

NEWS UPDATE FOR PROPERTY LAW PROFESSIONALS

New speed-up guidance issued

New guidance assessing the costs and benefits of speeding up the construction process has been launched by the Royal Institution of Chartered Surveyors.

Acceleration addresses how to speed up the completion of construction projects and what financial value can be placed on doing so. It also highlights the legal and financial repercussions associated with accelerating projects, and offers best practice guidance for contractors and clients.

The guidance also provides advice for quantity surveyors, who are often tasked with assessing the practicalities, risks and costs involved. In particular, it is likely to fall to the quantity surveyor to review and comment on any acceleration quotation provided by a contractor.

Squatters' loophole to close

Squatters will no longer get legal aid to fight home owners trying to evict them from properties.

Proposals set out in the Sentencing, Legal Aid and Punishment of Offenders Bill will close a loophole in the law that allows squatters to use legal aid to fight evictions in court, leaving landlords to foot the bill for their own legal costs.

Justice Minister Jonathan Djanogly said: "These reforms will ensure we have a legal aid system which is targeted at those who need it most."

The measure is designed to help reduce the UK's legal aid bill – which at more than £2 billion a year is one of the most expensive in the world.

Appeal court rules on landmark buy-to-let case

The valuer of a residential property does not owe a duty of care to a borrower if she or he was instructed by a commercial lender and the borrower is a buy-to-let investor, the Court of Appeal has ruled.

The appeal court's landmark ruling in *Scullion v Bank of Scotland plc (t/a Colleys)* [2011] EWCA Civ 693 has major implications for buy-to-let purchasers, valuers, lenders and insurers, says Marie-Louise Gobbi, the solicitor at Walker Morris who represented the valuer.

The Court of Appeal has ruled that there is a distinction between "standard" purchasers (to whom a duty of care is owed, even if the valuer was instructed by the lender) and buy-to-let investors. The latter, the Court of Appeal

ruled, can be expected to be better equipped to "look after themselves" by obtaining their own valuation.

Scullion had purchased a buy-to-let property, valued for the lender by Colleys. The rent obtainable was only £1,050 per month, compared to the £2,000 stated by Colleys, and the property was subsequently sold.

Scullion claimed Colleys had negligently overvalued both the capital value and likely rental income, and that he had relied on these valuations when deciding to purchase.

At trial, Scullion asserted that Colleys owed him a duty of care and was awarded damages of £72,234 based on the negligently high rental value – no damages were awarded in respect of the

capital valuation which had not caused any loss.

However, the valuer appealed and the Court of Appeal overruled the decision on the basis that the transaction was commercial in nature.

Gobbi said: "The decision is good news for surveyors, and provides a clear basis for resolving similar claims brought in the buy-to-let sector.

"Buy-to-let investors are not in the same position as ordinary domestic purchasers, and cannot assume they will automatically have the same rights and remedies. The case also provides crucial guidance on the calculation of damages in rental overvaluation cases," she added.

Ancient land law to be swept aside

Wide-sweeping reforms to ancient land rights and obligations have been proposed by the Law Commission.

In its report "*Making Land Work: Easements, Covenants and Profits à Prendre*", the Law Commission outlines plans to simplify the law to make it easier for buyers, vendors, developers and mortgage-lenders to work out the complex rights and responsibilities attaching to plots of land.

It is proposed that the law of easements by prescription and implication would be simplified, while restrictive covenants would be replaced with "land obligations". The jurisdiction of the Lands Chamber of the Upper Tribunal would also be extended to cover easements, profits and land obligations.

The report said the law of easements, covenants and profits à prendre are "essential to the effective use of land and are relied upon by a significant proportion of property owners in England", but that change is needed to simplify, modernise and enhance it.

Reform is recommended where needed, the Commission added, while preserving those aspects of the law that function as they should.

The validity and enforceability of existing rights would not be affected by the recommendations.

Law Commissioner Elizabeth Cooke said, "We are recommending an overhaul of law that is ancient, complicated and unfit for modern society and the land registration system. Our draft Bill would bring this area of the law into the 21st century."

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Legislation update

<p>Construction Contracts (England) Exclusion Order 2011</p>	<p>Enactment citation SI 2011/Draft</p> <p>Commencement date 1 October 2011</p> <p>Enabling power Housing Grants, Construction and Regeneration Act 1996, ss 106A(1), 146</p>	<p>Excludes a type of construction contract – a “first-tier PFI subcontract” – from a specific requirement of the Housing Grants, Construction and Regeneration Act 1996, Pt 2. Allows payments in first-tier private finance initiative (PFI) subcontracts to be conditional on obligations being performed in other contracts. A first-tier PFI subcontract is a contract between the non-public body party to a PFI agreement and a third party, essentially the main construction contractor, in which the former subcontracts construction obligations in the PFI agreement to the latter. PFI agreements themselves, as opposed to the subcontracts, are already excluded from the effects of the Housing Grants, Construction and Regeneration Act 1996, Pt 2, which prevented the use of “pay when paid” clauses in construction contracts.</p>
<p>Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011</p>	<p>Enactment citation SI 2011/Draft</p> <p>Commencement date 1 October 2011</p> <p>Legislation affected SI 1998/649 amended</p> <p>Enabling power Housing Grants, Construction and Regeneration Act 1996, ss 108(6), 114, 146(1), (2)</p>	<p>Scheme for Construction Contracts (England and Wales) Regulations 1998. Related primary legislation, Pt 2 of the Housing Grants, Construction and Regeneration Act 1996, makes provision for the contents of construction contracts and the scheme applies where the parties have failed to provide for these contents – in effect, by supplying the missing contractual terms.</p>
<p>Local Democracy, Economic Development and Construction Act 2009 (Commencement No 1) (England) Order 2011</p>	<p>Enactment citation SI 2011/1569</p> <p>Enabling power Local Democracy, Economic Development and Construction Act 2009, s 149</p>	<p>Brings into force the Local Democracy, Economic Development and Construction Act 2009, s 138, on 24 June 2011. This is the provision concerning the Secretary of State’s power to disapply (as regards specified types of construction contract) the operation of any or all of the provisions of Pt 2 of the Housing Grants, Construction and Regeneration Act 2006. It enacts this provision to the extent of enabling the Secretary of State to exercise this power.</p>
<p>Distress for Rent (Amendment) Rules 2011</p>	<p>Enactment citation SI 2011/1542</p> <p>Commencement date Partly on 18 July 2011; partly on 1 August 2011; fully on 8 August 2011</p> <p>Legislation affected SI 1988/2050 amended</p> <p>Enabling power Law of Distress Amendment Act 1888, s 8</p>	<p>Amend the Distress for Rent Rules 1988, SI 1988/2050, to remove the county courts referred to that have been closed by the Civil Courts Order 2011, SI 2011/1465, and other court closures. These courts are divided into three sets of dates from which they will be removed from the lists, namely:</p> <ul style="list-style-type: none"> ■ 18 July 2011; ■ 1 August 2011; and ■ 8 August 2011.
<p>Assured Tenancies (Amendment of Rental Threshold) (Wales) Order 2011</p>	<p>Enactment citation SI 2011/1409</p> <p>Commencement date 1 December 2011</p> <p>Legislation affected Housing Act 1988 amended</p> <p>Enabling power Housing Act 1988, s 1(2A)</p>	<p>Amends the amount of annual rent above which a tenancy cannot be an assured tenancy. The amount is increased from £25,000 to £100,000 with effect from 1 December 2011.</p>
<p>Building (Amendment) Regulations 2011</p>	<p>Enactment citation SI 2011/1515</p> <p>Commencement date 15 July 2011</p> <p>Legislation affected SI 2007/991, SI 2010/2214 amended</p> <p>Enabling power Building Act 1984, s 1(1), Sch 1, paras 1, 4, 4A, 7, 8, 10</p>	<p>Amend the Building Regulations 2010, SI 2010/2214, to add a new type of work in relation to self-certification schemes and exemptions from the requirement to give building notice or deposit full plans cover replacement of windows, doors, roof windows and roof lights in existing buildings other than dwellings. Introduce minor changes to the bodies able to register persons for the purposes of self-certification schemes. Exclude simple repairs to flat roofs, so that the requirements relating to thermal elements do not apply in this instance. Correct minor errors in the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007, SI 2007/991, and remove redundant provisions.</p>

Buyer-to-let beware!



Carl Fain of Tanfield Chambers considers the significance of the Court of Appeals decision in Scullion v Bank of Scotland PLC

In the Court of Appeal's recent decision in *Scullion v Bank of Scotland PLC* [2011] EWCA Civ 693, Lord Neuberger MR distinguished the House of Lords' authority *Smith v Eric S Bush* [1990] 1 AC 831 in respect of purchasers of buy-to-let property. The question for the Court of Appeal was whether surveyors instructed by the proposed mortgagee owed a duty of care to the purchaser of the property when they submitted their report on value.

Scullion, who had previously worked as a plasterer and a jobbing builder, took over a property management company and decided to invest some of the money he had accumulated in his personal pension fund in residential buy-to-let property. He attended a seminar given by Mr and Mrs Churchill where he met a mortgage broker and a Mr Connolly, whose business was locating investment properties. A company called Portfolios of Distinction Ltd (POD) was set up by the Churchills. POD found a new-build property which consisted of 18 flats. Connolly introduced Scullion to this opportunity and Scullion paid a deposit of £1,000 on an unspecified flat.

Thereafter the mortgage broker instructed Colleys to value 10 of the flats. These instructions were given on behalf of a division of the bank that specialised in buy-to-let mortgages. Scullion then entered into a one-sided agreement with POD, which included obligations on POD to propose properties for Scullion to purchase and to accompany each proposal with "a full appraisal sheet showing purchase costs and expected rental returns".

Meanwhile, Scullion submitted a mortgage application for one of the flats and a cheque which included a sum of money to pay for a valuation of the flat for the benefit of the proposed mortgagee. Scullion did not obtain his own valuation, as he understood that the purpose of the valuation was to satisfy the mortgagee of the value of the flat, and that the rent would be sufficient to meet the mortgage payments.

Collins, the surveyor, sent his valuation reports of the flats to the mortgage broker. These were in the form of a letter addressed to the bank with a disclaimer of liability to any third party. In relation to the flat that Scullion purchased, the valuation

report stated that the capital value was £353,000 and the achievable rental value was £2,000 per month. This valuation was reissued in the standard form of a company called Mortgages plc on behalf of Colleys and was headed "Buy to Let Report and Valuation". It identified Scullion as "applicant" and contained various details of the flat, such as its location, number of rooms, and services. The second page of the report contained Collins' view of the rental value of the flat and described the suitability of the location for letting within 60 days as "average". The report also made clear that it may be relied on the bank and its successors in title.

Contracts were exchanged and a mortgage offer of £290,766 was provided by the bank. The purchase completed in October 2002, and thereafter POD failed to let the flat so Scullion decided to find a tenant himself. Local letting agents told him that a rent of £2,000 per month was unachievable and they eventually found a tenant in April 2003, at a rent of £1,050 per month. The tenant vacated a year later and Scullion marketed the property. Eventually the flat was sold in May 2006 for £270,000 (as opposed to the opinion of value of £353,000), leaving a shortfall owed to the bank of £61,932.15.

Court of Appeal decision

The first instance judge found that Colleys owed Scullion a duty of care in accordance with the decision and reasoning of *Smith v Eric S Bush*. The Court of Appeal held that this case was distinguishable on four grounds which all stemmed from the fact that the transaction which the bank was proposing to fund, which the surveyor well knew, was for the purchase of a residential unit, not as the purchaser's residence but for the purpose of investment. It was not a case which involved an "ordinary domestic householder purchasing his home".

The four reasons were as follows:

1. The transaction from the purchaser's point of view was essentially commercial in nature. In such a scenario it is more likely that people who invest in buy-to-let properties are wealthier and more commercially astute and

thus more likely to obtain and afford an independent valuation or survey.

2. In *Smith* the evidence accepted was that surveyors knew that approximately 90% of purchasers relied on the valuations provided to the mortgagee when deciding whether to purchase, and thus there was the overwhelming possibility that those valuations would be relied on. Whereas the only evidence in respect of buy-to-let properties was that a great majority of buy-to-let owners owned more than two properties.
3. A purchaser buying a property to let is at least as interested in its rental value as he is in its capital value. A purchaser needs to make sure that the rental income will meet all the outgoings on the property, and in particular the mortgage. This is as important for the purchaser as making sure that he is not overpaying for the property. Rental value can be a tricky exercise, in particular in respect of rent voids. On this basis, Lord Neuberger MR held that he would expect a valuer in carrying out his valuation to expect a buy-to-let purchaser to obtain his own independent valuation.
4. Where a property is being bought to let, a valuer instructed by the mortgagee would appreciate that his client is primarily interested in the capital value as security, and this is why the valuation section of the report is only concerned with capital value and not rental value. The only section of the report dealing with rental value was headed "Suitability for Letting", which may be intended solely to confirm to the mortgagee that the property was suitable for being let.

To some extent, the facts of this case may seem unfair on Scullion. However, as a point of principle, the Court of Appeal has made it clear to buy-to-let investors that to rely on a mortgagee's valuation will be to their peril and will mean that they have no recourse against the valuer. Those assisting or advising buy-to-let investors should advise the client to consider obtaining an independent valuation.

Carl Fain, Barrister, Tanfield Chambers

Does “tenancy deposit protection” offer any protection?

Two recent Court of Appeal rulings have effectively made the tenancy deposit scheme worthless. Landlords are now under little pressure to comply

The Court of Appeal’s ruling in *Gladehurst Properties v Hashemi* [2011] All ER (D) 180 (May) effectively ended tenancy deposit protection.

Introduced in 2007, the tenancy deposit protection scheme was intended to remove the risk of residential tenants losing deposits, often amounting to hundreds or even thousands of pounds.

Landlords were required either to lodge deposits with a custodial scheme, or to subscribe to an insurance scheme allowing tenants to claim for lost deposits. The Housing Act 2004 aimed to provide protection to tenants

by imposing a penalty of three times the value of the deposit for landlords who fail to sign up to a tenancy deposit scheme.

However, the Court of Appeal held in *Gladehurst Properties v Hashemi* that once a tenancy ends, ex-tenants cannot bring a claim under the penalty rule. Since this is precisely the time when tenants would be most likely to need to bring a claim, the ruling depends on the unlikely event of a residential tenant being aware of the need to take action, and commencing the relevant county court procedure, before the tenancy ends.

Gladehurst compounded the earlier Court of Appeal ruling in *Christelle Tiensia v Vision Enterprises* [2011] 1 All ER 1059, which concluded that landlords can avoid sanctions for non-compliance with the “initial requirements” of the tenancy deposit scheme if they comply before the hearing of a tenant’s claim under the Housing Act 2004, s 214. *Tiensia* allows recalcitrant landlords to put their tenants to significant expense and risk on costs, only to deprive the court of jurisdiction by complying just before the hearing date.

Taken together, *Gladehurst* and *Tiensia* make the protection of the tenancy deposit scheme utterly worthless. The upshot is that landlords are under no real pressure to comply.

It is possible that the scheme will be revived through amendments to the Localism Bill. However, that bill is not due to receive royal assent until late 2011, with its provisions likely to be brought into force in stages over the following year. In the meantime, tenants seeking to retrieve deposits withheld by their landlords may be compelled to try their luck through the small claims procedure – the very lottery that the tenancy deposit scheme was intended to avoid.

Malcolm Dowden, LexisPSL

Assured but not secure

Despite the Housing Act 1988 preserving protection for existing tenancies, tenants whose interests were transferred to a housing association by the Crown Estate Commissioners became assured tenants, not secure or housing association tenants

Regulated tenancies: rights and restrictions

The Rent Act 1977 introduced regulated tenancies of dwellings. A tenant was a protected tenant and then a statutory tenant once the tenancy came to an end. Together protected and statutory tenants are known as regulated tenants. Regulated tenants enjoy security of tenure, succession rights and a system of rent regulation. A tenancy was not capable of being a regulated tenancy if the landlord was any of a number of listed bodies, including housing associations, for so long as that body was the landlord.

Crown Estate Commissioners

From 28 November 1980, tenancies where the Crown Estate Commissioners, as opposed to the Crown itself, was landlord, were capable of being regulated tenancies. The Crown Estate Commissioners is a body corporate charged on behalf of the Crown with the function of holding property under its management.

Housing association and secure tenancies

The Rent Act 1977 also provided a system of rent regulation for tenancies granted by housing associations which could not

be regulated tenancies. Subsequently, the Housing Act 1980 created secure tenancies (the provisions later consolidated into the Housing Act 1985), establishing a regime of rent regulation for tenancies granted by certain landlords, including housing associations. A tenancy granted by a housing association could be both a housing association tenancy and a secure tenancy, so the tenant benefitted from security of tenure and rent regulation.

Assured tenancies

The Housing Act 1988 (the 1988 Act) was intended to facilitate a transfer of rented accommodation from the public to the private sector. The government’s view was that the balance had shifted too far in favour of the public sector, so it introduced assured tenancies into the private rented sector. Assured tenants have less security of tenure as there are mandatory grounds for possession and they do not benefit from rent regulation. They have to pay contractual or market rents. The right of succession is more limited.

Preservation of existing protection

The broad scheme was to continue existing protection for existing tenancies, but to alter the scheme for tenancies granted after the 1988 Act came into force. Tenancies granted after it came into force could not be regulated tenancies, but were assured tenancies. However, a regulated tenant did not lose its status unless, on a change of landlord, the new landlord was not capable of being the landlord under a regulated tenancy.

Similarly, a tenancy granted by a housing association after the 1988 Act came into force could not be a secure or housing association tenancy, but was an assured tenancy. However, existing housing association tenants continued to enjoy their status as secure tenants and to benefit from rent regulation.

Landlord interest ceasing to be held by a public body

Section 38 of the 1988 Act provides that where a landlord's interest is held by a public body and at a later time ceases to be held by it, the tenancy becomes an assured tenancy and cannot be a protected tenancy, housing association or secure tenancy

(unless held again by a public body as defined). This was the case even if the new landlord was a private landlord capable of being a landlord of a regulated tenancy. The definition of "public body" includes "Her Majesty in right of the Crown". This includes the Crown Estate Commissioners.

Crown Estate Commissioners v Governors of Peabody Trust

In *Crown Estates Commissioners v Governors of Peabody Trust* [2011] All ER (D) 63 (Jun), the Crown Estate Commissioners transferred its interest in a number of its tenancies to a housing association. Before the 1988 Act came into force this would have meant that they were no longer regulated tenancies, but were both housing association and secure tenancies.

However, the effect of s 38 of the 1988 Act was that the regulated tenants became assured tenants. The High Court held that the wording of s 38 was clear and the anomalies in the legislation highlighted did not alter this.

This literal construction was not contrary to the intention of parliament. It was right that parliament did not

intend to affect existing tenancies, but the principle was well established before the 1988 Act that if the landlord changed, the tenant was only entitled to the form of tenancy, and security, which the new landlord was capable of offering. The protection available to the Crown Estate Commissioners' tenants on the transfer was still the highest form of security available under the 1988 Act, ie an assured tenancy. Moreover, the Crown Estate Commissioners was not a private landlord. It could be expected to exercise care in choosing to whom to transfer the tenancies. The Crown had traditionally, and by convention, treated its tenants as regulated tenants, even before November 1980.

It could not fairly be said that, under Human Rights Act 1998, tenants of the Crown Estates Commissioners were discriminated against under the 1988 Act as against other regulated tenants. In any event, the state has a wide margin of appreciation in how to draw up regimes for housing protection or other social measures, and the scheme of the 1988 Act fell readily within this.

Joanna Bhatia, LexisPSL

Uncompleted building should not have been entered in the rating list

Lack of small power and partitioning meant that a building was not sufficiently ready for occupation to constitute a hereditament. It should not have been entered in the rating list. A building which is nearly completed cannot be included in the rating list without following the completion notice procedure

A local non-domestic rating list must show each hereditament in the authority's area which is "a relevant non-domestic hereditament". Liability to the non-domestic rate in respect of unoccupied hereditaments arises only where: the property constitutes a hereditament; it is shown in the rating list; the ratepayer owns all of it.

New properties only qualify for rates from the date of completion. The local authority may serve a completion notice:

- in respect of a completed building, specifying the completion date as the date of the notice; or
- in respect of an uncompleted building, proposing a completion date, within

which the building can reasonably be expected to be completed, which must not be more than three months hence.

If the building is not completed within the three months, it is deemed to be completed on that day. There is a right of appeal.

Porter v Trustees of Gladman Sipp

In *Porter v Trustees of Gladman Sipp* [2011] UKUT 204 (LC), the Upper Tribunal (Lands Chamber) ruled that 19 speculatively built office premises had been entered in the rating list without following the completion notice procedure. The tribunal confirmed that the test of whether a building is a hereditament and whether it is completed for the purpose of the completion notice procedure is the same.

The authorities established that a building is only a hereditament if it is ready for occupation. This is assessed in the light of the purpose for which it is designed to be occupied. The building is not a hereditament and does not fall to be shown in the rating list if it lacks features which:

- will have to be provided before it can be occupied for the purpose; and

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- when provided, will form part of the occupied hereditament and basis of its valuation.

There is no scope for including in the rating list a building which is nearly, even very nearly, ready for occupation unless the completion notice procedure has been followed.

The buildings were intended to be occupied as offices. A potential occupier would have required power, tea points and at least some full height partitioning to be installed before occupying them as offices. These items would form part of the hereditament. Therefore, the buildings were not ready for occupation on the material day and had not satisfied the

requirements for entry in the rating list as hereditaments. The tribunal pointed out that the problem could have been avoided if the billing authority had served completion notices. A completion date could then have been established under the completion notice procedure.

Joanna Bhatia, LexisPSL

No relief

Private residence relief was not available on the gain accruing from the sale of a property where the seller spent most of the time at his late sister's property

Pprivate residence relief (PRR) from capital gains tax (CGT) is available on a gain accruing to an individual through the disposal of a property which is, or has at any time in his period of ownership been, his only or main residence. No part of the gain is chargeable if it has been the only or main residence throughout the period

of ownership, except for all or any part of the last 36 months of that period, otherwise a proportion of the gain is chargeable accordingly.

To qualify as a residence the occupation of a property must have some degree of permanence and some degree and expectation of continuity.

In *Lowrie v Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 309 (TC), David Lowrie purchased a property with the intention of renovating it so that he could live in it with his daughter. However, his sister died shortly after the purchase. He lost interest in the project and spent most of his time at his late sister's property.

The First-tier Tribunal (Tax Chamber) had sympathy with Lowrie's situation. However, after his sister's death, his stay at the property lacked the degree of permanence for it to qualify as his principal private residence. Therefore the sale of the property did not attract PRR and a liability to CGT arose.

Malcolm Dowden, LexisPSL

Case digests

Re Edwards
[2011] All ER (D) 22 (Jul); [2011] EWHC 1688 (Admin)
4 July 2011

Drugs – Drug trafficking – Confiscation order – Joint property – Applicant's husband being convicted of drug trafficking offences – Confiscation order agreed over property – Applicant being entitled to one-third share in matrimonial home – Applicant having joint legal interest in two other homes – Whether 50/50 beneficial interest in joint property correctly displaced.

In August 2006, the applicant's husband, S, was arrested for carrying cocaine in his vehicle at a ferry terminal. When interviewed, he made admissions as to money laundering over the previous decade. The applicant and S owned a house in Bolton (Turton Heights) and two properties in Spain (Gabriel and Gloria). Subsequently, S pleaded guilty to the importation of cocaine. He later pleaded guilty to two charges of money laundering. He was sentenced to a total of 12 years'

imprisonment. In September, S was made the subject of an order that restrained him from dealing with his assets. The applicant was also restrained from dealing with her interests in certain assets listed in the restraint order. In October, S made a statement which confirmed that he jointly owned Turton Heights and that there was no mortgage on that property. He also confirmed his joint ownership of Gloria and Gabriel. There was no mortgage on Gloria, but there was on Gabriel. Turton Heights and Gloria had been purchased with the proceeds of sale from a previous matrimonial home (The Grange). Despite being joint owner of the property, the applicant made no witness statement in relation to any of the matters that formed part of confiscation proceedings that had been commenced against S. In August 2007, contrary to the restraint order, Gloria was sold and the proceeds were used to reduce the mortgage on Gabriel. A confiscation hearing was listed for June 2008. Proceedings were adjourned to allow the parties to reach an agreement. A "confiscation summary" document

was agreed under which, in relation to the matrimonial estate, the applicant was "entitled to a ring-fenced amount of £108,818.66 (representing one-third of Turton Heights)". The amount to which the applicant was entitled was based upon a valuation of the property that had been conducted for the purpose of the confiscation proceedings. A confiscation order was made against S in the sum of approximately £713,550. S was given 12 months to allow for the realisation of Turton Heights and Gabriel. Turton Heights was sold by the receiver for significantly less than its estimated value. The ring-fenced amount as specified in the confiscation summary was to be accorded to the applicant. In proceedings brought against the Crown Prosecution Service (CPS), the applicant sought a declaration that she held a 50% beneficial interest in the property held jointly between her and S.

She contended that not only did she have a 50% legal interest in the properties, but that she also had a 50% beneficial interest because, at the time of purchase, it had been intended by the couple that she would have a 50% interest in the properties irrespective of her financial contribution and the source of the money used to purchase them. The applicant

had not been working at the time of the purchase of either the matrimonial property or the Spanish properties. The issue to be determined was, in what circumstances would the starting point of a 50/50 beneficial interest in jointly owned property be displaced.

The application would be dismissed.

The CPS had rebutted the ordinary 50/50 presumption in relation to The Grange and Turton Heights. While in the absence of assistance from the applicant and S, who had had full and direct knowledge of the true precise financial position, it was difficult to be certain as to the precise extent of the applicant's beneficial interest. The best estimate was that reached in the confiscation proceedings. The applicant was entitled to a beneficial interest since she had had an equal beneficial interest in the previous matrimonial home. There was no account of where the money came from to purchase Gloria and of the common intention at that time. It had been bought well into S's course of criminal conduct when considerable sums were being generated by money laundering. Consequently, the CPS had established that the true position as regards Gloria was that contained in the agreement from the confiscation proceedings and that the presumption of equal beneficial ownership was rebutted. As the applicant had given no contribution nor consideration, placing the property in her joint name could be regarded as by way of a gift. The same conclusion applied with Gabriel. Since the applicant had been paid the full ring-fenced amount by the receiver, no further payment was due to her (see paras [48], [52]-[54] of the judgment).

Brent London Borough Council v Shulem B Association Ltd
[2011] All ER (D) 238 (Jun); [2011] EWHC 1663 (Ch)
29 June 2011

Landlord and tenant – Service charge – Flat – Restriction on recovery of service charge – Recovery in advance – Notification requirements – Lessor undertaking building works to lessee's premises – Lessor seeking payment of estimated costs from lessee – Lessor seeking payment of invoice – Lessee refusing to pay and seeking to strike out claim – Judge refusing to strike out claim – Lessee appealing – Whether valid demand being served for purposes of lease – Whether valid demand being served for payment of service charge for purpose of statute – Landlord and Tenant Act 1985, s 20b.

The claimant local authority, the lessor, was the freehold owner of five blocks of flats. The defendant company was the lessee of 15 of the flats. By cl 2(6) of the lease, the lessee covenanted with the lessor to pay and contribute a proportion of the expenses of repairing the exterior of the flat (see para [7] of the judgment). In around 2003, the lessor took the view that extensive works were required to the blocks. The works in question amounted to "qualifying works" within s 20 of the Landlord and Tenant Act 1985 (LTA 1985) and therefore the lessor sought to comply with the consultation requirements imposed by s 20 by, *inter alia*, sending an estimated costs for the works on 12 March 2004. The lessor entered into a building contract with the chosen contractor. Under that building contract, an administrator valued the work as it progressed and prepared certificates of valuation to identify the sums payable on account by the lessor to the contractor. Altogether, nine certificates were issued. Certificates 1–7 inclusive were issued prior to 15 December 2006. On 23 February 2006, the lessor wrote to the lessee seeking payment of estimated costs within 28 days. The lessee failed to pay any sum. On 15 December 2006, the lessor wrote to the lessee enclosing the actual invoice for the major works. Section 20B(1) of LTA 1985 provided to the effect that if any of the costs of the service charge were incurred more than 18 months before a demand for payment of the service charge was served on the tenant, then the tenant was not liable to pay so much of the service charge as reflected the costs so incurred. Subsection 2 provided that sub-s 1 was not to apply if, within a period of 18 months beginning with the date when the relevant costs in question had been incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge. The lessor brought proceedings against the lessee to recover various sums which included sums said to be due under cl 2(6) of the leases. The lessee defended the proceedings on the basis that the relevant costs were incurred by the lessor more than 18 months before 15 December 2006 and relied on LTA 1985, s 20B. The lessee applied to strike out the claim. That application was refused, with the judge holding that the letter of 23 February 2006 was not a valid demand for the purposes of cl 2(6) of the leases and/or for the purpose of s 20B(1). He considered that the letter of 23 February 2006 was a relevant notification for the

purposes of s 20B(2) in that it notified the lessee that the costs which were the subject of LTA 1985, s 20B had been incurred. He declined to strike out the proceedings. The lessee appealed. It was common ground that the letter of 15 December 2006 was, in point of form, a valid demand under cl 2(6) of the lease in each case and that the lessor had incurred costs in relation to the matters covered by certificates 1 to 7. The parties did not agree, however, as to the precise date when the lessor should be taken to have incurred costs for the purposes of s 20B in relation to certificates 1 to 7. The lessor accepted that the costs were incurred in respect of each of the certificates numbered 1 to 7 more than 18 months before the demand of 15 December 2006. Accordingly, if the demand of 15 December 2006 was the only relevant demand, then that demand did not comply with s 20B(). In relation to the costs incurred pursuant to those certificates, as it was not served on the lessee within the requisite period of 18 months from the date when the relevant costs were incurred. The lessor contended that the demand of 15 December 2006 was not the only relevant demand and that the letter of 23 February 2006 was a relevant demand for the purposes of s 20B(1) of the Act. If the letter of 23 February 2006 was a relevant demand, then the lessee accepted that the costs which were the subject of certificates 3 to 7 were incurred by the lessor within the relevant 18 month period.

The issues to be determined were, *inter alia*:

- (i) whether the letter of 23 February 2006, was a valid demand for the purposes of cl 2(6) of the leases; and
- (ii) whether the letter of 23 February 2006, was a demand for payment of the service charge for the purposes of LTA 1985, s 20B(1).

The parties did not agree as to the extent of the statutory requirements. In particular, they did not agree as to what information had to be given to satisfy the requirement that the tenant was notified "that those costs have been incurred". The lessee submitted that a notice for the purposes of s 20B(2) had to state the amount of the costs which the lessor state had been incurred. The lessor submitted that it was not necessary to state the amount of such costs. He submitted that it was sufficient that the notification stated that the lessor had carried out works or provided relevant services.

The appeal would be allowed.

(1) In the instant case, on a construction of cl 2(6) of the lease, because the letter

Case digests

of 23 February 2006 did not ask for a proportion of the lessor's expenses but asked for a contribution based upon figures which had not, or had not necessarily, represented the lessor's expenses, the letter had not conformed to the requirements of a demand for the purposes of cl 2(6) (see para [52] of the judgment).

(2) Section 20B(2) of LTA 1985 was to be interpreted as to be understood that the written notification had to state a figure for the costs which had already been incurred by the lessor. A notice which so stated would be valid for the purpose of sub-s (2) even if the costs which the lessor later put forward in a service charge demand had been for a lesser amount. Second, the notice for the purposes of sub-s (2) had to tell the lessee that he would subsequently be required under the terms of his lease to contribute to those costs by the payment of a service charge. It was not necessary for the notice to tell the lessee what proportion of the cost would be passed on to the lessee nor what the resulting service charge demand would be (see para [65] of the judgment).

The letter of 23 February 2006 had not satisfied the requirement of sub-s (2) that the notification contained a statement 'that those costs had been incurred', when it had not purported to state what the actual costs had been and it had contained a statement that the actual costs might be greater than the estimated costs which were referred to and that the lessor would wish to recover any excess over the estimated costs referred to in the letter (see para [68] of the judgment).

The letter of 23 February 2006 was not a demand for the purposes of cl 2(6) of the lease, nor a demand for payment of the service charge within LTA 1985, s 20B(1), nor a notification in writing for the purposes of LTA 1985, s 20B(2) (see para [70] of the judgment).

Bashir v Ali and another
[2011] All ER (D) 132 (Jun); [2011] EWCA Civ 707
20 June 2011

Sale of Land – Contract – Certainty of terms – Defendants selling property at auction – Property comprising shop and two flats – Described as containing shop and flat – Claimant successful bidder and seeking to enforce contract of sale – Judge finding contract for sale of part of property only with “flying freehold” – Whether judge erred in ordering rectification of contract


The defendants put up a property for sale by auction. The auctioneer inspected the property, and understood from that and from the information that he had been given that the property comprised a ground floor shop, which was let, and the vacant self-contained flat on the first floor, which was to be subject to a lease-back on a long lease at ground rent. The auctioneer and the defendants were unaware that there was also a vacant studio flat on the ground floor. The claimant, who had not inspected the property, was the successful bidder. The defendants' solicitors subsequently notified the claimant that he had not purchased the whole property. A dispute arose between the parties as to whether the contract could be transferred. The claimant issued proceedings seeking specific performance of the contract. The defendants argued that the contract had been for only the shop and the first floor flat, which was effectively for the sale of a “flying freehold”, with the freehold of the studio flat and rear garden retained. The judge found that the parties, knowing of the existence of the vacant ground floor flat, would have appreciated that the description of the property and the details of the accommodation as comprising only the shop and the first floor flat were

incomplete. Second, the reserve and actual price reflected the value of the reversion on the shop lease and a lease on a nominal rent for the first floor flat. Accordingly, the judge found that the objective observer would have realised that something had gone wrong with the language of the contract, and would not have expected the contract to give a gift of vacant possession of an additional flat to the purchaser. As a result of those findings, the judge gave effect to the defendants' construction as she regarded it as the only sensible and workable construction if the contract were not void for uncertainty, and dismissed the claim. The claimant appealed.

The issue was whether the judge had erred in rectifying the contract so that it was for the sale of the shop and first floor flat only.

The appeal would be allowed.

On the proper construction of the contract, the construction of the claimant was to be preferred. If there had been an intention to sell only part of the freehold, it was simply inconceivable that that would not have been highlighted in the clearest possible terms in the catalogue. The judge had been right to conclude that the wording of the auction catalogue together with the associated documentation, as well as commercial reality, made it impossible to interpret the contract as one for the sale of only part of the freehold of the property. All those documents pointed to a sale of the entire registered title and not just part of it. The wording of the documentation in the instant case was clear, and if it was given its ordinary meaning the results were perfectly workable. It might have resulted in a good bargain for one of the parties, but that was not in itself a sufficient reason for supposing that the contract did not mean what it said. The commercial advantage concerned was not so great that it moved the case into the sphere of irrationality and arbitrariness.



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