UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – COLLECTIVE ENFRANCHISEMENT – procedure – common parts – whether initial notice ceasing to have effect on nominee purchaser exchanging contracts to acquire some but not all interests – whether nominee purchaser entitled to acquire leases of air space, boiler room and sub-soil – ss.2(3), 13(11) and 24, Leasehold Reform, Housing and Urban Development Act 1993 – appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

(1) L.M. HOMES LTD
(2) J.T. EMORE and F.E. EMORE
(3) DALVIR KAUR **Appellants**

and

QUEEN COURT FREEHOLD COMPANY LIMITED **Respondent**

Re: Queen Court,
Queen Square,
London WC1N 3BA

Martin Rodger QC, Deputy Chamber President

The Royal Courts of Justice

30 October 2018

Edward Denehan, instructed by Wallace LLP, for the appellants
Phillip Rainey QC, instructed by Pemberton Greenish, for the respondent

The following cases are referred to in this decision:

Cadogan v Panagopoulos [2010] EWHC 422 (Ch)
City of Victoria v Bishop of Vancouver Island [1921] 2 AC 384 (PC)
Dartmouth Court Blackheath Ltd v Berisworth Ltd
Gorst v Knight [2018] EWHC 613 (Ch)
Malekshad v Howard de Walden Estates Ltd [2012] UKSC 41
Merie Bin Mahfouz Co (UK) Ltd v Barrie House (Freehold) Ltd [2015] L&TR 21
Penman v Upavon Enterprises Ltd [2002] L&TR 10
Westbrook Dolphin Square Ltd v Friends Life Ltd [2014] L&TR 28
Wiggins v Regent Wealth Ltd [2015] 1WLR 1188

Introduction

1. On 15 January 2018 the First-tier Tribunal (Property Chamber) ("the FTT") decided two preliminary issues in an application by Queen Court Freehold Company Ltd ("the Nominee Purchaser") to acquire the freehold and a number of leasehold interests in Queen Court, Queen Square, London WC1 under Chapter 1 of Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"). The preliminary issues concerned the Nominee Purchaser's entitlement to acquire leases of areas which were found by the FTT to be common parts of Queen Court, namely a boiler room, the sub-soil beneath the building and the airspace above it.

2. The FTT determined the issues in favour of the Nominee Purchaser and against the owners of the leases of the common parts who now appeal.

The statutory scheme

3. Chapter 1 of Part 1 of the 1993 Act confers on tenants holding long leases of flats in a self-contained building the right collectively to acquire the freehold interest in the building. Acquisition is by a nominee who acts on behalf of the participating tenants.

4. By section 2(1)(b) and (3)(a) the participating tenants are additionally entitled to have acquired by their nominee the interest of the tenant under any lease of "common parts of the relevant premises", where the acquisition of that interest is "reasonably necessary for the proper management of or maintenance of those common parts".

5. Section 101 contains general provisions for the interpretation of Part 1 and defines "common parts", where they relate to any building or part of a building, as including "the structure and exterior of the building or part and any common facilities within it."

6. The process of acquisition is commenced by the participating tenants giving the freehold reversioner an initial notice under section 13 of the 1993 Act. The notice must specify the premises to be acquired and identify any interests other than the freehold which are sought.

7. Section 13(11) of the 1993 Act is concerned with the continuation in force of the initial notice. It provides:

> "Where a notice is given in accordance with this section, then for the purpose of this Chapter the notices continues in force as from the relevant date –
>
> (a) until a binding contract is entered into in pursuance of the notice, or an order is made under section 24(4)(a) or (b) or 25(6)(a) or (b) providing for the vesting of interests in the nominee purchaser;

(b) if the notice is withdrawn or deemed to have been withdrawn under or by virtue of any provision of this Chapter or under section 74(3), until the date of the withdrawal or deemed withdrawal, or

(c) until such other time as the notice ceases to have effect by virtue of any provision of this Chapter."

8. It is common ground in this appeal that when an initial notice no longer "continues in force" the right of the tenants who gave the notice to acquire the freehold and any other interests in reliance on it will also come to an end. Rights conferred by the notice may of course have been replaced by that time by a contract or transfer of the freehold, or by an order of the court vesting the freehold in the nominee.

9. Provision for the vesting of interests by order of the court is made by section 24(3) which permits either the nominee purchaser or the reversioner to make an application to the court if all the terms of the acquisition have either been agreed between the parties or determined by the appropriate tribunal but a binding contract has not been entered into within 2 months.

The facts

10. Queen Court is a purpose-built block of flats comprising 45 flats on ground and seven upper floors (the top floor is a relatively recent addition to the original structure). The main entrance to the building is on Queen Square, with a second entrance at the opposite end of the building on Guilford Street. At the northern end of the building it has a frontage to Guilford Street from which external steps lead down to a basement containing the water tanks, boilers, oil tanks and electrical switchboards which serve the whole building. A second entrance to the basement is available by a set of steps leading from a small external courtyard on the west side of the building which is assessible only from the ground floor hallway. The basement boiler room occupies about a third of the building's total footprint and there is no basement under the remainder.

11. On 24 November 2016 the tenants of the majority of the flats in Queen Court gave an initial notice exercising their right of collective enfranchisement under the 1993 Act to the owner of the freehold, Greymax Reversions Ltd. The Nominee Purchaser was appointed to acquire the freehold of the building on behalf of those participating tenants.

12. Queen Court is subject to a number of leasehold interests which the respondent also wishes to acquire on behalf of the participating tenants.

13. Ten flats are subject to intermediate leasehold interests for terms of 200 years granted in 2012 by then then owner of the freehold, West End & District Properties Ltd, to Anston Investments Ltd.

14. The whole building is the subject of a headlease granted in 2015 for a term of 99 years by West End & District Properties to Regal Estates Ltd.

15. On 3 December 2015 West End & District Properties granted Regal Estates a lease of the "roof area and air space up to a height of 7 metres above the surface of the roof" of the Building for a term of 999 years without charging a premium. The demise excluded "any part of the Building lying below the surface of the roof". The lease conferred full rights to develop the air space in accordance with any planning permission which the lessee might obtain. It reserved to the lessor rights of access over the air space to the extent that they were necessary either for emergency purposes or for the proper performance of the lessor's obligations to the owners or occupiers of any of the flats in Queen Court.

16. On 21 January 2016 Regal Estates transferred the air space lease to the first appellant, L M Homes Ltd, for a price which the Land Registry was informed had been £215,000.

17. On 7 October 2015 Westend granted a lease of about two thirds of the basement to Regal Estates, again without charging a premium. The basement is a relatively open area with two large rooms and a corridor running the width of the building at one end. The lease envisages further sub-division and the area demised is therefore represented by red lines on the lease plan rather than by any existing physical feature. It excludes the area for the time being occupied by two boilers, two hot water tanks and a number of electricity meters but includes areas occupied by an oil storage tank, a gas meter, a water pump and other service installations. The basement lease also includes the staircase leading down from Guilford Street, but not the staircase from the internal courtyard. It confers full rights for the lessee to develop the demised part of the basement in compliance with any planning permission which might be obtained, including the right to alter or remove any structural part of the Building and full rights of access to and from the remainder of the Building to facilitate such development. Rights of access are reserved to the landlord for emergency purposes or for the proper performance of its obligations to other lessees.

18. The basement lease was transferred to the second appellants, Mr and Mrs Emore on 1 December 2016, for a price stated to have been £345,000.

19. On the same day, West End granted a second lease, again to Regal Estates, of what were referred to in the lease as "basement areas" and noted in the register of title as being "at basement level, but which at the date of grant comprised the sub-soil beneath the whole of Queen Court with the exception of the existing basement. Once again the term was 999 years and no premium was paid. The lease included full rights to develop the demised premises in compliance with planning permission.

20. The sub-soil lease was transferred by Regal Estates to the third appellant, Dalvir Kaur on 7 January 2016 at a price recorded as being £150,000.

21. The initial notice given by the participating tenants on 24 November 2016 identified the ten Anston Investments intermediate leases and the leases of the air space, the basement and the sub-soil as interests which they proposed to acquire under section 2(1)(a) or (b) of the 1993 Act.

22. Greymax admitted the participating tenants' entitlement to acquire its freehold interest in Queen Court as well as the headlease and the Anston Investments intermediate leases by a counter-notice given on 6 February 2017. It disputed their right to acquire the leases of the air space, the basement and the sub-soil.

23. The parties were unable to agree whether the respondent is entitled to acquire the appellants' leases and, if so, on what terms, and an application was made to the FTT for a determination.

24. Agreement was subsequently reached concerning the terms of acquisition of the freehold, the headlease and the ten intermediate leases. The transfers of these interests in Queen Court to the respondent were completed by registration on 11 August 2017, 12 July and 9 November 2017 respectively.

The preliminary issues

25. On 8 August 2017 the FTT gave directions for the determination of two preliminary issues, as follows:

(1) Does the tribunal have jurisdiction to determine the terms of acquisition of the leasehold interests in the air space, the basement and the sub-soil?

(2) If so, is the respondent entitled to acquire the leases of the air space, the basement and the sub-soil?

26. By its decision given on 15 January 2018 the FTT determined both preliminary issues in the respondent's favour. It subsequently refused permission to appeal, but permission was granted by this Tribunal on 24 April 2018 with a direction being given that the appeal be conducted as a review of the FTT's decision.

Issue 1: Does the FTT have jurisdiction to determine the terms of acquisition of the remaining leasehold interests?

27. Mr Denehan, who presented the appeal on behalf of the appellants but had not been instructed at the FTT, submitted that the effect of section 13(11) of the Act was that an initial notice ceases to have effect whenever "a binding contract is entered into in pursuance of the notice". Binding contracts had been entered into by the transfers of the freehold, the headlease and the intermediate Aston leases. It followed that the initial notice no longer "continued in force" as from the date of the earliest of those contracts on 12 July 2017.

28. The reference to "a contract" in section 13(11)(a) should, Mr Denehan suggested, be given its natural meaning which he said connoted a single contract. There was no need for "a contract" to be construed as if it included a reference to more than one contract. Mr Denehan suggested that a requirement for a single contract was not only the more natural reading of the statutory language but would render the acquisition process "more streamlined" and "more containable". The respondent could have waited until its entitlement to the appellants' leases had been determined

before entering into any contract or taking any transfer of the freehold, the headlease and the intermediate leases. It had simply slipped up by pre-empting the making of a single contract to which the nominee purchaser, the freeholder, and the lessees of each of the leasehold interests sought to be acquired would be party. On the transfer of the freehold to the respondent it became the reversioner and its rights under the initial notice became spent.

29. Mr Philip Rainey QC who appeared on behalf of the respondent submitted that the starting point for understanding how the machinery of the Act was intended to operate was section 24. Section 24(1) confers jurisdiction on the FTT to determine disputes where "any of the terms of acquisition" remain in dispute 2 months after the date of the freeholder's counternotice in response to the leaseholder's initial notice under section 13. Section 24(3) enables the reversioner or the nominee purchaser to apply to the court for a vesting order under section 24(4) only where "all of the terms of acquisition have been either agreed between the parties or determined by the appropriate tribunal under sub-section (1)". It was apparent, therefore, that the FTT is intended to retain jurisdiction for so long as there remains a disagreement over "any of the terms" on which the acquisition is to proceed. The Court of Appeal had considered section 24(3)(b) in *Penman v Upavon Enterprises Limited* [2002] L&TR 10 and had concluded (at paragraph 33) that before the court could make a vesting order the situation must have been reached "where not just some, but all, of the terms of acquisition have either been agreed between the parties or determined" by the appropriate tribunal.

30. Mr Rainey submitted that section 13(11)(a) was not a trap for the unwary. The purpose of section 13(11) was to identify the point at which an initial notice ceased to be operative because its purpose had been served. Under sub-paragraph (a) the claim asserted by the initial notice has resolved by the rights of the participating tenants being replaced by a binding contract or by an order of the court vesting the property in the nominee, and for that reason the initial notice no longer continues in force. Where the initial notice is withdrawn or deemed to have been withdrawn sub-paragraph (b) has the same effect, as does sub-paragraph (c) where a notice ceases to have effect by virtue of some other provision of the Act. In each case the process initiated by the notice has been completed or has progressed beyond the statutory procedures.

31. Mr Rainey also pointed out that section 13(11)(a) refers, on the one hand, to a binding contract having been entered into, and on the other hand to orders having been made under section 24(4) or 25(6); such orders are made either where all terms have been agreed but no contract has been entered into or where the reversioner fails to give a counter-notice. Before the court may make a vesting order all of the terms of acquisition must first have been agreed or determined, including terms for the acquisition of all leasehold interests to which the nominee is entitled, and the same approach should be taken where the terms are settled by contract rather than by order of the appropriate tribunal. There could be no reason to interpret section 13(11)(a) so that an initial notice ceases to have effect as the result of a binding contract having been entered into in relation to only one of a number of interests, and where all of the terms of acquisition had not been agreed in respect of other interests. For the nominee purchaser's right of acquisition to fall away in part rather than being given effect to in whole would cause section 13(11)(a) to operate inconsistently for no good reason.

32. Mr Rainey drew my attention to those parts of the legislation which, he said, clearly contemplate that more than one contract might be required to complete the acquisition of all of the interests to which a nominee purchaser may be entitled. In particular, Part 2 of Schedule 1 to the Act includes provisions for the conduct of proceedings by the reversioner on behalf of other landlords. The acts of the reversioner bind other relevant landlords unless they have given notice under paragraph 7 of their intention to be separately represented and to deal directly with the nominee purchaser. It would be inconsistent with that general entitlement to deal separately for all parties to be required to enter into a single contract providing for the simultaneous acquisition of all their various interests. Section 38(2), a definitions provision, also makes clear that references in Chapter 1 to the acquisition by the nominee purchaser are references to the acquisition of "such freehold and other interests as fall to be acquired under a contract entered into in pursuance of the initial notice"; the right of acquisition will not fully be given effect to, in these terms, until all interests have been acquired.

33. The proper construction of section 13(11)(a) seems to me to be in accordance with Mr Rainey's submissions and involves no more than reading the words "until a binding contract is entered into" as encompassing both the singular and the plural – until binding contracts are entered into – where terms of acquisition of different interests need to be agreed between a number of different parties. That is an orthodox reading of the statute: section 6(c) of the Interpretation Act 1978 provides that in any Act, unless the contrary intention appears, words in the singular include the plural and *vice versa*. There is nothing in the statutory provisions to suggest a contrary intention and their proper operation requires that in cases such as this the initial notice should remain in force until contracts or vesting orders are in existence which cause the initial notice to cease to have effect in relation to all of the interests sought to be acquired.

34. It would be extremely inconvenient if Mr Denehan's submissions were correct. It is commonplace for acquisitions under Chapter 1 of the 1993 Act to include both the freehold of the relevant premises and a number of leasehold interests, sometimes comprising the whole of the building and sometimes distinct parts of it, such as common parts or individual flats held by intermediate landlords. Mr Denehan's suggestion that a single contract would be more streamlined and containable is difficult to accept. It would be more likely to enable a recalcitrant leaseholder to delay the completion of arrangements with which the owners of other interests were content. Rather than making the process smoother and more consensual, it would be necessary for parties who were in agreement to become involved in tribunal proceedings. I am not aware of any previous case in which it has been suggested that all parties from whom the nominee purchaser wishes to acquire interests must join in a single contract in order to avoid the nominee's rights being terminated on entering into a contract to acquire any one of the interests to which it is entitled. On the contrary, it has been assumed, including by the Court of Appeal in *Wiggins v Regent Wealth Ltd* [2015] 1WLR 1188, that that was not the effect of the statute.

35. I therefore dismiss the first ground of appeal. The FTT was right to find that it did not lose jurisdiction as a result of the conclusion of a binding contract between the respondent and the freeholder when no contracts were yet in existence for it to acquire the interests of the appellants.

Issue 2: Is the respondent entitled to acquire the remaining leasehold interests?

36. As I have already mentioned, section 2(1)(b) and (3) of the 1993 Act give the participating tenants the right to have acquired for them in addition to the freehold the interest of the tenant under any lease under which the demise premises consist of or include any common parts of the relevant premises where the acquisition of that interest is reasonably necessary for the proper management or maintenance of those common parts.

37. The second issue is whether the basement, the sub-soil beneath Queen Court, and the air space above it are "common parts" to which section 2(3)(a) applies.

"Common parts"

38. The expression "common parts" is defined in section 101(1) of the 1993 Act as follows:

> ""Common parts" in relation to any building or part of a building, includes the structure and exterior of that building or part and any common facilities within it."

39. The word "building" is not defined by the 1993 Act. In *Malekshad v Howard de Walden Estates Limited* [2012] UKSC 41 (which concerned proceedings under the Leasehold Reform Act 1967) Lord Millett said, at [47], that "a "building" is merely a built structure."

40. The definition of "common parts" in section 101 does not purport to be comprehensive, but rather identifies elements about which there might otherwise be doubt and which are intended to be included within the expression. The inclusions of the exterior of the building within the statutory meaning, and the reference to "common facilities", both suggest a wider meaning than "common parts" might be thought to have in every day speech. Further assistance in identifying the scope of the expression is available in a number of relatively recent decisions of the High Court and Court of Appeal.

41. In *Cadogan v Panagopoulos* [2010] EWHC 422 (Ch) the question arose whether a nominee purchaser was entitled to acquire a light well and a basement caretaker's flat. Roth J explained what he understood by the expression "common parts" in this context:

> "I consider that it is intended to include those parts of the building that either may be used by or serve the benefit of the residents in common (using that expression in a non-technical sense), as opposed to those parts of the building that are for the exclusive benefit of only one or a limited number of the residents or for none at all. Thus, I consider it will cover the boiler room or a room housing the lift machinery, although those rooms may be kept locked and no resident ever goes into them. It will encompass a covered atrium that all the residents can use, and also a sunken garden in the centre of the building to which the residents do not have access but which is a common amenity that is to be regarded as part of the building; or a banked rockery at the front of the building over which the residents do not pass but which is maintained for their common benefit and should be considered as part of the "exterior" although not part of the structure. Furthermore, there is no requirement that the part must

actually be used by all the residents: for example, the fact that the residents on the grounds floor may never use the lift does not prevent it from being a common part."

42. Roth J decided that both the caretaker's flat and the lightwell were common parts. The caretaker provided services to the building as a whole and the flat in which he or she was accommodated served to benefit the residents in common. Moreover, it clearly was reasonably necessary for the nominee to acquire the flat "for the proper management or maintenance of those common parts" since:

> " … if they did not acquire the interest under the lease they would not be able to use that flat to accommodate a caretaker. Indeed, if the lease remained in force, the basement flat would not be maintained as a common part at all."

As for the light-well, which was enclosed by flats on three sides and open on the fourth side to a mirror image light-well in an adjacent building, this could sensibly be regarded as part of the exterior of the building. However, its acquisition was not considered necessary for management or maintenance of the light-well since sufficient rights were already reserved in the lease of the basement flat to obtain access to it.

43. Roth J's analysis was upheld by the Court of Appeal ([2010] EWCA Civ 1259) in which, at [24], Carnwath LJ dismissed a submission that a caretaker's flat over which lessees have no rights or access could not be part of the common parts for the purposes of section 2:

> "I regard this as an unjustified restriction on the natural meaning of the definition. "Access", as such is not a necessary part of it. It is sufficient in my view that the lessees share the benefit of the caretaker's flat, by enjoying the services for the purposes of which it was provided."

44. Roth J's observations on the extent of common parts were also adopted by Mann J in *Westbrook Dolphin Square Limited v Friends Life Limited* [2014] L&TR 28 at [198]. Amongst other general points which he extracted from the authorities, at [200], was that it is not necessary that the part be devoted to common use or benefit as a matter of obligation in the leases, and that it is not necessary for residents to have access to a part of a building for it to be a "common part".

45. In *Merie Bin Mahfouz Co (UK) Ltd v Barrie House (Freehold) Limited* [2015] L&TR 21 the Tribunal (Sir Keith Lindblom (President) and A J Trott FRICS) described the essential attribute of "common parts" as being "some shared use or benefit".

46. With that guidance in mind I can now consider the three disputed areas which the respondent wishes to acquire.

The basement

47. I have already described the basement in paragraph 17 above. Mr Denehan submitted that the only common parts in the area demised by the basement lease were the boiler equipment and

service installations. These were not included in the lease because they had been carved out of the demise and left in the possession of the lessor as part of the Reserved Property described in paragraph (g) of Schedule 2 (which reserves hot water service boilers and, more generally, all equipment and services not used exclusively for any one part of the Building). Full rights of access over the basement itself were reserved to the lessor by paragraph (c) of the Schedule 5 for the proper performance of the lessor's obligations including the repair and maintenance of the equipment and services. Access would continue to be available through the door leading from the internal courtyard once the second appellants' intention to divide the basement had been put into effect, separating the area occupied by the boiler from the remainder which would be converted into a flat.

48. In agreement with Mr Rainey I consider that it is not correct to regard the common parts of the Building as being limited to the service installations themselves. By any ordinary understanding of the expression, the whole of the basement which houses the service installations for the whole of the Building is one of the common parts of the Building. The installations are not confined to one part of the basement, but are arranged around the perimeter of the rooms, with various substantial pipes and conduits rising up the walls and across the ceiling. The appellants' intention is no doubt to re-position some of these services, but that has not yet been done and as matters currently stand access to the whole basement is necessary to service and operate them.

49. It is necessary to have regard to the function served by an area when considering whether it is or is not a common part. If the purpose to which a particular room is put is to accommodate service installations used for the benefit of the whole Building that is sufficient to render the whole of the space part of the common parts of the Building. I derive some assistance on this point from the decision of Mann J in *Westbrook Dolphin Square*. He was required to consider the status of different areas within a large building including a corridor running between a boiler room and lift motor room; at paragraph 284 he found that despite being an empty space to which leaseholders did not have access the function of the corridor was to provide access to the admittedly common boiler room and lift room and for that reason it should itself be regarded as a common part. The same can be said of the boiler room at Queen Court, in that the boiler room houses the installations which are acknowledged themselves to be common parts. As the authorities demonstrate, it is immaterial that leaseholders have no rights of access to the basement or to the equipment housed in it. That equipment is for shared use and benefit and the FTT was entitled to conclude that the area in which it is located has the same character.

50. The other issue in relation to the basement is whether the acquisition of the appellants' lease is reasonably necessary for its proper management or maintenance by the respondent.

51. I accept Mr Rainey's submission that in addressing this question it is necessary to have regard to the appellants' intentions for the common parts demised by their leases. The purpose of a nominee purchaser being given the right to acquire common parts is a practical one and it is appropriate to have regard to the likely practical consequences if acquisition is not achieved. In common with the leases of the sub-soil and air space, the basement lease gives the appellants extensive right to develop the areas demised to them for which they are said to have paid substantial sums. It can be inferred from that expenditure and from the parcels clause in the lease (which refers to the demised premises as a "flat") that the appellants' intention is to create additional

residential accommodation in the basement. The result will be that the greater part of the area will lose its character as a common part of the Building and will cease to be managed as such.

52. The FTT inspected the area and made specific findings about it. In particular it found that the current access to the basement through double doors on the Guilford Street side of the Building was "essential to the maintenance of the boiler equipment". It regarded the alternative access through the communal ground floor hallway (and then down into the internal courtyard) as inappropriate for the transfer of large pieces of boiler equipment or for regular maintenance. It found that it was not reasonably possible for works of repair and replacement to the boiler to be undertaken in the area which the appellants intended should remain available; nor would there be any space for the spare parts and equipment currently stored in the basement and which are reasonably required to ensure the smooth running of the boilers and the electrical apparatus. In summary the FTT found that the proposed development of the basement by the appellants would significantly interfere with the reasonable maintenance and upkeep of the communal heating and electrical supply provided to the individual flats and the common parts.

53. It was suggested by Mr Denehan that these findings of fact were not open to the FTT because there had been no evidence about the practicality of maintaining the boiler or the need for space to store spare parts and equipment. I do not agree. All that the FTT saw on its inspection of the basement was evidence from which it was entitled to draw inferences about the practical consequences of the division of the basement in the manner proposed by the appellants.

54. Having been shown photographs of the basement area it is abundantly clear to me that the FTT's conclusions were properly open to it. The area occupied by the boiler is very confined and were it is to be further enclosed in the manner proposed by the appellants there would, as the FTT found, be likely to be real difficulties in maintaining or replacing the equipment. In order properly to manage the service installations, the respondent must also be in a position to manage the space in which they are housed.

55. In my judgment the FTT was entitled to come to the conclusion, on the facts, that the acquisition of the basement premises by the respondent was reasonably necessary for their management and maintenance as common parts of the Building. The appeal of the second appellants, Mr and Mrs Emore, is therefore dismissed.

The sub-soil

56. The premises demised by the lease of the sub-soil beneath Queen Court granted to Regal Estates on 1 December 2016 and subsequently assigned to the third appellant, Mr Kaur, are referred to in the parcels clause as "basement areas", suggesting an intention that a further basement should be excavated. The FTT found that the respondent had the right to acquire those premises. They were "properly described as "common parts", without which the structure of the Building would be compromised is development was permitted unchecked." They also included the sub-soil beneath planted and landscaped areas which the lessor had covenanted in the flat leases to maintain but which would be lost to the residents. The acquisition of the sub-soil was reasonably necessary for the proper management or maintenance of the Building.

57. In support of the appeal on this issue Mr Denehan submitted that the FTT's finding that the sub-soil beneath the Building was a common part within the meaning of section 101(1) was surprising. The lessee of the flats had no interest of any kind in the sub-soil, it was not identified as part of the Reserved Property in any of the leases, and the lessor was under no obligation under the flat leases to manage or maintain it.

58. The sub-soil obviously provided support for the Building, but Mr Denehan suggested there was no reason to fear that the development contemplated by Mr Kaur would compromise that support. The rights of support were contractually protected by the reservation in Schedule 5 of the sub-soil lease and far from being "unchecked" (as the FTT had described it) the development would have to comply with building regulations.

59. As for the obligation on the lessor to keep the landscaped part of the Reserved Property "planted and in good and tidy condition" (paragraph 5(c) of Schedule 7 to the flat leases) Mr Denehan submitted that that did not require the lessor to preserve the Reserved Property in its current state. In principle a lessor was entitled to deal with Reserved Property as he or she chose provided the rights of tenants were not substantially interfered with. The proposed provision of a light well in the current location of the landscaped areas would not constitute a substantial interference with the tenants' amenity rights.

60. I do not think one would ordinarily regard the sub-soil beneath a building as part of the building itself. The foundations of a building are likely to be regarded as part of the built structure, but the case for treating the ground below the foundations in that way is more difficult to see. The sub-soil seems to me to lie outside the ordinary meaning of the word building.

61. Some judicial support for that impression is provided by a recent decision of HHJ Paul Matthews, sitting as a Judge of the High Court, in *Gorst v Knight* [2018] EWHC 613 (Ch), in which the question was whether the lessee of a flat on the lower floor of a building had the right to dig down below the foundations of the building to create a habitable room out of an existing cellar. The lease demised the ground floor flat "including all parts of the building … below the line dividing equally the joists between the ground and first floors". At paragraph 38 Judge Matthews held that those words did not have the effect of including the subsoil in the demise, "because the subsoil was not part of the Building".

62. I was, however, referred by Mr Rainey to a decision of the Privy Council, *City of Victoria v Bishop of Vancouver Island* [1921] 2 AC 384 (PC) cited in *Stroud's Judicial Dictionary* in which the question was whether the ground on which there had been constructed a cathedral was included in a statutory exemption from rating granted in favour of "every building set apart and in use for the public worship of God". Lord Atkinson considered that the ordinary meaning of "building" included both "the fabric of the building and the ground that the fabric rests upon and encloses".

63. The *City of Victoria* case concerned legislation which levied a tax "upon land or upon real property or upon improvements" subject to a number of exemptions, which included the ecclesiastical exemption and another in favour of hospitals and "the land adjoining thereto"; neither exemption referred to the land on which the hospital or place of worship stood. Lord

Atkinson considered (at page 390) that "to hold that the ground on which the cathedral stands is exempt from taxation though not by express words is only to do what to avoid gross absurdity must be done." To construe the word "building" as including both the fabric and the ground on which it stands was only to make the legislations "rational", and to do otherwise would be "absurd" and "contrary to every sound principle of construction". In any event, I do not think the decision is authority for any proposition other than that the ordinary meaning of the word "building" includes "the ground that the fabric rests upon and encloses". It says nothing about the sub-soil.

64. While I do not accept Mr Rainey's submissions that the sub-soil is part of the building, or part of the structure of the building, I do agree with him that the sub-soil is within the extended meaning given to the expression "common parts" by section 101 because it is part of "the exterior" of the building. In *Dartmouth Court v Berisworth* [2008] L&TR 12 at [71] Warren J rejected the submission, in the context of Part 1 of the Landlord and Tenant Act 1987, that the "exterior" of a building was limited to non-structural external surfaces such as cladding or render. He considered the airspace above a building to the height necessary to enable maintenance to be carried out was part of the exterior of the building, and thus a common part, explaining:

> "It makes perfectly good sense, in my judgment, to include the airspace above the roof as part of the exterior when the enjoyment of that space is from time to time necessary for the protection of the building, i.e. by repairing it."

In the passage from *Cadogan v Panagopoulos* cited at paragraph 41 above Roth J considered that a rockery at the front of the building should be considered as part of the "exterior". In my judgment the same can be said of the ground on which the foundations of the building rest and the sub-soil which bears the weight of those foundations. Each has the essential attribute of "common parts" namely the provision of some shared use or benefit, and for that reason I consider the FTT was correct to regard the sub-soil as within the common parts of the Queen Court.

65. It was acknowledged by Mr Denehan that the sub-soil provides essential support to the Building. It was for that reasons that the FTT considered that the acquisition of the sub-soil was "reasonably necessary for the proper management or maintenance of the Building". But it is clear from section 2(3) of the Act that that is not the correct question. The true question is somewhat narrower, namely, whether the acquisition of "any common parts … is reasonably necessary for the proper management or maintenance of those common parts". In other words, in this case, is the acquisition of the sub-soil reasonably necessary for the proper management or maintenance of the sub-soil. In addressing that question I bear in mind that the circumstances in which any active maintenance or management of the sub-soil may be required are likely to be remote, although as the sub-soil lease is for a term of 999 years and the current Queen Court is unlikely to endure for so long, a requirement for management of the sub-soil at some point must be regarded as at least a distinct possibility.

66. Mr Rainey suggested that the FTT was right to answer the critical question in the affirmative, and he relied on the justification given in *Cadogan v Panagopoulos* by Roth J and the Court of Appeal for considering the acquisition of the caretaker's flat to be reasonably necessary. In the passage cited at paragraph 42 above Roth J said that the only way to ensure that the caretaker's flat remained in use for that purpose was to permit acquisition of the leasehold interest in it because "if the lease remained in force, the basement flat would not be maintained as a common part at

all". That reasoning was specifically approved by Carnwath LJ, at paragraph 26 of his judgment, with which the other members of the Court of Appeal agreed. It was not relevant that the freeholder might offer to make some alternative flat available because the statutory right related to the existing flat and because "once the existing caretaker's flat has been identified as "common parts" the only issue is whether acquisition of *that* part is necessary for its management; the fact that the service might be provided elsewhere is irrelevant."

67. Applying that reasoning to the sub-soil, it is clear that it is reasonably necessary that the tenants acquire it. The absence of any requirement for active management or maintenance in the short or medium term does not matter. What matters is that, if implemented, the appellant's intentions with regard to the lease will cause the subsoil to cease to be a common part to the extent required to create the appellant's proposed new residential accommodation. It is reasonably necessary to the tenants' management of the ground on which the Building stands that it should be within their possession, since otherwise the function performed by that ground will change. The fact that support will continue to be enjoyed by the Building from the stratum below that on which it currently stands is beside the point; it is not the management of that stratum which is in issue, but of the stratum which currently provides support and which has been demised.

68. For the same reasons the existence of rights of access to the demise for the lessor does not permit a different answer.

69. Even if that is wrong, the alternative explanation given by the FTT is sufficient in itself to make the acquisition of the sub-soil reasonably necessary. The landscaped and planted areas around the base of the walls of the Building are not very large, but they exist and the lessor's covenant to "keep the whole of the grassed planted and landscaped areas (if any) of the Reserved Property mown and planted in good and tidy condition" is therefore engaged. I do not accept Mr Denehan's submission that performance of this obligation is optional, and can be avoided altogether by the area being devoted to some other use (such as the provision of light wells for new basement accommodation) so long as the tenant's amenity as a whole is not substantially interfered with. When the respondent acquires the freehold it will become responsible for the performance of the covenant. If the soil immediately below the surface of the planted and landscaped areas, and which is essential for its current use, is not within the respondent's possession and is liable instead to be excavated to create light wells, the respondent will be unable to manage or maintain soil in compliance with the flat leases.

70. For these reasons the FTT was correct to find that the respondent had the right to acquire the sub-soil lease, and the appeal of the third appellant is dismissed.

The airspace

71. The final area under consideration is comprised in the airspace lease.

72. There is some uncertainty over the extent of the premises contained in the airspace lease. The demise is of the "Demised Premises", and expression defined by reference to the entry in the Land Registry prescribed particulars (which form part of the lease) as "airspace above the roof at

Queen Court … described in Schedule 3". Schedule 3 describes the Demised Premises as "all that roof area and air space up to a height of 7 metres above the surface of the roof" and excludes "any part of the Building below the surface of the roof". The effect of the formulation in Schedule 3 seems to me to include the surface of the roof itself, but the prescribed particulars refer only to the air space. Moreover, the particulars are stated to prevail in the event of any conflict with the remainder of the lease. Mr Denehan was initially disposed to suggest that the air space lease included the surface of the roof, and therefore comprised part of the structure and exterior of the Building. In the course of argument he withdrew that concession and submitted that no part of the physical structure of the Building was comprised in the air space lease, but only the air above the surface of the roof.

73. Ultimately I do not think it matters to the outcome, but I regard Mr Denehan's second thoughts as correct. Although the reference in Schedule 3 to "all that roof area" and the exclusion of anything below the surface of the roof indicate that the surface itself was thought to be demised, the key descriptor is in the prescribed particulars which confines the demise to the airspace. The question remains whether the airspace is within the extended definition of common parts in section 101.

74. In *Dartmouth Court Blackheath Ltd*, to which I have already referred, the relevant demise was of "the space above the roof" (and hence did not include the surface of the roof). Warren J's first reason for regarding the air space as within the common parts as defined by section 60(1) of the 1987 Act (which defines "common parts" in the same terms as section 101 of the 1993 Act) was that the air space, at least to the height of the chimneys, was "an essential part of the space over which any owner of the main building with repairing obligations would need to have adequate rights of access." For that reason (at paragraph 70) he considered that it was a perfectly legitimate meaning of the word "building" that it includes the air space necessary to enable maintenance to be carried out. If that was wrong, he considered that the airspace was a "common part", since it was part of the exterior of the building.

75. In the *Barrie House* case the premises demised by the relevant leases appear to have included parts of the fabric of the roof itself: "areas for aerials on the roof … (including the air space above such areas)" in the first lease (paragraph 129); and "part of the roof top" in the second lease (paragraph 130). The Tribunal accepted at paragraph 148 that:

> "For essentially the same reasons as those given by Warren J in *Dartmouth Court v Berisworth* we accept that, at least in the context of a claim for collective enfranchisement under the 1993 Act, the airspace immediately above the roof of a building can be regarded as being part of the building."

The argument for regarding the airspace as a common part of Barrie House seems to me to have been stronger than at Dartmouth Court because at Barrie House parts of the exterior of the building were undoubtedly included in the demise.

76. Mr Denehan did not advance any reasoned argument why I should not follow the approach taken in the High Court (*Dartmouth Court*) and in this Tribunal (*Barrie House*) that the air space

above a building is properly regarded as part of the exterior of the building and is therefore comprised within its common parts.

77. On the assumption that the air space was part of the common parts Mr Denehan nevertheless submitted that it ceased to be so on the grant of the air space lease. He made the same submission about the basement and cited the Tribunal's *Barrie House* decision support. I do not accept that proposition, nor do I consider *Barrie House* supports it. As Mr Rainey QC pointed out, in *Barrie House* the Tribunal was concerned with areas which had formerly been common parts of the building but which had been altered to create separate units in the occupation of the landlord or third parties. It was because of their alteration, and not because of their subsequent demise, that those parts of the building lost their character as common parts. If it were the case that the grant of a lease of common parts, by itself, was sufficient to cause an area which continued to provide some shared benefit to the building no longer to be a common part, the provisions of the 1993 Act entitling tenants to acquire common parts would be largely redundant.

78. Mr Denehan concentrated the remainder of his submissions on the proposition that ownership of the air space was not reasonably necessary for their proper management or maintenance on behalf of the tenants. He contended that the appellant's intention to undertake redevelopment of the air space if planning permission could be obtained was not determinative against him. The air space lease reserved rights to the lessor which would be enjoyed by the nominee purchaser and which were sufficient to enable it to enter the demised premises for the purpose of discharging all of its obligations to repair and maintain the Building.

79. Mr Denehan was critical of the FTT which had made no findings of fact or given any explanation for its conclusion that the acquisition of the air space was reasonably necessary, and in any event it had asked itself incorrectly whether acquisition was necessary for the proper management or maintenance of the Building, rather than the air space alone. The airspace itself required no management or maintenance. If it was relevant to consider the management or maintenance of any other part of the Building, the airspace lease reserved all the rights of access the respondent would require.

80. Mr Rainey characterised this part of the appeal is an appeal against a judicial evaluation by the FTT, and suggested that such a challenge could only succeed if the FTT's decision was one which a reasonable tribunal properly directed could not have reached. The difficulty with that submission is that Mr Denehan is correct that the FTT did not explain what factors it had taken into account in reaching its assessment and appears to have asked itself the wrong question.

81. The matters on which Mr Rainey sought in support of the FTT's finding focused on the breadth of the development right conferred by paragraph h of Schedule 4 of the airspace lease which conferred "full rights and liberty in its absolute discretion to develop the Demised Premises in compliance with any planning permission which may be obtained from time to time." This was intended to allow the lessee to create a flat or flats above the existing roof level if planning consent could be obtained. The roof and airspace could not be managed as it currently is unless the respondent acquired the lease, since it would lose its character as airspace and cease to be a

common part altogether. Applying *Cadogan v Panagopoulos* it was said to follow that the respondent is entitled to acquire the airspace lease.

82. Mr Rainey also relied on the potential for conflict between the respondent and the flat leaseholders on the one hand and the airspace lessee on the other. The safeguards which usually attended a lessee's contractual right to undertake improvements were wholly absent, and the respondent would have no powers to approve, control, supervise and manage any work, or regulate the taking of access through the Building. There would inevitably be significant disturbance of the enjoyment by the lessees of their flats and conflict and in all probability litigation would ensue.

83. I do not consider that the risk of litigation or the likelihood of inconvenience to the occupiers of the building caused by any development project are relevant considerations. Neither concerns the management or maintenance of the airspace, and it is only the reasonable necessity of the acquisition of the airspace lease for that purpose which is material.

84. The airspace currently provides access to the roof of the Building, which is required whenever work of repair or maintenance is to be undertaken. The "proper management" of the airspace entails its retention as a means of access to the structure of the Building to enable inspection and repair when necessary. Proper management of the airspace may also involve its use as a location for facilities serving the Building (such as aerials, dishes or air conditioning plant). There is no evidence about the structure of the roof, or about the frequency with which it requires to be repaired, but it is inevitable that work will be required from time to time during the 999 year term of the airspace lease. Nor is there evidence about any common facilities on the roof, but again the opportunity presented by the roof and airspace to site such facilities is readily apparent.

85. As with the boiler room and sub-soil, the appellant intends, if planning permission can be obtained, to undertake work which will cause the airspace no longer to be accessible. Convenient access to the structure would become impossible because of the presence of an additional flat or flats on top of it, and any change in the structure would be unnoticed and difficult to monitor. In my judgment the risk of these consequences makes it reasonably necessary for the proper management of the airspace that the airspace lease be acquired. If the lease is not acquired the airspace will be incapable of being managed as it currently is. It does not matter that the respondent will presumably still have access to a new roof over the Building, or that it will have access to the existing structure in the exercise of the rights reserved in the airspace lease, since the former will relate to a different structure and the latter will involve a very much more complex and inconvenient operation than is currently possible.

86. In addition to *Cadogan v Panagopoulos* Mr Rainey relied on a number of decisions of first-tier tribunals which have consistently taken the approach that possession of the airspace above a building is necessary for the proper management of that airspace, including in particular the proper management of repairs to the roof of the building. I have considered these decisions and derive support from them.

87. I would add finally that if I had concluded that the surface of the roof was within the airspace demise, the case for regarding its acquisition as necessary for the proper management and maintenance of that surface and airspace would have been even stronger.

88. I am therefore satisfied that the conclusions reached by the FTT were open to it and that its finding that the respondents are entitled to acquire each of the appellants' leases was correct.

89. The appeal of the first appellant is therefore also dismissed.

Martin Rodger QC
Deputy Chamber President

20 December 2018