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Hill & Redman's Law of Landlord and Tenant

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DIVISION A: GENERAL LAW

Judicial review of refusal of Upper Tribunal to grant permission to appeal – refusal quashed when based upon assumption which was contrary to facts as found by LVT

R (*on the application of Ground Rents* (*Regisport*) *Ltd*) *v Upper Tribunal* (*Administrative Appeals Chamber*) [2013] EWHC 2638 (Admin) is a judicial review arising out of the refusal of the Upper Tribunal to grant permission to Regisport to appeal against a decision of the LVT, the UT being unable to review its decision as the circumstances did not fall within r 45 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The factual background to the case is that a company (Countryside) had developed three blocks of flats in Merton, south-west London. Whilst the flats were in the development stage, Countryside had entered into an agreement with Thames Water Utilities Services ('Thames') for the provision of water and sewerage services. Following the sale of the last flat, Countryside had sold the freehold to Regisport. Following the transfer, Thames continued to bill Countryside, with the result that most of the charges remained unpaid. When the mistake was eventually discovered, the leaseholders claimed the benefit of the 18-month 'limitation period' in s 20B, LTA 1985 to restrict their liability. This argument succeeded before the LVT, but Regisport sought permission to appeal. This was refused by the President in the UT. Regisport contested this refusal, on the basis that the UT had assumed in refusing

permission that the demands for payment had been sent to Countryside *before* the transfer of the freehold to Regisport. This was contrary to the findings of fact made by the LVT.

In the Administrative Court Leggatt J confirmed that the court has power on judicial review to declare unlawful a decision taken on the basis of no evidence. The criteria set out by the Court of Appeal in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044 were satisfied, and, without expressing any view on the merits, the UT's decision to refuse permission to appeal had to be quashed.

Construction of service charge provisions in 'right to buy' leases – whether broader matters might be included within scope of 'management charge'

Blackpool BC v Cargill [2013] UKUT 0377 (LC) (which is in fact a conjoined appeal with *Blackpool BC v Morris*) is in essence a decision on the interpretation of the lease granted by Blackpool Borough Council to its leaseholders under the 'right to buy': one suspects, however, that it may in practice have wider influence in determining the approach of the FTT when faced with challenges to the management charges levied by local authority landlords.

The background was that Blackpool BC had for many years levied a standard management fee for all of its long leasehold units as part of its service charge arrangements: this was increased by a small amount each year, and between 2002–03 and 2010–11 had increased from £50 to £64 p.a. In 2007, however, the Council had devolved its management responsibilities to a not-for-profit company (which was also a party to the proceedings) and this eventually led to a review of the management charge. Accordingly for the year 2011–2012 the management charge was raised to nearly £195 p.a. Mr C succeeded in having this reduced before the LVT to £50; Mr M subsequently succeeded in having the charge for each of the past 12 years reduced to £50. As the Council felt obliged to apply this to all their 401 leaseholders, this would have amounted in total to a considerable sum.

The LVT had reached its decision on a restrictive interpretation of the service charge provisions of the leases, which on its reading appeared to allow an element for management to be added only to reflect the Council's compliance with the most essential covenants, including repair, reinstatement and insurance. On the basis of this restrictive interpretation, the LVT determined that £50 p.a. would, based on its expert knowledge, be a reasonable charge.

The Council appealed, with the permission of the LVT, and HHJ Huskinson allowed the appeals, quashed the LVT's determination, and proceeded to rehear the cases. Although recognising that the interpretation of the Council lease was not without difficulty, he held that a reference to the Council's providing other services had to be given some meaning, even though it appeared as part of a lessee's covenant to pay the service charge, rather than as covenant imposing a positive obligation on the lessor. (The reason for this style of drafting – common enough in practice – was of course to ensure that the lessor could charge for some services, even if not obliged to provide

them.) It therefore followed that the management costs relating to the other services could reasonably form part of the service charge.

It was not, however, an outright victory for the Council. Costs such as those relating to enforcement of arrears, registering assignments, the granting of consents, the provision of information to sellers' solicitors, and a Newsletter intended principally for 'renting' tenants were not, according to the Upper Tribunal, properly recoverable under the lease; and the UT also declined to accept the apportionment of the time allegedly spent by certain officers of the management company on dealing with leaseholders, as it was based on a subjective assessment rather than any detailed time-recording. The UT's own estimate was substituted for this apportionment. The management charge for 2011–12 was accordingly reduced from £195 to £155. The moral for local authorities and their agencies of this part of the decision would seem to be that detailed records need to be produced when arguing for a time apportionment of salaries and on-costs.

Provision of audited accounts as a condition precedent for liability for service charges – whether Warrior Quay Management Co v Joachim (2006) applied – whether applied to demands for insurance premiums

Wrigley v Landchance Property Management Ltd [2013] UKUT 0376 (LC) is significant chiefly in that it applies and slightly qualifies the decision of the Lands Tribunal in *Warrior Quay Management Co v Joachim* (LRX/42/2006), which concluded that whilst a condition that a service charge should become payable upon the provision of audited accounts and might operate as a condition precedent for payment of a final payment or 'balancing charge', a landlord might be able to avoid the effect of the condition if it were able to collect the service charge by relying on the provisions for payments in advance on account.

W, the appellant leaseholder here, alleged that the LVT had incorrectly construed the lease, and applied the case inappropriately. Sitting in the Upper Tribunal, HHJ Huskinson allowed the appeal in part, holding that the main part of the service charge would be recoverable once certain statutory formalities had been complied with; this did not apply, however, to the element of the service charge that covered the insurance premiums. These had not been included within L's estimate of future expenditure, and so could be recovered only once they had been incurred; and at that latter stage they were recoverable only if the condition precedent as to auditing had been complied with.

HHJ Huskinson also determined that, as the lease clearly reserved the service charge as rent, the limitation applicable to claiming arrears was six years rather than 12 years.

Forfeiture – allegations that property being used as commercial lodgings and therefore possession being shared – whether section 146 notice correctly expressed District Judge's declaration re: breach

The pitfalls involved in forfeiture proceedings are a frequent topic in this Bulletin, and *Anders v Haralambous* [2013] EWHC 2676 (QB) is yet another example of this. The landlords, H, thought that their tenant, A, had turned the demised premises into a multi-occupied student property. They sought a declaration of breach in the Central London County Court under s 168, CLRA 2002.

(Note: in view of *Cussens v Realreed Ltd* [2013] EWHC 1229 (QB) – see Bulletin No 100 – the county court would appear not to have jurisdiction to make a declaration under sub-s (4) of this section, but the point was apparently not raised, and the county court stage predated this High Court appellate decision; in any event, this distinction would seem to make very little difference in practice, as *Cussens* further decided that a county court *did* have power under its general jurisdiction in contract to make a declaration which would satisfy s 168(2).)

At an application for summary judgment, the District Judge held that A's use of the property amounted to breach of covenant (k), which required use as a private dwelling for residential use only, and also of covenant (m), which contained a provision ″not to assign, underlet or part with or share possession or occupation of part only of the premises″. Unfortunately, the DJ's finding was that taking in student lodgers amounted to 'parting with or sharing possession of part of the premises'. (In view of the well-known judgment of Neuberger LJ in *Akici v LR Butlin Ltd* [2005] EWCA Civ 1296, [2006] 1 WLR 201, this was a questionable finding, though, as the clause also covered sharing *occupation*, the DJ might well have found that there was a breach of that wing of the covenant.) The solicitors for H then compounded their problems by serving a s 146 notice on A which referred to operating a business on the demised property, and also alleged that it had been *sublet*. In reliance upon this H then commenced proceedings for possession, and A applied for relief from forfeiture. HHJ Dight in the CLCC heard the proceedings on 27 March 2013, and declared that A's lease had been forfeited, with the questions of possession and relief to be determined at a subsequent hearing. A appealed.

A's appeal was allowed by Jay J. With reference to covenant (m) (not to assign etc … part of the premises), although A, in some of her witness statements, appeared to admit subletting, she was representing herself, it took some time to elucidate her position, and the final finding was of a sharing of possession, not of subletting; and whilst the latter was not capable of remedy, the former was. Applying the *Mannai* test, the s 146 notice did not make it clear to A what she had to do to put matters right. Jay J also found in favour of A on the covenant (k) point (use as a private dwelling for residential use only). It would not have been sufficient ([44]) merely to have stated that the premises were being used otherwise than for residential purposes: something more had

to be specified so that A knew what she had to do to remedy the breach, and the further detail was, in effect, 'contaminated' by including allegations of subletting rather than of sharing of possession. The DJ had found the latter – even if a finding of sharing of occupation would have been a more accurate one. The appeal was therefore allowed.

(Jay J found against A on a second ground of appeal, where she in effect argued that, in view of her Convention rights, in particular Art 1, Prot 1, and Art 8, HHJ Dight ought not to have accepted a concession on the part of A's previous counsel that the alleged breaches were incapable of remedy, but should have investigated the matter of his own motion.)

Private prosecution for breach of LTA 1985 – whether company secretary liable for breach by limited company landlord

Riniker v Mattey [2013] EWHC 1851 (Admin) is an appeal by way of case stated from a private prosecution by a leaseholder, who had served a notice on her landlord – a limited company – at its registered office, requiring various details and copy documents relating to the building's insurance, the notice being served pursuant to para 3(1)(b) of the Schedule to the LTA 1985. When it failed to comply she laid an information leading to her private prosecution of the company secretary. The District Judge (Magistrates' Court) dismissed the case, and, on an appeal by way of case stated by the leaseholder/prosecutor, the Divisional Court (Laws LJ, and Irwin J) held that he was correct to do so: the company bore the obligation to the leaseholder, and the company secretary was not rendered a landlord by dint of being served with the notice.

(Case noted at: J.H.L. 2013, 16(5), D104-D105.)

Appeal against declaration as to removal of fixtures and fittings – whether interim injunction should be granted pending hearing of appeal

Peel Land and Property (*Ports No 3*) *Ltd v TS Sheerness Steel Ltd* [2013] EWHC 2689 (Ch) is a further stage of the litigation between the same parties noted under [2013] EWHC 1658 (Ch) in Bulletin No 100 (to which reference may be made for the facts). Morgan J, the trial judge, granted permission to the claimant to appeal to the Court of Appeal as to the meaning and operation of the relevant covenant, and it is stated ([10]) that the appeal will be heard in the period 18 December 2013 to 22 April 2014. The claimant also applied for an interim injunction to prevent the defendant from removing any trade fixtures pending the determination of the appeal. Morgan J rejected any suggestion from the defendant that the threshold for granting an interim injunction pending appeal was higher than for the granting of an interim injunction pending action: on his reading of the recent Court of Appeal patents case of *Novartis AG v Hospira UK Ltd* [2013] EWCA Civ 583, [2013] EWHC 1285 (Pat), the CA was applying essentially the same principles as set out in *American Cyanamid v Ethicon Ltd* [1975] AC 396 (see [40]), though

perhaps its formulation was influenced by the principles applied in considering the grant of a stay pending appeal ([41]). But even applying the *Cyanamid* test, Morgan J declined to grant an interim injunction, on the basis that, if granted, it would "carry with it a real risk of injustice to the Defendant" but the claimant had not demonstrated any potential harm to its own position pending the appeal ([74]).

Jurisdiction of First-tier Tribunal to determine under s 168, CLRA 2002 whether breach of covenant – whether there should be a finding of breach when a breach had been remedied

Forest House Estates Ltd v Dakhil Allah R Al-Harthi [2013] UKUT 0479 (LC) decides a short but significant point on the remit of the First-tier Tribunal in determining applications as to whether there has been a breach of covenant for the purpose of s 168 of the CLRA 2002. The leaseholder – the respondent to the appeal – had begun to remove fitted carpeting from his flat, and to install wooden laminate flooring, in breach of a covenant to carpet all the rooms save the kitchen and bathroom. He continued in spite of being asked by the managing agent to desist. When the work was completed he claimed that he had installed wooden flooring over the existing sound insulation material plus further installation, and that 95 per cent of the flooring would be covered by rugs, so the sound insulation would in fact be improved. The appellant first took this as an admission of breach for the purposes of s 168(2)(b), CLRA 2002, and served a s 146 notice, but then had second thoughts, and thought it prudent to obtain a determination from the LVT. By the time that the LVT inspected the flat, fitted carpets had been installed in accordance with the covenant, and the LVT's determination was therefore to the effect that any breach had been remedied (though it did not explicitly find that there had been a breach).

Sitting in the Upper Tribunal, Mr Peter McCrea FRICS determined that the approach of the LVT was inconsistent with the decision of Mr George Bartlett QC (the President), sitting in the Lands Tribunal in *GHM* (*Trustees*) *Ltd v Glass* (LRX/153/2007). The jurisdiction of the LVT (and so now the FTT) is to determine whether there has been a breach, leaving the questions of whether it has been remedied, and any award of damages, or grant of forfeiture, for the court to decide. He accordingly quashed the determination of the LVT and determined that there had been a breach of the lease for a period of four months in 2012.

One may note that the restrictive interpretation of the role of the Tribunal in the instant case does not sit comfortably with the decision of HHJ Huskinson in the Lands Tribunal in *Swanston Grange* (*Luton*) *Management Ltd v Langley-Essen* [2008] L&TR 20 (which was cited and implicitly approved in the *GHM Trustees* case), where he determined that the LVT had power to determine whether a breach of covenant had been waived, a decision which the principal work (see **HR A[4803]**, note 4) respectfully suggests is wrong. If these two cases and the instant case are reconcilable then it must be on the

basis that the decision in the *Swanston Grange* case was that the landlord had waived treating the leaseholder's omissions as a breach, in the sense that it was estopped from asserting that there was a breach, and the covenant was, in effect, suspended (see *Swanston Grange* at [16]), rather than that the Tribunal had jurisdiction to determine whether there has been waiver of breach as it is more generally understood, ie that a landlord cannot rely on an act or omission which is clearly a breach because he has taken some step which acknowledges the continued existence of the tenancy. If this analysis is correct then it would place a gloss on the cited footnote in the principal work.

Landlord's failure to comply with ss 47 and 48, LTA 1987 – issue not raised by leaseholders before LVT

Cullen v Barnard Lodge Management Ltd [2013] UKUT 0493 (LC) (HHJ Nigel Gerald) dismissed the leaseholders' appeal on the basis that the LVT could not be criticised for having failed to consider their argument that the landlord had not complied with ss 47 and 48 of the LTA 1987 when the leaseholders had failed to raise the issue themselves.

Unreasonable failure to engage in ADR – Court of Appeal guidance on effect on orders for costs

The subject matter of *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288 is not in any way related to the usual areas of practice covered in the principal work, but it is noted because of the broad relevance of the decision. In *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 the Court of Appeal (Maurice Kay, Beatson and Briggs LJJ) had decided that an unreasonable refusal to engage in ADR could result in the refusing party being penalised in costs. The instant case takes that principle a stage further and confirms that if one party simply remains silent and refuses to respond to an invitation to engage in ADR, that too may result in a penalty as to costs. The implication must be that, if a party considers that it has reasonable grounds upon which to decline ADR, it must state what those reasons are.

The CA was, in fact, dealing with an appeal and a cross-appeal here. The defendant – which had remained silent in response to the invitation to ADR – appealed against its being deprived of its costs during the relevant period, alleging that the judge had adopted a mechanistic approach in refusing its costs. The claimant cross-appealed, alleging that not only should the defendant be deprived of its costs incurred during the relevant period, but that the judge should have ordered the defendant to pay the claimant's costs as well, in respect of the relevant period. The Court of Appeal confirmed that the judge had a broad discretion to depart from the otherwise automatic consequences of Part 36 (see [55]), and that even though "a little more vigorous" than Briggs LJ would have preferred (see [56]), the judge's order as to costs lay within that discretion. The cross-appeal, in arguing that the otherwise successful party might not only be deprived of its own costs, but also ordered to pay all or part of the unsuccessful party's costs, went further than *Halsey* envisaged ([52]). In principle, Briggs LJ agreed that the court should have that power, but that draconian sanction should be "reserved for

only the most serious and flagrant failures to deal with ADR, for example where the court had taken upon itself to encourage the parties to do so, and its encouragement had been ignored" ([52]).

Contracts exchanged at a sales fair – whether complied with s 2, LP(MP)A 1989 if assembled after signature but before exchange

Mr Nicholas Strauss QC, the Deputy Judge in *Rabiu and others v Marlbray Ltd* [2013] EWHC 3272 (Ch) states that it is believed to be the first reported case involving litigation arising out of a 'sales fair': an event where prospective purchasers are encouraged there and then to enter into a purchase contract. A full conveyancing package is assembled by the seller's solicitors, and a panel of solicitors (in this case drawn from four different firms) is on hand to accept immediate instructions to act on behalf of prospective purchasers and to exchange contracts there and then. Usually such fairs involve the sale of apartments, but here the properties were individual 999-year leasehold rooms in a new central London 'apart-hotel', which were being sold as investments. The claimants claimed rescission of the contracts, on the basis that they were unconscionable bargains, but this hearing involved the preliminary issue of whether there were in fact binding contracts.

One area of dispute was whether a contract would comply with s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 if a purchaser had signed a frontsheet which was not, at the time, attached to the detailed terms of the contract. It was held, following *Koenigsblatt v Sweet* [1923] 2 Ch 314 (a case in fact on the Statute of Frauds) that the time to consider whether an agreement complied with the section was the time of the agreement, not the time when it was signed; and following that case, and *Gavaghan v Edwards* [1962] 1 Ch 220 (CA), that there was no reason why a document should not be exchanged, having been altered or assembled by a party, or by his agent, with his authority. The Deputy Judge also held that there was no absolute requirement that the frontsheet should have been stapled or otherwise attached to the remainder of the contract at the time of exchange: it was sufficient that the documents were clearly referable to one another.

In some of the cases the further issue arose of whether a term as to an income guarantee agreement had been effectively incorporated. The contract stipulated that it applied if the word 'applicable' appeared against the relevant box of the contract. It was held, unsurprisingly, that the term would also apply if the word 'yes' had been written in the relevant place.

The case report offers an interesting account of the conduct of a busy sales fair – held in 2005 when, in the words of one of the witnesses, the market was ″frenetic″.

DIVISION E: LONG LEASES

Appeal against LVT decision alleging procedural unfairness – 'moot' by the time appeal was heard – whether costs should be awarded – whether £500 cap to be applied

The initial purchase notice under Part 1 of the LRHUDA 1993 was served in the instant case in 2004, so, as one might expect, the detailed factual background in *Curzon v Hobbs* [2012] UKUT 0419 (LC) is complex. In essence, the five leaseholders in a block of six flats were seeking to purchase its freehold, which was owned by L, who resided in the sixth flat *quâ* freeholder, no lease having been granted of it. It had been agreed in principle that, on completion of the freehold purchase, L would be granted a lease-back of his flat, but the parties had been unable to agree the terms of it. The chief area in dispute was whether the lease-back to L should include various rights to extend the building and redevelop the garage and garden. It seems clear that L was deliberately trying to spin out the enfranchisement process ([25]), though both sides seem to have contributed to various communication difficulties. L's appeal, alleging procedural unfairness on the part of the LVT, was originally listed for January 2013, but was then relisted for July. At the hearing his counsel disclosed that in October 2012 L had granted to himself and his wife a lease-back of the flat that they occupied, on terms more favourable to him than the LVT had previously ordered, including the right to redevelop using part of the garden, the roof, and airspace over it. It was conceded by the highly-experienced counsel for the (other) leaseholders that this lease was valid and would bind them when they eventually acquired the freehold (he reserved his position as to whether they would have separate rights to have the lease set aside, as a breach of agreed terms, or they would have rights under the right of first refusal under Part 1, LTA 1987). In any event, counsel for L withdrew the appeal, and counsel for the leaseholders applied for their costs.

Prior to 1 July 2013, this was governed by r 10(7)(c) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, as amended, and allowed the UT to award costs, up to a maximum of £500, only if it considered that a party had acted unreasonably in bringing, defending, or conducting proceedings. The changes that took effect on 1 July 2013 did not alter the circumstances in which costs could be awarded, but did remove the £500 cap. A transitional provision allowed the UT to ensure that this operated fairly. In the circumstances Mr Martin Rodger QC, Deputy President, considered that L had acted unreasonably in not disclosing to the leaseholders the grant of the new lease to himself and his wife, and that he should pay their costs, but that the cap should apply, as otherwise there would be "an unattractive retrospectivity" ([29]).

Practitioners ought to note that, had the initial purchase note in 2004 been protected by a notice at the Land Registry, this would not have prevented the grant of the new lease of the flat occupied by L, but it would probably have

prevented the inclusion in the lease of the airspace and garden (see Hague, *Leasehold Enfranchisement*, fifth edn, 25–15, n.121; and *Cawthorne v Hamden* [2007] Ch 187): see [13]. The lesson is obvious.

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

Wenghold Ltd v Egleton [2013] UKUT 0420 (LC) can be briefly noted. An appeal by L in a service charge dispute involving the cost of lighting the common parts was allowed as the decision of the Southern LVT was inconsistent with the subsequent decision of the Upper Tribunal in *OM Property Management Ltd v Burr* [2012] UKUT 2 (LC), which was recently upheld by the Court of Appeal in [2013] EWCA Civ 479.

Whether expert evidence properly excluded, which challenged basic assumptions made in Sportelli

R. (*on the application of Wellcome Trust Ltd*) *v Upper Tribunal* (*Administrative Appeals Chamber*) [2013] EWHC 2803 (Admin) was an attempt by W as landlords to secure a second appeal against a decision of the LVT concerning the deferment rate applicable to the valuation of a freehold. Permission to appeal had been refused by the UT, hence W had to apply for judicial review of that decision (an unsuccessful attempt to appeal to the Court of Appeal had confirmed that this was how W had to proceed). Ouseley J, sitting in the Administrative Court, held that the LVT had correctly excluded expert evidence as inadmissible – having duly considered it – which would have had the effect of challenging the basic assumptions made in *Sportelli*, *Earl Cadogan v Erkman* [2009] 1 EGLR 87 that had confirmed that such evidence should be adduced only in exceptional circumstances. If specialist tribunals such as the LVT and Upper Chamber were to fulfil their role it was essential that cases such as *Sportelli*, which set out general principles, should generally be followed, allowing tribunals to make use of their specialist knowledge in applying those principles.

Estate management charge under s 19, LRA 1967 – whether jurisdiction to vary under s 159, CLRA 2002 – new power to review now enjoyed by First-tier Tribunal (Property Chamber)

Scriven and others v Calthorpe Estates and others [2013] UKUT 0469 (LC) is a rarity, a decision on the power to vary an estate charge made under an estate management scheme under s 19 of the Leasehold Reform Act 1967. That section made provision for estate management schemes to be sanctioned where leasehold houses became enfranchisable. An application had been brought before the Midland LVT for an estate charge to be varied under s 159 of the CLRA 2002. The LVT had declined jurisdiction, following the decision of the London LVT in *Walker v Hampstead Garden Suburb Trust Ltd* (LON/OOAC/LVE/2007/001) to the effect that there was no power under s 159(3) of the LRA 2002 to vary an estate management scheme which made

provision for a variable estate charge as defined in s 159(2). Unbeknown to the Midland LVT, that decision of the London LVT had been reversed by the Lands Tribunal, but under the title (because of a substitution of appellant) of *Botterill v Hampstead Garden Suburb Trust Ltd* (LRX/135/2007). When the existence of the successful appeal by Mr Botterill was brought to the attention of the Midland LVT, it granted permission to appeal to the UT.

The point in question on the appeal was whether a tribunal had jurisdiction under s 159(3) to vary ***any*** estate management charge, or only an estate management charge which fell outside the definition of a variable estate management charge contained in s 159(2), CLRA 2002 On the actual point in question, Mr Martin Rodger QC (Deputy President) allowed the appeal, holding that that the LVT did have jurisdiction, and remitted to what is now the FTT the question of whether the estate charge should in fact be varied. As appellants and respondents wanted this to happen, and neither was legally represented, Mr Rodger felt that it was appropriate to follow the *Botterill* appeal, though he expressed ([21]) doubt as to whether that decision was in fact correct, wondering whether the two LVTs might in fact have ″got it right″, and that the tribunal's power under s 159(3) was indeed restricted to non-variable estate management charges.

The Deputy President took the opportunity to point out that the transfer of jurisdiction from the LVT to the FTT meant that the FTT now had jurisdiction to review its decisions and to correct its own errors in certain circumstances. If those powers had been exercisable in this case, it would have avoided the need for an appeal to the UT. In addition he pointed out that a decision of a three-judge appeal panel (including Carnwath LJ, SPT) in *R* (*RB*) *v First-tier Tribunal* (*Review*) [2010] UKUT 160 (AAC) had provided guidance on when and how the review power should be exercised, and that this was now also applicable to the Property Chamber of the FTT.

Covenant for use "as a private dwelling for the lessee and his family …" – whether it prohibited subletting

Burchell v Raj Properties Ltd [2013] UKUT 0443 (LC) raises two short but interesting points. A 99-year lease of a flat granted in 1988 contained a use clause restricting the use of the flat to use "as a private dwelling for the lessee and his family and for no other purpose" but did not contain any restriction on subletting *per se*. The leaseholder applied for a lease extension under Part II of the LRHUDA 1993. When the freeholder wanted this provision to be carried over into the new lease the lessee sought the deletion of the words "for the lessee and his family". The LVT – having had to exercise the power to clarify its ruling – determined that the contentious words should remain.

The leaseholder presented three arguments in the alternative: (i) that the use clause, properly construed, did not restrict the use of the flat to use by the leaseholder personally; (ii) that its ambiguity was a defect which could and should be corrected by amending it under s 57(6)(a), LRHUDA 1993, by omitting it; or (iii) that if the wording did, in effect, prohibit subletting, the tribunal should exercise its power under s 57(6)(b) and remove the contentious words on the basis of changes occurring since the lease was granted: the

decreased security of tenure afforded to short-term tenants under the assured shorthold tenancies provided for by the Housing Act 1988; and an alleged practice on the part of the respondent in waiving the covenant in other leases in exchange for a payment.

Mr Martin Rodger QC (Deputy President) had little hesitation in rejecting the leaseholder's argument that the words "for the lessee and his family" had a substantially different meaning from the more commonly encountered "by the lessee as his family" as, if let, the dwelling would still be *for the benefit* of the lessee, who would draw the rent from it ([32]). He was in no doubt that the clause required personal occupation by the lessee. He also rejected the argument that the wording should be amended in the new lease. Cases such as *Lewis Lee's Application* [2012] UKUT 125 (LC) had accepted that there might be a genuine advantage in having a block of flats occupied by owner-occupiers rather than tenants of buy-to-let leaseholders. To justify a change of the terms of the lease based on s 57(6)(b) would require evidence of the alleged change of circumstances, and this had not been adduced before the LVT. The appeal was therefore dismissed.

Right to manage – whether a tribunal was confined to considering landlord's objections which had been included in its counternotice

Fairhold (*Yorkshire*) *Ltd v Trinity Wharf* (*SE16*) *RTM Co Ltd* [2013] UKUT 0502 (LC) involved a dispute over the exercise of the right to manage (RTM). The RTM Company had served a notice on the landlord, which had sought further information from the RTM Company. This had not been supplied by the time for service of the landlord's counternotice, so the landlord served its counternotice. When the RTM Company then applied to the LVT, the LVT determined that the landlord was confined to the objections included in its counternotice and that the LVT could not therefore entertain the landlord's other objections. The landlord appealed, and Sir Keith Lindblom (President) allowed the appeal. There was nothing in s 84, CLRA 2002 which so restricted the landlord. The LVT's statutory remit was as set out in s 84(3): to determine whether the RTM Company was on the relevant date entitled to acquire the RTM. Here the landlord's relevant contention was that a Notice to Participate had not been validly served on the relevant tenants, as no copy of the Notice had been produced. Section 78(7) excused ″any inaccuracy″ in the particulars, but not the omission of the Notice in its entirety. The appeal was therefore allowed and the RTM Company's application was remitted for the LVT to consider it.

It may be noted that the decision resolves conflicting decisions of LVTs on whether a tribunal could consider landlords' objections which had not been included in a counternotice.

RTM Company – whether letters 'RTM' had to be included in its registered name

Fairhold Mercury Ltd v HQ (*Block 1*) *Action Management Co* Ltd [2013] UKUT 0487 (LC) raises a very short but potentially important point on the

RTM provisions of the CLRA 2002, namely whether a company can be an RTM Company if it does not include the initials 'RTM' in its registered name. The Northern LVT had decided that this was not a fatal omission and granted its application for the RTM, but the freeholder appealed.

The potential conflict in the legislation arose because s 73(2), CLRA 2002 defines an RTM Company as "a private company limited by guarantee", the articles of association of which include as an object "the acquisition and exercise of the right to manage the premises', whilst the RTM Companies (Model Articles) (England) Regulations 2009 stipulate (in art 2) that "The name of the company is [name] RTM Company Ltd", thereby implying that the company name has to be in that format.

Mr Martin Rodger QC (Deputy President) held that the appellant was an RTM Company, notwithstanding the omission of the letters from its registered name. The statute was clear in its definition of an RTM company, and it was not permissible to refer to regulations made under it to help to interpret the parent act. Further, ss 74(4) and (5) and reg 2(1) made it clear that, if the adopted articles of an RTM company are inconsistent with the prescribed articles, they are *pro tanto* of no effect. If the discrepancy in the name were to be seen as an inconsistency, and the letters 'RTM' were essential, reg 2(2) would ensure that the articles should be read as if the letters were there.

PERMISSION TO APPEAL

On 26 July 2013 the Supreme Court granted permission to appeal in *AIB Group* (*UK*) *plc v Mark Redler and Co Solicitors* [2013] EWCA Civ 45.

On 1 July 2013 the Chancery Division granted permission to appeal in *Re Games Station Ltd*, which will have the effect that the Court of Appeal will be able to review the decisions in *Goldacre* (*Offices*) *Ltd v Nortel Networks UK Ltd* (*in administration*) [2009] EWHC 3389 (Ch), [2010] Ch 455 and *Leisure* (*Norwich*) *II Ltd v Luminar Lava Ignite Ltd* (*in administration*) [2012] EWHC 951 (Ch), [2012] 4 All ER 894.

NOTES ON CASES

Ahmad v Secret Garden (*Cheshire*) *Ltd* [2013] EWCA Civ 1005: [2013] Comm Leases 1973–1975 (noted in Bulletin No 101)

Arnold v Britton (2013] EWCA Civ 902: E.G. 2013, 1339, 99; and L. & T. Review 2013, 17(5), D45 (noted in Bulletin No 101)

Avon Freeholds Ltd v Regent Court RTM Co Ltd [2013] UKUT 213 (LC): L. & T. Review 2013, 17(5), D43 (noted in Bulletin No 101)

Barclays Wealth Trustees (*Jersey*) *Ltd v Erimus Housing Ltd* [2013] EWHC 2699 (Ch:) [2013] Comm Leases 1969–1970

BDW Trading Ltd v South Anglia Housing Ltd [2013] EWHC 2169 (Ch): E.G. 2013, 1337, 99 (noted in Bulletin No 101)

NOTES ON CASES

Boyd v Incommunities Ltd [2013] EWCA Civ 756: J.H.L. 2013, 16(5), D93-D94 (noted in Bulletin No 100)

Cravecrest Ltd v Sixth Duke of Westminster [2013] EWCA Civ 731: J.H.L. 2013, 16(5), D106 (noted in Bulletin No 100)

Cussens v Realreed Ltd [2013] EWHC 1229 (QB): J.H.L. 2013, 16(5), D103-D104 (noted in Bulletin No 100)

Daejan Investments Ltd v Benson [2013] UKSC 14; [2013] 1 WLR 854 (SC): H.P.L.R. 2013, 87(Jul), 7–9; (noted in Bulletin No 99)

Daejan Investments Ltd v Benson [2013] UKSC 54: L. & T. Review 2013, 17(5), D44 (noted in Bulletin No 101)

DV3 RS Limited Partnership v Revenue and Customs Commissioners [2013] EWCA Civ 907: E.G. 2013, 1335, 49

Eaton Mansions (*Westminster*) *Ltd v Stinger Compania de Inversion SA* [2012] EWHC 3354 (Ch): [2013] Conv. 439–447

Francis v Brent Housing Partnership Ltd [2013] EWCA Civ 912, [2013] 32 E.G. 56 (C.S.): H.P.L.R. 2013, 87(Jul), 3–4; and H.L.M. 2013, Oct, 1–5 (noted in Bulletin No 101)

Gala Unity Ltd v Ariadne Road RTM Ltd [2012] EWCA Civ 1372: [2013] Conv. 447–454 (noted in Bulletin No 96)

Games Station Ltd, Re, Ch Div, 1 July 2013: E.G. 2013, 1337, 90–92; and L. & T. Review 2013, 17(5), D37

Gavin and another v Community Housing Association Ltd [2013] EWCA Civ 580: L. & T. Review 2013, 17(5), 190–192 (noted in Bulletin No 100)

Hammersmatch Properties (*Welwyn*) *Ltd v Saint-Gobain Ceramics & Plastics Ltd* [2013] EWHC 1161 (TCC), [2013] 2 P. & C.R. 18: L. & T. Review 2013, 17(5), 174–177; and L. & T. Review 2013, 17(5), D38 (noted in Bulletin No 100)

Henley v Cohen [2013] EWCA Civ 480: L. & T. Review 2013, 17(5), 185–187 (noted in Bulletin No 100)

Holt v Reading BC [2013] EWCA Civ 641: J.H.L. 2013, 16(5), D109-D110 (noted in Bulletin No 100)

Jastrzembski v Westminster CC [2013] UKUT 0284 (LC): L. & T. Review 2013, 17(5), D44-D45 (noted in Bulletin No 101)

Johnson v Old [2013] EWCA Civ 415, [2013] H.L.R. 26: H.P.L.R. 2013, 87(Jul), 2 (noted in Bulletin No 100)

Ker v Optima Community Association [2013] EWCA Civ 579: J.H.L. 2013, 16(5), D100-D101; [2013] Conv. 422–431 (noted in Bulletin No 100)

Malik v Fassenfelt [2013] EWCA Civ 798: J.H.L. 2013, 16(5), D102-D103; and L. & T. Review 2013, 17(5), 170–173 (noted in Bulletin No 101)

Mitchell v Watkinson [2013] EWHC 2266 (Ch): E.G. 2013, 1341, 117 (noted in Bulletin No 101)

Moorings (*Bournemouth*) *Ltd v McNeill* [2013] UKUT 243 (LC): J.H.L. 2013, 16(5), D105-D106 (noted in Bulletin No 100)

Paratus AMC Ltd v Persons Unknown [2013] EWCA Civ 827: J.H.L. 2013, 16(5), D107-D108 (noted in Bulletin No 101/135)

Peel Land and Property (*Ports No 3*) *Ltd v TS Sheerness Steel Ltd* [2013] EWHC 1658 (Ch): L.S.G. 2013, 111(31), 24; E.G. 2013, 1328, 77; E.G. 2013, 1336, 109; and [2013] Comm Leases 1968 (noted in Bulletin No 100)

Project Blue Ltd v Revenue and Customs Commissioners [2013] UKFTT 378 (TC): E.G. 2013, 1335, 45

R (*on the application of Spaul*) *v Upper Tribunal* [2013] EWHC 2016 (Admin): J.H.L. 2013, 16(5), D105-D106

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Sunlife Europe Properties Ltd v Tiger Aspect Holdings Ltd [2013] EWHC 463 (TCC); 147 Con. L.R. 105: L. & T. Review 2013, 17(5), 174–177 (noted in Bulletin No 99)

Superstrike Ltd v Rodrigues [2013] EWCA Civ 669: J.H.L. 2013, 16(5), D110-D111; L. & T. Review 2013, 17(5), 187–189; P.I.P. 2013, 44 (Sep), 27–29; and H.L.M. 2013, Oct, 5–9 (noted in Bulletin No 100)

Twinmar Holdings Ltd v Klarius UK Ltd [2013] EWHC 944 (TCC); [2013] 2 P. & C.R. 6: E.G. 2013, 1340, 107 (noted in Bulletin No 100)

UK Housing Alliance (*North West*) *Ltd* (*in administration*), *Re* [2013] EWHC 2553 (Ch) (Companies Ct): [2013] Comm Leases 1967–1968

Voyvoda v Grosvenor West End Properties, 32 Grosvenor Sq Ltd [2013] UKUT 0334 (LC): E.G. 2013, 1340, 100–102; and L. & T. Review 2013, 17(5), D40 (noted in Bulletin No 101)

ARTICLES OF INTEREST

A costly business (application of CPR 36.14 in 'near miss' cases) E.G. 2013, 1337, 93

Avoiding a messy break up (break clauses in commercial leases) E.G. 2013, 1333, 44–46

"Constructing" a notice to quit [2013] Conv. 403–415

CRAR creeps closer (Commercial Rent Arrears Recovery scheme due to be implemented April 2014) (2013) 5 Corporate Rescue and Recovery Journal 135

ARTICLES OF INTEREST

Crowning Glory? (compulsory purchase and Crown land) 163 NLJ 13 (11 October 2013)

Exercising break options: a practical guide for tenants L. & T. Review 2013, 17(5), 193–198

Going Green Together (Better Buildings Partnership's Green Lease Toolkit, second edn) E.G. 2013, 1335, 42–44

Held over a barrel? (LTA 1954, Part II) E.G. 2013, 1340, 103

House of Cards? (residential service charge regulation) N.L.J. 2013, 163(7578), 15–16

Human rights and mortgage repossession: beyond property law using Article 8 Legal Studies 2013, 33(3), 431–454

Improving Protection for Landlords (consultation on proposed revised RICS Service Charge Residential Management Code) E.G. 2013, 1335, 48

In Practice: Legal Update: Commercial Property LS Gaz, 2 Sep 2013, 24

Is your insurance watertight? (pitfalls in wording of property insurance policies) E.G. 2013, 1336, 108

Ker v Optima Community Association: is "rent to homebuy" always what it is held out to be? J.H.L. 2013, 16(5), 107–109

Landlords beware: no guarantees after a material variation S.J. 2013, 157(36) Supp (Property Focus), xiii-xiv

Of trees, adverse possession and lease interpretation S.J. 2013, 157(36) Supp (Property Focus), ix-xi

Recent developments in housing law Legal Action 2013, Sep, 26–31

Regulating efficiency (pending regulations to require landlords to make commercial buildings more energy efficient) E.G. 2013, 1337, 94–95

Rent reviews (discusses update to eighth edition of RICS guidance on acting as expert in rent review cases) [2013] Comm Leases 1979–1980

Repeat problems (problems with AGAs and inter-group assignments – proposals of Property Litigation Association for reform) E.G. 2013, 1338, 96–98

Singular plurality (interpretation of singular terms as if plural under LPA 1925, s 61) [2013] Conv. 370–376

Social housing fraud: does the criminal law hold the key? J.H.L. 2013, 16(5), 101–106

Social landlords and the courts bear the brunt for welfare reform J.H.L. 2013, 16(5), 95–100

Termination in administration (forfeiture of lease of tenant in administration) E.G. 2013, 1336, 105

The right to manage multi-block flats L. & T. Review 2013, 17(5), 181–184

Think of a number (calculation of SDLT in certain circumstances) E.G. 2013, 1338, 100–101

Time provisions at common law and equity [2013] Conv. 355–369

Treat Landowners Equally (call for squatting in commercial as well as residential premises to be made a criminal offence) (2013) LS Gaz, 16 Sep, 10

Tribunals: access all areas (interview with Siobhan McGrath, President of Property Chamber within FTT) E.G. 2013, 1336, 102–104

Value in the German method (valuation methodologies in Germany and the UK) E.G. 2013, 1341, 112–113

What is a Flat? S.J. 2013, 157(24) Supp (Property Focus), 11, 13

Where the law went wrong? – Milmo v Carreras L. & T. Review 2013, 17(5), 165–166, and 167–169

NEWS AND CONSULTATIONS

The **Department for Communities and Local Government** on 16 October 2013 published for consultation a **Draft Tenants' Charter: Guidance Note for Discussion**: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251148/Draft_Tenants__Charter.pdf

Guidance for lettings professionals: compliance with relevant consumer protection law: a consultation. The Office of Fair Trading on 16 October 2013 published a consultation seeking views on draft guidance to assist letting agents and landlords working in the private rented sector (comments by 20 December 2013): http://www.oft.gov.uk/shared_oft/consultations/oft1509.pdf

OFFICIAL PUBLICATIONS

OFGEM published on 12 September a Guidance Note ***Tenants' Energy Rights Explained***: https://www.ofgem.gov.uk/ofgem-publications/83161/tenancyrightsfactsheetenglishweb.pdf

Selective licensing of private landlords – Commons Library Standard Note published 23 September 2013 (SN04634): http://www.parliament.uk/briefing-papers/SN04634.pdf

Leased pub companies and pub closures – Commons Library Standard Note published 11 October 2013 (SN06740): http://www.parliament.uk/briefing-papers/SN06740.pdf

The **Department for Communities and Local Government** on 16 October published the government's response to the corresponding **Select Committee's Report on the Private Rented Sector**: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251147/CM_8730.pdf

PRACTICE GUIDES ETC

HM Land Registry has published revised versions of many of the **Practice Guides**, which are available online on the Land Registry website. In most

cases the amendments are very minor. The guides which have been revised are not therefore listed, though if practitioners have downloaded copies they should ensure that they are consulting the most up-to-date version. It is perhaps rather more important to note **Practice Guide 66: Overriding interests losing automatic protection in 2013** which advises on how to deal with them. Certain overriding interests lost their overriding status on 13 October 2013, the tenth anniversary of the coming into force of the Land Registration Act 2012.

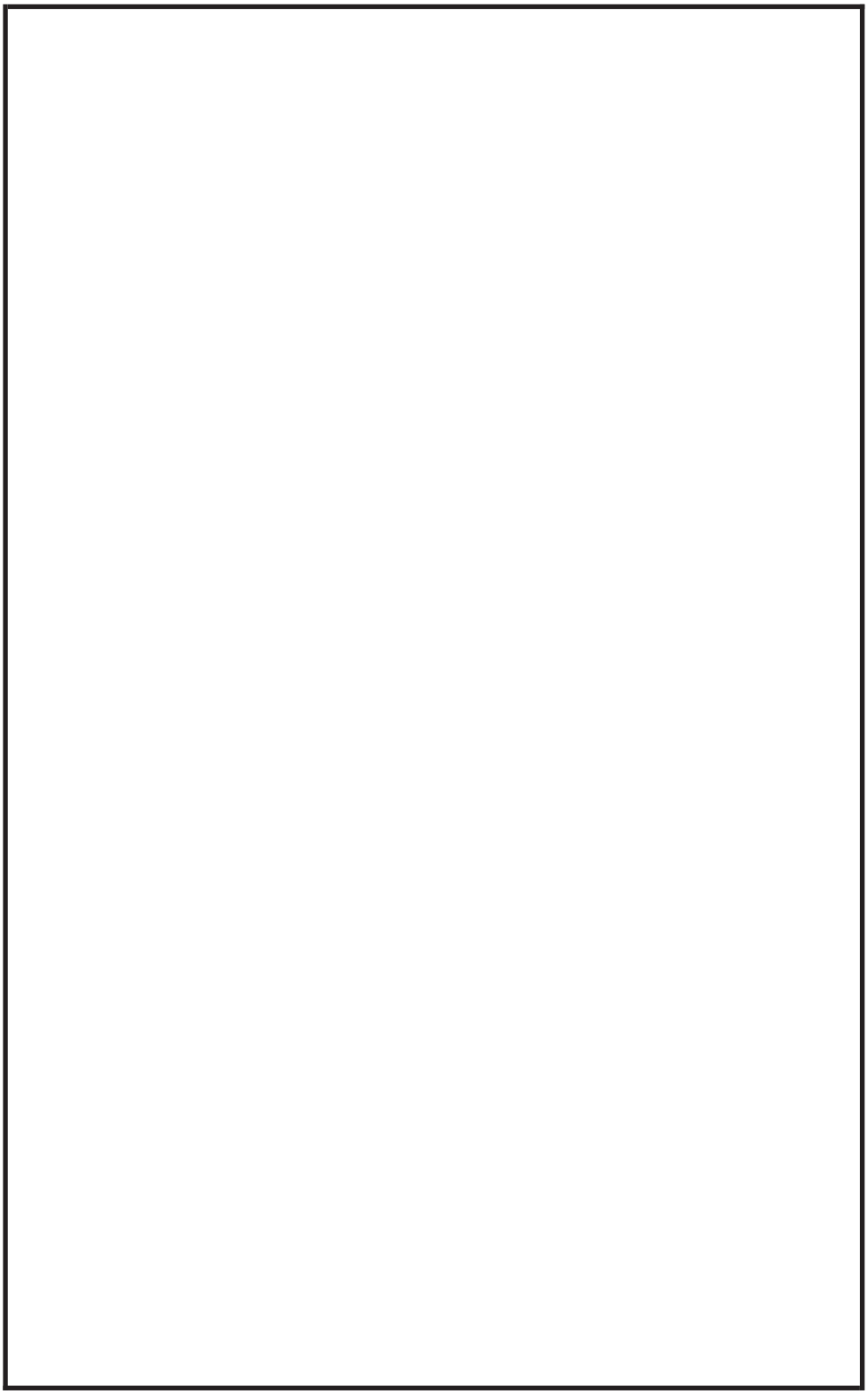
PRESS RELEASES

Department for Communities and Local Government: ***Putting communities in control: giving social tenants more power*** (12 September 2013): https://www.gov.uk/government/news/putting-communities-in-control-giving-social-tenants-more-power

The **Law Society** on 10 October 2013 launched a new form **LPE1** for **leasehold property**. It is to be used to collect information held about a property by landlords, management companies, and managing agents, about matters such as ground rent, service charges and insurance: http://www.lawsociety.org.uk/advice/articles/law-society-launches-new-lpe1-form-for-leasehold-property/

STATUTES, ETC

Section 15A is added to the **Housing Act 1988** with effect from 15 October 2013, consequent upon the coming in to force (in England only) of the **Prevention of Social Housing Fraud Act 2013, s 6** (by **SI 2013/2622**). It provides for assured tenancy status to be lost if an assured tenant parts with possession or sublets without consent.



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