UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

Leasehold enfranchisement - collective enfranchisement - leaseback - effect of grant of new leases by freeholder after determination of disputed terms of leaseback by LVT - whether nominee purchaser entitled to insist on leasebacks - ss.24 and 35 and Schedule 9, Leasehold Reform, Housing and Urban Development Act 1993.

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN:

QUEENSBRIDGE INVESTMENT LIMITED **Appellant**

AND

61 QUEENS GATE FREEHOLD LIMITED **Respondent**

Re: 61 Queens Gate,
London
SW7 5JP

Before: Martin Rodger QC, Deputy President

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on
15 September 2014

Stephen Jourdan QC, instructed by Forsters LLP, on behalf of the appellant
Carl Fain, instructed by Swabey & Co, on behalf of respondent

The following cases are referred to in this decision:

Brown & Root Technology Ltd v Sun Alliance and London Assurance Co Ltd [2001] Ch 733

Barrie House Freehold Ltd v Merie Bin Mahfouz [2012] EWHC 353 (Ch)

Cawthorne v Hamdan [2006] 3 EGLR 183 (LT)

Cawthorne v Hamdan [2007] Ch 187 (CA)

Introduction

1. This appeal is against two decisions of a Leasehold Valuation Tribunal ("the LVT") given on 29 October 2012 and 28 March 2013 concerning a claim by the Respondent, as nominee purchaser, to acquire the freehold of 61 Queens Gate, London SW7 under the collective enfranchisement provisions of Chapter I, Part I of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act").

2. In its first decision the LVT determined the disputed terms of the acquisition, before going on in its second decision to determined the price payable in light of those terms. Amongst the disputed terms was the form of the leases of three flats in the building which it was then common ground were to be granted back to the Appellant immediately upon completion by the Respondent of its acquisition of the freehold.

3. The Appellant was dissatisfied with the leaseback terms and the price determined by the LVT, and appealed both decisions to this Tribunal. Before the appeal came on for hearing the Appellant informed the Respondent that it intended to grant long leases of the three flats on the terms which it had previously proposed but which had already been rejected by the LVT. The Appellant subsequently granted those leases and now asserts that the effect of s. 36 and paragraph 5 of Schedule 9 to the 1993 Act is that it is under no obligation to enter into leasebacks on the terms determined by the LVT.

4. The appeal therefore concerns the entitlement of a freeholder of a block of flats to circumvent a determination by a first tier tribunal of the terms of a leaseback of one or more of those flats, by granting new leases of the same flats on terms more favourable to it than those which had already been determined.

5. The Appellant was represented before the Tribunal by Stephen Jourdan QC, and the Respondent by Carl Fain, both of whom had also appeared before the LVT. I am grateful to them both for their helpful submissions.

The relevant statutory provisions

6. The general operation of the collective enfranchisement regime under Chapter I of Part I of the 1993 Act is well known. In outline the right to acquire the freehold and certain leasehold interests is exercisable collectively by the tenants of flats in a self contained building containing two or more flats held on long leases. Those eligible to exercise the right are referred to as "qualifying tenants", while those who choose to do so (who must comprise the tenants of at least half of the flats in the building held on long leases) are referred to as "participating tenants".

7. The 1993 Act makes specific provision in s. 36 and Schedule 9 for the reversioner to be granted leases of certain flats or other units in the premises immediately after the acquisition of the freehold on behalf of the participating tenants. Referred to in Schedule 9

as a "leaseback", such leases enable the reversioner to retain control of empty flats, flats let under tenancies which are not long leases, shops and other commercial units within the premises.

8. The enfranchisement process is commenced by the giving of an initial notice by the participating tenants to the reversioner under s. 13. The initial notice must identify the nominee purchaser whom the participating tenants wish to acquire the freehold on their behalf, it must specify any leasehold interest proposed to be acquired and any leasebacks which it is considered the reversioner is obliged to acquire, and must provide certain other information including the proposed purchase price. The reversioner is required to give a counter-notice under s. 21 stating whether it accepts the right of the participating tenants to acquire the freehold and whether it disputes the proposed terms.

9. Where an initial notice has been given s. 97(1) of the 1993 Act enables it to be protected by registration under the Lands Charges Act 1972 or by a notice under the Land Registration Act 2002 as if it were an estate contract. If an initial notice has been registered in that way, s. 19 of the 1993 Act imposes restrictions on the entitlement of the freeholder to enter into certain transactions. In particular, so long as the initial notice remains in force s. 19(1) provides that:

> "(a) any person who owns the freehold of the whole or any part of the specified premises or the freehold of any property specified in the notice under s. 13(3)(a)(ii) shall not—
>
> (i) make any disposal severing his interest in those premises or in that property, or
>
> (ii) grant out of that interest any lease under which, if it had been granted before the relevant date, the interest of the tenant would to any extent have been liable on that date to acquisition by virtue of s. 2(1)(a) or (b); and
>
> (b) no other relevant landlord shall grant out of his interest in the specified premises or in any property so specified any such lease as is mentioned in paragraph (a)(ii);

and any transaction shall be void to the extent that it purports to effect any such disposal or any such grant of a lease as is mentioned in paragraph (a) or (b)."

10. Turning to the leaseback provisions themselves, s. 36 (1) provides that:

> "In connection with the acquisition by him of a freehold interest in specified premises, the nominee purchaser shall grant to the person from whom the interest is acquired such leases of flats or other units contained in those premises as are required to be so granted by virtue of Part II or III of Schedule 9."

By s. 36(2) any such lease "shall be granted so as to take effect immediately after the acquisition by the nominee purchaser of the freehold interest concerned".

11. Schedule 9 deals in detail with the grant of leases back to the former freeholder. It focuses attention on the circumstances which exist at "the appropriate time", an expression defined in paragraph 1(1) of Schedule 9 as follows:

> ""The appropriate time" in relation to a flat or other unit contained in the specified premises means the time when the freehold of the flat or other unit is acquired by the nominee purchaser"

12. Part II of Schedule 9 is concerned with mandatory leasebacks. These are required where a flat is let under a secure tenancy or an introductory tenancy (both of which are tenancies granted by a local housing authority or other public sector landlord under the Housing Act 1980). Paragraph 2 applies where immediately before the "appropriate time" a flat is let under a secure tenancy or an introductory tenancy, and either the freeholder is the tenant's immediate landlord, or the freeholder is a public sector landlord and every intermediate landlord of the flat is also a public sector landlord. Paragraph 3 has effect where immediately before the "appropriate time" a flat is let by a housing association under a tenancy other than a secure tenancy. In any case where paragraphs 2 or 3 apply, it is provided that the nominee purchaser "shall grant" a leaseback of the flat to the freeholder in accordance with s. 36.

13. Part III of Schedule 9 makes provision for the freeholder to have the right to take a leaseback in certain circumstances. So far as is relevant to this appeal, those circumstances are described in paragraph 5, as follows:

> "Flats without qualifying tenants and other units
>
> 5(1) Subject to sub-paragraph (3), this paragraph applies to any unit falling within sub-paragraph (1A) which is not immediately before the appropriate time a flat let to a person who is a qualifying tenant of it.
>
> (1A) A unit falls within this sub-paragraph if—
>
> (a) the freehold of the whole of it is owned by the same person, and
>
> (b) it is contained in the specified premises.
>
> (2) Where this paragraph applies, the nominee purchaser shall, if the freeholder by notice requires him to do so, grant to the freeholder a lease of the unit in accordance with s. 36 and paragraph 7 below.
>
> (3) This paragraph does not apply to a flat or other unit to which paragraph 2 or 3 applies."

14. An initial notice served by participating tenants is required by s. 13(3)(c)(ii) to specify any flats or other units contained in the premises in relation to which they consider that the mandatory leaseback requirements of Part II of Schedule 9 are satisfied. A counter-notice is required by s. 21(3)(a) to state whether the reversioner agrees with the participating tenants that the mandatory leaseback requirements are satisfied in relation to the flats specified in the initial notice, and also to specify any additional leaseback proposals by the reversioner.

15. It is apparent that the additional leaseback proposals which may be specified in a counter-notice given under s. 21 may include both additional mandatory leasebacks within Part II of Schedule 9 which may have been overlooked in the initial notice, and elective leasebacks within Part III which the freeholder is entitled to call for under paragraph 5.

16. Where paragraph 5 applies to a unit the nominee purchaser is obliged to grant a leaseback of the unit "if the freeholder by notice requires him to do so". In *Cawthorne v Hamdan* [2007] Ch. 187 the Court of Appeal decided that the necessary notice requiring the leaseback must be included in the freeholder's counter-notice. If notice was not given at that stage, it was not open to a freeholder subsequently to seek a leaseback.

17. Any dispute over the validity of an initial notice falls to be determined by the court under s. 23; in contrast, disputes over terms of acquisition are determined by the "appropriate tribunal" under s. 24(1). In England the appropriate tribunal is now the First-tier Tribunal (Property Chamber) although at the time of the decisions under appeal it was the LVT. S. 91 gives the appropriate tribunal jurisdiction to determine any question arising in relation (amongst other matters) to the terms of any lease which is to be granted in accordance with s. 36 and Schedule 9.

18. S. 24(3) enables either the nominee purchaser or the reversioner to make an application to the court if all of the terms of acquisition have been either agreed between the parties or determined by the appropriate tribunal but a binding contract has not been entered into within two months. On such an application "the court may … make such order under subsection (4) as it thinks fit". The orders provided for by s. 24(4) are the following:

> "(4) The court may under this subsection make an order—
>
> (a) providing for the interests to be acquired by the nominee purchaser to be vested in him on the terms referred to in subsection (3);
>
> (b) providing for those interests to be vested in him on those terms, but subject to such modifications as—
>
> (i) may have been determined by the appropriate tribunal, on the application of either the nominee purchaser or the reversioner, to be required by reason of any change in circumstances since the time when the terms were agreed or determined as mentioned in that subsection, and
>
> (ii) are specified in the order; or
>
> (c) providing for the initial notice to be deemed to have been withdrawn at the end of the appropriate period specified in subsection (6);
>
> and Schedule 5 shall have effect in relation to any such order as is mentioned in paragraph (a) or (b) above."

The facts

19. The parties agreed a helpful statement of facts, on which the following summary is based.

20. 61 Queens Gate is a substantial terraced townhouse constructed in about 1860 and subsequently converted into flats, probably in about 1921. There are now eleven flats in the building, of which eight are held on long leases in similar form, each granted between 2002 and 2006 for terms of 105 years. Five of the leases are held by the tenants to whom they were originally granted, while the remaining three have been assigned to their current owners. The holders of all eight long leases are qualifying tenants with the right to participate in a collective enfranchisement under the 1993 Act.

21. Until relatively recently three of the flats (A, 8 and 9) were not leased but were held directly by the Appellant by virtue of its freehold interest in the building as a whole. Flat A was occupied by statutory tenants protected by the Rent Act 1977 until 29 April 2014, when the tenants moved out and informed the Appellant's managing agents that they were terminating their tenancy with immediate effect. Flat 8 is still occupied under a statutory tenancy protected by the Rent Act, while Flat 9 has at all material times either been vacant or let by the Appellant under an assured shorthold tenancy.

22. The long leases of the eight remaining flats provide for the payment by the lessee of a specified percentage of the service charge costs and expenses incurred by the Appellant. The percentages vary between 6.21% and 17.92% but the aggregate of the lessees' contributions represents 91.77% of the Appellant's total expenditure. The tenants of Flats A, 8 and 9 have never contributed directly to the cost of services and the Appellant therefore has to bear the remaining 8.23% of such costs in its own right.

23. On 6 October 2011, the eight qualifying tenants served an initial notice under s. 13 of the 1993 Act informing the Appellant of their intention to acquire the freehold of the building and naming the Respondent as their nominee purchaser.

24. The initial notice identified Flat A and Flat 8 as satisfying the requirements of Part II of Schedule 9 to the 1993 Act (i.e. as being units in respect of which the Respondent would be required to grant the Appellant a lease in accordance with s. 36), supposedly on the grounds that each was let to a tenant protected by the Rent Act.

25. On 8 December 2011 the Appellant served a counter-notice under s. 21 of the 1993 Act, admitting the entitlement of the participating tenants to acquire the freehold. At paragraphs 4 and 5 of the counter-notice it said:

> *"4. The Landlord accepts the proposals in your Notice that they will be granted leasebacks of Flat A and Flat 8 in the Specified Premises but the terms of the leasebacks are to be granted in accordance with S. 36 and Paragraph 4 in Part II of Schedule 9 to the 1993 Act*
> *5. The Landlord requires a leaseback of Flat 9 in the Specified Premises pursuant to Paragraph 5 of Part III of Schedule 9 of the 1993 Act and the terms of the leaseback is to be granted in accordance with S. 36 and Paragraph 7 in Part III of Schedule 9 to the 1993 Act"*

26. It is common ground that at that stage both parties were under the mistaken impression that paragraph 4 of Part II of Schedule 9 to the 1993 Act applied to a flat held under a statutory tenancy to which the Rent Act 1977 applied. The true position is that such a flat falls within paragraph 5 and that the freeholder has the right to take a leaseback of such a flat, but no obligation to do so.

27. On 20 February 2012, the Respondent applied to the LVT under s. 24(1) for determination of the terms of the acquisition which remained in issue. One of those terms was identified as being "the terms of the leasebacks of flats A, 8 and 9".

28. The application was heard by the LVT on 23 October 2012. At that stage, it was assumed by all that leasebacks of flats A, 8 and 9 were to be granted. In the case of flats A and 8 these were considered to be mandatory leasebacks under Part II of Schedule 9, whereas the leaseback of flat 9 was understood to be an elective leaseback under Part III. Due to lack of time the LVT decided to determine the terms of the leasebacks and certain other disputed terms first, and to defer consideration of the valuation issues until a later date.

29. On 29 October 2012, the LVT issued its first decision. It determined that the terms of the leasebacks should be those proposed by the Respondent (which appear largely to have mirrored the terms of the long leases of the other flats in the building). The Respondent's proposals included a power for the landlord to vary the service charge percentage payable by the lessee, and specified that the premises to be demised by the leasebacks should exclude the structural walls of the flats. The draft leaseback put forward by the Respondent and accepted by the LVT did not at that stage quantify the service charge proportions payable by the lessees.

30. The Appellant applied to the LVT for permission to appeal against its decision in relation to those issues. Permission was refused by the LVT and, initially, by the Tribunal.

31. On 11 and 12 March 2013, the LVT heard evidence and submissions on the remaining issues. These included the service charge percentages to be included in the leasebacks, and what amount (if any) was payable to the Appellant under paragraph 3(4) of Schedule 6 in respect of the difference in the value of its interest in flats A, 8 and 9 due to the grant of the leasebacks.

32. On 28 March 2013, the LVT issued its second decision. It determined that the service charge percentages to be included in the leasebacks should be those proposed by the Respondent: flat A, 10.53%; flat 8, 6.11%; and flat 9, 17.05%, producing a total contribution of 33.69%. The apportionments were based on the relative floor areas of the flats.

33. If implemented without other adjustments, the effect of these apportionments when aggregated with the existing service charge contributions of the long lessees would be that the Respondent would be entitled to recoup 125.46% of its service charge expenditure. The

LVT was informed that it was the intention of the Respondent and the leaseholders to adjust the service charge contributions of those leaseholders after enfranchisement so that all leases in the building contributed in proportion to their floor area, and so that the aggregate of all contributions, including those of the Appellant, would be 100% of the relevant expenditure.

34. The LVT also determined that the price payable to the appellant for the freehold was £219,120, which included a payment of £46,035 under paragraph 3(4) of Schedule 6 representing the difference in value of its interest in flats A, 8 and 9 as a result of the proposed leasebacks. That sum comprised 0.5% of the agreed freehold value in respect of the difference between a freehold and a 999 year lease, and 1.48% of the agreed freehold value to reflect the difference between the 8.23% service charge shortfall which the Appellant had formerly had to meet in its capacity as freeholder and the 33.69% service charge contribution it would be required to pay under the terms of the leasebacks.

35. On 24 April 2013, the Landlord applied to the LVT for permission to appeal against the LVT's second decision on three issues: (1) the service charge percentages; (2) the development value attributable to the potential to create a studio flat and (3) the award of £46,035 under paragraph 3(4) of Schedule 6.

36. Permission to appeal those issues was refused by the LVT but granted by the Tribunal on 29 July 2013. Permission was also granted to the Respondent to cross-appeal against the assessment of compensation under paragraph 3(4) of Schedule 6. It was directed that the appeal and cross-appeal should be heard as a review with a view to rehearing.

37. On 15 January 2014, following a successful application for permission to seek judicial review of its refusal to grant permission to appeal the LVT's first decision, the Tribunal gave permission to appeal on the extent of the demise to be included in the leasebacks (i.e. whether it was to include the structural walls) and directed that the appeal on that issue should be joined with the other issues for which permission had already been given.

38. On 8 April 2014 matters took an unexpected course when Forsters, the Appellant's solicitors, wrote to the Respondent's solicitors saying that the Appellant had decided to grant 999 year leases of flats A, 8 and 9. The leases would include the structural walls of the flats within the demise and would require service charge contributions of 2%, 2.23% and 4% respectively (significantly lower than the apportionments which had been determined by the LVT). The effect of these arrangements, according to Forster would be:

> "that our client will not be entitled to leasebacks of flats A, 8 and 9 under Schedule 9 and therefore it is unnecessary to continue to debate the terms of the leasebacks. Nor is it necessary to continue to debate the differential between the value of the freehold and the leasebacks."

The letter concluded by inviting the Respondent to consent to the withdrawal of the appeal. That invitation was subsequently declined by the Respondent's solicitors, Swabey & Co, who asserted that the Appellant was obliged to enter into leasebacks on the terms set by the LVT.

39. On 12 May 2014, 999 year leases of flats A, 8 and 9 were granted by the Appellant ("the New Leases"). The lease of flat A was granted to Gate Real Estate Limited, of flat 8 to Kensington Avenue Limited, and of flat 9 to Kensington Real Estate Limited. Each of the leases was granted at a substantial premium.

40. All the shares in both Kensington Avenue Limited and Kensington Real Estate Limited are held by the Appellant. All the shares in Gate Real Estate Limited are held by Besh Holdings Limited. The shares in Besh Holdings Limited are owned equally by two individuals, Semsi Erkman and Ada Erkman. These arrangements have no doubt been structured to ensure that each of the lessees under the New Leases is a qualifying tenant for the purposes of the 1993 Act.

41. On 9 June 2014, Forsters submitted SDLT returns and on 12 June 2014, they applied to the Land Registry to register title to the New Leases. On 12 August 2014, Swabey & Co wrote to the Land Registry with objections to the registration of the New Leases. At the date of hearing of the appeal title to the New Leases had not yet been registered.

42. On 4 July 2014 HHJ Huskinson gave directions for a hearing to take place at which all issues in the appeal would be considered in the light of the grant of the New Leases. The Appellant was given the opportunity to serve an application for permission to amend its Statement of Case, which would also be considered at the hearing.

43. It was only at the stage of preparing for the case management hearing held on 4 July 2014 that the parties appreciated for the first time that they were mistaken in having treated flat A and flat 8 as being within paragraph 4 of Part II of Schedule 9 to the 1993 Act (and so subject to a mandatory leaseback) and that the true position was that they came within paragraph 5 (giving the Appellant the right to an elective leaseback if it chose to take one).

Issues

44. The parties agreed that the issues which now need to be considered divide into the following two groups.

45. First:

1. Should the Appellant be given permission to amend its Statement of Case to contend that the effect of the New Leases is that it is not obliged to enter into the leasebacks?

2. If so, does the Tribunal have jurisdiction to determine whether there should or should not be leasebacks of flats A, 8 and 9?

3. If the Tribunal has such jurisdiction, should it be exercised?

4. If the Tribunal has such jurisdiction, and exercises it, should there be leasebacks of flats A, 8 and 9, or should the freehold be acquired subject to and with the benefit

of the New Leases, at the price of £173,085 (being the price determined by the LVT less the sum of £46,035 which it had awarded under paragraph 3(4) of Schedule 6)?

46. Second, on the assumption that there are to be leasebacks of flats A, 8 and 9:

5. Was the LVT wrong to determine that the service charge percentages in the leasebacks should be as stated in paragraph 31 above? If so, what percentages should be included?

6. Was the LVT wrong to determine that the leasebacks should exclude the structural walls of flats A, 8 and 9?

7. Was the LVT wrong to determine that the difference between the value of the freehold interest in flats A, 8 and 9, and the value of a 999 year leaseback of them (with no difference in the contribution to the service charge costs), was 0.5% of the freehold value of those flats rather than 1%?

8. On the assumption that the LVT was right to determine that the service charge percentages in those leasebacks should be as stated in paragraph 31 above, was the LVT wrong to determine that the difference between the value of the freehold interest in flats A, 8 and 9, and the value of a 999 year leaseback of those units, attributable to the inclusion of those service charge percentages in the leasebacks, was 1.48% of the freehold value of those flats? If so, what (if anything) was that difference?

47. At the commencement of the hearing I indicated to the parties that, having read their skeleton arguments I was satisfied that the arguments raised by Mr Jourdan on behalf of the Appellant ought to be considered and that I was therefore minded to grant permission to amend the Appellant's statement of case to enable it to contend that it was not obliged to enter into the leasebacks. Mr Fain did not to seek to dissuade me from that course. I indicated that any issue concerning costs arising out of the amendment could be considered after I had given a final decision.

Jurisdiction

48. In his skeleton argument Mr Fain submitted that the Tribunal had no jurisdiction to decide upon the effect of the New Leases. He gave a number of reasons:

1. The parties had agreed that there would be leasebacks, and s.24(1) and 91(1) of the 1993 Act only gave the appropriate tribunal jurisdiction to determine matters in dispute. The fact that there would be leasebacks was not in dispute.

2. Alternatively, s.175(4) of the Commonhold and Leasehold Reform Act 2002 provides that on appeal the Tribunal may exercise any power which was available to the first-tier tribunal. The power to determine whether leasebacks were to be granted was not available to the LVT because it had been agreed that the leasebacks were to be granted.

3. Alternatively, an application to modify terms which had been agreed or determined in order to take account of a change of circumstances could only be made

following a direction from the County Court under s.24(4) on an application for a vesting order.

49. In my judgment there is no substance in any of these jurisdictional objections, and the Tribunal has power to consider the terms of acquisition, including whether there should be leasebacks, in light of the current circumstances. The terms of the leasebacks have never been agreed and will not be finally determined until the resolution of the Appellant's appeal against the decision of the LVT. The parties' expectation that there would be leasebacks was not contractual and if the correct analysis is that the Appellant has a right to receive leasebacks, rather than an obligation to accept them, it would take more than a non-contractual consensus to deprive the Tribunal of jurisdiction under s. 24(1).

50. In *Cawthorne v Hamdan* [2006] 3 EGLR 183 the Lands Tribunal (HHJ Huskinson) gave three reasons at [23] to [25] why it was within the Tribunal's jurisdiction to determine whether a leaseback should be granted. The terms of acquisition were for the appropriate tribunal to decide, rather than the county court, and those terms of acquisition included whether there was to be a leaseback or not. The Tribunal had equal powers to determine the matter as had the LVT and it was therefore unnecessary for there to have been a prior determination of the LVT on the same point. In any event, as a matter of case management (and possibly even as a matter of jurisdiction) it was necessary for the Tribunal to determine whether there should be leasebacks in order to decide whether the appeal would be pointless and ought not to be entertained. The same considerations seem to me to apply in this case.

The effect of the New Leases - submissions

51. Mr Jourdan QC began his submissions by emphasising that the 1993 Act does not prevent the freeholder from selling or renting units (be they flats, shops or otherwise) during the period while the claim is in force. The effect of s. 19(1) is to prohibit and render void specific proprietary transactions, namely dispositions which would sever the freehold or the grant of new leases which, had they existed when the initial notice was given, would have been liable to acquisition by the nominee purchaser in accordance with s. 2 (i.e. leases superior to a lease held by a qualifying tenant, or leases of common parts). There were good reasons for those restrictions, but the policy of the Act was not otherwise to inhibit the freeholder's ability to deal with what was still its own property.

52. It was, Mr Jourdan submitted, a condition of a freeholder's right to require a leaseback under paragraph 5 of Schedule 9 that the unit in question was not, immediately before the appropriate time, a flat let to a person who is a qualifying tenant of it. That had been recognised in the Court of Appeal by Lloyd LJ in *Cawthorne v Hamdan* [2007] Ch 187 at [29]:

> "If the reversioner wants a leaseback of a flat in respect of which, at the time of the counternotice, there is not a qualifying tenant, he must say so in his counternotice. If he does so, then he will be entitled to the leaseback, *so long as there is still no qualifying tenant immediately before acquisition by the nominee purchaser*. (There are constraints on what a reversioner can do with the premises pending the process,

under s. 13, but these do not appear to preclude the landlord from granting a long lease of one flat: see Hague at paragraph 25-15, footnote 117.) Thus, *the reference to the appropriate time* does not extend to that moment the opportunity for the reversioner to serve a leaseback notice if he has not made proposals to that effect in the counternotice. Rather it *imposes a condition subsequent on the entitlement of the reversioner to a leaseback if he has said he wants one in the counternotice, such that he cannot have it if immediately before the acquisition by the nominee purchaser the relevant flat does have a qualifying tenant*." (emphasis added)

53. Mr Jourdan stressed the significant practical implications if a freeholder was to be prevented generally from dealing with its property while the enfranchisement process progressed. That process could often take several years and may never result in a completed acquisition as the qualifying tenants have the right to withdraw their claim at any stage before a binding contract is entered into. Parliament had not intended to freeze the freeholder's ability to grant leases except to the extent specified in s.19.

54. It was impermissible to imply further duties or restrictions on a freeholder beyond those already narrowly defined in s.19. In support of that submission Mr Jourdan referred to *Barrie House Freehold Ltd v Merie Bin Mahfouz* [2012] EWHC 353 (Ch) in which Roth J rejected an argument that it was implicit in the 1993 Act that a landlord could not make physical changes to the premises after an initial notice had been served.

55. Mr Jourdan then gave a number of instances of circumstances in which terms of acquisition may have to change during the course of an acquisition to respond to changes of circumstances. Two examples will suffice. Where, at the date of the initial notice there exists a lease which is superior to an underlease held by a qualifying tenant of a flat, it will be liable to acquisition by the nominee purchaser under s.2(1)(b) and 2(2); if the underlease terminates, and the superior lease is held by a qualifying tenant, it will no longer be liable to acquisition and any terms previously agreed or determined will have to change to reflect that. So also if, in accordance with s.14, a qualifying tenant either ceases to be a participating tenant, or becomes a participating tenant for the first time, the assessment of marriage value under paragraph 4 of Schedule 6 will change. The possibility of such changes of circumstances was recognised in s.24(4) which allowed a modification of terms previously agreed or determined to take such changes into account.

56. It followed, Mr Jourdan submitted, that there could be no leasebacks of flats A, 8 or 9 because they were now held by qualifying tenants. Nor could the Appellant be criticised for granting the New Leases, because the scheme of the 1993 Act left it free to do so up to the appropriate time.

57. On behalf of the Respondent Mr Fain submitted that, if the Tribunal had jurisdiction to consider the effect of the leasebacks (which I am satisfied that it has) it should proceed on the basis that the Appellant was obliged to take a leaseback of each of flats A, 8 and 9.

58. The principal basis of Mr Fain's submission was that the power under s.24(4) of the 1993 Act to modify terms of acquisition which had either been agreed or determined was a

discretionary one. Although the 1993 Act does not suspend a freeholder's dealings with its interest in the premises except to the limited extent provided for by s.19, once a matter had been agreed or determined the freeholder should not be permitted to change the terms of acquisition unilaterally. In this case the Appellant had accepted in its counter-notice that it should be granted a mandatory leaseback of flats A and 8 and had required a leaseback of flat 9. The Respondent had incurred significant expense on the mutual assumption that the Appellant would take leasebacks, an assumption reflected in the draft transfer agreed between the parties and which underlay the proceedings before the LVT and the appeal as originally formulated as well as the application for judicial review made to the Administrative Court.

59. The New Leases were granted in an attempt by the Appellant to circumvent the decision of the LVT without the need for an Appeal and this should not be permitted. The situation engineered by the Appellant was, Mr Fain submitted, an abuse of the enfranchisement process. The 1993 Act did not contemplate that, once all the matters in dispute had been agreed or determined so as to enable the court to make a vesting order, a party could unilaterally change the state of affairs back so that there was once again a dispute as to the terms of acquisition.

60. In summary, either by means of an estoppel, or in the exercise of its discretion under s.24(4)(b), the Tribunal should refuse to modify the terms of the transfer and should insist on the Appellant taking the leasebacks.

61. Mr Fain submitted that the analysis of paragraph 5 of Schedule 9 by Lloyd LJ in *Cawthorne v Hamdan* was not adverse to his submissions. It was true that a freeholder could only elect to take a leaseback if there was no qualifying tenant of the unit in question, but that did not prevent a nominee purchaser from insisting on granting a leaseback if that was one of the terms agreed or determined even if there was a qualifying tenant at the appropriate time.

62. Mr Fain submitted in the alternative that, as the New Leases had not yet been registered, flats A, B and 9 were not currently let to qualifying tenants. It is only on registration that a tenant becomes the legal owner of the lease (Mr Fain cited s.27, Land Registration Act 2002 and *Brown & Root Technology Ltd v Sun Alliance and London Assurance Co Ltd* [2001] Ch 733 in support of that proposition). There had therefore been no relevant change of circumstances to merit a modification of the terms of acquisition.

63. The leasebacks would take effect as leases of the freehold reversion to the New Leases in accordance with s.36(3). A direct relationship of landlord and tenant would exist between the Respondent as freeholder and the Appellant as long lessee of the flats under which the Appellant would be obliged to contribute towards the service charge in the proportions determined by the LVT (subject to the outcome of the appeal concerning the apportionment).

Discussion and conclusion

64. Although I entirely see the force of the Respondent's complaint that the Appellant has engineered circumstances in which flats A, 8 and 9 are held by qualifying tenants in order to evade the consequences of the LVT's decision, I am satisfied that Mr Jourdan's submissions are correct.

65. It seems to me to be indisputable that the Appellant was entitled to grant the New Leases. Mr Fain accepted that (subject to there being a binding agreement or estoppel) the Appellant would have been free to grant new leases of flats A, 8 and 9 at any time until the determination by the LVT of the terms of acquisition, because such a grant was not prohibited by s.19. He also accepted that the 1993 Act did not create a statutory contract binding the parties to proceed on the terms agreed or determined by the appropriate tribunal: the nominee purchaser was entitled to withdraw from the acquisition at any time until its completion.

66. Once it is accepted to be consistent with the statutory scheme for the freeholder to grant new leases while the claim to enfranchise continues, provided it does not infringe s.19, the question then arises whether either an agreement of the terms of a leaseback or a determination by the appropriate tribunal takes away that freedom. In my judgment they do not. The 1993 Act makes no express provision for an additional limitation on the freeholder's entitlement to deal with its own property once the terms of a leaseback have been agreed or determined. Nor can any such limitation be implied. As Roth J noted in *Barrie House Freehold Ltd v Merie Bin Mahfouz,* at [53]:

> "…this legislation provides a detailed and comprehensive code and I see no basis on which to imply duties into the statute beyond those which are set out. In particular, s. 19 already includes an elaborately drafts anti-avoidance provision designed for the protection of tenants exercising the enfranchisement right."

67. It is also clear that the only time at which it can finally be known whether a leaseback is to be granted is "immediately before the appropriate time" (paragraphs 2(1) and 5(1) of Schedule 9) i.e. immediately before the freehold is acquired by the nominee purchaser. It is at that time that the "condition subsequent" (as Lloyd LJ described it) to which the freeholder's entitlement to a leaseback is subject, must exist. If, at that time, the flat is let to a qualifying tenant, there is no obligation on the freeholder to take a leaseback under Part II of Schedule 9 and no entitlement to do so under Part III. Nor is there any obligation on the nominee purchaser to grant a leaseback; s.36(1), which imposes that obligation, applies only in respect of leases which are required to be granted by virtue of Parts II and III of Schedule 9.

68. I cannot accept Mr Fain's submission that the appropriate tribunal has a discretion to refuse to recognise a change of circumstances the effect of which is that the conditions for the grant of a leaseback are no longer satisfied. Section 24(4) allows the terms of acquisition to be modified on the application of either party where there has been any change of circumstances, but it does not give the appropriate tribunal the power to re-write paragraphs 2(1) and 5(1) of Schedule 9. Any exercise of the power to modify terms of

acquisition in the light of changed circumstances (or any refusal to exercise it) must be consistent with the statutory scheme, and it would not be open to the appropriate tribunal to refuse to modify the terms of acquisition and to insist on the grant of leasebacks where the conditions for such a grant no longer existed.

69. The grant of the New Leases was without doubt a change of circumstances. The fact that registration had not been completed does not mean that the New Leases were not tenancies for the purpose of the 1993 Act. In Part I of the Act "lease" and "tenancy" have the same meaning and include (where the context permits) an agreement for a lease (s. 101(2)). An executed lease, awaiting registration, is an agreement for a lease, and the lessee under such a lease is not prevented from being a qualifying tenant by s. 27 of the Land Registration Act 2002.

70. It follows that the only basis on which the Respondent could insist on the grant of leasebacks would be either if a contract had come into existence between the parties for a grant of leasebacks on the terms determined by the LVT, or if the Appellant was prevented by an estoppel from taking advantage of the freedom allowed by the Act to grant new leases until immediately before the appropriate time.

71. There was clearly no enforceable contract for the grant of leasebacks. No document satisfying the requirements of s.2, Law of Property (Miscellaneous Provisions) Act 1989 ever came into existence. The inclusion in the counter-notice of a statement that the Appellant accepted the participating tenants' proposals for mandatory leasebacks of flats A and 8 and additionally required a leaseback of flat 9 could not be understood as committing the Appellant to leasebacks whatever terms were determined by the LVT and whether or not the conditions in paragraphs 2(1) and 5(1) of Schedule 9 were satisfied immediately before the appropriate time.

72. As far as elective leasebacks under Part III of Schedule 9 are concerned, it seems to me likely that, whether or not a flat is occupied by a qualifying tenant at the appropriate time, a freeholder retains the right to decline to accept a leaseback at all if it is not content with the terms settled by the appropriate tribunal. It would be surprising if the enfranchisement process could compel a freeholder into a new long term contractual relationship which it did not wish to accept, where the alternative would be for it to walk away. Mr Fain was inclined to argue that whether a freeholder could withdraw from a proposed leaseback or not depended on the circumstances; if it did withdraw it should be limited to letting on the same terms as had been determined by the appropriate tribunal. The problem with these submissions is that they are not reflected anywhere in the statutory scheme, and they depend on a very wide discretion being conferred on the county court to make a vesting order even after a relevant change of circumstances has occurred. For the reasons given in paragraphs 66 and 68 above I do not accept that approach.

73. Mr Fain did not in the end develop an argument based on estoppel, but subsumed it into his submissions on the exercise of the discretion to recognise changes of circumstances under s.24(4). While the circumstances of this case are rather extreme, because of the lengths which had already been gone to by the parties in their dispute over the terms of the

leaseback before the grant of the New Leases, it is difficult to see anything unconscionable in a freeholder exercising the freedom to deal with its own property which the 1993 Act allows it until immediately before the completion of the acquisition of that property. The effect of any such dealing will also be reflected in the price paid for the freehold by the nominee purchaser and if, as in this case, the appropriate tribunal has already quantified the difference in price attributable to the grant of leasebacks the acquisition need not be significantly delayed.

74. It is true that there is likely to be some wasted expenditure, which may be considerable (as it no doubt is in this case) but that may simply be a risk which the nominee purchaser and the participating tenants must take to obtain the freehold. As Lloyd LJ's reference to Hague in the passage from *Cawthorne v Hamdan* at paragraph 52 above shows, it has long been recognised by commentators that a landlord is not prevented by s.19 from granting a long lease of one flat. Any dispute over the terms of a leaseback is therefore conducted against the background that a change of circumstances may render the dispute redundant and the costs incurred wasted.

75. I am therefore satisfied that the effect of the New Leases, which are held by qualifying tenants, is that no leasebacks of flats A, 8 and 9 can be insisted upon by either party when the acquisition of the freehold is completed. Since the LVT had helpfully quantified the effect of the leasebacks on the price at £46,035 it is not necessary to remit that issue for further reconsideration. Without leasebacks the price will therefore be £173,085.

76. I heard argument only on the first group of issues and the parties agreed that if I was in the Appellant's favour on those issues no purpose would be served by considering the second group of issues which (subject to any appeal from this decision) would have become academic. I suggested to the parties that the appropriate course may be to stay further consideration of the appeal until it become apparent whether this decision is conclusive, but they may wish to consider what effect such a direction would have on the running of time under s.24(6) and either agree or propose an alternative disposal.

77. Mr Fain indicated that he wished to consider his position in relation to costs in light of the way in which the appeal had developed and it was agreed that the parties would have the opportunity to make any such further submissions in writing within 28 days of the date of this decision.

Martin Rodger QC
Deputy President

6 October 2014