Butterworths Property Law Service

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I. FREEHOLD CONVEYANCING

'Equity release schemes' – sale and lease back arrangement – whether assured shorthold tenancies binding on mortgagees – whether purchasers could confer proprietary rights before completion – whether contract should be seen as one indivisible transaction with the transfer and legal charge

Scott v Southern Pacific Mortgages Ltd [2014] UKSC 52 is the final stage to what has generally been referred to as the North East Property Buyers' Litigation (NEPB) (it was referred to as such when the decision in the Court of Appeal, [2012] EWCA Civ 17 was discussed in Bulletin No 128). Now, nearly three years later, we have the views of the Supreme Court. The case is the most significant opportunity the Supreme Court has had to review *Abbey National Building Society v Cann* [1991] 1 AC 56 since the Land and Registration Act 2002 (LRA 2002) came into force.

The facts of the numerous cases involved in the litigation obviously differ in their detail, but those of *Scott,* the subject of this appeal, are typical. Mr and Mrs Scott had purchased their property under the Right to Buy. They fell into financial difficulties, and agreed via a nebulous entity called the North East Property Buyers to sell the property at a discounted price to Ms Wilkinson, a nominee purchaser for NEPB. In return, Ms W would rent the property back to her, at a discounted rent, for ten years. If she stayed there for the full ten years she would receive a loyalty payment of £15,000, which went part of the way towards making up for the discounted price she would receive. In fact the purchase by Ms W was funded by a 'buy to let' mortgage from SPM, which permitted only the granting of fixed-term assured shorthold tenancies (ASTs) of not more than 12 months duration. Mrs Scott was in fact granted neither a 12-month AST nor a ten-year tenancy, but a two-year AST. Ms W defaulted on the mortgage, and SPM obtained a

possession order against her. When Mrs S found out about this she successfully applied to be joined in the proceedings so that she could argue that she had an overriding interest in the property under the LRA 2002. The sale contract under which Ms W acquired the property left both alternatives under Special Condition 4 undeleted, so that it was not clear whether the sale was with vacant possession, or subject to a tenancy. Replies to Requisitions implied that vacant possession would be given.

In the High Court and the Court of Appeal, discussion of the issues surrounding the transaction had concentrated on whether the contract, transfer and legal charge formed one indivisible transaction ('the *Cann* point'), and both courts had found in favour of the lenders. In the Supreme Court, the Justices focussed first on what they considered to be the logically prior issue: whether Ms W was in a position from exchange of contracts (ie prior to completion) to confer equitable proprietary rights on Mr and Mrs S. Only if this question were answered in the affirmative would the *Cann* point arise ([53], [54]). Mrs S argued that the promises made to her amounted to a proprietary estoppel, that by s 116 of the LRA 2002 such rights were proprietary even before confirmed by a court, and by virtue of s 29(2)(a)(ii) of the LRA 2002 they would take priority over SPM. She supported her argument by relying on the established line of authority (going back to *Lysaght v Edwards* (1876) 2 Ch D 499) that, as from exchange of contracts, the vendor holds on trust for the purchaser, and that therefore from exchange the purchasers were able to reconfer equitable rights on the sellers. Giving the lead judgment on what was described as the 'logically prior issue', Lord Collins considered the nature of the constructive trust between exchange and completion ([60]–[64]), and came to the conclusion, [65], that the purchaser did not enjoy proprietary rights for all purposes, but only as between the parties. Ms W was therefore in a position, prior to completion, to confer only personal rights upon Mr and Mrs S. Further, the true nature of the transaction was that of a sale and lease back, [78], and not the sale of a reversionary interest to Ms W.

Lord Collins's judgment, besides including much discussion of the nature of the constructive trust between exchange of contracts and completion, also discusses the relationship of *Cann* to previous and subsequent case law, including the clutch of cases in the early 1950s.

Lord Sumption agreed with Lord Collins's judgment in its entirety. The remaining justices (Lady Hale, Lord Wilson and Lord Reed) agreed with Lord Collins on the question of whether a purchaser was in a position to confer proprietary rights before completion. On the other question however – whether contract should be seen as one indivisible transaction with the transfer and the mortgage – Lord Wilson and Lord Reed concurred with Lady Hale. She parted company with Lord Collins on this issue, holding that the contract should be seen and treated as a separate transaction, as at that stage the seller would not necessarily know the buyer's mortgage arrangements, and the lender would not be a party to the contract of sale and purchase. It was even possible that the buyer might not have made definite

mortgage arrangements at the time of the purchase (a scenario which occasionally arises in practice on auction sales).

All the justices were aware that, so far as Mrs S was concerned, this would be seen as a harsh decision. Lord Collins hoped that the lenders would consider whether they could mitigate the hardship to Mrs S before enforcing their security, and Lady Hale hoped that the Law Commission might consider the issues when considering the impact of fraud in the review of the LRA 2002 which is to form part of their Twelfth Programme of Law Reform.

(case noted at: SJ 2014, 158(45), 14–15,17 (Online edition: October 22, 2014); [2014] Conv 461–465)

Conveyancing company set up to act for mortgagee – extent of its liability to assignee – variations to conditions in CML Handbook

Redstone Mortgages Ltd v B Legal Ltd [2014] EWHC 3398 (Ch) is a series of claims against BL, a conveyancing company. It was set up specifically to act on behalf of Beacon Homeloans ('Beacon') which was in the business of providing mortgages over residential properties so that they could immediately be purchased by Redstone (R), and, once assigned, bundled, securitised, and marketed as residential mortgage- backed securities.

Beacon and BL entered into a Legal Services Agreement (LSA) so as to define the extent of BL's responsibilities. It was based on the requirements of the CML Handbook, though in certain respects procedures were streamlined. BL did not have to concern themselves with local searches, planning restrictions or building regulation approvals, as Beacon had taken out title insurance. Although Beacon required that a certain minimum term be unexpired on any leasehold properties, BL did not have to concern itself with the terms of the lease, again because of the title insurance. On the other hand, the only tenancies which could be in existence prior to or after the mortgage to Beacon were assured shorthold tenancies; any shared ownership leases were not acceptable, and BL were expected to identify these from appropriate wording in the Land Registry entries, such as the obligation on the part of the lessee to offer a surrender. Although the LSA was principally between Beacon and BL, BL would also be acting on behalf of Beacon in their assignment of the mortgages to R, R was a party to the LSA, but solely for the purpose of specified clauses relating to its own purchase of the mortgages.

Four cases were chosen as test cases in this litigation, and various preliminary issues were decided in the context of those cases. Although specific to the precise terms of the retainer governed by the LSA, some of the discussion may well be of relevance to conveyancing solicitors' duties more generally.

In the first case R were attempting to hold BL liable on the basis that an advance to someone who was apparently a buy-to-let investor was in fact a loan which was part of a sale and lease-back arrangement. The high water mark of R's argument seemed to be that BL should have spotted that there

was something suspicious in that, in answer to requisitions, the seller's solicitor had answered that at completion their client would be the only person in occupation, and had not answered a requisition asking for a copy of any Assured Shorthold Tenancy agreement, and confirmation that only those to whom the property was let was in occupation. Norris J did not agree that there was sufficient material here to raise the suspicion that this was a sale and lease-back transaction, rather than an advance to a buy-to-let investor. The contract signed by the sellers said that the sale to the investor was with vacant possession, and the Property Information form indicated that they would be moving out. Either – or both – of these documents would have presented an opportunity for the sellers to indicate that they were staying put. It is refreshing to note Norris J's robust summary 'Beacon was told untruths by its borrower and its solicitors are not to blame'. (As an aside, it is difficult to understand why Norris J could say, [38] 'it is not in the least surprising that at the moment of completion the only person in occupation would be the purchaser (the vendor having given vacant possession to enable completion to take place)': one would surely expect ***no one*** to be in occupation at the moment of completion. But this is not relevant to the fact that the reply would not alert the buyer's solicitor to the fact that things were not as they seemed.)

The second case involved a problem that boiled down to the issue of whether the property offered as security was the whole of the property included in a registered title, or only part of it. A TP1 (transfer of part) was provided, but this did not include any of the ancillary rights which one would expect to find when a property in common ownership was separated. Norris J pointed out, [76], that this was not a case about boundaries as such. It was about whether BL had sufficiently drawn the potential problem to Beacon's attention. It was held on the facts that they had, and it was then up to Beacon to check with the valuer whether the valuation needed to be revised.

The third case involved a property which was described in the valuation report as 'freehold' but was in fact leasehold at a variable rent. (It will be recalled that the LSA did not require BL to obtain or peruse a copy of any lease, but that shared ownership leases were not acceptable.) BL did request a copy of the lease, and, in response, were sent the first four pages of an undated and unstamped lease. The fact that what was sent included such matters, inter alia, as definitions of 'Market Value', 'Gross rent' and 'specified ground rent', and the fact that the lease was by a local authority, for a 99-year term, but with no premium had been paid, was held by Norris J to be sufficient to raise in a competent solicitor the suspicion that this was in fact a shared ownership lease, and was not therefore covered by the title insurance policy. In this case, therefore, BL were liable to R.

The fourth case was similar in that, although the instructions described the property as 'freehold' it was in fact leasehold, for a term of 99 years, with a housing association as the lessor; further, the Property Register noted that, in certain circumstances, the lessee was under an obligation to surrender the lease. The copy of the lease made it even clearer that the borrowers did in fact own only a 50% share of the property, on typical shared ownership terms. BL

reported to Beacon that the lease was a shared ownership lease, and were told that they could proceed provided that at least 60 years remained on the term. BL were nevertheless held liable as they did not draw to Beacon's attention the fact that the property could not be disposed of at full market value, and was subject to a restriction on disposal.

The case offers some interesting examples of the complications that can still – perhaps even particularly – arise when solicitors are engaged to conduct conveyancing on a limited retainer.

Mistake made in discharging prior mortgage – extent of solicitors' liability to new mortgagee for loss arising therefrom – whether they could be required to reconstitute the trust fund

AIB Group (*UK*) *plc v Mark Redler and Co Solicitors* [2014] UKSC 58 is the appeal from [2013] EWCA Civ 45, which was noted in Bulletin No 134. As a decision on how far common law notions of causation, etc are relevant to claims for equitable compensation, and indeed on the nature of equitable compensation itself, the case has achieved a far greater significance than could have been foreseen from the Court of Appeal report: indeed, insofar as it clarifies and interprets *Target Holdings Ltd v Redferns* [1996] AC 421, *AIB Group* is clearly itself now a leading case in the field. From the point of view of the conveyancing practitioner (and their professional indemnity insurance premiums) the decision is generally to be welcomed, although it must be said that what it has to say about good conveyancing practice is of less importance than is offered in cases such as *Lloyds TSB plc v Markandan and Uddin* [2012] EWCA Civ 65 (see Bulletin No 128) and *Davisons Solicitors v Nationwide Building Society* [2012] EWCA Civ 1626 (see Bulletin No 130).

The facts are rather more straightforward than is often the case in this area. The Respondent solicitors MR were acting on a remortgage of £3.3M of the home (allegedly worth £4.25M) of their clients S, to fund a business expansion. They were also acting in the usual way for the Appellant lenders, AIB. They were aware that S had two relevant mortgage accounts, but, in discharging the prior legal charge, relied on what was clearly, if they had examined it, a figure relating only to the larger account. As a result AIB never obtained a first legal charge over the relevant property. S promised MR that they would clear the balance remaining owing on the first legal charge, but never did so. At first the first mortgagees relied on a provision in their mortgage deed and declined to allow the registration of AIB's charge at all. Subsequently, by agreement between the two lenders, AIB's mortgage was registered as a second charge. When the property was repossessed and sold by the first mortgagees in February 2011, it sold for only £1.2M, and AIB received less than £800,000. AIB sued MR, alleging breach of trust, breach of fiduciary duty, breach of contract and negligence. Although liability was not admitted, breach of contract and negligence were not live issues after the hearing at first instance before HHJ David Cooke (sitting as a judge of the Chancery Division). The real issue was the implication of the claim for

breach of trust. AIB argued throughout that, in parting with the mortgage advance (which MR were holding in their client account on a bare trust for AIB) in breach of the terms of their retainer, this was a breach of trust relating to the whole advance, and that AIB were therefore entitled to require MR to reconstitute the trust fund. They accordingly claimed the full amount of the remortgage advance (£3.3M), less what they had received on the sale. In round figure terms and excluding interest, the issue was whether AIB were entitled to £2.5M, or £275,000. The Supreme Court, like the High Court and the Court of Appeal, unanimously held that AIB was entitled only to the lower figure. Broadly speaking, the judgments – of Lord Toulson and Lord Reed – follow the judgment of Lord Browne-Wilkinson in *Target Holdings*. AIB had argued that the scenarios were different, claiming that Lord Browne-Wilkinson had apparently relied on the fact that the mortgage in *Target Holdings* was eventually completed (so the lenders got what they had stipulated for), whereas in the instant case AIB never did get the first charge that it required over S's property. The Supreme Court, however, stressed that the bare 'client account' trust existed in the context of a contractual relationship (ie MR's retainer) and adopted the commonsense view that the loss caused to AIB was the £275,000, and no more.

MR had raised the issue of relief under s 61 of the Trustee Act 1925 (which was a live issue in *Markandan and Uddin* and *Davisons Solicitors*), but that was not discussed in the Supreme Court. They had clearly not followed their contractual retainer, let alone best practice, when they had discharged the first mortgage only in part, and as they were liable only for that part of AIB's loss, no issue as to relief arose.

Application for vacation of caution against first registration lodged to protect claims under Inheritance (Provision for Family and Dependants) Act (I(PFD)A) 1975, probate claims and proprietary estoppel claims – balance to be struck by judge

In *Williams v Seals* [2014] EWHC 3708 (Ch) David Richards J offers some further guidance on the principles to be followed in deciding whether the court should order that a caution against first registration of land should be vacated. The case draws on the approach adopted by Morgan J in *Nugent v Nugent* [2013] EWHC 4095 (Ch), an application to vacate a unilateral notice.

The deceased had owned a half share in a farm, and owned outright a house, a paddock and some grassland. All the properties were about to be put up for sale by auction. The deceased, who took his own life, had, by his will, left his whole estate to a lady friend who had been supportive to him following the death of his wife. His three adult children had lodged the cautions on the basis that they had brought various claims against the estate under the I(PFD)A 1975, and they intended to bring claims challenging the will on the basis of a lack of capacity or undue influence; and to advance claims based on proprietary estoppel. The friend – who was his executor and sole beneficiary – applied to vacate the cautions. In *Nugent* it was accepted that

the court had jurisdiction to vacate an entry, if the claim it was intended to protect had no prospect of success, but the position was more complicated if, as in that case, it did not fall in that category. Morgan J there drew guidance from the analogous position where a party was seeking an interim injunction. In this case David Richards J felt that the guiding principle should be whether the adult children – the respondents to the application to vacate – had a seriously arguable case that they might acquire a proprietary interest in the real property comprised in the deceased's estate. If so, the court had to go on to consider whether they would be adequately compensated instead by an award of damages.

By the time of the hearing the respondents did not seek to prevent the sale of the house or the paddock, but they did claim to be seeking a proprietary interest in the jointly-owned farm, and the grassland. Although it was conceded that the court might order a transfer of land, either under the I(PFD)A or in proprietary estoppel, the other co-owners of the farm were keen for the sale to go ahead, and the respondents' objections to the sale seemed to be based on their wish to develop it in some way. But as their claim under the I(PFD)A emphasised their impecuniosity, David Richards J concluded that they had no realistic prospect of buying out the co-owners, which would be necessary for any of their schemes to proceed. He therefore ordered that the caution be vacated so that the auction sales could proceed. Further, the applicant was in a position to compensate the respondents for any loss which might result to them from the cancellation of the caution.

Contract for sale of country house – whether buyers or sellers entitled to rescind – whether non-reliance clause was a permitted exclusion clause – whether buyers should make deposit up to 10%.

Hardy v Griffiths [2014] EWHC 3947 (Ch) was a claim by the claimant sellers for a declaration that the contract had been rescinded, and the deposit forfeited; a claim for damages for breach of the defendant buyers' obligation to make the deposit up to 10%; and damages for breach of a collateral agreement. The property in question was a country house which was sold for £3.6M. The defendant buyers counterclaimed that they were entitled to rescind the contract for misrepresentation, and relief which would flow from that.

The buyers' allegations were essentially that the sellers had made misrepresentations as to the physical state of the property.

In a long and careful judgment Miss Amanda Tipples, QC (sitting as a deputy judge of the Chancery Division) found in favour of the sellers. The points which are likely to be of broader interest include:

(a) The defendants were not entitled to rescind the contract. They had not alleged fraud, and they could not rely instead on what their counsel described as 'recklessness' as that would be tantamount to fraud (see *Derry v Peek* (1889) 15 App Cas 337 at 368).

(b) Standard Condition 3.2.1 embodied the traditional rule of caveat emptor. This placed responsibility for ascertaining the condition of the property, and 'for reasons best known to themselves, the buyers (a QC and solicitor) had contracted to purchase a property for £3.6M without having had a survey undertaken'.

(c) The Claimant sellers claimed to be bound only by representations made by their solicitors in reply to enquiries. In so relying on Standard Condition 10 (the non-reliance clause), they were relying upon an exclusion clause, which, if unreasonable, was of no effect under s 3 of the Misrepresentation Act 1967. Miss Tipples, however, followed the judgment of Lewison J in *FoodCo UK LLP* (*T/a Muffin Break*) *v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch), to the effect that such a clause was fair and reasonable in all the circumstances. She noted that this approach had received the approval of the Court of Appeal in *Lloyd v Browning* [2013] EWCA Civ 1637.

(d) The Claimants were entitled to damages representing the amount required to bring the deposit up to 10%.

Purchase in name of tenant in order to take advantage of Right to Buy – whether trust deed procured by undue influence

Crossfield v Jackson [2014] EWCA Civ 1548 involves a trust: it is likely to be of particular interest to readers of this Bulletin as its context is a Right to Buy purchase where a relative funded the purchase by the tenant. C was a council tenant, entitled to buy a long lease of her flat under the Right to Buy, with a discount of £38,000, around (26% of the valuation of the property), but was unable because of her financial position to take advantage of it. Her brother therefore funded the purchase, and a declaration of trust was drawn up whereby she held the property in trust for him, the intention being that she would transfer title to him once the three-year period for the repayment of discount had expired. When she refused to do so, and he sued for an order, she defended the proceedings, alleging undue influence. The Court of Appeal (Sir Terence Etherton, C, and McFarlane and Gloster, LJJ) upheld the Recorder's decision that undue influence was not made out here. It confirmed that the principles set out in *Etridge* were applicable here. There was no relationship of trust and confidence; and the fact that C had given up both her secure housing, and her right to the discount, did not require explanation. The Recorder had accepted that she was intending to move to the United States; she could not release the discount unless she purchased her flat; and she could purchase her flat only if she could get a third party to fund its purchase. She was in a poor bargaining position, and the payment that J made to her of £10,000 (to clear her arrears of rent, and towards her move) was part of a reasonable bargain.

J had arranged for a solicitor to act on Cs behalf in the purchase, and to draw up the declaration of trust. Although he believed he was acting for C alone, his instructions came through J, and he registered a caution in respect of the

declaration of trust at the Land Registry as solicitor for J. The Recorder had expressed the view that his conduct of the transaction, though not dishonest, fell clearly below acceptable standards. The Court of Appeal expressed no view on this, but clearly, in transactions of this kind, greater care needs to be taken to avoid a conflict of interest. The Recorder took the view that, had the Deed been procured by undue influence, the advice offered by the solicitor would not have rebutted that presumption, as it had not been given truly independently.

II. EXISTING LEASEHOLDS

Consent to assignment of leases – requirement that parent company should continue to guarantee lessees' covenants – principles to be adopted in construing leases – effect of s 25 of the Landlord and Tenant (*Covenants*) *Act 1995* (*L&T*(*C*)*A 1995*) *– severance of offending words.*

Tindall Cobham 1 Ltd v Adda Hotels (*an unlimited company*) [2014] EWCA Civ 1215 is a very rapid appeal from a case heard on 17 July (judgment delivered on 29 July) and reported as [2014] EWHC 2637 (Ch). It is the most important case on the operation of the guarantee/AGA provisions of the L&T(C)A 1995 and the effect of the anti-avoidance provision in s 25 of that Act since *K*/*S Victoria Street v House of Fraser* (*Stores Management*) *Ltd* [2011] EWCA Civ 904. The dispute arose from the assignment of the leases of ten hotels in the Hilton Group. The predecessors in title of the claimants TC1 (the present respondents) had granted leases of ten hotels to the original lessees ('Adda') at substantial base and turnover rents which were originally guaranteed by Hilton Group plc, which was later validly replaced by Hinton Worldwide Inc ('HWI'), the international parent company registered in Delaware. The leases contained provisions as to the conditions which might be applied – so as to satisfy s 19(1A) of the Landlord and Tenant Act (LTA) 1927 – on assignments generally, and some streamlined provisions which applied in the event of assignments to associated companies within the Hilton Group. The present dispute arose when Adda purported on 1 July 2014 to assign the leases without obtaining the consent of the landlords, TC1. They immediately sought a declaration that the assignments were unlawful and therefore did not activate the automatic discharge provisions of s 5(2) of the 1995 Act; and an order for the re-assignment of the leases to Adda. TC1 sought summary judgment, and an expedited hearing took place before Peter Smith J on 29 July. TC1 was concerned about the assignments as they were to newly-established £1 subsidiary companies within the Hilton Group; the urgency arose because TC1 were in the process of refinancing their operations and their ability to obtain a new loan facility would depend upon the valuation of the hotels in question, which would in turn depend upon whether TC1 could rely upon anything more than the covenants which now relied upon the new £1 companies.

The Hilton Group (here to be take to include both the assignees and HWI) initially argued that the consent of TC1 was not required to the assignments, but Peter Smith J decided this point against them. To quote from Patten LJ (at [6]): 'He decided that the 1 July assignments had been carried out in

breach of cl 3.14 of the leases so that they were excluded assignments within the meaning of s 11 of the 1995 Act. But he also made a declaration that under cl 3.14.6 the tenants were not permitted to assign the leases without first applying for the written consent of the landlords (such consent not to be unreasonably withheld) and that the landlords were entitled, as a condition of giving consent, to require compliance with the conditions set out in sub-clauses (a) and (b) of cl 3.14.6. His construction of sub-clause (b) was that this entitled the landlords to require the assigning tenants to procure a new guarantor (approved by the landlords) in place of Hilton Worldwide Inc. whose own guarantee would expire on the next lawful assignment of the leases.'

On the appeal – before Longmore, Patten and Ryder LJJ – it was common ground that the consent of TC1 had been required to the assignments, so they were not excluded assignments under s 11 of the 1995 Act. The tenants appealed on the basis that a decision was needed as the effect of any future assignments and what arrangements for suitable guarantees would apply. The arguments and the discursive part of the judgment involve a discussion of the intricate inter-relationship between what have been described above as provisions which apply generally to assignments and the streamlined provisions which apply to intra-group assignments. Although streamlined, the wording of the latter – which were not drafted with exemplary clarity – seemed to require HWI to continue to guarantee the tenants' covenants notwithstanding the assignment; and, moreover, directly, rather than in the manner of a 'sub-guarantee' accepted in *K/S Victoria.* The Group had argued that the two sets of provisions were mutually exclusive, but the CA disagreed, and held that an intra-group assignment could take place governed by the general provisions, albeit they were more extensive and onerous than the streamlined provisions. The Group argued that s 25 of the 1995 Act operated not to invalidate the 'streamlined' conditions for an assignment, but merely prevented TC1 from exercising their rights under those conditions to require that HWI (or another existing guarantor) continue to guarantee the tenants' covenants notwithstanding the assignment. Alternatively, the Group argued that a severance should be effected, and the assignment could take place without the guarantee provisions. Peter Smith J had regarded that outcome as 'wholly uncommercial' (see [27] of the CA judgment). The Group's appeal against the judge's construction of the 'streamlined' conditions was based, first, on his acceptance of TC1's argument that 'the commercial construction of the clause has to be driven by the consequences of the application of the 1995 Act', [29]; and, second, on his reliance on the maxim *verba ita sunt intelligenda ut res magis valeat quam pereat* (sometimes abbreviated to the *ut res magis valeat* doctrine, and here dubbed 'validate if possible'), [29]. While accepting that the latter doctrine underpins modern canons of interpretation of documents, the CA held that it could not be applied here as it required the judge to impose a construction on the words which they would not bear, [36]. The CA also held that it was not possible to construe the words of the 'streamlined' provisions so as to comply with s 25 of the 1995 Act, as the section was a clear anti-avoidance provision, and, if it had the effect of striking down terms of a lease, then that had to be implemented in some way.

The CA did not adopt the arguments of either TC1 or the Hilton Group on this point. It rejected the Group's argument that s 25(1) was engaged only when TC1 purported to exercise its power to impose the guarantee provision, [43], and rejected also TC1's argument that it could rely on the invalidity of the provision as constituting non-compliance with the provision, [44]. The CA, following the House of Lords in *London Diocesan Fund v Phithwa* [2005] UKHL 70, stated that s 25 should be 'interpreted generously so as to ensure that the operation of the 1995 Act is not frustrated either directly or indirectly', [45]. The Act called for some measure of severance. The CA could not, however, accept the Group's argument that simply the condition setting out the 'guarantee provisions' could be severed, as that would leave TC1 with a very different agreement, [48]. (The other condition simply required that notice of assignment be given within ten days.) The appeal was therefore dismissed, subject to the deletion of certain sub-paragraphs of Peter Smith J's order. As they were not recited in the CA judgment, and the transcript of the first instance judgment refers to them by reference to the claim form, it is difficult for the present Editor to say with confidence what the precise outcome was of the appeal. It would appear, however, that *both* conditions of the 'streamlined provision' were deleted so that the 'streamlined provision' could take effect as a straightforward qualified covenant against assignment.

(case noted at: [2014] Comm Leases 2099; SJ 2014, 158(42), 33–34; SJ 2014, 158(43), 28; [2014] L & T Review 232–236; and L & T Review 2014, 18(6), D41)

Construction of service charge provisions in 'Right to Buy' leases – whether broader matters might be included within scope of 'management charge' – broader principles to be adopted in construing leases

Morris v Blackpool BC [2014] EWCA Civ 1384 is the appeal to the Court of Appeal against the decision of the Upper Tribunal in *Blackpool BC v Cargill* [2013] UKUT 0377 (LC) (noted in Bulletin No 136). Although specifically a decision on the interpretation of the precise wording used by Blackpool BC in granting its 'Right to Buy' leases, the tenor of the decision will no doubt influence the approach of the FTT when faced with challenges to the management charges levied by public sector landlords.

The background to the dispute was that in 2007 the Council had hived off its management responsibility to a not-for-profit company (which was also a party to the proceedings). This led to a review of the management charges. The standard management fee element with the service charge for all Council RTB leases jumped from £64 in 2010–2011 to £195 in 2011–2012. The appellant M had succeeded before the LVT in getting this element of the charge reduced to £50. The Council appealed, and, sitting in the Upper Tribunal HHJ Huskinson had substantially allowed its appeal on the interpretation point: because of the lack of evidence to support the Council's apportionment of its officers' time, the management charge for 2011–2012 was, however, reduced to £155.

The Court of Appeal (Jackson, McCombe and Gloster LJJ) revisited the interpretation point, and dismissed the appeal, substantially adopting the same reasoning as did HHJ Huskinson. Although the decision given in the judgment of Gloster LJ is ultimately on the wording of specific clauses, some broader points emerge. The nub of the dispute was whether a provision of the lease should be interpreted as allowing the Council to charge for services even though it was not obliged to provide them (the sort of provision which is to be found in many long leases, not just those granted by public sector landlords). The Court of Appeal, like the UT, was reluctant to adopt the interpretation of the lease adopted by the LVT which rendered the provision in question 'inherently meaningless', as this went against the canon of construction of attempting to give effect to every part of a written instrument, which put forward in *Re Strand Music Hall Co Ltd* (1865) 35 Beav 153. '[C]ommercial sense and consideration of the document as a whole' had to be applied here, [47]: the 'evolving challenges faced by a landlord may well require some room for adaptation as to what services best meet its lessees' requirements', [51], especially where the landlord is a local authority. The provision (which was 'oddly placed' in the lease) did not 'give the Council free rein to provide voluntary services as it saw fit and to pass on the charges to lessees' as the clause limited itself to 'reasonable expenses and outgoings' and it would moreover be subject to ss 18–30 of the LTA 1985, [54].

Another broader interpretation point was that the Court of Appeal, like HHJ Huskinson, thought that the scope for adopting the *contra proferentem* rule in interpreting leases (that is relying on the fact that leases were generally drafted by landlords and thus should be construed against them) was extremely limited. Relying on Sir John Pennycuick in *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark* (*No 2*) [1975] 1 WLR 478 at 477, it should be adopted only as a last resort if the court found itself 'unable on the material before it to reach a sure conclusion on the construction of a particular contractual term', [53]. It was not a factor to be taken into account by the court in reaching its conclusion. As the wording of the lease was not so vague or ambiguous that the court could not reach a conclusion, the presumption never came into play, [53].

Estate of holiday bungalows – service charge – requirement to consult under s 20 of the LTA 1985 – how financial limit for 'qualifying works' should be applied – whether landlords could charge for time spent as well as a percentage charge – general observations on construction of service charge provisions

Phillips v Francis [2014] EWCA Civ 1395 is the long-awaited verdict of a very strong Court of Appeal (Lord Dyson MR, Sir Terence Etherton C, and Kitchin LJ) on the decision of Sir Andrew Morritt C, reported as [2012] EWHC 3650 (Ch). The present editor predicted (Bulletin No 133) that the former Chancellor's decision would be controversial, and it has certainly

proved to be so in practice. It will be recalled that the case involved the service charges payable by lessees on an estate of holiday bungalows in St Merryn, Cornwall.

The most contentious issue was the former Chancellor's decision that, under s 20 of the LTA 1985, the financial limit for 'qualifying works' (currently £250 per unit paying the service charge) was the aggregate amount expended on qualifying works during the relevant accounting period. Prior to that decision, it had generally been accepted that the position was governed by the test set out by Walker LJ in *Martin v Maryland Estates* [1999] 2 EGLR 53, and that, if it was alleged before a court or tribunal that the limit had been exceeded, the test was whether any individual set of qualifying works exceeded the threshold, applying a 'commonsense approach' ie treating each set of works as an entity, and not allowing the lessor artificially to divide what was clearly one project. Applying that test HHJ Cotter in the Truro County Court had held that the requirements had not been triggered, but he was reversed on this point by Sir Andrew Morritt. As the Court of Appeal has, in effect, reverted to what had generally been taken to be the law prior to the decision of the Chancellor, it is perhaps unnecessary to go into too much detail. Broadly speaking, the Master of the Rolls held that, in determining whether the limit had been 'triggered' one had to consider not the total expenditure during the accounting period (what was referred to in the judgment as 'the aggregating approach') but instead look at each set of work: what he referred to as 'a sets approach'. Preferring the latter does, of course, raise the further question of what is meant by a single set of qualifying works. The Master of the Rolls affirmed, [36], that this is a question of fact, and is a 'multi-factorial question the answer to which should be determined in a commonsense way taking into account all relevant circumstances'. Helpfully, he elaborated on this: 'Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other.' He stressed that this is not an exhaustive list.

The CA in particular rejected the former Chancellor's reasoning to justify his departing from *Martin v Maryland Estates.* He had noted that that case had been decided on the pre-2002 law, and that the law had been amended by the Commonhold and Leasehold Reform Act 2002 (CLRA 2002). The Court of Appeal saw no reason to take the view that these amendments had changed the law as they did not affect the fundamental issue namely, the definition of 'qualifying works', [22].

The case also provides some guidance on the application of the various factors set out above. The estate included over 150 chalets, so the £250 limit produced a threshold of around £41,000 before the consultation requirements were triggered. The landlord was plainly wishing to upgrade the estate in several respects, and the leaseholders argued in a respondent's notice that, if the former Chancellor's interpretation of s 20 were not upheld, his decision

was nevertheless correct, because HHJ Cotter had wrongly applied the relevant factors. The Court of Appeal affirmed that the application of the various factors was a question of fact and degree, and that the judge in the County Court was entitled to come to the conclusion that he did. The only aspect in which he had misdirected himself was in suggesting that for works to be 'significant' they would have to have some 'permanent effect by way of modification of what was there before'. Lord Dyson disagreed with this test. Redecoration works could clearly be 'qualifying works' even though it could not be said that they effected some permanent modification to the property, [38]. This must surely be correct.

The understandable emphasis on the interpretation put by the former Chancellor on s 20 has to some extent obscured the fact that the appeal before him also included some guidance on management charges. The lessors claimed that the leases of the holiday bungalows allowed them to include the total sum of £95,000 for wages paid to them by the management company, as well as a management charge of a 5% uplift on expenditure. They argued that the former fell under para 6 of Sch 3 to the lease, and the latter under para 8, allowing a 5% management charge to be added to expenditure under paras 1–7. The former Chancellor's had rejected this part of the lessors' claim, and his judgment was affirmed on this point, although on different grounds. Essentially Lord Dyson took the view that, on the true construction of the lease, it could not have been intended that the lessors could have made a 'double recovery' by the 'simple expedient of incorporating themselves, or using a wholly owned corporate vehicle to carry out the management for them', [52]. He also rejected the idea that the lease could have been intended to distinguish between the day to day, or micro-management, of the estate, and some more strategic macro-management. He thought that that would cause difficulties of classification and record-keeping, [53].

Sir Terence Etherton C delivered a concurring judgment, and Kitchin LJ concurred with both. On the management charges issue, landlords may derive some comfort from the current Chancellor's rejection of the view that when the Lease referred to an 'agent' it must be taken as meaning an agent performing some specific professional service, [84]. He saw the true distinction as lying between 'services provided for the benefit of the various tenants, as opposed to the wholly separate commercial or property interest of the lessor', [85]. He urged practitioners to ensure that leases were drafted with clarity and certainty when dealing with management charges, [88]. One should also note his observations, at [72]–[74], that although the reported cases were consistent with the principle that one would generally expect any particular 'head' of service charge expenditure to be specifically set out in the lease if it was to be recoverable, [74], this should be understood in the context that the normal principles for interpretation of contracts applied as much to leases as to other contracts, [72].

(case noted at: EG 2014, 1445, 108–110; EG 2014, 1446, 110; and EG 2014, 1448, 127)

Whether notice to quit by one of two joint tenants was effective – whether Art 8 of the ECHR engaged – whether proportional to make a possession order against the tenant remaining in occupation

Sims v Dacorum BC [2014] UKSC 63 is a remarkable judgment. The fact that the decision of the Court of Appeal ([2013] EWCA Civ 12 – noted in Bulletin No 134) was affirmed is hardly surprising. Nor was it unexpected that the Supreme Court would indicate that, following *Powell* and *Pinnock,* a court hearing such as case as *Sims* could not make a possession order against a defendant unless it was satisfied that it would not be disproportionate to do so, [23]. What is surprising is the brevity of the judgment – a mere 26 paras – and the fact that, although a seven-judge court was convened to consider this challenge to *Qazi v Harrow LBC* [2003] UKHL 43, nowhere does the judgment specifically say that that case has been overruled – though that is the obvious inference that one has to draw.

The facts of *Sims* are typical of this genre of cases: a joint tenancy was granted by the Council to both tenants, Mrs Sims made allegations of violence against Mr Sims, she moved out with the younger children, and sought rehousing from the Council. The Council suggested that she serve them with notice to quit, and she did so. The Council then took possession proceedings against Mr Sims, who was occupying a three bedroom family house. The possession claim came before a Deputy District Judge (DDJ) in Watford County Court, who ordered possession. Mr Sims appealed, and the appeal was removed into the Court of Appeal. Both sides agreed there that the Court was bound by *Hammersmith & Fulham LBC v Monk* [1992] AC 478 and *Qazi,* but counsel for Mr Sims sought permission to appeal to the Supreme Court. As the present editor noted in Bulletin 134, the language of the judgment of Mummery LJ hardly seemed to take account of the change of approach wrought by *Powell* and *Pinnock.* The Supreme Court evidently agreed, as, although Mummery LJ refused permission to appeal, it was granted by the Supreme Court, and, though it affirmed the decision of the CA, its reasoning was very different.

To be fair, the judgment of the Supreme Court does largely answer our outstanding questions here. In the CA it was argued that the rule affirmed in *Monk* – that one of two or more joint tenants could serve a notice to quit, and thus bring the tenancy to an end for all of them – should be modified in the light of the Human Rights Act 1998 (HRA 1998) as incompatible with Art 8 of the ECHR. In the Supreme Court the argument was narrower: it was argued simply that the decision in *Monk* was incompatible with Art 8 and/or as incompatible with Art 1 of the First Protocol (A1P1).

The A1P1 argument was rejected on the basis that Mr Sims's property right in the secure tenancy was always liable to be determined by a notice served by a joint tenancy (the effect of the common law rule was indeed set out as an express term of the tenancy), and that therefore he had lost his property right

as a result of the bargain he himself had made. It is interesting to note that *Palma v United Kingdom* (1986) 10 EHRR 149 is still cited here with approval, [15].

In considering the Art 8 argument, it was accepted that, although Mr Sims's property right had always been to some extent precarious, he had clearly lost his home, so Art 8 was engaged. The Court rejected the argument that Mrs Sims's action in serving a notice to quit infringed Mr Sims's Art 8 rights (which would surely have engaged horizontal applicability) as she clearly always had the right to do so. The Supreme Court, however, crucially affirmed that Mr Sims's Art 8 rights had not been infringed, [23], as (i) his tenancy was determined in accordance with the tenancy agreement; (ii) he had the benefit of clause 101 (a point which will be touched on in a note at the end); (iii) under the Protection from Eviction Act 1977 (PEA 1977) he could not be evicted without a court order; (iv) the court had to be satisfied that as a matter of domestic law Dacorum BC were entitled to evict him; and (v) 'the court could not make such an order without permitting him to raise a claim that it would be disproportionate to evict him, in accordance with the reasoning in *Pinnock* and *Powell*'.

In this case the DDJ had considered the proportionality of evicting Mr Sims, and had come to the conclusion – surely inevitable in the circumstances – that it was. Although when she carried out the assessment it was necessary only if *Pinnock* and *Powell* had in fact undermined *Monk* and *Qazi,* the fact was that she had done so, and both the Court of Appeal and Supreme Court were clearly of the view that she had done a thorough and careful job of it. Mr Sims's appeal was therefore rejected.

As stated at the outset, the case therefore seems to overrule *Qazi* and modify *Monk*, but nowhere does the Supreme Court specifically say so. The brevity of the judgment leads one to suspect that individual judges might have wished it to be longer, but that it was kept short and to the point so that it would remain the unanimous judgment of the court, with no judges adding comments of their own. Possibly the present Justices were mindful of the criticisms of *Kay v Lambeth LBC, Leeds CC v Price* [2006] UKHL 10, where there were seven judgments and it was difficult to find a ratio with which a majority concurred.

Nowhere does the judgment address the issue of what the status of Mr Sims would have been if the court had declined to make a possession order against him. Presumably in practice a local authority would then grant him a new tenancy, and a new tenancy agreement would be signed, but would this be necessary? The possibility is not fanciful: one could well imagine that, had the court in *Qazi* had scope – indeed been under the duty – to consider the proportionality of Mr Q's eviction, it could well have declined to make an order. (It will be recalled that, by the time of the hearing, he had remarried, and acquired a new family, and it would have been difficult to argue that he was 'over-housed'.)

A minor criticism of the point at (ii) in [23] above: in what sense can Mr Sims be said to have the 'benefit' of a clause which simply says that the Council

'will decide whether any of the other joint tenant can remain in the property or be offered more suitable accommodation'. Perhaps it is intended to convey that he had a legitimate expectation that it would be considered. It is difficult to see that it gave Mr Sims anything more.

(Case noted at: NLJ 2014, 164(7633), 12–13; and EG 2014, 1450, 109)

Break clause allowing tenant to terminate lease if planning permission not granted – effect of grant of planning permission subject to condition with which tenants could not comply

Sirhowy Investments Ltd v Henderson [2014] EWHC 3562 (Ch) is a dispute as to the exercise of a break clause in a lease which raises some slightly unusual points. The clause allowed the tenants (T) to determine a lease if the local planning authority objected to the use of the demised premises for the sale of cars and for the repair of cars forming part of its stock, provided that T had used 'all reasonable endeavours' to secure the planning consent. The break clause was subject to the usual proviso that T should have paid the rent and observed the covenants in the lease.

Planning consent had been granted for the permitted use, but with a condition that a turning area (for car transporters) be provided and kept clear at all times. This had not been a problem so long as vehicles could turn on some vacant land owned by one of the directors of L, but became so when that was used for other purposes. The Council thereupon served T with a breach of condition notice, and eventually threatened legal proceedings. At this point T purported to serve a break notice.

L disputed the validity of the notice on several grounds. First, it disputed that the Council were objecting to the use of the premises for the permitted user: there would be no objection to the use for car sales, if the turning circle were provided. In an unreported part of the judgment Newey J rejected this argument, as the result of the failure of T to comply with the condition was that the use itself became a breach of planning controls.

The second objection that L raised was that T had not used all reasonable endeavours to secure a valid planning consent. L's principal argument here was that the turning circle could have been provided within the demised premises. This issue was determined against L, as it was not reasonable to expect to give up the retail use of such a substantial proportion of the demised premises.

L then argued that T had not fully performed their covenants under the lease. The first had an air of desperation to it: that by keeping a dog on the premises, they had infringed a covenant against the keeping of livestock. After having recourse to a dictionary, Newey J was satisfied that a dog could not reasonably be described as 'livestock'. Next L argued that T was in breach of a covenant to keep a certain area of the demised premises free for the parking of customers' vehicles only, alleging that T's employees had habitually used this. This breach was held not to have been proved; or, if

there had been a breach, it had not continued, and a purely historic breach with no continuing consequences could not have been intended to preclude the exercise of a break clause. A third complaint was that T had applied for a planning permission without L's written consent. The application in question was for a retrospective permission for a workshop, and T established that it was likely that workshop had been erected before the grant of the lease, and that T's building surveyor had been authorised by L at a meeting to sign the application.

L's final objection to the exercise of the break clause concerned T's alleged failure to repair and decorate. Some factual issues caused difficulties here, but Newey J was satisfied that patching up the fencing with some metal sheeting might have kept the premises secure but could not be said to amount to 'repair'. T then argued that, as L had accepted rent without objection, they should be taken to have consented to that breach. L argued, in response to that, that (a) the lease specifically provided that acceptance of rent should not amount to waiver and (b) it was possible (relying on Woodfall 11.044) for a landlord to waive a right to forfeit without losing all right to complain of the breach, [36]. Newey J was content to say on this that, whether or not L's conduct amount to waiver, it had clearly not consented to the breach, [37]. Thus in spite of having won all but one of the points in dispute, the conclusion was that T was not entitled to determine the lease, and so was liable in damages, with interest and costs.

Appointment of receiver and manager under Part II of the LTA 1987 – whether powers could extend over land outside demised area but over which tenants enjoyed recreational rights – whether issue going to jurisdiction of FTT should be challenged by judicial review or by appeal to the UT

R (*on the application of Cawsand Fort Management Co Ltd*) *v First Tier Tribunal* (Property Chamber) [2014] EWHC 3808 (Admin) revisits the locus and the subject matter of the Court of Appeal decision in *Cawsand Fort Management Co Ltd v Stafford* [2007] EWCA Civ 1187). It will be recalled that the 2007 case decided that if, under Part II of the LTA 1987, a receiver and manager has to be appointed of a building containing leasehold flats, such an order can extend over land outside the leased buildings and their curtilages, including – as here – amenity land over which the lessees have recreational rights. The original management order had been made in 2003 and was renewed in 2008. The current judicial review arose out of the further renewal of the order by the FTT in 2013.

The argument raised in the judicial review application, which was heard by Hickinbotham J, sitting at Bristol, was that the order went beyond the powers of the FTT and was therefore a nullity, and so it was appropriate to bring the matter before the Administrative Court rather than to appeal it to the Upper Tribunal. The present editor must confess to finding it somewhat difficult to identify precisely how the applicant management company claimed that the

substantive matter of the scope of s 24 of the LTA 1987 had not been finally determined by the Court of Appeal. Its argument seems to rely on its view that the substantive issue had been conceded before the CA, and that the issue before that court had been the issue of the construction of the order, rather than the LVT's power to make it (see [30] (vii)). Hickinbotham J seems to have been unimpressed by this argument, taking the view that the Lands Tribunal and the CA had been well aware of the real issue before them, which was the scope of s 24, and had held that a management order could extend over land of which the management company was the freeholder, but over which the lessees exercised rights.

The judgment also contains some useful observations on the jurisdictional issue ie the appropriate route by which to challenge a decision of the FTT which it is alleged is ultra vires. Hickinbotham J was of the view that s 11 of the Tribunals, Courts and Enforcement Act 2007 applied, and that under s 11(1) there was a right of appeal from the FTT to the UT on any point of law, apart from an 'excluded decision': these were set out in s 11(5) and did not cover instances where the FTT had exceeded its jurisdiction. He thought therefore that it was 'at least arguable' that the UT could consider an appeal on that ground, and that it would be unfortunate in practical terms if an appeal to the UT could be frustrated by arguing that it could be brought only by judicial review, [32]. He nevertheless thought that, even if it would have been open to the management company to appeal the decision, that did not preclude him from considering the substantive issue in a judicial review, [33].

Execution of deed of transfer to assign tenancy – whether conditions had been complied with and deed completed – whether Landlord was estopped from disputing that there had been an assignment

Lankester and Son Ltd v Rennie [2014] EWCA Civ 1515 reaffirms some established principles surrounding the assignment of tenancies. The appellants, R, were the tenants of a car showroom and workshop and were in negotiation with their respondent landlords, L, and another company, TCA Ltd, for either the surrender of their lease and the grant of a new lease to TCA, or else for the assignment of their lease to TCA. They had executed and delivered a deed of transfer, which was being held by their solicitors (who also acted for the assignees), but there was nothing to show that L's conditions for the assignment had ever been met. L were seeking arrears of rent from R; R argued that the assignment was valid in equity, or, in the alternative, that L was estopped from accepting the assignment, either on the basis of a proprietary estoppel or an estoppel by convention. In the light of cases such as *Brown & Root Ltd v Sun Alliance Ltd* [2001] Ch 733 the former would clearly be a difficult argument to sustain. The latter argument failed because of the lack of anything to show that a representation had been made by L, or that R had been induced to alter their position to their detriment. In the light of the Recorder's findings of fact his conclusion that R remained liability as tenants was unassailable.

Whether wording of lease permitted landlord to claim a payment on account of service charge for the following year

Subject to Sir Terence Etherton, C's comments in *Phillips v Francis* [2014] EWCA Civ 1395 (above), a landlord will generally need to be able to point to some specific wording in the service charge provisions of the lease in order demand a contribution towards a reserve fund, or even a payment on account of anticipated expenditure. In *Garrick Estate Ltd v Balchin* [2014] UKUT 407 (LC) the LVT purported to apply the latter principle in disallowing a claim by the landlord for a payment on account of the 2013 expenditure to be included in the 2012 demand. The service charge provisions in the lease, which dated back to 1970, were rather crude, and the LVT found nothing within them which permitted advance payments on account. Sitting in the Upper Tribunal, HHJ Gerald allowed the landlord's appeal, on the basis that the service charge provisions entitled the landlord to 'demand by way of service charge the due proportion as hereinafter defined of the expenditure incurred or to be incurred by the Lessors.' The words 'incurred or to be incurred' were sufficient to cover expenditure expected to be incurred in the following year.

Application under s 27A of the LTA 1985 to determine whether service charges payable – limitation period applicable thereto

Parissis v Blair Court (*St John's Wood*) *Management Ltd* [2014] UKUT 503 (LC) might have been a good opportunity for the Upper Tribunal to address in detail and authoritatively the fraught issue as to what limitation periods apply to proceedings involving services charges which come before the First-Tier Tribunal. Unfortunately, neither party was legally represented, and so HHJ Huskinson did not think it was an appropriate case to give a detailed analysis to what, if any, limitation periods apply generally to applications under s 27A of the LTA 1985, [11]. Nevertheless in deciding the appeal he does make some useful observations.

The preliminary issue in the appeal was whether the appellant was entitled to challenge service charges relating to the years 2001 to 2005 inclusive. The LVT had decided that the appellant's delay was unconscionable, so the applications that he made in November 2010 were accordingly time-barred. As HHJ Huskinson pointed out, the LVT was in practice applying the equitable doctrine of laches, though without identifying it as such. He was clear, [18], that this was not applicable here: laches could apply only to an application for equitable relief, and an application under s 27A was an application in exercise of a statutory right.

He also rejected the contention that s 19 of the Limitation Act 1980 (LA 1980) operated to bar the application here as it related to a service charge that was reserved as rent. The application under s 27A was to determine what was properly payable by way of service charge, not a claim for arrears of rent as such, [19].

Nor was an application under s 27A governed by s 9 of the LA 1980, as it was not an action to recover any sum recoverable by virtue of any enactment, [20].

The judge thought that s 5 of the LA 1980 would appear to be applicable if a restitutionary claim were brought in the county court to recover an overpayment (on the basis that, in at least the view of *Halsbury's Laws of England*, a restitutionary claim might be regarded as founded on a simple contract), but questions would then arise under s 32 as to whether the action was for relief from the consequences of a mistake. It would not, however, automatically bar applications under s 27A which a tenant might, for example, be bringing as a precursor to an application under s 24 of the LTA 1987 for the appointment of a manager, [21].

An application under s 27A might be considered to be an action upon a specialty (on the basis that a specialty includes a statute), and thus the 12-year limitation period prescribed by s 8 of the LA 1980 might apply. It was not, however, necessary to decide that point in these proceedings, as the applications would not fall outside a 12 year limitation period, [22].

The result of the appeal was therefore that the applications were remitted to the FTT for it to consider the s 27A applications.

Service charge claim for renewal of fire-alarm system – whether additional requirement of reasonableness imposed by Common Law

Anchor Trust v Corbett [2014] UKUT 510 (LC) raises an issue which fairly commonly arises in service charge disputes – the provision of a fire-alarm system – albeit in a slightly unusual context: the tenants who were objecting to having to contribute towards its cost held their properties on assured monthly tenancies, which included an obligation to pay both rent and service charges. Their tenancy agreements included a fire-alarm system as one of the services to which they could be required to contribute, and the LVT was satisfied that the replacement of the system fell within the contractual terms of their tenancies.

The problem was that the cost (some £50,000), when divided among 28 flats, and spread over 15 years (the likely lifetime of the system), resulted in a charge of £8.85 per month for each flat. It was conceded that the 'target market' for the flats would be people who were mainly reliant upon state pensions, and this represented around 2% of the current state pension. The tenants objected that the existing system had only recently been installed, and did not require upgrading; that there had been inadequate consultation; that the works were structural rather than a 'service' as such; and made the point about the financial significance of the increase.

The LVT approached the matter in a rather curious way. It made findings which were, on any analysis, entirely favourable to the landlords. The charges were contractually recoverable; the costs were reasonably incurred; the works

were carried out to a reasonable standard; and there had been full consultation with the tenants. Moreover, relying on the landlord's expert's report, the alarm system needed renewal and improvement. Notwithstanding all these findings, the LVT then decided that, in accordance with 'Common Law' *Finchbourne v Rodrigues* [1976] 3 All ER 581 required that the expenditure had to be fair and reasonable, and that, bearing in mind the 'target market', an increase of £8.85 per month did not satisfy that test.

Unsurprisingly, HHJ Huskinson did not accept this argument by reference to *Finchbourne v Rodrigues*. Firstly, the primary ratio of that case had been a different point, [18]. Further, at the time, tenants did not have the protection of what became s 19 of the LTA 1985, [19]. Again, *Finchbourne v Rodrigues* had suggested that the charge for any individual item ought not to be unreasonably high: the LVT here was purporting to go beyond this and determine that it was not 'fair and reasonable' for the parties to have agreed that a particular item should be charged for, [20]. The term which the LVT were prepared to imply would clearly not satisfy any officious by-stander test. The Upper Tribunal therefore determined that the service charge in respect of the new fire-alarm system had been reasonably incurred and was payable.

Service charge – whether clause included landlord's legal costs incurred on Party Wall etc dispute

Assethold Ltd v Watts [2014] UKUT 537 (LC) considers once again the vexed issue of whether a service charge provision in a lease is broad enough so as to cover the cost of legal proceedings taken by the landlord, A. The neighbouring plot to the block of flats in question was being redeveloped, and the owner of it served notices upon A under ss 2 and 6 of the Party Wall etc Act 1996. A appointed a surveyor, and the respondent leaseholders appointed a different surveyor. The leaseholders' surveyor jointly published a party wall award with his opposite number, but A's surveyor was unable to reach agreement. When the neighbour threatened to build near the boundary, A obtained an interim injunction from the Chancery Division, which endured until the party wall dispute was settled.

The LVT was prepared to accept that surveyors' fees of £4,188 should form part of the service charge, but not solicitors' costs and counsel's fees amounting to £55,600. A appealed to the UT. Mr Martin Rodger, QC, Deputy President, held (at [39]) that, following the decision of the Court of Appeal in *Phillips v Francis* [2014] EWCA Civ 1395, and in particular the observations of Sir Terence Etherton, C, at [72]–[74], one could not approach the problem on the basis that there was a presumption that a 'head' of expenditure could not be debited to the service charge account unless there were some clear provision in the lease to that effect. The normal principles for the interpretation of contracts should apply, although one would normally expect an obligation to be clearly spelled out in the lease ([74] of the CA case).

Applying these principles, the Deputy President held that the solicitors' costs and counsel's fees did not fall within a provision dealing with the maintenance and repair of the building, nor under another dealing with Surveyors'

and Accountants' fees (which did, however, include the party wall surveyors' fees), but the legal costs did fall within a further provision dealing with 'all works installations acts matters and things as in the reasonable discretion of the Landlord may be considered necessary or desirable for the proper maintenance safety amenity and administration of the Development'.

It is interesting to note that *Phillips v Francis* is already being used not to determine how s 20 of the LTA 1985 is to be applied, but to justify a possible reinterpretation of how *Gilje v Charlgrove Securities Ltd* [2002] 1 EGLR 41 is to be understood.

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Collective enfranchisement – whether landlord could claim 'lease-back' of unit which did not exist when initial notice served – whether there could be a 'lease-back' of property comprised in the common parts

Merie Bin Mahfouz Co (*UK*) *Ltd v Barrie House* (*Freehold*) *Ltd* [2014] UKUT 390 (LC) decides various points on the 'lease-back' provisions of s 36 and Sch 9 of the Leasehold Reform, Housing and Urban Development Act 1993 (LRHUDA 1993), which may arise where there is collective enfranchisement. It is perhaps surprising that the main point which was decided should have been thought open to argument: namely, that in order for the landlord to claim a lease-back of a unit, it must have been in existence at the time when the tenants' initial notice was served.

The factual background was that Barrie House consisted of 37 flats and a porter's flat. Twenty-seven of the flats were occupied by qualifying tenants, and ten were held on leases owned by the Group of which the landlord formed Part 23 of the 27 qualifying tenants were participating in the collective enfranchisement. Their initial notice was served during the early stages of various works by the landlord to develop the building, which were no doubt viewed by the leaseholders as demonstrating an intention on its part to extract maximum value from the building. The works included the extension of the porter's flat, and the creation of an additional flat (Flat 1A) on the ground floor from a room used as a rest area for the porters (and for leaseholders' meetings), and various store-rooms. Construction of the Flat 1A also involved the appropriation of part of the rather spacious entrance hallway, and its alteration.

The Upper Tribunal (Sir Keith Lindblom, P, and Mr A J Trott, FRICS) largely upheld what the LVT had originally decided, and held that the relevant time for determining whether the landlord could call for a lease-back was the point when the initial notice was served, and not the date of the transfer of the landlord's interest to the nominee purchaser. It followed that the landlord could not claim a lease-back of Flat 1A, both because it was not

in existence at the relevant date, and also because it was constructed in a part of the building which constituted part of the common parts at that time. Indeed, the UT generally affirmed that the leaseholders had been entitled to pass and repass over the full extent of the hallway as originally designed, and that the construction of Flat 1A partly within that space had amounted to an interference with those rights.

The UT also decided that the LVT, in determining that the porter's flat formed part of the common parts, was correct in looking at its actual use at the time of the initial notice, rather than whether the lease obliged the landlord to provide accommodation for the porter. The UT followed the CA in *Panagopoulos v Earl Cadogan* [2010] EWCA Civ 1259 on this point.

The LVT had, however, decided that the landlord was entitled to lease-backs of two parts of the roof and the airspace above it where the landlord had allowed O2 and Orange to erect mobile phone masts, and the UT dismissed a cross-appeal by the purchaser company on this point. For enfranchisement purposes airspace above a building could be viewed as a part of it.

Mobile Homes Act 1983 (MHA 1983) – whether licensee had complied within a notice within a reasonable time – review of law of when breaches of covenant could be treated as irremediable

Telchadder v Wickland Holdings Ltd [2014] UKSC 57 is at first sight is a decision on the rather 'niche' subject matter of the Mobile Homes Act 1983. It is, however, also of broader interest, as it contains a review, albeit obiter, of developments in the general area of forfeiture of leases: and, more particularly, it represents an endorsement by the Supreme Court of the more relaxed attitude taken by the Court of Appeal to the issue of whether breaches of covenant should be taken to be irremediable, upon which the House of Lords and now the Supreme Court has hitherto been silent.

The claimant owner (WH) of a mobile home park had granted the defendant T a licence to station his mobile home on a pitch in the park. It included an express term not to cause nuisance to neighbours, and also the terms implied into the agreement by s 2(1) of the MHA 1983, including (para 4 of Ch 2 of Part 1 of Sch 1) provision for the agreement to be terminated if the court was satisfied that the occupier had breached a term of the agreement and had failed to comply with a notice to remedy the breach within a reasonable time, and the court was also satisfied that it was reasonable for the agreement to be terminated.

The factual background was that T – who had a mild learning disability and suffered from autistic traits – had in 2006 alarmed other residents by his behaviour, including an incident when he had startled an elderly resident by jumping out at her from behind a tree while he was wearing military combat clothing, with his face covered with a mask. As a result of this incident WH had written to him, warning him that if he did not desist from such behaviour, his licence would be terminated. No further incident had occurred

until 2009, when T, during an argument, had threatened to kill another resident. As a result of this WH had issued possession proceedings. HHJ Moloney QC in the Southend County Court had found that the warning letting in 2006 had constituted a sufficient notice to remedy the breach, and that although T had not seriously intended to carry out the death threat, it amounted to a breach of the 2006 notice, and that it was reasonable for the court to make an order terminating the licence agreement and to grant the claimant possession. T appealed, but the Court of Appeal had upheld the orders, holding that the 2006 notice had effect throughout the remainder of the duration of the agreement.

Lord Wilson delivered the first judgment, and stated that it raised 'troublesome issues of construction' of the provisions referred to above. In particular, [2], '(i) can an occupier "remedy" a breach of covenant against anti-social behaviour? (ii) If not, what is the effect of the para. 4 term? (iii) Alternatively, if so, (a) how may he "comply" with a notice to remedy and (b) what is the effect of his obligation to do so "within a reasonable time" '.

Lord Wilson began by noting the resemblance that s 6(2) of the MHA 1983 (and its related Schedule) has to s 146 of the Law of Property Act 1925 (LPA 1925), leading to the conclusion that the draftsman must have drawn on it, though he further noted that (unlike its predecessor, s 3(g) of the MHA 1975) it omitted any reference to 'a breach which is capable of being remedied'. In his lordship's view, [20], it would be nonsensical to require service of a notice to remedy a breach which is incapable of remedy, so the twin requirements of sub-paragraph (a) can apply only to a breach which is capable of remedy.

In order to identify what breaches would be capable of remedy, Lord Wilson naturally drew on the jurisprudence on s 146 of the LPA 1925. Clearly a breach of positive terms could ordinarily be remedied (see *Expert Clothing Service and Sales Ltd v Hillgate House Ltd* [1986] Ch 340). He noted that, since *Rugby School* (*Governors*) *v Tannahill* [1935] 1 KB 87 it has been accepted that at least some breaches of a negative covenant are irremediable, but went on to note that *Savva v Hussein* (1996) 73 P&CR 150 and *Akici v LR Butlin Ltd* [2005] EWCA Civ 1296 have accepted that some breaches of a negative covenant may be remediable. Against this background the nature of T's breaches had to be examined. Inevitably, determining the nature of a breach of a covenant against anti-social behaviour – whether for the purposes of s 146(1) of the LPA 1925 or para 4 etc in the instant case – required the making of a value judgment, [31]. If the initial incident had caused serious injury, WH might reasonably have treated it as irremediable, have written to T accordingly, and hoped that the circuit judge agreed. But T's initial breach was clearly not of that gravity: and it could be remediated by his not committing any further breach for a reasonable time, [32]. In the CA, Mummery LJ had agreed with HHJ Moloney QC that WH's warning meant that T had to be on good behaviour for the remainder of the duration of the agreement, but Lord Wilson disagreed: provided there was no further breach for a reasonable time, T would have remedied the breach. To WH's objection that this would enable a wrongdoer to 'play cat and mouse' with the

site-owner, his answer was that a reasonable time for compliance with a second breach would generally be longer than that set for compliance with a first breach.

Separate judgments were given by Lady Hale, Lord Toulson and Lord Carnwath (with which Lord Reed agreed). At [38] Lord Wilson helpfully analysed the other judgments and offers his view of the 'net effect' of the rationes. He pointed out that he, Lady Hale and Lord Toulson concluded that, 'in the case of an irremediable breach, the para 4 term does not require service of a notice to remedy it. But our conclusion in this respect is not central to this decision because the breach dated 31 July 2006 was not irremediable and in any event a notice to remedy it was duly served'. The Court was unanimous that T's appeal should be allowed, but he pointed out that Lord Carnwath (with whom Lord Reed agreed) took the view, [91], that 'in the case of a remediable breach of a covenant against anti-social behaviour, compliance with the notice to remedy must continue indefinitely' but they joined with the majority in the actual decision because – in their view – there needed, [91], to be 'a causal or temporal link between the notice to remedy and the subsequent breach, which was absent in the present case' ([96]). The majority, on the other hand, took the view that 'a breach of such a covenant is remediable if the mischief resulting from it can be redressed; and that [T] redressed the mischief resulting from the breach dated 31 July 2006, and thereby complied with the notice to remedy, by not committing a further breach prior to 15 July 2009.'

Those whose practice is more concerned with s 146 of the LPA 1925 should note that all the Justices note with apparent approval the developing jurisprudence in the CA on whether breaches of negative covenants are irremediable, in particular *Expert Clothing, Savva v Hussein* and *Akici*. Lord Carnwath implicitly notes, [77]–[79], a tension between the view (expressed in para A[4685] of the principal work) that all breaches of a negative covenant can be remedied unless the premises has become 'stigmatised', and the suggestion in *Woodfall,* 17.132.1, that certain other classes of breach (especially assigning or sub-letting without consent) remain irremediable: he notes that the cases relied on in *Woodfall* as authorities date from before 1983. Coupled with Lord Wilson's emphasis on the practical consequences of any breach, [29], and Lady Hale's implicit approval of *Akici,* [46], it is difficult to see why even unauthorised assignment or sub-letting should any longer be seen in general as irremediable.

Damages under ss 27–28 of the Housing Act (HA) 1988 for unlawful eviction – basis of calculation when landlord was letting under a secure tenancy

Loveridge v Lambeth LBC [2014] UKSC 65 is the appeal from [2013] EWCA Civ 494 (noted in Bulletin No 135) and raises what Briggs LJ there described as 'a short but interesting point of construction of s 28 of the Housing Act 1988'. The fact that the present editor is uncertain as to whether the case should be noted under Private Sector or Public Sector tenancies gives some indication of the dilemma underlying the case.

The appellant L was the tenant of a flat of which the respondent local authority was the landlord. He paid a lengthy visit to Ghana: his failure to inform the council of his protracted absence was a breach of the terms of his tenancy agreement. The council forced entry to the flat (there was a fear that he might have died) and then cleared the flat of his possessions. Just after he returned, they relet the property on an introductory tenancy (L was too late to prevent this). The tenant sued Lambeth for unlawful eviction, and claimed statutory damages under ss 27 and 28 of the HA 1988. In the County Court HHJ Blunsdon found that L was still occupying the property as his principal residence, and the council could not rely on his failure to inform them of his absence. By the time the case came to trial, damages for loss of his possessions had been agreed at £9,000, with a further £7,400 as damages for the tenant's actual loss. The difficult issue, however, was whether he had any additional claim for statutory damages for wrongful eviction, under ss 27 and 28. It will be recalled that, in order to discourage landlords of Rent Act protected tenancies from evicting their tenants and reletting to them at higher rents as assured shorthold tenants, the HA 1988 provided that the measure of damages in unlawful eviction cases should, in effect, not be based on the tenant's loss but should be based on unjust enrichment principles, and operate so as to deprive the landlord of his gain. L's valuer took as his assumption that the values to be compared under s 28 were the value of the flat subject to a HA 1985 secure tenancy, and its value if sold with vacant possession. This produced a figure for statutory damages of £90,500. The Council, on the other hand, argued that the original value should be taken to be the value of the flat if subject to an assured tenancy. As this would be an attractive purchase for a buy-to-let investor, this would be the same as the market value. The tenant's valuer accepted that, if the Council were correct on the construction point, then this would be the case. At first instance L's argument prevailed; in the Court of Appeal the Council's interpretation was preferred.

In the Supreme Court, Lord Wilson (who delivered the judgment of the Court) preferred the view taken by HHJ Blunsdon. Argument centred on the interface between s 28(3)(a) and s 28(1)(a), as that effectively determined whether the vacant possession value of the property should be compared with a valuation based on the property being sold subject to assured tenancies or secure tenancies. Although he conceded that it was all a 'highly artificial exercise', [27], Lord Wilson felt constrained by the words of sub-s 1(a) to accept L's contentions.

Lord Wilson accepted that the fact that L could receive damages of £90,500 for an actual loss agreed at £7,400 could be seen as working injustice on local authority landlords. He noted, [28], that cases are rare where they have been held to have unlawfully evicted tenants (such as *Osei-Bonsu v Wandsworth LBC* [199] 1 WLR 1011); cases of deliberate illegality are even rarer (though it was found in the case of *AA v Southwark LBC* [2014] EWHC 500 (QB): see Bulletin No 140). The 'deprivation of benefit' (or restitutionary) measure of damages mandated by ss 27 and 28 is appropriate where there is a need to discourage private landlords from making a quick profit by

unlawfully evicting tenants; it is less clear why a tenant should be compensated for any more than his actual loss where the eviction is as a result of a genuine mistake on the part of a public sector landlord. The landlord will not benefit financially from the eviction, as is demonstrated by the fact that L's flat was so promptly relet to another social tenant. Lord Wilson suggested that Parliament might wish to revisit the application of s 28 to evictions on the part of local authorities, [30].

(case noted at: HLM 2014, Nov 9–10; and Solicitors Journal, December 3, 2014 (Online edition))

Tenancy deposit – periodic tenancy which pre-dated the coming into force of the provisions s 212–5 of the HA 2004 – whether landlord precluded from serving notice under s 21 of the HA 1988

Charalambous v Ng [2014] EWCA Civ 1604 is a case on the tenancy deposit provisions introduced by ss 212–215 of the HA 2004, and resolves a question which, as the principal work notes (at C[2285]) was unresolved by the amendments introduced by the Localism Act 2011: how the courts would treat landlords of tenancies which were in existence on 6 April 2012 and where the landlord had not taken the opportunity of the period of grace given by Article 16(2) of the Localism Act 2011 (Commencement No 4 and Transitional, Transitory and Savings Provisions) Order 2012, SI 2012/628 ('the Order'), and secured the deposit by 6 May 2012.

Mrs Ng, the respondent landlord in the case, was such a landlord. She had originally granted an assured shorthold tenancy to the tenant C in 2002. A deposit was paid to her. The tenancy was at first renewed annually, and the deposit was transferred to each new tenancy. From 2005 onwards C continued to hold under a periodic tenancy. N took no steps to secure the deposit. When in 2012 she served a notice under s 21 of the HA 1988 requiring possession of the property, she was met with the objection that she was by s 215(1) of the HA 2004 precluded from serving a notice, because of her failure to secure the deposit in accordance with the terms of s 213. The District Judge in the Clerkenwell and Shoreditch County Court had held that the s 21 notice was nevertheless valid. C appealed, and the appeal was heard by the Court of Appeal (Black, Lewison and King, LJJ). Lewison LJ, who gave the sole reasoned judgment, allowed the appeal, holding that the notice was invalid.

His reasoning is based on the wording of the Order (referred to above), which was apparently not cited before the District Judge. The chief objection to holding the s 21 notice invalid is the degree of retrospectivity that this involves. Lewison LJ felt that this was required by the wording of the Order, and mitigated by the period of grace allowed under it for compliance.

The result of the decision is that, as it is now too late for a landlord to comply with Art 16 and secure the deposit, he or she would need to refund the deposit (less any agreed deductions) to the tenant before serving a s 21 notice.

Homeless persons provided with temporary accommodation under s 188 of the HA 1996 – whether HRA 1998 required a landlord to obtain a possession order in order to recover possession

R (*on the application of ZH and CN*) *v Newham LBC* [2014] UKSC 62 is the appeal to the Supreme Court from *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). A bench of seven Justices sat, as the case involved a challenge to the established Court of Appeal authorities of *Mohamed v Malek and the Royal Borough of Kensington and Chelsea* (1995) 24 HLR 43, CA, and *Desnousse v Newham London Borough Council* [2006] EWCA Civ 547. The case also brought in HRA 1998 issues.

Essentially the issue was whether s 3(2B) of the PEA 1977 applied so as to require a local authority (or a private landlord) to obtain a possession order in order to evict licensees who had been provided with temporary accommodation under s 188 of the HA 1996 pending the making of further enquiries into a licensee's claim that he or she was homeless and entitled to be provided with more permanent accommodation. The Court of Appeal had found in favour of the local authorities ie that it was not necessary for a possession order to be obtained.

The appeal raised some finely balanced issues, which divided the Supreme Court 5:2 in favour of dismissing the appeal, with Lord Neuberger and Lady Hale as the dissenters.

In favour of requiring a local authority to obtain a possession order in such circumstances was the fact that s 3A of the PEA 1977 provides for numerous tenancies and licences to be excluded from the operation of the Act, but those that are provided pursuant to s 188 are not among them. On the other hand, Parliament has had several opportunities to amend the law following cases such as *Mohamed v Malek* (above), and has not seen fit to do so.

The case raised some difficult issues of policy, too. The requirement that evictions can take place only with explicit judicial authority is one that usually finds favour; on the other hand, the threshold for a council incurring an obligation under s 188 to a person who claims housing is a low one, and it was suggested that, in a straightforward case, it might take from 3–6 months to obtain and implement a possession order through the courts.

The judgment of the majority (Lords Wilson, Clark, Toulson and Hodge) was given by Lord Hodge: Lord Carnwath, who gave a separate judgment, also concurred in it. Essentially they held that it did not matter that licences under s 188 of the HA 1996 had not been specifically excluded, because it was a prior requirement under the PEA 1977 that the premises had been provided 'as a dwelling' and temporary accommodation of this kind did not have the necessary degree of permanence. They drew some support from the fact that Parliament had not seen fit to intervene after the Court of Appeal's

decision in *Mohamed v Malek,* and requiring local authorities (or private landlords, who provided temporary accommodation on their behalf) to go to Court to obtain possession orders would impose a heavy burden on them and on the judicial system. The system was still compliant with Art 8 of the ECHR as there were numerous safeguards built in to the system, including the requirement that licensees be given notice that their licence was being determined; the possibility of making an appeal to the county court on a point of law; and the availability of judicial review of the decision to serve the notice.

Both the judgment of Lord Hodge and that of Lord Neuberger include an extensive review of the development of the Rent Acts, both in the sense of the statutes themselves, and the case law on them, from the First World War to 1977. Lord Neuberger considers in detail whether 'occupation as a dwelling' connotes any greater degree of permanence than 'occupation as a residence'.

Lord Carnwath's concurring judgment is noteworthy as he embarks on a detailed consideration of the implications of Parliament not intervening after a statute has been interpreted by the courts, and whether its failure to amend should be taken as legislative approval *sub silentio*.

(case noted at: LSG 2014, 111(42), 18)

Whether tenant fulfilling occupation condition for secure tenancy – whether daughter could raise Art 8 proportionality issue on execution of warrant – whether appeal could be re-opened

Lawal v Circle 33 Housing Trust [2014] EWCA Civ 1514 raises some procedural issues, due in part to some complications in the way in which the matters came before the Court of Appeal. The respondent landlord, which was a registered non-charitable housing association, had sought possession from the appellant tenant, inter alia, on the basis that he had ceased to occupy the subject property as his principal or only home. HHJ Mills, QC had found that he had in fact spent only seven out of the preceding 70 months at the property. The crucial difficulty was that, in making her final submissions to the court the appellant's daughter – acting in person, and putting also her father's case – had raised the issue of whether the making of a possession order would satisfy the proportionality test required by Art 8 of the ECHR. This point had not been raised on the pleadings, or addressed before in argument, and HHJ Mills did not address it in her judgment. The appellant tenant then sought permission to appeal from the Court of Appeal, and Arden LJ refused permission, apparently assuming that it would be possible to raise a previously unaddressed Art 8 point at a hearing to suspend the warrant of possession. In the event that this was not possible, she suggested re-opening the appeal.

The appellant tenant then made an application to suspend to another Circuit Judge, HHJ Mitchell, who held that it would not be disproportionate not to

suspend the warrant; and that, in any event, s 89 of the HA 1980 prevented the suspension of a warrant for more than six weeks, and that time limit had already passed. The Supreme Court had already expressed the view in *Hounslow LBC v Powell* [2011] UKSC 8 that s 89 could not be read down under s 3(1) of the HRA 1998 so as to provide for a longer period than six weeks.

The Court of Appeal was therefore hearing both an appeal against HHJ Mitchell's order, and an application for an order under CPR 52.17 reopening the appeal from HHJ May's order.

Sir Terence Etherton, C, giving the only reasoned judgment, dismissed both appeals. The high tests to satisfy CPR 52.17 were not satisfied here. The jurisdiction could be invoked only where it is demonstrated that the integrity of the earlier litigation process has been critically undermined, [65]. With hindsight – and with the benefit of further transcripts which the full Court of Appeal had seen – it would have been better if Arden LJ had granted permission to appeal, [89], as she had not appreciated that s 89 of the HA 1980 meant that the county court had no power to entertain the appellants' Art 8 defence at the enforcement stage, and that the power to reopen an appeal under CPR 52.17 was so restricted.

The Court of Appeal confirmed that the Supreme Court had made it clear in *Pinnock*, [3], [54], that its judgment would apply equally to other social landlords as well as to local authorities. The evidential burden of proving disproportionality lay with the Appellants, [81]. Further, following Briggs LJ in *R* (*JL*) *v Secretary of State for Defence* [2013] EWCA Civ 449, it would normally be an abuse of process to raise an Art 8 defence at the enforcement stage which could have been raised at the trial, [89]. Nevertheless, in the exceptional circumstances here – where Arden LJ had suggested it as a course of action – HHJ Mitchell had rightly considered the Art 8 defence when it was raised before him.

Sir Terence Etherton, C, also rejected the argument that, if the tenant failed to satisfy the tenant condition of s 81 of the 1985 Act, this of itself precluded the necessity to consider the Art 8 balancing exercise. It would still be necessary to conduct the balancing exercise, even if the tenant did not satisfy the condition, [90].

Succession of someone 'living with the tenant as if that tenant's spouse or civil partner' to secure tenancy – whether condition of residence for 12 months amounted to a breach of rights under Art 8 and Art 14 of the ECHR

R (*on the application of Turley*) *v Wandsworth LBC* [2014] EWHC 4040 (Admin) raises a short point on the application of the ECHR to the provisions for succession to secure tenancies contained in the HA 1985 (as amended). As it applies to tenancies in England granted before 1 April 2012 (and still applies in Wales), a spouse or civil partner succeeds automatically

to a secure tenancy, provided that the property is his or her principal home at the time of the tenant's death; but someone who is living with the tenant as if that tenant's spouse or civil partner succeeds only if he or she has been living with the tenant for the past 12 months. In Ms Turley's case, it was accepted that she was living with the tenant as if she were his spouse, but for much of the 12 months preceding his death, their relationship had broken down, and the tenant was living elsewhere. She argued that the imposition of the requirement that they had been living together for the 12 months preceding his death amounted to a breach of her rights under Arts 8 and 14 of the ECHR. It was conceded on behalf of the Secretary of State that marital status was a relevant status for the purposes of Art 14, but it was argued that, because of the difficulty in proving that a couple were living together as if married or civil partners, the requirement that this state of affairs be demonstrated as having existed over a period of time served a legitimate aim. This argument was accepted by Knowles J, [22], who also accepted that there was 'a reasonable relationship of proportionality between the means employed and aim sought to be realised', [23].

It should be noted that, so far as England is concerned, for secure tenancies granted from 1 April 2012 onwards, the additional requirement does not apply: by virtue of s 86A of the HA 1985 (inserted by the Localism Act 2011) someone living with the tenant as if his or her spouse or civil partner would succeed automatically, but only if the tenancy agreement provided for such wider succession rights.

Failure to specify particulars of a qualifying tenant – whether rendered initial notice for collective enfranchisement a nullity

Natt v Osman [2014] EWCA Civ 1520 held that a notice served pursuant to s 13 of the LRHUDA 1993, claiming the right to enfranchise under that Act, but which did not specify the names of one of the qualifying tenants in the Property, nor give the address of her flat, or particulars of her lease, was a nullity.

The problem arose because the flat in question – the fourth flat, in the attic of the Property – was occupied by the Respondent Landlords' daughter, and the Appellants (who each owned one flat) alleged that the flat had been illegally created in that the staircase to it opened on to a part of the second floor landing which (they alleged) formed part of the demise to the second Appellant. In the Central London County Court HHJ Dight held that the staircase did not open on to a part of the Property that had been demised to the second Appellant, and the attic flat should therefore have been included as a qualifying flat. The Appellants did not appeal against HHJ Dight's ruling on the extent of the second Appellant's flat, but did argue that the error did not invalidate the notice.

The Court of Appeal (Sir Terence Etherton, C, and Patten and Gloster, LJJ) did not agree. The omission of the details of the attic flat, as required by s 13(3)(e) of the LRHUDA 1993, invalidated the notice. Its requirements

were mandatory, rather than directory. The Appellants had attempted to argue that a test of 'substantial compliance' should be applied. The Court of Appeal rejected this argument. Although it had been used in cases where the decision of a public body was being challenged, and the matters at issue involved some process for disputing the correctness of the decision, this was a dispute involving the private, property law rights of individuals. The established view of the Court of Appeal was that the court would review whether the requirements of the statute had been strictly complied with: if not, then the notice had to be held to be either wholly valid or wholly invalid, depending on the wording of the statute, [31]. It did not depend on factors such as the state of mind or knowledge of the parties or the actual prejudice caused by non-compliance in any particular case, [32]. The policy of the courts was to provide certainty where the existence, acquisition and transfer of property interests were concerned.

Applications for Right to Manage – whether invalidated by failure to make available for inspection on a Saturday or Sunday – whether duly signed – whether invalidated by failure to serve on an intermediate landlord

Elim Court RTM Co Ltd v Avon Freeholds Ltd [2014] UKUT 397 (LC) is in fact a single judgment given by Mr Martin Rodger, QC, Deputy President, on appeals against three decisions by LVTs dealing with applications by five RTM companies for the Right To Manage. A common factor was that in each of the five applications the Right To Manage was being dealt with by a company called The Right to Manage Federation Ltd ('TRTMF Ltd') and in each case the Participation Notice served under s 78 of the CLRA 2002 had been signed by a director of TRTMF Ltd.

Three issues arose – in varying combinations – in the five applications:

(a) whether s 78(5)(b) required that the RTM company's Articles of Association be available for inspection for at least three days, which had to include a Saturday or Sunday (or both);

(b) whether the signature on each of the participation notices satisfied s 44 of the Companies Act 2006; and

(c) whether, in one of the cases, the claim notice had been served on an intermediate landlord.

In each case, if the UT decided that the relevant requirement had not been met, then it would have to go on to consider what the consequences non-compliance should be.

On the first issue, HHJ Gerald determined that the provision in s 78(5)(b) did not merely permit the time for inspection to include a Saturday and/or a Sunday; it positively required it; and non-compliance was fatal to the validity of the RTM application.

On the second issue, the notices had been signed by a Mr Joyner, who was a director and secretary of TRTMF Ltd. The precise wording adopted varied

slightly, but a typical example was 'Dudley Joyner, Director, The Right to Manage Federation Limited, company's secretary for and on behalf of [XYZ] RTM Company Limited.' It was argued that this did not comply with s 44 of the Companies Act 2006 (CA 2006) on the basis that (a) if Mr Joyner were signing as Director then his signature needed to be witnessed; (b) if he were signing as secretary then another authorised signatory would also have to sign. HHJ Gerald decided that, although the mode of execution did not comply with s 44 of the CA 2006, the signature could be treated as the personal signature of Mr Joyner, who was authorised to sign on behalf of each RTM company, and the addition of the further descriptive words was, in effect, mere surplusage, to be disregarded.

On the third issue, the failure to serve an intermediate landlord was fatal to the validity of the Notice, even though it was accepted that it was extremely unlikely that that landlord would have any management responsibilities (it seemed likely that the lease formed part of some equity release scheme).

Application for extended lease under Part II of the LRHUDA 1993 – whether 'competent' landlord could bind 'other' landlord – effect of notice reserving right to separate representation

Howard De Walden Estates Ltd v Accordway Ltd [2014] UKUT 486 (LC) involved a tenant's application for an extended lease under the LRHUDA 1993, and raises the narrow issue of whether the 'competent' landlord (L1) can agree a premium which is binding on the 'other' (ie intermediate) landlord (L2), or whether L2 retains the right to have its part of the premium independently assessed. T had agreed with L1 to pay a premium of £269,000 for an extended lease, which L1 proposed to apportion as to £265,600 to itself and as to £3,400 to L2. L1 and T wrote to the LVT to ask for a hearing to be vacated, but L2 did not agree to this. L2 had previously served a notice of her intention to be separately represented in any legal proceedings pursuant to para 7(1) of Sch 11 to the 1993 Act. At a full hearing of the issue the LVT decided that it had jurisdiction to determine the value of the intermediate lease of L2. L1 appealed against that decision. In the meantime L1 had granted an extended lease to T.

Sitting in the Upper Tribunal, HHJ Gerald decided the issue in favour of L1. The provisions of Part II of the LRHUDA 1993, were very precise. The competent landlord was given authority to agree the terms of the new lease with the tenant: what was sometimes described as a 'statutory power of attorney'. This did not come to an end merely because L2 had reserved the right to be separately represented in any legal proceedings. While in theory L1 could ride rough-shod over the views of L2, L1 owed a statutory duty of care to L2, and would be liable unless he could show that he could avail himself of the statutory defence provided for by para 6(4) of Sch 11, namely that he had acted in good faith and with reasonable care and diligence. But service of a notice reserving the right to separate representation did still serve a useful function. If L2 felt that her interests were not being looked after, she could

apply to the county court under para 6(1) of Sch 11, for directions as to how L1 should act. The court might require L1 not to reach an agreement with T without the consent of L2 or the sanction of the court. If L1 felt that L2 was being obstructive, then he too could make such an application, for his own protection.

Right to Manage – whether misdescription of RTM Company in counter-notice invalidated it – whether common water supply to two buildings could be separately provided – whether LVT should refuse to accept jurisdiction even if counter-notice was invalid

St Stephens Mansions RTM Co Ltd v Fairhold NW Ltd [2014] UKUT 541 (LC) raises two separate issues on the Right To Manage. The first deals with whether a mistake in the counter-notice invalidated it. The second considers the application of the principle that a building cannot be self-contained for the purposes of the provisions if relevant services are provided jointly with those serving another part of the building and cannot be provided independently save by works involving considerable interruption to those services.

The case in fact involves separate claims to the RTM by two apartment blocks in Cardiff which abutted each other, but which were structurally free-standing, St Stephens Mansions and St James Mansions. They simultaneously began the process of acquiring the RTM, which was no doubt the cause of the issue of confusion that arose in the case of the St James appeal. The St James RTM Company ('St James RTM') served its initial notice, and the landlord and the management company (which was associated with the landlord, rather than being controlled by the leaseholders) each responded with a counter-notice which, although addressed to the St James RTM, denied that the ***St Stephens*** company was entitled to acquire the RTM. The Wales LVT (whose jurisdiction in such matters has not been transferred to the FTT) decided that the *Mannai* principles should not be applied so as to determine the validity of the counter-notice, but that the stricter principles set out in the *Assethold* group of cases (*Assethold Ltd v 15 Yonge Park RTM Co Ltd* [2011] UKUT 379 (LC), *Assethold Ltd v 14 Stansfield Road RTM Co Ltd* [2012] UKUT 262 (LC) and *Assethold Ltd v 13–14 Romside Place RTM Co Ltd* [2013] UKUT 0603 (LC)) should be applied. On this basis the LVT determined that the counter-notice was invalid, so St James RTM was entitled to acquire the RTM. It was against this ruling that the landlord and its management company appealed to the Upper Tribunal. (The LVT also expressed the view that, even if the matter were covered by the *Mannai* principle, it was not certain that the recipient would not be misled by the counter-notice.)

In the UT Mr Martin Rodger, QC, Deputy President, came to contrary conclusions. He decided that this was not a case where a degree of latitude should be given and he should intervene only if the decision of the LVT was irrational, [36]. If *Mannai* did apply, then the test did not involve the exercise of a discretion. If he were satisfied that the recipient would be under no

doubt as to what was intended, he should determine the issue. The receipt of the counter-notice had to be judged in the context of the operation RTM scheme, and St James RTM would not have been in any doubt as to what it was intended to signify.

It was therefore necessary for the UT to determine whether the stricter principle set out in the *Assethold* cases did apply here, and it did not. Those cases dealt with the situation where there was a statutory requirement that certain information be included in a notice. There was no requirement in s 84 of the CLRA 2002 that the name of the RTM Company be included, [51]. The appropriate test was therefore the *Mannai* test. The appeal of the landlord (and its management company) on this point was therefore allowed.

In the case of St Stephens Mansions appeal, the LVT had held that the St Stephens RTM Co Ltd ('St Stephens RTM') was ***not*** entitled to acquire the RTM, and therefore St Stephens RTM was appealing against that determination. The basis of that decision was that the water supply to each block passed through a pump house with a single system of pumps and holding tanks with a single outlet pipe which subsequently divided so as to serve the two blocks. Relying on the tests set out in the decision of HHJ Marshall QC in *Oakwood Court* (*Holland Park*) *Ltd v Daejan Properties Ltd* [2007] 1 EGLR 121 (which dealt with the similar tests to be applied on collective enfranchisement) the LVT had decided that the comparatively simple alterations that would be required to separate the supplies 'would result in the provision of new services, rather than the provision of the services, which is a prerequisite of s.72(4)'. The Deputy President found this explanation difficult to understand and to accept, [78]. The works would not result in the lengthy interruption which HHJ Marshall found would have resulted in the *Oakwood Court* case. The appeal by the St Stephens RTM was therefore allowed. (Mr Rodger must surely also have been correct to observe that (a) the provision of separate meters would not of itself be sufficient to provide separate supplies, if preceded in the supply by equipment serving both buildings; but that (b) the mere fact that there would be still a single pipe from the mains would be irrelevant.)

It had been agreed between the parties that the outcome of the St Stephens appeal would, in effect, also determine the result of that relating to St James, and that it would not therefore be necessary to remit the matter to the LVT.

As the Deputy President observed, the paradoxical result of the Wales LVT's determinations was that the St James RTM acquired the RTM, whereas the St Stephens RTM did not; but if the physical arrangements for the common services precluded St Stephens Mansions from acquiring the RTM, they must equally have been applicable in the case of St James Mansions. It would appear that the LVT reached this unsatisfactory conclusion because both parties in the St James case were proceeding on the basis that, if the counter-notice were invalid, St James RTM would acquire the RTM automatically. The Deputy President strongly doubted whether this could be so, [91]. Sir Keith Lindblom, P, in *Fairhold* (*Yorkshire*) *Ltd v Trinity Wharf* (*SE16*) *RTM Co Ltd* [2013] UKUT 0502 (LC) had made it clear that a

tribunal 'may consider the procedural integrity of the right to manage process', [93]. Provided a fair opportunity is given to each party to put its case, the tribunal could take, of its own initiative, a point which meant that it did not have jurisdiction, eg that the premises in question did not fall within the scope of the Act, [94].

One may observe that there have been numerous cases (eg *Fairhold Mercury Limited v Merryfield RTM Co Ltd* [2012] UKUT 311 (LC) where the Upper Tribunal has said that the FTT should not be over-zealous in taking technical points of law on its own initiative where the parties do not wish to raise them, but are content to let the tribunal resolve their matters in dispute. Clearly, however, it is necessary for a tribunal to take a point which would appear entirely to deprive it of jurisdiction, if only to avoid the self-contradictory decisions of the Wales LVT in these cases.

NOTES ON CASES

Akerman-Livingstone v Aster Communities Ltd (*formerly Flourish Homes Ltd*) [2014] EWCA Civ 1081: JHL 2014, 17(6), D104–D105 (noted in Bulletin No 140)

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

British Overseas Bank Nominees Ltd v Analytical Properties Ltd [2014] EWHC 802 (Ch): [2014] Comm Leases 2108

Century Projects Ltd v Almacantar (*Centre Point*) *Ltd* [2014] EWHC 394 (Ch): [2014] L & T Review 239–242; [2014] Comm Leases 2095–2096 (noted in Bulletin No 139)

CLP Holding Co Ltd v Singh [2014] EWCA Civ 1103: [2014] Comm Leases 2104

Cohen v Teseo Properties Ltd [2014] EWHC 2442 (Ch): [2014] Comm Leases 2106

Durley House Ltd v Firmdale Hotels plc [2014] EWHC 2608 (Ch): [2014] Comm Leases 2096–2098

Kishenin (*t/a Beiderbecke's Hotel and Restaurant*) *v Bleach* [2014] EWHC 3416 (Ch): [2014] Comm Leases 2113

Marks & Spencer plc v BNP Paribas Securities Services Trust Co (*Jersey*) *Ltd* [2014] EWCA Civ 603: NLJ 2014, 164(7622), 13–14 (noted in Bulletin No 139)

McDonald v McDonald [2014] EWCA Civ 1049: JHL 2014, 17(6), D107–D108; [2015] LQR 34–39 (noted in Bulletin No 140)

Marks & Spencer plc v BNP Paribas Securities Services Trust Co (*Jersey*) *Ltd* [2014] EWCA Civ 603: [2014] Conv 466–472 (noted in Bulletin No 139)

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

Pillar Denton Ltd v Jervis (*Re Games Station Ltd*) [2014] EWCA Civ 180: SJ 2014, 158(47), 28 (notes refusal by Supreme Court of permission to appeal) (case noted in Bulletin No 138)

R Square Properties Ltd v Nissan Motors (*GB*) *Ltd* (*Ch D*) [2014] Comm Leases 2112

Regent Wealth Ltd v Wiggins [2014] EWCA Civ 1078: EG 2014, 1446, 113; and JHL 2014, 17(6), D110–D111

Santander UK v RA Legal Solicitors [2014] EWCA Civ 183 (and other cases): SJ 2014, 158(36), 18–19, 21 (noted in Bulletin No 138)

SCMLLA (*Freehold*) *Ltd's Appeal, Re* [2014] UKUT 58 (LC): HPLR 2014, 89(Nov), 3–4 (noted in Bulletin No 138)

Singh v Dhanji [2014] EWCA Civ 414: [2014] L & T Review 237–239 (noted in Bulletin No 139)

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

Stratton v Patel [2014] EWHC 2677 (TCC): [2014] Comm Leases 2109

Waites (*H*) *Ltd v Hambledon Court Ltd* [2014] EWHC 651 (Ch): [2014] Comm Leases 2093–2094 (noted in Bulletin No 139)

Westleigh Properties Ltd v Grimes [2014] UKUT 213 (LC): HPLR 2014, 89(Nov), 4–5

Wyldecrest Parks (*Management*) *Ltd, Re* [2014] UKUT 351 (LC): HPLR 2014, 89(Nov), 5–6

Yeung v Potel [2014] EWCA Civ 481: [2014] Comm Leases 2113 (noted in Bulletin No 139)

Youssefi v Mussellwhite [2014] EWCA Civ 885: EG 2014, 1439, 99; SJ 2014, 158(37) Supp (Property Focus), 15, 17; [2014] L & T Review 193–195; and NLJ 2014, 164 (7623), 18 (noted in Bulletin No 140)

ARTICLES OF INTEREST

A bluffer's guide to leasehold enfranchisement: Part 1 [2014] L & T Review 215–218

A lament for draftsmanship [2014] L & T Review 207–209

A right to buy? LTA 1987, Pt 1, and its application to mixed-use tenancies) EG 2014, 1438, 122–123

Article 8 and disability discrimination: where are we now? [2014] L & T Review 210–214

Avenues to recovery (recovery of commercial rent arrears) EG 2014, 1445, 112–113

Bruton, licensees in possession and a fiction in title [2014] Conv 495–506

Business rates and the disclaimer of leases: the limits of statutory fictions [2014] Conv 434–444

Can Land Register rectification be retrospective? SJ 2014, 158(37) Supp (Property Focus), 11, 13

Capital gains tax charge on non-residents SJ 2014, 158(37) Supp (Property Focus), 19, 21

Challenging the rising cost of repairs EG 2014, 1444, 87

Chickens coming home to roost (mortgage fraud and rectification) [2014] Conv 444–449

Closing the legislative gap (possible legislation to deal with problem of Japanese knotweed in neighbouring gardens) EG 2014, 1437, 76–77

Confidentiality clauses and rent review arbitrations EG 2014, 1440, 94–96

Consenting adults (discusses Protocol for Applications for Consent to Assign or Sublet, and provisions for ADR in case of disagreement) EG 2014, 1438, 118–121

Contracts and crystal balls (drafting of commercial contracts, including options) EG 2014, 1445, 115

Conventional wisdoms (*Mount Eden Land Ltd v Bolsover Investments Ltd* [2014] EWHC 3523 (Ch) and *Westbrook Dolphin Square Ltd v Friends Life Ltd* [2014] EWHC 2433 (Ch)): NLJ 2014, 164(7628), 18–19

Criminal squatting and adverse possession: the best solution? JHL 2014, 17(5), 94–97

Damages for breach of covenant to repair/reinstate: Stratton v Patel [2014] L & T Review D34

Daylight robbery: is the removal of a restrictive covenant under section 84 of the Law of Property Act 1925 a breach of human rights? [2014] Conv 507–511

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Equitable relief from forfeiture of possessory rights in land [2014] L & T Review 223–227

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Flats: how to avoid rising tensions (recent case law) SJ 2014, 158(37) Supp (Property Focus), 27, 29

Frustrating property fraud EG 2014, 1443, 109

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Frustration of a lease: not never, but hardly ever [2014] L & T Review 219–222

Further advances under a secured loan: Land Registration Act 2002 s 49 [2014] Conv 430–433

Get your house in order (extension of Consumer Protection from Unfair Trading Regulations 2008 to private tenants) EG 2014, 1449, 89

Green leases – drafting for all situations [2014] L & T Review 199–206

Ground rents: modern v nominal (rent review provisions) EG 2014, 1438, 126

Housing repairs update 2014 Legal Action 2014/15, Dec/Jan, 24–29

How secure is your security? EG 2014, 1447, 106–107

Impractical consultation (s 20 LTA 1985) [2014] Conv 375–380

In place of strife (consent to assignment and sub-letting and ADR) LSG 2014, 111(34), 8

Invalid notices: form over substance? [2014] L & T Review 176–182

Knowing MEES, knowing you (Minimum Energy Efficiency Scheme for tenanted commercial properties) SJ 2014, 158(42), 33–34

Land registration in retrospect (*Gold Harp Properties Ltd v MacLeod* [2014] EWCA Civ 1084) EG 2014, 1443, 111

Land registration: unilateral notices EG 2014, 1444, 92

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Mixed use, commercial leases and the 1987 Act problem [2014] L & T Review 163–164

Not the disaster many feared (commercial rent arrears recovery) EG 2014, 1440, 101

Peaceable entry to mortgaged premises: considering the doctrine's compatibility with the HRA 1998 [2014] Conv 381–397

Perpetually renewable leases: a reappraisal [2014] Conv 482–494

Power to the social landlord? (anti-social behaviour) SJ 2014, 158(37) Supp (Property Focus), 23, 25

Practitioner's page: leases from and to charities – make sure you get it right! [2014] L & T Review 246–249

Prescriptive acquisition of rights over public authority land [2014] CLJ 487–490

Private eye (discusses various means of regulating the private rented sector) EG 2014, 1437 Supp (Residential), 17–18

Re-calculating repayments of rent JHL 2014, 17(6), 124–129

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Reflections on residential changes (changes to law in residential property sector in 2014) EG 2014, 1550, 108

Rents for social housing from 2015–16: summary of responses JHL 2014, 17(5), D99

Resolving title conflicts in registered land [2015] LQR 108–132

Saving heartache and expense on leasehold repairs SJ 2014, 158(35), 28

Section 2 turns 25 (has s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 brought certainty?) NLJ 2014, 164(7627), 16–17

Simplification of the implication (implied terms) EG 2014, 1439, 94–95

Speeding up evictions SJ 2014, 158(37) Supp (Property Focus), 30

Squatters and the criminal law: can two wrongs make a right? [2014] CLJ 484–487

SRA director questions holding of client money Law Society Gazette, September 19, 2014 (Online edition)

Tenancy deposits again: Gardner v McCusker [2014] L & T Review 191–193

The 'by right' argument and town or village greens in the Supreme Court [2014] Conv 512–518

The changing face of section 21 (ie of the HA 1988) SJ 2014, 158(44), 33–34

The elephant test in the post-Dolphin Square world EG 2014, 1448, 118–120

The immigration status of residential tenants: the new law [2014] L & T Review 228–231

The Land Registration Act 2002 – the show on the road MLR 2014, 77(5), 763–779

The Localism Act 2011: the hollow housing law revolution [2014] MLR 964–982

The model commercial lease [2014] L & T Review 183–188

The new Anti-social Behaviour Act 2014 – what it means for landlords and tenants: Part 2 [2014] L & T Review 165–168

The rule in Wringe and Cohen – still good law? [2014] L & T Review 172–175

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

This is the self-regulation society (Association of Residential Managing Agents and launch of ARMA-Q scheme) EG 2014, 1448, 125

Under new management (exercising the Right To Manage) EG 2014, 1444, 88–89

Vigilance Matters (freehold restrictive covenants and competition law) NLJ 2014, 164(7634), 11–12

What's the charge? (service charges and mixed-use properties) EG 2014, 1446, 108–109

What's the damage? (mitigating tenants' liability for dilapidations) EG 2014, 1446, 112

When the experts get it wrong (chancel repairs and land registration) [2014] Conv 369–374

Where are the boundaries? EG 2014, 1447, 105

Where the law went wrong – apportionment of rent: Ellis v Rowbotham [2014] L & T Review 2014, 169–171

Who's got it covered? (effect of co-insurance clause) EG 2014, 1445, 116

Will it ever see the light of day? (consideration of Law Commission's Report on Rights to Light) EG 2014, 1449, 82–84

NEWS AND CONSULTATIONS

The Chancellor of the Exchequer, in his **Autumn Statement** of **3 December 2014**, announced changes to the thresholds, rates and structure of **Stamp Duty Land Tax**, to take effect from **4 December 2014**: www.gov.uk/government/publications/stamp-duty-land-tax-reform-of-structure-rates-and-thresholds.

Amendments to the **Council of Mortgage Lenders' Handbook** came into force on **1 December 2014**, and Certificates of Title should now be based on the revised Handbook: www.cml.org.uk/cml/handbook.

The Law Society has issued a reminder to the minority (4%) still lodging **SDLT returns on paper** that, as from 1 October 2014, a valid local authority code must be included at Q.29 of SDLT (and on the other forms, if applicable), or the return will be rejected: www.lawsociety.org.uk/advice/articles/sdlt-returns-on-paper/.

The Law Society's updated **CON 29** and **CON 290 enquiry forms** will not now be launched in April 2015. A new date for the launch has not yet been set.

HM Revenue and Customs has produced a new **calculator** to calculate the **Stamp Duty Land Tax** payable on the sale of freehold residential properties, and the assignment of residential leasehold properties: www.gov.uk/stamp-duty-land-tax-calculators.

OFFICIAL PUBLICATIONS

Commercial and corporate ownership data – Land Registration guidance. This sets out how to get title records in all ownership categories: www.gov.uk/commercial-and-corporate-ownership-data.

Gazumping – a comparison of the English and Scottish conveyancing systems. A **House of Commons Library Standard Note** outlines the above: www.parliament.uk/briefing-papers/SN06980/gazumping-a-comparison-of-the-english-and-scottish-conveyancing-systems.

The **Department for Communities and Local Government** has published a **code of practice for the private rented sector**: www.rics.org/Global/Private_Rented_Sector_code.2014.pdf ; www.gov.uk/government/news/a-better-deal-for-hardworking-tenants.

It has also published a **model agreement for an assured shorthold tenancy** and accompanying **guidance**: www.gov.uk/government/uploads/system/uploads/attachment_data/file/353175/140911_Model_tenancy_agreement-online_version.docx; www.gov.uk/government/news/a-better-deal-for-hardworking-tenants.

Land: Frequently Asked Questions – A **House of Commons Library Standard Note** provides background information on registered and unregistered land, restrictive covenant and boundary disputes: www.parliament.uk/briefing-papers/SN06989.pdf.

The **Property Ombudsman** has published his **Interim Report** for **2014**: www.tpos.co.uk/downloads/reports/TPO-Interim-Report-2014.pdf.

The **Home Office** has issued the final version of its **guidance on landlords' responsibilities for checking their tenants' immigration status** and 'right to rent': www.gov.uk/government/publications/right-to-rent-landlords-code-of-practice.

On 2 December 2014 the **Competition and Markets Authority** published its **market study findings and recommendations for improvements** into the **residential property management sector**: www.gov.uk/government/news/cma-pushes-for-improvements-to-residential-property-management.

A **House of Commons Library Standard Note** explains the law with respect to **retaliatory eviction** and considers the extent to which it occurs; and goes on to explain the **Tenancies (Reform) Bill 2014**: www.parliament.uk/briefing-papers/SN07015.pdf.

A **House of Commons Library Standard Note** explains the law with respect to **private landlords' obligation to check the immigration status of prospective tenants:** www.parliament.uk/briefing-papers/SN07025.pdf.

HM Revenue and Customs have issued guidance to tenants and managing agents on **paying tax on rent paid to landlords who are resident abroad**: www.gov.uk/paying-tax-on-rent-to-landlords-abroad.

REPORTS

The **Law Commission** on 4 December 2014 published its **final report** and **draft bill** (Law Com No 356) on **Rights to light**: lawcommission.justice.gov.uk/areas/rights-to-light.htm.

The **Home Office** on 4 November 2014 published a *Code of Practice for Landlords: Avoiding unlawful discrimination when conducting 'right to rent' checks in the private rented residential sector*: www.gov.uk/government/uploads/system/uploads/attachment_data/file/370082/code_of_practice_for_landlords.pdf.

PRACTICE GUIDES ETC

HM Land Registry has issued revised versions of **Practice Guide 2** on first registration of title if deeds are lost or have destroyed (updated re: Statement of Truth Form ST3); **PG15** on overriding interests and their disclosure; **PG19A** on restrictions and leasehold properties; **PG28** on extension of leases; **PG70** on nil-rate band discretionary trusts; and **PG74** on searches of the index of proprietors' names.

The **Land Registry** has updated **Practice Guide 57**, on **Exempting documents from the general right to inspect and copy**, to clarify the change in policy for applications which are not first registrations.

The **Land Registry** has updated **Practice Guide 27**, on the **Leasehold Reform legislation**, to take account of the fact that, with effect from 1 December 2014, notices served under ss 13 or 42 of the 1993 Act in respect of premises in Wales no longer have to be served by the tenant(s) personally (the requirement was removed in respect of premises in England with effect from 13 May 2014).

The **Land Registry** has updated **Practice Guide 4**, on **adverse possession of registered land**; and **Practice Guide 14**, on **Charities**

PRESS RELEASES

The **Law Commission** has announced that it will consult and report on '**Transfer of Title and Change of Occupancy Fees in Leaseholds'**. These are generally encountered in the sheltered retirement home market and are commonly if somewhat tactlessly referred to as '**exit fees**'. A consultation will be issued in summer 2015 with a view to the Commission reporting with interim recommendations for reform in March 2016. See: lawcommission.justice.gov.uk/areas/2928.htm.

LEGISLATIVE PROPOSALS

A **House of Commons Library Standard Note** contains background information on the **Household Safety (Carbon Monoxide Detectors) Bill 2014**: www.parliament.uk/briefing-papers/SN06979.pdf.

STATUTORY INSTRUMENTS

The **Residential Property Tribunal Procedures and Fees (Wales) (Amendment No 2) Regulations 2014, SI 2553** update the Residential Property Tribunal Procedures and Fees (Wales) Regulations 2012 so that references are to the Mobile Homes (Wales) Act 2014 instead of the MHA 1983. The Rules also make provision for new applications that can be made to the Residential Property Tribunal.

The **Immigration (Residential Accommodation) (Prescribed Requirement and Codes of Practice) Order 2014,** SI 2014/2874, which come into force on 1 December 2014, set out the checks that landlords and their agents are required to carry out. The Regulations also set out the financial penalties for their breach.

The **Immigration (Residential Accommodation) (Prescribed Cases) Order 2014**, SI 2014/2873, which also come into force on 1 December 2014, exempt from checks cases where a tenancy is extended automatically due to contractual rights.

The **Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No 2 and Transitional Provisions) (Wales) Order 2014**, SI 2014/2830, introduced in Wales with effect from 21 October 2014 a new absolute ground for courts to grant possession of a dwelling subject to a secure tenancy (equivalent provisions apply in England by virtue of amendments to the Housing Act 1985 which were made by s 96 of the Anti-social Behaviour, Crime and Policing Act 2014).

The **Mobile Homes (Site Rules) (England) (Amendment) Regulations 2014**, SI 2014/3073, which came into force on 19 December 2014, correct a discrepancy in the Mobile Homes (Site Rules) (England) Regulations 2014, SI 2014/5. Mobile home owners who wish to appeal to the First-Tier Tribunal against the inclusion of a new site rule will no longer have to provide the site owner with a copy of their appeal to the Tribunal within the 21-day appeal period.

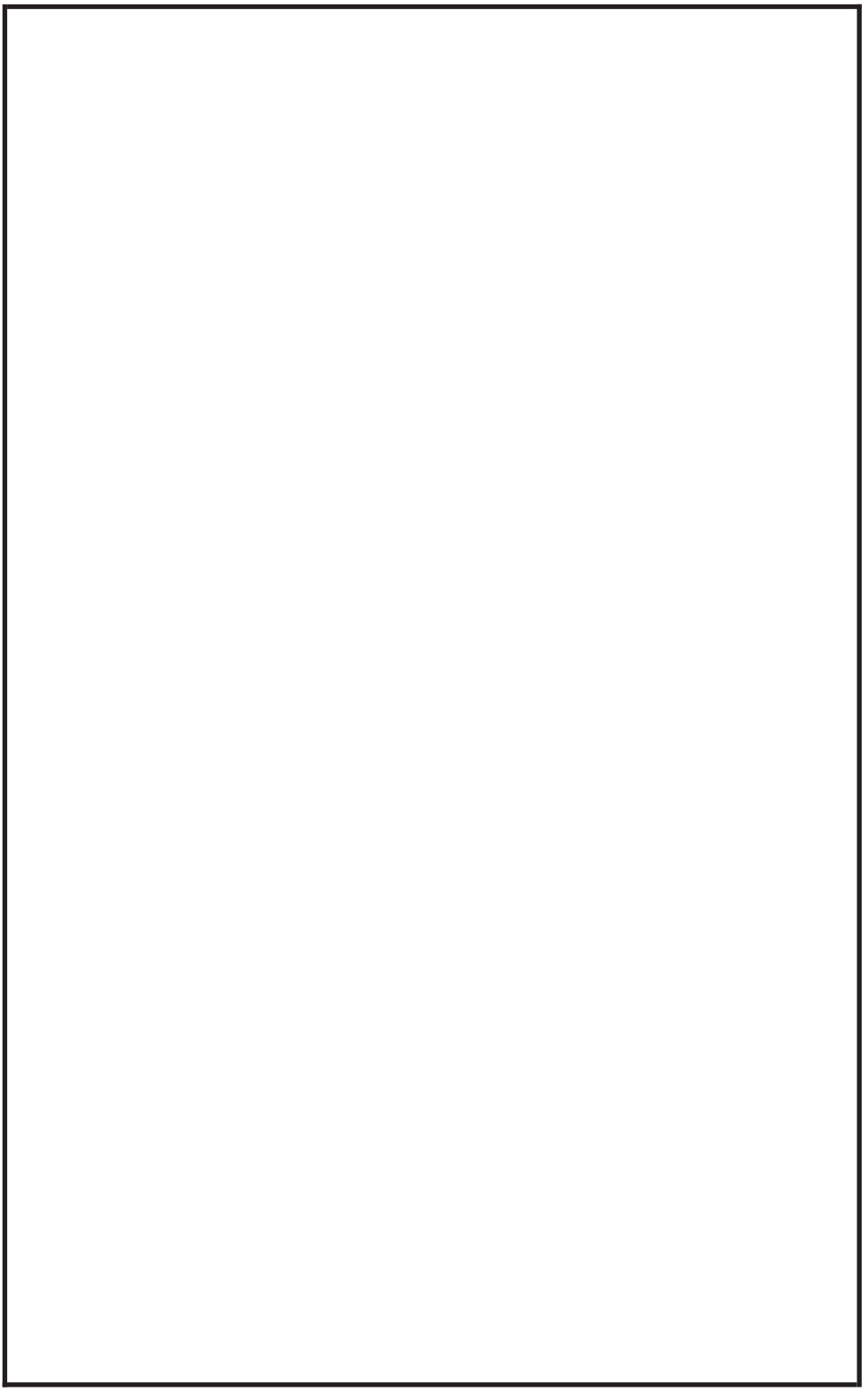
The **Commons Registration (England) Regulations 2014**, SI 2014/3038, which come into force on 15 December 2014, make provision for the maintenance of registers of common land and village greens, including the procedure for applications to amend them under the Commons Act 2006.

The **Business Improvement Districts (Property Owners) (England) Regulations 2014**, SI 2014/3204 make provision for the setting up and operation of arrangements for a levy on owners of certain property interests with the area of local Business Improvement Districts.

The **Rent Officers (Housing Benefit and Universal Credit Functions) (Local Housing Allowance Amendments) Order 2014**, SI 2014/3126 comes into force on 8 January 2015.

The **Housing (Wales) Act 2014 (Commencement No 1) Order 2014**, SI 2014/3127 brought certain provisions of the Act into force with effect from 1 December 2014. These relate to Housing administration, except insofar as they bring into force the power to make orders, regulations, guidance, codes of practice, etc.

The **Secure Tenancies (Absolute Ground for Possession for Anti-social Behaviour) (Review Procedure) (Wales) Regulations 2014**, SI 2014/3278 come into force on 12 January 2015.



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