WHAT CAN BE ACQUIRED?

Heather Sargent and Tom Jefferies

Freehold

1. First and foremost, the tenants can acquire the building itself, known as the "specified premises" or the "relevant premises".

Appurtenant property

2. Second, under s1(3)(a) they can acquire "appurtenant property" which at the relevant date (the date of the s13 notice) is demised by the lease held by a qualifying tenant of a flat contained in the relevant premises. Appurtenant property means "any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the flat": section 1(7). This is referring to appurtenances outside the relevant premises. It could, for example, include parking spaces demised with a flat.

Common property

3. Third, by section 1(3)(b) the tenants are entitled to acquire the freehold of

> ".. property which any such tenant is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises (whether those premises are contained in the relevant premises or not)."

4. There needs to be a legal right to use the common areas before they can be claimed. The most common such area is driveways and pathways. It is quite common for leases to require tenants to pay for the maintenance of some areas, such as lawns or flowerbeds, without granting rights over them. They cannot be acquired: *Cutter v Pry Ltd* [2014] UKUT 0215 (LC).

5. Note that legal rights can also have been acquired under s62 of the Law of Property Act 1925. For example, if the tenant under an old lease in fact parked on the drive, or perhaps used a store with the permission of the landlord, and then obtained a lease extension under s42 before the collective claim, he or she may well have acquired the legal right to park and use the store under s62.

6. The tenants can choose which common areas they claim. They may not want to claim areas if they are a liability, such as a dilapidated boundary wall.

7. A common problem faced by tenants is how to deal with areas over which they have no rights, such as, quite commonly, garden areas. They may want to claim them, but have no right. If they claim them incorrectly, the s13 Notice may be invalid: *Malekshad v Howard de Walden* (No 2) [2004] 1 W.L.R. 862. However at worst, the notice can be amended to

exclude the area. Usually no point is taken by the landlord, who can still dispute the claim to the disputed area he wants to. So it is best to claim any area you want.

Offer of rights in lieu

8. Landlords often want to retain common areas, especially if they have, or the landlord thinks they have, some value which could be exploited. For example, the landlord may think he can sell rights to park on the drive or build in the gardens. The landlord can, if he wants to, retain the common areas if he offers equivalent rights. By section 1(4)

> ‘‘ The right of acquisition in respect of the freehold of any such property as is mentioned in subsection (3)(b) shall, however, be taken to be satisfied with respect to that property if, on the acquisition of the relevant premises in pursuance of this Chapter, either—
>
> (a) there are granted by the person who owns the freehold of that property —
>
> (i) over that property, or (ii) over any other property,
>
> such permanent rights as will ensure that thereafter the occupier of the flat referred to in that provision has as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenant under the terms of his lease”

9. It was held in *Shortdean Place (Eastbourne) Residents Association Ltd v Lynari Properties Ltd [2003] 3 E.G.L.R. 14*at [63] that so long as the freeholder offers rights which satisfy the test in s1(4) the FTT has no discretion to order a transfer of the freehold.

10. In *Ulterra v Glenbarr* LRA/149/2006 the freeholder offered various rights but sought to reserve the right to build on retained land notwithstanding interference with easements. The Lands Tribunal held that the transfer had to be considered as a whole to see if the rights were sufficient [14]. The rights were not sufficient because the reservation of the right to build took away part/watered down the rights offered. See [15]. This was followed in the *Snowball* case referred to below.

11. In *Fluss v Queensbridge Terrace Residents Ltd [2011] UKUT 285 (LC)* it was held that the rights actually enjoyed at the relevant date must be considered under s.1(4) of the 1993 Act. Thus, if the leases allowed the landlord to restrict rights in the future, or to impose regulations, but that right had not been exercised at the relevant date, the landlord could not reserve the right to restrict the rights in the future in the freehold transfer. See [36]. Furthermore, rights offered in common with others should be granted on the basis that the landlord could not substantially increase the number of others enjoying the right in future. See [37], [41(8)]

12. It was also held that if the lessor seeks to impose a liability to contribute a service charge for maintaining the retained land, the lessees' rights under the Landlord and Tenant Act 1985 would be sufficiently replicated by requiring them to pay "a reasonable proportion of the reasonable costs of maintaining" the land.
13. The most recent case on s1(4) was *Snowball Assets Limited v Huntsmore House (Freehold) Limited* [2015] UKUT 0338 (LC). The tenants claimed the freehold of a development built in 1989, together with the common facilities which included gardens and a leisure centre. The landlord wanted to retain the common facilities, demolish the leisure centre and replace it with a new facility under the garden, with flats built in place of the existing leisure centre. It claimed that the rights reserved to it under the existing leases enabled it to carry out such a development, and offered rights in the counter-notice which it claimed were equivalent to the existing rights enjoyed by the lessees.

14. The first issue was whether the landlord had the right to withdraw existing facilities. The Tribunal held that it did not, even though rights were only granted over such

> "Facilities as might from time to time be allocated for the use and enjoyment of lessees for recreational or leisure purposes"

15. The next issue was whether the rights offered were sufficient. The Counter-notice proposed the following rights:

> "Pursuant to Section 1(4)(a) of the 1993 Act, the Reversioner will grant such permanent rights over the Additional Freehold Property (a) as are equivalent to the rights set out in clauses 2.1.01 and 2.1.05 of the leases …and (b) <u>any and all further rights as will ensure that thereafter the occupiers of the flats in the Specified Premises have as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenants in terms of their leases</u>."

16. It also sought to reserve a right to build on the retained land.

17. The "sweeper" clause (as underlined above) has become common. The landlord argued that in view of the rights proposed, the FTT had no jurisdiction to decide that the common areas were to be acquired. It only had jurisdiction to decide what rights were to be granted and reserved. The Judge held that the Counter-Notice had to be considered as a whole, and that the sweeper clause did not achieve the desired effect because the rights sought to be reserved cut down the rights offered, however broadly construed, in such a way that they were not equivalent to the rights currently enjoyed by the lessees: see [76], [80].

18. Thus if the issue were to be judged on the basis of the counter-notice, the landlord failed to satisfy section 1(4). The Judge did not however rule out the possibility of a Tribunal being precluded from determining that common areas were to be acquired based on a sweeper clause supplemented by a subsequent draft transfer offering sufficient rights.

19. The conclusions to be drawn from these decisions are

a. The freeholder must take care to ensure that he offers rights which are in all possible respects as good as those enjoyed in fact under the leases;
b. Attempts to retain the ability to restrict, cut down or dilute the rights now enjoyed by the tenants are likely to lead to the tenants acquiring the freehold;
c. At present the freeholder can improve his offer up to the hearing, but there is scope for argument that the test in s1(4) should be considered by reference to the counter-notice.
d. a "sweeper clause" can work, but only if the landlord proceeds throughout on the basis that it is willing to grant sufficient rights.

Leasehold interests

Intermediate leases

20. The tenants are obliged to acquire, under s2(2):

> " the interest of the tenant under any lease which is superior to the lease held by a qualifying tenant of a flat contained in the relevant premises"

21. This was aimed at headleases. By s2(4) the tenants are not entitled to acquire those parts of a superior lease which include premises other than
    a. A flat held by a qualifying tenant
    b. Common parts
    c. Appurtenant or common areas outside the building.

    Thus for example, the part of the headlease relating to vacant stores, commercial areas, or flats let by the headlessee on ASTs cannot be acquired.

22. To the delight of some, and consternation of others, s2(2) also requires the tenants to acquire overridings lease of qualifying tenants flats granted outside the 1993 Act, if they take effect in reversion to another intermediate lease. Many such leases have been granted by Grosvenor, Wellcome, the Crown Estate and others. They are now at risk of being acquired by their neighbours, a particular risk if the block has development potential. This has led to much litigation. See for example *Wiggins v Regent Wealth Ltd* [2014] EWCA Civ 1078; *Cravecrest Ltd v Sixth Duke of Westminster* [2013] EWCA Civ 731; [2014] Ch. 301.

Leases of common areas

23. By s2(3) the tenants are entitled to (but do not have to) acquire

> (3) .. the interest of the tenant under any lease (not falling within subsection (2) above) under which the demised premises consist of or include—
> (a) any common parts of the relevant premises, or

(b) any property falling within section 1(2)(a) which is to be acquired by virtue of that provision,

where the acquisition of that interest is reasonably necessary for the proper management or maintenance of those common parts, or (as the case may be) that property, on behalf of the tenants by whom the right to collective enfranchisement is exercised.

24. This has been held to apply to a caretakers flat (*Earl Cadogan v Panagopoulos* [2010] EWCA Civ 1259; *Westbrook Dolphin Square Ltd v Friends Life Ltd* [2014] EWHC 2433 (Ch); [2015] 1 W.L.R. 1713;) and leases of roofspace and airspace: *Kintyre Ltd v Romeomarch Property Management Ltd*, [2006] 1 E.G.L.R. 67. It has recently been considered in relation to a variety of different areas in *Merie Bin Mahfouz Co (UK) Ltd v Barrie House (Freehold) Ltd* [2014] UKUT 390 (LC).

Leasebacks

25. Provision is made in s.36 and Sch.9. for leasebacks of certain areas to the freeholder.

26. There are mandatory leasebacks of flats let on secure tenancies or introductory tenancies where the landlord is a public sector landlord.

27. The landlord is also entitled to claim an optional leaseback, of a "unit" contained in the specified premises, where the freehold of the whole of the unit is owned by the same person, and it is not immediately before the appropriate time let to a qualifying tenant.

28. A Unit is defined as " a flat, any other separate set of premises which is constructed or adapted for use for the purposes of a dwelling, or a separate set of premises let, or intended for letting, on a business lease": s.38(1). A business lease is a tenancy to which Pt II of the Landlord and Tenant Act 1954 applies: s.101(1) of the 1993 Act.

29. Thus the landlord can claim a leaseback of

    a. all flats which are vacant, occupied by the landlord, let on ASTs or any tenancy protected by the Rent Act 1977 or the Housing Act 1988,
    b. commercial units.

30. It does not apply to a flat demised by a Headlease and not underlet on a qualifying tenancy. That is let to a qualifying tenant, the headlessee.

31. If the freeholder wants to claim an optional leaseback he must claim it in the counter-notice. *Cawthorne v Hamdan* [2007] Ch. 187. The main reason for this decision appears to have been practical: if a request for a leaseback could be served at any time, there might need to be a further hearing to deal with terms, and a revised valuation.

32. The same pragmatism was relied on in *Bin Mahfouz v Barrie House (Freehold) Limited* [2014] UKUT 0390 by the Upper Tribunal to conclude that a leaseback could not be claimed of a unit which was not constructed until after the relevant date. Among other things the Tribunal relied on the fact that the valuation is to take place at the relevant date.

33. The Act makes detailed provision for the terms of any leaseback to the freeholder. All such leases must conform to those terms unless any departure is agreed by the nominee purchaser and the freeholder, or by the leasehold valuation tribunal: Schedule 9.

34. In practice, there is little need to rely on the optional leaseback provisions. Section 19 prohibits some transactions but permits others. It does not, for example, prevent the grant of a lease of a flat which is not subject to a qualifying tenancy. The landlord took advantage of this in *Queensbridge Investment Ltd v 61 Queens Gate Freehold Ltd* [2014] UKUT 437 (LC). In that case the freeholder requested leasebacks of 3 flats which were were either vacant, occupied by statutory tenants protected by the Rent Act 1977, or let under an assured shorthold tenancy. The parties could not agree the terms of the leasebacks, and the LVT made a determination which the freeholder did not like. It appealed. Before the appeal was heard, Q granted long leases of the three flats on the terms which it had previously proposed but which had been rejected by the LVT and asserted that the effect of s.36 and sch.9 para.5 was that it was under no obligation to enter into leasebacks on the terms determined by the LVT.

35. The nominee purchaser argued that the freeholder could not resile from its claim for leasebacks, especially since the parties had proceeded on the basis that leasebacks were to be granted. The Upper Tribunal disagreed. Neither section 19 nor any other provision prevents the grant of a lease by the freeholder at any time before contracts are agreed.