LANDMARK CHAMBERS SEMINAR SERIES

COLLECTIVE ENFRANCHISEMENT NUTS & BOLTS

(I) the requirements for a collective claim

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STRUCTURE OF PAPER

[1] This talk substantially relies on an earlier paper prepared by myself and Richard Clarke, also of Landmark Chambers, in November 2015. All errors are my own.

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A: INTRODUCTION

1. The term 'collective enfranchisement' refers to those rights bestowed by Part I of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act"). The essence of those rights is described by s1(1) of the Act in the following terms:

> *(1) This Chapter has effect for the purpose of conferring on qualifying tenants of flats contained in premises to which this Chapter applies on the relevant date the right, exercisable subject to and in accordance with this Chapter, to have the freehold of those premises acquired on their behalf—*
>
> *(a) by a person or persons appointed by them for the purpose, and*
>
> *(b) at a price determined in accordance with this Chapter;*
>
> *and that right is referred to in this Chapter as "the right to collective enfranchisement"*

2. It can be seen from s1 that collective enfranchisement involves a number of distinct elements. Two of the most fundamental are: (1) identifying who are qualifying tenants of flats and (2) identifying those premises to which the Act applies. Those are the issues that will be examined in this paper.

B; PREMISES TO WHICH THE ACT APPLIES

3. The starting point in identifying those premises to which the Act applies is section 3, which provides that:

> *"(1) Subject to section 4, this Chapter applies to any premises if—*
>
> *(a) they consist of a self-contained building or part of a building;*
>
> *(b) they contain two or more flats held by qualifying tenants; and*
>
> *(c) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises.*
>
> *(2) For the purposes of this section a building is a self-contained building if it is structurally detached, and a part of a building is a self-contained part of a building if—*
>
> *(a) it constitutes a vertical division of the building and the structure of the building is such that that part could be redeveloped independently of the remainder of the building; and*
>
> *(b) the relevant services provided for occupiers of that part either—*
>
> *(i) are provided independently of the relevant services provided for occupiers of the remainder of the building, or*
>
> *(ii) could be so provided without involving the carrying out of any works likely to result in a significant interruption in the provision of any such services for occupiers of the remainder of the building;*

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and for this purpose "relevant services" means services provided by means of pipes, cables or other fixed installations."

What is a building?

4. The starting point in section 3(1) is that the Act applies to self-contained buildings, meaning those buildings which are "*structurally detached*". Although 'building' itself is not defined by the Act, this is unlikely to cause difficulties in circumstances where any building, to fall within the Act, must contain two of more flats.[2]

5. It is generally accepted that a single collective enfranchisement claim cannot be made by the tenants of different buildings. This was apparently approved in passing by Gloster LJ in the Court of Appeal's decision in the case *Ninety Broomfield Road RTM Co Ltd* [2016] 1 WLR 275 where it was held that a RTM company could not exercise the right to manage in respect of multiple buildings, in part on the basis of an analogy with the position in collective enfranchisement claims. If there are different buildings on the same estate, separate claims should be made, but they can name the same nominee purchaser to avoid problems following completion.

What is a self-contained building?

6. As above, a building is 'self-contained' for the purposes of the Act if it is 'structurally detached'. Whilst, as Lord Millet noted in Malekshad v Howard de Walden Estates Ltd [2003] 1 A.C. 1013, in everyday language "*the same structure may be regarded as a single building or as several buildings. Thus a terrace of houses may constitute a single building even though each house in the terrace also constitutes a building in itself*"[3], for the purposes of the 1993 Act, only the complete terrace would be structurally detached; the individual houses would not.

7. Identifying when a building is structurally detached can, however, sometimes cause difficulties[4]. Helpful guidance as to the correct approach in deciding whether a building is structurally detached can be found in two recent cases of the Upper Tribunal: No.1 Deansgate (Residential) Ltd v No. 1 Deansgate RTM Co Ltd [2013] UKUT 580 (LC) and Albion Residential v Albion Riverside RTM Co Ltd [2014] UKUT 6 (LC).

[2] A point made by the authors of Hague on Leasehold Enfranchisement (6th Ed.) at 21-02.
[3] Paragraph 47.
[4] As with 'building', 'structurally detached' is not defined by the Act.

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8. Deansgate was a case concerning an application for the right to manage premises under the Commonhold and Leasehold Reform Act 2002. Section 72 of that Act, like the 1993 Act, applies to self-contained buildings, defined as buildings which are "*structurally detached*". The issue in Deansgate was whether the premises, No. 1 Deansgate, are a self-contained building.

9. No.1 Deansgate is a mixed commercial/residential development, with 14 floors of residential accommodation containing 82 flats, and 5 commercial units at ground level. Importantly:

> *"4. No 1 Deansgate was constructed as a stand-alone building before the surrounding properties were built at a later date. Therefore, when No.1 Deansgate was originally constructed, it did not touch any other properties.*
> *5. It was built as a structurally detached development (in that it did not and does not derive any structural support or lateral stability from (or give any such support to) the adjoining properties).*
> *6. When the surrounding properties were built, weathering features were introduced to cover the gaps between No.1 Deansgate and those other properties in order to prevent the water ingress that would otherwise have occurred because the later properties had been constructed alongside No.1 Deansgate.*
> *7. As a result, No.1 Deansgate is now connected to the adjoining properties – but only by the weathering features.*
> *8. The weathering features have no structural element and do not provide structural integrity to No.1 Deansgate."*

10. The issue in Deansgate was whether, given these features, the building could be regarded as structurally detached. Holding that it could, HHJ Huskinson considered that:

    a. The purpose of this part of the 2002 Act is to permit a RTM company to manage premises which are self-contained and which are in consequence susceptible to being managed as a discrete unit (paragraph 29);
    b. To construe "structurally detached" as requiring the absence of any attachment or touching between the subject building and some other structure is to construe section 72(2) as though it said "detached" or "wholly detached" rather than "structurally detached". ***"What is required is that there should be no structural attachment (as opposed to non-structural attachment) between the building and some other structure."*** (paragraph 30)

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c. If the alternative construction were correct (that *any* attachment with another building meant it was not structurally detached), then there would be absurd results, for example, in the case of a connection such as *"hypothetical triumphal metalwork arch connecting two otherwise entirely self-standing and separate buildings"* (paragraph 33);
d. To the extent the case of Parsons v Gage [1974] 1 WLR 435 (HL) says otherwise, it applies only to the 1967 Act (paragraph 28).

11. Albion Residential was another right to manage case under the 2002 Act. Again, the issue was whether the premises (referred to in the case as the "Main Building") which was the subject of the right to manage application were structurally detached. The facts were that[5]:

a. Albion Riverside is a mixed commercial and residential development located on the south bank of the River Thames, formed of three buildings;
b. The principal part of the development comprises the Main Building and another (separate) building, "Building 1";
c. The Main Building has a "C" shaped footprint and is of predominately concrete framed construction with a ground floor entrance lobby accessing lifts and stairs to 185 residential units on 7 floors of luxury apartments and two further penthouse floors above. Those units, together with basement car parking spaces, a ground floor swimming pool complex, gymnasium and other common areas were the subject of the right to manage application;
d. The Building lies atop a very large basement car park which extends well beyond its own footprint to include the area below Building 1 and below a large part of the contiguous piazza, walkways and lawned grounds surrounding the buildings.
e. The car park area also incorporates the plant rooms and the base of the service and lift cores for Main Building, the commercial areas and for the adjacent Building 1 lying to the west. That building has commercial units at ground floor with five storeys of housing association flats above.

12. On these facts, the Upper Tribunal determined that the Main Building was not structurally detached. Its reasoning was that:

a. Whether a building is structurally detached is *"an issue of fact which depends on the nature and degree of attachment between the Building and other*

[5] Paragraphs 13-14.

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structures" (paragraph 29). Further, *"the statutory language speaks for itself and…it is neither necessary nor helpful for a tribunal considering whether premises are structurally detached to reframe the question in different terms"* (paragraph 30)[6];

b. In order to consider whether premises are a building which is structurally detached, it is first necessary to identify the premises to which the claim relates. Until the premises have been clearly identified one cannot begin to consider whether they are a building or part of a building or whether they are structurally detached. (paragraph 31)
c. The respondents submitted that the claim relates only to so much of the structure as is at or above ground level and does not include the car park or service cores beneath. That submission should not be accepted. As a matter of ordinary language, the "building" with which this claim is concerned does not begin at ground level. It includes the entirety of each of the four reinforced concrete cores which rise from basement level to the tenth floor; it also includes the plant and service rooms clustered around the two central cores at basement level (paragraphs 32, 34);
d. As for whether the identified building is structurally detached. The Main Building, as described, is not structurally detached at ground or basement level from the continuous concrete slabs which form the floor and ceiling of the underground car park. Whilst *"the car park itself would not ordinarily be regarded as part of the Building… that is not the issue. The issue is whether the [Main] Building is structurally detached from the car park and from any other structure.* ***In circumstances where continuous concrete structures — the ground and basement floor slabs — are major and integral components both of the Building and of the car park, the piazza and Building 1, it is not possible… to regard the Building as structurally detached."*** (paragraph 33)

13. The correct approach, as demonstrated from these cases, is:

a. To identify the extent of the building subject to the claim;
b. To ascertain, as a question of fact, whether that building is *structurally* detached from other buildings, rather than wholly detached.

What is a self-contained part of a building?

[6] At paragraph 30 the Upper Tribunal also agreed with HHJ Huskinson in Deansgate that *"The decision of the House of Lords in Parsons v Gage was not concerned with the 2002 Act and did not purport to lay down a test of general application wherever the expression "structurally detached" is employed in a statute".*

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14. As above, s3(1) allows claims for enfranchisement to be made for a self-contained part of a building. A part of a building is a self-contained part of a building if—

    a. it constitutes a vertical division of the building and the structure of the building is such that that part could be redeveloped independently of the remainder of the building; and
    b. the relevant services provided for occupiers of that part either—
        i. provided independently of the relevant services provided for occupiers of the remainder of the building, or
        ii. could be so provided without involving the carrying out of any works likely to result in a significant interruption in the provision of any such services for occupiers of the remainder of the building;

    and for this purpose "relevant services" means services provided by means of pipes, cables or other fixed installations.

15. There are therefore two requirements, both of which must be met: (1) a vertical division and (2) the independent provision of services.

Vertical division

16. By reason of s3, the part sought to be enfranchised must be capable of being divided by a vertical plane, without including any part of a neighbouring building. Considering identical provisions under the 2002 Act, the Lands Tribunal in Holding and Management (Solitaire) Ltd v 1-16 Finland Street RTM Co [2008] 1 EGLR 107 took a strict approach to construing this requirement, observing that:

> *"The requirement that, to be a self-contained part of a building, a part of a building must constitute "a vertical division of the building" is unqualified. Deviations from the vertical that are* de minimis *could no doubt be ignored for this purpose. The LVT concluded that the area within the deviation, as it put it, was approximately 2 per cent of the floor area subject to the notice of claim, that this seemed minimal in the context of the notice and was not material for the purpose of the Act. The question, however, it seems to me, is, not whether the area outside a line drawn vertically through the building is minimal in the context of the notice, or very small in relation to the total floor area, but whether, including the area in question, the part of the building was, physically, a vertical division of the building. Moreover in importing a test of materiality by reference to provisions in the 1967 Act, the LVT was in my judgment in error…*

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> *…the LVT was clearly right to conclude that there was "mostly vertical severance" but that "there was also some horizontal severance". The building as described was divided down one vertical plane at the ground and upper three floors and down a different vertical plane in the basement. No question properly arose for consideration as to whether the difference in the planes was "material", and it is clear that it was not de minimis. The part of the building in respect of which the claim was made did not constitute "a vertical division of the building". Accordingly it was not a self-contained part of the building for the purpose of c.1 of Pt 2 of the Act, and the RTM company was not entitled to the right to manage it."* (Paragraphs 8-10)

17. As for the requirement that the identified part is capable of being redeveloped independently of the remainder of the building, the Act does not defined 'redeveloped independently' and there is, as yet, no case law considering its meaning. The authors of *Hague* suggest the sensible test of whether that part is capable of being demolished and/or rebuilt without causing damage to the structure of the neighbouring part.[7]

Relevant services

18. As for the requirement that the relevant services are, or could be, provided independently, these provisions were considered by the County Court in the case of Oakwood Court (Holland Park) v Daejan [2007] 1 EGLR 121. In Oakwood Court, the judge proposed a five step approach to applying the s3 requirements (paragraph 46):

    a. Identify the services provided to occupiers of the enfranchising part which are in issue because they are not provided independently;
    b. Consider whether those services can be provided independently to the enfranchising part independently of their provision to the remainder of the building.
    c. Ascertain the works required to separate the respective parts of the services supplying the enfranchising part and the remainder of the building, so that such services would thereafter be supplied to each part independently of the other.
    d. Assess the interruption to the services provided to the remainder of the building which would be caused by carrying out the works.[8]

[7] See Hague 21-03.
[8] Stages 2-4 will, ordinarily, be matters for expert evidence.

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e. Decide whether that interruption would be "significant". Although not defined in the Act, this is, ultimately, a matter of fact and degree.

19. More recently, the identical provisions in the 2002 Act were considered by the Upper Tribunal in St Stephens Mansions RTM Co Ltd v Fairhold NW Ltd [2014] UKUT 541. The Upper Tribunal endorsed the five stage test identified by the Court in Oakwood and reiterated that it is a *"practical test"* (paragraph 80). The Upper Tribunal added that:

    a. The provision of additional components to supply the relevant services is not fatal for the purposes of the section 3[9] test: *"the only scale of measurement which the Act provides for deciding whether work is too substantial is by reference to the degree of interruption it will inflict on occupiers of the remainder of the building…The provision of the same service, the supply of water, through adapted service installations, including new components, seems to me to be equally capable of passing the test."* (paragraph 83);
    b. That the *"use of a shared pipe from the water main to the pump-house"* was not significant as it *"is in the nature of many services provided by means of pipes, cables or fixed installations that mains conduits are subdivided at a point close to the point of delivery to the consumer; until that point is reached the supply to any individual customer or group of customers is not independent of the supply to any other group. That fact cannot prevent the relevant service from being supplied independently for the purpose of s.72(4) . A sensible line has to be drawn."* (paragraph 86)
    c. That an interpretation of the section s.72(4)(b) (or section 3(2)(b) of the 1993 Act which is in identical terms) which required the tenant to have a right to do the necessary works to render the services independent *"would deprive the provision of virtually all effect. In order to give the statute a sensible effect it is therefore necessary to disregard the question of entitlement to carry out the necessary work. The purpose of s.72 is to identify premises to which the Act applies, and it is appropriate to consider that question on a purely practical level, focussing on the construction and configuration of the premises, rather than on the rights of their occupiers."* (paragraph 88)

Parts of parts

20. The Court of Appeal has confirmed that a self-contained part of a building is not precluded from the rights to enfranchisement contained in the Act simply because

[9] Which is in identical terms to that in the 2002 Act.

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it is capable of being sub-divided into smaller self-contained parts: Craftrule Ltd v 41-60 Albert Palace Mansions (Freehold) Ltd [2011] EWCA Civ 185.

21. It should also be noted that in the case of split freeholds, a claim can only be made for a self-contained part owned by a single landlord: section 4(3A) providing that:

> *"Where different persons own the freehold of different parts of premises within subsection (1) of section 3, this Chapter does not apply to the premises if any of those parts is a self-contained part of a building for the purposes of that section."*

Excluded premises

22. A number of premises which would otherwise fall within the scope of section3 of the Act are excluded by the terms of section 4, which provides:

> *(1) This Chapter does not apply to premises falling within section 3(1) if—*
> *(a)* ***any part or parts of the premises is or are neither—***
> ***(i) occupied, or intended to be occupied, for residential purposes, nor***
> ***(ii) comprised in any common parts of the premises; and***
> ***(b) the internal floor area of that part or of those parts (taken together) exceeds 25 per cent. of the internal floor area of the premises (taken as a whole).***
> *(2) Where in the case of any such premises any part of the premises (such as, for example, a garage, parking space or storage area) is used, or intended for use, in conjunction with a particular dwelling contained in the premises (and accordingly is not comprised in any common parts of the premises), it shall be taken to be occupied, or intended to be occupied, for residential purposes.*
> *(3) For the purpose of determining the internal floor area of a building or of any part of a building, the floor or floors of the building or part shall be taken to extend (without interruption) throughout the whole of the interior of the building or part, except that the area of any common parts of the building or part shall be disregarded.*
> *(3A) Where different persons own the freehold of different parts of premises within subsection (1) of section 3, this Chapter does not apply to the premises if any of those parts is a self-contained part of a building for the purposes of that section.*
> ***(4) This Chapter does not apply to premises falling within section 3(1) if the premises are premises with a resident landlord and do not contain more than four units.***

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(5) This Chapter does not apply to premises falling within section 3(1) if the freehold of the premises includes track of an operational railway; and for the purposes of this subsection –

(a) "track" includes any land or other property comprising the permanent way of a railway (whether or not it is also used for other purposes) and includes any bridge, tunnel, culvert, retaining wall or other structure used for the support of, or otherwise in connection with, track,

(b) "operational" means not disused, and

(c) "railway" has the same meaning as in any provision of Part 1 of the Railways Act 1993 (c. 43) for the purposes of which that term is stated to have its wider meaning.

Exclusion for 25% non-residential

23. In ascertaining whether this exception applies, it is therefore necessary to ascertain: (1) the internal floor area of the premises as a whole and (2) the internal floor area of all those parts of the premises, other than the common parts, which are not occupied for residential purposes and not intended to be so occupied. If area (2) amounts to more than 25% of area (1), the premises are excluded.

24. In making this assessment, the common parts are excluded from both sides of the equation (i.e. are not included in either the total internal floor area, or the non-residential floor area).[10] Section 101(1) of the Act provides that: *"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".*

25. In Westbrook Dolphin Square Ltd v Friends Life Ltd (No 2) [2015] 1 W.L.R. 1713, Mann J confirmed that:

    a. The section 101(1) definition is non-exhaustive (paragraph 197);
    b. The definition of "common parts" assumed an ordinary meaning of those words (paragraph 198). The non-exhaustive definition suggested by Roth J in the Panagopoulos case [2011] Ch 177 was approved, namely 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

[10] Section 4(3). See too Indiana Investments Ltd v Taylor [2004] EGLR 63 and Marine Court (St Leonards on Sea) Freeholders Ltd v Rother District Investments Ltd [2008] 1 EGLR 39.

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exclusive benefit of only one or a limited number of the residents or for none at all."

c. Other general points that were said to be extracted from the authorities included (paragraph 200):
   i. It is not necessary that the part be devoted to purposes as a matter of obligation in the leases;
   ii. It is not necessary for residents to have access to a part of the building for it to be a "common part". A caretakers flat, for example, is capable of being a common part even though the residents do not have access to it.[11]
   iii. A part of the premises used by several occupants can be a "common part" even if the only users are commercial users and not residential users. An example would be a corridor which leads to commercial units and is used by the commercial tenants only.

26. Further consideration to the meaning of common parts under the Act was given by the Upper Tribunal in Merie Bin Mahfouz Co (UK) Ltd v Barrie House (Freehold) Ltd [2015] L. & T.R. 21.

27. The Tribunal (Sir Keith Lindblom, President, and Mr A.J. Trott) considered whether leasebacks under s.36 and Schedule 9 could be granted of a newly constructed flat, the caretaker's flat and a basement office. The Upper Tribunal confirmed that a leaseback could not be granted of an area which was a common part at the relevant date and went on to hold that:
   a. The caretaker's flat was a common part even though there was no obligation to provide a resident caretaker;
   b. The common parts could not include areas now let to mobile phone providers; although the roof on which the mobile phone masts were situated was within the common parts originally defined by the leases they ceased to be part of the common parts once they were let to the telecoms companies.

28. In ascertaining the internal floor area which is neither occupied, or intended to be occupied, for residential purposes, regard should be had to s4(2) which clarifies that areas *"intended for use, in conjunction with a particular dwelling contained in the premises"* are to be treated as residential areas, the example given being garages, parking spaces and storage areas.

[11] For a helpful discussion of the authorities on caretakers flats, see Hague paragraph 21-08.

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29. The calculation of areas occupied, or intended to be occupied, for residential purposes was also considered by Mann J in Westbrook, who confirmed that:

    a. The Act does not define either "non-residential" or "residential" purposes, and the court did not propose to formulate a test (paragraph 179);
    b. However, the court did confirm that it is possible for premises to be used for residential purposes without being anyone's home in the sense of sole home, or principal home (paragraph 181);
    c. The term "residence" indicated living, as opposed to office, accommodation, and could encompass lodgings (paragraphs 178-179, 181-195).

Exclusion for resident landlord

30. The section 4(4) exclusion (premises with a resident landlord not containing more than four units) is considerably restricted by the additional s10 criteria which must all be satisfied in order for the exclusion to apply. Section 10 additionally requires that, for the exception to apply:

    a. The premises must not have been constructed as a purpose built block of flats (s10(1)(a)), meaning "a building which as constructed contained two or more flats" (s10(6)); and
    b. The same person has owned the freehold of the premises since before the conversion of the premises into two or more flats or other units (s10(1)(b); and
    c. He, or an adult member of his family, has occupied a flat or other unit contained in the premises as his only or principal home throughout the period of twelve months ending with that time.

31. Section 10(5) defines a person to be an "adult member of another's family" if that person is—

    a. the other's wife or husband; or
    b. a son or daughter or a son-in-law or daughter-in-law of the other, or of the other's wife or husband, who has attained the age of 18; or
    c. the father or mother of the other, or of the other's wife or husband;

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32. The purpose of the s4(4) exclusion, read together with s10, is to exclude the Act in cases where people convert their homes into flats and continue to reside there.

C: FLATS AND TENANTS

33. Two of the three conditions laid out in section 3(1) relate to existence of flats, held by qualifying tenants. These are that:

> *"(b) they contain two or more flats held by qualifying tenants; and*
>
> *(c) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises."*

34. To answer the question of whether premises qualify for collective enfranchisement relate to the tenants is therefore necessary to establish:

    a. Whether units within the building constitute "flats"; and
    b. Whether those flats are held by "qualifying tenants".

35. Having established the number of flats and whether each of them is held by a qualifying tenant or not, it is then possible to ascertain whether conditions 3(1)(b) and 3(1)(c) are met by asking, first, whether there are two flats in the building which are held by qualifying tenants and then, second, whether the total number of flats held by qualifying tenants is two thirds or more of the total number of flats contained in the premises.

Flats qualifying

36. A "flat" is defined for the purposes of Part I of the 1993 Act[12] as being:

> *"a separate set of premises (whether or not on the same floor) -*
> *(a) which forms part of a building, and*
> *(b) which is constructed or adapted for use for the purposes of a dwelling, and*
> *(c) either the whole or a material part of which lies above or below some other part of the building*

37. There are a number of elements of this definition worth exploring.

[12] This definition is found at s.101. Note that an extended meaning is given to flats in the context of Chapter II (lease extensions) by s.62

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38. First, the definition captures maisonettes: this follows from the words "*whether or not on the same floor*".

39. Second, the set of premises must be "*separate*".

40. The leading analysis on this point was undertaken by Nicholls LJ in Cadogan v McGirk [1996] All ER 643 who held that although this is clearly a physical description it does not mean that the 'flat' has to be a single, contiguous space. The facts of McGirk were that Cadogan, the landlord, had entered into a separate agreement with Mr McGirk for use of the storeroom on the same date on which the lease was entered. Cadogan then sought to prevent the storeroom being acquired to which Mr McGirk argued that it was not only an appurtenance (in relation to which see talks to follow) but was also part of the flat. The storeroom was separated from the rest of the dwelling with which it was leased by four floors.

41. Nicholls LJ observed that the term suggested both that the flat is "physically separate" or "set apart" and that it is "single" or "regarded as a unit":

> *In my opinion the word "separate" suggests both "physically separate" or "set apart" and "single" or "regarded as a unit". The definition is concerned with the physical configuration of the premises. It was conceded by the appellants that the rooms which form part of the flat do not have to be contiguous. Many sets of chambers in the Inns of Court are physically divided by a common staircase and landing but they would, I think, be regarded as a single "separate set of premises". The question is one of fact and degree, and must largely be one of impression. The degree of proximity of any part of the premises which is not contiguous is likely to be decisive. I have come to the clear conclusion that the storeroom on the sixth floor cannot be said to be part of the same separate set of premises as the rooms in the second floor flat. It was allocated to and let with the flat, but it does not form part of the flat.*

42. Therefore, a set of premises can exist, if not contiguous, provided that it can be properly regarded as a unit which will, in turn, often depend on the proximity of the non-contiguous part.

43. This is to some extent unhelpful as few clients will want to be told that the issue is a matter of something as intangible as "impression", but in practice it is likely to be capable of resolution in most cases. While not expressly mentioned by Nicholls LJ it might be thought that the nature of the facility contained in the non-contiguous 'part' of the flat could be relevant. For example it could perhaps be

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argued that a room with a washing machine is more likely to be regarded as part of the premises than a general storeroom as was the case in *McGirk*. Also, while Nicholls LJ expressly ruled out the possibility that the fact of the separate leases might be determinative, it is hard not to believe that this must have been at least a background factor in his conclusion that they were not in reality a part of the flat.

44. The consequence of the "separate" criterion may also be to rule out various forms of more limited accommodation. *Hague* suggests that a single bedsit with use of a shared kitchen or bathroom would not qualify: *Hague on Leasehold Enfranchisement* (6th Ed., 2014), 21-04. While this is not fully reasoned, it might be thought that this is because while the occupier of such a bedsit would be able to avail himself of all of the facilities necessary to make it his home[13] he would not be able to do so within the same "single unit". The only "physically separate" element would be his bedsit, which would be dependent on use of the common parts.

45. By contrast, a number of bedsit units with independent bathroom facilities but a shared kitchen was held to be a 'flat' in Farndale Court Freehold Ltd v G&O Rents Ltd: referred to in *Hague*, 21-04. This appears to follow from the fact that such a group of bedsits will in reality function as a single physically separate unit for the purposes of being used as a dwelling

46. Another noteworthy element of the definition in s.101(3) provides that a 'flat' should be *"constructed or adapted for use for the purposes of a dwelling"*

47. As with many of these points, this is unlikely to be controversial in most cases.

48. Watch out for cases where the lessee has incorporated other space such as an attic or part of the common parts into the flat. In such a case the "separate set of premises£ includes the additional area, but it is not within the demise. In such a case it needs to be considered whether it has become part of the demises through the doctrine of encroachments.

49. The question of what amounts to a flat has also been contested in claims relating to buildings whose use comes close to that of a hotel.

[13] Which is the critical quality of a dwelling, see *Uratemp Ventures Ltd v Collins* [2002] 1 A.C. 301 HL in relation to meaning of a "dwelling" under s.1 of the Housing Act 1988, per Lord Millett at 30,31 and 38.

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50. This was considered by the county court in the case of Smith v Jafton Properties Ltd (No 2)[14], there the situation arose where two tenants owned four 'flats' on long leases which were then let out as serviced apartments on a short-term basis to the business community[15]. The judge indicated that he was swayed by the physical characteristics of the 'flats' which were in his view spacious enough and sufficiently well-appointed that they could be lived in as well as stayed in. However, in the end his mind was made up by the booking system by which the flats were used. These provided no guarantee of specific choice of flat and were indicative of a form of occupancy which was unregulated by formal tnenacy agreements and short term.

51. The judge therefore proceeded to find that in circumstances where the pattern of occupancy had been effectively the same since the property was last adapted he was entitled to take account of the way in which the property has been used. Accordingly he concluded that the purpose for which the 'flats' had been adapted was not for the purposes of a dwelling: albeit that he observed that it was a "*finely balanced decision*".

52. It is worth noting in passing (as has recently been affirmed by Mann J in the Westbrook Dolphin Square[16] case) that the question under s.3(1)(b) is distinct from the question of whether a flat is occupied for residential purposes.

Qualifying tenants

53. Subject to the exceptions under s.5, a person is a qualifying tenant if "*he is tenant of the flat under a long lease*".

54. Long lease is defined in s. 7. In most situation it will be a lease granted for a term of 21 years or more, but will also include:

    a. A lease for a term fixed by law under a grant with a covenant or obligation for perpetual renewal, other than a lease by sub-demise from one which is not a long lease;
    b. A lease taking effect under s.149(6) of the Law of Property Act 1925, that is, a lease terminable after a death or marriage;
    c. A lease granted in pursuance of:

[14] [2013] 2 EGLR 104 Central London County Court, Judge Hands QC.
[15] An arrangement perhaps quite similar to that increasingly common through flat-renting websites like Air BnB
[16] *Westbrook Dolphin Square Ltd v Friends Life Ltd* [2015] 1 W.L.R. 1713

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i. the right to buy;
ii. or the right to acquire on rent to mortgage terms, as conferred by Pt V of the Housing Act 1985.13

d. A shared ownership lease where the tenant's share is 100 per cent;
e. Subsequent leases;
f. Renewal leases.

55. However certain kinds of tenancies are exempted, notably:
    a. A business leases under Part II of the 1964 Act [17];
    b. An unlawful sub-lease[18];
    c. A lease granted by a charity in pursuance of its charitable purposes[19].

56. If a person holds a long lease which includes within it a flat within the premises that is sufficient to make him a qualifying tenant – this will apply equally if the long lease demises property that is not part of any particular flat as if it only demised the flat: see Howard de Walden Estates Ltd v Aggio [2009] 1 A.C. 39 at [31].

57. This can have the notable consequence that a long headlease of the whole of a premises will make the headlessee the qualifying tenant of that flat. This will often mean that a caretakers flat will be counted as held by a qualifying tenant which may help those seeking to enfranchise in that it may allow them to reach the two-thirds threshold for a premises to qualify, but may also have the effect of reducing the proportion of qualifying tenants who are willing to participate in the claim: as was the situation in Crean Davidson Investments Ltd v Earl Cadogan [1998] 2 EGLR 96.

58. The only further exception that may apply is that tenants are excluded if they would be qualifying tenant of three flats or more[20].

59. This will apply just the same if a person is a qualifying tenant under a joint tenancy as under a sole tenancy. It will also apply to a group of associated companies as if they were one person. It also does not matter under how many leases the person holds the flats: if he is the qualifying tenant of three flats under a single lease he will be excluded just as if there were three separate leases.

[17] 1993 Act s.5(2)(a)
[18] 1993 Act s.5(2)(c)
[19] 1993 Act s.5(2)(b)
[20] 1993 Act s.5 (5).

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Who is the qualifying tenant?

60. If a flat is held under two or more long leases and therefore has two or more tenancies which may qualify, the rule is that any tenant under a superior lease is not to be regarded as a qualifying tenant.[21]

61. Therefore it is only the tenant in possession who can qualify (unless the tenant in possession occupies on a "short" lease and does not therefore possess a tenancy which qualifies).

62. If a flat is held on a joint tenancy then the tenants (whether they hold in common or as joint tenants in equity) are treated by the 1993 Act as a single tenant.

D: CONCLUSION

63. The courts have repeatedly stressed that the test for whether the Act applies is a practical one. Provided careful attention is paid to the statutory language, and a practical approach is adopted, issues surrounding whether premises are subject to the Act should, usually, be capable of resolution.

Matthew Dale-Harris[22]

20 April 2018

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[21] 1993 Act s.5(4)(a).