel Ltd [2013] EWHC 1658* (*Ch*) in **Division II.**

Land Registration – whether adverse possessor could lodge caution against first registration

Turner v Chief Land Registrar [2013] EWHC 1382 (Ch) primarily raises a short point of construction on LRA 2002, s 15. By way of background, prior to the LRA 2002, it had been possible for a landowner who claimed to be entitled to first registration as proprietor of a freehold or leasehold estate to lodge instead a caution against first registration, so ensuring that no one else could be registered with notice to him or her, but without incurring the

possible bother and expense of first registration. This was felt by the Law Commission to be an abuse of the procedure (LC 271, at para 2.14), and was prohibited by LRA 2002, s 15(3)(a).

The claimant here, T, a self-described 'gypsy' had, since 2007, resided in his caravan in adverse possession of unregistered land in Leatherhead. He had also – apparently with the support of his neighbours – obtained planning permission for use of the land as a private gypsy and traveller site. Prior to this he had applied to register a caution against first registration, under LRA 2002, s 15. The Registrar accepted that T had an 'estate in land' but refused the application, arguing that T was claiming a freehold estate, and therefore registration of a caution was precluded by s 15(3)(a)(i)([13]). Roth J rejected the argument of T's counsel that T held a legal estate (ie a 'common law' fee simple) but not a 'fee simple absolute in possession' as it was liable to be defeated by the paper owner. Under LPA 1925, s 1(1), only two legal estates could exist. Anything less than an 'absolute' fee simple did not exist, and, in any event, 'fee simple absolute in possession' is a term of art: [14]. Nevertheless it was 'fundamental to English land law that title (at least to unregistered land) is not absolute but relative'. So if T remained in occupation for 12 years, he would be entitled to be registered as freehold owner ([22]). Alternatively, counsel for T argued that his client was entitled to 'an interest affecting a qualifying estate' which therefore fell within LRA 2002, s 15(1)(b). Roth J rejected this argument as T's interest did not affect the paper owner, but was a separate title ([24]). He also rejected an argument based on the Human Rights Act 1998. Although the jurisprudence clearly indicated that T's caravan might amount to a 'home' for the purposes of Art 8 ECHR, the refusal to grant a caution would not affect T's substantive rights, but would be merely procedural. "The degree of seriousness required to trigger lack of respect for the home will depend on the circumstances, but it must be substantial." (Lester, Pannick and Herberg, *Human Rights Law and Practice* (3rd edn, 2009) at 4.8.76). The judgment also contains further discussion of the theory of estates and interests in land in English Law.

Mortgage possession action – whether serious procedural irregularity

Dunbar Assets plc v Dorcas Holdings Ltd and others [2013] EWCA Civ 864 is the appeal by the defendants against the making of a possession order, which was successful not because the order was necessarily wrong but because of a serious procedural irregularity. The judge in the Brentford County Court had been faced with unsuccessful applications to amend their defences by three of the defendants, and an application to be joined as a defendant by another party. These had taken up most of the half day that had been allowed. At the conclusion of those applications the judge had taken the view that, as the amendments had been disallowed, and certain admissions made, the defendants had no defence, and he proceeded to make a possession order. The Court of Appeal took the view that, whilst it was permissible for the judge to take a view that a defence stood no prospect of success, and could proceed accordingly even if no application for striking out was formally before him –

indeed, doing so might save the parties some of the costs of a trial – he should not do so without giving the parties the opportunity properly to make submissions as to whether or not there was an issue which could and should go to trial. The appeal was therefore allowed, and the case remitted for trial to the Central London County Court, but with permission to the claimant to make an application to strike out the defences, if so advised.

Portfolio of 'buy to let' mortgages – Receivers appointed – whether oral agreement to return to mortgagor if arrears cleared

Jumani and another v Mortgage Express and another [2013] EWHC 1571 (Ch) is a case exemplifying the difficulties that can arise when substantial 'buy-to-let' portfolios are affected by the current financial crisis. The claimants respectively had portfolios of 32 and 21 buy-to-let properties which were mortgaged to Mortgage Express, a subsidiary of Bradford and Bingley plc. Because of arrears Mortgage Express, the first defendant, had appointed the second defendants as LPA Receivers of the properties. The claimants alleged that oral agreements had been reached whereby the first defendant had agreed that the properties would be returned to their possession and control if and when the arrears were cleared. On a hearing of this preliminary point, Mr Mark Cawson QC (sitting as a deputy judge of the Chancery Division) determined that no such agreements had been concluded.

Purchase of new 'barn conversion' – whether certificate of practical completion had been properly issued

Elmbid Ltd v Burgess [2013] EWHC 1489 (Ch) is a very lengthy and detailed judgment on whether the defendant housebuyer B had been entitled to allege that a certificate of practical completion (CPC) had not been properly issued and therefore whether B had been entitled to rescind the contract. If not, then the claimant claimed damages for breach from B. Mr William Trower QC, sitting as a deputy judge of the Chancery Division, held that it was established law that practical completion might have been achieved even if there remained defects to be remedied, and that in any event the CPC was valid even if the certifying architect ought not to have signed it.

The judgment contains a good deal of useful discussion of the problems of compliance that can arise when a listed building is being converted (the instant case involved a barn conversion), and in particular divergent expert views on whether cement could be added to a lime-based render, and the use of modern masonry paints.

Purchaser disputed whether VAT to be added to purchase price – completion notice served – whether purchaser was then ready to complete when vendor backed down

Clarke Investments Ltd v Pacific Technologies Ltd [2013] EWCA Civ 750 offers a salutary reminder that, in the words of Floyd LJ (at [31]), a

completion notice is a powerful weapon, which may rebound upon the giver if it is not handled carefully. CI, the claimant and appellant, had agreed to purchase a shop, with two residential units over, from PT, the respondent / defendant. A dispute arose as to whether VAT had to be added to the purchase price, PT asserting that VAT should be added, whilst CI vigorously denied this.

This dispute had not been resolved by the contractual completion date, whereupon CI served a notice to complete. On the last day for completion under that completion notice, PT backed down on the VAT issue, and agreed to complete without it being added to the price. By this time, however, CI's solicitors had returned the purchase price to them, and they were not again in funds until the following day. As CI had not been able to complete in accordance with their own completion notice, the CA (Floyd and Maurice Kay, LJJ, and Sir Stephen Sedley), following the very strict interpretation in *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514, held this to be a repudiatory breach ([39]–[40]). CI also alleged that PT's solicitors had failed to produce an accurate completion statement.

Following *Schindler v Pigault* (1975) 30 P&CR 328 (Ch D), *Carne v Debono* [1988] 1 WLR 1107 (CA) and *Hanson v SWEB Property Depts Ltd* [2002] 1 P&CR 35 the Court of Appeal confirmed that, as there was no contractual obligation on the seller to provide a completion statement, it was not an act of repudiation if the seller asked for more than the sum to which he was entitled.

Reckless representation as to past flooding in preliminary enquiries – whether seller liable in deceit

Vahey v Kenyon [2013] EWC Civ 658 deals with a misrepresentation as to the risk of flooding at a property, a topic which is likely to be of increasing importance. The judge in the Central London CC had found that K, the defendant/appellant, had made certain misleading representations in response to enquiries by V, which rendered him liable in deceit for reckless misrepresentation. K appealed, on the basis that part of the judgment appeared to suggest that, even if V had been fully informed of the flooding – which was rather limited in extent – then he would probably have proceeded with the purchase anyway. This raised the issue as to whether the misrepresentation could be said to have caused any loss to him.

Reviewing the judgment, the Court of Appeal (Beatson, Lewison and Mummery LJJ) held that the judge had not gone so far as to say that V would have proceeded with the purchase, or, at least, not without further renegotiation of the price. The appeal was therefore dismissed.

Restrictive Covenants – whether covenants restricting use of regional broadcasting centre to use by the BBC benefited Council's retained land – whether right of pre-emption was valid

Cosmichome v Southampton City Council [2013] EWHC 1378 (Ch) addresses issues concerned with restrictive covenants, pre-emptions and land registration, and has potentially far-reaching implications on the enforceability of restrictive covenants.

The background to the instant case was that in 1989 the Council sold land to the BBC for the erection of a regional Broadcasting Centre for a nominal £1. The Transfer contained restrictive covenants effectively confining the use of the building to broadcasting by the BBC or its franchisee. The transfer envisaged that, if the land were sold for other purposes, the covenants could be discharged by payment of one half of the enhanced value to the Council. In 2004 the BBC had entered into a sale and lease-back arrangement with the claimant C. C now sought declarations that neither the restrictive covenant, nor a pre-emption clause, was still binding on them.

The first point which arose was whether the covenants did in fact benefit the land in the vicinity retained by the Council. Sir William Blackburne, sitting as a judge of the Chancery Division, accepted that it was presumed that a restriction expressed to benefit the covenantee's land did do so, but also that this could be challenged, and to bind successors it would actually have to be of benefit. It was clear on the evidence that the Council had been keen to retain the BBC's regional centre in Southampton so as to underpin its plan for that part of the city to become its 'Cultural Quarter', and for broader questions of civic pride, but it would appear that the question of whether it did actually benefit the Council's neighbouring land (including the Civic Centre, a major theatre, and a new Sea City Museum) – as opposed to its broader civic aspirations – was overlooked, including by the experts who gave evidence on its behalf at the hearing. The BBC Building had no public auditorium, and could not be said to attract the public to the area. The judge therefore held that the covenant was not of benefit to the Council's land, and was not therefore enforceable against the BBC's successors in title.

The second point involved the right of pre-emption contained in the 1989 Transfer, which provided that the Council could repurchase the Building at its market value as radio/TV studios (but not necessarily used by the BBC). The validity of this right was challenged on three grounds. The first of these was that the right had been triggered by the sale and lease-back in 2004, and, as the Council had not acted then, it had lost the right now to enforce it. It was held that the sale and lease-back had not triggered the right: [43]. The second point of law was more complex, and was whether the pre-emption right amounted to an option, which was void as the 21 year perpetuity period under s 9(2) of the Accumulations and Perpetuities Act 1964 had expired. If so, then it was also void as between the original parties, ie the Council and the BBC: s 10. The Judge followed the view expressed in *Pritchard v Briggs* [1980] Ch 338 that a right of pre-emption, as opposed to an option, does not

give rise to an immediate interest in land (though see now LRA 2002, s 116 for pre-emptions created more recently), and declined to follow Judge Hodge QC's reasoning in *Taylor v Couch* [2012] EWHC 1213 (Ch). The Council, however, lost overall on the second point too, as C also relied as its third ground on the fact that, as the pre-emption operated personally, it could not have bound C when it acquired the site in 2004. This ground would seem to have taken the Council by surprise, as it sought to raise the point in its defence that the Building had been purchased subject to a constructive trust to give effect to the pre-emption right. The judge declined to entertain this argument, as it had not been pleaded, and no evidence had been directed to it ([67]). He added that for a constructive trust to apply, there would have to be clear evidence that a purchaser had purchased a property subject to third party rights and also that this had affected the price ([68]). (Although he did not refer to it in his judgment, he clearly had in mind the high threshold set in a case such as *Lyus v Prowsa* [1982] 1 WLR 1044). C was therefore bound neither by the restrictive covenants nor by the right of pre-emption.

The case may well have wider implications for other restrictive covenants which local authorities across the country may have taken. The decision implies that restrictive covenants must clearly benefit identifiable land owned by the local authority, rather than being of more general benefit to the council or inhabitants of a particular local government area.

(noted in E.G. 2013, 1326, 105)

Rural boundary dispute – interpretation of parcels clause – meaning of 'T' marks – whether presumption as to 'ditch width'

Avon Estates Ltd v Evans [2013] EWHC 1635 (Ch) involves a boundary dispute between two adjacent rural properties, one a mobile home park, and the other a stud farm for thoroughbred horses. The lengthy judgment of HHJ David Cooke (sitting as a deputy Chancery judge) as one might expect turns very much on the facts, but a few points of potentially wider importance can be identified. First, the parcels clause of the 1955 Conveyance which he was attempting to construe contained the unfortunate and oft-criticised formula 'more particularly delineated … on the plan attached hereto for the purposes of identification only'. Although the presence of 'delineated' and 'for identification only' has been described by Megarry J in *Neilson v Poole* (1969) 20 P&CR 909 as 'mutually stultifying', the judge here was able to derive some sense from the wording, as he observed that the schedule included in the (verbal) parcels clause referred to field numbers and acreages, so it was an ordinary use of language to say that delineation of the fields on the plan assisted in their identification, so long as it was not inconsistent with the parcels clause (see [21]).

Second, there was also some discussion of the meaning of 'T' marks on the plan. The meaning to be attributed to them was relevant to the ascertainment of the boundary. One side argued that they implied that the boundary structure was owned by the owner on whose side the 'T's lay, the other that,

unless there was some mention of the 'T' marks in the conveyance or transfer, no such assumption could be made, and it was alternatively possible that the 'T' marks indicated repairing responsibilities but not necessarily ownership. HHJ David Cooke here held that no 'single or default' meaning could be attached to the 'T' marks here: the intention of those who were parties to the relevant conveyance had not been made clear ([31]). He also rejected ([34]), following *Collis v Amphlett* [1918] 1 Ch 232, any suggestion that there was a presumption that the owner of a hedge owned a 'ditch width' of three or four feet to the far side of the hedge, where there was no evidence of there being or having been a ditch. In this particular case the boundary was held to run along the centre of the 'growers' of the hedge, as they existed at the time of the 1955 Conveyance.

Solicitors innocent victims of mortgage fraud – whether breach of trust – whether solicitors entitled to relief under s 61 Trustee Act 1925

Santander UK plc v R A Legal Solicitors (*A Firm*) [2013] EWHC 1380 (QB) is yet another case where solicitors acting for a purchaser and mortgagee have been the subject of a mortgage fraud and the lenders have attempted to hold them liable for it, on the basis of a breach of trust: the reasoning behind this is of course that the mortgage advance is held on a bare trust for the lenders, and if the solicitors then part with it without receiving a valid legal charge in return, they are in breach of trust.

The fraud here was on the part of the purported seller's solicitors, who acted on a 'sale' which the owner of the property knew nothing about. The claimant lender alleged that RAL was also dishonest, but no finding was made on that. Essentially RAL had exchanged and completed on the same day on an apparently routine domestic conveyancing transaction, but then found that although they received a TR1 transfer deed, purportedly signed by the seller, the legal charge outstanding on the property was never redeemed. Various excuses were given as to why evidence could not be provided of the redemption of the charge; seven weeks later they were told that the SRA had intervened in the seller's solicitors' practice; and within a further few weeks it was clear that there had been a fraud.

The claimant lender sued the defendants alleging breach of trust, or in the alternative breach of the terms of their retainer, or tortious negligence. RAL denied that they were in breach of trust, or, in the alternative, sought to rely on s 61 Trustee Act 1925. The aspects in which the claimants alleged that the defendants had not complied with their retainer were not particularly serious:

(1) The lender alleged that the defendants had not fully investigated title when they provided their Certificate of Title. This was strictly correct, in that a copy of a 1986 transfer deed had not then been supplied to them, but Andrew Smith J accepted that (a) the defendants correctly expected that it would contain nothing which adversely affected the value of the property and (b) they had in fact checked it before completing.

(2) The lender also alleged that the defendants had failed to return the mortgage funds to them as soon as completion was delayed beyond the expected completion date. Although this was true, the judge accepted that it was reasonable for solicitors not to send back funds if completion still seemed imminent; and did not accept the suggestion that, if the lender had been notified of the delay, it would have requested the immediate return of the funds. Rather, he was satisfied that the lender would in practice have asked the solicitors to keep the funds and re-arrange the completion date.

(3) The lender also suggested that the defendants had remitted the purchase moneys without having a proper undertaking from the seller's solicitor, as the Replies to Requisitions did not cover the position if there had been no exchange of contracts. The judge accepted the defendants' suggestion that it would be implied that funds sent in these circumstances would be have to be returned if there were no completion.

(4) The judge also rejected the criticism that the defendants had delayed unduly in informing the lender that the transaction had been delayed and, eventually, that they could not register their legal charge. The defendants had only at a late stage appreciated that there had been a fraud.

(5) Finally, the judge rejected the argument that the defendants had completed without there being a legal charge because the legal charge deed was not dated: the Law Society's conveyancing handbook acknowledged that a charge deed could not be dated until the chargor had gained title.

The judge nevertheless held that the trust money – the mortgage advance – had technically been paid away in breach of trust, because the money had been transferred out of the solicitors' control, and they had not received anything in return. Following *Lloyds TSB Bank plc v Markandan & Uddin* [2012] EWCA Civ 65 (noted in Bulletin No 128), *Nationwide Building Society v Davidson* [2002] EWCA Civ 1626 and *AIB Group (UK) plc v Redler*, [2013] EWCA Civ 45 he was bound to hold therefore that there had been a breach. Although the solicitors were in breach of trust, the judge felt able to grant full relief under TA 1925, s 61, noting that in order for a trustee to be granted relief, it was necessary that he had acted reasonably, not that he had acted perfectly (see [70] – [72]). In view of the judge's findings that the matters for which the lender had criticised the solicitors had not actually caused the loss, the claim for damages also failed.

Unpaid vendor's lien – claim by Bank allowed by subrogation into the lien

Menelaou v Bank of Cyprus UK Ltd [2013] EWCA Civ 1960 is a case on the rather esoteric area of subrogation to an unpaid vendor's lien. The success of the bank's appeal may be a surprise to those who are not acquainted with the area. The defendant bank held charges over the claimant M's parents'

property to secure their indebtedness. The parents wished to purchase a smaller property and to put it in the name of M by way of gift. The bank agreed to release their charges over the former property, taking instead a charge over the new property, although this left the debt largely unsecured. The solicitors acting for M, her parents and the bank seem to have procured the execution of a forged charge deed, and M by this action sought a declaration that, because the deed was a forgery, she held the property free from the legal charge to the bank. She succeeded in this action, and there was no appeal against this finding. The bank, however, sought by a counterclaim to establish that they had an equitable charge over her property, by subrogating into the unpaid vendor's lien.

This argument was rejected by Mr David Donaldson QC, sitting as a Deputy Judge in the Chancery Division, but the appeal by the bank on this point was allowed in the Court of Appeal (Moses, Tomlinson and Lloyd LJJ). The three-part test of Lord Hoffmann in *Banque Financière de la Cité v Parc* (*Battersea*) *Ltd* [1999] 1 AC 221 was held to be satisfied: M had been enriched at the Bank's expense; such enrichment was unjust; and there were no reasons of policy for denying a remedy. The Deputy Judge had taken the view that the enrichment was not at the Bank's expense, as M had obtained title to her new property before the charges over her parents' former property had been released. The Bank, however, successfully argued before the Court of Appeal that this unduly chronological approach ought not to withstand the approach in *Banque Financière*, which had stressed the importance of looking at the economic reality of the transactions, rather than a formal analysis. The judgment contains a useful analysis of the juridical basis of subrogation into an unpaid vendor's lien for those unfamiliar with it.

Mortgage identity fraud – tenant paying rent to mortgagee – whether estopped from denying tenancy was binding on it

Paratus AMC Ltd v Persons unknown and another [2013] EWCA Civ 827 is a second appeal by the defendant F against the making of a possession order in favour of a mortgagee, P. Lest it seem strange that 'persons unknown' should be so active in litigation, it should be noted that P's possession action was so entitled when it was commenced, but the present appellant applied to be joined as a second defendant. Essentially P, the claimant, had in January 2008 granted a mortgage to assist in the purchase of a property by a Mr Maru. It would appear that an identity fraud had been perpetrated, as he denied all knowledge of the mortgage, and it was likely, though not actually found, that the deed was a forgery. F had signed an agreement to rent the property from an agent acting for an undisclosed landlord. By the time she commenced living at the property in August 2009 the mortgage was in arrears, and, in circumstances which remained somewhat unclear, from November 2009 onwards she began to pay her rent of £1,000 p.m. directly into P's bank account. This sum later increased to £1,110 p.m. P's solicitors wrote to 'the tenants or occupiers' of the property in August 2010 alleging that any tenancy agreement with the purported owners was without their consent, and

not binding on them, and in April 2011 they commenced the possession proceedings, to which F applied to be joined. In the Court of Appeal F's principal argument was that P was estopped from denying that she had a tenancy. The Court of Appeal (Longmore, Leveson and Floyd LJJ) rejected this. Although she had made the payments to P, she had failed to establish that this was pursuant to any agreement, and, although her name had appeared on the paying-in slips, P had no reason to connect these payments with the then-unidentified occupier of the property. As against P, F remained a trespasser, and her appeal failed.

II. EXISTING LEASEHOLDS

Collective enfranchisement under LRHUDA 1993 – whether valuation could assume that owners of superior leasehold interests would co-operate to release development value

Cravecrest Ltd v Trustees of the Will of the Second Duke of Westminster and Another [2013] EWCA Civ 731 raises a rather technical issue on the valuation of the freehold and superior leasehold interests on a collective enfranchisement under the LRHUDA 1993. As Sir Terence Etherton observed in the case, it is unlikely to be of much relevance outside the central London area – though its factual matrix would be by no means unique there – as the valuation problem essentially revolved around the fact that the five-storey building (with the possibility of adding an attic storey) was currently divided into three flats, with a total value of just under £5 million; whereas if the building were restored to a single dwelling, its value would be nearly £7 million. The Appellant was the nominee purchaser (representing the owners of two flats, whose leases were about to expire when the original purchase notice was served); the First Respondent was the freeholder, and the Second Respondent was the holder of an overriding lease of the non-participating flat. There was in addition a headlease of the whole building, held by Grosvenor Estates Belgravia. The Lands Chamber of the Upper Tribunal had valued the two superior leasehold interests on the basis that if their respective owners co-operated with each other then they could unlock the development or hope value. The Appellant argued that the Tribunal had erred in this approach, and the LRHUDA 1993 required that they be separately valued, with no element of hope value. The Court of Appeal dismissed the appeal. Those whose practices are frequently concerned with valuation principles in such high-value cases will clearly need to give the judgment close attention, but for the more general reader it should suffice to say that the Court endorsed the approach of the Upper Tribunal which emphasised that valuations had to reflect what was likely to happen in the 'real world' (see [13], [30] and [31), and not some theoretical construct, and that the court should avoid if possible an interpretation of the Act which had the result of bestowing on tenants rights which went beyond those that Parliament had intended (see [62], [65], [81) and [82]). The result of the valuation which the Court of Appeal upheld was that the increased value

resulting from the development of the property – more accurately its reconversion back to a house – remained largely with the Duke of Westminster's Belgravia Estate.

Construction of lease where plan 'delineated' the demise

A brief note of *Network Rail Infrastructure Ltd v Freemont Ltd* [2013] EWHC 1733 (Ch) should suffice. A dispute arose between NRI (the L) and F Ltd (T) over who was responsible for repairs to a platform erected adjacent to a road bridge over the railway; the platform carried various shop units. Who was responsible depended upon whether the demise included just the platform itself or also included an 'infill'. The Deputy Judge (Mr N Strauss QC) held that the infill did not form part of the demise, and T was not therefore liable for the repairs. A plan attached to a lease in 1990 was expressed to 'delineate' the demised property, and this was held to prevail, even though it was different from a plan attached to an earlier 1964 lease. Of wider import is the affirmation of the principle that the construction of any contract relating to land is governed by the same principles as would apply to construction of any other contract (see [26]).

Consultation notice under LTA 1985, s 20 – whether notice invalidated by reference to wrong person – whether earlier notice was still valid – whether point should have been taken at all – whether dispensation should be granted

Jastrzembski v Westminster CC [2013] UKUT 0284 (LC) is a service charge appeal, where again one of the grounds of appeal is that the LVT took it upon itself to take a point which had not been raised by the parties, and thus put one of the parties at a disadvantage. The appellant tenant was the long leasehold owner of a flat. He had issued an application to the LVT to determine the reasonableness of an estimated account for future major works. He alleged that a s 20 consultation notice which the council alleged that they had served upon him in 2009 ('the 2009 notice') had not in fact been received by him. Rather than resolve this issue of fact, the LVT decided that the notice was in any event invalid, in that it invited that observations be made to someone (the project manager) who was no longer involved. It went on to decide that a previous consultation notice issued in 2007 ('the 2007 notice') was a perfectly good notice in respect of the works proposed in 2009; and that, if the LVT were wrong on that, it would have granted dispensation pursuant to LTA 1985, s 20ZA. J appealed against the finding that the 2007 notice was a valid notice, and against the finding that dispensation would have been appropriate; the council cross-appealed on the basis of the procedural irregularity in the LVT determining an issue which had not been raised as part of the dispute between the parties, and against the finding that the inclusion of the name of the project manager invalidated the 2009 notice.

Sitting in the Upper Tribunal, HHJ Walden-Smith and Mr Trott re-iterated the stance previously taken by the UT in cases such as *Beitov Properties Ltd v Martin* [2012] UKUT 133 (LC) that the LVT should not take a purely technical point which had not been raised before the tribunal. It accordingly found there to have been a procedural irregularity and allowed the cross-appeal on that point. It further allowed the cross-appeal on the point about the inclusion of the name of the project manager: the legislation was silent as to whom representations had to be made if the consultation process were engaged, and there was no evidence to suggest that representations directed to the address given on the notice would not have reached the Council. On the appeal itself the UT allowed J's appeal on the point about the 2007 notice, holding that it was not still a valid notice for the purpose of the later works; but this did not in the end assist J, as the UT agreed with the LVT that it was appropriate to grant the council a dispensation from complying with this, as there was no evidence that J had suffered any prejudice. The general principles established by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] UKSC 14 were applied on this point.

Damages under HA 1988, ss 27–28 for unlawful eviction – basis of calculation when landlord was letting under a secure tenancy

Loveridge v Lambeth LBC [2013] EWCA Civ 494 raises what Briggs LJ described as 'a short but interesting point of construction of s 28 of the Housing Act 1988'. The respondent was the tenant of a flat of which the appellant local authority. He paid a lengthy visit to Ghana: his failure to inform the council of his protracted absence was a breach of the terms of his tenancy agreement. The council forced entry to the flat (there was a fear that he might have died) and then cleared the flat of his possessions. Just before he returned, they relet the property on an introductory tenancy. The tenant sued Lambeth for unlawful eviction, and claimed statutory damages under HA 1988, ss 27 and 28. By the time the case came to trial, damages for loss of his possessions had been agreed at £9,000, with a further £7,400 as damages for the tenant's actual loss. The difficult issue, however, was whether he had any additional claim for statutory damages for wrongful eviction, under ss 27 and 28. His valuer took as his assumption that the values to be compared under s 28 were the value of the flat subject to a HA 1985 secure tenancy, and its value if sold with vacant possession. This produced a figure for statutory damages of £90,500. The Council, on the other hand, argued that the original value should be taken to be the value of the flat if subject to an assured tenancy. As this would be an attractive purchase for a buy-to-let investor, this would be the same as the market value. The tenant's valuer accepted that, if the Council were correct on the construction point, then this would be the case.

Looking at the existing case law, both sides agreed ([15]–[16]) that, relying on *Tagro v Cafane* [1991] 2 All ER 235, [1991] 1 WLR 378, one had to assume that the sale was to a private investor, difficult as it would be for a local authority to achieve this result. *Melville v Bruton* (1996) 29 HLR 319 (CA)

had confirmed, [17], that one had to calculate statutory damages in accordance with the formula set out in s 28 and this could result in nil damages. Finally, in *Osei-Bonsu v Wandsworth LBC* [1999] 1 All ER 265, [1999] 1 WLR 1011 – a case involving a joint tenant who was wrongfully evicted – it was held that, in assessing his statutory damages, one had to take account of the precarious position of one of two joint tenants. Applying this to the case in question, it had to be accepted, [28], that the tenant's rights in the property as a secure tenant had always been vulnerable to be downgraded to that of an assured tenancy if the council were to sell their reversion. The appeal was therefore allowed, and the tenant was left with his damages of £16,400, calculated as above. As the statutory damages under ss 27 and 28 were calculated to be nil, the court did not have to consider whether the trial judge should have mitigated the damages on account of the tenant's conduct.

(Case note at E.G. 2013, 1325, 107)

Dismantling of steelworks – whether items of heavy plant were fixtures and/or tenant's fixtures – whether requirement for licence to make alterations displaced tenant's right to remove tenant's fixtures

As Morgan J points out in *Peel Land and Property* (*Ports No 3*) *Ltd v TS Sheerness Steel Ltd* [2013] EWHC 1658 (Ch), many of the cases on distinguishing a chattel from a fixture, and a removable (tenant's) fixture from a non-removable one, date from the 19th century or earlier, [3]. The instant case is therefore to be welcomed as a modern case which extensively reviews and affirms the existing law.

The case involved a steelworks demised for a term of 125 years from 1968, and the tenant, T, sought to remove various items (131 were enumerated in the relevant Schedule) of heavy plant ('the plant') which it had installed. L disputed this. T's action took the form of seeking a declaration that it was the owner of the legal and equitable interest in the items, though, as was pointed out by L, the real issue was whether T was entitled to remove them. L claimed that T's covenant not only to erect buildings on the demised land but to equip them as a steelworks meant that, as a matter of commercial reality, the plant had to belong to L. More specifically, there was, in addition, a covenant in the lease against making alterations, and L alleged that this effectively displaced the general rule of law that a tenant might remove fixtures if they were 'tenant's fixtures' (notwithstanding that they remained fixtures for all other legal purposes).

The long and careful judgment of Morgan J repays close reading by anyone faced with a dispute relating to fixtures and fittings, particularly where industrial plant is concerned. Although the findings on the individual items of plant (most of which were determined to be either chattels or tenant's fixtures, and thus removable) are highly fact-specific, the principles which Morgan J applied are of broader import. He endorsed the threefold classification (adopted in *Elitestone Ltd v Morris* [1997] 1 WLR 687 (HL)) of objects brought onto land into (1) chattels, (2) fixtures, and (3) those that

became part and parcel of the land itself (at [39]). Fixtures were then further subdivided, in landlord and tenant law, but not generally, into landlord's fixtures and tenant's fixtures. Morgan J pointed out that the distinction between whether an item is a chattel, or a removable (tenant's) fixture, is sometimes confused. The early law placed great importance on the degree of annexation to determine whether an item was a fixture or not, but the law then evolved a second test, which focussed on the intention of the party who had affixed it. This called into question the result in some of the earlier cases ([40]), but it should always be borne in mind that intention had to objectively ascertained ([40]) from the degree and purpose of the annexation. The judgment therefore very much affirms and explains the existing law.

An aspect of the judgment which may assume wider significance is the way in which Morgan J dealt with the argument that a covenant in the lease against making alterations without the consent of L served to exclude T's right to remove tenant's fixtures (into which sub-class most of the fixtures fell). The right to remove tenant's fixtures was firmly established in the common law, and, whilst it could be overridden by express terms of the lease (e.g. *In re British Red Ash Collieries Ltd* [1920] 1 Ch 326 and *Herbert v British Railways Board*, CA, 15 October 1999, unreported), *Lambourn v McLellan* [1903] 2 Ch 268 at 277 laid down that nothing less than clear words would suffice. The wording of the lease in the instant case was not sufficiently clear to override the common law: [154]–[155]. Nor did the covenant to install fixtures (i.e. to equip the steelworks) prevent T from removing such as were in law tenant's fixtures: *Mowats Ltd v Hudson Bros Ltd* (1911) 105 LT 400 (CA) and *Young v Dalgety plc* [1987] 2 EGLR 116 (CA) ([156]).

(case note at: E.G. 2013, 1328, 81)

Early determination of lease by Tenant's break clause – whether tenant could recover apportioned part of overpaid rent

Marks and Spencer PLC v Paribas Securities Services Trust Co (Jersey) Ltd [2013] EWHC 1279 (Ch) decides whether, when a lease is terminated early by a tenant's break clause, the tenant may then recover an apportioned part of the (basic) rent, insurance rent, car parking rent and service charges. The Claimant was the tenant of four floors of an office building under substantially similar leases. It was entitled to exercise a tenant's break clause to bring the leases to an end on 24 January 2012, and did so by service of an appropriate notice. Recent cases such as *Quirkco Investments Ltd v Aspray Transport Ltd* [2012] L&TR 282, *PCE Investors Ltd v Cancer Research UK* [2012] 2 P&CR 71 and *Canonical UK Ltd v TST Millbank LLC* [2012] EWHC 3710 (Ch) have all stressed that to exercise a break clause a tenant must have paid all rent in full, and this includes rent for the whole of the quarter, if the break date falls within a quarter (it was stated in the instant case that appeals to the Court of Appeal in *PCE* and *Canonical* have been compromised). One might have thought that these decisions would have told against the claimant, but they rested heavily on the principle that, until a lease was finally determined, one could not be sure that it would end on the

break date, so the tenant could not anticipate this and apportion the rent on the assumption that the break notice would be effective. Even if it is accepted that these recent decisions are correct, whether – when there has been an effective break notice – the 'overpaid' rent can be recovered is logically a distinct issue.

The tenant's hand was slightly strengthened here by the presence of the words 'proportionately for any year' in the rent reservation clause of the lease. Morgan J held that the only conclusion one could draw from this would be that, if the lease had been allowed to expire by effluxion of time, then, as the term expired part way through a quarter, the tenant would not have been expected to pay rent beyond the date when the lease expired, and would have been entitled to apportion: [27]. The judge nevertheless held that the lease did not *expressly* give the tenant the right to recover rent which became apparently overpaid if the term were brought to an end early by virtue of the break clause, [29]. The tenant's next submission was that there should be implied into the lease a term that 'overpaid' rent would be refunded if the tenant successfully operated the tenant's break clause. It was accepted that the principles to apply were those formulated by the Privy Council in *A-G of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 and widely applied since by English courts, e.g. in *Crema v Cenkos Securities plc* [2011] 1 WLR 2066 (CA). Morgan J approved ([34]) Lord Hoffman's observation in *Belize Telecom* (at [23]) that the phrase 'necessary to give business efficacy' to a contract could not be detached from the basic process of construing the instrument. Although a term could not (see *Liverpool CC v Irwin* [1977] AC 239) be implied into a contract simply because it might be a reasonable one, the term proposed by the tenant here was one which could be seen as necessary to give business efficacy to the lease ([37]). The tenant was accordingly entitled to a refund of the overpaid rent: [40]. Parallel reasoning was applied to the tenant's claim for a refund of the other charges: [47]– 56]. Morgan J did, however, reject the alternative argument that the tenant was entitled to a refund on the basis of total failure of consideration ([41]–[46]), and accepted, obiter, that *Ellis v Rowbotham* [1900] 1 QB 740 (and the cases that rely on it: [20]) was correctly decided, and thus rejected any suggestion that a tenant who was subjected to forfeiture part way through a rental period would be entitled to a refund ([38]).

The breadth of application of this decision may to some extent be restricted in that a relevant consideration which led Morgan J to decide that a term should be implied was the fact that the lease expressly provided that, on exercising the break clause, the tenant had to pay a sum to the landlord equivalent to one year's rent. "That provision shows that the parties applied their minds to the compensation which the lessor should receive for the fact that after the break date the lessor would have vacant possession rather than in income stream under a continuing lease. That fact makes it unlikely that the parties would have intended that, in addition, the lessor would be entitled to retain the full amount of the quarter's rent paid before the break date." ([35]).

(Case notes at: E.G. 2013, 1323, 75; E.G. 2013, 1324, 93; N.L.J. 2013, 163(7568), 15–16; and Comm. Leases 2013, Jun/Jul, 1949–1954)

Enquiry into homelessness – temporary accommodation provided under HA 1996, s 188(1) – whether council bound after Pinnock to obtain possession order

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. This appeal raises the issue of whether a local authority is bound to seek a possession order against someone to whom it has provided temporary accommodation under s 188(1) of the Housing Act 1996 whilst pursuing further enquiries as their status for homelessness purposes. Although s 3 of the Protection from Eviction Act 1977 imposes a general requirement that a possession order be obtained to evict someone from premises occupied as a dwelling (whether under a tenancy or certain licences), the Court of Appeal had, in *Mohammed v Manek v Royal Borough of Kensington and Chelsea* (1995) 27 HLR 439 construed the expression 'occupied as a dwelling under a licence' in s 3(2B) as not extending to temporary accommodation provided in the circumstances mentioned above. This interpretation was upheld by the majority in *Desnousse v Newham LBC* [2006] EWCA Civ 547, but the question was raised in the instant appeals of whether this construction could withstand the decisions of the Supreme Court in *Manchester CC v Pinnock* [2010] UKSC 45 and *Hounslow LBC v Powell* [2011] UKSC 8.

The unanimous decision of the Court (Moses, Kitchin and Floyd LJJ) (at [64]) was that *Pinnock* did not require that a public authority had always to take proceedings before evicting someone from his home. Giving the leading judgment, Kitchin LJ held that insofar as someone in the applicant's position might need to challenge the legality of the eviction, they had sufficient opportunity to do so in judicial review proceedings ([65]). It was now understood that a court in doing so had the power to assess the proportionality of the measure, and could assess the relevant facts, and so this was sufficient to give effect to an occupier's Article 8 rights. Further, as explained by the ECtHR in *Tysiac v Poland* (2007) 45 EHRR 42 at [115], regard had to be had to the council's decision making process as a whole. Relevant here were factors such as the many opportunities that the applicant would have to engage with the council's processes by which it dealt with those presenting as homeless ([43]), and to require review of them; and, moreover, as in practice 28 days' notice would be given, that would ([42]) if necessary afford sufficient opportunity to challenge the decision by judicial review and secure an interim injunction staying eviction. Further, it was clear ([69]) from cases such as *Tysiac* that, in the field of the provision of social housing the ECtHR would extend to national courts a wide margin of appreciation on how Article 8 rights should be secured. The sheer number of cases where temporary accommodation was provided would mean that it would impose an intolerable burden on local authorities if they had to resort to court proceedings in every case: [70]. Permission to appeal to the Supreme Court was refused.

'FlexiBuy' Scheme – housing association letting at a full market rent – credit of part of rent to deposit if T later exercised option – whether 'deposit incentive' should be credited to T when she fell into arrears – deprivation of possessions and Article 1, Protocol 1 ECHR

Optima Community Association v Ker [2013] EWCA Civ 579 offers an interesting illustration of the difficulties which can result when, with the best intentions, housing associations offer properties on terms which confuse traditional categories of tenure. The typical 'shared ownership lease', although cumbersome, has become familiar, and seems to work reasonably well: the vehicle devised or adopted by the claimant Housing Association here seems to have given rise to confusion.

The background to this is that Optima (O) could obtain a larger social housing grant for properties which were built for rent than for those which were built for shared ownership. The property in question was one of the properties which had been built for shared ownership, but which were slow in selling because of the recession in the property market. If rented at a *social* rent – or if left vacant – they would be a drain on its resources. O therefore got permission from the Homes and Communities Agency to offer it for rental on a 'FlexiBuy' Scheme: this involved renting the property on an assured shorthold tenancy at a *market* rent, coupled with an option to purchase, on the basis that, when the tenant was ready to buy the property (in fact to purchase a share in it under a shared ownership lease), the difference between the market rent actually paid and the social rent which would have been paid would be credited towards the tenant's deposit. This was referred to in the judgment as the 'deposit incentive'.

Ms Ker, the tenant (K), signed a tenancy agreement and an option agreement in February 2009, paying a rent of £700 p.m. Due to the combined effects of a second pregnancy, a car accident which affected her ability to work, and the fact that – unbeknown to O – she was relying on Housing Benefit, which did not in fact cover the rent, K fell into arrears. Eventually O obtained an order for possession, and judgment for over £9,000 in arrears of rent. By the time of the appeal she accepted that she could not afford to rent the property, but appealed against the financial judgment: her counterclaim sought the repayment to her of the deposit incentive which would have been credited to her had she been able to exercise her option to purchase the property.

K firstly alleged that the tenancy agreement was a sham, on the basis that the rent under it was properly the social rent, to which was added a 'mandatory monthly contribution towards a deposit' ([20]). Patten LJ, giving the only reasoned judgment of the Court, had no difficulty in rejecting this argument, [22]. K also raised an issue under Article 8 ECHR, challenging the proportionality of the order for possession. It was argued on her behalf that the case could be distinguished from cases such as *Manchester CC v Pinnock* [2010] UKSC 45 and the cases before and after it, because K lost not only her home, but her accrued rights under the deposit incentive scheme. If these were set

against the arrears of rent, then the arrears would have been much lower. The Court had little difficulty in rejecting any argument based on Article 8 ([30]–[31]). K's arguments also brought in Article 1 Protocol 1, as she was, in effect, arguing that she was being deprived of her possessions i.e. her entitlement to the contributions that she was expecting to be credited towards her eventual deposit. Although the Court accepted that a legitimate expectation of obtaining a property right might be protected under Art 1 Protocol 1 (*JA Pye* (*Oxford*) *Ltd v UK* (2008) 45 EHRR 45 at [61]), it fell to the domestic courts to determine what was property ([36]), and it was impossible to find anything in the tenancy agreement or the option agreement which gave K a proprietary claim to the deposit incentive ([39]). The 'sham' argument came in again at this point, K arguing that the reality of the situation was that the tenancy was for a lower (social) rent, to which was added a compulsory contribution towards a deposit. The Court rejected this argument. There was nothing to suggest that what had been agreed between the parties was different from what had been recorded in the two agreements, and they contained no suggestion that the 'deposit incentive' should be refunded if K could not proceed with a purchase.

One may observe in conclusion that, although the intention of both *Pinnock* and *Hounslow LBC v Powell* [2011] UKSC 8 was to set a high threshold before claims under the ECHR would affect property rights, this does not seem to have discouraged here the attempted deployment of some somewhat tenuous arguments based on alleged infringement of the Convention.

Ingress of water and sewage from retained part of building – whether landlord liable in tort or for breach of an implied covenant to repair – treatment at final hearing of reserved costs

Gavin and another v Community Housing Association Ltd [2013] EWCA Civ 580 raises some interrelated issues on repairing covenants, damage to the demised premises because of leaks from the remainder of the building, and forfeiture. In spite of its name the case involves commercial leases, as the demised premises consisted of a gallery on the ground floor of a building. The leases to Gavin (the T) comprised the ground floor and basement, and included the internal plasterwork, but not the upper floors, which comprised flats let by CHAL as L, and not the soil pipes on the rear wall serving the upper floors. T (the claimants, now the appellants) covenanted to put and keep the demised premises in good and substantial repair, decoration and condition, but there was no corresponding covenant by L in respect of the upper parts of the building. L did, however covenant to insure the whole of the building, and to lay out insurance moneys on rebuilding, etc.

Between April 2004 and June 2005 the interior of the demised premises was damaged by the ingress of water on at least four occasions and by ingress of sewage on two. Insurance payments were made to T. T failed to pay the rent in June 2008, and T responded to a notice threatening forfeiture by claiming that they had no liability to pay the rent because they had paid it when they

need not have done, owing to the usual form of cesser of rent clause, and they claimed to set off the overpayment against the rent falling due in 2008. L thereupon re-entered to effect a forfeiture, but T obtained an ex parte injunction requiring L to restore them to possession, where they remained until trial. (HHJ Cowell eventually held that there was never any occasion when the premises were wholly unfit for use, so as to trigger the cesser clause). T's claim for damages included loss of profits etc which brought their claim over £2m. Any such claim would have to lie either in contract, on the basis of an implied obligation to keep the retained parts in repair or as a common law duty, or in tort, as a duty cast upon an adjoining occupier to remedy any defect which was capable of causing damage to the demised premises [15]. The judge accepted that there was such a duty, relying on *Hargroves, Aronson & Co v Hartopp* [1905] 1 KB 472 (approved by the CA in *Cockburn v Smith* [1924] 2 KB 119), but he also held that it was not an absolute duty, but one, absent negligence, arising only once L was aware of damage. L was therefore held liable only for one of the ingresses, and damages of £100 awarded.

T's appeal was presented in the sort of flexible format which is becoming increasingly common: although they acted in person, their application for leave relied on grounds settled by leading Counsel, who represented them at the application but not at the appeal. The Court of Appeal nevertheless was clearly assisted by the written grounds and its judgment addressed them. Patten LJ preferred to characterise the obligation imposed on L in respect of the reserved part of the building as an implied term, rather than an obligation in tort, though he took the view that whichever it was was not likely to affect the eventual result, [31]. Further, the obligation imposed on L relied on negligence and notice (*Gordon v Selico Ltd* [1986] 1 EGLR 71): L's liability depended upon having notice of disrepair, and was not a strict one: [34], [35]. The Court of Appeal was unwilling to imply repairing obligations. Although T's leases included internal repairing and decorating obligations, the court was not prepared to imply a covenant on the part of L in respect of the reserved property: *Barrett v Lounova* [1990] 1 QB 348 was once again distinguished, [38]. The repair of the structure of the building was catered for in the lease by the provision in the insurance clause for re-instatement ([42]) – which seems a somewhat odd conclusion – and so there was no need to imply any further provisions in order to give the lease business efficacy. T therefore failed on all their grounds of appeal, and, indeed, a cross-appeal by L succeeded, as to the £100 damages awarded in the County Court ([44]).

T, acting in person, also attempted to allege liability under the Rule in *Rylands v Fletcher* – which was not a ground that Counsel had canvassed – but Patten LJ reiterated the essentially restrictive criteria for this liability confirmed in *Transco plc v Stockport MBC* [2003] UKHL 61, stressing that it involved keeping inherently dangerous things posing an exceptionally high risk of damage if they escaped. Water and soil pipes and their contents were simply not in this category ([25]–[26]).

T's challenge to the judge for not having considered whether the premises were partially "unfit for occupation or use" was rejected on the basis that T

had argued the case at the trial on the basis that the premises were wholly unfit, and both experts were agreed that this was not the case, [46].

The case clearly ended up an expensive one for T in terms of costs, as, although they had succeeded on certain of their earlier applications (e g to be restored to the property), and those costs had been reserved, at the trial HHJ Cowell had ordered them to be paid by T. The Court of Appeal held that this fell within his discretion; it would have been open to the application judge to give them to T at the time, and HHJ Cowell was clearly unimpressed with the way that T had framed their claims so broadly and at one time put forward what appeared to be a highly inflated claim ([47]–[51]).

Interpretation of ground rent subject to escalator clause – whether clause imposed a 'service charge'

The present editor suggested in Bulletin No 133 that *Arnold v Britton and others* (there reported as [2012] EWHC 3451 (Ch)) offered a reminder to solicitors to check figures with a calculator before agreeing to any escalator clause in a lease. The decision of the Court of Appeal ([2013] EWCA Civ 902) to uphold the decision serves to reinforce that advice.

The leases were of chalets on a leisure park at Oxwich, in the Gower, near Swansea. There were in fact five slightly different versions of the wording in question, though in essence the issues that they raised were the same. The leases, which were first granted in 1977, demised the chalets for terms of 99 years from 1974. Besides the ground rent, the leases required the lessees to pay a 'service charge' of £90 p a in respect of various services. The leases further provided, however, that the charge should rise 'by Ten Pounds per Hundred' for every subsequent year. The claimant lessor sought a declaration that this provided for a 10% uplift in the service charge each year. This would result in the current service charge amounting to over £3,000 p.a. per chalet, which would rise to £1,025,004 in the final year, 2072–73. Although no evidence was admitted as to the lessor's expenditure, it was obvious that the charges already exceeded the lessor's expenses of providing the services.

In the Cardiff County Court, HHJ Jarman QC found in favour of the lessees, holding that they were liable to pay only their proportionate share of the lessor's actual expenditure, the sum of £90 and the 10% uplift representing the maximum that a lessee could be required to pay. That charge was accordingly a 'service charge' within the meaning of LTA 1985, s 18(1). Hearing the appeal in the Cardiff District Registry, Morgan J reached a contrary decision. The leaseholders appealed to the Court of Appeal: a minor point of relevance to legal devolution is that the case was heard in Cardiff, before a panel of lords justices with Welsh connections (Richards, Davis, and Lloyd Jones, LJJ). The judgment of Davis LJ (with which the others agreed) is relatively brief, as he was in agreement with Morgan J's reasoning. The leading cases bring out the potential difference between cases of ambiguity and mistake ([34]–[35]) but essentially here the leaseholders were seeking the re-writing of a bargain that proved to be a bad one for them.

As had Morgan J, Davis LJ rejected (at [39]) any supposed special principle that a service charge should be construed restrictively so as to ensure that the landlord could make a profit. His words do, however, need to be examined carefully. He goes on to suggest that as most modern service charges are designed not to provide the landlord with a profit (or a loss), any wording which points to that conclusion would need to be carefully examined to ascertain whether that is in fact what the words mean. Having decided that it was likely that the original parties were opting for a fixed service charge (plus an 'escalator') rather than a variable one, it was likely, at the end of the day, that that formula would favour either the landlord or the leaseholders, and the court could not re-write that bargain.

Landlord and Tenant Act 1954 – meaning of 'notice given under s 24(2)' – whether notice complied – whether break notice thereby invalidated

Siemens Hearing Instruments Ltd v Friends Life Ltd [2013] Lexis Citation 52l, [2013] All ER (D) 188 (Jul) raises 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 LTA 1954, s 26(2), a course of action which might be attractive in a falling market. The relevant clause of a lease required T, when serving a break notice, *to state that it was being given under LTA 1954, s 24(2)*. 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: one of its arguments was that s 24(2) would be relevant only to a tenant in occupation, and so T who here was out of occupation could not serve a valid break notice. Unsurprisingly, this argument was rejected. Mr N Strauss QC, however, rejected (at [18]) 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 sub-section. T's break notice did not therefore ([21]) comply with the relevant clause, but, following a detailed consideration of the cases on mistakes in notices, he decided that this did not serve to invalidate the notice. 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.

Landlord had entered into a long-term agreement prior to the grant of first lease in block – whether dispensation from LTA 1985, s 20 requirement to consult should have been obtained – relevance of Regulations

BDW Trading Ltd v South Anglia Housing Ltd [2013] EWHC 2169 (Ch) is a surprising decision. The claimant had, when the freeholder, developed various blocks of flats, and was now the sub-lessor to the defendant following a

sale and lease-back. Before any leases were granted the claimant had entered into a long term (25 year) agreement for the supply electricity, and of hot water for domestic and space heating purposes, to the individual flats in the development. The reference in Regulation 3(1)(d) of the Service Charges (Consultation Requirements) (England) Regulations 2003 to certain such long term agreements – those entered into for not exceeding five years , when there are no tenants of the premises – being exempted from the consultation requirements of LTA 1985, s 20 might lead one to expect that agreements entered into when there were no tenants, but which *were* intended to run for more than 5 years, would fall within the scope of s 20. The claimant nevertheless argued that any agreement that was entered into when there were no tenants lay outside the scope of s.20, and succeeded before Mr N Strauss QC (sitting as a Deputy Judge of the Chancery Division).

The primary issue ([9]) was whether 'the landlord' in the definition of 'qualifying long term agreement' in s 20ZA could encompass someone who at a later time became a landlord. The judge observed that terms such as 'landlord', 'tenant', 'lease' and 'tenancy' were defined in ss 30 and 36 of the LTA 1985 in conventional terms, with no hint that any extended meaning was intended. Unlike in, for example, HAA 1985, s 107B, there was no reference to 'prospective landlords'. When first enacted, the legislation on service charges covered only building works, not long term contracts, so there would have been no point in including an extended definition. The contrary argument was that the restricted meaning would leave service charge payers without any protection. The judge did not accept this, pointing out that (a) their pre-contract enquiries would reveal that there was a long term agreement, and with that knowledge they could decide whether they wished to proceed or not; and (b) they would not be entirely without redress, as expenditure would still, under s 19, have to be reasonably incurred. For those readers who are wondering how, on the defendant's case, consultation would take place when there were, ex hypothesi, no tenants with whom to consult, its argument assumed that every long-term agreement entered into for more than five years when there were no tenants would require an application to the LVT to secure a dispensation: in effect, any long-term agreement would require the sanction of the tribunal.

The decision is an interesting and unusual one, is that it offers a comparatively rare example where the draftsman of the Regulations has, in effect, been held to have misunderstood the scope of the principal Act. The judge held that whilst both the Regulations and Government Consultation that preceded them were admissible in evidence ([22]), they did not have any persuasive power as an aid to interpretation of the principal Act, and did not dislodge the clear meaning of s 20ZA ([26]).

Leasehold Reform Act 1967 – whether a shop with a flat over it, but no internal connection, was a 'house' – whether tenant could rely on alterations made in breach of a covenant in the lease

Henley v Cohen [2013] EWCA Civ 480 is the first reported case in the Court of Appeal to apply the revised test of what is a 'house' which was formulated in *Day v Hosebay* [2012] UKSC 41. It also decides (or rather expresses a strong *obiter* view on) what would appear to be a novel point under the Leasehold Reform Act 1967: whether a tenant can take advantage of that Act by alterations which are made in breach of the lease.

The premises which were the subject matter of the lease and of the enfranchisement dispute comprised a ground floor shop in a shopping parade, with a first floor above that had been adapted as living accommodation. There was, and never had been any internal connection between the ground and first floors, and access to the first floor had been via the first floor of the adjacent premises: it had originally been used for non-residential purposes in conjunction with the adjacent premises. Firstly the internal access from the adjacent premises had been bricked up, so that an external iron fire escape staircase became the sole access to the first floor; the first floor was then subdivided with internal partitions so as to form a self-contained flat. The landlord had refused consent to these works but the tenants had proceeded regardless. The judge in the County Court had perhaps unsurprisingly held that the tenants were not entitled to enfranchise, though his decision predated the decision of the Supreme Court in *Day v Hosebay*.

The tenants appealed on three grounds, which were handled with commendable clarity by the Court of Appeal (Mummery, Hallett and Leveson LJJ). The first issue (on the assumption that the alterations were lawful) was whether the premises were "a house reasonably so called". The appellant tenants relied on *Tandon v Trustees of Spurgeon's Homes* [1982] AC 755, as the leading case on mixed-use premises, and argued that *Hosebay* had not cast any doubt on that decision. Mummery LJ upheld the trial judge on this issue. He had applied the right tests. The case was clearly distinguishable from *Tandon* in that there was no internal connection between the ground and first floors, and the first floor had never been adapted for living in until the recent conversion: indeed, it had never been occupied with the ground floor. The history of the building could not be ignored ([53] – [55]).

The second issue was whether the alterations to the premises were a breach of the lease. This arose because there was no covenant against making alterations as such, but a covenant against altering the 'plan or elevation or architectural design' of the premises. The alteration of the internal layout inherent in the conversion works was held to be altering the 'plan' [56].

Having decided that the premises were not a "house, reasonably so called" even if the alterations had been legally carried out, the Court did not, strictly speaking, have to decide the third issue, ie what the Court referred to as the "disentitlement point": whether the tenants could rely on unauthorised

conversion works to assert that part of the premises had been "adapted for living in". Mummery LJ nevertheless, as the point had been fully argued, expressed a view on this, stating that it could not have been intended that a tenant should be able to take advantage of the LRA 1967 by virtue of his own illegal act [61]. This point of law is not discussed in the principal work, and thus may well be a novel one: but the view expressed by the Court is hardly a surprising one.

(One may note in passing that HHJ Cowell in the County Court had also held that the landlord had not withheld consent to the alterations unreasonably when he had done so in order to prevent the premises from falling within the scope of the LRA 1967. Although leave to appeal this point had been refused, the Court of Appeal appears to have implicitly accepted the correctness of this view).

(Noted in Sol Jo, 2013, 157 (19), 5; and May 7, 2013 (Online edition); and in E.G. 2013, 1322, 91)

Lessor's failure to consult under LTA 1985, s 20 – effect on recoverability of service charge – working out of order including order as to costs

Daejan Investments Ltd v Benson [2013] UKSC 54 is a supplemental judgment of the Supreme Court (following written representations) dealing with issues as to costs and the precise wording of the Order, arising from [2013] UKSC 14 (noted in Bulletin No 134). Although a decision as to costs would not generally be of wider interest, it is noted here, for, as the Supreme Court acknowledged, its principles might well be relied upon in future cases where a landlord seeks a dispensation. Readers will recall that part of the reasoning of the Supreme Court was that, as a condition of granting dispensation from complying with LTA 1985, s 20, an LVT (now the FTT) might well wish to impose a condition that the landlord should pay the tenants' legal costs incurred in connection with the landlord's application: [59]. Applying that principle here, where the tenants had won at the earlier hearings but had, at the end of the day, lost, was clearly going to raise some difficult issues. Certain issues on costs were not in dispute: even so, there were eight in contention. Lord Neuberger again gave the judgment of the Court, and on this occasion the other justices all concurred with him. His rulings were:

(1) the respondents were entitled to their costs in the LVT insofar as they were incurred 'in reasonably investigating and establishing non- compliance with the Regulations, investigating or seeking to establish prejudice, and investigating and challenging [Daejan's] application for dispensation'. These should not be limited to those incurred after Daejan's application for a dispensation, and could include those incurred in connection with an earlier determination: [8] (The italicised words were the formulation preferred by the respondents).

(2) on the question of costs incurred in the UT, the Court of Appeal and Supreme Court but falling within the scope of the words italicised above, the respondents sought to include those also within their costs.

As, however, the respondents had lost, it was not appropriate to make an order which was more favourable to them than 'no order as to costs' ([12]). (It will be recalled that Daejan was allowed to appeal only on condition that it did not seek costs from the respondents in either the Court of Appeal or the Supreme Court: as a large institutional landlord it clearly had an incentive to secure a precedent in its favour).

(3) although the result of (2) would be that Daejan would be entitled to recover any costs which it had paid to the respondents in respect of the UT or CA hearings, it was right for a stay to be imposed on any order for repayment, while the parties await the decision of the LVT on the sums that Daejan might be required to repay under (1), so that the liabilities could be set off against one another ([16]).

(4) the parties agreed that Daejan ought, as a condition of the dispensation, to be barred from including its own legal costs in the service charges: the Supreme Court rejected both parties' suggested wording here, and imposed its own ([17]).

(5) in view of (4) it might be thought surprising that the Supreme Court should be invited by the respondents to make an order under s 20C LTA 1985, but it was, and it did so, on the basis that (4) was merely a condition imposed as a term of granting a dispensation, and in theory Daejan might not take up that dispensation ([18]).

(6) and (7) involved when the dispensation should take effect, as that would affect the interest payable by the respondents on late payments of service charge. The Supreme Court here ruled that the dispensation would take effect only once all conditions had been satisfied, and that contractual interest under the respondents' leases would therefore begun to run 14 days thereafter ([24]).

(8) The parties disagreed as to whether the dispensation issue should be remitted to the same or a differently constituted LVT. The Court took the view that it could be, but need not be, the same panel. As the original panel had been reversed on a point of law, there could be no doubting its ability to determine the necessary issues; as its members were familiar with the issues, there might be a saving of time and costs; but it might in practice be difficult to reconvene the same panel as in 2007 and 2008 ([26]).

Disputes involving service charges can raise some complex issues as to costs, as is shown by the need for LTA 1985, s 20C and some of the difficult decisions on it. Lord Neuberger's careful supplemental judgment offers useful guidance on the principles to be applied in any case where there is a dispute as to the terms upon which a dispensation under s 20(1)(b) should be granted.

Liability of surety under lease – whether discharged by variation – principles to be applied

Topland Portfolio No 1 Ltd v Smiths News Trading Ltd [2013] EWHC 1445 (Ch) represents a challenge by the defendant surety, SNT, to the rule

established in *Holme v Brunskill* (1877–78) 2 QBD 495 that a variation of the lease without the consent of a surety will automatically release the surety from liability. Here a lease had been granted in 1981 and, following the dissolution of the tenant in 2012, the landlord TP had attempted to recover the arrears from SNT, and to force them to take a new lease for the remainder of the term, in accordance with an express provision in the lease; or alternatively to pay rent for 6 months, or until the premises were relet, whichever might be the less. TP as surety resisted on the basis of a variation, namely a 'Licence for Alterations' in 1987 which permitted the then tenant to execute works of alteration and extension to the premises. It argued that the rule was a strict one, and applied unless it was self-evident that the variation was insubstantial or could not be prejudicial to the surety, [21]. As the extension formed part of the demised premises, the repairing, etc., covenants would apply to them, thus enlarging the surety's obligations. The landlord countered this with detailed arguments that the rule should not apply, which in summary were that the 1987 Licence should not be seen as a variation but as a concession given notwithstanding the lease, [23], that the original lease always envisaged a degree of 'flexibility', [25], and that, as they were contained in the licence, they did not impose a detriment under the rule in *Holme v Brunskill*, [30].

Ms Alison Foster, QC, sitting as a Deputy Judge of the Chancery Division, did not accept the landlord's arguments. The Licence amounted to a permission to carry out major works which self-evidently affected the surety's obligations ([40]), and discharged them entirely (and did not merely prevent them from being enlarged: [41]). A summary of the law at 3–33 in the 4th Edition of *Dilapidations, the Modern Law in Practice*, (Dowding & Ors) was approved.

(case note at: E.G. 2013, 1328, 83; and Comm. Leases 2013, Jun/Jul, 1943–1947)

Parking scheme made under power in lease to make regulations– whether lawfully made – whether tenant estopped by concession made in previous action

Moorings (*Bournemouth*) *Ltd v McNeill* [2013] UKUT 243 (LC) raises a short but interesting point on leasehold administration charges that may perhaps be of wider relevance. L was the residents' management company and freeholder and, because of parking problems, had had to initiate a new parking scheme. T's vehicle was clamped and he sued in the County Court to recover the release fee. At a directions hearing he conceded the legality of the scheme introduced by L, and confined his claim to its application in his case. He thereafter discontinued his claim. L applied to the LVT for a declaration under CLRA 2002, s 168 that T was in breach of covenant in order to be able to charge him with the legal and managing agents' costs incurred in defending his county court claim, so that those costs would not fall on the service charge payers generally.

HHJ Walden-Smith in the Upper Tribunal held that the LVT was wrong to hold that T was not estopped from challenging the legitimacy of the scheme before the tribunal: he was so estopped, due to his concession made before the county court. The judge further held that, if it had been open to T to challenge the legitimacy of the scheme, the new parking scheme was reasonable, did not interfere with access across the estate, and therefore was a permissible regulation made for the good management of the estate.

Participation Notice in respect of Right To Manage – whether one duly served – whether process invalidated

Avon Freeholds Ltd v Regent Court RTM Co Ltd [2013] UKUT 0213 (LC) offers guidance on the consequences if the notice requirements of ss 78 and 111 of the Right To Manage provisions of the CLRA 2002 are not strictly complied with. The respondent RTM company had purported to give notice inviting participation, pursuant to s 78 of the Act, to all qualifying tenants who were not members of the company. The appellant freeholder gave a counter-notice to this, alleging that the notice had given insufficient time for such tenants to respond. The RTM company accepted this, and served a second notice. The appellant freeholder thereupon opposed the RTM claim before the LVT, on the grounds that (1) the second notice was invalid, as it was served at a time when the first claim notice remained in force and (2) not all non-participating qualifying tenants had been served. The LVT found against the freeholder on these issues, and its appeal to the Upper Tribunal raised the issues of (1) whether the admitted failure on the part of the RTM company to prove service of the notice of invitation to participate on the non-resident joint owners of one of the flats invalidated the right to manage process and (2) whether the LVT was right to hold that the existence of the earlier notice did not render the second notice invalid and ineffective.

On the first ground of appeal, the Upper Tribunal (Sir Keith Lindblom, P) conducted an extensive review of the case law, and followed the decision of former President Sir George Bartlett in *Sinclair Gardens Investments* (*Kensington*) *Ltd v Oak Investments RTM Co. Ltd* (LRX/52/2004), in which he had held that the tribunal had to have regard to whether the qualifying tenant had in practice been aware of the procedures, whether there had been genuine inadvertence, and whether the landlord had been prejudiced ([32] of the instant case). The facts of the present appeal are in fact a salutary reminder that, if a statute contains provisions which, in effect, allow service to be deemed, solicitors 'make a rod for their own back' if they apply what would appear to be a more commonsense solution. It would seem that the directors of the RTM Company were well aware that the flat in question was empty, and, not having a forwarding address for the two joint tenants, they served them at alternative addresses ie the addresses recorded for them in the proprietorship register at HM Land Registry. They had only certificates of posting, which it was accepted did not prove service. In fact, as the President pointed out, the terms of CLRA 2002, s 111(5) are quite unequivocal, and service at the flat address is deemed to be good service, unless the tenant has, under s 111(4), notified the RTM Company that he wishes to be served

elsewhere. The tenants had not done this, but the RTM had nevertheless followed what appeared to be the sensible course, instead of observing s 111(5) to the letter. (The tribunal rejected the argument that the entry of another address at the Land Registry could be taken as notification of a different address). The approach of the President was 'to consider whether the statutory provisions have been substantially complied with, and whether such prejudice has been caused as to undermine the right to manage process as a whole' ([39]). Applying these principles to the facts, there had clearly been substantial compliance here (the owners of 40 out of 41 flats were either participants or had been invited to participate); although the RTM Company had not taken advantage of s 111(5), it had made an attempt at service ([50]), and there was nothing to show that the notice was any more likely to have come to the tenants' attention if they had effected service at the flat. The tenants who had not been served were non-residents who appeared to have taken no interest in the management of the block, and it could not be said that they were significantly prejudiced. Further, the appeal was being mounted by the landlord, and the primary focus of the statutory provisions as to participation notices was clearly to protect other tenants rather than landlords ([53]). The appeal on this ground failed.

On the second ground – that the existence of the first notice rendered the second notice ineffective – the President followed *Sinclair Gardens Investments* (*Kensington*) *Ltd. v Poets Chase Freehold Co. Ltd* [2007] EWHC 1776 (Ch) and *Alleyn Court RTM Co. Ltd. v Abou-Hamdan* [2012] UKUT 74 (LC). The first notice was clearly invalid, so it could not be taken as preventing the service of a second notice. Another decision of Mr George Bartlett QC, P, in *Plintal SA v 36–48A Edgwood Drive Co Ltd* (LRX/16/2007), which suggested that an invalid notice could not be ignored, was held not to be inconsistent with the other cases: it had decided that an invalid notice could not be treated as though for all purposes it had not existed, and its scope was no wider than that.

Possession Order on Grounds 12 and 14 – neighbours in fear of tenant – whether admitting anonymous evidence under Civil Evidence Act 1995 was a breach of Art 6 ECHR

Incommunities Ltd v Boyd [2013] EWCA Civ 756 is a useful example of the application of the law on the admittance of hearsay evidence, though it would appear not to take the law any further than the Court of Appeal had held previously in *Moat Housing Group v Harris* [2005] EWCA Civ 287, [2006] QB 606 and *Solon South West Housing Association Limited v James* [2004] EWCA Civ1847. The defendant tenant T – the appellant in the Court of Appeal – had been made subject to a suspended possession order on the grounds of substantial rent arrears (Ground 10 in Sch 2 Part II to the HA 1988), breach of tenancy obligations (Ground 12) and causing nuisance or annoyance to neighbours (Ground 14). There was no appeal on the first Ground, but the making out of the other two grounds depended largely on hearsay evidence: evidence which had been given anonymously to a housing

officer by neighbours who claimed to be afraid of T. The evidence included allegations of nuisance and disturbance from callers in the early hours of the morning, intimidatory begging, and bizarre behaviour which appeared to be drug-related, extending over a period of 11 months. T had convictions for offences involving violence which lent credibility to the neighbours' fears. Counsel for T alleged that admitting anonymous evidence in this way under the Civil Evidence Act 1995 was a breach of Article 6 ECHR, and that the Recorder at the trial had failed to have proper regard for the considerations identified in s 4 of the Act (which would be necessary in order to render the Act compliant with Art 6). The Court of Appeal (Tomlinson, Longmore and Lewison LJJ) rejected these arguments, Tomlinson LJ holding that these questions had been raised at the trial, the Recorder had clearly applied the proper tests and come to a reasoned conclusion, and the *Moat Housing* and *Solon* cases were instances where the Court of Appeal had previously admitted anonymous evidence in possession cases. The appeal was accordingly dismissed.

Private possession action against squatters/trespassers – whether Art 8 ECHR applied – proportionality of making of order

Although the case does not involve a tenancy at all, the decision in *Malik v Fassenfelt* (*since deceased*)*, McGahan and persons unknown* [2013] EWCA Civ 798 has been long awaited in the expectation that it would offer guidance on the contentious issue of whether Article 8 ECHR has horizontal applicability: in other words, whether courts must have regard to the Article in determining possession claims by private landlords against their tenants and others. The judgments of the Court of Appeal (Sir Alan Ward, Lloyd LJ and Lord Toulson) offer interesting and competing analyses, but definitive guidance remains elusive.

The factual background to the case revolves around the 'Grow Heathrow' movement. Some land near Heathrow Airport which was owned by the claimant M had been unused since various unlawful uses (dumping of cars and fly tipping) had ceased following enforcement notices. M's longer term plans for the land were blighted by possible plans for the enlargement of the airport, and the appellants entered the land as trespassers. They restored it to its former attractiveness as a market garden, complete with glass houses. M took possession proceedings in the Central London CC, which they defended on the basis of, inter alia, an implied licence and the protection of Article 8. The appeal was solely on the Article 8 ground. In a long and careful reserved judgment, HHJ Karen Walden-Smith held that Article 8 did apply, but, applying the test of proportionality, decided that notwithstanding the work that the (present) appellants had put into improving the property, an immediate possession order was called for. She held that s 89 HA 1980 did not apply to trespassers, and so "the court has no jurisdiction to extend time for possession as a result of 'exceptional hardship'". It was unclear whether she relied for this upon *McPhail v Persons Unknown* [1973] Ch 447, which of

course decided that an immediate possession order had to be made against squatters and the courts (at least then) had no power of suspension.

There is an air of unreality about the judgments, as technically this was an appeal by the squatters against the judge's refusal to suspend the possession. On this the three Lords Justices (or, more accurately, one Lord Justice, a retired Lord Justice and a Lord Justice who has since been elevated to the Supreme Court) were all agreed that the judge's decision on this could not be faulted. The difficulty, however, is that, whilst the judge at first instance had granted permission for an appeal on her finding that Article 8 did apply, the claimant did not wish to prolong the appeal by serving a respondent's notice challenging that finding. The appeal therefore had to proceed on the basis that that aspect of her decision was correct, and argument was confined to the manner in which she exercised her discretion on the proportionality issue. Sir Alan Ward, sitting on his final appeal, took the opportunity to conduct an extensive review of the now-familiar case law on *public* sector tenancies, and expressed the view (at [28]) – which has perforce to be obiter – that Article 8 would apply to a possession claim by a private landlord, insofar as the court, as a public authority, would have to be approached in a similar way to a possession claim by a local authority, stressing nevertheless that 'it is difficult to imagine circumstances which would give the defendant an unlimited and unconditional right to remain'. Although Sir Alan delivered what is very much the leading judgment, the brief judgments of Lloyd LJ and Lord Toulson concur in his decision on what is technically the issue before the court (i.e. whether the possession claim should be remitted for a judge to reconsider whether it should be suspended) but express no view on what is the broader and more important issue i.e. whether HHJ Walden-Smith was correct to admit the applicability of Article 8 at all. Lord Toulson expressly reserves his opinion on the issue to a case which directly raises the issue (at [47]), and Lloyd LJ says that it must await another day (at [50]). Both agree that *McPhail v Persons Unknown* should not be treated as having ceased to represent the law applicable to privately-owned land. Sir Alan Ward concludes ([40]) with a panegyric on the virtues of oral argument, and the British way of doing justice. He indicates regret at not being able to enjoy the application of Article 8. Others may question whether it was useful or wise for him to bequeath the legacy of a lengthy analysis of an issue which was doomed, in the instant appeal, to be obiter. It nevertheless offers a rehearsal of a discussion which will surely have to come.

Respect for home and private life – licensee suffering from Obsessive Compulsive Disorder – whether felling of tree might infringe his Art 8 ECHR rights

Lane v Royal Borough of Kensington and Chelsea LBC [2013] EWHC 1320 (QB) raises an unusual issue on the Human Rights Act. The appellant was occupying a property owned by the Council, apparently without paying any rent: his late mother had rented the property as a studio, and she had been granted a personal licence permitting residential occupation. He suffered from a severe obsessive compulsive disorder (OCD). A Tree of Heaven in the

back garden of the property was allegedly causing damage to a boundary wall between the property and the next door property and possibly also was interfering with the water services to the neighbouring property. The appellant's OCD made him particularly resistant to any changes being made to what was his life-long home, and he appeared to have developed something of a fixation about the tree. The Council permitted the neighbour to enter the appellant's property and to fell the tree, but the appellant commenced proceedings for an injunction restraining the Council and the neighbour from felling it. On preliminary issues, HHJ Collender in the County Court held that the appellant did not have any proprietary interest in the property, and that he did not have any claim under the Equality Act 2010 arising from his disability as he was not a lawful occupier. He further held that the Council's action was not an interference with his rights under Article 8 of the ECHR. The appeal was against only this last determination. Sir Raymond Jack, sitting as a Deputy Judge of the QBD, allowed the appeal as it was clear that the Judge in the County Court had been referred by Counsel only to *Harrow LBC v Qazi* [2003] UKHL 43 and had not had his attention drawn to subsequent case law, in particular *Manchester CC v Pinnock* [2010] UKSC 45, which made it clear that the question of whether a property constituted a person's home had to be determined even if the person in question had no proprietary right to occupy it, and the proportionality of making any possession order would have to be assessed. Although *Hounslow LBC v Powell* [2011] UKSC 8 recommended a summary resolution of the question of whether the person affected had crossed the high threshold of putting forward an argument that was seriously arguable, Sir Raymond Jack, sitting as an appeal court, did not feel able to embark upon the summary examination which *Pinnock* envisaged, especially as he had not been asked to consider the medical evidence, and remitted the Article 8 issue to the County Court to be considered afresh. Although the reported cases had dealt with possession proceedings, which clearly amounted to an interference with a person's home, the less drastic step of the felling of the tree might amount to such, given the appellant's OCD and the potentially severe effect that this might have on his health. *Pretty v UK* [2002] 2 FCR 97 had confirmed that the concept of 'private life' was broad and not susceptible to exhaustive definition [17].

It ought to be noted in passing that the appellant had consented to the substantial lopping of the tree, and it had been left as little more than a trunk, but the Council's permission to fell it still stood.

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 [2013] EWHC 948 (Ch) raises an apparently novel point on the operation of Schemes of

Management under Leasehold Reform Act 1967, s 19. 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 – in effect their immediate neighbours – 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 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, and matters such as the claimants were raising were matters for the local planning authority. They could not fall within the Trust's purview, as whether matters such as the effect of disrupting ground water could be considered at all would depend on whether the nature of the proposed works was such as to 'trigger' the requirement for consent. Henderson J rejected, [40], this argument, holding that the scope of the Scheme was not as narrow as the Trust contended, and that 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'.

On the second preliminary point, Henderson J found in favour of the Trust, and therefore dismissed the claimant's application and gave summary judgment for the Trust. In determining the freehold owners' application, the Trust could not be constrained by considerations as to whether they might be putting themselves in breach of the covenant for quiet enjoyment contained in leases of neighbouring properties: the parties to the lease must be taken to have envisaged that the covenant for quiet enjoyment 'could not be relied upon so as to prevent or hinder the proper exercise of public duties in the public interest by a landlord in whom the freehold reversion might subsequently become vested' (see [62]).

(case noted at: E.G. 2013, 1326, 100–101)

Section 168 of Commonhold and Leasehold Reform Act 2002 – whether County Court can make a declaration that a tenant is in breach of covenant

Cussens v Realreed Ltd [2013] EWHC 1229 (QB) is a case on an interesting point on the relationship between the LVT (now the First-tier Tribunal) and

the County Court when dealing with forfeitures which fall within the restrictions imposed by s 168 of the Commonhold and Leasehold Reform Act 2002. This section requires that, with long residential leases, before a landlord may serve a notice under LPA 1925, s 146, either the breach must have been admitted, or a court, an LVT or an arbitral tribunal, must have determined that there has been such a breach. Section 168(4) of CLRA 2002 permits a landlord to make an application to the LVT (now the FTT) for a determination that there has been a breach. The upshot of all this is to prescribe a most cumbersome procedure if a landlord wishes to forfeit a lease.

In the instant case, the landlord sought to forfeit two leases on the basis that the flats had been used for prostitution by the defendant's sub-tenants. The relevant covenants were worded in such a way that the sub-tenants' breach also put the defendant in breach. The landlord commenced proceedings for a declaration that the tenant was in breach, doing so in the County Court probably because of the cap on costs imposed in the LVT. The tenant defended but lost those proceedings, but then appealed to the QBD, alleging that the County Court did not have jurisdiction to make its declaration. The landlord argued that s 168(4) was permissive only, and did not deprive the county court of its power to grant an equivalent declaration. Andrew Smith J. disagreed on this point, holding that the county court could exercise only those jurisdictions which had been bestowed on it by statute, and it could not therefore grant a declaration under s 168(4). He distinguished the instant case from *Phillips v Francis* [2010] 2 EGLR 31, which concerned the power to make a declaration under LTA 1985, s 27A, as the latter case involved the High Court, which has an inherent jurisdiction unless statute provides otherwise [10]. The reference in s 168(2)(c) to a court having made a determination referred to cases where the issue of whether there was a breach had already been determined by e g a county court on a claim for damages, or on a claim for an injunction. Andrew Smith J, however, held that the county court here had had jurisdiction to make the determination, on the basis that the county court had jurisdiction to determine cases founded on contract, and this applied also to actions relying on LPA 1925, ss 78, 79. (The judge relied on cases such as *Hutchings v Islington LBC* [1998] 1 WLR 1629, *Great Yarmouth Corpn v Gibson* [1956] 1 QB 573 and *Agobzo v Bristol CC* [1999] 1 WLR 1971). The landlord's applications for 'declarations' would, if granted, give it the determinations that it was seeking.

HHJ Saggerson in the Central London County Court had appeared to consider that he was exercising a jurisdiction under s 168(4). Andrew Smith J rejected this analysis [24]. It also appeared that the Circuit Judge had thought that the cap on costs imposed by CLRA 2002, Sch 12, para 10, applied only if an application had been brought frivolously or vexatiously, etc. This was not so, as para 10(3) imposed a general cap of £500 on costs. The tenant might therefore, have been able successfully to argue that the landlord's application for a declaration ought to have been transferred to the LVT. But as she had not done so, the judge's order that she pay costs on the standard basis had to stand. It would, however, be for the costs judge to decide whether the

existence of an alternative procedure, which was subject to a costs cap, ought to restrict the costs which might be found recoverable on a detailed assessment.

It may be noted that the decision does nothing to cast any doubt on the appropriateness of the tactics adopted by some landlords who, rather than seeking a declaration from the LVT (now FTT) under CLRA 2002, s 168(4), instead seek an injunction from the county court to restrain the breach – thus obtaining the necessary 'determination' upon which to base the service of a s 146 notice from a forum where costs are generally awarded.

Sections 21–22 of LTA 1985 – whether civil obligations created; –LTA 1987, s 21(6) – whether jurisdiction of court to appoint a manager was excluded

Di Marco v Morshead Mansions Ltd [2013] EWHC 1068 (Ch) is a further instalment in the ongoing saga of Morshead Mansions (see above and Bulletin No 134). The present case is, in fact, of more significance than those recently noted, as it represents the further examination of issues first raised in *Morshead Mansions Ltd v Di Marco* [2008] EWCA Civ 1371. That case, it will be recalled, appeared to support the proposition that a Residents' Management Company (RMC) which was a landlord might in principle circumvent the regulations surrounding service charges contained in LTA 1985, ss 19–30 by raising funds from flat-owners quâ members of the company (by means of appropriate resolutions) rather than quâ tenants via service charge demands. Mummery LJ, however, expressed no view, [31], on whether the funds so raised could be used to defray service charge expenditure.

It would seem that Morshead Mansions Ltd (MML) had, since 2007, funded itself by demands made under its Articles for contributions. Following the unsuccessful challenge which was the subject of the previous proceedings, D filed a defence and counterclaim to further claims relating to the period 2008 to 2010. Three preliminary issues were identified for hearing, but they were then settled, MML and D agreeing in a consent order that MML could expend money collected under the Articles on the provision of services under the lease; that LTA 1985, ss 18–30 would not apply to such expenditure; and that the funds so collected would not be held under a trust under LTA 1987, s 42. MML thereupon applied in the County Court for an order striking out the defence and counterclaim, which was granted by HHJ Hand on the basis that the previous Court of Appeal proceedings and the consent order effectively disposed of the issues between the parties. D thereupon appealed to Mann J in the Chancery Division against the striking out of the counterclaim (but not the defence).

D's appeal succeeded, but only to a limited extent. Two of the various determinations by Mann J would appear to be of wider import:

(1) D had sought an order that MML produce accounts and summaries of accounts for the years 2002–05, inspection facilities, and a summary of costs incurred in 2009. HHJ Hand had struck this (counter)claim out, on the basis that ss 21–22 LTA 1985 created statutory duties with

criminal sanctions, but not civil rights which a tenant could enforce. Mann J disagreed with HHJ Hand on this, holding that a court could enforce these rights by making orders at the suit of a tenant.

(2) D also sought the appointment of a manager by the court under s 21 LTA 1987, on the basis that the LVT had declined to appoint a manager, and the exclusion under s.21(6) on the Court making an appointment therefore no longer applied. Mann J unsurprisingly held that this sub-section gave the LVT exclusive jurisdiction and so excluded the possibility of the court making an appointment.

Service charge dispute – order as to costs

Morshead Mansions Ltd v Mactra Properties Ltd [2013] EWHC 801(Ch) is the judgment as to costs following on from the appeal noted in Bulletin No 134 as [2013] EWHC 224 (Ch). Warren J determined that MML should bear 90% of MPL's costs of the original application for summary judgment and of the appeal in the Chancery Division.

Service charge under a tripartite lease – RMC in liquidation – whether apportionment required – whether overriding lease had been granted

Triplerose Ltd v Khan [2013] UKUT 002 (LC) raises a short point. The Northern LVT had been unable to determine the service charges payable under a lease because they were expressed to be payable to a management company under a tripartite lease, and it had been liquidated. There was, however, a provision in the lease that prior to the grant of an overriding lease to the management company, and in the event of its liquidation, the service charges would be payable to the landlord. As the management company had been liquidated, the LVT had been under the impression that it would therefore have to make an apportionment of the service charges between those payable to the management company and those payable to the landlord. On the appeal, however, it was held that the intended overriding lease had never been granted to the management company, but one had been granted to T Ltd, the current appellant. HHJ Huskinson therefore determined in a hearing on written representations that the service charges had never become payable to the management company and so an apportionment was not called for.

Tenancy deposit under Housing Act 2004 – whether statutory periodic tenancy arising under Housing Act 1988, s 5 amounted to a new tenancy

Superstrike Ltd v Rodrigues [2013] EWCA Civ 669 is yet another decision on the unfortunately-worded deposit-protection provisions (ss 213–215) of the Housing Act 2004. In this case the defendant tenant (T) had originally been granted an assured shorthold tenancy for a fixed term of one year less one day from 8 January 2007, and paid one month's rent as a deposit. This was before the deposit protection provisions came into force on 6 April 2007, and

was not secured by the claimant landlord L in accordance with HA 2004, s 213. T remained in possession, and, under the terms s 5 of the HA 1988, he continued to hold the premises, but under a statutory periodic tenancy on equivalent terms. On 22 June 2011 L served a notice under HA 1988, s 21 requiring possession, using the accelerated procedure. This was originally granted on the papers, but set aside by the District Judge. L appealed to the Circuit Judge, who granted a possession order, but T further appealed to the CA. The grounds of T's appeal were that the statutory periodic tenancy under which he was holding was separate from his original fixed term tenancy, and by the time the periodic tenancy commenced, the deposit protection provisions were in force. Section 215 of HA 2004 therefore precluded L from serving a s 21 notice while the deposit was not duly held under a deposit protection scheme.

Delivering the only reasoned judgment, Lloyd LJ (with whom Lewison and Gloster, LJJ, agreed) accepted T's argument. The appeal was therefore allowed. It was decided on T's narrower ground of appeal viz that the effect of HA 1988, s 5 was that the statutory periodic tenancy had to be treated as a separate tenancy from the original one, and L therefore had to comply with s 213 when the statutory periodic tenancy commenced. The court expressed no view on T's broader ground that the wording of s 215(1) was such that it would prevent a s 21 notice from being served whenever a deposit was held which was not held in accordance with an authorised scheme ([43]–[45]). Lloyd LJ expressed the view that this might well no longer be of practical significance, now that six years had elapsed since the provisions came into force. The result of the appeal being allowed was that, assuming L still wished to bring the tenancy to an end, the amended provisions contained in the Localism Act 2011 would now apply to the termination of the tenancy: [24].

(case note at: E.G. 2013, 1329, 103)

Tenancy deposit under Housing Act 2004, ss 212–213 – whether payment an advance payment of rent or a security deposit

Johnson v Old [2013] EWCA Civ 415 raises an interesting issue on what amounts to a tenancy deposit for the purposes of ss 212–213 of the Housing Act 2004. The defendant tenant had entered into three successive assured shorthold tenancy agreements. When she entered into the first agreement in May 2009 she paid a deposit, which was paid into a deposit protection scheme; but each tenancy agreement also required that the rent for the full six-month term be paid in advance, and the tenant complied with this. The advance payments of rent were held by landlords' agents, rather than in a deposit protection scheme, and were paid out month by month to the landlords. On the expiry of the third fixed term on 31 October 2010, the tenant remained in possession, under the statutory periodic tenancy which then arose by virtue of s 5 of the Housing Act 1988. From March 2011 onwards the tenant fell into arrears, and notice under HA 1988, s 21 was served requiring that possession be given up by 31 October 2011; the tenant

remained in occupation, and the present possession proceedings were commenced. The proceedings initially came before the Deputy District Judge, who dismissed the claim on the basis that the advance payment of rent amounted to a deposit equivalent to five months rent; as it had not been paid into a deposit protection scheme, the landlords were precluded by HA 2004, s 215 from serving a notice under HA 1988, s 21. The landlords appealed successfully to the Circuit Judge, and the tenant thereupon appealed to the Court of Appeal.

Although in certain respects the final tenancy agreement was not as clearly worded as it might have been, in the Court of Appeal Sir John Chadwick (with whom Jackson and Arden LJJ agreed) had no difficulty in holding [35] that the advance payment of rent under that agreement was not, in the words of HA 2004, s 212 paid as 'security' for the future obligations of the tenant, but was paid [36] in order to discharge an existing obligation; the intention was that the first six months rent be taken from the advance payment itself. There was therefore no failure to comply with the deposit protection requirements, and HA 2004, s 215 could not operate to prevent the landlords from serving a notice under HA 1988, s 21. The tenant's appeal was therefore dismissed.

(Case notes at N.L.J. 2013, 163(7561), 14–15; and E.G. 2013, 1320, 102).

Terminal dilapidations claim – tenants successfully claimed benefit of LTA 1927, s 18(1)

Hammersmatch Properties (*Welwyn*) *Ltd v Saint-Gobain Ceramics and Plastics Ltd* [2013] EWHC 1161 (TCC) is a substantial claim for dilapidations on the termination of a 25 year lease of an industrial and office building in Welwyn Garden City. Although the landlords put forward a claim for more than £3 million, the tenants successfully argued that the first limb of LTA 1927, s 18(1) applied, and that accordingly their damages were restricted to the diminution of the value of the freehold reversion, which Ramsey J assessed at £900,000. As the statutory cap applied, the landlords were not able to claim for loss of rent in addition to the cost of repairs, though they were able to claim their costs of preparing the Schedule of Dilapidations, and interest thereon.

Terminal dilapidations claim – whether GRP roof lights were still in repair – effect of defendant's insolvency before judgment given

Twinmar Holdings Ltd v Klarius UK Ltd [2013] EWHC 944 (TCC) is a substantial terminal dilapidations claim. One point of interest is that it applies the gloss placed on *Proudfoot v Hart* (1890) 25 QBD 42 by *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716: the test in the former case (that the premises be fit for occupation by a tenant of the class who would be likely to take them) had to be considered as at the commencement of the lease rather than at its expiry. This was particularly relevant here as the factory premises had been newly-built at the commencement of the lease.

The case also contains a useful discussion of the principles to apply when determining whether the glass reinforced polyester (GRP) roof lights were in disrepair. Edwards-Stuart J. rejected the contention of the tenant's expert that they remained in repair so long as they were weathertight: he accepted the claimant landlord's argument that they were no longer in repair when the effect of deterioration through exposure to UV light and wear from weather etc. had reached the point that they were no longer adequately translucent.

By the time that judgment was handed down, the defendant was in liquidation, and the Official Receiver wrote to the Judge suggesting that s 130 of the Insolvency Act 1986 precluded him from giving judgment (the section providing that, when a winding up order has been made, no action or proceeding shall be proceeded with or commenced against the company or its property, except by the leave of the court). The judge disagreed, stating that the judgment was declaratory in nature, and that in the liquidation the Claimant might make what use of it as it could.

Time limit imposed by LTA 1985, s 20B – meaning of when 'costs incurred'

OM Property Management Ltd v Burr [2013] EWCA Civ 479 is the appeal against the decision of the Upper Tribunal reported at [2012] UKUT 2 (and noted in Bulletin No 128). The dispute was on the interpretation of LTA 1985, s 20B, the section requiring that costs under service charges be levied within 18 months of their being incurred unless the leaseholder is notified within that period that an account is to follow. The dispute arose from the rather extraordinary mistake of OM (a management company under a tripartite lease) in paying for gas to heat the swimming pool in a development to the wrong supplier for nearly seven years – it had been misinformed by the developer. When the sum wrongly paid was reimbursed, there were still arrears of over £100,000. B, the tenant's, share of this came to just over £300. The LVT decided, on written submissions, that the cost of the gas had been incurred when the liability accrued, and not when the invoices were issued, and OM were accordingly unable to recover the costs. HHJ Mole, sitting in the Upper Tribunal, allowed the appeal, relying on the point that s 20B(1) referred to 'costs' rather than 'liabilities' being incurred.

The Court of Appeal (Lord Dyson MR, Elias and Patten LJJ) upheld that decision, and dismissed B's appeal, adopting essentially the same interpretation of s 20B(1) as had HHJ Mole. Like the Upper Tribunal, the Court of Appeal did not find it necessary for the purposes of this case to decide whether costs were 'incurred' for the purpose of a service charge when the invoice was rendered or when it was paid [15]. In answer to the suggestion that the Court's interpretation of s 20B(1) effectively deprived s 20B(2) of any meaning, Lord Dyson accepted the suggestion of Counsel for OM (Mr Andrew Arden, QC) that sub-section (2) would apply if there were some delay in allocating an item under the service charge between the various tenants, or if an invoice were disputed [17].

Under-occupation by secure tenant – reasonableness of making of possession order – whether alternative accommodation had to be immediately available – manner of wording of possession order

Reading Borough Council v Holt [2013] EWCA Civ 641 is a useful though rather sad case offering guidance on two issues involving 'under-occupation'. Mrs Recorder Moulder in the Reading County Court had granted a possession order against the tenant Ms H. It was a hard case in that H, a single lady of 59, had lived in a three bedroom council property all her life, and had for around twenty years cared for her mother, who suffered from Alzheimer's. After her mother's death she succeeded to the tenancy under ss 87 and 89 of the HA 1985. The council sought to rehouse her, but she declined their offers of various one bedroom flats. The council took possession proceedings under s 84 and Ground 16 (Sch 2, Part III) ie the 'under-occupation' ground, and a possession order was granted.

The first ground of the defendant's appeal was that the Recorder had erred in holding that it was reasonable to make a possession order. The Court of Appeal (Arden and Kitchin LJJ and Sir David Keene) could see no error in her approach. Ground 16 involved a 'multi-factorial evaluation', [18], and an appeal court would be reluctant to interfere unless obviously wrong. H argued that insufficient weight had been given to the time that she had spent caring for her mother. Although the Court was understandably sympathetic to H's predicament, it was clear that the Recorder had taken this fully into account, but had nevertheless considered that it was outweighed by the extent of the under-occupation, and the long list of those waiting for three bedroom houses in the Reading area. H also argued that her position was, if anything, stronger than that of the tenant in *Bracknell Forest BC v Green* [2009] EWCA Civ 238, who had successfully resisted the Council's appeal. Kitchin LJ, however, giving the only judgment, pointed out that this was not a helpful approach. It was important that the various relevant factors should be taken into account, but drawing comparisons with the conclusions reached on the facts of other cases would result only in an unnecessary increase in the cost and length of cases. "The issue of reasonableness must be decided in each case in the light of its own facts" ([45]).

H also challenged the way in which the Recorder had dealt with the issue of suitable alternative accommodation. No specific alternative accommodation was specified in the possession order, which was expressed to come into force within 28 days of the receipt by H of a formal offer of a tenancy which met certain criteria (a secure tenancy of a one-bedroom flat, with a bicycle storage area, within 1.5 miles of H's current property). Kitchin LJ could see nothing wrong with the way in which this order had been expressed. The wording of the statute referred to suitable alternative accommodation being available when the possession order took effect (see *Wandsworth LBC v Randall* [2007] EWVA Civ 1126), not at the time of the hearing. Councils could not be expected to keep properties empty whilst the court adjudicated upon their suitability. Indeed here H had shown a great deal of reluctance to

engage with the process of considering alternative accommodation. It was quite permissible to make a possession order based on the provision of accommodation which met specified criteria. It was desirable that this should be coupled with 'Liberty to apply' in case any difficulty had to be resolved.

The Court of Appeal took the opportunity to flag two points which it might be necessary to include in such conditional orders, and will no doubt guide County Courts when minded to make such orders. First, where the order is suspended, there should be a time limit after which it would lapse, so that the tenant is not left in a state of protracted uncertainty; and, second, consideration should be given, in the case of a vulnerable tenant, to requiring that the permission of the court be required before a warrant should be issued, so that if an eviction should take place, it would be under the supervision of the court. It would appear, however, that these additional provisions were not added to the order in this case.

Whether demand for service charge invalidated by non-compliance with LTA 1987, s 47

Triplerose Ltd v Grantglen Ltd [2012] UKUT 204 (LC) decides the short point that naming a director rather than the company itself on a service charge demand was a breach of LTA 1987, s 47 and accordingly invalidated that demand for service charges. Although the President, Mr George Bartlett QC had indicated in *Beitov Properties Limited v Martin* [2012] UKUT 133 (LC) that it was inappropriate for a tribunal to raise a purely technical point of its own motion, the position in the instant case was that, although the omission was a technical one and did not give rise to prejudice, it had been raised by the tenant, and it did defeat the landlord's claim.

NOTES ON CASES

Ansa Logistics Ltd v Towerbeg Ltd [2012] EWHC 3651 (Ch): L. & T. Review 2013, 17(3), 106–109 (noted in Bulletin No 134)

Ayannuga v Swindells [2012] EWCA Civ 1789: J.H.L. 2013, 16(3), 49–52 (noted in Bulletin No 134)

Brent LBC v Tudor [2013] EWCA Civ 157: L. & T. Review 2013, 17(3), D23–D24 (noted in Bulletin No 134)

Brickfield Properties Ltd v Botten [2013] UKUT 133 (LC): L. & T. Review 2013, 17(3), D26; E.G. 2013, 1329, 102 (noted in Bulletin No 134)

Buckland v United Kingdom (40060/08) (2013) 56 E.H.R.R. 16; [2013] H.L.R. 2 ("Strasbourg triggers another Article 8 dialogue"): Conv. 2013, 2, 148–156

Canonical UK Ltd v TST Millbank LLC [2012] EWHC 3710 (Ch): L. & T. Review 2013, 17(3), 95–99 (noted in Bulletin No 134)

Daejan Investments Ltd v Benson [2013] UKSC 14: .JH.L. 2013, 16(3) 45–48; L. & T. Review 2013, 17(3), 81–85, 86–89, and D24–D25; N.L.J. 2013, 163(7555), 13–14; E.G. 2013, 1315, 99; and Comm. Leases 2013, Apr, 1925–1927 (noted in Bulletin No 134)

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Edwards & Walkden (*Norfolk*) *Ltd v City of London Corpn* [2012] EWHC 2527 (Ch): L. & T. Review 2013, 17(2), 67–70 (noted in Bulletin No 132)

Field Fisher Waterhouse LLP v The Commissioner for Her Majesty's Revenue & Customs (*Case C-392/11*) (VAT on service charges) L. & T. Review 2013, 17(2), 72–76

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Hosebay Ltd v Day; Lexgorge Ltd v Howard de Walden Estates Ltd [2012] UKSC 41: Conv. 2013, 2, 140–148 (noted in Bulletin No 132)

Joyce v Epsom and Ewell BC [2012] EWCA Civ 1398: Conv. 2013, 2, 156–164 (noted in Bulletin No 133)

Kutchukian v Governors of Free Grammar School of John Lyon [2012] UKUT 53 (LC): L. & T. Review 2013, 17(2), D14; and E.G. 2013, 1316, 105 (noted in Bulletin No 134)

Morshead Mansions Ltd v Mactra Properties Ltd [2013] EWHC 801(Ch): L. & T. Review 2013, 17(2), D17-D18 (noted in Bulletin No 134)

Nationwide BS v Davisons Solicitors [2012] EWCA Civ 1616: 163 N.L.J. 8 (noted in Bulletin No 133)

Parshall v Hackney (otherwise *Parshall v Bryans*) [2013] EWCA Civ 240: [2013] Conv 222–232 (noted in Bulletin No 134)

Phillips v Francis [2012] EWHC 3650 (Ch): 163 NLJ 14 (10 May 2013) (argues that, applying *Pepper v Hart*, statements made on behalf of the Government when CLRA 2002 was enacted do not support the decision); and L. & T. Review 2013, 17(2), 60–64 and 64–67; and Comm. Leases 2013, Apr, 1925–1927 (noted in Bulletin No 133)

Ridgewood Properties Group Ltd v Valero Energy Ltd [2013] EWHC 98 (Ch): L. & T. Review 2013, 17(2), D11; Comm. Leases 2013, May, 1941–1942; and [2013] Conv. 169–175

RVB Investments Ltd v Bibby [2013] EWHC 65 (Ch): Comm. Leases 2013, Apr, 1919–1923; and E.G. 2013, 1321, 105 (noted in Bulletin No 134)

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Seeing clearly: greater transparency in rights of light S.J. 2013, 157(24) Supp (Property Focus), 15–17

Shining a light on easements Conv. 2013, 2, 85–88

Simple overage: Part 1 Conv. 2013, 2, 89–95

Squats go to work E.G. 2013, 1315, 96–98

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Taxpayer wins right to claim overpaid SDLT P.L.J. 3 June 2013, 15–17

Termination of tenancies – another year goes by (failure to implement Law Commission's 2006 Report) E.G. 2013, 1325, 101

The future of conveyancing: customer service is key S.J. 2013, 157(24) Supp (Property Focus), 7–9

The holy grail as an empty chalice? Proportionality review in possession proceedings after Pinnock and Powell J.P.L. 2013, 6, 622–631

The Land Registration Act 2002: the registration of franchises and manorial rights Conv. 2013, 2, 129–139

The ongoing "house" conundrum E.G. 2013, 1327, 80–82

The Prevention of Social Housing Fraud Act 2013 J.H.L. 2013, 16(3), 53–55

There's nothing optional about option notices E.G. 2013, 1323, 66–68

Things aren't always what they seem (anti-avoidance provisions of s 38 LTA 1954) N.L.J. 2013, 163(7565), 12–13

Turning management green (commercial property and energy efficiency) E.G. 2013, 1321, 104

Using an interim possession order to combat commercial squatting L. & T. Review 2013, 17(3), 90–94

What fees can a landlord reasonably charge for granting licence to sublet residential property? L. & T. Review 2013, 17(3), 109–112

What's special about land? The relationship between promissory and proprietary estoppel K.L.J. 2013, 24(1), 111–118

Which option is a safe bet? E.G. 2013, 1324, 90–92

NEWS AND CONSULTATIONS

Private sector letting and managing agents: should they be regulated? – **Commons Library Standard Note**: http://www.parliament.uk/briefing-papers/SN06000.pdf

Reform of the regulation of estate agents – **Commons Library Standard Note**: http://www.parliament.uk/briefing-papers/SN06622.pdf

The Land Registry has issued an updated *Practice Guide 7 – Entry of price paid or value stated on the register* to reflect Land Registry practice as from 1 May 2013: http://www.landregistry.gov.uk/professional/guides/practice-guide-7

The Council for Licensed Conveyancers' Consultation: Disciplinary Appeals Arrangements: SRA Response at: http://www.sra.org.uk/sra/consultations/consultation-responses/discipline-appeals-arrangements.page

A **Law Society** consultation invites views on the **revision of Enquiries of Local Authorities Forms Con 29 and Con 290**: http://www.lawsociety.org.uk/representation/policy-discussion/documents/con29-consultation-paper/ (comments by 1 August)

A **Home Office** Consultation seeks views on imposing a requirement on landlords to check the immigration status of prospective tenants, with penalties imposed on those who let to non-EEA migrants. (Responses by 21 August 2013): http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/33-landlords/consultation.pdf?view=Binary

REPORTS

A **Law Commission** Command Paper (Cm 8578) recommends reforms to the residential rented sector in Wales. It proposes two standard forms of tenancy agreement: one for the public sector, and one for the private sector: http://www.official-documents.gov.uk/document/cm85/8578/8578.pdf

Flood Risk: A Law Society practice note offers guidance to solicitors on dealing with property transactions where flooding is a relevant risk: http://www.lawsociety.org.uk/advice/articles/flood-risk/

Response to Consultation Changes to the Network Access Agreement and the Technical Manual Part 1 – Electronic Document Registration Service (July 2013) (summarises response to its June 2013 consultation proposing to amend the network access agreement, including proposals for next steps): http://www.landregistry.gov.uk/__data/assets/pdf_file/0016/48301/consultation-response-NAA-tech-manual.pdf

PRACTICE GUIDES

A new **Land Registry Practice Guide 66** on '**Overriding interests losing automatic protection in 2013**' was issued on 1 July 2013: http://www.landregistry.gov.uk/professional/guides/practice-guide-66

A new **Land Registry Practice Guide 52** on '**Easements claimed by prescription'** was issued on 1 July 2013, to replace the October 2011 edition: http://www.landregistry.gov.uk/professional/guides/practice-guide-52

New **Land Registry Practice Guides 34** on '**Personal Insolvency**', **38** on '**Costs**' and **39** on '**Rectification and Indemnity**' were issued on 1 July, and **37** on '**Objections and Disputes**' on 8 July 2013, to take account of the transfer of the functions of the Adjudicator to the First-tier Tribunal and the Upper Tribunal: http://www.landregistry.gov.uk/professional/guides/practice-guide-34
http://www.landregistry.gov.uk/professional/guides/practice-guide-37
http://www.landregistry.gov.uk/professional/guides/practice-guide-38 and
http://www.landregistry.gov.uk/professional/guides/practice-guide-39

PRESS RELEASES

An **HMRC brief** explains policy on the treatment of stamp duty land tax following the decision of the Tax Tribunal in the case of *Robinson Family Ltd v Revenue and Customs Commissioners* [2012] UKFTT 360 (TC): http://www.hmrc.gov.uk/briefs/vat/brief0813.htm

The **Solicitors' Regulation Authority** reports a downturn in conveyancing income: http://www.sra.org.uk/sra/news/press/conveyancing-survey.page

The **Office of Fair Trading** has launched (18 April 2013) a study into the 'quick house sale' market: http://www.oft.gov.uk/news-and-updates/press/2013/35-13#.UW-FAErchjk

Responses to a **Consultation** by the **Council of Licensed Conveyancers** have indicated (30 April 2013) support for the CLC's present stance in favour of

referral fees, with some enhanced disclosure requirements: http://www.legalfutures.co.uk/latest-news/licensed-conveyancers-support-retaining-referral-fees

The **Property Ombudsman** has welcomed Government plans to bring residential letting agents within the scope of the Consumers, Estate Agents and Redress Act 2007: http://www.tpos.co.uk/news-13.htm

H M Land Registry has announced that it is to make various historical data available free of charge. This includes the price paid for every residential property sold at full market value between 2009 and 2012 (with effect from 28 June 2013) and between 1995 and 2008 (with effect from November 2013). See http://www.landregistry.gov.uk/announcements/2013/land-registry-to-release-free-historical-property-data

The **Property Ombudsman** has advised that Client Money Protection cover is now available to all UK letting agents, as two additional CMP providers are available from July 2013. Letting agents who are not registered with a trade body will therefore be able to obtain cover to protect tenants' deposits: http://www.tpos.co.uk/news-13.htm

STATUTES

The **Growth and Infrastructure Act 2013** received the Royal Assent on 25 April 2013. It amends several Acts with a view to facilitating development, including those relating to planning, the stopping up and diversion of highways and public paths, and compulsory purchase, and it amends the law relating to Town and Village Greens.

STATUTORY INSTRUMENTS

Mobile Homes (Selling and Gifting) (England) Regulations 2013, SI 2013/981; in force 26 May 2013. The Regulations make it easier for mobile home owners to sell or give away their homes without interference from the site owner.

The Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013, SI 2013/1101 (in force 30 May 2013) relaxes the General Development Order, and in particular introduces the controversial amendments relating to home extensions.

The Transfer of Tribunal Functions Order 2013, SI 2013/1036 (in force 1 July 2013) abolishes the rent assessment committees in England (including leasehold valuation tribunals, rent tribunals, rent assessment committees and residential property tribunals), Agricultural Land Tribunals in England, and the office of Adjudicator to HM Land Registry, and transfers their functions to the First-tier Tribunal (or, in certain cases, the Upper Tribunal).

(NOTE: the Agricultural Land Tribunal in Wales, and the rent assessment committee – in its various guises, including the LVT – in Wales are not affected)

The First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2013, SI 2013/1187 (in force 1 July 2013) creates the Property Chamber of the First-tier Tribunal and allocates functions to this new Chamber. It also adds to the functions of the Lands Chamber and the Tax and Chancery Chamber of the Upper Tribunal.

The Tribunal Procedure (Amendment No. 3) Rules 2013, SI 2013/1168 (in force 1 July 2013) make changes to the Upper Tribunal (Lands Chamber) Rules 2010 that will allow cases and appeals from the new Property Chamber to be dealt with in the Upper Tribunal. They also make amendments relating to costs and address some practical issues.

Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, SI 2013/1169 (in force 1 July 2013) makes rules specific to the Chamber consequent upon the transfer of the functions of former tribunals to it.

Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal (Amendment) Order 2013, SI 2013/1185 (in force 1 July 2013) enlarges the range of existing qualifications and experience that make a person who is not a judge of the tribunal eligible for appointment as a member of the First-tier Tribunal or Upper Tribunal. These include matters within the purview of the new Property Chamber of the FTT.

Mobile Homes (Pitch Fees) (Prescribed Form) (England) Regulations 2013, SI 2013/1505, prescribe the form to be served when Pitch Fees are reviewed, and come into force on 26 July 2013

The **Land Registration (Proper Office) Order 2013**, SI 2013/1627 (in force 1 October 2013) From that date, paper applications can be sent to any Land Registry Office, regardless of where the land is situated. The Land Registry will offer guidance to conveyancers on the office they are recommended to use, based on their business address. See http://www.landregistry.gov.uk/announcements/2013/proper-office-order

The **Tribunals, Courts and Enforcement Act 2007 (Commencement No 9) Order 2013**, SI 2013/1739 brought s 90 of the principal act into force with effect from 15 July 2013, and various other sections into force for the purpose only of making regulations. These future regulations will abolish distraint for rent, and replace it – for commercial premises only – with the long-postponed CRAR (Commercial Rent Arrears Recovery) scheme outlined in the TCEA 2007.

The **Commons (Registration of Town or Village Greens) and Dedicated Highways (Landowner Statements and Declarations) (England) Regulations 2013** SI 2013/1774 (in force 1 October 2013) provide for a landowner to file a notice with the appropriate council so as to negative an intention to dedicate a highway (pursuant to s 31(6) of the Highways Act 1980) or a town or village green (pursuant to s 15A of the Commons Act 2006). These procedures will be of particular relevance and importance to developers.

The **Housing and Regeneration Act 2008 (Commencement No 3 and Transitional, Transitory and Saving Provisions) (Wales) Order 2013**, SI 2013/1469

(W. 140) (C. 57) appoints 10 July 2013 as the day upon which s 318 of the 2008 Act takes effect in Wales, so extending the provisions of the Mobile Homes Act 1983 to local authority gypsy and traveller sites in Wales. (The provision has been in force in England since 30 April 2011 by virtue of SI 2011/1002).

The **Annual Tax on Enveloped Dwellings (Returns) Regulations 2013**, SI 2013/1844 provide HMRC with authority to prescribe the form and content of an ATED return. (ATED was introduced by Part 3 of the Finance Act 2013 and is directed chiefly at high-value UK residential property held by certain non-natural persons).

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