Hill & Redman's Law of Landlord and Tenant

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This Bulletin includes material available up to 28 February 2015.

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DIVISION A: GENERAL LAW

Re-assignment following assignment without consent – whether could be effected directly without contravening Landlord and Tenants (Covenants) Act 1995 (LTC)A 1995)

UK Leasing Brighton Ltd and others v Topland Neptune Ltd and another; Zinc Cobham 1 Ltd and others v Adda Hotels and others [2015] EWHC 53 (Ch) is a further stage in the dispute in *Tindall Cobham 1 Ltd v Adda Hotels* [2014] EWCA Civ 1215, which was discussed in *Bulletin No 108*. In that case leases of various hotels had been assigned without the consent of the landlord, so that the result was that both the original tenant and its guarantor remained liable on the tenants' covenants, as well as the (unauthorised) assignees. Both the landlord, and the current and original tenants, did not think that situation satisfactory, and wished to revert to the position where the leases were vested in the original tenants, with their covenants backed by the original guarantor. The landlord wished to achieve this directly by a simple re-assignment, with a new guarantee, but the tenants were not satisfied that this would achieve the objective, because of the decision of Newey J in *Good Harvest Partnership LLP v Centaur Services Ltd* [2010] Ch 426 ('Good Harvest'): the decision of the Court of Appeal in *K/S Victoria Street v House of Fraser* [2012] Ch 497 ('Victoria Street') approved that decision, though offering a gloss upon it which restricted its scope. The tenants (current and original) thought that, because of the interpretation of the L&T(C)A 1995 in those cases, the objective could be achieved only by the current tenants assigning the leases to a new subsidiary company, which could then assign the leases to the original tenants, with a fresh guarantee being given. The

landlords were concerned that the final assignments might not take place. The dispute therefore came before Morgan J, the parties seeking declaratory relief.

Morgan J's view of the complex and not wholly uncontroversial current state of the law after Good Harvest and Victoria Street is very conveniently set out in his judgment at [19].

The upshot of the arguments was that Morgan J held that the objective could be achieved by the landlord's preferred route (re-assignments, with the original guarantor entering into a fresh guarantee), [33]. The tenants' preferred route, on the other hand, would not be valid, as it would be held to frustrate the operation of s.24(2) of the 1995 Act, [38].

(case noted at: EG 2015, 1507, 87)

Implied covenant to repair common parts under s 11(A) of the Landlord and Tenant Act 1985 (LTA 1985) – whether landlord of individual flat could be in breach – whether notice of defect required before landlord could be liable under the implied covenant – owner of dominant tenement's right to maintain subject matter of easement could be invoked when owner of dominant tenement was himself lessee of a flat

Edwards v Kumarasamy [2015] EWCA Civ 20, addresses some of the difficulties that can arise in applying the repairing covenant to be implied under s 11 of the LTA 1985. As originally enacted, the covenant related to the structure and exterior of the dwelling itself. This was later extended, by the insertion of subsection (1A), to cover 'any part of the building in which the lessor has an estate or interest'. This is appropriate where the landlord of the flat owns the freehold of the whole building (or a superior leasehold estate in it), but it had often been thought (relying on *Niazi Services Ltd v van der Loo* [2004] EWCA Civ 53) that this would generally be ineffective in the common scenario where the landlord of the flat is himself a 'buy to let' leaseholder of a flat in the building.

In the instant case E was injured when he tripped on an uneven paving slab in the pathway between the front door of his block of flats and the communal bin area. He rented a flat from K under an assured shorthold tenancy; K was himself a long leaseholder of the flat, rather than the owner of the block. The Deputy District Judge who heard his claim held that the paved area was part of the flat itself. That conclusion was clearly wrong, and was reversed on appeal to the Circuit Judge. She took a new point, and accepted that K might be liable under the extended covenant implied by s 11(1A); she went on, however, to hold that he was not liable, because it was a precondition to liability that notice of the defect have been given. This finding of law was reversed by the Court of Appeal, so K was held to be liable.

The basis of the decision of the Count of Appeal (Lewison and Clarke LJJ, and Etherton C) was that, under the lease, K had an easement to use the communal facilities, and he therefore had an 'estate or interest' in the paved area so as to satisfy s 11 (1A). K had argued that, even if he did, the estate or interest had to form 'part of a building'. Giving the lead judgment, Lewison LJ held that, although a paved area would not normally be held to be a 'part of a building' it could be, and was a part of the 'structure or exterior of part of the building' in which K had an estate or interest: *Niazi Services Ltd v van der Loo* (above). K clearly had a legal easement over the front hall, and the paved area was 'part of a building' as it formed part of the exterior of the front hall, just as the steps leading to the front door were held to be part of the exterior of the dwelling in *Brown v Liverpool Corpn* (1983) 13 HLR 1.

As for the point about whether the giving of notice by the tenant was a precondition to the landlord being liable, Lewison LJ confirmed, [9], that at common law a breach of a repairing condition took effect as soon as a defect occurs: only if the defect occurred within the demised area itself was the tenant under an obligation first to give notice to the landlord. This was not affected if a right of entry to inspect was reserved: [10]. Neither side had drawn to the circuit judge's attention the principle that an express grant of an easement would 'carry with it an ancillary right on the part of the dominant owner to carry out repairs on the servient owner's land in order to make the easement effective': *Newcomen v Coulson* (1877) 5 Ch D 133, see [11]. Section 11(3A)(c), which limited a landlord's liability if he did 'not have a sufficient right in the part of the building or the installation concerned to enable him to carry out the required works or repairs' did not therefore apply. Although it might be 'pragmatic' to limit a landlord's liability to require that notice have first been given to the landlord, [20], no such words were to be found in the statute, and the argument had been rejected in *British Telecommunications plc v Sun Life Assurance Society plc* [1996] Ch 69.

Lewison LJ expressed disagreement with the view expressed in *Dowding and Reynolds on Dilapidations* (Fifth edn, para 20–37) that notice is required under the extended covenant implied under s 11(1A).

Whilst one can see that the steps leading to the front door of a building can appositely be described as 'part of the building' (as in *Brown*), it does seem somewhat imaginative to describe a paved area as 'the exterior of the front hall'([6], [7]). Lewison LJ would seem to have been driven to resort to this fiction, as relying on an *implied* easement to use the pathway would not carry with it a right on the part of K to repair it.

Whilst one may have some sympathy for those in E's position, who by literally falling on a hole in a path might also fall into a metaphorical 'hole in the law', the idea that a leaseholder would have a legal right to take it upon himself to repair part of the common parts (thus rendering inapplicable the exclusion in s 11(3A)(c)) is one that would surely surprise many ground landlords and their managing agents. *Newcomen v Coulson* (1877) 5 Ch D 133 – which is cited in support of that proposition – concerned a scenario where

the owner of the dominant tenement wished to repair a right of way so that a right to use it as a carriageway could conveniently be exercised, which is far removed from the situation here. The more recent case of *Carter v Cole* [2006] EWCA Civ 398 did indeed involve an easement granted appurtenant to a lease, but that was a straightforward case involving two tenements. The present case would suggest that a leaseholder is entitled not only to require his landlord to repair an access path forming part of the common parts (or presumably the landings, hall and stairs themselves), but also to resort to self-help. It this is correct, then one can imagine that landlords – especially landlords of leasehold flats and of multi-occupied commercial buildings – will wish leases be drafted so as to exclude this right, which would then also allow 'buy to let' leaseholder landlords to rely on s 11(3A)(c).

(Case noted at: HLM 2015, Mar, 9–11)

Claim to adverse possession based on para 5 Sch 1 of the Limitation Act 1980 – whether there was a 'lease in writing' – whether need for notice to comply with Part II Landlord and Tenant Act 1954

Mitchell v Watkinson [2014] EWCA Civ 1472 is a case on facts which Morgan J, the judge at first instance (see [2013] EWHC 2266 (Ch): noted in *Bulletin No 101*) described as 'highly unusual'. In essence Mr Arthur Mitchell in 1947 granted a written tenancy to three persons as trustees of a cricket club. However, shortly before the tenancy was granted, Mr Mitchell had conveyed the land by deed of gift to his son, whose widow was the current claimant. Title to the land was now registered, but, if there had been adverse possession, it had been completed before 2002. Rent had ceased to be paid in 1974, and the defendants defended the possession claim brought by the son's widow's by relying on paragraph 5 of Sch 1 to the Limitation Act 1980 ie the special rules applicable to tenancies from year to year 'without a lease in writing'. The claimant disputed their applicability, on the basis that there ***had*** been an agreement in writing, but Morgan J had rejected this argument: although he accepted that the tenancy would have implicitly incorporated the terms in the written agreement, applying *Long v Tower Hamlets LBC* [1998] Ch 197, the special rules applied even when a lease was ***evidenced*** in writing: for para 5 not to apply, the lease had actually to be ***effected*** in writing.

The defendant trustees appealed, firstly on the basis that the claimant and her predecessors were estopped from denying the existence of the tenancy in writing, either by a common law (or title) estoppel, or alternatively by an estoppel by representation, or alternatively by an estoppel by convention. The Court of Appeal, however, (Arden and Christopher Clarke, LJJ and Barling J) after detailed consideration rejected each of the estoppel grounds. It also rejected a further ground of appeal, based largely upon the lack of a capable licensor to authorise the Cricket Club to use the cricket ground whilst the estate of the former tenants remained (probably) vested in the Probate Judge on the death of the last surviving joint tenant/trustee in 1974: so far as could be ascertained, he had died intestate. The Court of Appeal nevertheless held

that, if the Club had been licensed by the tenant/trustees to use the club grounds prior to 1974, this licence would have continued automatically after the death of the last tenant/trustee in that year, [70]. Further, the fact that the leasehold estate was then vested in the Probate Judge did not make its vesting any different in kind than if it had vested in an executor or administrator, [74]. The appeal was accordingly dismissed.

Ability of Tribunal to determine apportionment of service charge under s 27A off the LTA 1985 – whether applicable when discretion under superior lease being challenged

Gater v Wellington Real Estate Ltd and LCP Commercial Ltd [2014] UKUT 0561 (LC) raises a novel point on the apportionment of service charges, but one which arises increasingly in practice, given the number of buildings where commercial and residential use is combined. A building in Sheffield had been refurbished for commercial use, and a lease (referred to as 'the intermediate lease') granted of the third and fourth floors, originally for commercial purposes. With consent, these floors had, however, been converted into eight one-bedroom flats. The proportion of various heads of service charge expenditure to be paid by the sub-landlord of the third and fourth floors was to be determined by the surveyor to the head landlord WRE; the proportions in which the individual long leaseholders (including G) had to contribute to this was then fixed by their sub-leases. Initially the head landlord and the sub-landlord were unconnected; but the intermediate lease had become vested in a company which was a member of the same group as WRE. In practice the 'two-tier' approach to the levying of the service charge had become blurred.

Relying on some earlier caselaw, the First Tier Tribunal had decided that it did not have jurisdiction to entertain a challenge by G and others to the proportion of the overall service charge that they had to pay. Following that decision, the Upper Tribunal had determined in *Windermere Marina Village Ltd v Wild* [2014] UKUT 163 (LC) (noted in *Bulletin No 106*) that s 27A(6) allows a tribunal to determine the apportionment of a service charge even if a lease purports to make a determination by the landlord or its surveyor conclusive. Sitting in the Upper Tribunal, Mr Martin Rodger, QC (DP) decided that the tribunal had this power even when the sub-lessees were not in a contractual relationship with the head landlord.

The sub-lessees here mainly objected to the fact that elements of the service charge were apportioned without taking account of the fact that the basement was used for storage, but under a licence, and no contribution towards the service charge was made in respect of it. The FTT had not properly investigated the issues arising from this, so, unless the parties could agree on an appropriate apportionment, the matter would have to be remitted to the FTT for further consideration.

It may be noted that although the original application under s 27A of the LTA 1985 named WRE Ltd as the respondent, the UT joined LCP Commercial Ltd, the intermediate landlord, as an additional party, so that it would be bound by the decision (it appeared by the same counsel).

(case included in note at: SJ 2015, 159(6), 28)

Recognition of Tenants' Association under s 29 of the LTA 1985 – whether decision of FTT could now be challenged on appeal – whether proportion of total service charges paid by represented tenants was a relevant factor

Rosslyn Mansions Tenants' Association v Winstonworth Ltd [2015] UKUT 0011 (LC) is a rare example of an appeal on the application of s 29 of the LTA 1985, ie the provision enabling what is now the First Tier Tribunal to issue a certificate that a Tenants' Association should be recognised for the purposes of the Act. It seems likely that such appeals will become more common, as prior to the changes made to s 29 by the Tribunals, Courts and Enforcement Act 2007 (which were applied when the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 came into force), the issue of a certificate was by 'a member of the local Rent Assessment Committee Panel' and was therefore viewed as an administrative rather than as a judicial act. It was thus susceptible only to judicial review, rather than to appeal (see *R v London Rent Assessment Panel, ex p. Trustees of Henry Smith's Charity* [1988] 1 EGLR 34 and observations of Mr George Bartlett QC (President of the Lands Tribunal) in *Minster Chalets Limited v Irwin Park Residents Association* (LRX/28/2000)). In the present appeal the Upper Tribunal (HHJ Huskinson) first considered the jurisdictional point, and determined that, whatever may have been the position in the past, the issue of a recognition certificate was now a judicial act, and susceptible to appeal to the UT.

The factual background was that the appellant association operated in a block of 13 flats. Eight were held on long leases, one of which was owned by a director of W, the respondent landlord company. Of the remaining seven, four were members of RMTA, and sought recognition. The FTT had refused recognition, relying (no regulations ever having been made under s 27(6)) on Guidance issued by the Department of Communities and Local Government , which has now been replaced by further guidance from HM Courts and Tribunal Service (document T545). Both sets of Guidance had suggested that, as a general rule, in order to qualify for recognition a tenants' association (TA) should represent 60% of its potential membership. The FTT had considered that RMTA represented 57% (4 out of 7) and had therefore rejected its application for recognition. RMTA had argued, inter alia, that the FTT should have taken into account that those four paid more than 60% of the service charge. HHJ Huskinson agreed that this was a relevant factor, allowed the appeal, quashed the FTT's decision, and remitted it for further consideration.

His further observations will be useful to those faced with resolving these disputes. He rejected, [29], the argument of counsel for RTMA that there was a presumption that an application for a certificate of recognition should be granted unless there were good reasons to the contrary. He also rejected the idea that an FTT should adhere slavishly to the 60% threshold, [31].

Argument touched on two other issues which can be contentious in applying s 29. First, the FTT had criticised the constitution of the RMTA (para 4 of their decision, quoted at [13]) on the basis that it did not make provision for 'renting tenants' to become members, restricting membership to long leaseholders (s 29 requires only that those who do not directly bear the service charge should not vote on matters relating to the LTA 1985). Second, although counsel for the RTMA submitted, [21], that the FTT had correctly excluded the flat owned by the director of the ground landlord in calculating the numerical proportion of service charge payers who were members of the association, the director (appearing for the company) disagreed with this stance, [27]. No view was expressed by the UT of the correctness of the submissions on these two issues.

Whether FTT had jurisdiction to construe an order under s 24 of the Landlord and Tenant Act 1987 (LTA 1987) appointing a manager – whether manager could recover from freeholder sums in lieu of service charge in respect of flats let under short term leases

Eaglesham Properties Ltd v Leaseholders of Flats 2, 3, 6, 7, 8 and 12 Drysdale Dwellings [2015] UKUT 22 (LC) has a somewhat involved procedural background, but essentially a receiver and manager had been appointed under s 24 of the LTA 1987 in respect of a block of 12 flats, seven of which were let on long leases and five of which were let on short term tenancies. A dispute had arisen in the county court as to whether the manager was entitled to recover service charge contributions from the freeholder in respect of the flats let on short tenancies. The proceedings had been stayed pending a further ruling from the FTT. Sitting in the Upper Tribunal HHJ Alice Robinson held that the FTT had jurisdiction to determine the proper construction of orders appointing managers and that, properly construed, the order appointing the manager permitted it to recover contributions equivalent to the service charges from the freeholder in respect of the flats which it let on short term tenancies.

DIVISION B: BUSINESS TENANCIES

Landlord objecting to renewal of tenancy on s 30(1)(f)of the Landlord and Tenant Act 1954 (LTA 1954) – whether relevant time altered from time of hearing by amendment of s25

Hough v Greathall Ltd [2013] EWCA Civ 23 confirms that the changes to the wording of s 25 of the LTA 1954, brought about as part of the abolition of

the requirement for a tenant to serve a counter-notice, have not altered the requirement (dating back to *Betty's Cafés Ltd v Phillips Furniture Stores Ltd* [1959] AC 20 ('*Betty's Cafés*') that the genuineness of a landlord's intention to redevelop should be considered as at the date of the hearing, and not as at the date of the notice.

In the instant case the landlord had served a notice under 25 terminating the tenant's tenancy, and stating under sub-section (7) that he would oppose the grant of a new tenancy, under s 30(1)(f). The judge in the County Court had found that the landlord had had that intention as at the date of the hearing, but not at the date when the notice was served. A possession order was therefore made against the tenant. The tenant appealed, arguing that the wording of the new s 25(6) and (7), inserted in the LTA 1954 by para 11 of the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003/3096, had amended the law on this. Essentially his argument was that subsections (5) and (6) of s.25, and subs.(2) of s 29, had clearly referred to the future, requiring the landlord to state whether it would oppose the grant of a new tenancy, whereas the new wording of s 25(6) requires the landlord to state whether it ***is*** opposed to the grant of a new tenancy. The Court of Appeal (McCombe, Vos and Burnett, LJJ) rejected this argument, holding that there was nothing to indicate that Parliament had intended to vary the longstanding rule which had been established in *Betty's Cafés*. The dropping of the requirement for the tenant to serve a counter-notice had originally been suggested by the Law Commission, had been subject to consultation, and had been considered by the Regulatory Reform Committees of both Houses of Parliament, and they had not identified that this would result in a change in the date for establishing an intention to redevelop. The appeal was accordingly dismissed.

NOTES ON CASES

AA v Southwark LBC [2014] EWHC 500 (QB): JHL 2015, 18(1), D24-D25; L & T Review 2015, 19(1), 27–30; and Adviser 2015, 167, 29–30 (noted in *Bulletin No 108*)

Boots UK Ltd v Goldpine Estates Ltd [2014] EWCA Civ 1565: Comm Leases 2015, Feb, 2144–2146

Charalambous v Ng [2014] EWCA Civ 1604: E.G. 2015, 1506, 83; SJ 2015, 159(2), 28; and SJ 2015, 159(5), 33–34 (noted in *Bulletin No 109*)

Coventry v Lawrence (*No 2*) [2014] UKSC 46: L & T Review 2015, 19(1), 3–6 (noted in *Bulletin No 107*)

Cravecrest Ltd v Sixth Duke of Westminster [2013] EWCA Civ 731: EG 2015, 1506, 74–76; and EG 2015, 1507, 78–80 (noted in *Bulletin No 100*)

Daejan Investments Ltd v Benson [2013] UKSC 14: Denning LJ 2014, 205–213 (noted in *Bulletin No 99*)

Elim Court RTM Co Ltd v Avon Freeholds Ltd [2014] UKUT 397 (LC): JHL 2015, 18(1), D13-D15 (noted in *Bulletin No 109*)

Lambeth LBC v Loveridge [2014] UKSC 65: L & T Review 2015, 19(1), 24–27; and EG 2015, 1504, 97 (noted in Bulletin No 109)

Lankester and Son Ltd v Rennie [2014] EWCA Civ 1515: Comm. Leases 2015, Feb, 2141–2144 (noted in *Bulletin No 109*)

Lie v Mohile [2014] EWHC 3709 (Ch): Comm Leases 2014/15, Dec/Jan, 215–216

McDonald v McDonald [2014] EWCA Civ 1049 [2015] Conv 77–88 (noted in *Bulletin No 107*)

Morris v Blackpool BC [2014] EWCA Civ 1384: JHL 2015, 18(1), D15-D16 (noted in *Bulletin No 108*)

Natt v Osman [2014] EWCA Civ 1520: Comm Leases 2015, Feb, 2137–2139; and SJ 2015, 159(5), 33–34 (noted in *Bulletin No 109*)

North East Property Buyers Litigation, Re [2014] UKSC 52: NLJ 2015, 165(7635), 14

Phillips v Francis [2014] EWCA Civ 1395: JH. 2015, 18(1), D17-D18; Comm Leases 2014/15, Dec/Jan, 2133–2134; L & T Review 2015, 19(1), 20–23; SJ 2015, 159(5), 33–34; and Conv 2015, 1, 67–77 (noted in *Bulletin No 109*)

Queensbridge Investment Ltd v 61 Queens Gate Freehold Ltd [2014] UKUT 437 (LC): JHL 2015, 18(1), D16; and L & T Review 2015, 19(1), D2

R. (*on the application of N*) *v Lewisham LBC* [2014] UKSC 62 (otherwise *R* (*on the application of ZH and CN*) *v Newham LBC*): J.H.L. 2015, 18(1), 1–9 and D3-D6; and L & T Review 2015, 19(1), 30–32 (noted in *Bulletin No 109*)

Saturn Leisure Ltd v Havering LBC [2014] EWHC 3717 (Ch D): Comm Leases 2015, Feb, 2139–2140

Sirhowy Investments Ltd v Henderson [2014] EWHC 3562 (Ch): Comm. Leases 2014/15, Dec/Jan, 2127–2129 (noted in *Bulletin No 109*)

Telchadder v Wickland (*Holdings*) *Ltd* [2014] UKSC 57: JHL 2015, 18(1), D18-D19; and EG 2015, 1501, 61 (noted in Bulletin No 109)

Sims v Dacorum BC [2014] UKSC 63: J.H.L. 2015, 18(1), D11-D12; Comm. Leases 2014/15, Dec/Jan, 2129–2130; and L & T Review 2015, 19(1), 7–11 (noted in *Bulletin No 109*)

Windermere Marina Village Ltd v Wild [2014] UKUT 163 (LC): SJ 2015, 159(6), 28 (noted in *Bulletin No 106*)

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NEWS AND CONSULTATIONS

The **National Assembly for Wales** is consulting on the general principles for the reform of the law on residential tenancies contained in the **Renting Homes (Wales) Bill 2015**. Comments are to be received by 27 March 2015: http://www.senedd.assembly.wales/mgConsultationDisplay.aspx?ID=168

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: http://lawcommission.justice.gov.uk/areas/2928.htm

The **Property Ombudsman** has reported on 23 February 2015 that in the three months following the implementation on 1 October 2014 of the **redress scheme for disputes with letting agents**, he dealt with 2,246 enquiries. 64% of enquiries were by tenants, whilst 36% were made by landlords who wished to make use of the dispute resolution service: http://www.tpos.co.uk/news-14.htm

STATUTORY INSTRUMENTS

The **Landlord and Tenant (Notices) (Revocations) (England) Regulations 2015, SI 2015/1**, revoked with effect from 4 February 2015 various regulations dating from 1957 and 1967 dealing with security of tenure of residential properties which are now redundant.

The **Housing (Tenancy Deposits) (Specified Interest Rate) (Revocation) (England) Regulations 2015, SI 2015/14** revoked with effect from 4 February 2015 on the basis of redundancy regulations covering the rate of interest to be paid on the repayment of deposits to landlords and tenants under the custodial tenancy deposit scheme.

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Published by LexisNexis

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

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

ISBN 978-1-4057-9322-3

9 781405 793223