Hill & Redman's Law of Landlord and Tenant

Bulletin Editor
Nicholas Roberts, BA, LLM, PhD, Solicitor and Notary Public
Associate Professor, School of Law, University of Reading

This Bulletin includes material available up to 30 June 2015.

Filing Instructions: Please file immediately behind the Bulletins Guidecard in Binder 5. The Binder should now contain Bulletins 109 to 112.

DIVISION A: GENERAL LAW

Supreme Court upholds 'escalator' clause for service charge in chalet leases

Arnold v Britton [2015] UKSC 36, [2015] All ER (D) 108 (Jun) marks the final stage of the longstanding dispute as to the correct interpretation of a number of 99 year leases of chalets on a holiday park at Oxwich, in the Gower peninsula, near Swansea. The park contained a total of 91 long leasehold chalets. Of these, the leases of 21, which were granted between 1980 and 1991 (a further four were varied so as to follow the formula in 2000) contained a service charge provision which – on its literal interpretation – appeared to set a fixed charge of £90 per year which was then subject to an automatic 'escalator' of 10% per year. The appellant leaseholders complained that the result of this was that by 2012 they were required to pay £3,366 per year, and that in the final year of the term in 2072 they would be paying £1,025,044 per year. At first instance HHJ Jarman QC had found in favour of the leaseholders, but Morgan J in the High Court, and Richards, Davis, and Lloyd Jones, LJJ in the Court of Appeal (sitting in Cardiff) had found in favour of the landlord. The Supreme Court dismissed the leaseholders' appeal by a 4–1 majority (Lord Neuberger PSC, and Lords Sumption, Hughes and Hodge JJSC in the majority; Lord Carnwath JSC dissenting).

Lord Neuberger gave the lead judgment, and based his decision firmly on the basis of established canons of the construction of contracts, set out in the line of case law from *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381 to *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2012] 1 All ER 1137, summarising this as requiring that the meaning be 'assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant

provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions', at [15].

Although obviously the decision has to turn on the actual wording of the clause in question, Lord Neuberger makes some points of more general application. He accepted that there was a potential conflict between the first and second parts of the relevant clause, as it began by referring to a requirement on the leaseholder to pay a 'proportionate part' but then went on to require a fixed annual payment, plus the annual 'escalator'. His view was that, whilst the clause could have been better drafted (and indeed it was revised in some later versions) the 'reasonable reader of the clause would see the first half of the clause as descriptive of the purpose of clause 3(2), namely to provide for an annual service charge, and the second half as a quantification of that service charge', at [27]. He rejected the notion that the two parts of the clause were mutually inconsistent, and that, because of that ambiguity, the court could 'reject or modify one half to give effect to the real intention of the parties – see e g *Walker v Giles* (1848) 6 CB 662'. He felt that the court should not find ambiguity or substantially defective drafting where there really was none, just so as to justify a departure from the clear meaning of the words, at [34].

Lord Neuberger also expressed himself unconvinced 'by the commercially-based argument that it is inconceivable that a lessee would have agreed a service charge provision which had the effect for which the [landlord] contends', at [35], pointing out that, given the rates of inflation that were prevalent between 1974 and 1981, a 10% per annum escalator would have been a perfectly reasonable figure for each party to agree to: it would have been a gamble for both, at [36]. It is worth noting that the 70 or so leases granted between 1974 and 1980 contained the same provision for a fixed £90 per annum service charge, but the 10% 'escalator' applied every *three* years, rather than every year. The service charge under these leases had therefore reached £311 per year by 2012, and would reach only £1,900 by 2072 (if it had been revised in accordance with actual inflation the £90 annual contribution set in 1974 would have risen to £794 by 2012: see table at [100]).

Lord Neuberger's judgment included some interesting and rather unexpected observations about the possible applicability of the principles of 'letting schemes' to the problem in hand. This line of argument – which was not raised in the courts below, and was pursued here at the invitation of the court – depends on the fact that each lease contained requirements that the leases of the other chalets would be granted subject to identical or similar obligations, and an overall 'letting scheme' was clearly intended. He raises, at [51], the possibility that a letting scheme might extend not only to restrictive covenants but also to positive covenants, but concludes that 'even if a leasehold scheme can extend to positive covenants, it is also questionable whether a lessee's covenant to pay a service charge, or any other sum of money to the lessor, can be within the ambit of a scheme.' The present editor had not previously come across the suggestion that a leasehold letting scheme

might include positive covenants: the prospect that it might include covenants to pay sums of money would have some very far-reaching implications! Ultimately Lord Neuberger rejects the idea that there is any scope for any such terms to be implied here, at [51]–[59], not least because the earlier leases had a different form of 'escalator' clause.

All five Justices note that fixed service charges of this nature have not – unlike variable service charges – been the subject of statutory intervention by Parliament, and raise the possibility that it may be a matter requiring attention. But the table at [100] well illustrates the difficulty that this poses. One may well have sympathy for the present appellants, who are faced with 'service charges' which are substantially outpacing today's inflation. But, if there is to be statutory reform, how should it deal with the leaseholders who hold under leases granted between 1974 and 1980? For them the triennial 10% escalator has, at least so far, proved superficially to be a very attractive deal!

(case noted at: NLJ 2015, 165(7657); and EG 2015, 1525, 117)

Mexfield tenancy for life precluded by intention of parties

Southward Housing Co-operative Ltd v Walker [2015] EWHC 1615 (Ch), [2015] All ER (D) 141 (Jun) addresses some issues which remained unresolved by *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52, [2012] 1 AC 955, and several other points touching on public law and Human Rights Act law.

Like *Mexfield*, *Southward* involves a fully mutual housing association, so by virtue of the Housing Act 1985 and the Housing Act 1988 its tenancies do not attract any form of statutory security. Like *Mexfield*, the tenancy here appeared to be of indefinite duration, with the landlord able to bring it to an end only on certain specified grounds, which included non-payment of rent, and persistent delay in paying the rent. Unlike *Mexfield*, the fetters on bringing the tenancy to an end were expressed in a rather curious way, which appeared to relate to the bringing of possession proceedings rather than the service of a notice to quit as such. Rather more explicitly than *Mexfield*, the agreement here indicated that a periodic tenancy (in this case a weekly tenancy) was in the contemplation of the parties. The defendants were still in arrears when the proceedings came on for hearing, although they had managed considerably to reduce the level of their arrears. The arrears were due to difficulties with their Job Seeker's Allowance and Housing Benefit.

Hildyard J began by following established law and confirming that a tenancy granted by a fully mutual housing association did not attract any statutory protection. The most important part of his judgment addresses an issue which was left open in *Mexfield*, and indeed was there referred to by Lady Hale as a 'conundrum': whether a tenancy with an uncertain term would automatically and inexorably be 'saved' by operation of law by being treated as a tenancy for life and thus converted into a 90-year term (with provisions for determination on T's earlier death) under the Law of Property Act 1925

('LPA 1925'), s 149(6), or whether this conclusion would be avoided if clearly contrary to the intention of the parties. The question did not arise in the *Mexfield* case, as the justices there were agreed that, although not expressly provided for, the solution which they reached was consistent with the parties' expectations, at [78]. *Southward* was different in that the agreement more clearly pointed to a periodic tenancy, and, whereas in *Mexfield* there was a forfeiture clause, the provisions for early determination in *Southward* were cast in the form of providing when the landlord might serve notice to quit.

Hildyard J, after surveying the competing interpretations of *Mexfield*, accepted that the matter *had* been left open in that case, at [91], and so he was at liberty to determine the point, and he came down on the side that a tenancy for life was precluded by the parties' expressed preference for a periodic tenancy, at [79]–[93]. If it were such, then it would have been validly determined by the claimant's notice to quit.

He went on to consider the position if he were wrong in that conclusion, and the agreement had in fact been 'transmogrified' into a 90 year lease. That would present the considerable difficulty that a long lease would, apparently, have no right of re-entry for non-payment of rent, at [100]. The defendants argued that either the lease would not be capable of early determination, or forfeiture would be possible only in accordance with the stringent requirements set out at paragraphs [103](ii) and [123]–[127] of the judgment (which had not been complied with). After detailed discussion of some points of the law on forfeiture which rarely – because of the use of standard form clauses in leases – need to be considered, he ultimately came down in favour of there having been a valid re-entry, rejecting an argument of the defendants based on waiver, at [143]–[148], and finding there to have been a forfeiture. He then considered the facts and found that it would not be appropriate to grant relief from forfeiture (though pointing out that the point did not arise on the basis of his *primary* holding of law that the tenancy was a periodic tenancy which had been determined by a notice to quit, at [153]).

(It may be noted that at [94]–[95] Hildyard J apparently follows *Mexfield* in holding that, if the agreement failed to create a fixed term tenancy, then, if it should not be possible for the agreement to be construed as a periodic tenancy, there would be no good reason for the agreement not to be given contractual effect as a periodic contractual licence, which the defendants apparently conceded would have been duly determined, at [96]. This alternative ratio does not, however, appear to the present editor to be well integrated in the judgment.)

The final sections of the judgment deal with Public Law and Human Rights Act issues. Essentially the defendants argued that if the agreement is not to be converted into a long lease (and Hildyard J's primary holding is that it did not) then it would be discriminatory under the European Convention on Human Rights ('ECHR'), Arts 8 and 14 for the agreement to be exempted from the protection given to secure and assured tenants. Hildyard J held against them on the various stages that would be necessary to sustain this argument, holding that (a) the claimant was not a public authority susceptible to judicial review, and that (relying on *McDonald v McDonald* [2014]

EWCA Civ 1049, [2015] 1 All ER 1041) the Human Rights Act 1998 ('HRA 1998') could not be invoked in what would therefore be a private law landlord and tenant dispute. If Arts 8 and 14 did apply, then any differential treatment of tenants of fully mutual housing associations was justifiable and proportionate. In particular, being 'the tenant of a fully mutual housing association' could not in any way be considered to be a 'protected characteristic' so as to engage the discrimination provisions of being 'another status' under Art 14. These characteristics were generally 'innate and immutable', not concerned with 'what people do or what happens to them', at [179]. Further, the Strasbourg cases accepted that matters involving the level of security given within the rental market would typically lie within the 'margin of appreciation' given to each state. The judge accordingly declined either to 'read down' the statutory provisions so as to treat a fully mutual housing association as if it were a public sector housing association or to make a declaration that the provisions were incompatible with the HRA 1998.

DIVISION C: PRIVATE SECTOR RESIDENTIAL TENANCIES

First-tier Tribunal required to give reasons for repair deduction

Trustees of the Israel Moss Children's Charity v Blandy [2015] UKUT 0276 (LC) is a rare example of an appeal against a rent officer's determination of a fair rent under the Rent Act 1977 reaching the Upper Tribunal ('UT'). The property which was the subject of the determination was in a poor state of repair, and the First-tier Tribunal ('FTT') had made a deduction therefore which was larger than that for which the tenant had argued, and resulted in the registered rent being lower than that registered in 2012. The FTT had given little in the way of reasoning as to how it arrived at this deduction, and when it gave some supplemental reasons on refusing permission to appeal, these (in the view of Mr Martin Rodger QC, Deputy President) had done little to clarify the basis of its decision. He confirmed that the FTT ought to give full reasons for its decisions, and remitted the matter for rehearing, expressing the view that it would be better if it could be reheard by a differently-constituted tribunal.

DIVISION E: LONG LEASES

Leasehold Reform, Housing and Urban Development Act 1993, s 57 required variation of defective lease

Rossman v Crown Estate Commissioners [2015] UKUT 0288 (LC) raises a novel point on the scope of the Leasehold Reform, Housing and Urban Development Act 1993, s 57, and its inter-relationship with the jurisdiction of the FTT to vary leases under the Landlord and Tenant Act 1987 ('LTA 1987'), s 35. The appellant was the long-leaseholder of a flat in Whitehall, SW1. He had applied for a lease extension under Part II of the 1993 Act. He argued that the service charge provisions of the lease should not follow his existing lease (which provided for a contribution of 0.8%) on the basis that,

following the creation of new units within the building, and the re-arrangement of others, the aggregate of the service charge contributions recoverable by the landlords now totalled 129%. He argued that a fairer allocation, based on floor area, would allocate to his unit a proportion of 0.287230% and that the proportion included in the current lease amounted to a 'defect' which accordingly should be modified under s 57(6) of the 1993 Act on the grant of new lease.

The position was complicated in that the appellant and other leaseholders had brought an application before the FTT for the variation of their leases under the LTA 1987, s 35 on similar grounds, and that application had been rejected on the basis that the FTT was not satisfied that the scheme of amendment brought forward by the applicants was workable and an improvement over the current scheme. It was relevant that the landlords had for some time calculated the service charge on the basis of an extra-contractual scheme which ensured that the landlords collected no more than 100% of their expenditure. The Upper Tribunal had refused permission to appeal against the refusal of the s 35 application. The current appellant, however, argued that the extra-contractual scheme, although it confined the aggregate which the landlords could recover to 100%, unduly favoured the commercial tenants; and that what was clearly a defect ought not to be carried over into a new lease on renewal.

The Upper Tribunal agreed with the landlords that, when the FTT (in the lease extension application) rejected the appellant's appeal it was entitled simply to adopt the reasoning of the previous FTT in the variation hearing. It had therefore given adequate reasons. In the opinion of the President (Sir Keith Lindblom) the FTT had, however, got its decision wrong. As the FTT seemed to have accepted, the current apportionment scheme was defective, at [45]. The existence – indeed the necessity for – the extra-contractual scheme supported the argument of the appellant rather than that of the respondents. When Parliament allowed for defects in leases to be remedied on the granting of new leases, it could not have been its intention for the parties to have to rely on a scheme for the collection of service charges which was extra-contractual and which the landlord might discontinue, at [47]. It did not, however, follow that the scheme rejected by the original FTT should now be followed. The President was not satisfied that a scheme based on floor-area was necessarily the best that could be devised, at [51]. The matter would have to be remitted to the FTT for it to decide what form of modified scheme should be formulated to replace the one in the existing leases, at [56].

FTT should have considered major works item in spite of lack of invoice; lease did not permit recovery of legal costs via service charge

Union Pension Trustees Ltd and Bliss v Slavin [2015] UKUT 0103 (LC) is a service charge dispute in which two issues were raised on appeal to the UT (Mr Martin Rodger QC, Deputy President). Work on a small block of flats had been undertaken by a contractor who was himself the long leaseholder of

one of the flats. A sum of just over £38,000 for major works had been included in the service charge account, and disputed by one of the other leaseholders. At the hearing before the FTT no valid invoice relating to this sum had been produced (indeed a statement of works, on which had been written various manuscript annotations, including the heading 'Invoice', was the closest approximation to one that was available). The FTT had accordingly disallowed the claim in its entirety; as a result, it had not had to gone on to consider the respondent leaseholder's arguments relating to the adequacy of the works. On this point the UT had allowed the appeal of the appellant landlord. There was no dispute that the work had been carried out, and the FTT had previously determined (on an application under the Landlord and Tenant Act 1985 ('LTA 1985'), s 27A) that the contractor's tender was reasonable. The FTT should have allowed other evidence as to what had actually been paid, at [45]. The matter should be remitted to the FTT, which would then also have to consider the respondent's arguments that, in view of the standard of the work, its cost had not been reasonably incurred. The UT also criticised the FTT for raising the issue of the credibility of Mr Bliss, one of the landlords, when refusing permission to appeal, when this had not been alleged in its original judgment, and the issue had not been properly addressed in the hearing. His poor management skills, and arbitrary time recording were relevant matters, but did not go to his honesty.

The second issue raised on appeal was whether the wording of the lease allowed the appellant landlords to include their legal costs in the service charge. The UT agreed with the FTT and found against the landlord on this issue. Legal costs were specifically referred to in the clauses in the lease relating to the LPA 1925, ss 146 and 147, but not in the clauses dealing with the general costs of managing the building. The inference was that they were not included, and the specific language and particular facts of recent UT decisions such as *Conway v Jam Factory* [2013] UKUT 592 (LC) and *Assethold v Watts* [2014] UKUT 537 (LC) (noted respectively in Bulletins104 and 109) were not present here.

LTA 1987, s 47 applied because management company had been granted lease of the reversion

Tedla v Cameret Court Residents Association Ltd [2015] UKUT 0221 (LC) raised two issues on appeal. The first – which was wholly dependent on its facts – was whether the appellant leaseholder was free to challenge the service charges for certain years, or whether the dispute had been compromised in correspondence. The second was of potentially wider significance. The respondent company was in the slightly unusual position of being both a 'third party' management company under a tripartite underlease, but of also holding an underlease of the reversion. The appellant leaseholder had argued that the requirement of the LTA 1987, s 47 that landlords give their names and addresses when issuing demands to tenants did not apply to management companies and other third parties (an argument which the UT subsequently accepted in *Pendra Loweth Management Ltd v North* [2015] UKUT 91(LC) (see Bulletin No 111)). The FTT had accepted this argument, and found

against the appellant on this point. Before the UT, however, the appellant raised the issue that the underlease of the reversion had the effect of making the respondent the immediate landlord of the occupational leaseholders, and thus bound by s 47. The UT (Mr Martin Rodger QC, Deputy President) accepted this argument, and allowed the appeal on this point.

Unsuccessful challenge by Right to Buy leaseholder to council upgrading scheme – council had to give credit for CESP grant

Oliver v Sheffield CC [2015] UKUT 229 (LC) is an appeal by a local authority 'Right to Buy' leaseholder against the rejection by the FTT of her challenge to her landlord's scheme to upgrade the 'non-traditionally constructed' block of which her flat formed part; she argued that a programme of running repairs would have been more appropriate than the wholesale upgrading scheme for which the council had opted. The judgment is lengthy, and highly fact specific, but a few points of more general importance emerge. Notable is the fact that the UT (Mr Martin Rodger QC, Deputy President, and Mr P D McCrea, FRICS) proceeded to rehear the case because its members felt some sympathy 'with the appellant's complaint that her side of the argument had not been adequately weighed and reflected in the decision' at [54]. They felt that there was some justification for her feeling that she was 'left in a state of uncertainty over the LVT's reasons for its decision'. Nevertheless, having proceeded with the rehearing, the UT agreed with the original decision on the works themselves, save for some minor points. The leaseholder also succeeded on a more significant point, viz the UT determined that the way in which the council had credited the Community Energy Saving Project funding that it had received towards the cost of the works had not been done in accordance with the terms of the lease, and the leaseholder was entitled to a credit on account of this.

Any local authority considering major works on blocks including Right to Buy leaseholders would do well to consider the judgment, which identifies issues which may well be common to many such projects.

Landlord entitled to costs under Commonhold and Leasehold Reform Act 2002, s 88 when Right to Buy claim 'withdrawn'

Post Box Ground Rents Ltd v The Post Box RTM Company Ltd [2015] UKUT 0230 (LC) is an appeal to the UT (former Law Commissioner HHJ Stuart Bridge) on a question of costs. The respondent Right to Manage ('RTM') company had commenced a claim to acquire the right to manage three blocks of flats, but, after receiving the witness statement containing the expert evidence of the landlord's surveyor, had withdrawn its claim, and the landlord had consented to this, and the LVT had accepted the withdrawal. The appellant landlord had subsequently sought its costs under the Commonhold and Leasehold Reform Act 2002 ('CLRA 2002'), s 88. The FTT had, applying s 88(1), assessed the landlord's costs for the period leading up

to the issue of proceedings, but, purporting to apply s 88(3), had declined to assess its costs for the period whilst the proceedings were current. The landlord appealed. Both sides agreed that, in view of the decision of the UT in *Fencott Ltd v Lyttleton Court RTM Companies* [2014] UKUT 0027 (LC) the approach of the FTT could not stand; the respondent nevertheless sought to uphold the actual decision of the FTT on the basis that their potential liability for costs was entirely statutory, and, as their application had never been 'dismissed', any liability could not have arisen.

HHJ Stuart Bridge allowed the landlord's appeal. Following *Fencott*, the general liability on the RTM company to pay costs is imposed by s 88(1); this is then circumscribed by s 88(3). The respondent's argument was undermined, however, by the decision of the High Court in *R* (*O Twelve Baytree Ltd*) *v Leasehold Valuation Tribunal* [2014] EWHC 1229 (Admin), [2015] 1 WLR 276 ('*Baytree*') (noted in Bulletin No 105), which held that, if an RTM company indicated that it wished to withdraw an application, and the landlord then consented, withdrawal would be effective only when the Tribunal dismissed the application, at [38]; and this would give the Tribunal jurisdiction to deal with costs under s 88(3). Although a decision of the High Court ('HC') did not technically bind the UT, the UT should give due weight to HC decisions, and HHJ Stuart Bridge agreed with and adopted the analysis in *Baytree*, at [35].

As the application had not been dismissed by the FTT, rather than remitting the matter to the FTT, the UT itself dismissed the application, giving the parties the opportunity to agree costs. If they failed to do so, then the costs incurred by the landlord during the period under dispute would have to be assessed by the FTT.

Landlord could not escape requirement to have recourse to reserve fund by failing to set one up

Caribax Ltd v Hinde House Management Company Ltd [2015] UKUT 0234 (LC) primarily concerns the construction of provisions regarding the use of a reserve fund contained in a lease. The clause allowed the landlord to accumulate a reserve towards the capital costs of replacing equipment, etc, and future repairs and redecoration, etc, and required that such reserves be transferred to a 'specially designated trust fund' complying with the LTA 1987, s 42(5). It also required that expenditure on such items be met first from recourse to that reserve fund. The landlord had accumulated reserves but had never set up such a 'specially designated trust fund' so the FTT had held that, where expenditure fell within the relevant categories, it could not be required first to use those reserves. Unsurprisingly the UT (HHJ Stuart Bridge) found against the landlord and reversed the FTT on this issue, on the basis that the FTT decision had, in effect, allowed the landlord to take advantage of its own wrongdoing in not having set up the designated fund in the first place.

RTM claim form not invalidated by inclusion of small yard which did not form part of the property

Miltonland Ltd v Platinum House (*Harrow*) *RTM Co Ltd* [2015] UKUT 0236 (LC) is an appeal against the decision of the FTT that a notice claiming the RTM had not been invalidated by reason that the claim had been by reference to a registered title which included within it a small yard which did not in fact form part of the property over which the RTM could be claimed. The RTM company had successfully argued before the FTT that this was an inaccuracy which could be excused under the CLRA 2002, s 81(1). The UT (HHJ Stuart Bridge) held that the combined effect of *Gala Unity Ltd v Ariadne Road RTM Co Ltd* [2011] UKUT 425 (LC) and *Pineview Ltd v 83 Crampton Street RTM Co Ltd* [2013] UKUT 0598 (LC) is that 'it is not necessary for the claim notice to state that there is any property appurtenant to the building or part of the building over which the right to manage is claimed, and if reference is made to appurtenant property, it is not necessary to state what that property is', at [19]. The appellant landlord argued that s 81(1) expressly allows certain inaccuracies to be disregarded, but this relates to the particulars required by or by virtue of s 80, which would not include any inaccuracy in the specification of the premises or the statement of the grounds for the claim, as they are not specifically described as 'particulars' in s 80 itself, at [26]. Whilst this approach had been accepted in *Moskovitz v 75 Worple Road RTM Co Ltd* [2010] UKUT 393, an unopposed appeal, it had not been followed in *Assethold Ltd v 15 Yonge Park RTM Co Ltd* [2011] UKUT 379 (LC) or in *Assethold Ltd v 14 Stansfield Road RTM Co Ltd* [2012] UKUT 262 (LC) where a more purposive approach had been applied.

HHJ Bridge was of the view that crucially here the claim notice set out the RTM company's claim to exercise the RTM *within* a designated area. It was open to a tribunal to accept that this was sufficient and to go on to determine over precisely what area the management functions should be exercised. He observed that 'appurtenances' could include incorporeal rights, and that these would be very difficult to set out with any precision at the time when the claim notice was served, at [17], [47].

Arrangements for LTA 1985, s 20 consultation were not reasonable

Ashleigh Court Right to Manage Co Ltd v De-Nuccio [2015] UKUT 258 (LC) is an appeal to the UT (HHJ Stuart Bridge) against the decision of the FTT that the appellant RTM company had not complied with the consultation requirements of the LTA 1985, s 20. As one might expect, the decision very much depends on the specific facts of the case, but, in dismissing the appeal, some points of more general application were made. The FTT had decided that the arrangements for inspection were not 'sufficiently convenient' for the respondents. HHJ Bridge agreed that this was not the correct test to apply: the regulations required the FTT to decide whether the arrangements were 'reasonable', at [44], which implied that a fair balance should be struck between the landlord and the tenants. Nevertheless it was clear from the

findings of fact of the FTT that the inspection requirements had not been complied with: 'the place and hours' when the estimates were said to be available for inspection were not reasonable; and they were not in fact available at the stated time and place, at [50]. Another point was that 'substantial compliance' was not sufficient, at [52]: if the requirements of the regulations were not complied with, then the question of substantial compliance was a factor to be taken into consideration in deciding any application by the landlord under s 20ZA to dispense with those requirements, to be determined (following *Daejan Investments v Benson* [2013] UKSC 14, [2013] 1 WLR 854) by considering the extent to which the leaseholders had been prejudiced by the lack of full compliance, at [52].

Improvement notice under Housing Act 2004 could not be served either on freeholder or on RTM company

The detailed law surrounding the service of improvement notices lies outside the scope of this work, but it is perhaps worth noting briefly in passing the decision of the UT (Mr Martin Rodger QC, Deputy President) in *Hastings BC v Braear Developments Ltd* [2015] UKUT 0145 (LC). The case involved a five-storey mid-Victorian house which had been converted into five flats. The appellant local authority had served an improvement notice under the Housing Act 2004 relating to the fire escape, initially on the freeholder and on the RTM company. It had subsequently withdrawn the notice in respect of the RTM company when it accepted that it could not be the responsible person. The FTT had granted the freeholder's appeal, on the basis that the notice could not be served on it either, and the UT agreed. In the particular circumstances here, it would be necessary to serve notices on the long leaseholders as the persons collectively in receipt (or who would be in receipt) of the rack rents of the building. The case raises difficult issues as to when a block of flats can also be a House in Multiple Occupation ('HMO'), and the complex interrelationship of the provisions dealing with HMOs and their licensing, and the provisions on who is responsible for implementing improvement notices on buildings in multiple ownership.

Pending appeals allowed because a single RTM company could not acquire the right to manage more than one block

In *Sinclair Gardens Investments* (*Kensington*) *Ltd v Darlaston Court RTM Ltd* [2015] UKUT 0277 (LC) the landlord had appealed against the decision of the LVT that a single RTM company was entitled to acquire the right to manage three blocks of flats. The appeal had been stayed pending the decision of the UT (and subsequently the appeal to the Court of Appeal) in *Triplerose Ltd v 90 Broomfield Road RTM Co Ltd* [2015] EWCA Civ 282. In view of the decision of the Court of Appeal the decision of the LVT clearly could not stand, and its decision was accordingly set aside. For similar reasons an appeal was allowed in *Sinclair Gardens Investments* (*Kensington*) *Ltd v Maltings* (*Stanstead Abbotts*) *Management Co Ltd* [2015] UKUT 0278 (LC).

Reasonableness test did not have to accept contractual rent when service charge for gym and office was challenged

The Gateway (*Leeds*) *Management Ltd v Naghash* [2015] UKUT 0333 (LC) raises an issue which seems to be common in many of the more large-scale and elaborate modern developments: the cost charged for facilities such as gyms, and the suspicion that financial arrangements may be 'sweetheart' contracts which have been set up for the developer's benefit.

The service charge for a large mixed development in the centre of Leeds included the cost of providing a gym, the CCTV system and a concierge office. In response to an application brought by leaseholder N the FTT decided that the service charge relating to the first two should be reduced by 50% and 20% respectively; at a separate hearing of an application by leaseholder S the FTT made the same reductions in respect of those items, and a further deduction of 50% in respect of the concierge's office. The appellant, which was responsible for providing these services, appealed, firstly on the basis that the charges were fixed, and were not therefore service charges within the meaning of the LTA 1985, s 18; secondly, that the FTT had considered whether the costs were expensive, rather than reasonably incurred; and thirdly that its reasons for reducing the charges had been insufficiently explained. The charge for the gym was made up largely of the rent payable on a lease-back of the unit to the freeholder. It had been accepted by the appellants that the size of the gym was similar to a standard two bedroom unit within the block and that a more appropriate rent would be £10,000 to £15,000, whereas the rent constituted most of the £39,000 annual cost of the gym. A similar argument prevailed in respect of the concierge's office. The cost of the CCTV was derived from a lease-purchase agreement entered into originally by the freeholder.

The UT (Mr Martin Rodger QC, Deputy President) held that the obligation of the lessees was to contribute to the cost of providing for the services, and there was no specific provision requiring them to contribute towards the rent paid by the appellant to its landlord or towards a specific finance agreement. On the question of the evidence, the appellants had produced little to support their charges, and the FTT had inspected the facilities, had made the best it could of such evidence as there was, and correctly applied their own specialist knowledge. The appellant's managing agent had given evidence that the lease-purchase agreement was 'a way for a developer to defray their construction costs by passing these costs into the tenants'. Given that admission, it is hardly surprising that the FTT and UT decided that the expenditure had not been reasonably incurred! The Deputy President did, however, warn the respondent lessees that they should not necessarily assume that the deductions made on this occasion would necessarily apply in future years: the appellant management company might well wish to produce more extensive evidence on the reasonableness of the costs on another occasion.

NOTES ON CASES

Curzon v Wolstenholme [2015] UKUT 173 (LC): L & T Review 2015, 19(3), D16 (noted in Bulletin No 111)

Edwards v Kumarasamy [2015] EWCA Civ 20: EG 2015, 1520, 89 (noted in Bulletin No 110)

Ramsay v Love [2015] EWHC 65 (Ch): EG 2015, 1517, 68–69

Lincoln City Council v Bird [2015] EWHC 843 (QB): HLM 2015, May, 5–8

Magnic Ltd v Ul-Hassan [2015] EWCA Civ 224: L & T Review 2015, 19(3), D13–D14 (noted in Bulletin No 111)

Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (*Jersey*) *Ltd* [2014] EWCA Civ 603: EG 2015, 1522, 69 (noted in Bulletin No 106)

Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd [2015] EWCA Civ 282: SJ 2015, 159(20) Supp (Property Focus), 27 (noted in Bulletin No 111)

Obichukwu v Enfield LBC [2015] UKUT 64 (LC): L & T Review 2015, 19(3), D13

One Housing Group Ltd v Wright [2015] UKUT 124 (LC): L & T Review 2015, 19(3), D20 (noted in Bulletin No 111)

Pendra Loweth Management Ltd v North [2015] UKUT 91 (LC): L & T Review 2015, 19(3), D19 (noted in Bulletin No 111)

UK Leasing Brighton Ltd v Topland Neptune Ltd [2015] EWHC 53 (Ch): L & T Review 2015, 19(3), 119–122 (noted in Bulletin No 110)

Waaler v Hounslow LBC [2015] UKUT 17 (LC): L & T Review 2015, 19(3), D20–D21

ARTICLES OF INTEREST

20 years on – the 1995 Act [2015] Conv 191–198

A reformist menu [2015] Conv 187–190

An end to retaliatory evictions? New measures on repossession by private sector landlords L & T Review 2015, 19(3), 113–118

An end to revenge evictions SJ 2015, 159(20) Supp (Property Focus), 5, 7

Breaking up is hard to do (*resolving dilapidation disputes amicably*) EG 2015, 1519, 94, 96.

Choosing the right vehicle (*choice of company limited by shares or company limited by guarantee for residents' management companies*) EG 2015, 1520, 88

Deregulating deposits: further regulation of the protection of tenancy deposits and section 21 notices in the Deregulation Act 2015 L & T Review 2015, 19(3), 90–96

Developments and disputes (*prescribed form notices, tenancy deposits, and Consumer Rights Act 2015*) SJ 2015, 159(24), 33–34

ARTICLES OF INTEREST

Disclaiming responsibility: Part 2 (*disclaimer of onerous leases*) L & T Review 2015, 19(3), 104–108

Getting it right (*tribunal or court must be satisfied that statutory procedures have been followed*) NLJ 2015, 165(7655), 14

Guarding the guardians (*use of property guardian companies by local authorities and social landlords to secure properties*) SJ 2015, 159(20) Supp (Property Focus), 19, 21

Issues with long leases EG 2015, 1518, 86–87

Mediation is not just for litigant EG 2015, 1518, 90

Moving up a gear (*tax implications of re-gearing leases*) EG 2015, 1518, 82–84

Point of re-entry (*proposals for reform of law of forfeiture*) EG 2015, 1522, 66–68

Priorities and sale and lease back: a wrong question, much ado about nothing and a story of tails and dogs [2015] Conv 245–253

Questions and answers: rising damp – meaning of repair – s 11 of the Landlord and Tenant Act 1985 L & T Review 2015, 19(3), 123–125

Recent developments in housing law Legal Action 2015, Jun, 41–46

Regulation not deregulation (*property law changes included in Deregulation Act 2015*) EG 2015, 1522, 73

Residential v business protection (*effect of Small Business, Enterprise and Employment Act 2015, s 35*) EG 2015, 1518, 85

SDLT on the continuation and renewal of a lease: Part 3 L & T Review 2015, 19(3), 97–103

Sign language (*use of signature machines*) EG 2015, 1517, 68–69

Sit up and take notice (*effect of non-compliance with statutory requirements for notices*) EG 2015, 1517, 72

The burning issue of insurance EG 2015, 1520, 83

The draft Tenants' Charter L & T Review 2015, 19(3), 87–89

The issue with preconditions (*preconditions to underletting*) EG 2015, 1522, 70–71

The Landlord and Tenant (*Covenants*) *Act 1995: 20 years on – Part 1* L & T Review 2015, 19(3), 109–112

The mysterious case of the disappearing rent review (*problems with rent reviews as the rent review market recovers*) EG 2015, 1519, 126–127

Unpicking the Deregulation Act 2015 SJ 2015, 159(19), 17

When is a cost 'incurred'? (*ie for purposes of s 20B LTA 1985*) EG 2015, 1521, 74–75

When 'pretty vacant' won't do (*vacant possession and break clauses*) EG 2015, 1520, 84–85

Worth noticing (*various landlord and tenant matters*) SJ 2015, 159(19), 33–34

OFFICIAL PUBLICATIONS

Extending the Right to Buy – Briefing Paper (**England**) was published as a House of Commons Library Briefing Paper on 9 June 2015: http://researchbriefings.files.parliament.uk/documents/CBP-7224/CBP-7224.pdf

PRACTICE GUIDES ETC

The Legal Aid Agency has issued guidance: with effect from 27 April 2015, when the relevant section of the Housing (Wales) Act 2014 came into force, persons living in Wales faced with homelessness within the next 56 days are eligible for legal advice: https://www.gov.uk/government/news/civil-news-advice-for-clients-threatened-with-homelessness. The relevant time limit in England remains 28 days.

PRESS RELEASES

The Law Society has issued a press release **Deregulation Act 2015: Changes to tenants' protection from eviction**: http://www.lawsociety.org.uk/news/stories/changes-to-tenants-protection-from-eviction/. The changes – which apply to so called 'retaliatory evictions' where a tenant complains about the state of repair etc of a property – come into effect on 1 October 2015.

STATUTORY INSTRUMENTS

The Regulation of Private Rented Housing (Information, Periods and Fees for Registration and Licensing) (Wales) Regulations 2015, SI 2015/1368 come into effect (in Wales only) from 7 July 2015.

The Housing (Right to Buy and Right to Acquire) (Limits on Discount) (Amendment) (Wales) Order 2015, SI 2015/1349 (W 130), comes into force (in Wales only) on 14 July 2015 and amends the maximum rates of discount available in the exercise of the Right to Buy under the Housing Act 1985, Pt 5 and the right to acquire under the Housing Act 1996, s 16.

Correspondence and queries about the content of *Hill & Redman's Law of Landlord and Tenant* should be sent to Sarah Hanson, Senior Editor, LexisNexis, Lexis House, 30 Farringdon Street, London EC4A 4HH, tel: 020 7400 2500, email: sarah.hanson@lexisnexis.co.uk.

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

Visit LEXISNEXIS direct at www.lexisnexis.co.uk

Published by LexisNexis

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

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

ISBN 978-1-4057-9326-1

9 781405 793261