Landmark CHAMBERS

Collective Enfranchisement: Nuts & Bolts

What can be acquired?

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The "specified premises"

The core of a collective claim is to acquire the freehold of the whole building containing the flats – the "bricks and mortar".

This is known as the "specified premises".

See section 1(1) of the 1993 Act.

Note: some external areas may fall within the Specified Premises (e.g. patios, basement wells) see *Cadogan v Panagopoulos* [2011] Ch 177.

What else can be acquired?

1. “Appurtenant” property
2. “Common use” property
3. Leasehold interests

1. “Appurtenant” property

The tenants can also acquire the freehold of any “appurtenant property” that is demised by any lease held by a qualifying tenant of a flat contained in the specified premises (section 1(3)(a) of the 1993 Act).

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 specified premises itself. It could, for example, include a parking space demised with a flat.

The property has to actually be part of the demise in a lease – rights of use/access are not enough.

2. "Common use" property

The tenants can also acquire the freehold of any property over which they have rights in their leases in common with each other. E.g. driveways/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. Some leases grant rights that are individual to the tenant. None of this can be acquired: *Cutter v Pry Ltd* [2014] UKUT 0215 (LC).

The tenants can choose which common property to acquire. Some property – like a dilapidated boundary wall – might prove to be a liability and is best avoided.

Rights in lieu of freehold of "common use" property

A landlord can choose to offer equivalent rights in lieu of the freehold of "common use" (but not "appurtenant") property: s.1(4).

- The rights have to be "as nearly as may be the same rights as those enjoyed in relation to that property".

- Landlords should think strategically:
  - Do they really want to retain the freehold of common use areas when the rest is being acquired?
  - But: use of section 1(4) could discourage the collective claim – could be a useful bargaining tool.

Rights in lieu of freehold of "common use" property

- If the permanent rights meet the statutory test of equivalence, the FTT has no power to determine that the freehold should be transferred instead: *Shortdean Plan (Eastbourne) Residents' Association Ltd v Lynari Properties Ltd* [2003] 3 EGLR 147
- Counter-notice need not spell out what the permanent rights are – sufficient to specify what is known as an "omnibus clause" or "sweeper clause":

  "*such permanent rights as will ensure that thereafter the occupier 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 under the terms of their leases*".
- The debate on specifics is then left to be agreed between the parties or determined by the FTT.

Rights in lieu of freehold of "common use" property

But: see *Snowball Assets Ltd v Huntsmore House (Freehold) Ltd* [2015] UKUT 0338.

- The omnibus clause will only work if the freeholder makes it clear that it is proceeding on the basis that in order to retain the freehold of the additional premises it is prepared to grant whatever rights may be required, however extensive, in order fully to satisfy the equivalence test in section 1(4). In such a case, the FTT has no discretion to order transfer of freehold (unless impossible on the facts to grant equivalent rights): [77].
- If the freeholder doesn't do this, the FTT can require the acquisition of the freehold: at [76].

Rights in lieu of freehold of "common use" property

- In *Snowball Assets*, "[i]*t was fundamental to the freeholder's case that after the enfranchisement it must have rights sufficient to enable it to carry out its proposed development*": [79].
- "*the counter-notice must be considered as a whole and that, when so considered, the counter-notice does indeed offer rights with one hand (by clause 8 including the omnibus clause) and take them away with the other hand, namely by the provisions making clear that rights to develop the additional premises (being rights which did not exist under the terms of the leases) were to be reserved*": [80].
- So existence of a "sweeper" clause is not necessarily enough.

Rights in lieu of freehold of "common use" property

- The question is what is actually enjoyed at the time of the initial notice – the right of the landlord to restrict the rights at a future date is irrelevant and should not be carried forward into the transfer (because otherwise the rights would not be "permanent" as required by s.1(4)): see *Fluss v Queensbridge Terrace Residents Ltd* [2011] UKUT 285 at [36].
- The numbers of those enjoying the right in common cannot substantially increase: *Fluss* at [37].
- Liability to contribute a service charge to maintain retained land can adequately replicate s.19 of the LTA 1985 by requiring the tenants to pay "a reasonable proportion of the reasonable costs of maintaining" the retained land: [41(11)].

Rights in lieu of freehold of "common use" property

- What about land enjoyed pursuant to a licence that can be revoked by the freeholder at any time and can be made subject to regulations?
- See *The Corporation of Trinity House of Deptford Strond v 4-6 Trinity Church Square Freehold Ltd* [2018] EWCA Civ 764 (18 April 2018)
- Lessees had right to use common garden by revocable licence – power to make regulations, but not exercised.
- CA agreed with UT that rights granted under s.1(4) would need to be irrevocable but could also be subject to equivalent power to make regulations, even though no regulations had been made at the time of the initial notice: see [19]-[27].

3. Leasehold interests

1. The tenants must acquire intermediate/superior leases (even those of non-participating qualifying tenants): s.2(2) of the 1993 Act. This section also requires tenants to acquire overriding leases held by qualifying tenants where the lease was granted outside the 1993 Act and would take effect in reversion to another intermediate lease.
2. The tenants may acquire the interest under any leases which demise "common parts" (see s.101(1) of the 1993 Act) or any "appurtenant" or "common use" property IF "reasonably necessary for the proper management or maintenance of those common parts or additional property":
   - Caretaker's flat (*Panagopoulos* and *Westbrook Dolphin Square Ltd v Friends Life Ltd* [2015] 1 WLR 1713)
   - Roofspace/airspace (*Kintyre Ltd v Romeomarch Property Management Ltd* [2006] 1 EGLR 67)
   - See also: *Merie Bin Mahfouz v Barrie House (Freehold) Ltd* [2014] UKUT 390

3. Leasehold interests

- Common parts:
  - S.101(1): "includes the structure and exterior of [the] building … and any common facilities within it".
  - Does not cover external common areas (but these could be "appurtenant")
  - No requirement for lessor to be legally obliged to provide it (see *Merie Bin Mahfouz* at [115]) – *de facto* use is sufficient.
  - "parts of the building that either may be used by or serve the benefit of the residents in common … 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": *Panagopoulos.*
  - See *Dolphin Square* as regards cleaner's store, parking spaces, fitness club, bar, laundry, store rooms, empty areas, access corridor to lift motor room.

Two other tools for landlords regarding what can be acquired

1. Leasebacks
2. Compulsory acquisition of other property

Leasebacks

- The landlord can claim "leasebacks" of one or more flats from the nominee purchaser. See s.36 and Sch.9 of the 1993 Act.
- Mandatory leasebacks of flats let on secure tenancies or introductory tenancies where the landlord is a public sector landlord.
- Optional leasebacks of a "unit" contained in the Specified Premises, where the (a) there is a resident landlord who is a qualifying tenant; or (b) 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. This includes all flats let on short-term tenancies, whether or not protected by the Rent Act 1977 or the Housing Act 1988, and commercial units.
- S.38: "unit" means —(a) a flat; (b) any other separate set of premises which is constructed or adapted for use for the purposes of a dwelling; or (c) a separate set of premises let, or intended for letting, on a business lease (see s.101(1)).

Leasebacks

- Terms of leaseback are specified by the 1993 Act, but can be departed from by the Tribunal (if mandatory) and by either the Tribunal or agreement between the parties (if optional): see Sch.9.

- In the *Barrie House* case, the UT held that a leaseback of units was only possible where the relevant units had existed as units in which a leasehold interest could properly be created when the initial notice was served by the nominee purchaser.

Leasebacks

- In *Queensbridge Investment Ltd v 61 Queens Gate Freehold Ltd* [2014] UKUT 0437 (LC) the landlord claimed leasebacks of three flats. The FTT had determined a dispute about the terms of the leasebacks in favour of the tenants (a power to vary the service charge percentage payable, and exclusion of the structural walls from the demised premises).

- The landlord appealed. While the appeal was pending, the landlord "took an unexpected course" by granting new leases of those "leaseback" flats to connected companies, on the terms it had proposed to the LVT but which had been rejected: inclusive of structural walls, with fixed service charge percentages. The landlord then contended that this meant that it was under no obligation to proceed with the leasebacks, nor was it entitled to, and that the acquisition of the freehold on behalf of the tenants would be subject to the new leases, because the new lessees were qualifying tenants.

Leasebacks

- By section 19(1) of the 1993 Act, once a notice of collective enfranchisement has been given, the freeholder cannot grant "any lease under which, if it had been granted before the relevant date, the interest of the tenant would to any extent have been liable on that date to acquisition …"
- By paragraph 5 of Part III of Schedule 9 to the 1993 Act, the freeholder does not have a right to take a leaseback of a flat which is immediately before acquisition "a flat let to a person who is a qualifying tenant of it".
- The judge held that the landlord, by granting a lease of a flat to a qualifying tenant, did not therefore grant an interest liable to acquisition. The grant did not therefore fall foul of section 19(1). By such grant, it removed the freeholder's right to a leaseback under paragraph 5, which also meant that the tenants were not obliged by section 36(1) to grant the leaseback.

Leasebacks

- In the absence of a binding agreement or estoppel, the appellant was entitled to grant new leases of the three flats at any time until the determination by the LVT of the terms of acquisition, because such a grant was not prohibited by section 19. Neither an agreement of the terms of a leaseback nor a determination by the appropriate tribunal took away that freedom. The 1993 Act did not create a statutory contract binding the parties to proceed on the terms agreed or determined by the tribunal: the nominee purchaser could withdraw from the acquisition at any time until its completion: [65].

Compulsory acquisition of other land

- Sometimes the tenants will seek to acquire most but not all of the property in question, either because they (a) have a right to acquire the remainder but have not exercised that right, or (b) they have no right in the first place.

- Under section 21(4) of the 1993 Act, the freeholder can compel the acquisition of this other property if it would either, for all practical purposes, cease to be of use and benefit to him, or would cease to be capable of being reasonably managed or maintained by him, in the event of his interest in the Specified Premises (or other property) being acquired.