Monthly Update

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Topics This Month

Landlord and tenant (general): Unlawful eviction – damages; Guarantee - tenant insolvency; Terminal dilapidations - assessing damages
Long leases: Service charges - dispensing with consultation requirements; Service charges - dispensing with service; Service charges – reasonableness; Service charges – affordability; Service charges - variation of leases
Mortgages: Tomlin order – rectification; Rectification of charges register - effect of e-DS1
Planning: Injunction - breaches of planning control; EIA screening - review of screening decision; Material considerations - heritage assets and the setting of listed buildings; Neighbourhood areas - local authorities' discretion over designation; Interpretation - terms of grant of planning permission for change of use; Core strategies - unlawful adoption; Localism - the role of the Secretary of State under the Localism Act 2011; Costs - recovery by developers
Property transactions: Electronic Communications Code (formerly the Telecoms Code) - Law Commission recommendations

Editors

Gary Webber	General Editor
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Daniel Dovar	Residential tenancies and Property litigation
Piers Harrison	Enfranchisement
Carla Revere	Boundaries, co-ownership and estoppel, nuisance and trespass
Emma Humphreys	Easements and restrictive covenants
Saira Sheikh	Planning
Sarah Thompson-Copsey	Landlord and Tenant (General)
Jonathan Upton	Service charges

Boundaries and adverse possession

The editor of this section is Carla Revere of 1 Chancery Lane, London

Nothing to report this month.

Business lease renewal

The editor of this section is Sarah Thompson-Copsey, solicitor and freelance property law trainer (stcjb@btinternet.com).

Nothing to report this month.

Co-ownership

The editor of this section is Carla Revere of 1 Chancery Lane, London

Nothing to report this month.

Easements

The editor of this section is Emma Humphreys, solicitor, partner in Charles Russell LLP

Nothing to report this month.

Landlord and tenant (general)

The editor of this section is Sarah Thompson-Copsey, solicitor and freelance property law trainer (stcjb@btinternet.com).

Unlawful eviction

Damages

Grange v Quinn
[2013] EWCA Civ 24

Summary
The Court of Appeal awarded the tenant damages for unlawful eviction by the landlord, the damages being equal to the premium paid by the tenant on the granting of the lease, but strongly criticized the "massive legal fees and expert costs" incurred by the parties.

Facts
In July 2008 T (as tenant) took a six-year lease of a sandwich shop from L (the landlord). Although the lease did not refer to a premium, T paid L £9,950 described in contemporaneous correspondence as being for L's interest in the business, or what the particulars of sale called "business/lease/fixtures and fittings…plus stock at value". The finding of fact in the lower court was that this sum was paid "for the goodwill of the business as it existed in July 2008".
Six months into the term, T was evicted by L for, amongst other breaches of covenant, failure to keep the windows clean. T maintained that L had unlawfully evicted her and sought to recover the premium she had paid on taking the lease by way of damages for wrongful eviction.

Issue
The main issue related to the correct basis on which damages should be awarded. As unlawful eviction was a breach of contract for which damages could be awarded the court considered whether these should be assessed by reference to the premium paid by the tenant, or by reference to the profitability of the tenant's business.

First instance
The trial judge held that the breaches of covenant complained of, such as failure to keep the windows clean, were not serious enough to constitute a breach of covenant. Further, no notice under s146 notice of the Law of Property Act 1925 had been served; and also L had, in any event, waived the breach by accepting rent. However, the court held that T had suffered no significant loss and awarded her only nominal damages.

Decision on appeal
By a 2:1 majority, the Court of Appeal allowed T's appeal. The Court held that it should approach the claim as one for wasted expenditure incurred in reliance on the contract. Damages may be awarded on that basis rather on the basis of loss of bargain. Jackson LJ quoted Lord Blackburn in *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25:

> "where any injury is to be compensated by damages, [it] should as nearly as possible [be] that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

He went on to say that:

> "The starting point for assessing damages is the purchase price which the claimant paid, namely £9,950. It would be manifestly unjust if [L] could evict [T] after only six months and still keep the purchase price."

The court held that T needed to deduct a small amount from the original premium paid to represent the benefit received by her because of her occupation of the premises and running the business before the unlawful eviction. He ruled that T's appeal should be allowed and awarded damages of £9,079 as meeting the justice of this case.

Guarantee

Tenant insolvency – disclaimer

RVB Investments Ltd v Bibby
[2013] EWHC 65 (Ch)

Summary
Disclaimer of the tenant's rights and obligations under a lease did not release the tenant's guarantor, notwithstanding the wording of the guarantee. The guarantor was therefore obliged to take a new lease pursuant to the terms of the guarantee.

Facts
B guaranteed the liabilities of the tenant (T) to the

Landlord and tenant (general) (continued)

landlord (L) under two leases. His obligations as guarantor were stated to apply until the expiry of the tenancy created by the lease "or (if earlier) the date on which the Lessee ceases to be bound by the covenants in this lease". In the event that the leases were disclaimed or forfeited during the guarantee period, by the terms of the lease L was entitled to require B to accept a new lease of the premises for a term equivalent to the residue of the original lease, at the same rent as had applied immediately before disclaimer.
T went into liquidation and the liquidator disclaimed the lease of one of the units pursuant to s178 of the Insolvency Act 1986. T was then dissolved and the Treasury Solicitor filed a notice of disclaimer in respect of the lease of the second unit pursuant to s1013 of the Companies Act 2006.
Following this L requested B to take a new lease of the second unit, pursuant to his obligations as guarantor, for the residue of the term but at a higher rent than before; B refused. L then brought a claim for specific performance. L also claimed the outstanding rent and service charge payments in respect of both units.

Issues
B contended that he was no longer liable under the guarantee since:

- On the proper construction of the lease, his obligations as surety came to an end on the dissolution of T;

- The vesting of the second unit in the Crown amounted to an assignment by operation of law within the meaning of the Landlord and Tenant (Covenants) Act 1995, such that B, as the guarantor of the "former tenant", was not thereafter liable in the absence of a notice served on him by L under s17(3); and

- L had accepted a surrender of the leases by its conduct in, inter alia, entering on the premises to carry out inspections and beginning to market the premises.

- B further submitted that the court should refuse specific performance in any event since damages would be an adequate remedy.

Decision
The High court awarded L a decree of specific performance ordering B to enter into a new lease at the old rent.

Issue: obligations ending on dissolution of T
As to the first argument of B, it was settled law that, by virtue of s178(4) of the Insolvency Act 1986, the disclaimer of a lease by the liquidator of an insolvent tenant did not affect the liabilities of guarantors, whose rights and liabilities remained as though the lease had continued (*Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] A.C. 70 applied). Accordingly, the liquidator's disclaimer of the lease of the first unit did not discharge the defendant as surety.
It made no difference that the guarantee period was defined in such a way that it could end on "the date on which the Lessee ceases to be bound by the covenants in this lease". On the proper construction of the lease, that provision was not intended to apply where the lessee ceased to be bound by reason of a disclaimer by its liquidator. It dealt instead with the situation that applied under s5 of Landlord and Tenant (Covenants) Act 1995, where, if the tenant assigned the whole of the demised premises, the tenant was released from the covenants of the tenancy.
The same applied to the disclaimer of the lease of the second unit by the Treasury Solicitor, following the vesting of that lease in the Crown as bona vacantia under s1012 of the Companies Act 2006. The Treasury Solicitor had executed a valid notice of disclaimer under s1013. The provisions of s1015, prescribing the effects of such a notice, were in all material respects identical to those in s178(4) of the Insolvency Act 1986 and the law applicable to that section applied with equal force to a disclaimer under s1013 of the Companies Act 2006.

Issue: section 17 notice
As to B's second point, L did not need to serve a notice on the defendant under s17(3) of the Landlord and Tenant (Covenants) Act 1995. First, s17(3) could have no application to the claims in respect of the first unit since the lease of that unit had remained vested in the tenant until it was disclaimed by the liquidator. Second, such a notice was required only in respect of payment by the guarantor of a "fixed charge payable under the covenant" and did not prevent a landlord from seeking to enforce a covenant requiring a surety to accept a new lease for the residue of the term following disclaimer or forfeiture; likewise it would not prevent a claim for damages for breach of, or in lieu of an order for specific performance of such a covenant.
Further, although the definition of assignment in s28 of the Landlord and Tenant (Covenants) Act 1995 included assignments by operation of law, such an assignment was an "excluded assignment" within s11 of the Landlord and Tenant (Covenants) Act

Landlord and tenant (general) (continued)

1995, and as such did not release the tenant from its covenants under the lease: see section 11(2)(a). The obligation under section 17(3) did not arise where the tenant was dissolved following liquidation.

Issue: surrender
L had not accepted a surrender of the lease so as to bar it from enforcing B's obligations as guarantor. For surrender to occur by operation of law, the parties had to have acted towards each other in a way that was inconsistent with the continuation of the tenancy. A high threshold had to be crossed before the tenant would be held to have surrendered and the landlord to have accepted a surrender. The effective re–delivery of possession by a tenant and its acceptance by its landlord were vital. None of the matters relied on by B amounted to an unequivocal act of taking possession by L so as to prevent it from denying that the leases were at an end. As regards the marketing of the premises, in circumstances where there were substantial arrears of rent, L was entitled to look for a new tenant and yet maintain its rights for rent against the old tenant and surety until a new tenant was found.

Issue: damages being an adequate remedy
The court held that damages in lieu of an order for specific performance would not be an adequate remedy, notwithstanding that the term to be granted by the new lease would have expired before the order was made. In the absence of a lease, the claimant would incur liability for non–domestic rates on both units as unoccupied properties. Although the claimant would be entitled to an indemnity from B that indemnity would be valueless since B was insolvent. If the lease were granted, then L could argue that the defendant was entitled to possession for the period of the new lease, such that he, and not L, was liable for the rates. An order for specific performance would be made accordingly.
Finally, the rent payable under the new lease should be the rent payable immediately before the date of the disclaimer. L was not entitled to specify a higher rent, as no rent review had in fact taken place. L could not simply ignore the rent review provisions in the lease. Although it might still be entitled to have the rent reviewed, it was not entitled to insert into the new lease a rent based on a review that had not occurred.

Comment
Situations where landlords seek to force guarantors to take new leases under the terms of the lease are rare. This is perhaps because it is often sufficient to enforce payment of rent and other obligations under the lease against the guarantor where the tenant becomes insolvent. Here, however, the guarantor and the tenant were both insolvent. Therefore the advantage for the landlord in enforcing the covenant to take the lease was to enable it to claim that it was not in occupation of the premises and so was not liable for rates. No doubt in the current economic climate more landlords may seek to do the same.

Terminal dilapidations

Assessing damages

Sunlife Europe Properties v Tiger Aspect Holdings [2013] EWHC 463 (TCC)

Summary
The case is a useful reminder of the principles to be considered in assessing damages for terminal dilapidations especially where the premises, and the expired lease, are old.

Facts
The case concerns two properties let to the tenant (T) under two full repairing leases for terms of 35 years. Both leases continued beyond their expiry dates pursuant to the provisions of the Landlord and Tenant 1954, Part 2 but ultimately came to an end in 2008 when T moved out. It was not disputed that T did not comply with its repairing obligations under the leases.

Issue
What was the measure of damages due to the landlord for the tenant's failure to yield up in accordance with the repairing obligations under the leases?
At trial the landlord (L) produced a costed schedule of dilapidations, and the total damages sought were £2.172 million (including 30 weeks loss of rent).
T, by contrast, asserted that the remedial works attributable to want of repair amounted to around £700,000. However, T contended that it was not obliged to pay more than £240,000 being the diminution in the landlord's reversionary interest under s18(1) of the Landlord and Tenant Act 1927. T's argument was that even if it had left the premises in a good state of repair by reference to the standards at the date of the leases the building would not have been lettable without the substantial upgrade and improvement works which the landlord had carried out.

Decision
The damages claim was assessed by the High Court at £1.4 million.

Landlord and tenant (general) (continued)

Section 18(1) of the Landlord and Tenant Act 1927 provides that:

> "Damages for breach of a covenant or agreement to keep or put in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is express or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) is diminished owing to the breach of such covenant or agreement as aforesaid . . ."

The starting point, therefore, must be to consider whether, if T had handed back the premises in accordance with its repairing obligations under the lease, L would have been ***able to relet or sell*** the building without significant discount. If this was the case then damages are the ***lower*** of either of the total ***cost of putting the property back*** into the state of repair required by the lease (to include the cost of the works and consequential fees, costs and losses) or the ***difference in value*** of the building in its current state and the state it should have been handed back in.

If, however, L would not have been able to relet or sell the building without significant discount, even if T had carried out the works necessary under the lease, then it is necessary to look at what L would have to do to be able to relet the premises at a fair market price; in other words, what "extra" work must the landlord do to make the premises lettable in today's market? In looking at that "extra" work, the court must have in mind two points. First, that the landlord cannot recover the cost of this "extra" work from the tenant and secondly, that this "extra" work may make some of the tenant's repair works redundant – and so the landlord has suffered no loss if the tenant fails to carry out such "redundant" repair works (an issue known as "supercession").

Further points to be borne in mind are:

- The tenant is entitled to choose a less costly method of complying with its covenants
- The tenant (in the absence of wording to the contrary in the lease) is under no obligation to upgrade plant and machinery to current standards, the tenant is entitled to replace such plant and machinery with 'like-for-like'
- The landlord cannot recover costs which he could have avoided if he had acted reasonably, and he cannot recover costs of works where the costs are "disproportionate" to the benefit obtained (*Ruxley v Forsyth* [1996] 1 AC 344)

Applying these principles to the facts of this case the court made an assessment of damages. The court agreed with L that, had T yielded up in a good state of repair L would have only had to carry out "relatively modest additional works" to be able to "relet to a tenant of the appropriate type".

Long leases

The editors of this section are Piers Harrison, barrister (enfranchisement) and Jonathan Upton, barrister (service charges) both of Tanfield Chambers

Service charges

Dispensing with consultation requirements

Daejan Investments Ltd v Benson
[2013] UKSC 14

Summary

The landlord had not followed all the stages of the correct procedure to consult with tenants prior to imposing service charges. By a majority the Supreme Court has overruled the decisions of all lower Courts and tribunals and granted the landlord dispensation on terms. There is no justification for treating consultation or transparency as appropriate ends in themselves. The sole question for the LVT when considering how to exercise its jurisdiction in accordance with section 20ZA(1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements. In this very important case the Supreme Court went on to give guidance on a number of matters that arise in these cases.

Facts

The landlord (L) was the freehold owner of a building comprised of shops and seven flats, five of which were held by the tenants (Ts) under long leases, which provided for the payment of service charges. L gave Ts notice of its intention to carry out major works to the building and appointed a firm of surveyors (REA), at the tenants' request, to prepare a revised specification of works and act as contract administrator. Four tenants nominated Rosewood Building Contractors (Rosewood) as their preferred contractor.

L obtained four priced tenders for the work and instructed REA to prepare a tender report. The report stated that the choice was between Rosewood and Mitre (L's preferred contractor). L gave Ts a copy of Mitre's tender and the tender

Long leases (continued)

report and the Ts requested copies of the other tenders; they particularly wanted to see Rosewood's tender.
The tenants then issued an application under s27A of the Landlord and Tenant Act 1985 for a determination, inter alia, that the consultation process had not been complied with and that the cost of the major works was not reasonable.
L served a stage 2 notice which stated that the end of the relevant period for making observations was 31 August 2006. At a pre-trial review in the LVT proceedings on 8 August 2006 (i.e. before the end of the relevant period), L's representative stated that the contract had already been awarded to Mitre.
The LVT found that it was futile for Ts to make further observations and that L had failed to comply with the Consultation Requirements. The tenants' contribution to the cost of the works (which was around £280,000 under the terms of their leases) was capped at £1,250 (£250 each). L applied for dispensation pursuant to s20ZA(1) of the Landlord and Tenant Act 1985. It argued, inter alia:

- That the failure to comply with the Consultation Requirements had not caused the tenants to suffer significant prejudice;
- That the financial consequences on L of not granting dispensation was a relevant factor; and
- The offer to compensate Ts for any prejudice by reducing the cost of the works by £50,000 was also relevant.

At the dispensation hearing, Ts were unable to identify what comments they would have made had they seen the Rosewood tender.

First Instance at the LVT
The LVT held that:

> "the cutting short of the consultation period by indicating that Mitre had been awarded the contract … removed from the leaseholders the opportunity to make observations on the estimates … the fact that they did not have this opportunity amounts to significant prejudice".

It rejected the landlord's offer to reduce the cost of the works by £50,000.

Upper Tribunal and Court of Appeal
The Upper Tribunal followed *London Borough of Camden v The Leaseholders of 37 Flats at 30-40 Grafton Way* (2008) WL 2595998 and held that the financial consequences of refusing dispensation was not a relevant consideration. It was not an easy case because "the evidence of actual prejudice is weak". Nonetheless, the LVT was "entitled to regard this as a [case involving a] serious breach, rather than a technical or excusable oversight", as the tenants' "right to make further representations [at stage 3] was nullified". It was not for Ts to show prejudice, but for L to show that they had suffered no prejudice, as a result of L's default, and it was "enough that there was a realistic possibility that further representations might have influenced" L's decision to engage Mitre rather than Rosewood. The LVT was not entitled to accept a landlord's offer to reduce the amount of the charge to reflect its view of any prejudice suffered.
The Court of Appeal upheld the LVT's decision on essentially the same grounds as the UT. The case was appealed to the Supreme Court

Issues for Supreme Court
In the Supreme Court, Lord Neuberger identified three questions of principle:

- The proper approach to be adopted on an application under s20ZA(1) to dispense with compliance with the Requirements;
- Whether the LVT had to either refuse or allow such an application, or whether it could grant a dispensation on terms;
- The approach to be adopted when prejudice is alleged by tenants owing to the landlord's failure to comply with the requirements.

Supreme Court
By a majority (3:2) the Supreme Court overruled the decisions of all lower courts and tribunals and granted L dispensation on terms, which included the discount of £50,000 offered by L. Lord Neuberger gave the leading judgment.

Issue: proper approach to dispensation
The Court held that sections 20 and 20ZA are intended to reinforce and to give practical effect to the purpose of s19(1), namely by ensuring that tenants of flats are not required to pay:

- More than they should for works/services which are necessary and are provided to an acceptable standard (19(1)(a)); and
- For unnecessary works/services or works/services which are provided to a defective standard (s.19(1)(b)).

There is no justification for treating consultation or transparency as appropriate ends in themselves (Lewison J. was wrong to so hold in *Paddington Basin Developments Ltd v West End Quay Ltd*

Long leases (continued)

[2010] EWHC 833 (Ch), [2010] 1 WLR 2735). The main, indeed normally, the sole question for the LVT when considering how to exercise its jurisdiction in accordance with section 20ZA(1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.
The financial consequences to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.
It is not appropriate to distinguish between "a serious failing" and "a technical, minor or excusable oversight", save in relation to the prejudice it causes.
Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements. The Court held that *Grafton Way* may have been rightly decided but, if so, it was for the wrong reasons.

Issue: conditional dispensation
The Court held that the LVT has power to grant a dispensation on such terms as it thinks fit, provided that any such terms are appropriate in their nature and their effect. Thus, the LVT can require a landlord to reduce the recoverable cost of the works by an amount equivalent to the additional cost of the works caused by the failure to comply with consultation requirements.
The LVT has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord's application under section 20ZA(1).

Issue: approach to prejudice
The Court held that the legal burden of proof remains throughout on the landlord. The factual burden of identifying some "relevant" prejudice that they would or might have suffered is on the tenants.
The court considered that "relevant" prejudice should be given a narrow definition; it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.
Lord Neuberger anticipated that LVTs will view tenants' arguments sympathetically, for instance by resolving in their favour any doubts as to whether the works would have cost less (or, for instance, that some of the works would not have been carried out or would have been carried out in a different way), if the tenants had been given a proper opportunity to make their points. The more flagrant the landlord's failure, the more readily an LVT would be likely to accept that the tenants had suffered prejudice.
Once the tenants had shown a credible case for prejudice, the LVT should look to the landlord to rebut it.

Comment
Many landlords will welcome this decision. Dispensation is likely to be granted in far more cases, albeit on terms. Landlords are likely to have to pay their own costs of the application for dispensation and the tenants' reasonable costs in so far as they reasonably tested its claim for a dispensation and reasonably canvassed any relevant prejudice which they might suffer but it is difficult to envisage many situations whereby a tenant's contribution to the cost of major works will be capped at £250.
Tenants will be able to identify what they would have said with the benefit of hindsight and assisted by a surveyor. If and to the extent that tenants establish relevant (financial) prejudice, dispensation is likely to be granted on condition that the recoverable costs are reduced to compensate such prejudice.

Service charges

Dispensing with service

Tobicon Limited v Collinson
[2013] UKUT 047(LC)

Summary
Where a landlord, with a registered office outside the UK, was not formally served with proceedings but through its agents in the country was aware of and chose not to take part, in those proceedings the Upper Tribunal dismissed the landlord's appeal against the LVT decision on the matter.

Facts
At the LVT hearing the tribunal made an order requiring repayment of service charges under s27A of the Landlord and Tenant Act 1985. The total sum repayable was £149,509. The landlord (L), which had taken no part in the LVT proceedings, subsequently applied for permission to appeal on the ground that it had not been served with notice of the proceedings and had no knowledge of them.
Permission to appeal was granted by the Upper Tribunal on the limited matter of service and L was permitted to call evidence on the issue of service. If successful the matter would have been remitted to the LVT to consider again the merits of the application.

Long leases (continued)

L's registered office was in Jersey. The address for service given in Ts' application (which named L and their two agents as respondents) to the LVT was out of the UK. Regulation 5(1) of the LVT Procedure (England) Regulations 2003 requires the LVT to send a copy of the application to each named respondent. The proceedings were not served on L at its registered address in Jersey and no order was made dispensing with service or for substituted service pursuant to regulations 23(4)(a)(iii) and 23(5) of the Procedure Regulations. The Tribunal did, however, send copies of the application to the agents in the UK to inform them of the application and the date for the pre-trial review. Neither of the agents had been appointed to act on L's behalf for the purposes of regulation 23(1)(c). In the circumstances, there was no service on L in accordance with the 2003 Regulations.

Decision
The Upper Tribunal, having held that there had been no proper service on L in accordance with the rules went on to find that it was inconceivable that neither of the agents would have informed L of the existence of the proceedings. It held that L was well aware of the proceedings but chose not to take any part in them. The Tribunal therefore had a discretion in the matter: it dispensed with the requirement of service of the proceedings on L and dismissed the appeal. (*Nelson v Clearsprings (Management) Limited* [2007] 2 All ER 407, CA and *Al-Tobashi v Aung* (1994) The Times, 10 March considered).

Service charges

Reasonableness – caretaker
Carey-Morgan v de Walden
[2013] UKUT 0134 (LC)

Summary
The freeholder had threatened to forfeit the intermediate landlord's headlease if, in breach of covenant, no full time resident caretaker was employed. It was therefore reasonable for the intermediate landlord to include the cost of a full time resident caretaker in the estimated service charge payable on account, notwithstanding the fact that both the intermediate landlord and the tenant agreed that a cleaner would suffice.

Facts
The freehold of premises was owned by F and a headlease was vested in H. This headlease contained a covenant on the part of H to employ a full-time caretaker to reside in the basement flat throughout the term.
The underleases were vested in the Ts. These contained a covenant by the Ts to contribute towards the costs of the services provided by the landlord. The services included "employing such staff as the landlord may in its absolute discretion deem necessary to provide caretaking services for the Building … including … where accommodation is provided for the use of occupation of such person a sum equivalent to the market rent of such accommodation".
Despite these covenants, the basement flat was let to obtain a commercial rent. F threatened to apply for a declaration that H was in breach of covenant. As a result, H decided to employ a full time resident caretaker. The caretaker's contract of employment required her to live in the basement flat.
H then sought to recover the cost of doing so and also a sum equivalent to the market rent of the basement flat from the Ts. This greatly increased the total estimated service charge from around £8,000 to £56,000 per year.

Issues
The Ts contended that they were not liable to pay through the service charge for the costs of the caretaker or for the market rent of the basement flat. H accepted that, given a free hand, it would not have thought it appropriate to employ a full time resident caretaker.

First Instance
On the issue of the reasonableness of the estimated service charges, the LVT accepted that H had grounds for concern that F might try to forfeit the headlease. It concluded that it was prudent (viewed from H's perspective) to employ a resident caretaker. It was not, however, necessarily reasonable, within s19(2) of the Landlord and Tenant Act 1985, to impose upon the Ts the full costs of taking the commercial decision to employ a resident caretaker. The LVT concluded it was reasonable to employ – and therefore to budget for – a cleaner rather than a resident caretaker and that the reasonable estimated costs of employing a cleaner were properly to be included within the estimated on account service charges. Having reached these conclusions, the LVT decided that as the costs of employing a resident caretaker were not properly recoverable there could be no recovery of the notional amount of the market rent of the basement, such that it was not necessary to consider the question of whether this notional rent was capable of being challenged under s19 of the Landlord and Tenant Act 1985.

Long leases (continued)

Decision on Appeal
The Tribunal allowed the appeal and found for H. The Tribunal held that it was reasonable for H to employ a full time resident caretaker in order to remedy a breach of covenant in the headlease and to avoid the risk of forfeiture proceedings. Accordingly, despite the fact that a full time resident caretaker was not needed for the proper day-to-day enjoyment of the building, those costs would be costs which were reasonably incurred within section 19(1)(a). Therefore an estimated amount for the on account service charges which included an amount for the costs of employing a full time resident caretaker would be, in principle, a reasonable amount.
The Ts accepted that if the LVT's decision was wrong, such that the costs of employing a full time resident caretaker could reasonably be included in an estimated on account service charge, then so also can there be included a sum in respect of the notional loss of the market rent of the basement flat.

Service charges
Reasonableness - affordability
Hillfinch Properties Ltd v Lessees of Southbourne Court
[2013] UKUT 096 (LC)

Summary
The LVT had erred in failing to consider the tenants' ability to afford works when determining that certain works were reasonably incurred.

Facts
The landlord applied for a determination under s27A(3) of the Landlord and Tenant Act 1985 that the cost of proposed major works were reasonably incurred and that the overall costs were reasonable. None of the tenants contended that the proposed works were unnecessary or that the scope was excessive or that the cost was unreasonable. The only concern was one of affordability.

First Instance
The LVT found the costs of the work to be reasonable but it was not clear whether the LVT had decided the affordability point. The appellant sought permission to appeal from the LVT, one of the grounds being whether the LVT did or should have taken into account the question of affordability. In refusing permission, the LVT said it was not necessary to decide the affordability point so it had not done so and, in any event, the point was not properly raised or argued. The case was appealed to the Upper Tribunal (Lands Chamber).

Decision on Appeal
The Tribunal held that the affordability point had been raised and argued and it was necessary for the LVT to determine the issue. The case was remitted to the LVT.

Service charges
Variation of leases
Brickfield Properties Limited v Botten
[2013] UKUT 0133 (LC)

Summary
The LVT has jurisdiction to order a variation of leases to take effect from a date prior to the LVT's decision and prior to the application to vary.

Facts
The freeholder of 56 flats contained in seven blocks had granted long leases with a covenant to repair and maintain the buildings and a covenant by the lessees to contribute towards the service charge. Qualifying tenants in one of the blocks exercised their right to collective enfranchisement of their block. As a consequence, the total expenditure incurred by the freeholder in maintaining the remaining six blocks of flats was less than it would have been if the freeholder had been obliged to continue to maintain seven blocks rather than six. Thus, the total expenditure by the freeholder, which was capable of being recovered through the service charge provisions, decreased. A further consequence concerned the relevant proportions paid by each of the lessees in the remaining six blocks. If the proportions for each of these flats were added together they now added up to less than 100%.
The freeholder subsequently granted a headlessee to the appellant. In consequence, the rights and obligations of the freeholder under the various long leases of the flats became vested in the appellant. After attempts to agree variations with the lessees failed, the appellant applied to the LVT seeking variations of the relevant leases with effect from the date of the transfer pursuant to the collective enfranchisement ("the Transfer Date") so as to re-establish the 100% total for the proportionate contributions to the service charge expense.

Issues
The issues were:
- Did LVT have jurisdiction to order a variation of leases to take effect from a date prior to the LVT's decision and prior to the application to

Long leases (continued)

vary; and
- If so, whether such jurisdiction should be exercised in the instant case?

First Instance
The LVT ordered a variation of the leases but ordered such variations to have effect from the date of the decision, not the Transfer Date as sought in the application. It did not expressly consider whether it had jurisdiction to order that the variation was to be effective from the Transfer Date, but appears to have concluded that it did have jurisdiction to do so. The LVT decided it should not exercise its discretion because of the delay in making the application and having regard to the contra proferentum rule. The case was appealed to the Upper Tribunal (Lands Chamber).

Decision on Appeal
The Tribunal allowed the appeal. The LVT did have jurisdiction to order a variation of leases to take effect from a date prior to the LVT's decision and prior to the application to vary. There was no justification for refusing to order the variation to take effect from the Transfer Date.

Comment
This is the first known decision of the Upper Tribunal on this issue. It affirms what many LVT's have considered the position to be.

Mortgages

*The editor of this section is Nigel Clayton of Kings Chambers, Leeds and Manchester. Nigel also maintains the specialist website dealing with mortgages at **www.legalmortgage.co.uk**.*

Tomlin order
Enforcement of legal charge - rectification
Lloyds TSB Bank Plc v Crowborough Properties Ltd [2013] EWCA Civ 107

Summary
A bank was entitled to rectification of a Tomlin Order entered into in settlement of its claims to enforce legal charges. The parties had overlooked that one of the scheduled terms involved the release of a guarantee, which had the unintended effect of discharging the charges entered into by the guarantors.

Facts
CP, a company, owed a bank over £29M. Mr & Mrs K were guarantors up to £25M. The bank had security over various properties – some owned by the company and some owned by the guarantors, and had appointed LPA Receivers.
The company and the guarantors claimed the bank had reneged on a commitment to support a property development. The proceedings were compromised by a Tomlin Order. Part of the arrangement was that the guarantees would be released upon payment of £500,000 with payment being secured over two new properties. The unintended effect of the release was that it would free that part of the development owned by the guarantors from the bank's charge because there would no longer be any debt due from them. That was acknowledged to be a drafting error. The underlying assumption was that the development, including the properties owned by the guarantors would remain charged to secure the company's indebtedness. However, it went unnoticed at the time.
The bank sought rectification of the Tomlin Order, effectively to retain security over the properties notwithstanding the release of the guarantees.

First instance
At first instance the High Court refused the claim, holding that what must be shown is a common intention that the bank was to have a separate charge over the guarantors' properties to secure the company's debt. However, this was not something it had already and it was not something which anyone had asked for. There was a mistaken assumption that the charge was wide enough to survive the discharge of the guarantees, but no intention (because of that mistake) to grant a wider charge. Rectification was therefore refused. The bank appealed.

Decision on appeal
The Court of Appeal allowed the appeal and found for the bank. The judge had taken too narrow a view. He posed himself the question whether the parties had manifested an objective intention that fresh charges should be granted. That was not the right question. The grant of a fresh charge was not the only way in which the agreed objective could have been achieved. It was equally valid to characterise the bank's existing right in other, commercial terms – the bank's right was to sell all the charged properties and apply the proceeds of sale towards discharge of the company's indebtedness. On the evidence and on the judge's findings, that was plainly the right that both parties intended the bank to retain.
The fact that the drafting error which led to the

Mortgages (continued)

release of the charges was an erroneous assumption did not remove the drafting error from the reach of rectification (*Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71 applied).

Comment
The schedule to a Tomlin Order is a private contract entered into between the parties. Whilst the court has no jurisdiction over the scheduled terms, as opposed to the body of the Order itself (*Noel v Becker* [1971] 1 WLR 355), it plainly has jurisdiction to consider rectification of the scheduled terms on normal contractual principles. It can also resolve questions of construction as to the interpretation of the scheduled terms (*Sirius International Insurance v FAI General Insurance* [2004] 1 WLR 3251; *Vickbar Ltd v David Freud Ltd [*2006] EWCA Civ 1622).
In drafting more complex Tomlin Orders, it may be appropriate to record contemporaneous notes not only of the terms being negotiated, but the reasons for them, and the underlying basis on which the parties are proceeding.

Rectification of charges register

Effect of e-DS1
Garwood v Bank of Scotland Plc
[2012] EWHC 415

Summary
An Adjudicator to HM Land Registry has jurisdiction to resolve substantive issues of law underlying a claim for rectification of the charges register. The submission of an e-DS1 is effective to cancel a charge and cause it to cease to exist. Where a lender obtains more than it bargained for, it is not entitled to subrogation.

Facts
A borrower purchased a freehold property with a mortgage advance from Mortgage Express secured by a legal charge which was duly registered on the freehold title. The property was then divided into two flats – the ground floor ("Flat A") and the first floor ("Flat B") - but no separate leasehold interests were created.
In due course the borrower made separate applications to another lender, BoS, for mortgage finance ostensibly to purchase Flats A and B, suppressing the fact that he owned the freehold and that there were no long leases in existence.
BoS advanced £97,750.00 on the purchase of Flat A and £96,725.00 on the purchase of Flat B. There were problems and delays caused by the conveyancing solicitors appointed by both the borrower and BoS. They did not create separate leasehold titles; they only produced one executed charge which referred to the advance for Flat B but was registered against the freehold title; and they used the joint advance to discharge the Mortgage Express charge on the freehold in the sum of £134,049.60.
The borrower subsequently purported to grant a 99-year lease of Flat A to a third party, which was registered with a separate leasehold title.
Subsequently, BoS received £91,117.99 apparently to discharge the advance for Flat B. BoS then made an electronic application by e-DS1 to cancel its registered charge on the freehold.
The result was that the borrower still owed BoS the amount required to redeem the advance for Flat A but BoS had been left without security. The borrower became bankrupt and his trustee wanted to create a leasehold interest in Flat B to sell on, and to sell the freehold in the whole property. BoS claimed to have security which the trustee denied. BoS therefore lodged an application to enter a unilateral notice against the freehold title on the basis that it had erroneously discharged its charge. The trustee applied to remove the notice. The matter was referred to adjudication.

First instance
The Adjudicator held that the removal of the charge was a mistake that should be corrected by reinstatement on the register. It was also held that:

- BoS had an equitable charge as a result of the monies advanced by it;
- BoS had a charge by way of subrogation to Mortgage Express;
- The charge entered into is (properly construed) over the leasehold interest in Flat A.

The trustee appealed against these findings and took two further points. First that the Adjudicator misunderstood his jurisdiction – it was not just to decide whether the unilateral notice should remain but to determine the substantive dispute. Second, that the Adjudicator's treatment of the issues was inadequate and superficial and did not amount to an adjudication of the dispute.

Decision on appeal
The High court dismissed the appeal and held that BoS was entitled to be re-registered as proprietor of

Mortgages (continued)

its charge over the freehold title to secure the advance for Flat A which it had cancelled by mistake.
The court held that the charge did not affect a leasehold interest because no such interest existed at the time. The borrower charged whatever estate he had, which was the freehold interest. By a process of correction of mistakes by construction, it was considered to be an equitable charge over the freehold of Flat B. The parties hadn't bargained for a charge over the freehold of the whole property; further a reference to Flat B appeared on the charge itself.

Issue: subrogation
As to the use of the money, it was common ground that an equitable charge by way of subrogation can arise if, as a result of a mistake that gives rise to a claim for unjust enrichment, a lender has failed to obtain the intended security. However, insofar as the advance for Flat B was in anticipation of the grant of a first legal charge over the leasehold interest in Flat B, the use of that advance in part to discharge the Mortgage Express charge cannot give rise to any question of subrogation. BoS did not get what it bargained for, but it got something better – a charge over the whole of the freehold estate in the property. BoS's position at law (albeit not the position it bargained for) fully prevented any unjust enrichment occurring: *Cheltenham & Gloucester Plc v Appleyard* [2004] EWCA Civ 291 at para [42].
Accordingly BoS was not subrogated to Mortgage Express.

Issue: e-DS1
The submission of the e-DS1 acted as both evidence of discharge and an application to alter the register (rr. 114, 115 of the Land Registration Rules 2003). The discharge and cancellation caused the charge to cease to exist at law and in equity.
However, as the Adjudicator found, there was a mistake. BoS knew that it was discharging its charge as security for the advance for Flat B, but it did not know that it was releasing its only security for the advance for Flat A.
An e-DS1 was a unilateral transaction. To invoke the equitable jurisdiction to set aside a voluntary disposition for mistake there must be a mistake of sufficient gravity either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction (*Pitt v Holt* [2011] EWCA Civ 132). Here, the mistake of BoS satisfied each of these requirements. The e-DS1 was therefore liable to be rescinded on the grounds of mistake.

Issue: jurisdiction
Since the Adjudicator had power to decide the underlying substance of the objection on its merits, he was required to decide whether BoS was entitled to have its charge re-registered. There was therefore no jurisdictional inhibition on him setting aside the e-DS1.
If the e-DS1 is to be set aside then the register would have to be brought up to date under paragraph 5(b) of schedule 4 of the Land Registration Act 2002. There were no exceptional circumstances which would justify not exercising the power to alter the register to bring it up to date to reflect BoS's property rights as now determined.

Comment
Norris J commented that the Adjudicator had said it was difficult to conceive of a greater conveyancing muddle. This case is of general interest for a number of reasons. First, it confirms the scope of an Adjudicator's powers to resolve substantive issues of law underlying what, on the face of it, is merely a procedural application (in this case a disputed UN1).
It also deals, consequentially, with disputes about rectification of the charges register (in this case, to bring it up to date to reflect the resolution of the substantive issues). It confirms that an e-DS1 electronic discharge is effective to cancel a charge and to cause it to cease to exist.
Finally, it addresses an unusual aspect of subrogation, that where a lender gets more than it bargained for (which is unusual), it is not entitled to a remedy to reverse an unjust enrichment.

Nuisance and trespass

The editor of this section is Carla Revere of 1 Chancery Lane, London

Nothing to report this month.

Planning

The editor of this section is Saira Sheikh, barrister of Francis Taylor Building)

Injunction

Breaches of planning control - Travellers

Doncaster MBC v AC
[2013] EWHC 45 (QB)

Summary
An injunction was an appropriate remedy to remove travellers from a site they had owned and occupied for over three years without planning permission. Such a remedy was not disproportionate under the European Convention on Human Rights.

Facts
The site, which was in the Green Belt, had been purchased by a member of the travelling community, turned into a traveller site and divided into six pitches which were subsequently sold to six of the defendants. A retrospective planning application for permission for a change of use to a traveller's site was submitted, but rejected by Doncaster MBC (D) on the grounds that there were no very special circumstances sufficient to justify planning permission given the Green Belt situation of the site. This refusal was unsuccessfully appealed to the Secretary of State and to the High Court. D issued an enforcement notice giving the defendants three months to vacate the site, and six months to restore it. This was also unsuccessfully appealed to the Secretary of State, who also refused to grant a temporary permission, but who extended the times for compliance to 12 and 15 months respectively. A High Court challenge to this decision was unsuccessful. The time for compliance with the enforcement passed without compliance, and having refused to consider the defendants' renewed applications, Doncaster MBC sought an injunction under s187B of the Town and Country Planning Act 1990.

Issues
The main issues were:

- Whether eviction of the travellers would unnecessarily interfere with their Article 8 rights and failed to take into account the best interests of the defendants' children in that they would inevitably have to resort to roadside living as Doncaster had failed to provide a sufficient number of traveller's sites; and
- Whether granting an injunction would be a disproportionate response to the breach in question?

Decision
The High court granted an injunction. Section 187B of the Town and Country Planning Act 1990 confers upon the court an original and discretionary jurisdiction that requires the court take into account all of the relevant circumstances. In exercising this jurisdiction the court recognised that granting an injunction would be a drastic and significant disruption to the defendants' lives, especially as they owned the land, and that as D had failed to provide a sufficient number of traveller sites it had to bear some of the responsibility for the defendants' predicament.
However, the site was unsuitable for a traveller's site, the defendants' occupation of the land had always been unlawful, an injunction was the only means by which the unlawful land use could be brought to an end and the factors relied upon by the defendants had been fully considered by the Council, Secretary of State and the courts at every stage. To refuse an injunction and permit the defendants to ignore planning control would be problematic under Article 14 (in line with *Chapman v United Kingdom* (2001) 33 E.H.R.R. 18). Further, it risked bringing the planning system into disrepute insofar as it would indicate to others that they could avoid planning controls by "playing the system" with a number of appeals and repeat applications so as to extend the period of unlawful occupation.
Further, D had made provision for the defendants to move into bricks and mortar housing and there was no evidence that the defendants would suffer from living in such accommodation. Consequently, if the defendants found themselves living on the road after eviction it would be as a result of their choice.

EIA screening

Review of screening decision

R (Evans) v Secretary of State for Communities and Local Government
[2013] EWCA Civ 114

The Court of Appeal has held that nothing in the Aarhus Convention or European legislation required the court to apply anything other than the *Wednesbury* standard to the review of a screening decision.

Facts
P applied for planning permission for 170 dwellings on a site in Sudbury. The District Council initially failed to screen the application under the Environmental Impact Assessment Regulations, but later issued a screening opinion that the development would not have significant environmental effects. This opinion was challenged by the applicant, and in a second screening opinion the Council determined that an EIA was in fact

Planning (continued)

necessary. P then requested the Secretary of State make a screening direction. The Secretary of State subsequently issued a screening decision that the proposed development was not likely to have significant effects on the environment, partly because the development was situated in a natural 'bowl' in the land and a nearby Grade I listed building was well screened by trees. The High court refused the applicant (E) leave to apply for a judicial review of the screening direction made by the Secretary of State. E applied for permission to appeal that decision.

Issues
The applicant argued that:

- The Secretary of State ought to have taken a "precautionary" approach when making the screening decision; and
- The *Wednesbury* test was not the appropriate standard of review.

Decision
The Court of Appeal refused E's application. The Court held that far from failing to take a precautionary approach, the Secretary of State, in concluding that the proposed development "would not cause a significant environmental impact", had in fact taken a more precautionary approach that was required. The challenge to *Wednesbury* as an appropriate standard of review failed on a number of grounds. E's had relied on the Aarhus Convention and its Compliance Committee's concerns about the *Wednesbury* approach. However, this was not part of domestic or EU law; these concerns were general and particularised, may have been incomplete and were of no direct legal consequence. Further there was established domestic (*Bowen-West* [2012] EW Civ 321, *Loader* [2012] EWCA Civ 869) and European (C-508/03 *Commission v UK* [2006] QB 764) precedents that endorsed the current *Wednesbury* approach. The arguments put forward in the present case were essentially a rerun of the arguments in those cases; and in any event a proportionality based test was inapt to apply to a decision of fact, such as whether a development would have significant environmental effects.

Material considerations

Heritage assets and the setting of listed buildings

East Northamptonshire DC v Secretary of State for Communities and Local Government [2013] EWHC 473 (Admin)

Summary
Special regard had to be given to the desirability of preserving the setting of listed buildings when balancing that factor against other material considerations in the planning balance. This was achieved by treating it as the starting point and by affording it considerable weight.

Facts
A developer applied for planning permission for five wind turbine generators and associated development. The District Council refused planning permission on the grounds of unacceptable harm to the local setting and a number of Grade 1 buildings in the locality. The developer appealed, and the Secretary of State's Inspector concluded that the although there would be harm to a number of heritage assets, that harm would be less than substantial, temporary and reversible, such that benefits of the development (to which he attached significant weight) outweighed the harm caused. He granted planning permission for an amended development of four turbines.
The local authority applied to quash the decision.

Issues
There were three issues before the court:

- Whether the Inspector had had special regard to the desirability of preserving the setting of listed buildings in accordance with s66(1) of the Planning (Listed Building and Conservation Areas) Act 1990;
- Whether he had correctly interpreted and applied planning policy on heritage assets; and
- Whether the reasons he had given for his recommendation were adequate.

Decision
The High court granted the application by the local authority and remitted the matter for further consideration. Although the weight to be given to a material consideration was a question of planning judgment (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759), to properly discharge the duty under s66(1) a decision maker was required to accord considerable importance and weight to the desirability of preserving the setting of listed buildings when balancing that consideration against other material considerations which did not benefit from statutory significance. The Inspector had failed to do this as he had treated the harm to the setting of listed buildings as being of equal importance to the wider benefits of the wind farm instead of according the former special weight.

Planning (continued)

Further, the Inspector had incorrectly applied planning policies on heritage assets by limiting himself to assessing the public's ability to understand the assets in question and not addressing the contribution made to the assets by their setting, which was to be affected by the development. Finally, it was held that in failing to give a reasoned conclusion as to whether there were 'planned views' from the heritage asset, the Inspector had failed to give adequate reasons. Mrs Justice Lang therefore remitted the matter.

Comment
Although seized upon by some of the press as a victory for anti-wind farm campaigners, in truth this case does not make new law. Instead, it essentially restates what the statute already requires: that in order to properly discharge their duty under s66(1), decision makers must give considerable weight to the desirability of preserving the setting of listed buildings when balancing that factor against other material considerations.

Neighbourhood areas

Local authorities' discretion over designation

R (Daws Hill Neighbourhood Forum) v Wycombe DC
[2013] EWHC 513 (Admin)

Summary
A local authority has a wide discretion when deciding whether to designate an area as a Neighbourhood Area. In exercising this discretion it must take into account the factual and policy matrix applying to the area.

Facts
A residents' association (D) was established to engage with the Council in respect of a number of sites including two brownfield sites of strategic importance. One of these sites was purchased by a builder and outline planning permission was anticipated in the near future, and the second was already subject to a grant of outline permission. Following the coming into force of the Localism Act 2011, D applied to become a Neighbourhood Forum in respect of a Neighbourhood Area covering inter alia the strategic sites. The District Council subsequently decided in principle to designate a Neighbourhood Area for the Forum, but excluded the two strategic sites from that area. D applied for judicial review of the decision by the local authority.

Issue
D submitted that in excluding the two strategic sites the local authority had failed to give effect to the purpose behind the Localism Act 2011 to give new rights and powers to communities to allow them to participate in the planning process by guiding development in their neighbourhoods.

Decision
The High court refused the application by D.
The court held that s61G(5) of the Town and Country Planning Act 1990 gave local authorities a wide and broad discretion when considering whether an area was appropriate for designation as a Neighbourhood Area. Further, the court held that the exercise of that discretion would be guided by the specific facts and policies relating to the proposed area.
In the instant case, the Council had properly paid due regard to the circumstances existing at the time of their decision, and had properly taken into account the following factors: that it could take up to 21 months for the Neighbourhood Plan process to be completed, by which time development on one strategic site would have commenced and the planning process would have been well under way on the other such that there would have been no useful purpose in including them within the Neighbourhood Area. Further, the likelihood that a referendum would be required over a larger area than the proposed Neighbourhood Area suggested a mismatch between the proposed Area and the area affected. Consequently, the challenge to the limited extent of the designation failed.

Interpretation

Terms of grant of planning permission for change of use

Winchester City Council v Secretary of State for Communities and Local Government [2013] EWHC 101 (Admin)

Summary
A planning permission for a change of use to "a travelling showpeoples' site" was not to be interpreted as a more general permission for a residential caravan site.

Facts
In 2003 Winchester City Council granted planning permission for a change of use over redundant agricultural land to "a travelling showpeoples' site". 15 conditions were attached to the permission, but none restricted people other than travelling showpeople from residing at the site.
In due course the local authority determined that persons other than showpeople came to reside on

Planning (continued)

the site, although this was disputed. The local authority subsequently issued six enforcement notices alleging a material change of use. The occupiers appealed against the notices. The Inspector held that the 2003 planning permission was to be interpreted as a permission for a change of use to a residential caravan site and quashed the enforcement notice. The local authority appealed.

Issues
The main issue concerned the proper application of the principle in *I'm Your Man Ltd v Secretary of State for the Environment, Transport and the Regions* (1999) 77 P&CR 251 that when permission is granted for a certain use, limitations on that use had to be imposed by way of a condition.
Decision
The High court allowed the local authority's appeal in part.
The court held that travelling showpeople constituted a distinct group with distinct needs separate to gypsies and travellers. Consequently there was also a distinction between land used by travelling showpeople and land used by gypsies and travellers more generally and land used as a residential caravan site.
I'm Your Man did not fall to be applied on the facts. Before *I'm Your Man* could be applied it was necessary to determine what use the planning permission for a change of use in fact permitted. Here, the permission for a change of use itself was a limited grant for use as a travelling showpeoples' site, it was not a grant for a change of use to a residential caravan site. It was therefore unnecessary to require a repetitious condition limiting the site to use as a travelling showpeoples' site.

Core strategies

Unlawful adoption

University of Bristol v North Somerset Council [2013] EWHC 231 (Admin)

Summary
A Council's adoption of a core strategy based on an Inspector's recommendations was unlawful. The Inspector had failed to give adequate or intelligible reasons for his conclusion that the local authority's figures made sufficient allowance for latent demand for housing unrelated to the creation of new jobs.

Facts
A Council submitted a draft core strategy for examination, which proposed that the Green Belt would remain unchanged during 2016 to 2026, and also proposed the building of some 14,000 new houses. A university owned land in the Green Belt and challenged the core strategy on the basis that provisions should have been made for the construction of more houses, and for green belt boundaries to be reviewed such that the area for urban land should be extended to cover its land. An Inspector found that the assessment of the need for housing was sound as there was both latent demand and demand unrelated to the creation of new jobs. The university applied to quash the local authority's adoption of the core strategy.

Issues
There were three main issues:

- Whether the duty upon a local authority to cooperate in preparing a development plan for sustainable development under s33A of the Planning and Compulsory Purchase Act 2004 applied where a core strategy had been submitted before that provision came into force;
- Whether the Inspector had given adequate reasons for his conclusions on housing supply; and
- Whether there was a need for a Green Belt review.

Decision
The High court found for the claimant university and held that the adoption was unlawful.
As to the issues raised, first the court held that the duty to cooperate applied only in relation to the preparation of the core strategy and was not retrospective. Therefore, once a strategy was prepared, there was no longer a duty to cooperate.
Secondly, the Inspector had not given adequate or intelligible reasons for his decision. As regards his conclusions on housing provision, his reasons were short and failed to inform of why the local authority's figures included sufficient allowance for latent demand unrelated to the creation of new jobs. Therefore the process leading towards the adoption of the policy was legally flawed and the policy dealing with housing provision was therefore unlawful.
Finally, the Inspector was entitled to conclude that there was a sufficient supply of housing land for 14,000 houses such that there was no need for an urban expansion into the existing Green Belt. No Green Belt review was therefore necessary.

Planning (continued)

Localism

The role of the Secretary of State under the Localism Act 2011.

Tewkesbury BC v Secretary of State for Communities and Local Government
[2013] EWHC 286 (Admin)

Summary

The Localism Act 2011 has made significant changes to the planning system but it did not bring about a fundamental change in the approach to planning applications. The Secretary of State had not undermined the democratic process.

Facts

Two developers applied for planning permission for the development of farmland including the construction of 1,000 new dwellings. The land was not in the Green Belt. Tewkesbury Borough Council failed to make a decision in time on either application, so the developers appealed to the Secretary of State. The Inspector recommended approval, and the Secretary of State granted planning permission and in so doing found that although the proposed development contravened the various documents that together made up the Council's development plan that plan was out of date and did not comply with national policy requiring local authorities to maintain a five-year supply of housing land, and consequently should be given very little weight. (The Council had not produced a local development plan despite the statutory requirement to produce one being some 9 years old),
The Inspector also found that there was also no issue of prematurity, given that the Council's emerging Joint Core Strategy was at the early stages of development and was in any event unlikely to provide for a five-year housing supply.
The local planning authority applied to quash the decision of the Secretary of State.

Issue

The local authority challenged the Secretary of State's decision under the Localism Act 2011, claiming that by determining the need for local housing provision the Secretary of State had undermined the democratic process and acted contrary to the fundamental change said to have been occasioned by the Localism Act 2011, which was intended to transfer power to local communities.

Decision

The High Court refused the application by the local authority.
The court held that both the Inspector and Secretary of State had made their decisions by "an entirely unexceptional" application of established principles and policies to the evidence and had made legitimate decisions on matters of planning judgment and there was no question of those decisions being *Wednesbury* unreasonable.
The Court accepted that the Localism Act 2011 had made significant changes to the planning system but there was nothing in either the wording of the Act or accompanying policy statements that removed the role of the Secretary of State in determining appeals or removed long standing policies such as the need for local authorities to have a five-year housing supply (which were in fact expressly reaffirmed in the National Planning Policy Framework). While the Localism Act 2011 did indeed give local communities more say over developments in their area, there were conditions attached to the exercise of that greater say, such as the need for the preparation of up to date Local Development Plans which made provision for a five-year housing supply.

Comment

This judgment makes it clear that although the Localism Act makes local development plans the starting point of the planning enquiry, power comes with responsibility, and local authorities will need to fulfil their statutory duties to have an up to date development plan in order to benefit from having greater weight attached to those plans.

Costs

Recovery by developers

Tewkesbury BC v Secretary of State for Communities and Local Government
[2013] EWHC 449 (Admin)

Summary

A local authority who unsuccessfully challenged a decision of the Secretary of State to grant planning permission should pay the latter's costs, but not those of the developers who also took part as respondents when there was no need for them to be separately represented.

Facts

The Secretary of State granted planning permission for two developments following their non-determination by the local authority. The court dismissed the challenge. The question for the court was whether developers who took part in proceedings should be able to recover their costs of so appearing when they did not raise issues distinct from those raised by the Secretary of State.

Planning (continued)

Decision
The High court held that whilst it was agreed that following the dismissal of its challenge the local authority had to pay the Secretary of State's costs following *Bolton MDC v Secretary of State for the Environment (Costs)* [1995] 1 WLR 1176 the developers, as the second and third respondents, were not entitled to recover their costs from the local authority.
Although it was understandable that they would wish to be represented, it was not acceptable for the local authority to have to pay for this desire unless there was some identifiable separate issue on which they wished to be heard. The court also emphasised that were the local authority has a weak case, the arguments in favour of separate representation and incurring extra costs were even weaker.

Property litigation

The editor of this section is Daniel Dovar, barrister of Tanfield Chambers

Unlawful eviction
Damages
See Landlord and Tenant (General) section.

Tomlin order
Enforcement of legal charge - rectification
See Mortgage section.

Property transactions

*The editors of this section are Peta Dollar, solicitor and freelance property law trainer (**peta.dollar@freenet.co.uk**) and Alex Troup, barrister of St John's Chambers, Bristol*

Electronic Communications Code
Law Commission recommendations

Background
In June 2012, following a request by the Government as part of its wider review of electronic communications regulation, the Law Commission published a consultation on proposals to reform the Code. In February 2013, the Law Commission published its report recommending how the Code should be reformed. The report does not contain a draft bill, although the Law Commission advises that the revised Code should be a complete redraft, not a mere amendment of the existing Code, and that it should not be retrospective.

Main recommendations
The Law Commission's main recommendations are as follows.

General
The revised Code should continue to regulate relationships between Code operators and landowners and occupiers, whether these arise by agreement or, where agreement cannot be reached, through the procedures prescribed by the Code. It should set out a list of Code rights, granted to Code operators, which will be protected by the provisions of the revised Code, including the right to keep apparatus installed on, under or over land, to inspect, maintain and operate that apparatus and to carry out works on land for installation of apparatus.

Leases
Where Code rights are granted in a lease, the revised Code should make no special provision as to who should be bound by the lease; where Code rights are granted otherwise than in a lease, the revised Code should provide for them to bind successors in title to the grantor and those whose interest derives from the title of the grantor. Code rights will be overriding interests (where they are not granted in a lease) and the grant of such rights will not be a relevant disposal for the purposes of the Landlord and Tenant Act 1987 (so that residential tenants will not enjoy rights of first refusal in relation to these rights).

Assignment
A Code operator should be able to assign the benefit of any agreement or lease that confers Code rights without restriction or payment (except that a lease may require the assignor to give an authorised guarantee agreement). After assignment of an agreement (but not a lease), the assignor will not be liable for future breaches of that agreement after the site provider has been notified of the name and address of the assignee (such notification should also be given on assignment of a lease).

Upgrading
Code operator should be able to upgrade or share equipment within a physical structure of which the Code operator has exclusive possession, so long as the sharing or upgrading is not visible from outside the structure and imposes no burden on the site provider, and any obligation to pay for such upgrading or sharing shall be void.

Code rights
The tribunal (normally the Lands Chamber of the

Property transactions (continued)

Upper Tribunal) should be able to grant Code rights to a Code operator, or order that Code rights shall bind a landowner (so long as none of the grounds for bringing Code rights or the lease granting them to an end are made out by the landowner) if the prejudice to the landowner can be compensated in money and the public benefit that is likely to be derived from the making of the order outweighs the prejudice to the landowner, bearing in mind the public interest in access to a choice of high quality electronic communications services. A Code operator should be free to initiate proceedings for the imposition of Code rights as soon as its notice requiring the grant of Code rights has been rejected by the landowner.

Compensation
The distinction between compensation available to a wide range of landowners and consideration paid only to those who confer Code rights or have them imposed on them should be maintained. Compensation should be payable by Code operators to those against whom Code rights are created, those who are bound by Code rights, those who suffer depreciation in the value of an interest in neighbouring land, those who are required to lop trees and vegetation overhanging a street pursuant to a notice served by a Code operator and those who are entitled to require the removal of a Code operator's apparatus, in respect of the period until the apparatus is removed or becomes the subject of Code rights, and the expenses of removal, where appropriate. Code operators should pay the valuation and legal costs of those claiming compensation.

Removal
Landowners should not have a general right to have apparatus moved or otherwise altered beyond any expressly agreed. There should be a new system for the removal of apparatus that does away with the current overlap between the Code and the Landlord and Tenant Act 1954 (a lease granted primarily to confer Code rights should not fall within the 1954 Act). Code rights should continue despite their contractual expiry while giving landowners the right to have equipment removed when they plan to redevelop or where the Code operator is in breach of its obligations. Where these grounds are not made out, the tribunal may make an order conferring fresh or amended Code rights. Terms on which the Code rights are held may be amended by serving a notice on the other party, in the prescribed form.

Operators' rights
The revised Code should preserve Code operators' rights, in paragraph 10 of the current Code, to install and keep installed lines passing over third party land which are connected to apparatus. There should be rights to object to lines kept installed on or over land and apparatus kept installed on, under or over tidal water or lands. The revised Code should include a right to object to apparatus the whole or part of which is at a height of 3 metres or more above the ground, exercisable by occupiers and landowners of neighbouring land, the enjoyment of which may be prejudiced due to the proximity of the apparatus, unless the occupier or landowner is bound by Code rights in respect of that apparatus. Code operators should have the right to require the cutting back of any tree or other vegetation that overhangs a highway where it interferes with apparatus, and otherwise corresponding with the provisions of paragraph 19 of the current Code. The revised Code should not include a provision equivalent to that in paragraph 8 of the current Code, providing for potential subscribers to serve a notice on Code operators to compel them to use the powers under the Code to acquire an interest in another's land compulsorily.

Lands Chamber and Ofcom
Most Code disputes should be determined by the Lands Chamber of the Upper Tribunal. Code operators should be able to apply to get early interim access to sites where all terms are agreed other than price. Ofcom should produce forms; use of such forms by landowners and site providers will be optional, but use by Code operators should be compulsory. Ofcom should consult on standard forms of agreement between landowners and Code operators, for optional use, and should provide a code of practice covering issues such as the provision of information to landowners, conduct in negotiations with landowners, the content of agreements granting Code rights, and relationships with those whose property adjoins land where apparatus is sited (including highways).

Rectification of charges register

Effect of e-DS1

See Mortgage section.

Residential tenancies

*The editor of this section is Daniel Dovar, barrister of Tanfield Chambers (**www.tanfieldchambers.co.uk**)*

Nothing to report this month.

Restrictive covenant

The editor of this section is Emma Humphreys, solicitor, partner in Charles Russell LLP

Nothing to report this month.

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