Butterworths
Property Law Newsletter
April 2012
Vol 4 Issue 4
NEWS UPDATE FOR PROPERTY LAW PROFESSIONALS

Government plan targets "neighbours from hell"

A new type of court statement, which aims to make it easier for social landlords to deal with anti-social tenants, has been announced by the government.

The move aims to help landlords present a stronger case in court by enabling them to exhibit the impact of anti-social behaviour on the entire community, not just individuals.

It comes ahead of new measures to tackle anti-social behaviour and strengthen the hand of landlords that will soon be announced by the government.

Housing minister, Grant Shapps, said the new court statements will help landlords end the agony of tenants who have suffered cruel and nasty behaviour from neighbours, and have endured living alongside the perpetrators for months or even years before they can be evicted.

He said that over the past six months the new tool, developed by the sector with government funding, has been piloted by 11 landlords across the country, and has already proved successful in 21 court cases where it has been vital in assessing the harmful impact of anti-social behaviour.

Shapps said: "These new statements have already proved their mettle in court, with landlords confident that judges are taking them seriously. So I would encourage all landlords to make these statements part of their toolkit for tackling anti-social behaviour, and reclaim the streets from the disruptive thugs who think they can make everyone else's lives a misery."

Appeal court rejects challenge to starter tenancies

A case that threatened the future of housing association starter tenancies has been rejected by the Court of Appeal.

The court upheld the right of West Kent Housing Association to evict tenant, Jack Haycraft. The housing association sought possession of the West Kent flat – which Haycraft moved into in May 2009 on a starter tenancy – following a series of complaints and allegations of anti-social behaviour.

Haycraft unsuccessfully tried to use West Kent's internal appeals process to contest the eviction, but then tried to pursue the matter through the courts, on the grounds that a possession order would breach his human rights.

Haycraft argued that a possession order was not a proportionate response to the complaints against him. He asserted that as he disputed the allegations against him the court should decide the truth of them, not his landlord.

Delivering the appeal court's main judgment, Lord Neuberger said the allegations had been properly investigated by West Kent and found to be established in a perfectly well reasoned manner.

He found that Simpkiss J had been entitled to conclude that there had not been a strong enough case put forward by Haycraft to justify a full hearing on whether it would be proportionate to order him to give up possession of his flat.

Andy Lane, the Hardwicke Chambers barrister who acted for West Kent, said the decision will encourage housing associations to pursue good internal review procedures and continue their starter tenancy schemes.

"Nobody disputes that it is important that a tenant's right to respect for their home is protected by the courts, and in my experience the social housing sector appreciates this as much as anyone. But that protection must extend in anti-social behaviour cases, such as here, to the victims of such incidents and proper regard has to be had to a landlord's genuine and reasonable attempts to consider such rights prior to taking possession proceedings."

Court of Appeal rules on reasonableness of rentcharges

A recent Court of Appeal decision emphasises that service charge contributions secured by rentcharges will be viewed as reasonable even if the paying party does not benefit from all of the services he pays for.

In Smith Bros Farms Ltd v Canwell Estate Co Ltd, Canwell – which owned an estate's roads, sewers and sewage treatment plants – claimed for unpaid service charges from Smith Bros which owned two farms on the estate and benefited from some but not all of the services provided which were secured by a rentcharge.

Hardwicke barrister, John de Waal says: "Estate rentcharges...are a way of ensuring that landowners who benefit from common services such as roads or sewerage services provided by a management company can be made to pay for services provided by the owner of the common parts, the 'rent owner'. But what if the landowner considers that the charges are not reasonable?"

In *Canwell*, he says, the Court of Appeal discussed the workings of the Rentcharges Act 1977 and outlined how the question of "reasonableness" was to be approached.

"The case confirms that the paying party can challenge the service charges for 'reasonableness' as and when they are charged," he says.

Conveyancing solicitors acting for individuals or companies buying freehold land subject to a rentcharge need to consider the terms of the rentcharge and the sums that have been historically charged very carefully, he adds.

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Published by LexisNexis, Halsbury House, 35 Chancery Lane, London WC2A 1EL

Printed by Headley Brothers Ltd.

ISSN: 2040-0128

LexisNexis®

Break notices: tenants beware

Recent case law illustrates the importance of complying with conditions attached to a break clause as ***Jonathan Upton*** *reports*

In times of austerity, it is not surprising that commercial tenants are increasingly looking to quit or move premises in search of a better deal. A tenant may be able to exercise a break clause to determine the lease before the end of the contractual term.

Although the operation of a tenant's break clause is always conditional upon the giving of the requisite notice, it may be expressed to be conditional on other matters as well. Common conditions are: the payment of the reserved rent up to the date of termination; reasonable performance of all the covenants in the lease; substantial performance of all the covenants in the lease; the absence of material breaches of covenant; or the absence of any breach of a material covenant.

In two recent decisions, *Ibrend Estates BV v NYK Logistics (UK) Ltd* [2011] EWCA Civ 683 and *Avocet Industrial Estates LLP v Merol Ltd* [2011] EWHC 3422 (Ch), the Court of Appeal and the Chancery Division considered whether a break clause had been validly exercised by the tenant. In both cases, the court held that the tenant had not determined the lease and remained liable to pay rent to the landlord until the lease was validly terminated.

Payment due under the lease

Payment due under the lease is not limited to the rent being paid up to date. In *Avocet Industrial Estates LLP v Merol Ltd*, Morgan J held that the tenant's failure to pay default interest invalidated a break notice as the debt had remained unpaid as of the break date.

The claimant landlord (L) had demised a ten-year commercial lease to the defendant tenant (T). Clause 45 of the lease entitled T to give not less than three months' notice to terminate the lease on a specified break date. Under cl 45 a break notice would be of no effect where at the break date any payment due under the lease had not been paid, where there was a subsisting material breach of T's covenants, and where T had not paid a sum equal to six months' rent to L. Time was of the essence in respect of cl 45. T served a break notice along with a letter stating that T was not aware of any breach of the lease. The day before the break date, T delivered a cheque by hand for six months' rent along with the keys to the property, and confirmed that it had paid outstanding charges, was not in breach of any pre-conditions under cl 45 and had vacated the premises. T also stated that it was unaware of any outstanding amounts owing, that it had not received any notice from L that it intended to draw on a deposit account for any breach by T, and affirmed its right under the lease to terminate it pursuant to cl 45.

L claimed that the break notice given by T was invalid. The issues for determination were whether: (1) the provision of a cheque a day prior to the break date constituted payment on or before the break date, where there was no definition of "paid" under the lease; (2) T was liable for any unpaid amounts as of the break date, specifically for default interest allegedly due under cl 14.1 for various late payments for rent and other charges, where T had not received a demand from L; (3) if default interest were due, L was estopped from recovering it because the course of conduct amounted to a representation that default interest would not be charged without a demand; and (4) there had been an estoppel by acquiescence.

Giving judgment, Morgan J held: (1) L was not entitled to reject T's tender of a cheque on the day before the break date. There had been a consistent course of dealing which clearly indicated that L had agreed to accept cheques. The fact that time was of the essence under cl 45 did not mean that L had to be paid in cleared funds and not by cheque; the implied agreement applied to every type of sum due under the lease which fell due during the parties' course of dealing. (2) A demand by L under cl 14.1 was not necessary in relation to any default interest payable under that clause; there was nothing in the wording of cl 14.1 which indicated that it contained a pre-condition that L serve a valid demand on T before a liability for default interest arose. Furthermore, it was unlikely that there would have been any real practical difficulty in T knowing what sum it had to pay in relation to default interest even without a demand from L. (3) There was no positive statement that gave rise to an estoppel by representation. (4) L's failure to inform T of any amount that was due as default interest did not raise an estoppel by acquiescence, as it could not be established that L knew before the end of the break date that T was mistaken when it stated that it did not owe any sums under the lease.

Vacant possession

Another common condition is that the tenant must have delivered vacant possession of the property before the break notice expires. In *Ibrend Estates BV v NYK Logistics (UK) Ltd* [2011] EWCA Civ 683, the Court of Appeal considered the meaning of the expression "vacant possession" in the context of a break clause.

T had taken a lease of warehouse premises from L which included two tenant's break clauses. The first entitled T to terminate the term in April 2009 and if that option was not exercised, the second entitled T to terminate at a subsequent date. The first break clause provided that for it to be effective, the tenant had to have delivered up vacant possession of the premises on the first date of determination. T had given L notice of its intention to end the lease in April 2009. L commissioned a schedule of "dilapidation repairs" which would need to be performed pursuant to T's obligations under the lease. A site meeting to review the necessary repair works took place only two days before the termination date. By that time, the premises were clear of T's fixtures, fittings and stock. T agreed to undertake the minor repairs necessary and L indicated that it would send someone to collect the keys, although that did not

happen before the termination date. T's contractors completed the repairs six days after the termination date. There were two issues: (1) had T given vacant possession by the due date; and (2) if it had not, then whether L had (by offering to send someone to collect the keys) waived the condition.

The meaning of "vacant possession" was considered in *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264 and by Lewsion J, as he then was, in *Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd* [2006] EWHC 1008 (Ch); [2007] 1 P&CR5 in the context of a conditional break option in a lease. In both cases, the point turned on two tests as explained in Lewison J's distillation of the *Cumberland* decision:

> *"[41] ...The first test looks at the activities of the person who is required to give vacant possession. If he is actually using the property for purposes of his own otherwise than* de minimis*, he will be held not to have given vacant possession. Thus in* Norwich Union v Preston *[1957] 1 WLR 813 the borrower continued to keep his household furniture in the mortgaged property after he had been ordered to give possession of it. That was an activity carried out by a person who ought to have given possession.*
> *[42] The second test looks at the physical condition of the property from the perspective of the person to whom vacant possession must be given. If that physical condition is such that there is a substantial impediment to his use of the property or a substantial part of it then vacant possession will not have been given. As the Court of Appeal said in the* Cumberland *case, that is likely to be satisfied only in exceptional circumstances."*

In *Ibrend*, the Court of Appeal (Ward, Moore-Bick and Rimer LJJ) held that if T was to satisfy the vacant possession condition in the break option, it had to give such possession to L by midnight on the designated date and not a minute later. The concept of "vacant possession" in that context was not complicated: it meant that at the moment that "vacant possession" was required to be given, the property was empty of people and that the purchaser was able to assume and enjoy immediate and exclusive possession, occupation and control of it. Since T had not given such possession to L on the relevant date, it had remained in occupation. T's argument amounted to the proposition that, provided that it would have downed tools and left the warehouse the moment that L asked it to, its occupation after the designated date was not inconsistent with L's right to vacant possession and therefore it had given such possession. That was not a correct statement of principle. If right, it would mean that a vendor who (perhaps retaining an extra set of keys) continued (without the purchaser's consent) to occupy the sold premises after completion until such later date as he knew the purchaser would actually seek to occupy it himself, at which point he willingly departed, would have given vacant possession on completion. Such a proposition was obviously wrong.

In respect of the waiver argument, a landlord's mere oral uttering of words, such as those used by L in relation to collecting keys, could not thereby extinguish a legal estate in a term of years vested in his tenant. There was an absence of any writing satisfying the Law of Property Act 1925 s 53(1)(a), no consideration moving between the parties, no acts performed by T in reliance on L's statement as to the keys that might have enabled it to assert that it would have been inequitable for L to go back on its words, and nothing else that might have entitled T to hold L to them. In those circumstances, L's words had no effect on the parties' respective rights and legal positions and there was no substance in the waiver argument.

Conclusion

A tenant of commercial premises that has carried out alterations and is required to reinstate at the end of the term is well advised to start the works in good time before the break date. If works have started but will not be completed before the break date, *Ibrend* suggests the tenant may have to yield up possession part-way through the works and then seek readmission as a licensee. Failure to do this may result in the tenant being liable to pay rent for the remainder of the term.

Both these cases highlight the importance of complying with conditions attached to a break clause. A failure to satisfy the conditions will be costly. Advice should be sought and in good time ahead of the break date so that the tenant can evaluate all of the options and achieve the desired result.

Jonathan Upton
Tanfield Chambers

Grabbing the headlines

Adam Harmer *examines how HSBC's decision to slash its law firm panel may change the face of conveyancing*

Headlines abounded following HSBC's decision to reduce its conveyancing panel down from thousands of law firms to just 43 firms to cover the whole of the UK: "Competition and choice under threat"; "Solicitors slam HSBC conveyancer panel"; "HSBC radical separate representation move splits market" to name but a few. It is, of course, understandable in today's conveyancing climate that banks and other lending institutions wish to have greater security, but are there ways to give comfort to lenders without the need to restrict the number of firms that appear on their panels?

One of the simplest ways for solicitors to demonstrate that they are capable of looking after the interests of lenders is to ensure that the conveyancing process they use is efficient, professional and, most importantly, thorough. Most firms that deal with conveyancing (both residential and commercial) will have structures in place to deal with what is usually a fairly standard process for the purchasing, selling, and re-mortgaging of property. However, is a good process structure alone sufficient to give the necessary comfort to lenders?

Increasing challenges

As all conveyancers will be aware, the current property climate has increased the challenges they face, which in turn has increased the pressures (in terms of time, monies which can be charged for fees, and competition) upon them.

Even the best conveyancer using the best conveyancing processes cannot resolve every title issue that arises during the course of a transaction. Adverse entries on title and the timing of the transaction can thwart diligent conveyancers in providing a clean title to their client or providing sufficient peace of mind (and thereby security) for the bank.

Title insurance

How can these issues be resolved? One option is for title insurance to cover the points that are not able to be solved from a legal position (such as the inability to locate the necessary entities to resolve any given issue) or are unable to be solved within a timeframe which is acceptable to all parties concerned with the transaction.

Using title insurance to resolve what appear to be title issues without solution, or to provide assistance to allow a transaction to complete in the necessary timeframe, is nothing new. Insurance can cover the majority of adverse title issues which arise, and which are noted on the title to any given property. However, can insurance be part of the conveyancing process to provide comfort to lenders, if the issues are not identified at the outset? Without an identifiable issue upon which to base insurance, providing a policy to cover a specific risk is extremely difficult without a lot of conjecture and speculation – a foundation on which conveyancers and insurers alike do not necessarily like to work. Therefore, without insurance to cover the specific risk, the bank's security may not be as strong as they would have expected.

A marriage of convenience?

With all the pressures that conveyancers already face, asking them to change their processes and the way they deal with conveyancing transactions could be difficult (and potentially costly). However, an alternative solution could lie in a marriage between redefining processes and the use of title insurance. Such a union would:

- reassure lenders that the opportunity for error and/or fraud has been reduced, thereby boosting the prospect of ongoing and new panel membership;
- help conveyancers assess and insure more efficiently;
- provide time and cost savings for conveyancers.

The majority of firms dealing with conveyancing transactions, and lenders alike, would benefit from a system which is able to provide the above. It would not only deal neatly with all the requirements which firms expect of their conveyancers, ie to identify and consider issues which are noted on the registered title, but also the requirements of the bank, which state that any issues which could affect their security have been identified and considered and suitably dealt with. Will it ever be possible to have a system which is both beneficial to firms and lenders alike, or is that only a pipe dream? Who knows what the future may hold, but what is clear in today's climate is that changes are coming and the ability to adapt and embrace these changes, may for some, be the key to survival.

Adam Harmer,
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An edited version of this article first appeared in New Law Journal *(www.newlawjournal.co.uk).*

Costs not included

Service charge recoverable for services necessary for the better use and enjoyment of a property did not include the landlord's costs of proceedings.

As a matter of law, the costs of legal proceedings are only recoverable via a residential service charge if the wording of the lease allows it. A clause allowing for recovery of such fees should be clear and unambiguous (see *Sella House v Mears* [1989] 1 EGLR 65).

In *Twenty Two Clifton Gardens v Thayer Investments* [2012] UKUT 71 (LC), the Upper Tribunal (Lands Chamber) held that the landlord's legal fees and the fees of its expert surveyor, in respect of legal proceedings before the leasehold valuation tribunal (LVT), were not recoverable as service charge under the terms of the lease.

Better use and enjoyment of the property

The landlord could provide such other services as it deemed necessary for the "better use and enjoyment" of the property by the tenant and other occupiers of the building. This did not include the cost of bringing the LVT proceedings:

- the reference to "other services" must be to services other than those already referred to in previous clauses and so did not include enforcement matters already dealt with expressly (see below);
- the cost of bringing LVT proceedings was not necessary for the better use and enjoyment of the property. The collection of service charges is a by-product of the provision of the services for the better use and enjoyment of the property; it is not a service which in itself enables the tenant to better enjoy the property. The provision covered any services deemed necessary for the better physical use and enjoyment of the property not otherwise covered in the other clauses.

Enforcement of tenant covenants

The landlord was entitled to recover as service charge the cost of carrying out its obligations. One of those was to enforce performance by "the Lessee" of other flats in the block of the covenants in the leases "of the other flats". The tribunal confirmed that despite the capital "L" used for "Lessee" it was clear that the obligation was to enforce the tenant covenants in leases other than the tenant's lease. It could not be relied upon as a basis for recovering the costs of enforcing compliance by the tenant of its covenants.

Cost of staff and agents

The lease confirmed that the landlord could employ and remunerate such staff or agents in the performance of its obligations as it saw fit. The tribunal confirmed that this could include employing solicitors and surveyors if appropriate. However, as the provisions dealing with its obligations did not entitle the landlord to recover the LVT costs, this clause did not assist it.

Joanna Bhatia

Ransom position

A freeholder can justify the inclusion of a restrictive covenant in a transfer on collective enfranchisement if it materially enhances the value of other property. This does not include the ability to charge for the relaxation of a covenant.

The exact form and content of the conveyance on a collective enfranchisement claim, in the absence of agreement, is prescribed by statute (Leasehold Reform, Housing and Urban Development Act 1993, s 34(9), Sch 7, para 5). It is to include (among others) such restrictive covenants as the freeholder or the nominee purchaser may require to ensure the continuance (with suitable adaptations) of restrictions in any lease subject to which the relevant premises are to be acquired. This includes restrictions affecting the relevant premises which are:

- capable of benefiting other property; and
- (if enforceable only by the freeholder) are such as materially to enhance the value of the other property.

In *Kutchukian v The Keepers and Governors of the possessions and Goods of the Free Grammar School of John Lyon* [2012] UKUT 53 (LC), the freeholder argued that the conveyance to the nominated purchaser should include a restrictive covenant in very similar form to that in the headlease of the property, prohibiting certain uses.

The Upper Tribunal (Lands Chamber) disagreed on the basis that the inclusion of the restrictive covenant would not materially enhance the value of other property.

Estate management scheme

It was agreed that, after the transfer, the provisions of an estate management scheme governing the area in which the property was situated, would apply to it. There was no significant prospect of the scheme being amended to allow some objectionable use which at present it prohibited.

The evidence was that the scheme was effectively as good as the restrictions in the restrictive covenant. The covenants in the scheme were qualified (the freeholders could not unreasonably withhold consent to the relevant uses), whereas those in the headlease were absolute. However, this did not bring any significant benefit to the freeholder such as to "materially to enhance the value of other property". If there was a realistic prospect of another use of the property (for which planning permission had been obtained) and it would be difficult reasonably to withhold consent to it under the scheme, it could become a permitted use on a successful application to the Upper Tribunal (Lands Chamber) to modify the restrictive covenant.

Theoretical issues

There was also a lack of any evidence showing any real problems on the estate in question, only theoretical situations which, if they did occur, the freeholder could control satisfactorily under the estate management scheme.

Not an envisaged benefit

This was enough to reject the inclusion of the covenant. However, the tribunal also confirmed that the freeholder's principal reason for wanting to include the restrictive covenant was so that they would continue to have what they perceived to be a ransom position (ie, to enable them (subject to any application to modify the covenant) to charge the nominee purchaser or its successors for consent to relax the terms of the covenant). This was not a benefit envisaged by the words "materially to enhance the value of the other property".

Joanna Bhatia

No direct benefit required

A rentcharge qualifies as an estate rentcharge even if it does not directly benefit the chargor's land.

A rentcharge is a legal interest in land and can be enforced against successors in title to the land charged.

With certain exceptions, the creation of new rentcharges after 21 August 1977 is prohibited under the Rentcharges Act 1977 (RA 1977) s 2.

One of the exceptions under RA 1977 s 2(4) is an "estate rentcharge" created for the purpose of:

- ensuring the performance of positive covenants ("covenant supporting rentcharges");
- meeting or contributing towards the cost of the performance by the chargee (rent owner) of covenants for the:
  - provision of services;
  - carrying out of maintenance or repairs;
  - effecting of insurance; or
  - making of any payment for the benefit of the land affected by the rentcharge or for the benefit of that and other land ("service charge rentcharges").

The right of entry can be exercised on non-performance of such covenants to enforce them. That right is exempt from the perpetuity rule. Rentcharges are used in development schemes to support a positive covenant to contribute to the costs of shared elements of the development.

Direct benefit necessary?

In *Canwell Estate Company v Smith Brothers Farms* [2012] All ER (D) 30 (Mar), the Court of Appeal held that a rentcharge on Smith Brothers Farms' land was valid even though the contribution by it was towards the cost of upkeep of roads on the relevant estate over which it had no right of way. Smith Brothers Farms were placing undue emphasis on the words, in the service charge rentcharges provision, "for the benefit of the land affected by the rentcharge":

- the opening words of the service charge rentcharges provision refer to the purpose for which the rentcharge is created. The rentcharge here was created for that purpose (ie meeting or contributing to the cost of performance of service charge

rentcharge covenants), as distinct from the pure income profit purposes prohibited by RA 1977;

- the focus is on the overall beneficial purposes of the rentcharge for the estate, not on the specific, direct benefit for particular pieces of land affected. It is sufficient that the purpose of the rentcharge is performance of a covenant that will benefit the land affected directly or indirectly;
- the reference to "...that and other land" was important. The beneficial purpose does not have to be directed solely to the chargor's land. This was the case here where other parts of the estate benefitted from the performance of the covenant.

Anti-avoidance

Under RA 1977 s 2(5), a charge of more than a nominal amount is not treated as an estate rentcharge unless it represents a reasonable payment for performance by the rent owner of service charge rentcharge covenants.

The Court of Appeal confirmed that the aim of the legislation was to prevent circumvention of the general prohibition on rentcharges for pure income profit. It did not follow that the validity of a rentcharge depends on the reasonableness of the amount calculated from time to time. If the estate rentcharge is legitimate it is valid from the outset. If the payment sought is not reasonable in relation to the performance of the covenant, then the rentcharge cannot be relied on to collect that particular payment. It is "not treated" as an estate rentcharge in those circumstances, but the rentcharge does not cease to be valid.

No express covenant

The court below had found that there was a valid rentcharge even though there was no express covenant to provide services. The transfer was construed to include such a covenant. Permission to appeal on this ground was refused.

Contribution to repair of all roads on the estate?

Smith Brothers Farms argued that a clause referring to the repair of "…roads so that the same shall be adequate for the use of the [property] on the conditions referred to" did not refer to all the roads on the estate and so it was not liable to contribute to the cost of maintaining them all. It only had a right to share the use of one road on the estate (for which it had a separate obligation to contribute to the cost of repair) and the right to use service media under the estate roads did not justify it being liable to contribute to the upkeep of the surfaces of all estate roads.

The Court of Appeal disagreed. The services were not supplied by Canwell on an individual basis to particular landowners of separate areas of land. They were supplied for the benefit of the estate as a whole, on which many different landowners owned land and from which they all stood to derive some benefit. Under the scheme of contribution affecting them all Canwell rendered the services and owned the roads. This included all estate roads which it covenanted to maintain and Smith Brothers Farms were bound to contribute to a share of that total cost as set out in the transfer.

Joanna Bhatia

Case digests

Lawrence and another v Fen Tigers Ltd and others
[2012] All ER (D) 180 (Feb); [2012] EWCA Civ 26
27 February 2012

Nuisance – Noise – Motor racing – Defendants using land for motor racing – Claimants acquiring land nearby – Claimants alleging nuisance by noise – Court finding noise constituting private nuisance – Defendants appealing – Whether court erring in law.

In 1975, the fourth defendant (TW) obtained planning permission to construct a sports complex on part of his land. The development included a stadium and associated facilities (the stadium). TW entered into an arrangement with the first defendant (D1) under which D1 used the stadium for speedway racing. Additional forms of motor racing commenced at the stadium. The local authorities were supportive of those activities and, in 1997, a certificate of lawful use was granted which stated that stock car racing and banger racing had become an established use of the stadium and was therefore lawful within s 191 of the Town and Country Planning Act 1990. In 1992, TW entered into an arrangement to construct a motocross track on land at the rear of the stadium owned by TW and the fifth defendant, D5 (the track). The local planning authority granted planning permission for change of use from agricultural land to off-road motorcycle track limited to one year. The track and associated facilities were constructed. In 2002, permanent planning permission was granted for the track. The conditions on the permission included restrictions on days and times of use and on noise levels. The conditions also required that all events and practice activities be supervised by the third defendant (Moto). In 2003, TW and D5 granted Moto a ten-year lease of the land on which the track was located. In 2005, TW sold the stadium to the sixth defendant, JW. Events at the stadium were organised by the second defendant (DC). In 2006, the claimants bought a house situated 560 metres from the stadium and 864 metres from the track. They alleged that they had been unaware of the various forms of motor sport that took place at the stadium and the track. They complained to the authority about the noise of motor sports. The authority investigated and, on two occasions, served notices asserting a breach of the planning permission conditions relating to the track. In 2007, the authority served abatement notices under the Environmental Protection Act 1990 on DC and Moto. A further abatement notice was served on D1, which had, by the time of the instant proceedings, gone into liquidation. In 2008, JW sold the stadium to DC and his brother (trading as RDC). Works were carried out to reduce the noise from the track and stadium. The authority was satisfied with those works. The claimants continued to make complaints and eventually commenced proceedings against the defendants for private nuisance. The judge held that the noise generated by the motor sports at the stadium and the track constituted a nuisance to the claimants for which DC and Moto were responsible. He held that JW was only responsible for the nuisance for a limited period between a previous surrender of a lease of the stadium and its sale to RDC. JW was held not liable for the period when he was lessor of the stadium. TW and D5 had had no responsibility for nuisance emanating from the track because

they had been lessors of the property rather than operators of the motocross activities. The claimants were awarded damages which were apportioned between DC, Moto and JW. Further, the judge held that the claimants were entitled to injunctive relief restricting the noise emissions form the stadium and track. DC and Moto appealed, maintaining that an injunction in the terms ordered would result in the closure of their businesses. They further contradicted the finding that their activities constituted a nuisance. The claimants cross-appealed on the ground that the judge had wrongly dismissed their entire claim against TW and wrongly dismissed most of their claim against JW.

The issue for the determination of the court was whether, in assessing whether the noise from the stadium and the track constituted a nuisance, the judge had failed properly to take into account the planning permissions which had been granted, in particular failing to take into account the fact that the implementation of those permissions had changed the character of the locality.

The court ruled:

Under established authorities, a planning authority, by the grant of planning permission, could not authorise the commission of a nuisance. Nevertheless, the grant of planning permission followed by the implementation of such permission might change the character of a locality. It was a question of fact in every case whether the grant of planning permission, followed by steps to implement such permission, did not have the effect of changing the character of the locality. If the character of the locality was changed as a consequence of planning permission having been granted and implemented, then the question whether particular activities in that locality constituted a nuisance had to be decided against the background of its changed character. One consequence might be that otherwise offensive activities in that locality ceased to constitute a nuisance.

The judge's finding of private nuisance had been based on an error of law and could not stand. The noise generated from time to time by motor sports was "one of the noise characteristics of the locality". The noise of motor sports from the track and stadium were an established part of the character of the locality. They could not be left out of account when considering whether the matters of which the claimants complained constituted a nuisance. Had DC and Moto ignored the breach of condition notices and conducted their business at noise levels above those permitted by the planning permissions, the claimants might have been able to make out a case in nuisance. However, on the evidence that had not been the case.

DC and Moto's appeal would be allowed. The claimants' cross-appeal would be dismissed. Decision of Judge Seymour [2011] 4 All ER 1314 reversed.

Swindon Borough Council v Forefront Estates Ltd
[2012] All ER (D) 181 (Feb); [2012] EWHC 231 (TCC)
14 February 2012

Building – Building control – Repair or maintenance of building – Local authority – Defendant company owning building housing theatre – Local authority inspecting building and finding roof of theatre at risk of collapsing – Authority assessing building as dangerous and carrying out repairs to roof – Authority bringing proceedings against defendant to recover costs of repairs – Whether authority following correct procedure – Whether authority entitled to recover costs – Building Act 1984, s 77, s 78.

The defendant company (the company) was the freehold owner of the Mechanics' Institute (the institute) having acquired it in 2003. The institute was a Grade II listed building in the historic centre of Swindon. In the instant proceedings, the claimant local authority sought to recover sums which had been paid for works which it contended had been necessary to remove the danger caused by the dangerous state of the institute. The work had been carried out in the light of key risks identified by the authority, namely the collapse of the theatre roof of the institute and contamination, including by asbestos and lead, in the event of its collapse. The claim was brought under s 78 of the Building Act 1984 (BA 1984). The company challenged the authority's entitlement to recover sums under s 78, BA 1984 and contested the authority's claim that the works had been necessary to render the building safe. It also put the authority to proof that the costs claimed had been reasonably incurred.

The issues for consideration were whether the authority was entitled to recover sums under s 78, BA 1984. The company contended that it was not because the authority could reasonably have proceeded instead under s 77(1) of that Act, which provided for the authority to apply to a magistrates' court for an order requiring the owner to deal with the dangerous building.

The court ruled:

The distinction between ss 77 and 78 of BA 1984 showed that, merely because a building was in a dangerous state or condition did not, in itself, justify a local authority from taking the emergency measures under s 78. In deciding whether to proceed under s 78, rather than s 77, a form of risk assessment had to be carried out by the authority and it had to consider the risks in terms of the consequences of the dangerous state or condition of the building or structure, the likelihood of those consequences occurring and the seriousness of the situation if those consequences did occur. The phrase "if it appears to a local authority" in ss 77 and 78 of BA 1984 suggested that the matter depended on the subjective view of the local authority. However, s 78 required a review of whether it had been reasonable for the authority to take immediate action to remove the danger, which required an assessment on an objective basis.

In this case, there could be no doubt, on the basis of the evidence, that the roof structure of the theatre roof at the institute had been in such a state or condition as to be dangerous. It was evident that the dangerous state of the roof had been likely to lead to the roof collapsing, releasing asbestos and lead contamination into the atmosphere and causing masonry to fall outside the boundary of the institute. The risk of that happening had been high and the consequences for the health and safety of people in the vicinity as a result of that contamination or falling masonry would have been serious, giving rise to potentially serious injury or death to those in the vicinity. In such circumstances, it had been necessary for the local authority to take immediate action to remove the danger caused by the dangerous state of the roof of the theatre at the institute. The instant case was not one where the local authority might reasonable have proceeded under s 77(1), BA 1984, instead of s 78, by seeking an order from the magistrates' court for the owner to carry out the work. It followed that the authority had properly concluded that it had been necessary for immediate action to be taken to remove the danger. It followed that s 78(5) did not prevent the authority from recovering the costs claimed in the proceedings.

The authority was entitled to recover from the defendant the total sum of £331, 242.69 plus interest and to the costs of the proceedings.

Legislation update

Housing (Right to Buy) (Limit on Discount) (England) Order 2012	**Enactment citation** SI 2012/734 **Commencement date** 2 April 2012 **Enabling power** Housing Act 1985, s 131	Increases the maximum discount for social tenants buying their homes through the "Right to Buy" scheme to £75 000. The previous maximum ranged from £16,000 to £38,000. Also increases the period of time used in the calculation of costs from ten to 15 years. This limits the discount to ensure that the purchase price of the property does not fall below what has been spent on building, buying, repairing or maintaining it over 15 years.
Houses in Multiple Occupation (Specified Educational Establishments) (England) Regulations 2012	**Enactment citation** SI 2012/249 **Commencement date** 14 March 2012 **Legislation affected** SI 2010/2616 revoked **Enabling power** Housing Act 2004, para 4(2) of Sch 14	Specifies educational establishments for the purposes of para 4(2) of Sch 14 to the Housing Act 2004. Any building managed or controlled by such as establishment and occupied solely or principally by it students will not be a house in multiple occupation for the purposes of the 2004 Act, while the establishment is a member of one of the specified codes of practice.
Statutory Nuisances (Insects) Regulations (Northern Ireland) 2012	**Enactment citation** SR 2012/36 **Commencement date** 1 April 2012 **Enabling power** Clean Neighbourhoods and Environment Act (Northern Ireland) 2011 s 63(11)(d)	Prescribe land in respect of which payments are made under any of the land management schemes described in the schedule to the regulations. The Clean Neighbourhoods and Environment Act (Northern Ireland) 2011 excludes certain types of land from the definition of "relevant industrial, trade or business premises". The Department of the Environment may prescribe other land which forms part of an agricultural unit to be excluded from this definition.
Industrial Training Levy (Construction Industry Training Board) Order 2012	**Enactment citation** SI 2012/Draft **Enabling power** Industrial Training Act 1982, 11(2), 12(3), (4)	Gives effect to levy proposals of the Construction Industry Training Board for the imposition of a levy on employers engaged wholly or mainly in the construction industry for the purpose of raising money towards the board's expenses. Sets out the rate and exemptions from that levy.
Non-Domestic Rates (Levying) (Scotland) Regulations 2012	**Enactment citation** SSI 2012/28 **Commencement date** 1 April 2012 **Legislation affected** SSI 2010/440 partially revoked **Enabling power** Local Government etc. (Scotland) Act 1994, s 153	Makes provision from 1 April 2012 for reductions in non-domestic rates as a result of the Small Business Bonus Scheme. Further, provides for a poundage supplement on larger business properties with a rateable value in excess of £35,000.