

# Hill & Redman's Law of Landlord and Tenant

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## **DIVISION A: GENERAL LAW**

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

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

Five issues arose in the proceedings:

- (1) Whether the premises demised to the leaseholders included the roof of the garages.

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- (2) Whether the demised premises included the airspace over the garages.
- (3) Whether the court should imply into the leases a covenant not to construct further flats on the estate.
- (4) Whether the claimant, the lessee under the 2007 lease, was entitled to erect columns external to the garage blocks to support the proposed flats.
- (5) Whether the lessor had unreasonably withheld consent to the erection of staircases to serve the proposed flats.

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

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

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

On the fourth issue Morgan J held that, on the wording of the 2007 Lease, the claimant would be entitled to erect columns external to the garage blocks to support the new flats, but that, having decided that the earlier leases

included the airspace over the garages, this part of the decision was for the time being, academic as that lease could take effect only in reversion to the leases of the existing leaseholders.

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

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

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

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

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

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

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

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

It was accepted that the test to be applied (relying on *Ashworth Frazer Ltd v Gloucester City Council* [2001] UKHL 59) was whether the landlord’s conclusions were ones which a reasonably landlord in the circumstances might have reached. The judge at first instance had (for the purposes of the possession action) found that the alleged breaches of covenant had not been proved. The landlord nevertheless argued that, in assessing the reasonableness of the conditions that he sought to impose, the court should have had regard for whether he had reasonable grounds for thinking that there had been breaches. This was not, however, how the case had been argued in the county court, where the judge had found that, even if the breaches had covenant had been proved, they were not of so serious a nature to require that they be remedied before the lease could be assigned. The Court of Appeal agreed with the judge on this point.

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

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

*G & O Investments Ltd v Khan* [2014] UKUT 0096 (LC) raises a short though – on the facts – crucial point on the interpretation of a lease. In a service charge dispute, the First Tier Tribunal (Property Chamber) had determined

that a lease required that service charge demands be served by registered post or recorded delivery, and that as they had been sent by ordinary second class post, service charges due from 2007 to 2010 were not payable at all, so there was no need to consider their reasonableness. The Upper Tribunal had given permission to appeal, limited to this point of construction, and HHJ Edward Cousins determined on written representations that the clause in question only prescribed a procedure which, if followed, would result in service being deemed: it did not displace the possibility that actual service might be proved. Although the decision of course turns on the construction of the clause in question, it is a point which is worth bearing in mind.

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

*Red Kite Community Housing Ltd v Robertson* [2014] UKUT 0134 (LC) is a service charge dispute involving whether service charges in respect of cleaning were reasonably incurred, and reviews the issue of how far the First Tier Tribunal (FtT), as an expert tribunal, may use its own knowledge in adjudicating upon disputes. Following a large scale voluntary transfer of housing stock from the local authority to the appellant, the element in the service charge for cleaning of the common parts had increased from £193 pa to £321 pa. It was suggested that there had been an element of subsidy when the local authority had been responsible, but that was not established on the facts. The FTT had reduced the sum from £321 to £225, relying in part on its knowledge and experience as an expert tribunal. The appellants appealed on the basis that it was unclear whether this decision had been reached on the basis that the service provided was adequate, but too expensive, or inadequate, and therefore too expensive. The appellants had produced extensive evidence as to how the work was costed and monitored, but the FTT had not explained if this evidence had been accepted, or, if not, which part or parts had not been accepted.

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

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

*Friends Life Ltd v Siemens Hearing Instruments Ltd* [2014] EWCA Civ 382 is the successful appeal against the decision of Mr Nicholas Strauss QC, sitting as a Deputy Judge at first instance (reported as [2013] EWHC 815 (Ch) and noted in Bulletin No 101). It raised some issues on the meaning of a

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somewhat ill-drafted clause which seems to have been fairly widely adopted around the time when it was thought to be uncertain whether a tenant could simultaneously exercise a break clause and apply for a new tenancy under s 26(2) of the LTA 1954, a course of action which might be attractive in a falling market. The wording of the relevant clause of the lease had been evolved in an attempt to cover the potential loophole in the law (which *Garston v Scottish Widows Fund* [1996] 1 WLR 834 had held did not in fact exist) and required T, when serving a break notice, *to state that it was being given under s 24(2) of the LTA 1954*. T purported to serve a break notice, but failed to refer to s 24(2) (though it did not combine the notice with any step seeking a new tenancy). L contested the validity of the notice. At first instance Mr Strauss QC had rejected T's suggestion that the relevant clause was meaningless: one could draft a break notice so that it was expressed to be compliant with s 24(2), even if it was not strictly possible to serve a notice 'under' that sub-section. T's break notice did not therefore comply with the relevant clause, but he went on to decide that this did not serve to invalidate the notice.

Giving the only judgment of the Court of Appeal, Lewison LJ (with whom Black LJ and Sir Timothy Lloyd agreed) held that a break clause, like an option, was a unilateral or 'if' contract. There can therefore be no room for any enquiry as to whether the event that gives rise to the new contract has occurred: in taking this strict line, he relied on the decisions of Diplock LJ in *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74, 83, which he then referred to when sitting in the House of Lords in *United Scientific Holdings Ltd v Burnley BC* [1978] AC 904, 929. The more liberal approach applied in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 949 did not therefore apply here. Having found that T's break notice did not comply with the relevant clause, Mr Strauss QC should have gone on to hold that it was invalid.

(case noted at: E.G. 2014, 1417, 119)

### **Alleged failure to comply with Dilapidations Pre-Action Protocol or to mediate – whether costs should be awarded on indemnity basis**

In *Courtwell Properties Ltd v Glencore PF (UK) Ltd* [2014] EWHC (TCC), [2014] All ER (D) 107 (Mar) Akenhead J offers guidance on when costs should be awarded on an indemnity basis. The defendant had accepted a CPR Pt 36 offer on a dilapidations claim. The claimant made an application for cost on an indemnity basis, alleging that the defendant's experts had conducted themselves badly, the defendant had failed to comply with the Dilapidations Pre-Action Protocol (DPAP), the defendant had failed to mediate, and its defence had maintained a positive denial of any loss.

The application was dismissed. None of the alleged factors here would justify indemnity costs. The claimant had not complied with the spirit or the letter of the DPAP. Both sides had been inflexible and failed to co-operate, and there had been ill-feeling between their experts. In the circumstances it was

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unlikely that mediation would have succeeded either when it was suggested or later. The denial of loss was not outside of the norm. The claimants had themselves not properly complied with the DPAP, and had then rushed into taking proceedings.

### **Whether possession order against protestors would breach ECHR**

*Manchester Ship Canal Developments Ltd v Persons Unknown* [2014] EWHC 645 (Ch) need be noted only briefly. At a hearing in the Manchester District Registry HHJ Pelling QC (sitting as a Deputy Judge of the Chancery Division) held that arts 8, 10 and 11 of the European Convention on Human Rights would not prevent the making of a possession order against protestors who were occupying land as part of a campaign against fracking.

## DIVISION B: BUSINESS TENANCIES

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

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

(case noted at: E.G. 2014, 1415, 73)

## DIVISION C: PRIVATE SECTOR RESIDENTIAL TENANCIES

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

*Preston v Area Estates Ltd* [2014] EWHC 1206 (Admin) is an appeal to the Administrative Court against a decision of the London Rent Assessment Panel setting a rent for a flat which was held under a secure periodic tenancy. The respondent landlord had proposed an increase in the rent from £338 pcm to £1,050 pcm. The tenant had referred that increase to the RAP, which had set a rent of £1,020 pcm.

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

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

*R (on the application of Tummond) v Reading County Court* [2014] EWHC 1039 (Admin) stresses the limited scope that exists for judicial review of an appellate court’s refusal to grant permission for a second appeal. The claimant tenant, T, entered into an agreement on 18 December 2012 for an assured shorthold tenancy for a term expiring in June 2013. On the same day the landlord L served T with a notice under s 21 of the Housing Act 1988 notifying him that she would require possession at the end of the fixed term. T’s deposit was secured with an approved scheme: the Tenancy Deposit Certificate recorded that the tenancy had commenced on 20 December 2012, that the deposit had been received on 22 December 2012, and had been protected from 2 January 2013. T defended the possession proceedings on the basis that, at the time when the s 21 notice was served, the deposit was not held in an authorised scheme, and accordingly under s 215(a) of the HA 2004 L could not rely on the notice (an argument to which, in their commentary to



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the section at 1–4182.268.2, the editors of the *Encyclopaedia of Housing Law and Practice* would seem to have lent credence). The District Judge struck out the defence, and another District Judge struck out T’s application to set aside the order for possession. T then appealed to the Circuit Judge, who held that the deposit had been ‘held in accordance with an authorised scheme’, refused the appeal, and refused permission for a further appeal. T attempted to appeal to the Court of Appeal, which pointed out that his only redress was to apply for judicial review of the refusal, so giving rise to the instant case.

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

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

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#### **Introductory tenancy – Article 8 of the ECHR – whether trial judge had applied correct test – whether additional evidence should be admitted**

*Southend-on-Sea BC v Armour* [2014] EWHC Civ 231 is a second appeal, the first appeal having been reported as [2012] EWHC 3361 (QB) and discussed in Bulletin No 133. In the High Court, Cranston J upheld the decision of the Recorder in the County Court to allow a defence under Article 8 of the ECHR to defeat a possession claim in respect of a property held under an introductory tenancy. On an appeal by the Council, the Court of Appeal (Sullivan, McFarlane and Lewison, LJJ) upheld Cranston J and the Recorder.

A had been granted an introductory tenancy, and signed the tenancy agreement on 31 January 2011. Within two months there had been complaints about his being abusive and threatening to a neighbour, to a member of the managing agent’s staff, and to electrical contractors working at the

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property. It was alleged, though denied by A, that he had switched the power supply back on, causing a contractor to receive an electric shock. A review panel upheld the three complaints of abuse, but made no finding on how the power supply had become live again. It accordingly dismissed A's appeal, and the Council issued possession proceedings in June. It should have been heard in July or August, but, because of four interlocutory hearings, it was not heard until March 2012. The Recorder applied the guidance in the relevant Supreme Court cases (*Manchester CC v Pinnock* [2010] UKSC 45 and *Hounslow LBC v Powell* [2011] UKSC 8) and determined that the making of a possession order would not be proportionate in the circumstances, given the defendant's history of mental health problems, and the fact that he seemed at last, with assistance from various support mechanisms, to be getting on top of those problems. Particular weight was put on the fact that, at the time of the hearing, 11½ months had elapsed since there had been any cause for complaint against the defendant's conduct.

In this, the second appeal, Counsel for the appellant Council appealed on the basis that the Recorder had applied too generous a test to the tenant. Giving the only judgment, Lewison LJ emphasised that the test of proportionality, ie deciding whether eviction is 'necessary in a democratic society', required a value judgment, and that an appellate court should be reluctant to interfere with a trial judge's exercise of his or her discretion in what was a value judgment (see [17]). He rejected the Council's argument that this would collapse the difference between those tenancies where in order for possession to be recovered the test to be satisfied was one of reasonableness, and those where the test was one of proportionality ([19]). The test was not whether the Court of Appeal would have made the same decision as the Recorder, but whether the decision was open to her ([20]).

The question arose of the weight to be given to the fact that after a 'shaky start' the tenant had largely 'mended his ways' by the end of the one year introductory tenancy. Lewison LJ drew a distinction between a case such as *Birmingham CC v Lloyd* [2012] EWCA Civ 969, where the occupier's good conduct was held to be irrelevant (as he was a trespasser), and a case such as this, as an introductory tenancy was intended to give a tenant an opportunity to 'prove himself/herself' ([26]). Further, the proportionality of the tenant's eviction had to be considered at the date of the hearing, even if this might give an incentive for the tenant to secure adjournments ([29]).

A complicating factor in the appeal was that the Council wished to adduce further evidence, indicating that some of the evidence given on behalf of the tenant at first instance was misleading or indeed false. The criteria by which such evidence is to be adduced are discussed. The Court of Appeal declined to admit the further evidence, dealing with the tenant's alleged illiteracy and his mental health, holding that it did not play a significant part in the findings of the Recorder at first instance, and that the criteria for admitting evidence on a second appeal were stricter than those that applied on a first appeal (see [56], applying *Wiemer v Redstone Mortgages Ltd* [2014] EWCA Civ 81). Further, some of the evidence – suggesting that tenancy had been

obtained by deception – could, if proven, justify the Council in taking separate possession proceedings under Ground 5 of Sch 2 to the Housing Act 1985.

### DIVISION E: LONG LEASES

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

*Shebelle Enterprises Ltd v Hampstead Garden Suburb Trust Ltd* [2014] EWCA Civ 305 is the appeal against the judgment of Henderson J reported as [2013] EWHC 948 (Ch) and noted in Bulletin No 99. It raises an apparently novel point on the operation of Schemes of Management under s 19 of the Leasehold Reform Act 1967. These, where approved by the High Court, allow a former landlord to exercise over enfranchised properties certain controls which were formerly contained in the leases.

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

- (a) whether the Trust was entitled to withhold consent on the basis of a risk of flooding; and
- (b) whether the claimants could establish that granting of consent might put the Trust in breach of the usual covenant for quiet enjoyment contained in the claimant’s lease.

On the first preliminary point, the Trust argued that the scope of the Scheme of Management was restricted solely to matters relating to the use, appearance and maintenance of enfranchised properties, other matters being for the local planning authority. Henderson J had rejected, (at [40] of the first instance judgment), this argument, holding that the scope of the Scheme was not as narrow as the Trust contended, and it could take into account wider considerations, though clearly the main focus of the Scheme should be, [42],

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the ‘use, appearance and maintenance of enfranchised properties’. There was no appeal or cross-appeal on this point.

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

S had argued at first instance that clause 15 of their lease, a standard form of an express covenant for quiet enjoyment, prevented the Trust from consenting to the application by the owners of the neighbouring enfranchised property. S argued on appeal that Henderson J had fallen into error:

- (a) in construing the 1931 Lease by reference to the LRA 1967;
- (b) in treating the Trust as if it were a public body when it was in fact a private company;
- (c) by concluding that the Trust’s status effectively overrode S’s covenant for quiet enjoyment; and
- (d) by accepting the Trust’s alternative case that it had a defence of statutory duty to S’s claim.

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

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

Judgment in *Money v Cadogan Holdings Ltd* [2013] UKUT 211 (LC) was given in June 2013 but it seems to have been given wider attention after having been cited in *Padmore v Trustees of the Barry and Peggy High Foundation* [2013] UKUT 0646 (LC) (see Bulletin No 104). The former case – a decision of Sir Keith Lindblom, P, and Mr N J Rose, FRICS – also concerned a collective enfranchisement under the LRHUDA 1993. Four long leaseholders in a house converted into flats wished to acquire their freehold.

The basement flat was occupied as a caretaker's flat, and the issue arose of whether the prospect of releasing the covenant in the lease so restricting its use should form part of the marriage value. Because the lease of the basement flat was for an unexpired term exceeding 80 years, it was common ground that it could not be taken into account as part of the marriage value under para 4, Sch 6 of the LRHUDA 1993. The nominee purchaser argued on appeal that the LVT had erred, in that it was also impermissible to increase the prospect of releasing the covenant as part of the valuation of the freeholder's interest under para 3. The Upper Tribunal rejected this contention, holding that the underlying principle of valuations under the LRHUDA 1993 was that 'no legitimate portion of value should be left out of account, and none should come in more than once' ([69]). The price paid for enfranchisement should reflect the opportunity that the enfranchising leaseholders would have to dispose of the basement flat on a long lease subject only to a covenant for ordinary residential lease. The matter was, however, remitted to the LVT for a further hearing, as their valuation had been flawed in other ways.

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

*Columbia House Properties (No 3) Ltd v Imperial Hall RTM Co Ltd* [2014] UKUT 0030 (LC) is a decision of HHJ Alice Robinson in the Upper Tribunal which illustrates how one should approach disputes as to whether costs have been reasonably incurred. The costs here involved three notices claiming the Right To Manage. The first had been served in 2006: it had been withdrawn at a hearing, and the LVT had ordered the RTM Company to pay the Landlord's costs. A further claim had been made in February 2010, and a further claim – without prejudice to the former – had been made in August 2010. That had been compromised on the basis that the RTM Company would acquire the RTM from an agreed date, and would pay £6,313 in full and final settlement of surveyors' and legal costs arising out of the February claim notice. In August 2011 the Landlord sought to recover further costs under s.88 of the CLRA 2002 from the RTM Company, subsequently reducing its claim to one for £15,036. These costs arose out of work done by its Managing Agents, and so fell outside the scope of the agreement as to costs.

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

## DIVISION E: LONG LEASES

### **Withdrawal of application for RTM – whether could be withdrawn without permission of the FTT**

In *R (on the application of O Twelve Baytree Ltd) v Rent Assessment Panel* [2014] EWHC 1229 (Admin) Lewis J decided the short point that an applicant for the Right To Manage could not unilaterally withdraw the application, and the FTT had been wrong to allow an RTM Company to purport to do so: although s 84(3) of the CLRA 2002 contemplated that an applicant might withdraw an application, in order to ensure that the landlord's right to its costs under s 88(3) was protected, the tribunal would have to consent to the withdrawal.

### **Exercise of Right To Manage – whether had to be exercised on a block by block or estate-wide basis – whether prior existence of estate-wide company prevented companies set up for each block from being validly constituted RTM companies**

*Fencott Ltd v Lyttelton Court 114–34a RTM Co Ltd* [2014] UKUT 0027 (LC) is an Upper Tribunal appeal on the difficult issue of whether the Right To Manage (RTM) can be exercised on an estate-wide basis, or whether it can be exercised only on a block by block basis. It both approves, and offers a gloss on, the decision of the Upper Tribunal Lands Chamber (Judge McGrath, President of the First Tier Tribunal, sitting as a judge of the Upper Tribunal) in the recent case of *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* [2013] UKUT 0606 (LC) (noted in Bulletin No 103). The latter was in fact three appeals, heard with a case transferred up to the Upper Tribunal, and held that, whilst the eligibility to determine whether the RTM had to be determined on a block by block basis, there was no reason why a single RTM Company should not then exercise the RTM, and further that a single claim could be made.

In view of the previous inconsistent decisions of the LVTs on these issues, the leaseholders of three blocks of flats in Lyttelton Court had attempted to circumvent these difficulties by setting up four RTM Companies: one for each block, and one (referred to here and in the report as the 'Estate Company'), which had all purported to claim the RTM. Before the *Ninety Broomfield Road* appeal was heard the LVT hearing the four Lyttelton Court applications determined that the RTM had to be exercised on a block by block basis: it therefore granted the individual applications, and dismissed the application of the Estate Company. The landlord thereupon appealed, though it is unclear whether it had a strong preference for there being one RTM company with which it would have in future to deal, or whether this was essentially a delaying tactic.

The hearing of the appeal in the instant case took place before Mr Martin Rodger QC, after the hearing in *Ninety Broomfield Road*, but before the decision was given. An opportunity was given for each side to make further representations before the present decision was issued. The Tribunal Judge

here accepted that he was not bound to follow the decision of another single judge of the Tribunal, but that he should normally do so unless he felt that the previous decision was clearly wrong (see [55]–[57]). In fact Mr Rodger agreed with Judge McGrath on the points set out above. The further point decided in the instant case is the effect of s 73(4) of the CLRA 2002. The appellant landlord argued that, as the section does not permit more than one company to be an RTM company in respect of the same premises, this must mean that there could not simultaneously be a validly constituted RTM company formed to exercise the RTM over a block and another RTM company formed to exercise an RTM over a wider area including the block. Mr Rodger agreed with the landlord on this point of law. As the first RTM company to be registered was the Estate Company, it followed from s 73(4) of the CLRA 2002 that the RTM companies purportedly set up for the individual blocks did not satisfy the statutory definition of an RTM company in s 73. The landlord's appeal had therefore to be allowed, and a determination substituted that the separate companies were not entitled to acquire the RTM in respect of their individual blocks ([74]). As there was no appeal by the Estate Company, the result of the appeal was therefore that the landlord continued to manage all three blocks, at least for the time being.

The result of this case would seem to be that, by setting up an RTM Company for an individual block, leaseholders can prevent the acquisition of the RTM on an estate-wide basis, and vice versa. This would seem to be the case even if, once it has been set up, the company then takes no steps to claim the RTM.

### PERMISSION TO APPEAL

The Leasehold Advisory Service (LEASE) reports on its website that the appeal in *Phillips v Francis* [2012] EWHC 3650 (Ch), the controversial decision of the former Chancellor on how the consultation requirements under s 20 of the LTA 1985 should be interpreted (see Bulletin No 133), will be heard by the Court of Appeal on 14 and 15 May 2014.

### NOTES ON CASES

*Anselm v Buckle* [2014] EWCA Civ 311: [2014] Comm Leases 2047–2048

*Blueco Ltd v BWAT Retail Nominee (1) Ltd* [2014] EWCA Civ 154: [2014] Comm. Leases 2036–2037; and E.G. 2014, 1417, 114

*Bywater Properties Investments LLP v Oswestry Town Council* [2014] EWHC 310 (Ch) [2014] Comm. Leases 2030–2031 (noted in Bulletin No 104)

*Christoforou v Standard Apartments Ltd* [2013] UKUT 0586 (LC): J.H.L. 2014, 17(2), D39 (noted in Bulletin No 103)

*Courtwell Properties Ltd v Greencore PF (UK) Ltd* [2014] EWHC 184 (TCC): [2014] Comm Leases 2043–2046

*Daejan Investments Ltd v Benson* [2013] UKSC 14: N.L.J. 2014, 164(7603), 13 (noted in Bulletin No 99)

## NOTES ON CASES

*Di Marco v Morshead Mansions Ltd* [2014] EWCA Civ 96: E.G. 2014, 1414, 91 (noted in Bulletin No 104)

*Fulham Broadway Trustees No.1 Ltd v Telefonica UK Ltd* [2014] EWHC 1048 (Ch) [2014] Comm. Leases 2030 (noted in Bulletin No 104)

*HKRUK II (CHC) Ltd v Heaney* [2010] EWHC 2245 (Ch); [2010] 3 E.G.L.R. 15: E.G. 2014, 1416, 81

*Innerspaces Self Storage Ltd v Harding* [2014] EWCA Civ 46: [2014] Comm Leases 2041–2042 (noted in Bulletin No 104)

*No.1 Deansgate (Residential) Ltd v No.1 Deansgate RTM Co Ltd* [2013] UKUT 0580 (LC): J.H.L. 2014, 17(2), D37-D38 (noted in Bulletin No 103)

*Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* [2013] UKUT 0606 (LC): J.H.L. 2014, 17(2), D38-D39 (noted in Bulletin No 103)

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

*Peel Land and Property (Ports No.3) Ltd v TS Sheerness Steel Ltd* [2014] EWCA Civ 100: [2014] Comm. Leases 2034–2036; [2014] L. & T. Review 54–55; and S.J. 2014, 158(12), 15 (noted in Bulletin No 104)

*Pillar Denton Ltd and Ors v Jervis & Ors (Re Games Station Ltd)* [2014] EWCA Civ 180: E.G. 2014, 1410, 98–100; N.L.J. 2014, 164(7602), 11–12; [2014] Comm Leases 2039–2041; and L.S.G. 2014, 111(14), 20 (noted in Bulletin No 104) (NB *first instance* decision discussed at [2014] L. & T. Review 43–47)

*R. (on the application of Trafford) v Blackpool BC* [2014] EWHC 85 (Admin): [2014] Comm. Leases 2037–2038 (noted in Bulletin No 104)

*Sumner v Costa Ltd* [2014] EWHC 96 (Ch): [2014] Comm. Leases 2027–2029 (noted in Bulletin No 104)

*Sunlife Europe Properties Ltd v Tiger Aspect Holdings Ltd* [2013] EWCA Civ 1656: [2014] L. & T. Review 55–60 (noted in Bulletin No 103)

*Taylor v Spencer* [2013] EWCA Civ 1600: [2014] L. & T. Review 51–53; J.H.L. 2014, 17(2), D27; and N.L.J. 2014, 164(7597), 15–16 (noted in Bulletin No 103)

*Topland Portfolio No.1 Ltd v Smiths News Trading Ltd* [2014] EWCA Civ 18: [2014] Comm. Leases 2031–2032; [2014] L. & T. Review 63–65; and [2014] L. & T. Review 69–75; and E.G. 2014, 1417, 118 (noted in Bulletin No 104)

*Trafford Housing Trust Ltd v Rubinstein and others* [2013] UKUT 0581 (LC): [2014] L. & T. Review D16-D17 (noted in Bulletin No 103)

*Xenakis and another v Birkett Long LLP* [2014] EWHC 171 (QB): [2014] Comm Leases 2048–2050 (noted in Bulletin No 104)



**ARTICLES OF INTEREST**

*A distressing new world?* (abolition of distress and introduction of CRAR) E.G. 2014, 1413, 95

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

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

*Arbitration: more effective justice* E.G. 2014, 1411, 105

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

*Commercial property update* L.S.G. 2014, 111(9), 2

*Compensating business tenants* (for disturbance and improvements) E.G. 2014, 1416, 82–83

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

*Conveyancers: join our campaign to reduce delays to leasehold property purchases* S.J. 2014, 158(11), 15

*Getting notices right* (commentary on Leasehold Reform (Amendment) Act 2014) E.G. 2014, 1417, 115

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

*Homing in on mixed-use challenges* E.G. 2014, 1414, 86–87

*Landlord and tenancy update* S.J. 2014, 158(16), 30,33

*Minor tenants – Part 1, status and succession* J.H.L. 2014, 17(2), 37–41

*Modernising the right to manage* E.G. 2014, 1411, 111

*Nothin' goin' on but the rent* (Commercial Rent Arrears Recovery Scheme) N.L.J. 2014, 164(7599), 11–12

*Obtaining absolute titles when leases were granted before TLATA 1996* S.J. 2014, 158(15), 28

*Practicalities of subtenancies* E.G. 2014, 1412, 88–89

*Practice points* (various) E.G. 2014, 1412, 90

*Practice points* (various) E.G. 2014, 1413, 98

*Practice points* (various) E.G. 2014, 1414, 88

*Practice points* (various) E.G. 2014, 1415, 72

*Practice points* (various) E.G. 2014, 1416, 84

*Practice points* (various) E.G. 2014, 1417, 116

## PRACTICE GUIDES ETC

*Protecting rental payments* E.G. 2014, 1411, 102–104

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

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

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

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

*The unenviable position of subtenants* E.G. 2014, 1410, 102–103

*The need for a housing mediation service* J.H.L. 2014, 17(2), 24–30

*The practicalities of recovering costs* (i.e. of service charge disputes before the FTT (PC)): E.G. 2014, 1415, 74

*Title in ejectment* [2014] Conv 123–142

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

*Working with Sharia* (Islamic finance) E.G. 2014, 1417, 82

## PRACTICE GUIDES ETC

**HM Land Registry** has issued revised versions of **Practice Guides 33** and **56** to take account of the new Land Registration Fee Order 2013; new versions of **Practice Guides 40** (including **Supplement 2**), **41** and **71** to reflect enhancements to the electronic Document Registration Service; a new version of **Practice Guide 10** to include the use of **MapSearch**, a new digital service for an online version of the Land Registry's Public Index Map; and also new versions of **Practice Guides 12, 19, 72, 33, 67, and 75**.

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

## PRESS RELEASES

Land Registry has launched a new Online owner verification service.

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

## STATUTES

The **Leasehold Reform (Amendment) Act 2014** received the Royal Assent on 13 March 2014 and comes into force on 13 May 2014. The effect of this brief Act is that, as regards England (but not Wales) the requirement of s 99(5)(a) of the LRHUDA 1993 is abrogated, so that a notice under s 13 (collective

enfranchisement) or s 42 (lease extension) no longer has to be signed by the tenant personally but may be signed by e.g. an attorney or a solicitor. The Act therefore effects a statutory reversal of the inconvenient decision in *St Ermins Property Co v Tingay* [2002] EWHC 1673 (Ch).

### STATUTORY INSTRUMENTS

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

The **Mobile Homes (Site Licensing) (England) Regulations 2014, SI 2014/442** came into force on 1 April 2014 (in England only) and set out the matters to which local authorities must have regard in deciding whether or not to issue consent to transfer a site licence for a mobile home

The **Tribunal Procedure (Amendment) Rules 2014, SI 2014/514** come into force on 1 April 2014. Paragraphs 14 and 15 make a minor amendment to the **Upper Tribunal (Lands Chamber) Rules 2010** (SI 2010/2600).

The **Assured Tenancies and Agricultural Occupancies (Forms) (Amendment) (Wales) Regulations 2014, SI 2014/374** came into force (in Wales only) from 21 February 2014. References to Universal Credit are inserted in statutory forms for proposing a new rent or licence fee for agricultural assured tenancies and licences

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

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

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