Hill & Redman's Law of Landlord and Tenant

Bulletin Editor
Nicholas Roberts, BA, LLM, PhD, Solicitor and Notary Public
Principal Teaching Fellow, School of Law, University of Reading

This Bulletin includes material available up to 30 June 2014.

Filing Instructions: Please file immediately behind the Bulletins Guidecard in Binder 5. The Binder should now contain Bulletins 104 to 106.

DIVISION A: GENERAL LAW

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

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

The factual background to the case was that the leases in question – unsurprisingly, of properties within a marina on the shore of Windermere – had been granted in 1965 and included the provision mentioned above. The intention had always been to expand the marina, hence the Landlord (L) had not stipulated fixed proportions. It would seem that until 2007 the apportionment of the service charges had been uncontroversial, as the service charges for 'boathouse apartments' such as that leased to the respondent W had

covered only drainage and sewerage. As the marina grew, however, it included a variety of mixed uses – commercial premises, holiday cottages, boat moorings, etc – and from 2007 onwards L had sought to recover certain costs, including lighting and security costs, via the service charge. It had engaged a Chartered Surveyor, Mr P, to make an apportionment of costs in accordance with the lease. He had adopted a recommended RICS methodology and produced a report: the LVT praised him for his 'professionalism and diligence'. W and other residential occupiers, however, objected to his assessment of the comparative benefit that they and those who used the boat moorings derived from the security provisions, and commissioned an alternative report from a Mr G-H. The LVT confined itself to the respective merits of the two reports, coming down in favour of the latter. On appeal, the issue of principle was raised as to whether the apportionment of Mr P ought to have been accepted, or whether the LVT did indeed have jurisdiction to make its own apportionment.

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

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

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

One suspects that the approach adopted by the UT is what FTTs have generally been adopting in practice, but it is useful to have it endorsed by a well-reasoned judgment of the Deputy President. It seems implicit in the judgment that, although both the FTT and the UT are expert tribunals, when either is required to rule on the reasonableness of an apportionment, it is

likely to need the assistance of expert evidence to help it to determine that apportionment, especially if the service charge relates to a complex multi-use development.

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

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

The issue which the Court of Appeal had to consider most closely was whether Y under his lease had a right to relay the gas supply pipe and his gas meter in a position which was more convenient, given the raising of the ceiling. He relied on the fact that the High Court in *Trailfinders v Razuki* [1998] 2 EGLR 46 distinguished the Court of Appeal authority in *Taylor v British Legal Life Assurance Co* (1925) 94 LJ Ch 284 on the basis that in the former case a reservation clause in a lease expressly referred to drains, pipes and wires which 'may hereafter during the term granted be in under or over the said premises'. Similar wording was used in the leases in the present case,

but only in the words of grant, not in the words of reservation. The Court of Appeal declined to read the necessary words of reservation into the lease of the upper flat. It held that the wording of the leases might be viewed as giving rise to an anomaly, and it might be desirable to improve it, but it could not be seen as raising an issue of necessity, and the courts were traditionally reluctant to imply words of reservation into leases where there were none ([46]–[48]). The court therefore declined to order P as the lessees of Flat 4 to allow Y access to their flat for the purpose of temporarily turning off the gas supply to that flat, so that the pipes serving Flat 3 could be relaid. It was also made clear in the judgment that Y could not relay the pipes either within the floor joists under Flat 4 (i.e. above any new ceiling to Flat 3) or within the area which formerly lay between the floor of Flat 4 and the old ceiling of Flat 3 (see [58]).

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

(case noted at: S.J. 2014, 158(25), 32–33)

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

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

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

As stated, the decision of Morgan J is very much based on the interpretation of the service charge provisions of the lease. He rejected T's contention that it had no liability for works carried out after its exercise of the break clause had become effective: the accounting year ran with the calendar year, and L had not nominated any other date. The lease expressly envisaged that an accounting period might extend beyond the duration of the lease, and rejected T's contention that this should be taken as applying only if the lease were forfeited: its wording could clearly also cover the situation here, where a break clause had been exercised. T did not, however, have any liability for that part of the expenditure on major works incurred after the end of the financial year to 31 December 2010. Perhaps of more general applicability is Morgan J's determination that the service charge for the year 2010 ought then to be apportioned on a daily basis even though there was no express provision for this made in the lease. He further determined that credit had to be given to T for the £875,000 collected on account of the works in previous year, and – in calculating T's overall liability – at which stage of the calculations this sum should have been credited.

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

Marks & Spencer plc v Paribas Securities Service Trust Co (*Jersey*) *Ltd* [2014] EWCA Civ 603 is the successful appeal against the decision of Morgan J reported as [2013] EWHC 1279 (Ch) and discussed in *Bulletin No 100*. T had exercised a break clause, and to ensure that it could successfully do so in compliance with the relevant case law, it had paid up in advance rent, service charge, insurance rent and parking fees for the period which straddled the operative date of the break. Following its successful exercise of the break, it had then sought to recover an apportioned part of the rent and other charges. There was no express provision made in the lease. Morgan J rejected T's arguments based on the express wording of the lease, restitution and a total failure of consideration, but T succeeded with an argument that a term to that effect should be implied.

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

Some commentators have suggested that, as a result of this ruling, tenants will attempt to ensure that any break date falls as close as possible before a quarter day, so they do not end up paying rent for premises that they do not

wish to occupy. Alternatively, there is nothing in the case that suggests that an express apportionment clause would not be upheld.

(case noted at E.G. 2014, 1422, 85; E.G. 2014, 1423, 78; and (with others) at E.G. 2014, 1422, 79.

Grant of tenancy by one member of a business partnership to himself and another partner – Rye v Rye (1962) followed

Lie v Mohile [2014] EWCA Civ 728 (see Division B)

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

Daejan Properties Ltd v Griffin and Mathew [2014] UKUT 0206 (LC) raises an issue which often arises in service charge disputes, especially in residential disputes in which s.19 LTA 1985 is invoked: namely whether repair costs are reasonably incurred if – as is sometimes allegedly – the disrepair had been more timeously undertaken, with the result that the costs would have been cheaper. The factual background to the instant case was that the premises dated back to the 19th century, and consisted of a block of 18 flats over a row of 9 shops. Access to the flats was via first floor walkway. The walkway was supported on three rows of steel beams which had corroded and were dangerous. The need for the work became apparent only when one of the outer beams failed, and the brickwork forming the parapet which was built on it, moved and threatened the footpath below. The LVT had disallowed around 13% of the cost, on the basis that some of the beams ought to have been replaced as long ago as the 1960s; one beam had been replaced 20 to 30 years ago; and that if the work had been carried out at the time, it would have been cheaper as emergency safety measures would not have been necessary. The landlord successfully appealed.

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

damages the tribunal would need to have regard to the general law relating to repairs including whether L needed to be aware of the disrepair before it could be under any liability, whether L could be liable for disrepair existing when the reversion was assigned to it, and whether Ts could sue for disrepair which existed before the lease was assigned to them. Applying all these factors, the repair costs incurred by L had been reasonably incurred, and the LVT's determination was varied.

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

Ground Rents (*Regisport*) *Ltd v Dowlen* [2014] UKUT 0144 (LC) has certain similarities with the case of *Burr v OM Property Management Ltd* [2013] EWCA Civ 479, [2013] 1 WLR 3071(see *Bulletin No 100*). In the instant case the developer had entered into a contract with Thames Water for the supply of water to a development consisting of three blocks of flats: each block had a communal meter. When the freehold was sold to the current ground landlord Thames Water billed the new landlord for one of the blocks, but, in respect of the other two, continued to send bills (and reminders) to the developers for the period between June 2005 and April 2011. In the meantime the current ground landlords assumed that the water bill that was being sent to them related to all three blocks, and so apportioned it accordingly. When the mistake came to light the current ground landlord attempted to recover from the leaseholders the arrears that had built up, but the leaseholders argued that they could claim the protection of s 20B of the LTA 1985, which renders irrecoverable costs incurred more than 18 months before the relevant accounting period.

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

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

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

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

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

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

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

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

Repair or replacement of windows – whether consultation notices were sufficiently clear

Southwark LBC v Oyeyinka [2014] UKUT 0258 (LC) is a successful appeal by the Council against a decision of the LVT which had disallowed most of the cost of replacing windows on the basis that the consultation requirements of s 20 of the LTA 1985 had not been complied with. The dispute arose because the original consultation notices had referred to the repair or replacement of the windows and the applicant (the current respondent) had argued that the windows had actually been replaced, and this was considerably more expensive than the repair option which had been mentioned in the original notices. The UT (HHJ Nigel Gerald) held that the original consultation notices had made it adequately clear that the alternatives of repair and replacement were both under consideration, and that it would not be known until the works had commenced whether the cheaper option of repair would be feasible. The UT therefore allowed the appeal and required O to pay his share of the cost of replacement windows.

DIVISION B BUSINESS TENANCIES

Section 41A of the LTA 1954 – whether general medical practice was to be carried on by only one of the members of a partnership – Rye v Rye (1962) followed

Lie v Mohile [2014] EWCA Civ 728 represents the second visit to the Court of Appeal (see further *Lie v Mohile* [2013] EWCA Civ 1436, which discussed in *Bulletin No 103*) by two general medical practitioners who would appear still to be conducting a practice in partnership with each other. The medical centre in which they practised was owned by Dr M but was let to himself and Dr L as partners. As a result of disagreements Dr M served notice on Dr L purporting to terminate their partnership and the periodic tenancy. The notice terminating the partnership was held to be ineffective in the previous proceedings. Dr L issued an application under s 24 of the LTA 1954 seeking the grant of a tenancy to himself alone, which Dr M opposed under s 30(1)(g) on the basis that he wished to continue to practise at the premises without Dr L. At the previous hearing in the Court of Appeal Rimer LJ raised the question of whether an application for a new tenancy – which would have to be under the provisions of s.41A, which made provision for such applications by some, but not all, of the joint tenants, in the case of partnerships – could be made by Dr L alone. This matter was then raised in the 1954 Act proceedings, and, sitting in the Central London County Court, HHJ Karen Walden-Smith heard it as a preliminary issue. She determined that the first three of the conditions in s 41A(1) were satisfied, but not the fourth, because it could not be said that the business was carried on 'by one or some only of the joint tenants': both Dr L and Dr M continued in practice as partners. Dr L appealed against this finding, arguing that Dr M was not capable of granting a tenancy to himself, even jointly with Dr L, and so Dr L was in effect the sole tenant. This argument was rejected by the CA (Patten, Underhill and Vos LJJ): s 82 LPA of the 1925, as interpreted in *Rye v Rye*

[1962] AC 496 made it clear that A could grant a valid tenancy to A and B; further, if Dr L's argument were correct, then s 41A would not be engaged at all. The appeal was therefore dismissed.

DIVISION D: PUBLIC SECTOR RESIDENTIAL TENANCIES

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

Birmingham CC v Beech [2014] EWCA Civ 830 is an unsuccessful appeal against the judgment of Keith J reported as [2013] EWHC 518 (QB) and discussed in *Bulletin No 99*. The appellant B was the adult daughter of a secure council tenant (W); W was tenant of a house which included three bedrooms and two living rooms. W was the survivor of joint tenants, so (prior to the amendments brought about by the Localism Act 2011) under ss 87 and 88 no succession to the property was permitted. In November 2007 B moved back to live with W, and was joined by her new partner, whom she later married. B and her partner sought a council tenancy in Birmingham, but turned down the properties that they were offered. B then sought to become a joint tenant with W, but this was turned down, as the council's policy was to permit cross-generational joint tenancies only in exceptional circumstances. In October 2009 W went into hospital for an operation and was discharged into a care home. B requested that the tenancy be transferred into the names of herself and her partner, but a council officer visited W and got her to sign a notice to quit. B again sought the tenancy; whilst the request was being considered, W died, in June 2010; the request for the tenancy was again refused; there were further reviews and an internal appeal. The Council thereupon commenced possession proceedings in the County Court. These were challenged on several grounds:

(1) Whether W had validly given notice to quit: this was challenged on the basis (a) that W had not had mental capacity at the relevant time, or (b), in the alternative, was procured by the Council by undue influence and unconscionable behaviour.

(2) A public law challenge to the Council's refusal to add B's name to the tenancy.

(3) A public law challenge to the Council's refusal to grant the tenancy to B and her partner.

(4) A defence under art 8, on the basis that the council was acting disproportionately in seeking to evict B from what had become her home.

(5) A further argument under the HRA 1998 that the statutory succession scheme itself under s 88 was itself not compliant with the Act.

In view of the complexity of the defence, and the HRA 1998 issues, the case was transferred to the High Court.

Permission to appeal to the Court of Appeal was given only on:

(a) whether there was a presumption that the signing of the notice to quit by W had been procured by the undue influence of the Council officer; and

(b) whether the Council's decision to take possession proceedings was liable to a public law challenge on the basis that it should have procured a formal assessment of her mental capacity before she signed the notice.

The appeal failed on both grounds. Essentially the Court of Appeal (Etherton, C, and Underhill and Briggs, LJJ) confined presumed undue influence to its traditional cases (parent and child, trustee and beneficiary, solicitor and client, medical adviser and patient) and declined to extend it to a scenario where a frail elderly person was dealing with a person whom she would perceive to be in authority. Although it could be argued that this takes a rather narrow view of the reality of the situation here, it should be noted (see [75]) that, if W had not signed the notice to quit, then there would have been nothing to stop the Council from serving their own notice, as W was not in occupation, and so was no longer a secure tenant. The Court also found no merit in the second ground of appeal. Mental capacity is presumed under the Mental Capacity Act 2005 until disproved. There was no evidential basis to suggest that, if a formal assessment had been carried out, it would have found that W had insufficient capacity to give the notice to quit ([83]). Any public law challenge to the decision of the council to rely on that notice to quit was 'plainly untenable' ([85]).

DIVISION E: LONG LEASES

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

Note: a brief account of this case appeared in *Bulletin No 105*, but its brevity led to its being misleading. A fuller and more accurate account appears below.

R (*on the application of O Twelve Bay Tree Ltd*) *v The Rent Assessment Panel* [2014] EWHC 1229 (Admin) raises a short point on the powers of the former LVTs when dealing with an application to determine whether a company set up as an RTM Company is entitled to exercise the Right to Manage. The RTM Company (which was joined as an Interested Party, but did not participate in these judicial review proceedings) had given a notice under s 79(1) of the CLRA 2002 claiming the RTM, which the landlord had contested by serving a counter notice under s 84(2)(b). The RTM company had thereupon issued an application to the LVT under s 84(3) for a determination to be made. Following the service of a statement and a reply, and exchange of documents, the RTM Company's solicitor had written to the

LVT asking for the application to be withdrawn. The LVT had considered that it had no choice but to accede to this request, and had not accepted an argument put to it in a letter from the ground landlord to the effect that, once made, the application under s 84(3) remained current until dismissed by the LVT. The landlord had therefore commenced these judicial review proceedings. The landlord was of course keen to have an opportunity to seek an order for costs in its favour.

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

It should be noted that the jurisdiction of the LVT in these matters has of course been transferred to the First-tier Tribunal (Property Chamber), and that r 22(3) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber Rules 2013 now provides that if an applicant serves a notice of withdrawal, such a notice does not take effect without the consent of the Tribunal. The instant case therefore confirms that the new Rules correctly reflect the proper interpretation of the CLRA 2002 ([44]).

(case noted at: E.G. 2014, 1419, 125)

Valuation of lease extension under Part II of the LRHUDA 1993 – deferment date to be adopted – whether evidence should be adduced to justify a Zuckerman departure from the Sportelli rate

Contrary to what the case name may suggest, *Re Sinclair Gardens Investments* (*Kensington*) *Ltd* [2014] UKUT 0079 (LC) deals with a valuation in Halesowen, and the case was argued as one of particular significance to valuations across the Midlands. The long leaseholder (T) of a maisonette held under a lease granted in 1962 had applied for a lease extension under Part II of the LRHUDA 1993. The specific issue raised by the appeal was the deferment rate to be adopted. The landlord (L) had argued for 4.75% (following *Sportelli*); T had argued for 5.75%, relying on *Zuckerman* (*Zuckerman v Trustees of the Calthorpe Estate* [2009] UKUT 0235 (LC)). The LVT had accepted a deferment rate of 5.75%, and L had appealed. Essentially the issue was whether (as L argued) *Zuckerman* was a departure from *Sportelli* which could be justified only if appropriate evidence were adduced, or whether (as T argued) it was a precedent which could be taken to be of general applicability across the Midlands. At a deeper level this in turn raised the issue of whether LVTs (now FTTs) could treat decisions of the UT as

binding precedents on issues of fact as well as on issues of methodology and law. Only the appellant was represented before the UT, T choosing not to take part in the appeal.

The UT (Mr Martin Rodger QC, Deputy President, and Mr A J Trott, FRICS) reviewed the case law since *Sportelli* and *Zuckerman*, including cases such as *Voyvoda v Grosvenor West End Properties* ([2014] UKUT 0334 (LC) (see *Bulletin No 101*) and concluded that it was unrealistic to treat *Zuckerman* as a decision which allowed an FTT to depart from *Sportelli* only if evidence were adduced fully to justify that that step. The UT had to set a framework in which a consistent approach to valuation could be adopted in cases where relatively modest values were at stake (see [68]). The jurisprudence of the UT since *Sportelli* indicated that the decisions of the UT (though not the FTT) could be treated as precedents on matters of fact such as the factors relevant to the deferment rate (see [73]).

The UT's decision in the instant appeal was to accept that it could be assumed that the *Zuckerman* modification to *Sportelli* could be applied here as the starting point for setting the deferment rate. However, the addition of the further 0.25% 'to reflect obsolescence and deterioration' (see [84]) which had been adopted in *Zuckerman* could not be justified on the facts of the instant case. The UT therefore calculated the premium to be paid on the basis of a deferment rate of 5.5% rather than the rate of 5.75% accepted by the LVT (following *Zuckerman*) or the rate of 4.75% (following *Sportelli*) for which L had contended.

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 97*), which had been listed for hearing by the Court of Appeal for 14 and 15 May 2014, has now been adjourned to 13–15 October 2014.

The appeal to the Supreme Court in *Sims v Dacorum BC* [2013] EWCA Civ 12 (see *Bulletin No 98*) was heard on 23–26 June 2014. It was heard together with an appeal in *R* (*on the application of CN*) *v Lewisham LBC; R* (*on the application of ZH* (*a child by his litigation friend*)) *v Newham LBC* [2013] EWCA Civ 804 (noted in Bulletin No 101). Judgment is awaited.

Permission to appeal has been granted by the Upper Chamber (Mr Martin Rodger, QC, DP) in the case of *an application by Mr JW Fisher* (RAP/19/2013, 14 April 2014). An application to register a fair rent for a property on the Howard de Walden Estate in W1 was capped – in fact reduced by more than 50% – because of the effect of the Rent Acts (Maximum Fair Rent) Order 1999, which capped the increase in the registered rent by RPI plus 5%. The Rent Officer and the FTT had used as the base the previous registered rent, which included a sum for services. Having a separate element for services was no longer appropriate, as a separate heating system had been installed. The tenant was granted permission to appeal on

the basis that it was an arguable proposition that the base rent for recalculation purposes should have been the previously registered rent, less the element for services. The Deputy President made the point that appeals from LVTs and residential property tribunals were governed by s 175 of the CLRA 2002 and s 231 of the HA 2004, which permitted appeals more widely than on points of law; appeals from the Rent Assessment Committee were confined to points of law, under s 11 of the Tribunals, Courts and Enforcement Act 2007. This distinction had been preserved following the transfer of jurisdiction of all these tribunals to the FTT (Property Chamber). However, the application to appeal in the instant case clearly involved a point of law.

NOTES ON CASES

Barclays Wealth Trustees (*Jersey*) *Ltd v Erimus Housing Ltd* [2014] EWCA Civ 303: [2014] L. & T. Review, 18(3), D19 (noted in *Bulletin No 105*)

Bitto v Slovakia (30255/09) Unreported, January 28, 2014 (ECHR) (rent controls) J.H.L. 2014, 17(3), D57-D58

Bolton v Godwin-Austen [2014] EWCA Civ 27: J.H.L. 2014, 17(3), D61-D62; and E.G. 2014, 1423, 79

Ceballos v Southwark LBC [2014] EWHC 1450 (QB): J.H.L. 2014, 17(3), D66-D67

Di Marco v Morshead Mansions Ltd [2014] EWCA Civ 96: J.H.L. 2014, 17(3), D62-D63 (noted in *Bulletin No 104*)

Friends Life Ltd v Siemens Hearing Instruments Ltd [2014] EWCA Civ 382: [2014] Comm. Leases 2051–4; [2014] L. & T. Review 96–101; and [2014] L. & T. Review, 18(3), D21-D22 (noted in *Bulletin No 105*)

Furlonger v Lalatta [2014] EWHC 37 (Ch): J.H.L. 2014, 17(3), D62 (noted in Bulletin No 104)

Re Games Station Ltd (*Pillar Denton Ltd v Jervis*) [2014] EWCA Civ 180: [2014] L. & T. Review, 18(3), D20-D21 (noted in *Bulletin No 105*)

Helman v John Lyon Free Grammar School [2014] EWCA Civ 17: J.H.L. 2014, 17(3), D60-D61 (noted in *Bulletin No 104*)

Horne and Meredith Properties Ltd v Cox [2014] EWCA Civ 423: [2014] Comm. Leases 2055–7 (noted in *Bulletin No 105*)

Masih v Yousaf [2014] EWCA Civ 234: J.H.L. 2014, 17(3), D45 (noted in *Bulletin No 104*)

Manchester Ship Canal Developments Ltd v Persons Unknown [2014] EWHC 645 (Ch) J.H.L. 2014, 17(3), D58-D59 (noted briefly in *Bulletin No 105*)

Martin Retail Group Ltd v Crawley BC (*CC* (*Central London*), unreported, 24 December 2013) E.G. 2014, 1420, 95

Nelson v Circle Thirty Three Housing Trust Ltd [2014] EWCA Civ 106: J.H.L. 2014, 17(3), D66 (noted in *Bulletin No 104*)

Singh v Dhanji [2014] EWCA Civ 414: [2014] Comm. Leases 2057–9 (noted in *Bulletin No 105*)

Southend-on-Sea BC v Armour [2014] EWCA Civ 231: N.L.J. 2014, 164(7605), 16–17; and J.H.L. 2014, 17(3), D59-D60 (noted in *Bulletin No 105*)

Sumner v Costa Ltd [2014] EWHC 96 (Ch): E.G. 2014, 1422, 83 (noted *in Bulletin No 104*)

ARTICLES OF INTEREST

A tough break (need for strict compliance with break clauses) E.G. 2014, 1417, 119

Agricultural tenancies: don't come a cropper E.G. 2014, 1422, 80–81

Beware the costs of holding over (SDLT liabilities) E.G. 2014, 1421, 91

Boom time for property tribunals E.G. 2014, 1424, 88–90

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

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

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

Clarifying counter-notices E.G. 2014, 1423, 79

Closing the door on anti-social behaviour E.G. 2014, 1418, 89

Commercial property update S.J. 2014, 158(20), 33–34

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

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

Covenants versus development rights E.G. 2014, 1424, 91

Cutting the red tape (regulation of residential letting agents) E.G. 2014, 1425, 79

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

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

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

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

Estate Management Schemes (challenging unreasonable charges) E.G. 2014, 1418, 85

ARTICLES OF INTEREST

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

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

Getting connected (IT and Telecommunications in tenancies) E.G. 2014, 1418, 90

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

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

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

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

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

Losing a home (discussion of report into housing repossession cases) N.L.J. 2014, 164(7611), 16–17

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

Minor tenants – Part 2, liability and grounds for possession J.H.L. 2014, 17(3), 62–67

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

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

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

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

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

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

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

SDLT on multiple transactions [2014] Conv 193–201

Service charges [2014] Conv 237–248

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

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

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

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

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

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

Time to take notice (treatment of various defective notices) E.G. 2014, 1421, 89

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

Your duty on stamp duty L.S.G. 2014, 111(17), 25–26

NEWS AND CONSULTATIONS

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

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

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

OFFICIAL PUBLICATIONS

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

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

REPORT

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

PRACTICE GUIDES ETC

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

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

PRESS RELEASES

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

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

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

STATUTES, ETC

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

STATUTORY INSTRUMENTS

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

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

Correspondence and queries about the content of *Hill & Redman's Law of Landlord and Tenant* should be sent to Sarah Thornhill, Senior Editor, LexisNexis, Lexis House, 30 Farringdon Street Lane, London EC4A 4HH, tel: 020 7400 2736, email: sarah.thornhill@lexisnexis.co.uk.

Subscription and filing enquiries should be directed to LexisNexis Customer Services, LexisNexis, PO BOX 1073, BELFAST, BT10 9AS. Tel 0(84) 5370 1234.

Visit LEXISNEXIS direct at www.lexisnexis.co.uk

Published by LexisNexis

Printed and bound in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire

FSC
www.fsc.org
MIX
Paper from responsible sources
FSC® C020438

ISBN 978-1-4057-8499-3

9 781405 784993