LEEDS AND YORKSHIRE HOUSING ASSOCIATION v VERTIGAN

COURT OF APPEAL, CIVIL DIVISION

Elias L.J., Norris J.: December 9, 2010

[2010] EWCA Civ 1583; [2011] L. & T.R. 17

H1 *Assured tenancy—Possession Orders—Suspension of Order—Persistent and deliberate breaches of tenancy agreement—Order for immediate possession after trial—On appeal, undertaking offered by the tenant regarding his future conduct—Whether it was reasonable to suspend the order in light of the offer of undertakings—Whether the offer constituted new evidence.*

Summary of decision

H2 In the circumstances of the case the judge had plainly been correct to make an immediate order for possession: an offer of an undertaking to comply with obligations under an assured tenancy made on appeal did not constitute fresh evidence in any meaningful sense so that the court might consider whether a suspended order would have been reasonable.

Parties

H3

Appellant (defendant below):	Vertigan (V)
Respondent (claimant below):	Leeds and Yorkshire Housing Association (L)

Facts

H4 L sought an order for possession of the ground floor flat of 91 Spencer Place, which had been let to V under an assured tenancy on November 26, 2001. The order was sought on the basis of a number of breaches of the tenancy agreement by V, including sawing through the floorboards of the property to gain access to a cellar, to which he had no right of access, causing nuisance or annoyance to neighbours by not regularly clearing up after his four dogs that fouled in the communal front garden, and conducting unauthorised works, including erecting a metal structure with two disco balls on the front of the flat in 2003 and not removing it, despite repeated requests to do so.

H5 At first instance, H.H. Judge Belcher concluded that V had persistently and deliberately breached his tenancy agreement despite repeated encouragement by L to comply with his obligations. After a review of the competing factors, the judge found that it was reasonable to make a possession order. On considering whether to suspend the order, the judge noted a need for any order to include terms requiring

the removal of the metal structure and making good any associated damage, the making good of the floorboards to the cellar and a requirement not to damage any other floorboards and to clear all dog fouling immediately. In considering whether V was likely to comply with those conditions, the judge expressly considered: first, V's attitude to his obligations under the tenancy; secondly, his attitude to the landlord's requests for compliance (written, verbal and under threat of litigation); thirdly, V's credibility; and, lastly, his attitude in the witness box. An immediate order was made, despite an indication in closing submissions that V would comply with any order of the court and he was anxious to keep his home, such an indication not having been given by V in the witness box.

H6 V appealed, indicating his willingness to offer undertakings as to his future conduct. Permission to appeal was granted, limited to whether it is reasonable to suspend the order for possession in the light of V's willingness to give appropriate undertakings to the court.

H7 **Held:**

H8 (1) The Court's function on appeal is not to give a second chance to a party who has lost in the lower court; its task is to consider whether the judge was wrong in law on the evidence that was adduced at the trial and the way the case was presented at the trial. Exceptionally, a court may consider a rehearing in the light of fresh evidence, but the rules as to the admission of that fresh evidence are restricted. The discretion to admit the acceptance of an undertaking should be considered in much the same way as one would consider whether to admit fresh evidence, *Sharab v Abdul-Aziz Al Saud* [2009] EWCA Civ 353 noted. Accordingly the principles in *Ladd v Marshall* [1954] 1 W.L.R. 1489 CA normally have to be satisfied before that material is heard.

H9 (2) The present offer of an undertaking did not constitute fresh evidence in any meaningful sense. V had had the opportunity to offer an undertaking in evidence at trial and he did not do so. The present offer of an undertaking was of no greater significance than a promise given through counsel on instructions of compliance with conditions for the suspension of a possession order. The principles of *Ladd v Marshall* [1954] 1 W.L.R. 1489 CA were not satisfied.

H10 (3) The making of a suspended order inevitably involves an assessment as to the future conduct of the tenant. That assessment is grounded on past behaviour, the circumstances in which the offer of compliance is put forward, and the reliance that can be placed on the word of the promiser. That is pre-eminently the province of the trial judge. The judge's conclusion upon the material available to her over the course of the trial had not fallen outside the proper range of decisions; in fact, it was plainly right.

H11 (4) Those who commit persistent breaches of their tenancy agreements, albeit that the breaches may not individually be serious, must understand that they are at risk of an immediate order for possession in an appropriate case. They should not assume that, because an individual breach is not serious, the outcome will inevitably be a suspended order, however many or repeated the breaches.

H12 **Cases referred to:**

Ladd v Marshall [1954] 1 W.L.R. 1489; [1954] 3 All E.R. 745; (1954) 98 S.J. 870 CA

Sharab v Prince Al-Waleed Bin Tala Bin Abdal-Aziz-Al-Saud [2009] EWCA Civ 353; [2009] 2 Lloyd's Rep. 160

H13 For further details of the law in this area see *Woodfall's Law of Landlord and Tenant*, Vol.1, para.19.041: "General power to suspend orders for possession".

H14 *Timothy Hodgson* (instructed by Godloves) for the appellant.
Michelle Caney (instructed by Whiteheads) for the respondent.

JUDGMENT

NORRIS J.:

1 On November 26, 2001 the Leeds and Yorkshire Housing Association ("the Association") let the ground floor flat of 91 Spencer Place ("number 91") on an assured tenancy to Mr Vertigan.

2 There was only one dispute over the terms of the tenancy, to which I will make brief reference because it provides part of the context for the decision we have to make on this appeal. That issue was whether the flat included the cellar of number 91. In a reserved judgment delivered after trial in the Leeds County Court in April 2010 H.H. Judge Belcher determined that issue against Mr Vertigan. In the course of doing so, she found that he had been told in June 2007 that the cellar did not form part of his tenancy and that he could not use it, and the landlord blocked the access; but on the departure of the landlord Mr Vertigan immediately regained access to the cellar by sawing through the floorboards of the flat, doing so in full knowledge that he had no right of access to the cellar. The judge noted his evidence, which was:

> "I resorted to taking this desperate measure in view of the landlord's completely unreasonable and overhanded action. The landlord does not derive any benefit from the cellar whatsoever. It does not make sense for it to be locked up and not used by anyone."

3 The landlord discovered the re-entry in September 2007 and took steps to secure the cellar. Mr Vertigan at the trial conceded moving a lock from the internal cellar door to the external cellar door so as to prevent the landlord gaining further access to the cellar (thereby restricting access to the cellar only through the floorboards of the flat).

4 This was not a breach of the tenancy, but Mr Vertigan's behaviour in relation to the cellar forms part of the context for our present decision.

5 The landlord also relied on further breaches. In a balanced and thoughtful review of the evidence H.H. Judge Belcher found some of these were not proved, some were technical and did not warrant an order for possession, but others she did find proved. They related to covenants as to user and as to unauthorised works to the flat.

6 The tenancy contained obligations as to user in cl.3.5. They included an obligation not to cause nuisance or annoyance to neighbours. There was evidence of dog-fouling in the front garden of number 91. The judge found it proved that Mr Vertigan, who had four dogs, was responsible for that fouling. Mr Vertigan had admitted that he had four dogs which fouled the front communal garden, and that he did not clear it up on a daily basis, but only every couple of days. He acknowledged that the landlord's contractors, in particular the gardeners and the tree surgeons, were hampered in their work by the quantity of dog faeces, and he

acknowledged that the matter had been raised in February 2007 but had been persisted in even down until the trial in April 2010.

7 As to the matter of unauthorised works, the obligations in relation to the premises were contained in cll.3.11 and 4.5 of the tenancy agreement. In breach of those obligations Mr Vertigan had erected a metal structure with two disco balls onto the front of the flat in 2003 as part of his 40th birthday party celebrations. He acknowledged that he did not seek and had never been given permission to erect this structure and had been repeatedly asked to remove it. The judge recorded his evidence to the effect:

> "I am not taking them down because I don't want to."

And again:

> "... the premises are his home which is sacred to him and he wishes to decorate it and make it special. He said he will not be treated like a child and that it is not for someone else to tell him what he could or could not do with his home."

At that point in Mr Vertigan's evidence, the judge noted, he was quite angry.

8 The judge also found that sawing through the floorboards in order to gain access to the cellar, the removal of the locks and the placing of locks on other doors to number 91 constituted damage. She summarised the position in this way:

> "What is clear from the evidence is that Mr Vertigan considers that he can do exactly as he likes in relation to the Premises. Taken together with the evidence of his repeated refusals to comply with requests to remove the metal structure, it is clear that he puts his own desires and wishes before the obligations in his Tenancy Agreement."

9 After a careful review of competing factors the judge found that it was reasonable to make a possession order. She thought the metal structure was a breach that was persistent and deliberate in nature and continued right up to the date of the trial. She thought the damage by cutting the floorboards in order to gain access was plainly deliberate and carried out in full knowledge that Mr Vertigan had no right of access to the cellar. She found that the landlord had repeatedly encouraged Mr Vertigan to comply with the terms of his tenancy agreement but that he had deliberately persisted in the breaches. She found that, despite being requested repeatedly to deal with the dog-fouling, he had taken the view that it was unnecessary to clear it up until there was an amount which he thought merited his attention. She noted that by the time of the trial the breaches had been ongoing and complained of by the landlord and disregarded by Mr Vertigan for at least two-and-a-half years. Permission to appeal against all those conclusions has been refused.

10 The learned judge then identified and separately addressed the question whether, if a possession order was to be made, that order should be outright or should be suspended. It is not on this appeal disputed that she correctly directed herself on the law. It is also accepted that she correctly described the nature of the order that would have to be made if it was suspended. She said at [69] of her judgment:

> "... if I were to suspend the order for possession, the suspended order would plainly have to include terms requiring the removal of the metal structure and making good on any associated damage, the making good of the floorboards

to the cellar and a requirement not to damage any other floorboards (the net effect of which would be to deny Mr Vertigan access to the cellar), and to clear all dog fouling in the communal garden immediately. Mr Vertigan was not asked in the witness box whether he was willing to comply with any such orders, but Dr Hodgson told me in closing that his instructions were that Mr Vertigan would comply with any order of the court and was anxious to keep his home."

11 In assessing whether he would be likely to comply with the conditions attached to any suspended order, the factors of which the judge expressly took account were, first, Mr Vertigan's attitude to his obligations under the tenancy; secondly, his attitude to the landlord's requests for compliance (written, verbal and under threat of litigation); thirdly, Mr Vertigan's credibility; and, lastly, his attitude in the witness box.

12 Permission to appeal her decision to make an immediate order was refused on paper. Mr Vertigan applied in person to Peter Smith J. In the course of that application he acknowledged that he had in fact once more gained access to the cellar, notwithstanding what his counsel had said to the judge below; but he seemed willing to offer undertakings as to his future conduct. Accordingly, Peter Smith J. took that into account in granting permission to appeal. The permission he gave was in these terms:

> "... the application for permission to appeal be allowed, but the issue to be limited to whether it is reasonable to suspend the order for possession in the light of the applicant's willingness to give undertakings to the court as to the control of his dogs, the removal of the ornament and the non-replacement of it, and his undertaking not to re-enter the cellar."

13 A form of undertaking to that effect is now to be found in the appeal bundle.

14 Dr Hodgson, in moving the appeal, went straight to the heart of the matter and put the point as forcefully as it could be put. He says that an undertaking is a serious thing, breach of which is punishable; that Mr Vertigan is now willing to offer such an undertaking, and, in the light of that present offer, it warrants the withdrawal of the immediate order for possession and its replacement by a suspended order. I am not persuaded that the existence of an undertaking now offered justifies the court, on a proper application of the law, in allowing the appeal.

15 Firstly, our function on appeal is not to give a second bite of the cherry to a party who has lost in the lower court; it is our task to consider whether the judge was wrong in law on the evidence that was adduced at the trial and the way the case was run at the trial. Permission to appeal has been refused on all grounds relating to those matters. Exceptionally, of course, a court may consider a rehearing in the light of fresh evidence, but the rules as to the admission of that fresh evidence are restricted.

16 Secondly, I do not think the present offer of an undertaking constitutes fresh evidence in any meaningful sense. I respectfully disagree with Peter Smith J.'s view that Mr Vertigan did not have the opportunity below to offer an undertaking. It seems to me that clearly he did; he had the opportunity to do so in evidence, if the offer of the undertaking is genuine. The judge noted that that course was not taken. That is no criticism of counsel, who, on Mr Vertigan's performance in the witness box, could not be sure what answer he would receive if he asked as to

Mr Vertigan's willingness to comply with his tenancy obligations; and counsel took the sensible forensic decision to deal with it in the closing speech on instructions. But the fact remains that Mr Vertigan had his chance to offer an undertaking and did not take it. The question, I think, has to be answered in terms of principle rather than by reference to authority, but I am comforted to seek that my approach to the question mirrors that taken by Richards L.J. in *Sharab v Abdul-Aziz Al-Saud* [2009] EWCA Civ 353 at [52], to which we have been referred by both counsel.

17 Thirdly, I do not myself seek that the present offer of an undertaking is of any greater significance than a promise given through counsel on instructions of compliance with the conditions for the suspension for possession order. In each case the question for the court must be: what is the likelihood of compliance?

18 Fourthly, the making of a suspended order inevitably involves an assessment as to the future conduct of the tenant. That assessment is grounded on past behaviour, the circumstances in which the offer of compliance is put forward, and the reliance that can be placed on the word of the promisor. That is pre-eminently the province of the trial judge, who draws on a depth of experience of cases of this sort; an intimate knowledge of the facts of this particular case and all their nuances, not all of which translate readily into the written word; and the inestimable advantage of having seen Mr Vertigan over a two-day trial. The judge plainly drew on all of that material and gives an account of it in her careful judgment. Her conclusion upon that material cannot be thought to fall outside the proper range of decisions; in fact, I think it was plainly right.

19 Those who commit persistent breaches of their tenancy agreements, albeit that the breaches may not individually be serious, must understand that they are at risk of an immediate order for possession in an appropriate case. They should not assume that, because an individual breach is not serious, the outcome will inevitably be a suspended order, however many or repeated the breaches. That is the assumption which I fear Mr Vertigan made in his approach at trial.

20 I would accordingly dismiss this appeal. I am able to reach this conclusion without reference to the additional evidence which was sought to be adduced by the landlord which, as I understand it, endeavoured to demonstrate continued breaches; breaches which, naturally enough, Mr Vertigan disputes.

21 The pressures of a county court possessions list are not to be underestimated. This judge took the trouble to reserve her judgment, and I respectfully think that the judgment she delivered was exemplary in its approach to the evidence, the issues for decision and the balancing exercise to be undertaken in the exercise of her discretion. I would dismiss the appeal.

LORD JUSTICE ELIAS:[1]

22 1. I agree. In a conspicuously careful and impressive judgment, the judge determined that an order for possession should be granted and then she in terms addressed the question of whether it should be suspended. She did so in some detail between [67] and [75] of her decision. She noted that counsel had submitted on behalf of Mr Vertigan that he would comply with any order of the court in order to keep his home, save that he was insisting on keeping his dogs. With that in mind,

[1] Paragraph numbers have been assigned by the Publisher. Original paragraph numbering retained for reference purposes.

she considered whether the order should be suspended. She gave cogent reasons why she did not consider that it was appropriate to do so; she was not satisfied that he would comply with the terms of any suspended possession order.

23 2. Counsel does not in fact criticise the way in which she exercised her discretion. He accepts that it was unchallengeable. What he says is that now there is new material, to put it neutrally, before the court, namely the fact that the appellant has indicated that he will give an express undertaking to comply with the terms of the tenancy agreement and any conditions which the court may make. I confess I do not see that this is, in substance, any different from the undertaking that he was prepared to give through counsel below. For that reason it seems to me that it casts no material doubt at all on the way in which the judge exercised her discretion and cannot be a basis for interfering with the exercise of that discretion. If I am wrong about that, and it is in some way qualitatively different from the undertaking that was given below, then in any event, in my judgment, we ought not to allow that material to be adduced in this appeal before us. Whether or not it is strictly to be described as fresh evidence, as Richards L.J. noted in the case of *Sharab v Abdul-Aziz Al Saud* [2009] EWCA Civ 353 at [52](iii), the discretion to admit the acceptance of an undertaking should be considered in much the same way as one would consider whether to admit fresh evidence. Accordingly the principles in Ladd v Marshall will normally have to be satisfied before that material is heard.

24 3. I respectfully agree with Richards L.J.'s observation, and in my judgment there is no reason why this more formal undertaking, if indeed it is materially different from that given below, could not have been offered below. So the principles in *Ladd v Marshall* are not satisfied.

25 4. It follows that either this is not new material, in which case it was already before the judge in a decision not otherwise open to challenge; or it is new material, in which case it was not before the judge but should have been. Either way, the appeal fails.

26 5. For these reasons and those given by Norris J., I too would dismiss this appeal.

Appeal dismissed.

MCHALE v EARL CADOGAN

COURT OF APPEAL (CIVIL DIVISION)

Arden, Elias and Pitchford L.JJ.: December 21, 2010

[2010] EWCA Civ 1471; [2011] L. & T.R. 18

H1 *Collective enfranchisement—Leasehold Reform, Housing and Urban Development Act 1993—Price payable for freehold—Marriage value—Basis of valuation—Statutory requirement that freehold is valued on assumption of no enfranchisement rights—Whether leaseholds also to be valued on "no rights" assumption to calculate marriage value.*

Summary of decision

H2 In assessing the marriage value element of the price to be paid for the freehold by the nominee purchaser on an application by the qualifying tenants for collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993, para.4(2) of Sch.6 to the Act is to be construed as requiring the tenants' interests to be valued on the assumption that the tenants have no right under the Act to acquire the freehold or new leases.

Parties

H3

Appellants (appellants below)	10 Sloane Gardens Management Co Ltd ("the nominee purchaser") Henry McHale.
Respondent (respondent below)	The Right Honourable Charles Gerald John Earl Cadogan ("the landlord").
Interveners	Betul Erkman and Cadogan Square Ltd.

LAYOUT. Is a word missing?

Facts

H4 Five of the six flats in a building in London SW1 were underlet on long leases. By an initial notice served on July 20, 2004, three of the tenants of those flats sought to acquire the freehold under the Leasehold Reform, Housing and Urban Development Act 1993. The terms of the transfer, other than the price for the freehold, were agreed and the landlord applied to the Leasehold Valuation Tribunal to determine the price under Sch.6 to the Act. Schedule 6 provides that the price includes the freeholder's share of the "marriage value" (the increase in value of the freehold attributable to the purchase by the tenants of the freehold interest in the premises) and requires valuations of the freehold (and any intermediate interest) and of the tenants' interests. Paragraph 4(4)(a) of Sch.6 requires the freehold to be valued on the assumption that the tenants have no enfranchisement rights under the Act but makes no provision for a "no rights" assumption in valuing the leasehold

interests. Schedule 13 makes similar provision in determining the price to be paid by the tenants for new leases but, as amended by the Housing Act 1996, expressly provides that the tenants' interests are to be valued on a "no rights" assumption. The tenants contended that, unlike Sch.13, Sch.6 does not require the tenants' interests to be valued on a "no rights" assumption; para.4(4)(b) requires any merger and the circumstances of the purchase by the nominee purchaser to be disregarded; the tenants' interests should be valued on the basis of reality and a "no rights" valuation would be unfair to the tenants because the tenants paid for those rights on acquiring their leases. The landlord contended that the Act does not require a valuation of the tenants' existing interests; that since the marriage value increase is attributed by s.4(2) of the Act to the ability of the tenants on acquiring the freehold to grant themselves new leases, the valuation of their interests cannot properly be carried out without a "no rights" assumption, and that such an approach would result in a valuation carried out on consistent principles and in accordance with the "*Pointe Gourde*" principle in compulsory purchase cases. The LVT and the Lands Tribunal valued the tenants' interests on a "no rights" assumption and the nominee purchaser appealed to the Court of Appeal.

H5 **Held,** dismissing the appeal:

H6 (1) In the absence of a contrary indication, the normal principle of statutory interpretation is that an Act of Parliament (including provisions introduced by later amendment) must be read as a single, consistently-expressed code of provisions, but this principle can be excluded by the context, for example when it is clear that two sets of provisions operate independently and in different circumstances. There is no link between Sch.6 and Sch.13 and the latter requires a valuation of a tenant's existing lease, which necessarily carries with it statutory rights, unless they are excluded by some other provision. The focus is therefore on the true interpretation of Sch.6 as it stands, rather than read with Sch.13.

H7 (2) Sch.6 does not require a valuation of existing property but of the increase in value of a package of two items of property taken together, valued on two different bases. The second basis is the increase in value after enfranchisement that is attributable to the potential ability of the participating tenants to grant new leases to themselves and which, in an open market transaction, would have to have been divided by negotiation between the seller and the buyer. The first element is intended to give a comparable figure before enfranchisement and Parliament specifically excluded the prospect of enfranchisement from the valuation of the freehold interest. In order to produce a consistent valuation, the second element in that package of property must be valued in the same way. Paragraph 4(4)(b) concerns the value of the interest to be acquired by the nominee purchaser, which does not form part of the package to be valued.

H8 (3) Such an interpretation accords with the presumption that Parliament intended to act in a principled and consistent way and achieves internal consistency in the valuation of the freehold and leasehold interests that is also consistent with the *Pointe Gourde* principle. The element of increase attributable to the potential ability of the tenants to grant themselves new leases cannot be fully achieved without valuing the participating tenants' interests on the basis of a "no rights" assumption.

H9 (4) The presence of artificial assumptions in Sch.6 displaces the presumption that the valuation is to be conducted on the basis of reality. Paragraph 4(2) introduces a price for a transaction under statutory compulsion and not the actual value of anything that could be obtained in the market. Parliament was clearly

Forty-five ← This is what the transcript says

trying to strike a balance between the freeholder and the tenants: if the tenants had already paid for part of the marriage value when they had acquired their leases it was not a payment they had made to the freeholder and they could not buy the freehold interest in the open market. The "no rights" valuation is therefore not unfair to the tenants.

H10 **Legislation referred to:**
Leasehold Reform, Housing and Urban Development Act 1993 Sch.6, para.4; Sch.13, para.4.

H11 **Cases referred to:**
Holdings Ltd v Grosvenor (Mayfair) Estate [2009] UKUT 234 (LC); [2010] L. & T.R. 21; [2010] 2 E.G. 84 (C.S.)
Fattal v John Lyon Free Grammar School Governors [2004] EWCA Civ 1530; [2005] 1 W.L.R. 803; [2005] L. & T.R. 11
Laura Investment Co Ltd v Havering LBC [1992] 1 E.G.L.R. 155; [1992] 24 E.G. 136 Ch D
Pitts v Earl Cadogan [2008] UKHL 71; [2010] 1 A.C. 226; [2009] L. & T.R. 10

H12 For further details of the law in this area see *Woodfall's Law of Landlord and Tenant*, Vol.4, para.29.066: "Marriage value: meaning".

H13 *Henry McHale* (appearing as litigant in person and for the second appellant).
A. Radevsky (instructed by Pemberton Greenish) for the landlord.
S. Jourdan QC (instructed by Forsters) for the interveners.

JUDGMENT

ARDEN L.J.:

1 The subject matter of this appeal is the interpretation of the requirements in Sch.6 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") for determining the marriage value which forms part of the price payable by qualifying tenants for the freehold interest on exercise of the right of collective enfranchisement. This judgment represents the last stage in the appeal brought by the appellants, who are the nominee purchaser and an intermediate lessee. The first part of the appeal was determined by another constitution this court (Rix, Rimer and Patten L.JJ.) by order dated January 21, 2010.

2 The precise point at issue is whether the tenants' interests, like the freehold interest, should, for the purpose of ascertaining the marriage value, be valued on what has been called a "no Act rights assumption", that is, on the basis that the rights to enfranchisement under the 1993 Act do not exist. There is a specific direction that this assumption should be made when determining the value of the freeholder's interest (Sch.6, para.3(1)(b) of the 1993 Act) but the same schedule is silent as to whether the same assumption should be made when valuing the tenants' interests.

Background

3 10 Sloane Gardens, London SW1 is a building divided into six flats of which the respondent, the Rt Hon Earl Cadogan, is the freeholder. The first appellant, Mr

McHale, is the intermediate landlord under a headlease. The second appellant, 10 Sloane Gardens Management Co Ltd, is the nominee purchaser for the purposes of the collective enfranchisement of the property under s.24 of the 1993 Act. I refer to the two appellants as simply "Mr McHale".

4 Five of the six flats are underlet on long leases. By an initial notice served on July 20, 2004, three of the tenants sought to acquire the freehold of the premises under the 1993 Act. On December 15, 2004 the freeholder applied to the Leasehold Valuation Tribunal (the LVT) to determine the enfranchisement price under Sch.6 to the 1993 Act. The terms of the transfer, other than price, were agreed on May 16, 2006, which thereby became the valuation date for the purposes of Sch.6.

5 In its decision dated January 17, 2007, the LVT determined the enfranchisement price in the sum of £770,940. In the course of its decision, the LVT rejected the submissions of Mr McHale that the tenants' interests should not be valued on the no Act rights assumption. It held that the marriage value should be obtained by applying the same assumptions to the current lease value as are required to be made to the freehold interest under para.3(1) of Sch.6 to the 1993 Act, that is, as unaffected by rights given by the 1993 Act.

6 On February 7, 2007 Mr McHale submitted an application for leave to appeal which the LVT granted on February 23, 2007. On October 30, 2008 the Lands Tribunal (George Bartlett QC, President, and PR Francis FRICS) (the LT) dismissed the appeal, but adjusted the enfranchisement price because of a small mathematical error to £780,405.

7 On the no Act rights assumption, the LT held:

> "17. We accept Mr Radevsky's submission. What paragraph 4(2) provides for is the assessment, as marriage value, of any increase in the aggregate value of the freehold and intermediate leasehold interests, and subparagraphs (3) and (4) provide for the application and the paragraph 3(1) assumptions in determining the value of those interests. The provisions do not prescribe the format in which the marriage value is to be determined, and it says nothing about the valuation of the participating tenants' current leasehold interests. But it is clear that the value of those current interests need [sic] to be brought into the calculation for the purpose of determining what increase in value of the freeholder's and intermediate leaseholder's interest will result from a marriage of those interests. For the purpose of valuing the freeholder's and intermediate leaseholders' interests it must be assumed that Chapters I and II confer no right to acquire any interest in the demised premises.
>
> 18. It follows that that assumption must be made throughout the valuation of those interests and where, as part of that valuation, the value of the participating tenants' current interests is brought into the reckoning, it must apply there. It is moreover implicit in paragraph 4(2)(a) which refers to the increase in value attributable to the potential ability of the participating tenants, post-enfranchisement, to have new leases granted to them that the before valuation must be done on the basis that they have no such rights. In any event it would, in our view, be contrary to the scheme of the provisions to do otherwise than to assume throughout the valuation that Chapter I and II rights do not exist in relation to the premises. The Act provides for the acquisition of the freeholder's and intermediate leaseholder's interests, and so they must be compensated for what they have lost by reason of the provisions of the Act

that enable the acquisition to take place. To import into the valuation of the interests before acquisition values that derive from the provisions of the Act itself would be inconsistent with objective and there could be no justification for it. The LVT was undoubtedly right, in our judgment, in approaching the matter on the basis that the paragraph 3(1)(b) assumption was to be applied to the value of the participating tenants' current interest in determining marriage value."

Statutory framework

8 For simplicity I omit (where possible) references to the intermediate interest as they do not affect the analysis. I set out the relevant provisions as amended by the Commonhold and Leasehold Reform Act 2002 as it has not been suggested that those amendments have any material effect for the purposes of this appeal.

9 Paragraph 2(1) of Sch.6 provides that the price payable by the participating tenants for the freehold interest on collective enfranchisement comprises three elements which are to be ascertained by separate consecutive paragraphs of the same schedule:

> "(a) the value of the freeholder's interest in the premises as determined in accordance with paragraph 3;
> (b) the freeholder's share of the marriage value as determined in accordance with paragraph 4; and
> (c) any amount of compensation payable to the freeholder under paragraph 5."

10 As we are concerned with the freeholder's share of the marriage value, para.4 of Sch.6 applies. The valuation exercise to be performed is identified in subparagraph (2):

> **"Freeholder's share of marriage value**
> 4 (1) The marriage value is the amount referred to in sub-paragraph (2), and the freeholder's share of the marriage value is 50 per cent of that amount.
> (2) Subject to sub-paragraph (2A), the marriage value is any increase in the aggregate value of the freehold and every intermediate interest in the specified premises, when regarded as being (in consequence of their being acquired by the nominee purchaser) interests under the control of the participating tenants, as compared with the aggregate value of those interests when held by the persons from whom they are to be so acquired, being an increase in value:
> (a) which is attributable to the potential ability of the participating tenants, once those interests have been so acquired, to have new leases granted to them without payment of any premium and without restriction as to length of term; and
> (b) which, if those interests were being sold to the nominee purchaser on the open market by willing sellers, the nominee purchaser would have to agree to share with the sellers in order to reach agreement as to price.
> (2A) Where at the relevant date the unexpired term of the lease held by any of those participating members exceeds eighty years, any increase in the value

of the freehold or any intermediate leasehold interest in the specified premises which is attributable to his potential ability to have a new lease granted to him as mentioned in sub-paragraph (2)(a) is to be ignored.

(3) For the purposes of sub-paragraph (2) the value of the freehold or any intermediate leasehold interest in the specified premises when held by the person from whom it is to be acquired by the nominee purchaser and its value when acquired by the nominee purchaser:

(a) shall be determined on the same basis as the value of the interest is determined for the purposes of paragraph 2(1)(b) ...; and

(b) shall be so determined as at the relevant date.

(4) Accordingly, in so determining the value of an interest when acquired by the nominee purchaser:

(a) the same assumptions shall be made under paragraph 3(1) ... as are to be made under that provision in determining the value of the interest when held by the person from whom it is to be acquired by the nominee purchaser; and

(b) any merger or other circumstances affecting the interest on its acquisition by the nominee purchaser shall be disregarded."

11 As para.4(2) demonstrates, the rationale behind the sharing of marriage value is that on collective enfranchisement the participating tenants obtain the right to grant 999 year leases to themselves without any ground rent, restrictive covenants, premium or forfeiture clause and the right to vacant possession on termination of that lease. Moreover, the tenant under an existing lease is likely to pay more for this right than any other purchaser and so the value of the freehold interest to the tenant is more than the market value of that interest and that of the tenant's interest taken together. This gives rise to the marriage value which is required to be shared between the owner of the freehold interest and the participating tenants.

12 To carry out the valuation direction in para.4(2) both the freehold interest and the tenants' interests need to be valued. There are no special directions about the valuation of the tenants' interests, but full directions as to the way in which the freehold interest is to be valued.

13 Paragraph 4(4)(a) thus incorporates or borrows three specific assumptions in para.3, which so far as material provide:

"Value of freeholder's interest

3(1) Subject to the provisions of this paragraph, the value of the freeholder's interest in the specified premises is the amount which at the relevant date that interest might be expected to realise if sold on the open market by a willing seller (with no person who falls with sub-paragraph (1A) buying or seeking to buy) on the following assumptions:

(a) on the assumption that the vendor is selling for an estate in fee simple:

(i) subject to any leases subject to which the freeholder's interest in the premises is to be acquired by the nominee purchaser; but

(ii) subject also to any intermediate or other leasehold interests in the premises which are to be acquired by the nominee purchaser;

(b) *[the "no Act rights" assumption]* on the assumption that this Chapter and Chapter II confer no right to acquire any interest in the specified premises or to acquire any new lease (except that this shall not preclude

the taking into account of a notice given under section 42 with respect to a flat contained in the specified premises where it is given by a person other than a participating tenant);

(c) *[the "improvements" disregard]* on the assumption that any increase in the value of any flat held by a participating tenant which is attributable to an improvement carried out at his own expense by the tenant or by any predecessor in title is to be disregarded; ...

(5) *[the so-called "anti-increase disregard"]* The value of the freeholder's interest in the specified premises shall not be increased by reason of—

(a) any transaction which:

(i) is entered into on or after the date of the passing of this Act (otherwise than in pursuance of a contract entered into before that date); and

(ii) involves the creation or transfer of an interest superior to (whether or not preceding) any interest held by a qualifying tenant of a flat contained in the specified premises; or

(b) any alteration on or after that date of the terms on which any such superior interest is held ... ."(italicised words in brackets added)

14 The issue in this case is whether the no Act rights assumption ought also to be made when valuing the tenants' interest for the purpose of carrying out the valuation exercise in para.4(2).

15 Schedule 6 is to be contrasted with Sch.13. It concerns the premium payable in respect of the grant of a new lease. Although Sch.13 has always contained the trio of assumptions—the no Act rights assumption, an improvements disregard and an anti-increase direction—to be applied when valuing the landlord's interest (see [3]), Sch.13 did not, as originally enacted, provide for the same trio to be applied when valuing the tenants' existing lease for the purpose of the marriage value calculation. Schedule 13 was amended by the Housing Act 1996 by the insertion of a new para.4B, which provides for the tenant's interest to be valued on the no Act rights assumption. Changes were also made to Sch.6 by the Housing Act 1996, but those changes did not include the introduction of a provision applying the trio of assumptions to the valuation of the tenants' existing interests for the purpose of ascertaining marriage value.

16 Schedule 13 as amended by the Housing Act 1996 contains the same structuring of the separate components of the premium payable by the tenant on obtaining a lease extension. It provides in material part:

"Premium payable by tenant

2 The premium payable by the tenant in respect of the grant of the new lease shall be the aggregate of:

(a) the diminution in value of the landlord's interest in the tenant's flat as determined in accordance with paragraph 3;

(b) the landlord's share of the marriage value as determined in accordance with paragraph 4; and

(c) any amount of compensation payable to the landlord under paragraph 5.

Diminution in value of landlord's interest

3 (1) The diminution in value of the landlord's interest is the difference between:

(a) the value of the landlord's interest in the tenant's flat prior to the grant of the new lease; and

(b) the value of his interest in the flat once the new lease is granted.

(2) Subject to the provisions of this paragraph, the value of any such interest of the landlord as is mentioned in sub-paragraph (1)(a) or (b) is the amount which at [the relevant date] that interest might be expected to realise if sold on the open market by a willing seller (with [neither the tenant nor any owner of an intermediate leasehold interest] buying or seeking to buy) on the following assumptions:

(a) on the assumption that the vendor is selling for an estate in fee simple or (as the case may be) such other interest as is held by the landlord, subject to the relevant lease and any intermediate leasehold interests;

(b) on the assumption that Chapter I and this Chapter confer no right to acquire any interest in any premises containing the tenant's flat or to acquire any new lease;

(c) on the assumption that any increase in the value of the flat which is attributable to an improvement carried out at his own expense by the tenant or by any predecessor in title is to be disregarded; and

(d) on the assumption that (subject to paragraph (b)) the vendor is selling with and subject to the rights and burdens with and subject to which the relevant lease has effect or (as the case may be) is to be granted.

(3) In sub-paragraph (2) 'the relevant lease' means either the tenant's existing lease or the new lease, depending on whether the valuation is for the purposes of paragraph (a) or paragraph (b) of sub-paragraph (1).

(4) It is hereby declared that the fact that sub-paragraph (2) requires assumptions to be made as to the matters specified in paragraphs (a) to (d) of that sub-paragraph does not preclude the making of assumptions as to other matters where those assumptions are appropriate for determining the amount which at [the relevant date] any such interest of the landlord as is mentioned in sub-paragraph (1)(a) or (b) might be expected to realise if sold as mentioned in sub-paragraph (2).

(5) In determining any such amount there shall be made such deduction (if any) in respect of any defect in title as on a sale of that interest on the open market might be expected to be allowed between a willing seller and a willing buyer.

(6) The value of any such interest of the landlord as is mentioned in sub-paragraph (1)(a) or (b) shall not be increased by reason of:

(a) any transaction which:

(i) is entered into on or after the date of the passing of this Act (otherwise than in pursuance of a contract entered into before that date), and

(ii) involves the creation or transfer of an interest superior to (whether or not preceding) any interest held by the tenant; or

(b) any alteration on or after that date of the terms on which any such superior interest is held.

Landlord's share of marriage value

4 (1) The marriage value is the amount referred to in sub-paragraph (2), and the landlord's share of the marriage value is 50 per cent of that amount.

(2) Subject to sub-paragraph (2A), the marriage value is the difference between the following amounts, namely:

(a) the aggregate of:
  (i) the value of the interest of the tenant under his existing lease;
  (ii) the value of the landlord's interest in the tenant's flat prior to the grant of the new lease; and
  (iii) the values prior to the grant of that lease of all intermediate leasehold interests (if any); and

(b) the aggregate of:
  (i) the value of the interest to be held by the tenant under the new lease;
  (ii) the value of the landlord's interest in the tenant's flat once the new lease is granted; and
  (iii) the values of all intermediate leasehold interests (if any) once that lease is granted.

(2A) Where at the relevant date the unexpired term of the tenant's existing lease exceeds eighty years, the marriage value shall be taken to be nil.

(3) For the purposes of sub-paragraph (2):

(a) the value of the interest of the tenant under his existing lease shall be determined in accordance with paragraph 4A;

(aa) the value of the interest to be held by the tenant under the new lease shall be determined in accordance with paragraph 4B;

(b) the value of any such interest of the landlord as is mentioned in paragraph (a) or paragraph (b) of sub-paragraph (2) is the amount determined for the purposes of paragraph 3(1)(a) or paragraph 3(1)(b) (as the case may be); and

(c) the value of any intermediate leasehold interest shall be determined in accordance with paragraph 8, and shall be so determined as at the relevant date.

4A(1) Subject to the provisions of this paragraph, the value of the interest of the tenant under the existing lease is the amount which at [the relevant date] that interest might be expected to realise if sold on the open market by a willing seller (with neither the landlord nor any owner of an intermediate leasehold interest buying or seeking to buy) on the following assumptions:

(a) on the assumption that the vendor is selling such interest as is held by the tenant subject to any interest inferior to the interest of the tenant;

(b) on the assumption that Chapter I and this Chapter confer no right to acquire any interest in any premises containing the tenant's flat or to acquire any new lease;

(c) on the assumption that any increase in the value of the flat which is attributable to an improvement carried out at his own expense by the tenant or by any predecessor in title is to be disregarded; and

(d) on the assumption that (subject to paragraph (b)) the vendor is selling with and subject to the rights and burdens with and subject to which any interest inferior to the existing lease of the tenant has effect.

(2) It is hereby declared that the fact that sub-paragraph (1) requires assumptions to be made in relation to particular matters does not preclude the making of assumptions as to other matters where those assumptions are

appropriate for determining the amount which at [the relevant date] the interest of the tenant under his existing lease might be expected to realise if sold as mentioned in that sub-paragraph.

(3) In determining any such amount there shall be made such deduction (if any) in respect of any defect in title as on a sale of that interest on the open market might be expected to be allowed between a willing seller and a willing buyer.

(4) Subject to sub-paragraph (5), the value of the interest of the tenant under his existing lease shall not be increased by reason of:

(a) any transaction which:
  (i) is entered into after 19th January 1996; and
  (ii) involves the creation or transfer of an interest inferior to the tenant's existing lease; or
(b) any alteration after that date of the terms on which any such inferior interest is held.

(5) Sub-paragraph (4) shall not apply to any transaction which falls within paragraph (a) of that sub-paragraph if:

(a) the transaction is entered into in pursuance of a contract entered into on or before the date mentioned in that paragraph; and
(b) the amount of the premium payable by the tenant in respect of the grant of the new lease was determined on or before that date either by agreement or by a leasehold valuation tribunal under this Chapter.

4B(1) Subject to the provisions of this paragraph, the value of the interest to be held by the tenant under the new lease is the amount which at the relevant date that interest (assuming it to have been granted to him at that date) might be expected to realise if sold on the open market by a willing seller (with the owner of any interest superior to the interest of the tenant not buying or seeking to buy) on the following assumptions:

(a) on the assumption that the vendor is selling such interest as is to be held by the tenant under the new lease subject to the inferior interests to which the tenant's existing lease is subject at the relevant date;
(b) on the assumption that Chapter I and this Chapter confer no right to acquire any interest in any premises containing the tenant's flat or to acquire any new lease;
(c) on the assumption that there is to be disregarded any increase in the value of the flat which would fall to be disregarded under paragraph (c) of sub-paragraph (1) of paragraph 4A in valuing in accordance with that sub-paragraph the interest of the tenant under his existing lease; and
(d) on the assumption that (subject to paragraph (b)) the vendor is selling with and subject to the rights and burdens with and subject to which any interest inferior to the tenant's existing lease at the relevant date then has effect.

(2) It is hereby declared that the fact that sub-paragraph (1) requires assumptions to be made in relation to particular matters does not preclude the making of assumptions as to other matters where those assumptions are appropriate for determining the amount which at [the relevant date] the interest to be held by the tenant under the new lease might be expected to realise if sold as mentioned in that sub-paragraph.

(3) In determining any such amount there shall be made such deduction (if any) in respect of any defect in title as on a sale of that interest on the open market might be expected to be allowed between a willing seller and a willing buyer.

(4) Subject to sub-paragraph (5), the value of the interest to be held by the tenant under the new lease shall not be decreased by reason of:

(a) any transaction which:

(i) is entered into after 19th January 1996; and

(ii) involves the creation or transfer of an interest inferior to the tenant's existing lease; or

(b) any alteration after that date of the terms on which any such inferior interest is held.

(5) Sub-paragraph (4) shall not apply to any transaction which falls within paragraph (a) of that sub-paragraph if:

(a) the transaction is entered into in pursuance of a contract entered into on or before the date mentioned in that paragraph; and

(b) the amount of the premium payable by the tenant in respect of the grant of the new lease was determined on or before that date either by agreement or by a leasehold valuation tribunal under this Chapter."

Submissions

17 Not surprisingly, both sides have approached this appeal on the basis that it is a simple question of statutory construction on which they come to opposite results.

18 Opening the appeal and supporting the position of the appellants, Mr Stephen Jourdan QC addressed us on behalf of the interveners, who are tenants of another property where the same point is being taken before the LT. The disparity in the provisions of Sch.6 and Sch.13 constitutes the kernel of his case. Mr Jourdan submits that the natural meaning of para.4 of Sch.6, when read on its own and in the context of the 1993 Act (particularly Sch.13), is that the no Act rights assumption and improvements disregard only apply in valuing the freehold interest, and not to the valuation of the tenants' interest. Accordingly marriage value is calculated under Sch.6 on a different basis from that applying when a tenant of a high value house buys the freehold (see s.9 of the Leasehold Reform Act 1967) or a tenant of a flat acquires a new lease in it and Sch.13 applies. He submits that that result is not surprising or unfair and is not a reason to depart from the natural meaning of Sch.6 para.4. The reasoning in [18] of the LT decision is wrong as there is nothing implicit in para.4(2)(a) (setting out what I have called the valuation exercise) leading to valuation of the existing leasehold interests on a no Act basis.

19 Amplifying his submissions on Sch.13, Mr Jourdan further submits that, when Sch.6 is compared with Sch.13, it is clear that the trio of assumptions, which are to be used under Sch.13, are not to be used under Sch.6, para.4 when valuing the tenants' interests. Schedules 6 and Sch.13 form part of the same statute and should be read as one. Further para.4(4)(b) provides that in determining the value of an interest when acquired by the nominee purchaser "any merger or other circumstances affecting the interest of its acquisition by the nominee purchaser shall be disregarded." So, existing leases of the participating tenants are treated as remaining in existence throughout the valuation process, as on his submission the

LT correctly held in *Z Holdings Ltd v Grosvenor (Mayfair) Estate* [2009] UKUT 234 (LC) at [24](2).

20 Mr Jourdan also invokes the principle of valuation that valuation should take place on the basis of reality in the absence of contrary indication (*Laura Investment Co Ltd v Havering LBC* [1992] 1 E.G.L.R. 156)). Accordingly he submits that the tenants' interests should be valued on the basis of reality in the absence of contrary indication in the statute. There is no market for the tenants' interests on the no Act rights basis.

21 He submits that the leading text of *Hague on Leasehold Enfranchisement* was persuaded to change its mind on this issue, and that its first thoughts were better than its second thoughts. In the third edition (1999) at p.408, the editors (Mr Radevsky and Mr Damian Greenish) expressed the view that the no Act rights assumption did not apply to the valuation of leasehold interests under collective enfranchisement. In the fourth edition (2003) they noted that it was arguable that, in valuing the existing leases of the participating tenants, the relevant disregards were not to be taken into account. The editors stated that the main reason for this argument was that, in the case of a new lease claim, the 1993 Act makes specific provision that the disregards are to apply in the valuation of the leaseholder's interest as to that of the freeholder (Sch.13, paras 3, 4A(1) and 4B(1)). However, in a supplement issued in 2005, the authors stated that they had reconsidered their criticisms:

> "The authors have reconsidered their criticism of the drafting, as set out in the third paragraph on p.440. It is considered that the fact that the increase in price which represents the marriage value must be based on the same assumptions as under paragraph 3(1) makes it clear that the relevant disregards apply throughout the calculation. The corresponding provision in Sch. 13 is distinguishable insofar as the definition of marriage value therein contains a specific direction to value the interest of the tenant under the existing lease. In consequence, it is necessary to set out the assumptions to be made in calculating that value."

22 Further matters were referred to by both Counsel, such as passages in Hansard and decisions of the LVT, which, while often helpful, appear on the point to go either way. We were also referred to the Leasehold Reform Act 1967, which made different valuation assumptions, but detailed reference to that Act is not essential for the purposes of my conclusions. It is clear that Parliament can enact that different assumptions be made for the valuation of marriage value at different times and for different purposes. Both sides also referred to *Earl Cadogan v Pitts and Sportelli* [2010] 1 A.C. 226, but that case does not deal with the assumptions to be made when determining the marriage value under Sch.6 and thus cannot help us resolve the issues in this case.

23 Mr Jourdan, an experienced practitioner in the field of landlord and tenant, submits that it is possible that Parliament intended that there should not be consistency in this field. Marriage value, he submits, is a "political hot potato" and there are different policy considerations which apply to collective enfranchisement from those applying to lease extension. This could be, as he put it, a case of swings and roundabouts. Parliament may simply have wished to be more generous in this context to the tenant. The issue in this case was known to be a problem in 2002 when the Commonhold and Leasehold Reform Act 2002 made certain immaterial

amendments to Sch.6, but Parliament decided not to deal with it. Strictly, I think he meant that Parliament failed or omitted to deal with it.

24 Mr Jourdan submits that it does not help to refer to the principle of compulsory purchase valuation that when valuing land taken compulsorily any increase in value due to the scheme for which the land was taken should be disregarded (the *Pointe Gourde* principle).

25 Mr McHale made helpful submissions to us, primarily based on fairness. The purpose of the marriage value valuation is to value the increase attributable to the right of the participating tenants to grant themselves new leases. That can only be done by reference to the market value of their new 999 year leases compared with the market value of their existing leases. There is no express provision requiring para.3(1)(b) of Sch.6 to be taken into account. He submits the marriage value is profit. It has to be a real profit, not a profit increased by some notional amount. It is unfair to hold that there is some notional element. The leaseholder has already paid for that when he bought his interest. The 1993 Act was intended to be for the benefit of tenants with long leases but it cannot be for the benefit of tenants if the respondent is right. The freeholder should not obtain the benefit of an increase in value by reference to a market which does not exist in reality. Otherwise the freeholder obtains a windfall. A tenant should only have to share a real profit. On Mr McHale's submission, para.4(2)(b) refers to a real profit. The trio of assumptions in para.3 are thus inapposite when valuing the tenants' interest. If it was intended that the statutory rights should be disregarded, express words would have made this clear.

26 Mr Antony Radevsky, for Earl Cadogan, also contends that this is a simple question of statutory interpretation which can be answered by reference only to Sch.6. He starts with para.4(2) of Sch.6. This defines marriage value by reference to the increase in value of the freehold interest when it comes under the control of participating tenants on collective enfranchisement as compared with its value when held by the freeholder. That increase in value is specifically determined to be an increase in value attributable to the ability of the participating tenants to issue new leases to themselves in circumstances where, if the transaction had indeed taken place on the open market, the increase in value would have had to have been divided between the seller and the purchaser to persuade the seller to sell. The valuation exercise in para.4 (2) cannot properly be carried out unless the no Act rights assumption is made. Only then is the whole of the value of the tenants' ability to issue themselves with new leases ascertained in relation to the participating tenants' interests as well as the freeholder interest. The 1993 Act does not direct that it is the existing interests of the tenants which have to be valued. Thus the LT was entirely correct in [18] of its decision.

27 Mr Radevsky supports his argument by reference to the "the *Pointe Gourde* principle" that the value of an asset being compulsorily acquired is not increased by the fact that it is subject to acquisition. He submits by analogy that the 1993 Act reflects this principle. When this assumption applies, the principle of actual reality does not apply. Taking the improvements disregard, Sch.6 is indeed a case of swings and roundabouts since normally the landlord would get the benefit of improvements when the lease came to an end. The improvements disregard does not normally have a great effect on value but it is for the benefit of the tenant.

28 Moreover, as a subsidiary point, he submits that, if he is right, the valuation would be carried out on consistent principles. It is the normal expectation, in the

absence of some explicit indication to the contrary, that where different interests in the same property fall to be valued as part of the same valuation exercise they will be valued on a consistent basis (see *Fattal v John Lyon Free Grammar School* [2005] 1 W.L.R. 803 at [18]). Schedule 13 provides that in carrying out the marriage value calculation the same assumptions must be applied to the landlord's interest and the tenant's interest but that schedule is structured in a different way. It has a different statutory history since Sch.6 replicates the structure of the valuation provisions in s.9 of the Leasehold Reform Act 1967.

Conclusions

29 In my judgment we should focus on the issue of the true interpretation of Sch.6 of the 1993 Act as it stands rather than Sch.6 read with Sch.13. Schedule 13 is of course as part of the same statute and the normal principle of statutory interpretation is, as Mr Jourdan and Mr McHale both submit, that, in the absence of contrary indication, an Act of Parliament must be read as a whole. In other words, in the absence of contrary indication, where Parliament enacts a single statute, it must be taken to intend to enact a single consistently-expressed code of provisions. The central argument on this appeal is that, because under Sch.13 Parliament has specifically provided (by amendment) that the no Act rights assumption will apply to the valuation of the tenant's interest, that assumption cannot apply to the valuation of the tenants' interests under Sch.6 because Sch.6 makes no provision for the same specific assumption.

30 Schedule 13 was the subject of substantial amendment in 1996. The normal principle of statutory interpretation described above can still apply to provisions introduced into a statute by later amendment (see for example, Bennion, *Statutory Interpretation* (5th edn) at p.290). It is then the statute as amended which is to be read as a consistent whole from the effective date of amendment.

31 This principle of statutory interpretation can, however, be excluded by the context, such as when it is clear that two sets of provisions operate independently and in different circumstances or have different statutory forbears. It follows that we should not start the process of interpreting Sch.6 on the basis that an assumption which is expressly stated in Sch.13 does not apply unless we have first examined Sch.6. To take Sch.13 into account at the first stage would in my judgment be to put the cart before the horse. This is confirmed by the fact that that Sch.13 is dealing with a similar valuation exercise but it is not one which has any link with any valuation actually performed under Sch.6. Moreover the statutory directions in Sch.13 are different. In particular, Sch.13 para.4 starts from a valuation of the tenant's existing lease, which necessarily carries with it statutory rights, unless they are excluded by some other provision, as indeed is the case under para.4(3)(a) and 4A(b). Thus Sch.13 is structured in an entirely different way. It is perfectly possible in such circumstances and without creating absurdity for Parliament to use different statutory language in one schedule from that in another, and to do so without enacting a substantially different effect.

32 So the starting point must be Sch.6 and, within Sch.6, the description of the valuation exercise described in para.4(2). What has to be valued is not an item of existing property but the increase in value of two items of property taken together, namely the freeholder's interest, valued on the basis of (inter alia) the no Act rights assumption, and the participating tenants' interests. These two items together form

a single package which has to be valued on two different bases. We know that the second basis is that spelt out in para.4(2)(a) and (b), and it involves a determination of the element in the increase in value following collective enfranchisement which is attributable to the potential ability of the participating tenants to grant new leases to themselves and which, if there had been a transaction in the open market, would have to have been divided through a process of negotiation between the seller and the purchaser. The first element of value is clearly intended to give a comparable figure before enfranchisement. The market may very well discount the prospect of enfranchisement in the values of the two interests to be valued, in which case the comparison on the basis of market values may be without much meaning. However that may be, Parliament has specifically excluded the prospect of enfranchisement from the valuation of the freehold interest by incorporating para.3. In order to produce a consistent valuation, the second element in that package of property must be valued in the same way. Otherwise Parliament's obvious purpose of identifying the marriage value on a principled basis would be thwarted.

33 Reference has been made to the policy reasons for particular bases of valuation in relation to marriage values. If the basis turns out to have a result which is more generous to a party than it needed to be, that is not a matter with which we can be concerned. The stronger principle in the process of statutory interpretation is the application of a presumption that Parliament intended to act in a principled and consistent way. On this interpretation, the valuation of the interests of the freeholder and the participating tenants will have achieved internal consistency. Moreover, the result would be to achieve consistency with the approach in Sch.13. We have not had full submissions about the *Pointe Gourde* principle, but, on the face of it, it is a logical principle and so the point can validly be made that an additional, if minor, merit of this interpretation of Sch.6 is that it achieves consistency with that principle as well. It is the same point as that made by the LT in the third and fourth sentences of [18] of its decision. Further, the presence of artificial assumptions necessarily displaces the presumption that the valuation is to be conducted on the basis of reality. It is clearly a generous result to the freeholder, but it has to be borne in mind that he only obtains 50 per cent of the marriage value.

34 There is the further point made by the LT that the element of increase attributable to the potential ability of the tenants to grant themselves new leases cannot be fully achieved without valuing the participating tenants' interests on the basis of a no Act rights assumption. I agree with this point, taken, as the LT took it, with the point that, unless the contrary intention is indicated, Parliament is presumed to have intended to achieve a valuation which is internally consistent.

35 Mr McHale submits that to read Sch.6 as requiring a valuation of the tenants' interests on the no Act rights basis is unfair because the tenants have already paid for their rights when they acquired their interests. The difficulty with that argument is that para.4(2) is clearly introducing a price which is not the actual value of any item that anyone could obtain in the market because it is referring to a transaction which is taking place under statutory compulsion so far as the freeholder is concerned and not in the open market. Parliament was clearly trying to strike the balance being freeholder and the tenants: that is apparent from the provision that freeholder and the participating tenants should share the marriage value. If that was something for which the tenant paid in the market when he acquired his leasehold interest it was not a payment made to the freeholder. He could not have

obtained the freehold interest in the open market. I accordingly reject Mr McHale's argument on this point.

36 I do not consider that this conclusion is undermined by the fact that para.4(4)(b) of Sch.6 does not refer to the valuation of the existing leases on the basis of a no Act rights assumption because this provision is for the purpose of valuing the interest to be acquired by the nominee purchaser which does not form part of the package to which I have referred.

37 In the circumstances I would dismiss this appeal.

ELIAS L.J.:

38 I agree.

PITCHFORD L.J.:

39 I also agree.

Appeal dismissed

I am pretty convinced it is one 'l' ie TELULAR. This is the spelling in the judgment itself (see para [14])

MW TRUSTEES LTD v TELLULAR CORPORATION

HIGH COURT OF JUSTICE (CHANCERY DIVISION)

Peter L Smith J.: January 31, 2011

[2011] EWHC 104 (Ch); [2011] L. & T.R. 19

H1 *Lease—Break clause—Form and method of service of break notice prescribed by lease—Break notice served by tenant at incorrect address and addressed to the wrong landlord—Break notice subsequently sent to managing agent for correct landlord—Managing agent indicated letter was "accepted" and they were happy for tenant to break the lease—Whether tenant had succeeded in exercising his option to determine a lease despite deficiencies in form and service of break clause.*

Summary of decision

H2 A landlord was estopped from subsequently challenging the validity of a break notice or alternatively had waived the requirement for the notice to be served in the way specified in the lease as a result of an email sent by its managing agents agreeing to the option to break being exercised.

Parties

Claimants:	MW Trustees (M).
	Robert Posel (RP)
	Pamela Posel.
Defendant:	Tellular Corporation (T).

Facts

H3 By a lease dated March 1, 2005, Unit 4, City Limits, Reading was demised to T for a term of 10 years. The lease contained a break clause that provided that if T wished to terminate the lease on March 1, 2011, he needed to give the landlord not less than six months' notice in writing and to pay the rent up to that date and other sums due under the lease. The lease also contained provisions regarding service of a notice, which stated that any notice to be served by any party must be given in writing and would only be valid if it were sent by special delivery post or delivered by hand. If the receiving party was a company it had to be sent to the registered office of the company. If the receiving party was not a company, it had to be sent to the address shown on the lease or such other address as that party might notify to the other parties from time to time. Service would be deemed to be effected at the time of delivery, if delivered by hand, or the next working day if delivered after 16.00. If sent by special delivery post, service would be deemed

effected on the expiry of two days from the delivery into the custody of the postal service.

H4 The freehold of the premises was transferred to M in October 2008. M delegated management of the premises to managing agents. T decided to exercise its option to terminate the lease, but the employee entrusted to this act was unaware that there had been a change in freehold owners. The break notice was sent by special delivery on August 10, 2009 to the previous freehold company. That company contacted T to inform them that the freehold had been transferred. The employee contacted RP, the second claimant, directly to inform him that a break notice had been sent to the previous freeholder and she had been informed that the managing agents were now in charge of the property and asked about the necessary steps to terminate the lease. RP replied that he had forwarded the email to the managing agents, who would be in touch. A representative from M's managing agent sent an email to T's employee on August 17, 2009, stating that the attached letter was accepted and confirmed that they were happy for T to break the lease. He asked her to readdress the letter and send it to another address beginning "Posel Trust". RP was in contact with T on the same day and noted that the managing agents had responded. No further letter was sent or received by T, as instructed by the email on August 17, 2009.

H5 M and RP sought a declaration that T had not served a valid break notice and had thus failed to determine the lease. T accepted that the August 10, 2009 notice was invalid and the subsequent exchange of emails of itself was not valid service in accordance with the lease, but submitted that the managing agent's email of August 17, 2009 was a representation that M accepted the notice despite its defects as to form and service and were content for it to be treated as a valid exercise of the break clause contained in the lease. The subsequent document requested was merely a matter of form and did not deflect from the primary position that notice was accepted.

H6 **Held,** dismissing the claim:

H7 (1) T had successfully terminated the lease and the claim for declaratory relief therefore failed. In considering the effect of the email from the managing agents of August 17, 2009, the documentation had to be interpreted objectively: *Mannai Ltd v Eagle Star Life Assurance Co Ltd* [1997] A.C. 749 applied. M knew that T intended to terminate the lease. RP appreciated that T intended to terminate the lease and on behalf of M raised an issue as to the sub-tenants which would only be relevant if the lease terminated. When the managing agents wrote that they accepted the attached letter and confirmed that they were happy for T to break the lease, they accepted the break and did not simply acknowledge receipt of the letter. M was therefore estopped from subsequently challenging the validity of the notice or alternatively had waived the requirement for the notice to be served in the way specified in the Lease.

H8 (2) The further notice referred to in the email of August 17, 2009 did not affect that conclusion. The requirement for service of a fresh document did not mean that M was requiring re-service of that notice in order for the break notice to be exercised. That would mean that contrary to the word "accept" in the email, M was not "accepting" the notice, but requiring a fresh one to be served.

The previous case has first names as well, instead of "Mr". What is the house style?

H9 **Cases referred to:**
Mannai Ltd v Eagle Star Life Assurance Co Ltd [1997] A.C. 749; [1997] 2 W.L.R. 945; [1997] 3 All E.R. 352 HL
Townsend Carriers Ltd v Pfizer Ltd (1977) 33 P. & C.R. 361; (1977) 242 E.G. 813; (1977) 121 S.J. 375 Ch D

H10 For further details of the law in this area see *Woodfall's Law of Landlord and Tenant*, Vol.1, para.17.290 "Conditions of exercise: service of notice".

H11 *Mr Holland* (instructed by Shoosmiths) for the claimants.
Mr Weekes (instructed by Speechly Bircham) for the defendant.

JUDGMENT

PETER SMITH J.:

Introduction

1 This action involves the consideration of one short point namely whether the defendant as tenant has succeeded in exercising an option conferred by a break clause to determine a lease.

2 The claimants (the defendant's landlords) seek a declaration that it has not served a valid break notice and so has failed to determine the lease.

Background

3 By a lease ("the Lease") dated March 1, 2005 and made between Manhattan Securities Ltd (1) and the defendant (2) the premises ("the Premises") known as unit 4 City Limits Lower Earley Reading were demised to the defendant for a term of ten years from and including March 1, 2005 at an initial rent £40,000 pa.

4 The Lease contains a break clause in cl.8.8.1 which provides:

> "If the Tenant shall wish to terminate this Lease on the Break Date [i.e. 1st March 2010] and shall give to the Landlord not less than six months [notice] in writing to do so and up to the Break Date the Tenant has paid all the Rent and other sums due under this Lease, then on the Break Date this Lease shall cease and determine, but without prejudice to any claims which either party may have against the other for breaches of the covenants and conditions of this Lease occurring prior to the Break Date."

5 The issue in this case is as to the service of the notice. It is therefore necessary to look at the provisions in the Lease for service.

Service provisions

6 Clause 8.7.1 provides:

> "Any notice to be served by any party to this Lease must be given in writing and shall be valid only if:
> (a) It is sent by special delivery post or delivered by hand.
> (b) It is sent:
> (i) To a company, at the registered office of the company

(ii) Where the receiving party is not a company, at the address shown in this Lease or such other address as that party may notify to the other parties from time to time.
(iii) in the case to the Tenant only, to the premises."

7 Clause 8.7.2 provides that service of any notice will be deemed to be effected:

"(a) By hand, at the time of delivery, or if delivered after 4pm on a working day, on the next working day
(b) By special delivery post, on the expiry of 2 days from delivery into the custody of the postal service."

8 Accordingly for the notice to be effective if the provisions of the Lease are to be complied with it must be conditional upon: (i) the Tenant wishing to terminate the Lease on March 1, 2010; (ii) the Tenant giving to the Landlord not less than six months' notice in writing; and (iii) up to March 1, 2010 the Tenant paying the rent and other sums due under the Lease.

9 The only dispute is whether in the events that transpired condition (ii) as to service of the Notice has been fulfilled.

10 It will be seen that cl.8.7.1 is not designed to provide an additional choice of methods of service in addition to methods of service valid at common law. The wording in the provision is "shall be valid only if" thus demonstrating that unless in some way the Landlord is debarred from insisting on service in accordance with that Lease provision the method of service is mandatory.

11 The defendant initially occupied the Premises as its UK office. It is a company based in Chicago providing telecommunication services. In October 2008 the claimants' immediate predecessor in title SLA Property Company Ltd (SLA) transferred the freehold of the Premises and thus the reversion expectant on the determination of the Lease to the claimants in their capacity as trustees of the second and third claimants' pension. The transfer was duly registered at HM Land Registry and the defendant was informed of that transfer as it acknowledged in the trial before me.

12 The claimants delegated the management of the Premises to managing agents namely Mattioli Woods Plc the account manager being a Mr Ekanayake. He informed the defendant that the pension scheme had taken over the freehold by an email on December 18, 2008 and enclosed an invoice for the rent due on the December 2008 quarter day which suggested that the "Trustees Posel of Trust" were the new landlords.

Decision to terminate the lease

13 The premises have been unoccupied by the defendant for two years and as part of its business reorganisation it therefore wishes to be rid of its obligations under the Lease if possible. Mr Charak the defendant's Chief Financial Officer entrusted Ms Tiffany Voltz (the defendant's Director of Administration) with the responsibility of serving the break notice. Although she was not legally trained she had read the Lease and formed the view that any break notice had to be sent by special delivery post or by hand and the defendant decided to serve a Break Notice by special delivery post.

Service

14 Unfortunately Ms Voltz was unaware of the fact that there had been a change of the freehold owners. As I have said above the defendant accepts that it as a company was aware of that change. On August 10, 2009 she sent a Break Notice to SLA saying:

> "... this letter is to inform that Telular Corporation wishes to exercise its right to terminate its lease according to section 8.8.1 of our lease for the [premises] ... on the Break Date of March 1, 2010. If Telular Corporation is required to submit any additional information to secure this Break Date lease termination, please do not hesitate to contact me ... ."

15 That letter was sent by special delivery post by Fedex.

16 Mr Holland who appears for the claimants accepts that Notice was served in accordance with the requirements as to the *method* of service. Equally Mr Weekes who appears for the defendant acknowledges that the Notice was invalid because it was not sent to the Landlords.

17 Had matters rested there the defendant would have failed to establish that it had correctly exercised the break clause. However subsequent events present a different position.

Subsequent events

18 First a Mr Elliot a property administrator who had received the Notice sent an email to Ms Voltz on August 13, 2009. In that he informed her that the property had been transferred on October 6, 2008 to Mattioli Woods. That is not correct in the sense that Mattioli Woods were managing agents and not the owners.

19 The same day Ms Voltz sent an email to Mr Posel the second claimant. In that email she said:

> "Mr Posel, Telular recently sent a letter to Suffolk Life regarding our desire to terminate our Lease on the Break Date (please see attached). I was informed (and confirmed with Sherry Swehla of our Finance team) that Mattioli Woods is now in charge of this property. If you could let me know the necessary steps to appropriately terminate our Lease on the Break Date, I would greatly appreciate it. Thanks in advance for your help!"

20 Mr Posel replied on the same day (copying in Mr Ekanayake) saying that he had forwarded her email to Mattioli Woods who would then be in contact.

Crucial email

21 On August 17, 2009 Mr Ekanayake sent an email to Ms Voltz (copying in inter alia Mr Posel). In that email he said:

> "Dear Ms Voltz We accept the attached letter and can confirm we are happy for you to break the Lease, however please could you re-address this letter to the following address:
>
> Posel Trust MW House
> 1 Penman Way
> Grove Park
> Enderby

Leicester
LE19 1SY
I look forward to hearing from you soon ... ."

22 On the same day Mr Posel sent an email to Ms Voltz acknowledging that Mattioli Woods had now responded to her and requesting details of the sub-tenant to whom the premises had been sub-let and advice as to when their lease with Telular would come to an end. It is clear that the landlords were acknowledging that they expected the lease to terminate and were investigating whether they could carry on in a direct relationship with the sub-tenant to avoid a rental void.

23 The dispute between the parties in this case turns entirely on the effect of that email from Mr Ekanayake.

24 Ms Voltz prepared the suggested replacement Notice but regrettably it was either not sent out or has been lost in the post. The defendant accepts it cannot show that any such Notice was effectively served on the claimants.

25 Any Break Notice to be effective would have to be served before September 1, 2009. Between this correspondence and the passing of that date nothing further happened.

The issues

26 The claimants had no further communication as I have said after that exchange of emails on August 17, 2009. The sub-tenants have departed (which might explain their current stance). They have therefore taken the view that the documentation set out earlier in the judgment was not effective to exercise the Break Clause in the Lease and the defendant is still the tenant. This conduct has been described in somewhat pejorative terms in correspondence and in the witness statements served on behalf of the defendant. That in my view is not justified. This was a commercial arrangement and the claimants are perfectly entitled to take whatever positions they are advised are appropriate to protect their own commercial position. At the end of the day the difficulties posed by this arise out of the failure on the part of the defendant properly to serve Notices in accordance with the clear provisions in the Lease. Equally it is entitled to take what arguments are in its favour for its commercial benefit i.e. its desire to be rid of this Lease which is regarded as burdensome now.

Claimants' position

27 The claimants' position is relatively straight forward. The Notice that was correctly served dated August 10, 2009 was ineffective because it was not addressed to nor served on the then Landlord.

28 Second the copying of the email to Mr Posel on August 13, 2009 was equally ineffective because the letter attached was not addressed to the Landlord and, even if that hurdle is overcome, emailing the document is ineffective because it does not comply with the service requirements in the Lease.

29 Third in respect of Mr Ekanayake's email of August 17, 2009 the claimants' position is that it merely acknowledged receipt of the email and the appended Notice which had been sent to him by Mr Posel and no more. It is not an acceptance of the validity of the Notice for the purposes of exercising the Break Clause. That is clear the claimants say by reason of the final part of the sentence "however could

you please readdress this letter to the following address." That the claimants contend shows that whilst the claimants were acknowledging the early documentation they still required something more properly to trigger the Break Clause i.e. service of a fresh Notice on them at the address identified in that email. That never happened and accordingly the defendant had not terminated the Lease because it has failed to properly to exercise the Break Clause.

The defendant's contentions

30 As I have said the defendant accepts the August 10, 2009 Notice was invalid because it was not sent to the Landlord.

31 Equally the defendant acknowledges that the exchange of emails on August 17, 2009 of itself is not valid service in accordance with the Lease. It is acknowledged that it is defective for two reasons. First once again the Notice is not addressed to the Landlord (although there could have been an argument about that see below). Second and more fundamentally service by email even the mis-addressing point can be overcome is not in accordance with the Lease.

32 The defendant acknowledges that the provisions in the Lease are mandatory and do not provide an alternative method of service to service at common law.

33 However the defendant's contention is that Mr Ekanayake's email waived any of the defects when he said "we accept the attached letter and can confirm we are happy for you to break the Lease ... ."

34 That the defendant contends is a representation that the claimants accepted the Notice despite its defects as to form and service and were content for it to be treated as a valid exercise of the Break Clause contained in the Lease.

35 The defendant deals with the final part of the letter by submitting that a subsequent document was merely a matter of form and does not deflect from the primary position as set out in the email that Mr Ekanayake on behalf of the claimants accepted the Notice, accepted that the defendant was intending to break the Lease and was intending so to do by those documents which he accepted.

Legal issues

36 Despite the shortness of the point I was provided with a large number of authorities. I do not intend to refer to the bulk of them because at the end of the day in my view the decision is primarily one of fact to be determined by me namely the effect of Mr Ekanayake's email of August 17, 2009.

37 I will refer to a number of key authorities however. First the leading authority on interpretation of notices is *Mannai Ltd v Eagle Star Insurance Co Ltd* [1997] A.C. 749. In that case the Break Notice was served specifying the date of termination of the lease on January 12, 1995. In fact the Notice ought to have expired on the 3rd anniversary of the Term of Commencement Date namely January 13, 1995. Nevertheless the House of Lords held that the Notice was effective the Head Note providing:

> "... the construction of the notices had to be approached objectively, and the question was how a reasonable recipient would have understood them, bearing in mind their context; that the purposes of the notices was to inform the landlord of the tenants decision to determine the leases in accordance with the break clauses; that a reasonable recipient with knowledge of the terms of

the leases and of the third anniversary date would have been left in no doubt that the tenant wished to determine the leases on 13th January 1995 but had wrongly described it as 12th January 1995; and that accordingly the notices were effective to terminate the leases."

38 Lord Steyn said this at p.767:

"(1) This is not a case of a contractual right to determine which prescribes as an indispensable condition for its effective exercise that the notice must contain specific information. After providing for the form of the notice ('in writing'), its duration ('not less than six months') and service ('on the landlord or its solicitors'), the only words in clause 7(13) relevant to the content of the notice are the words 'notice to expire on the third anniversary of the term commencement date determine this lease'. Those words do not have any customary meaning in a technical sense. No terms of art are involved. And neither side has suggested that anything should be implied into the language. That is not surprising since the tests governing the implication of terms could not conceivably be satisfied. The language of clause 7(13) must be given its ordinary meaning. A notice simply expressed to determine the lease on third anniversary of the commencement date would therefore have been effective. The principle is that that is certain which the context renders certain: *Sunrose Ltd v Gould* [1962] 1 W.L.R. 20.

(2) The question is not how the landlord understood the notices. The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices. And in considering this question the notices must be construed taking into account the relevant objective contextual scene. The approach in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as H.E. Hansen-Tangen)* [1976] 1 W.L.R. 989, which deals with the construction of commercial contracts, is by analogy of assistance in respect of unilateral notices such as those under consideration in the present case. Relying on the reasoning in Lord Wilberforce's speech in the *Reardon Smith* case, at 996D to 997D, three propositions can be formulated. First, in respect of contracts and contractual notices the contextual scene is always relevant. Secondly, what is admissible as a matter of the rules of evidence under this heading is what is arguably relevant. But admissibility is not the decisive matter. The real question is what evidence of surrounding circumstances may ultimately be allowed to influence the question of interpretation. That depends on what meanings the language read against the objective contextual scene will let in. Thirdly, the inquiry is objective: the question is what reasonable persons, circumstanced as the actual parties were, would have had in mind. It follows that one cannot ignore that a reasonable recipient of the notices would have had in the forefront of his mind the terms of the leases. Given that the reasonable recipient must be credited with knowledge of the critical date and the terms of clause 7(13) the question is simply how the reasonable recipient would have understood such a notice. This proposition may in other cases require qualification. Depending on the circumstances a party may be precluded by an estoppel by convention from raising a contention contrary to a common assumption of fact or law (which could include the validity of a notice) upon which they have acted: Norwegian American Cruises A/S (formerly *Norwegian American Lines A/S) v Paul*

Munday Ltd [1988] 2 Lloyds Rep. 343. Such an issue may involve subjective questions. That is, however, a different issue and not one relevant to this appeal. I proceed therefore to examine the matter objectively.

(3) It is important not to lose sight of the purpose of a notice under the break clause. It serves one purpose only: to inform the landlord that the tenant has decided to determine the lease in accordance with the right reserved. That purpose must be relevant to the construction and validity of the notice. Prima facie one would expect that if a notice unambiguously conveys a decision to determine a court may nowadays ignore immaterial errors which would not have misled a reasonable recipient.

(4) There is no justification for placing notices under a break clause in leases in a unique category. Making due allowance for contextual differences, such notices belong to the general class of unilateral notices served under contractual rights reserved, e.g. notices to quit, notices to determine licences and notices to complete: *Delta Vale Properties Ltd v Mills* [1990] 1 W.L.R. 445, 454E-G. To those examples may be added notices under charter parties, contracts of affreightment, and so forth. Even if such notices under contractual rights reserved contain errors they may be valid if they are 'sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate': the *Delta* case, at p. 454E-G, per Slade L.J. and adopted by Stocker L.J. and Bingham L.J: see also *Carradine Properties Ltd v Aslam* [1976] 1 W.L.R. 442, 444. That test postulates that the reasonable recipient is left in no doubt that the right reserved is being exercised. It acknowledges the importance of such notices. The application of that test is principled and cannot cause any injustice to a recipient of the notice. I would gratefully adopt it."

39 Lord Hoffmann delivered a similar judgment (at p.774):

"If one applies that kind of interpretation to the notice in this case, there will also be no ambiguity. The reasonable recipient will see that in purporting to terminate pursuant to clause 7(13) but naming 12 January 1995 as the day upon which he will do so, the tenant has made a mistake. He will reject as too improbable the possibility that the tenant meant that unless he could terminate on 12 January, he did not want to terminate at all. He will therefore understand the notice to mean that the tenant wants to terminate on the date on which, in accordance with clause 7(13), he may do so, i.e. 13 January."

The estoppel and waiver

40 The claimants submit that the concepts of estoppel and waiver are similar if not identical but they both require:

i) a clear and unequivocal promise or assurance;
ii) by one party to contract to another;
iii) that the promisor will not enforce its strict legal rights under the contract;
iv) which promise or assurance is intended to effect the legal relations between them; and
v) which is reasonably understood by the other party to have that effect; and
vi) which is in fact acted upon by the other party.

41 These principles the claimants submit in Snell "*Principles of Equity*" (32nd Edn) paras 12-09 and 12-010.

42 Mr Weekes for the defendant acknowledges that was a correct summary of the law.

43 Had the issue as to the form of the Notice been vital (i.e. it being addressed to the predecessor landlord) I would have decided that applying the *Mannai* principles and following an earlier decision of Megarry V.C. in *Townsend Carriers Ltd v Pfizer Ltd* [1977] 33 P. & C.R. 361 that a reasonable recipient would not have been misled as to the intentions of the defendant to terminate the Lease because the Notice was addressed to the wrong person. On the construction of the Lease I do not accept that the form of the Notice requires it to be addressed to the Landlord as opposed to being sent to them. The Notice has to be given to them but it does not specify that the *contents* of the Notice require them to be referred to in it. There can be no question of the claimants being misled as to the intent by the service of the Notice.

44 It follows therefore that the only issue is whether or not Mr Ekanayake's email of August 17, 2009 on behalf of the Landlords dispensed with the requirement set out in the Lease for service in the manner therein stated. As set out above in *Mannai* I need to interpret the documentation objectively.

45 In so doing I conclude that the Landlords by the service of the original Notice and the sending of the same by email on August 17, 2009 knew full well the defendant intended to terminate the Lease. Further Mr Posel referred the documentation to Mr Ekanayake for him to act on it. He then sent an email acknowledging it. Not only did he appreciate that the defendant intended to terminate the Lease but he also on behalf of the claimants raised an issue as to the sub-tenants which would only be relevant if the Lease terminated.

46 Further effect must be given to the opening part of his sentence. "We accept the attached letter and can confirm we are happy for you to break the Lease ... ." Mr Holland ingeniously but in my view unsuccessfully sought to argue that the document was not an acceptance but merely an acknowledgment of receipt. That in my judgment does not give effect to the word "accept". Looked at objectively in my view Mr Ekanayake was accepting on behalf of the claimants that the documentation provided to them showed an intent on the part of the defendant to terminate the Lease and that they accepted that the documentation had the effect of terminating the Lease on March 1, 2010.

47 In sending the email in the form that he did in my view Mr Ekanayake represented that was the claimants' stance and accordingly they are estopped from subsequently challenging the validity of the Notice or alternatively they have waived the requirement for the Notice to be served in the way specified in the Lease. They could have withdrawn that concession at any time up until August 31, 2009. Withdrawing after that would be too late. The defendant has plainly in my view objectively acted on the basis that there was no issue but that it has served an effective Notice.

48 I do not see the further notice referred to in the email as affecting that. The defendant was entitled to conclude and did so conclude that the claimants accepted the earlier documents as being effective to terminate the Lease but required service of a further document for reasons for which were and are unexplained. Given the first sentence of Mr Ekanayake's email they cannot have formed the view that he was rejecting the earlier Notices and required further Notices to be served to

terminate the Lease. They therefore acted on Mr Ekanayake's email by failing to serve a Notice in accordance with the Lease. Alternatively Mr Ekanayake by unequivocally accepting the earlier Notices thereby waived any requirement for the defendant to serve a fresh Notice compliant with the Lease.

49 Of course as Mr Weekes acknowledged if the Landlords had simply acknowledged receipt of the Notice and said nothing more it would have been open to them to challenge the validity of the Notice. There is no duty in my view on a Landlord served with a document to inform the server that he believes that it has not been validly served. However a Landlord receiving such a Notice must not give any indication that the notice is accepted despite its defects. In the present case but for the acceptance set out in the first part of Mr Ekanayake's email the Landlords would subsequently be able in my view to challenge the validity of the Notice. However given his opening words it is in my view not open to them so to do for the reasons that I have said.

50 The requirement for service of a fresh document does not in my view mean that the Landlords were *requiring* re-service of that Notice in order for the Break Notice to be exercised. I do not know why they required it but I do not accept that it was as Mr Holland submits demonstrative of the fact that the Landlords were not accepting the earlier documentation. His argument requires me to find that contrary to the word "accept" the Landlords are "not accepting" the Notice and require a fresh one to be served. That seems to me to fly in the face of the clear word "accept". The defendant was therefore entitled to assume nothing more was required.

51 I therefore conclude that the defendant has successfully terminated the Lease and the claim for the declaratory relief fails.

Claim dismissed

PLEDREAM PROPERTIES LTD v 5 FELIX AVENUE LONDON LTD

HIGH COURT (CHANCERY DIVISION)

Lewison J.: October 14, 2010

[2010] EWHC 3048 (Ch); [2011] L. & T.R. 20

H1 *Leasehold—Collective enfranchisement—Terms of acquisition—Time limit for application for vesting order—Whether nominee purchaser's application made in time—When terms of acquisition "agreed" for the purposes of s.24 Leasehold Reform, Housing and Urban Development Act 1993—What constitutes an agreement.*

Summary of decision

H2 A positive rather than implicit agreement is necessary in order to conclude that terms of acquisition have been agreed for the purposes of s.24 of the Leasehold Reform, Housing and Urban Development Act 1993. The nominee purchaser's application for a vesting order had therefore been made within the required timescale.

Parties

H3

Appellant (respondent below):	Pledream Properties Ltd (P)
Respondent (applicant below):	5 Felix Avenue London Ltd (F)

Facts

H4 F was the nominee purchaser for 5 Felix Avenue, Haringey. An initial notice pursuant to s.13 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") was served on March 6, 2006 claiming the right to buy the freehold and proposing a purchase price. P, the reversioner, served a counter-notice pursuant to s.21 of the 1993 Act on April 27, 2006. It admitted the right to collective enfranchisement but put forward a counter-proposal as to the price. Following negotiations, the price was agreed on August 9, 2006 when F's solicitors sent Form ~~TR4~~ to P's solicitor. Box 10 of the Land Registry TR1 form contained spaces to show whether the transferor was to transfer with full title guarantee or limited title guarantee. The box for full title guarantee was marked as the relevant box. The draft transfer did not include a statement that it was executed for the purposes of Ch.1 of the 1993 Act (as is required by the Act).

H5 On August 11, 2006, P's solicitors wrote to F's solicitors asking for the transfer to be amended by showing that the sale was to be with limited title guarantee and

incorporating a declaration that the transfer was executed for the purpose of the 1993 Act. On September 1, 2006 F's solicitors sent a revised draft transfer that still contained a covenant for full title guarantee. On September 8, 2006, F's solicitors wrote to P's solicitors asking for confirmation that the transfer was approved. On September 11, 2006, P's solicitors wrote a letter asking for the draft to be amended to provide for the transfer with limited title guarantee. F's solicitors wrote to P's solicitors on October 24, 2006 stating that further to a telephone conversation, all terms of the acquisition were agreed as of September 11, 2006.

H6 No contract having been entered into, on January 10, 2007, F issued a claim for a vesting order. The issue at first instance was the date on which the terms of acquisition had been agreed between the parties for the purposes of s.24 of the 1993 Act, that being the date from which time would begin to run for the period within which an application for a vesting order could be made. If time had begun to run earlier than September 10, 2006, the claim was out of time.

H7 P submitted the terms were agreed on August 10 or August 11, 2006, when their solicitors asked for the draft transfer to be amended to include the limited title guarantee. F submitted that the terms were not agreed until September 11, 2006 at the earliest, when the transfer was in fact finally amended. At first instance, H.H. Judge Cryan found in F's favour. P appealed.

H8 **Held,** dismissing the appeal:

H9 (1) Whether a term has been agreed is a question of fact. The 1993 Act does not deem a term to have been agreed when in fact it has not. A dispute may arise exist even if the outcome of a dispute is a foregone conclusion and it would be a misuse of language to say that there was no dispute simply because the outcome was inevitable. This is consistent with the view of the ordinary meaning of the word "dispute", *Halkin Shipping Corporation v Soapex Oils Ltd* [1998] 2 All E.R. 23 applied.

H10 (2) Following the approach of the Court of Appeal in the appeal from *Gold Eagle Properties Ltd v Thornbury Court Ltd* [2008] 3 E.G.L.R. 69, positive agreement rather than implicit agreement is necessary to conclude that terms had been agreed. The test proposed in *City of Westminster v ~~CH (2006)~~ Ltd* [2009] UKUT 174 (LC) is a workable test: it must be clear that negotiations have been completed and final agreement has been reached either orally or in writing on a specific term or terms that is not in any way contingent on agreement or determination of some other term or terms.

H11 (3) Where it is open to the parties to agree a departure from the default provisions of Sch.7, there is no reason why the proponent of a change must take an initial refusal at face value and cannot make another attempt to secure agreement. It was plain on the facts of this case that F's solicitors persisted in their attempt to secure a full title guarantee by submitting a second version of the transfer containing that covenant on September 1, 2006 and moreover asking for it to be approved on September 8, 2006. They had not then given up hope of securing P's agreement to the full title guarantee. Further, until September 11, 2006, the only draft transfer actually in existence was that which contained the full title guarantee. There was an express acknowledgement by the nominee purchaser that the terms had been agreed in the letter of October 24, 2006. The terms of the acquisition had therefore not been agreed earlier than September 11, 2006. The application for a vesting order, therefore, had been made in time.

CH2006

No brackets or spaces

H12 **Legislation referred to:**
Leasehold Reform, Housing and Urban Development Act 1993 ss.13, 21, 24, 28, 29, 34, 38, Sch.7.

H13 **Cases referred to:**
Gold Eagle Properties Ltd v Thornbury Court Ltd [2008] EWCA Civ 864; [2008] 3 EGLR 69; [2009] L. & T.R. 1
Halkin Shipping Corp v Soapex Oils Ltd [1998] 1 W.L.R. 726; [1998] 2 All E.R. 23; [1998] 1 Lloyd's Rep. 465 CA (Civ Div)
Hayter v Nelson & Home Insurance Co [1990] 2 Lloyd's Rep. 265; 23 Con. L.R. 88 QBD (Comm)
City of Westminster v CH2006 Ltd [2009] UKUT 174 (LC)

H14 For further details of the law in this area see *Woodfall's Law of Landlord and Tenant*, Vol.4, para.29.094: "Vesting orders".

H15 *J. Swirsky* (instructed by Sheridan & Stretton) for the appellants.
J. Fieldsend (instructed by Comptons) for the respondents.

JUDGMENT

LEWISON J.:

1 When are terms of acquisition agreed for the purposes of s.24 Leasehold Reform, Housing and Urban Development Act 1993? The date of agreement is important because it starts the procedural clock ticking for the making of various applications. The freeholder says that if a term of the agreement is not positively in dispute or if the tenant has no prospect of resisting the freeholder's proposed term then it is agreed. The nominee purchaser says that in the absence of positive agreement there is no agreement. H.H. Judge Cryan agreed with the nominee purchaser. With the permission of Peter Smith J., the freeholder appeals.

2 The facts are all agreed. The leaseholder served an initial notice on March 6, 2006 claiming the right to buy the freehold of 5 Felix Avenue in Haringey and proposing a purchase price. The reversioner served a counter notice on April 27, 2006. It admitted the right to collective enfranchisement but put forward a counter proposal as to the price. At some point the claimant company was put forward as the nominee purchaser. Following negotiations, the price was agreed on August 9, 2006 when the nominee purchaser's solicitors sent a transfer in Form ~~TR1~~ to the reversioner's solicitor. Box 10 of the ~~TR1~~ contains spaces in which it can be shown whether the transferor is to transfer with full title guarantee or limited title guarantee. The box for full title guarantee was marked as the relevant box. In addition, the draft transfer did not include a statement that the conveyance was executed for the purposes of Ch.1 of the 1993 Act.

3 On August 11, 2006, the reversioner's solicitors wrote to the nominee purchaser's solicitors asking for the transfer to be amended by showing that the sale was to be with limited guarantee and incorporating a declaration that the transfer was executed for the purpose of Ch.1 Leasehold Reform, Housing and Urban Development Act 1993. The letter concluded: "This limited title guarantee and a declaration are the requirements of the 1993 Act." As Mr Swirsky, who appears for the appellant,

agrees, this was an overstatement of the legal position—at least as regards the limited title guarantee.

4 On September 1, 2006 the nominee purchaser's solicitors sent a revised draft transfer. The judge found that it contained the required statement but still contained a covenant for full title guarantee.

5 On September 8, 2006 the nominee purchaser's solicitors wrote to the reversioner's solicitors asking for confirmation that the transfer was approved. Approval was not in fact forthcoming. On September 11, the reversioner's solicitors said:

> "We have made one amendment to the transfer which is in item 10 to provide for the transfer with limited title guarantee. This is the requirement under the 1993 Act."

Thus until September 11, the only draft transfer in existence was one which contained the full title guarantee. Little more was heard about the terms of the transfer until the nominee purchaser's solicitor's letter of October 24, 2006 in which they said:

> "Further to our telephone conversation we agree that having to exchange contracts is probably not necessary as we have agreed all terms of the acquisition. For the avoidance of doubt, we believe the agreement was made on 11th September in your letter when the last of the terms of the transfer were settled. We note from our telephone conversation that you also agree that all matters between us have been agreed."

6 On January 10, 2007 the nominee purchaser issued a claim for an order commonly known as a vesting order. If time began to run earlier than September 10, 2006 the claim was out of time. Time begins to run when all the terms of the acquisition are agreed or determined by the Leasehold Valuation Tribunal (the LVT). The reversioner says that the terms were agreed on August 10 or 11, when their solicitors asked for the draft transfer to be amended to include the limited title guarantee. The nominee purchaser says that they were not agreed until September 11, at the earliest when the transfer was in fact finally amended.

7 The basic scheme of Ch.1 of the 1993 Act is as follows. Part 1 of Ch.1 gives certain tenants of flats the right to collective enfranchisement as regards the freehold of the premises in which their flats are situated. In addition to the right to acquire the freehold of the flats, qualifying tenants also have the right under the 1993 Act to acquire the freehold of certain appurtenant premises and in some circumstances certain intermediate leasehold interests. Tenants who take advantage of this right to collective enfranchisement act through a nominee purchaser, usually a company created specifically for this purpose. The enfranchisement process is begun by the tenants by the service of an initial notice pursuant to s.13. The initial notice must be served on behalf of not less than one-half of the qualifying tenants of any premises. These are known as the participating tenants. There is certain information which an initial notice must contain. This includes the proposed price to be paid for the freehold and any other property to be conveyed to the tenants, and details of the rights of the qualifying tenants to seek collective enfranchisement. It does not go into such details as what title guarantee is to be provided.

8 The next substantive step in the procedure is the service by the landlord of a counter notice under s.21. The counter notice must either admit or dispute the

participating tenants' right to collective enfranchisement; and if the right is admitted must contain details of any counter proposals which the landlord wishes to put forward.

9 The next part of Pt 1 deals with various applications that can be made either to the court or to the LVT. The relevant section for the purposes of this case is s.24. This concerns applications relating to the terms of acquisition and the making of a binding contract. Section 24(1) provides as follows:

> "Where the reversioner in respect of a specified premises has given the nominee purchaser (a) a counter notice under Section 21 complying with a requirement set out in subsection (2)(a) of that Section, or (b) a further counter notice required by or by virtue of Section 22(3) or Section 23(5) or (6) but any of the terms of acquisition remain in dispute at the end of the period of two months beginning with the date on which the counter notice or further counter notice was so given, a Leasehold Valuation Tribunal may on the application of either the nominee purchaser or the reversioner determine the matters in dispute.
>
> 2) Any application under subsection (1) must be made not later than the end of the period of six months beginning with the date on which the counter notice or further counter notice was given to the nominee purchaser.
>
> (3) Where (a) the reversioner has given the nominee purchaser such a counter notice or further counter notice as is mentioned in subsection (1)(a) or (b), and (b) all of the terms of acquisition have been either agreed between the parties or determined by a Leasehold Valuation Tribunal under subsection (1) but a binding contract incorporating those terms has not been entered into by the end of the appropriate period specified in subsection (6) the court may on the application of either the nominee purchaser or the reversioner make such order under subsection (4) as it thinks fit."

10 Section 24(4) sets out the orders that the court may make and these include what is commonly known as a vesting order. Section 24 continues:

> "(5) An application for an order under subsection (4) must be made not later than the end of the period of two months beginning immediately after the end of the appropriate period specified in subsection (6).
>
> 6) For the purposes of this Section, the appropriate period is (a) where all the terms of acquisition have been agreed between the parties the period of two months beginning with the date when those terms were finally so agreed, (b) where all or any of those terms have been determined by a Leasehold Valuation Tribunal under subsection (1) (i) the period of two months beginning with the date when the decision of the Tribunal under that subsection becomes final or (ii) such other period as may have been fixed by the Tribunal when making its determination."

11 I omit subsection (7). Section 24 continues:

> "(8) In this Chapter the terms of acquisition in relation to a claim made under this Chapter means the terms of the proposed acquisition by the

nominee purchaser whether relating to (a) the interests to be acquired, (b) the extent of the property to which those interests relate or the rights to be granted over any property, (c) the amounts payable as the purchase price for such interests, (d) the apportionment of conditions or other matters in connection with the severance of any reversionary interest, or (e) the provisions to be contained in any conveyance or otherwise and includes any such terms in respect of any interests to be acquired in pursuance of Section 1(4) or (21)(4)."

12 Section 38(4) of the Act says that:

"Any reference in this Chapter to agreement in relation to all or any of the terms of acquisition is a reference to agreement subject to contract."

13 Under s.28 the participating tenants may withdraw from the transaction at any time before a binding contract is entered into. They can withdraw even if the landlord makes an application to the court under s.24(3). This is done by withdrawing the initial notice. Inevitably there are costs consequences of such a withdrawal. In addition, once an initial notice has been withdrawn there is a moratorium before the tenants can serve another. This may have the effect of increasing the price that they would have to pay on any subsequent exercise of the right to collective enfranchisement either because the market has risen or because the unexpired terms of their leases are shorter, or both.

14 As well as an actual withdrawal of an initial notice, the Act prescribes circumstances in which an initial notice is deemed to be withdrawn. Thus if the terms of acquisition have been agreed and no binding contract entered into, but no application is made to the court for a vesting order within the period of two months after the end of the appropriate period, then there is a deemed withdrawal of the initial notice under s.20(2). There is also a deemed withdrawal under s.24(2) and s.29(2) if terms of acquisition remain in dispute and no application is made to the LVT within six months of the date of the counter notice. There are other circumstances as well but the details of these do not matter.

15 The contents of the conveyance are dealt with by s.34. The parts of that Section relevant to this appeal are as follows:

"(9) Except to the extent that any departure is agreed to by the nominee purchaser and person whose interest is to be conveyed, any conveyance executed for the purposes of this Chapter shall (a) as respects the conveyance of any freehold interest conform with the provisions of Schedule 7, and (b) as respects the conveyance of any leasehold interest conform with the provisions of para.2 of that Schedule ...

(10) Any such conveyance shall in addition contain a statement that it is a conveyance executed for the purposes of this Chapter and any such statement shall comply with such requirements as may be prescribed by land registration rules under the Land Registration Act 2002."

16 Schedule 7 contains the following. In para.2.2:

"The freeholder shall not be bound (a) to convey to the nominee purchaser any better title than that which he has or could be required to be vested in him or (b) to enter into any covenant for title beyond those implied under Part 1 Law of Property (Miscellaneous Provisions) Act 1994 in a case where a

disposition is expressed to be made with title guarantee, and in the absence of agreement to the contrary the freeholder shall be entitled to be indemnified by the nominee purchaser in respect of any costs incurred by him in complying with a covenant implied by virtue of Section 2(1)(b) of that Act (covenant for further assurance)."

17 Mr Swirsky says that the Act makes a binary distinction; either terms are agreed or they are in dispute. There is no halfway house. The mechanism for resolving disputes about the terms of a conveyance is to go to the LVT. If there is nothing for the LVT to decide there cannot by definition be a dispute. If there is no dispute then by default the terms must be agreed. In the present case, the first objection taken to the form of the draft transfer was that it did not contain the statement required by s.34(10). This is a mandatory requirement. There was quite simply nothing to argue about and therefore there was no dispute about that. So far as the second objection was concerned, the Act says that unless a departure from Sch.7 is agreed, the terms set out in Sch.7 must be included in the conveyance. Those terms include the limited title guarantee. Once the reversioner had said that it was not prepared to give a full title guarantee, that was the end of that. The LVT could not have compelled the reversioner to agree to depart from the default terms of Sch.7; the reversioner was in an impregnable position. So once again there was nothing to argue about. Since there was nothing to argue about, there was no dispute. Once again, if there was no dispute then the terms must have been agreed. Mr Swirsky recognises that the nominee purchaser may be unhappy that the reversioner refuses to give a full title guarantee but his remedy in that case is to withdraw from the transaction, as the Act entitles him to do.

18 The judge did not accept this argument and nor do I. First, whether a term has been agreed is, in my judgment, a question of fact. The Act does not deem a term to have been agreed when in fact it has not. Second, a dispute may arise in fact even if the outcome of a dispute is a foregone conclusion. We all have experience of litigants advancing hopeless cases with no prospects of success. It would be a misuse of language to say that there was no dispute simply because the outcome was inevitable. This is consistent with the view of the ordinary meaning of the word "dispute" addressed by Savile J. in *Hayter v Nelson* [1990] 2 Lloyd's Rep. 265 and confirmed by the Court of Appeal in *Halkin Shipping Corporation v Soapex Oils Ltd* [1998] 2 All E.R. 23.

19 Third, in a case such as the present, where it was open to the parties to agree a departure from the default provisions of Sch.7, I see no reason why the proponent of a change must take an initial refusal at face value and cannot make another attempt to secure agreement. It is plain on the facts of this case that the nominee purchaser's solicitors persisted in their attempt to secure a full title guarantee by submitting a second version of the transfer containing that covenant on September 1, and moreover asking for it to be approved on September 8. To put it at its lowest, they had not then given up hope of securing the reversioner's agreement to the full title guarantee. In addition, until September 11, the only draft transfer actually in existence was that which contained the full title guarantee.

20 Fourth, such indications as there are in case law suggest that what one is looking for is positive agreement rather than silence. In *Gold Eagle Properties Ltd v Thornbury Court Ltd* [2008] 3 E.G.L.R. 69 Judge Collins held that there was no agreement on the terms of a transfer until there had been an express indication that

the terms of a transfer had been agreed. His decision was upheld by the Court of Appeal. They rejected an argument that agreement on terms was implicit in the fixing of a price for the freehold. The lesson that Jacob L.J. drew from the case was, as he put it in [28]:

> "When a party makes a reference it should ensure that all points that are not agreed are put before the LVT for determination at the outset which would say what it was, but even seemingly minor matters, for example, the terms of the transfer in a case where these are likely to be routine have not been positively agreed, the LVT should be asked to determine them."

21 Thus it is clear in my judgment that the Court of Appeal took the view that positive agreement rather than implicit agreement was that which was necessary. This, as I see it, is the opposite approach to that which Mr Swirsky advocates. Assuming therefore that there is a stark dichotomy between terms that are agreed and terms that are in dispute, Jacob L.J. held in effect that terms which are not positively agreed are deemed to be in dispute or, to use the language of s.24(1), "remain in dispute." Likewise in *City of Westminster v ~~CH (2006)~~ Ltd* [2009] UKUT 174 (LC), H.H. Judge Robinson sitting in the Upper Tribunal said that so long as any of the terms of acquisition are not agreed those terms remain in dispute. The test which she proposed in [23] of her judgment, which I consider to be a workable test, was:

> "It must be clear that negotiations have been completed and final agreement has been reached either orally or in writing on a specific term or terms that is not in any way contingent on agreement or determination of some other term or terms."

22 In the present case, there was an express acknowledgement by the nominee purchaser that the terms had been agreed but that acknowledgement did not take place until the letter of October 24, 2006. For these reasons I consider the judge was right to hold that the terms of the acquisition had not been agreed earlier than September 11, 2006 with the consequence, as I understand it, that the application for a vesting order was made in time. Consequently, I dismiss the appeal.

Appeal dismissed

Scheme Ltd v West Bromwich Building Society

the airspace above. R submitted that the underlease included the airspace above the extension to Flat 15, with the effect that the second underlease could only take effect in reversion. RL and E submitted that the underlease demised the roof terrace above Flat 12 to R, together with the airspace above it up to the height of the roof of Flat 15 but no higher. Whilst R had acquired an additional foot or two in height by encroachment when the extension was built, the demise did not as a result of the encroachment include the flat roof above the extension. RL said it was therefore free to lease that roof to E, as it had, and the second underlease should take immediate effect.

H6 **Held:**

H7 (1) The vertical extent of the demise was a matter of construction of the underlease, governed by the ordinary principles of contractual interpretation. There is no presumption in any lease of, or including, the roof of a building or part of a building that it extends upwards to the full height of the airspace available to the lessor. The test is what a reasonable third party, equipped with the relevant background knowledge available to both parties, would conclude: *Investors Compensation* [1998] 1 W.L.R. 896 applied.

H8 (2) The underlease did not extend to the airspace above the roof. The natural meaning of the words "the terrace adjoining the premises", where nothing is said about height, is that the height is the same height of the adjoining flat: the airspace above that height does not "adjoin" the premises. The natural expectation when a sixth floor terrace is added by a supplemental underlease to the sixth floor flat is that it will occupy only the sixth floor. Other leases made for the building did expressly include the airspace: if there had been an intention to do so here, the parties would probably have said so expressly. The inclusion of airspace would have been of practical and commercial importance to both parties.

H9 (3) The court was entitled to consider evidence of subsequent conduct on the part of one of the original parties that was inconsistent with the construction being advanced by him or his successor in title in cases involving a conveyance, *Ali v Lane* [2007] 1 E.G.L.R. 71 applied. In this case, R's conduct was inconsistent with an intention that the airspace above the height of the flat was to be demised to it, or any belief that it had been agreed.

H10 (4) The natural inference to draw, where an extension is to be built by a lessee within the space demised to him, is that the whole of it is to be within the demise unless otherwise stated. The extension, including its roof but not any airspace above it, was demised to R by the underlease.

H11 **Cases referred to:**

Ali v Lane [2006] EWCA Civ 1532; [2007] 1 P. & C.R. 26; [2007] 1 E.G.L.R. 71

Bocardo SA v Star Energy UK Onshore Ltd [2010] UKSC 35; [2011] 1 A.C. 380; [2010] 3 W.L.R. 654

Davies v Yadegar (1990) 22 H.L.R. 232; [1990] 09 E.G. 67; [1990] 1 E.G.L.R. 71 CA (Civ Div)

Grigsby v Melville [1974] 1 W.L.R. 80; [1973] 3 All E.R. 455; (1973) 26 P. & C.R. 182 CA (Civ Div)

Investors Compensation [1998] 1 W.L.R. 896; [1998] 1 All E.R. 98; [1998] 1 B.C.L.C. 531 HL

Kelsen v Imperial Tobacco Co [1957] 2 Q.B. 334; [1957] 2 W.L.R. 1007; [1957] 2 All E.R. 343 QBD

Scheme Ltd v West Bromwich Building Society

ROSEBERY LTD v ROCKLEE LTD

HIGH COURT OF JUSTICE (CHANCERY DIVISION)

Mr N. Strauss QC: January 20, 2011

[2011] EWHC B1 (Ch); [2011] L. & T.R. 21

H1 *Leasehold—Airspace—Underlease granted for roof terrace of sixth floor flat—Lessor later purported to grant leaseholder of seventh floor flat an underlease of the roof and airspace above an extension built on sixth floor roof terrace—Whether the underlease of the roof terrace of the sixth floor flat included the airspace above the height of the sixth floor flat—Contractual interpretation.*

Summary of decision

H2 There is no presumption in any lease of or including the roof of a building or part of a building that it extends upwards to the full height of the airspace above. Applying the ordinary principles of contractual interpretation, an underlease demising a roof terrace also demised the airspace above the roof terrace, but only up to the height of the leased flat.

Parties

H3

Claimant:	Rosebery Ltd (R)
First defendant and Part 20 defendant:	Rocklee Ltd (RL)
Second defendant and Part 20 claimant:	Eaglestone Investments Corporation (E)

Facts

H4 R was the lessee of Flat 15 (on the sixth floor) of 45–47 Grosvenor Square, London. An underlease ("the underlease") was granted to R on November 13, 1984 of the empty roof space at the level of the sixth floor, above Flat 12 (which was underneath Flat 15, on the fifth floor) and outside Flat 15. Permission was subsequently given to build an extension on it and an extension was built. E was the lessee of Flats 16 and 17 (on the seventh floor). Part of Flat 17 was above Flat 15. RL was the lessor for Flats 15,16 and 17.

H5 The issue was whether the underlease included only the airspace up to height of Flat 15, or whether it also included the airspace above it, including the airspace above the roof of the extension to Flat 15, which adjoined Flat 17. The underlease demised the terrace without reference to airspace. The register of title described the property as the land showed edged in red and added "only the sixth floor roof terrace is included in the title". On January 25, 2008, RL purported to grant E an underlease ("the second underlease") of the roof of the extension to Flat 15 including

I should not need to have to correct Casenames like this !

STRAUDLEY

Straddley Investments v Barpress [1987] 1 E.G.L.R. 69; (1987) 282 E.G. 1124 CA (Civ Div)

H12 For further details of the law in this area see *Woodfall's Law of Landlord and Tenant*, Vol.1, para.11.007: "General approach to construction".

H13 *Charles Harpum* (instructed by Rochman Landau LLP) for the claimant.
Alan Tunkel (instructed by Blount Petre Kramert) for the first defendant and Part 20 defendant.
Anthony Radevsky (instructed by Wallace LLP) for the second defendant and Part 20 claimant.

NAME OF DEPUTY JUDGE HERE ?

JUDGMENT:

Introduction

1 This action relates to a large block of flats at Nos 45–7 Grosvenor Square, London. Most of the building consists of the ground floor plus seven upper floors in height but, in one area at least, it had only five upper floors in 1984.

2 The dispute is essentially between the claimant ("Rosebery"), which is the lessee of flat 15 on the sixth floor, and the second defendant ("Eaglestone"), which is the lessee of flats 16 and 17 on the seventh floor. The first defendant ("Rocklee") was the lessor in each case. Part of flat 17 is above flat 15. Flat 15 is above flat 12, which is on the fifth floor. The dispute arises from an underlease granted *to* Rosebery in 1984 of what had previously been an empty roof space at the level of the sixth floor, above flat 12 and outside flat 15, and from permission subsequently given to build an extension on it.

3 Put shortly, the principal contention of Mr Charles Harpum on behalf of Rosebery is that the underlease of the roof terrace demised not only (as is accepted) the airspace up to the height of flat 15, but also the airspace above it including that which adjoins flat 17. The effect of this would be that Rosebery would be entitled to use the roof of the extension at seventh floor level as a roof terrace or, subject to obtaining planning consent, and the consent of the new freeholders following enfranchisement, to build on it.

4 Mr Harpum's alternative contention is that, even if the demise was restricted vertically to the height of flat 15, Rosebery is still the lessee of the extension which it built, including its roof. The effect of this would be that nobody would be able to use the roof of the extension except for maintenance. Rosebery would not be able to use it, because it would have no rights over the airspace above it. Rocklee and its successors would have no right to use it because it belongs to Rosebery.

5 The event which triggered the dispute was the grant by Rocklee to Eaglestone in January 2008 of an underlease of the roof of the extension. Eaglestone's object in entering into the underlease was (I accept, despite one letter which suggests the contrary) to preserve its privacy at seventh floor level. It was not to make any use of the roof of the extension as a roof terrace. If either of Rosebery's arguments is correct, this underlease can only take effect in reversion, save insofar as it relates to a lobby which is unaffected by the dispute over the roof terrace.

6 Both defendants take issue with Rosebery's case. They contend: (a) that the underlease of flat 15 demised the roof terrace above flat 12 to Rosebery, together with the airspace above it up to the height of flat 15 but no higher; and (b) that,

whilst Rosebery has acquired an additional foot or two in height by encroachment when the extension was built, the demise did not, and does not as a result of the encroachment, include the flat roof above the extension. Therefore Rocklee was free to lease it to Eaglestone, as it did, and the lease takes immediate effect.

The parties

7 Rosebery is a Cayman Islands company owned by Mr Shlomo Moussaieff and his wife Alisa. They occupy flat 15. Mrs Alisa Moussaieff provided a witness statement and gave oral evidence, as did one of her daughters, Dorrit Moussaieff.

8 Eaglestone, the owner of flats 16 and 17, is a Liberian company owned by the Israni family, which occupies these flats. Mr Israni provided a witness statement and also gave oral evidence.

9 Rocklee was the lessor, and one of its directors, Mr Anthony Kemp, also provided a witness statement and gave oral evidence.

10 There was a short uncontroversial witness statement provided by Mr Peter Dan Neidle of Eaglestone's solicitors, Robert Brand & Co.

The detailed facts

11 At all relevant times, the freehold owner was Grosvenor (Mayfair) Estates, which is owned by the Duke of Westminster. On May 5, 1972, this and other buildings were leased to Grand Metropolitan Hotels by the head lease for a period of 140 years. At some time not later than 1979, the head lease was assigned to Sarounsa Limited ("Sarounsa"), then it was assigned to Ventgrant Limited ("Ventgrant") in 1985, and then to Rocklee in 1992. The head lease was surrendered on October 22, 2009 when enfranchisement took place. The freehold is now owned by the lessees through a company which has a 999 year lease. Rocklee has no further interest in the building, except for these proceedings.

12 It is convenient to start with the underlease of the flat at fifth floor level, flat 12 ("the flat 12 underlease"). The only provision to which I must draw attention is the parcels clause, which demises:

> "ALL THAT the Flat ... Numbered 12 ... on the Fifth Floor of the Building ... known as 47 Grosvenor Square ... (including one-half part in depth of the concrete beams between the ceilings of the flat and floors of the flat above it and the internal and external walls of the Flat 7 up to the same level)."

13 The greater part of the area of the flat lay immediately under flat 15 on the floor above, and it is clear that in this area the vertical extent of the demise was up to the mid-point of the concrete beams above the ceiling of flat 12.

14 However, part of flat 12 did not lie under any other flat, but just had a flat roof above it. Therefore the definition of the vertical extent, read literally, does not cover the vertical height of that area. It is however common ground that the vertical height of that area of flat 12 must have been the same. The parties cannot have intended the height to increase in this area so as to encompass the roof above the flat. The flat roof was part of the premises demised to the head lessor and there was no underlease in respect of it. The head lessor was therefore entitled to underlet it to Rosebery.

15 I do not have the exact dimensions of the roof terrace, but it seems from a photograph taken in about 1984 to have been about 8m by 5m. It was protected by

railings. On one side there was (and there still is) a part of the building, rising to the level of the roof terrace above the seventh floor, which contains a service staircase and the service lift. In it, overlooking one corner of the terrace, there was quite a large window. Adjacent to that was a part of the wall of flat 15 and, above it, part of flat 17. At the level of flat 17, there was (and is) a large barred window, which is the window of one of the bathrooms in that flat.

16 On August 15, 1975, Grand Metropolitan underleased flat 15 to Scitis Ltd ("the main flat 15 underlease") for 100 years and a quarter from December 25, 1969. Scitis assigned the benefit of this underlease to Rosebery on March 8, 1983. Title was registered on July 14, 1983. Mr and Mrs Moussariaff have occupied it ever since.

17 The parcels clause in the main flat 15 underlease is in the same terms as the corresponding clause in the flat 12 underlease (see [12] above). It defines the area and the height of the demise. At that time, there was a flat above what was then the whole area of flat 15. The parcels clause referred to a plan, which was the same plan as was referred to in the main underlease, and consisted of a cross-section of each floor, including the sixth floor. It can be seen from the plan that the area of the roof terrace is not built on, either at sixth or seventh floor level, whereas it is at all the lower levels.

18 There are, as one would expect, provisions governing contributions to the lessor's costs of maintaining (inter alia) the main structure of the building including the roofs and boundary walls and railings in accordance with the covenants in the head lease (cll.2(a) and 5(2) and Third Schedule §1), painting and maintenance of the inside of the flat and anything not within the landlord's obligations (cll.2(7) and (8)), prohibition against altering the construction, height, elevation or architectural appearance of the flat (cl.2(14)(a)), and a covenant by the landlord to permit peaceable enjoyment (cl.5(7)).

19 On August 2, 1982, Sarounsa underleased flats 16 and 17 on the seventh floor to Castleton Properties Ltd for a similar period. I have not been shown the plan which was attached to this lease. The underlease was assigned to Eaglestone in April 1985 and since then Mr Israni and his family have occupied the flats. This underlease was replaced in July 2007 by two separate underleases, one for each flat, but nothing turns on this.

20 On July 17, 1984, Sarounsa granted an underlease of the roof space over flats 16 and 17 to Alanine Inc., which is probably a Panamanian company. The parcels clause defined the demised property in the following terms:

> "ALL THAT the exterior of the roof situate immediately over the Seventh Floor of the building ... known as 45 and 47 Grosvenor Square ... as the said roof is shown edged red on the attached plan (hereinafter called "the Roof Space" which expression is deemed to include all premises and structures and any flat that may at any time hereafter be erected thereon or any part of parts thereof) including the surface materials and structure of the said roof *and airspace above the same* ...."(My emphasis)

Thus, in this underlease, the airspace above the roof was explicitly demised. However, there is no evidence to show that the existence of this underlease, or its terms, became known to Rosebery at the time of the supplemental flat 15 underlease a few months later, or that knowledge of it was available to Rosebery. This underlease was assigned to Eaglestone in 1991.

21 Next, there is the supplemental flat 15 underlease relating to the roof terrace above flat 12. This was completed in November 1984. I have been shown a few letters passing between Rosebery's solicitors and Mrs Moussaieff, and between Rosebery's solicitors and Sarounsa's solicitors, starting in December 1983. On the basis of those letters, I find, on the balance of probabilities, that it was known to Sarounsa that Rosebery intended, or at least was contemplating as a possibility, the erection of a conservatory on the roof terrace.

22 Mrs Moussaieff's evidence is that the intention was to build a swimming pool or a roof terrace on top of an extension. I do not accept her evidence on this point, which is inconsistent with the correspondence, and in any event there is no evidence that any such contemplated use, or any contemplated use at seventh floor level, was known to Sarounsa. Therefore the factual background which is relevant to the construction of the demise is that Sarounsa knew that Rosebery would or might not use the terrace just as a terrace, but the only specific project known to it was the erection or possible erection of a conservatory; however an extension was an obvious possibility.

23 The roof terrace was the subject of an underlease between Sarounsa and Rosebery dated November 13, 1984 ("the supplemental flat 15 underlease"). It is convenient to set out the relevant terms in full here:

> "WHEREAS
> (i) This Deed is supplemental to an Underlease (hereinafter called "the Underlease") dated 15th August 1975 and made between Grand Metropolitan Limited of the first part Mecca Limited of the second part of Scitis Limited of the third part whereby the premises known as Flat 15 47 Grosvenor Square London W1 (hereinafter called "the premises") were demised to the said Scitis Limited for a term of one hundred years and one quarter of another year (less 5 days) from 25th December 1969 subject to the payment of the yearly rent thereby reserved and the performance and observance of the covenants on the part
> (ii) The reversion immediately expectant on the term created by the Underlease is now vested in the Lessor;
> (iii) The Underlease is now vested in the Lessee for all the unexpired residue of the term of years thereby created subject to payment of the rent thereby reserved and to the Lessee's covenants and conditions therein contained;
> (iv) The Lessee has requested the Lessor (and the Lessor has agreed) to grant to the Lessee a further demise of the terrace adjoining the premises for the term hereinafter mentioned in consideration of a sum of SEVENTEEN THOUSAND FIVE HUNDRED POUNDS (£17,500) and subject to the stipulations and exceptions and reservations hereinafter mentioned;
> NOW THIS DEED WITNESSETH as follows:
> 1. IN consideration of the sum of SEVENTEEN THOUSAND FIVE HUNDRED POUNDS (£17,500) now paid by the Lessee to the Lessor (the receipt whereof is hereby acknowledged) the Lessor hereby demises to the Lessee the terrace adjoining the premises as the same is more particularly delineated on the plan annexed hereto and thereon edged red (hereinafter called "the additional premises") SUBJECT TO the stipulations and exceptions and reservations hereinafter mentioned TO HOLD the same unto the Lessee

for a term of one hundred years and one quarter of another year (less 5 days) computed from 25th December 1969 YIELDING AND PAYING therefor an annual rent of a peppercorn;

2. IT IS HEREBY AGREED AND DECLARED that there shall be deemed to be included in the Underlease a covenant by the Lessee to well and substantially repair cleanse maintain paint and decorate the additional premises at all times during the term created hereby in accordance with clauses 2(7) and 2(8) of the Underlease;

3. THERE are excepted and reserved from this demise the following rights:

(i) The right for the Lessor and its respective agents and workmen at reasonable hours in the daytime but only after due written notice (except in case of emergency) to enter upon the additional premises to execute repairs or alterations to or upon the additional premises or upon adjoining or adjacent premises such persons as aforesaid making good damage thereby done to the additional premises;

(ii) The right in particular for the Lessor and its respective agents and workmen at reasonable hours in the daytime to gain access to adjoining or adjacent premises through a door at the top of the service staircase which is situate in the additional premises such persons as aforesaid making good all damage thereby done to the additional premises;

4. IT IS HEREBY DECLARED that in all other respects the Underlease shall remain in full force and effect and the obligations therein contained shall continue and be binding upon the parties hereto henceforth during the residue of the terms of years granted and the parties hereto will respectively perform and observe the several covenants and conditions contained in the Underlease as if the same were repeated in full herein; ..."

24 The plan which is annexed to the supplemental flat 15 underlease is the same plan, dated February 1975, which was annexed to the main flat 15 underlease: see [17] above.

25 The Register of Title describes the property as "the Leasehold Land shown edged in red on the plan of the above Title filed at the Registry and being part of 47 Grosvenor Square" and adds "NOTE: Only the sixth floor roof terrace is included in the Title". It was suggested on behalf of the defendants that significance was to be attached to the fact that there is no reference to the air space above the roof terrace, but this does not seem to be right. Exactly the same wording is used in relation to a later underlease to Eaglestone dated July 27, 1992 of the roof space above seventh floor level, where the air space was expressly demised.

26 On October 29, 1986, the City of Westminster gave planning permission for a proposal described as "Mansard extension to existing roof terrace to provide residential accommodation" in accordance with plans numbered 65/06, 07, 08 and photographs. One of the photographs has been described at [15] above.

27 Plan 65-08 was an axonometric plan showing the proposed residential accommodation of covering the area of the roof terrace, with three skylights in it.

28 Plan 65/07 shows the roof level of the extension as being slightly lower than the top of the window of Flat 15. It therefore falls within what, on either view, is within the vertical extent of what is demised by the supplemental flat 15 underlease. The plan shows with two sky lights extending above the roof level, at approximately

the height of Flat 15. The plan shows no safety measures for the skylights, and no railings at second floor level.

29 Plan 65/06 is a plan which shows the existing flat 15 and a profile of the new extension. It also has a more detailed plan of the extension, showing a layout which was subsequently altered. The plan is dated July 28, 1986, but it bears a notation dated July 6, 1989, signed by the managing director of Grosvenor (Mayfair) Estate, confirming that he has no objection in principle to it. There are notes on it relating to the means of entrance and exit. They show that the entrance to the extension is by direct access from the existing flat 15. There is then a door which leads to a lobby in the part of the building housing the service staircase and lift, which is referred to as "alternative means of escape from extension to Common Parts by way of ex. Door D2." The notes then continue "means of escape of the Apartment above (i.e. flat 17) will be by way of new doorway onto the flat roof of the new extension (above D2) D3". This plan shows only one skylight.

30 On December 17, 1986, Grosvenor (Mayfair) Estate wrote to the managing agents acting for the head lessor (now Ventgrant), referring to the application and plans submitted for "... the proposed additional sixth floor part mansarded storey to rear addition, to provide additional accommodation for the existing self-contained Flat 15, for continuation of private residential user". The Grosvenor Estate confirmed that there was no objection in principle subject to a number of conditions, including completion of the work within six months, the submission and approval of copies of a more detailed floor plan, together with the proposed design of external railings. The letter ended as follows:

> "This approval is granted on the strict understanding that the door opening D2 on the approved drawing is used only for fire escape purposes, and to no separate sub-letting of this extension, as it must form part of Flat 15."

31 Although the times for commencement and completion of the work were extended to the end of 1988, it was not done by then, but there was a further application which resulted in permission being given to Ventgrant on July 6, 1989. This was in very similar terms to the previous permission, and referred to plan 65/06B (which is not before the court). The conditions imposed included provision for a more detailed plan of the proposed layout of the extension showing the proposed design of the external railings which were to be provided. The concluding passage in the previous consent was repeated in substantially the same terms as condition 7.

32 On October 16, 1989, the Grosvenor Estate acknowledged receipt of additional drawings and documents necessary to satisfy the outstanding approval conditions, and confirm that the work would proceed. By way of formal approval it enclosed an endorsed copy of plan 65/01D. This plan is not in the documents before the court, and nor are the plans relating to changes to the layout referred to in a letter from Rosebery's architects to Mrs Moussaieff dated December 20, 1989.

33 As built, the extension differs from the plans approved in July 1989, in that there is a large bedroom instead of a smaller room and a kitchen. I accept Mrs Moussaieff's evidence that this was because the extension was originally planned for her mother to live in, and possibly to accommodate a residential nurse, but her mother then died. Mrs Moussaieff said that there were many amendments to the plans, and that not all of them were before the court. Other features of the extension as built are that the skylights do not appear to be in the originally planned positions,

40 However, in *Straddley Investments Ltd v Barpress Ltd* [1987] 1 E.G.L.R. 69, the Court of Appeal held that a long lease of a terrace of eight houses included the roof and exterior walls. This was because it plainly could not have been intended that the lessor's repairing covenants did not cover them. Nicholls L.J. added at 704:

> "... this lease, being a long lease of a whole building or whole buildings, is quite different from a lease or tenancy of a top-floor flat of a building which has been divided horizontally into flats ... ."

41 In *Davies v Yadegar* [1990] 1 E.G.L.R. 71; (1990) 22 H.L.R. 232, however, the Court of Appeal held that where a house had been divided horizontally into two, and the demise of the upper part included the roof space and the roof, it also included the this space above it. Woolf L.J., who gave the leading judgment, said:

> "On a demise of this sort of premises and the roof, the demise includes the airspace above the roof and, accordingly, there is no trespass involved in carrying out an alteration which alters the profile of the roof so as to protrude further into the airspace above the existing roof. Mr Bickford-Smith submits to the contrary that the airspace above the roof is not included in the demise and he does so because he submits a different principle applies where one is dealing with a property which is divided into flats. He submits that, in a case where a property is so divided, all that is in fact included in the demise is the actual area occupied by the flat. The demise is restricted laterally by the extent of the flat. He accepts, and clearly rightly accepts, that, if this were not a demise of a flat but a demise of the whole building, it would have included the air space above the roof, but he submits a different situation exists because this was merely a demise of a flat. *I can well see that, in a different situation where one is considering a block of flats containing a number of different premises occupied by different tenants where no tenant has included in his demise the roof*, a position different from that which I have indicated could exist. However, in the situation that we are dealing with hereof what was once a single residential unit which has been divided into two flats, Mr Bickford-Smith's submission, in my view, has no application. The roof space and the roof were included in the demise and the logical intent would be that the airspace above should be included in that demise. Were the position otherwise, one can easily see that all sorts of absurd results would follow: if the tenant of the upper flat wished to alter his chimney he would not be in a position to do so: if he wished to erect an aerial on the roof he would not be in a position to do so; if he wished to change the flue on the roof because of changes in building practices he would not be in a position to do so without the consent of the lessor, and the lessor would have completely unfettered discretion to refuse the consent." (My emphasis)

42 Sir Roger Ormrod agreed:

> "The appellant's case in this case depends wholly and entirely on establishing that any alteration to the roof or in raising its height or altering its profile would amount to a trespass, that is to say an interference with the airspace which it is presumed for the purpose of this argument is retained by the landlord. But I think that that is a fallacy, because it is, to my mind, quite

and that there is folding ladder inside the extension which leads to the largest of them. As built, all the skylights could be opened, as indicated by plan 65/07.

34 Mrs Moussaieff and her daughter gave evidence as to the regular use of the roof of the extension, or sunbathing, picnics etc., from the time it was completed in about 1990 onwards. Mr Harpum indicated that he placed no reliance on this evidence in support of either of the arguments he advanced, and it is therefore unnecessary for me to deal with it in detail. I should record however that I did not believe the evidence about these matters.

35 The evidence shows that the height of the extension is greater than the height of the remainder of flat 15, by between one and two feet. There is no evidence that this was permitted, but no objection was made to it at the time. In a letter dated January 15, 2007, well over 12 years after the extension had been built, Rocklee complained of two allegedly unauthorised skylights, but that is all. Therefore the demise now includes the additional height, and the right to open the skylights as presently positioned. On top of the extension, Rosebery installed the railings required by the Grosvenor Estate. In part, they are placed on a low parapet wall also built by Rosebery. There is no evidence as to whether this too was required by the Grosvenor Estate, but it is quite likely, and in any event they must have inspected and approved it.

36 Finally, on January 25, 2008, Rocklee granted an underlease to Eaglestone of the roof terrace adjacent to flat 17 including the air space above ("the flat 17 supplemental underlease"). As noted earlier, Mr Israni's evidence is that he bought this underlease in order to maintain the privacy of his existing flats, not to use it as a roof terrace. But a subsequent owner would, of course, be able to use it as a roof terrace, and possibly to build an extension on it, if it takes effect in possession. It was this lease, of the roof of the extension built by Rosebery, that led to the present proceedings.

The effect of the supplemental flat 15 underlease

37 It is common ground between the parties that the vertical extent of the demise is a matter of construction of the supplemental flat 15 underlease, governed by the ordinary principles of contractual interpretation.

38 However, Mr Harpum submits that the starting point is a presumption that the demise of the roof terrace included the column of air above it, up to such height as was necessary for the ordinary use of it, and of any structures built on it. He relied on *Kelsen v Imperial Tobacco Co* [1957] 2 Q.B. 334 at 488 and *Bocardo S.A. v Star Energy UK Onshore Ltd* [2010] 3 W.L.R. 654 at [20] per Lord Hope, for the proposition that this defined the vertical extent of a freehold owner's interest. This is not controversial.

39 He also relied on the decision of the Court of Appeal in *Grigsby v Melville* [1974] 1 W.L.R. 80 in which it was held that a conveyance of land unless otherwise stated includes everything beneath the surface including a cellar. This was said by Stamp L.J. at [85]G to be "axiomatic" and at [88]A-B James L.J. described it as "a fundamental proposition" that:

> "... a conveyance of land includes, unless the conveyance is to be construed to the contrary, everything beneath the surface of the land conveyed *and the space directly above* ... ."(My emphasis)

plain from the terms of the lease that there were demised to the respondent to this appeal, the tenant, the first-floor flat at 13 Beechcroft Avenue and the roof and roof space thereover; and that, it seems to me, clearly distinguishes this case from any authority that has been cited to us, in particular *Cockburn v Smith* [1942] 2 KB 119, because there is all the difference in the world between demising horizontal flats and retaining the roof and roof space, and demising a flat together with the roof and roof space. In the first case the landlord retains the roof and roof space and so there is no possibility of the tenant's relying upon a column of airspace above his flat, and that is enough to provide the answer to this case."

43 In my opinion, the authorities do not support the proposition advanced by Mr Harpum that there is a presumption in any lease of, or including, a roof that it extends upwards to the full height of the airspace available to the lessor. *Davies v Yadegar* was a case in which the demise included the whole of the top floor and the whole of the roof. The passage emphasised in the judgment of Woolf L.J. above suggests that, where the demise is of the roof of a small part of the building, in circumstances in which its use could affect tenants on other floors, no such presumption applies. I agree with Lewison on *Interpretation of Contacts*, 4th edn. at §11–12 that there are no clear presumptions relating to divisions of individual parts of a building.

44 I therefore approach this issue unhampered by any presumption. I must consider what a reasonable third party, equipped with the relevant background knowledge available to both parties, would conclude: see the *Investors Compensation* case [1998] 1 W.L.R. 896 at 912–3. On that basis, my clear view is that the supplemental flat 15 underlease did not extend to the air space above the roof, for the following reasons:

(a) It is common ground that the flat 12 underlease did not include the roof or the air space above it. Otherwise the flat 15 underlease to Rosebery could not have taken effect. The flat 15 underlease is identical in its terms. This strongly suggests that the air space is not included in the flat 15 underlease either. Whether the roof is included is a separate question, considered at [48]–[50] below.

(b) The natural expectation, where a sixth floor terrace is added by a supplemental underlease to a sixth floor flat is that it will occupy only the sixth floor, and not (unless otherwise specified) upper floors.

(c) That this is so is supported by the fact that the leases referred to at [20] and [25] above do expressly include the air space. These are not part of the factual matrix, in the sense that their terms were known to both parties at the time of the flat 15 underlease, but they do reinforce the view that, where this is the intention, the parties to the lease would probably say so expressly. That is because the inclusion of the air space would have been of great practical and commercial importance to both parties and, in a building of this kind, unusual especially if it would affect other occupiers. Therefore, if this had been the intention, one would have expected to see it spelt out in the terms.

(d) Both the preamble at (iii) and cl.1 refer to the demise as being of "the terrace adjoining the premises as the same is more particularly delineated on the plan". Mr Harpum submits that, taken in conjunction with the plan, this

refers only to the horizontal plain, and has no bearing on the vertical extent of the demise. I do not agree. I think that the natural meaning of "the terrace *adjoining* the premises", where nothing is said about height, is that the height is the same as the height of the flat; the air space above that height does not "adjoin" the premises.

(e) I also think that Mr Radevsky is right to submit that the plan supports this conclusion. It shows a thick red outline round the demised roof space at sixth floor level, but not at seventh floor level. Had it been intended that the demise should include the air space at seventh floor level and above, the outline would, logically, have been shown at both levels.

(f) Rosebery's construction is an unlikely one. To permit one tenant of a block of flats the use of space outside the bathroom window of the tenant of an upper floor would be likely to lead to trouble, and is unlikely to have been intended by a responsible landlord. Although there is no evidence that an extension had been discussed with Sarounsa at the time of the flat 15 supplemental underlease, this was an obvious possibility; a landlord contemplating it would have appreciated that the tenant of flat 17 might well object to a roof terrace over the extension, with a direct view into his bathroom.

45 I have been referred to the decision of the Court of Appeal in *Ali v Lane* [2007] 1 E.G.L.R. 71, from which it is clear that, as an exception to the usual rules governing the construction of contracts, in cases involving a conveyance, evidence of subsequent conduct on the part of one of the original parties to it which is inconsistent with the construction which is being advanced by him or by a successor in title is admissible. Further, it seems from the facts of the case that the conduct may be the conduct of one party only. It does not have to be conduct which is common to both parties.

46 In the present case, there is in my view conduct on the part of Rosebery which is inconsistent with an intention on its part that the air space above the height of the flat was to be demised to it, or any belief that this had been agreed. The main points are as follows:

(a) The plans for the extension were for additional residential accommodation, and made no reference to any proposed use of the roof.

(b) The plans for the extension did not provide for any safety railings either round the roof, or round the skylights, such as would have been needed if it had been intended to use it as a terrace.

(c) Doors d2 and d3 on the plans were referred to as means of escape only, not, as would have been natural if the intention had been to use the roof as a terrace, as a means of access to it.

(d) The extension had an internal ladder giving access to the main skylight. If it had been intended to use the roof as a terrace, Rosebery would have sought and obtained a right of way through to d2 and/or d3 and up by the service staircase. I did not find Mrs Moussaieff's evidence that she did not want such access because of dustbins near that staircase convincing. Access via the staircase would have been far more convenient.

(e) Rosebery did not answer complaints about unauthorised use of d3, and the installation of a satellite dish, but desisted from the conduct complained of.

47 Rosebery's alternative case was developed during the course of the hearing. It is, I think, to be decided by reference to the same principles of contractual construction. The facts set out at [26]–[31] above amount to an agreement between Rosebery, Sarounsa/Ventgrant and the Grosvenor Estate, whereby the extension which Rosebery wanted to build would be permitted. The roof which would be part of the extension would obviously become part of the freehold, and therefore part of what the Grosvenor Estate leased to Sarounsa/Ventgrant. The question is whether, on the proper construction of the agreement, the roof was also to be part of what was leased by the supplemental flat 15 underlease to Rosebery.

48 The defendants submitted:

(a) that since (i) the demise of flat 12 did not include the roof (see [14] above) and (ii) the parcels clause in the flat 15 underlease was in exactly the same terms, the flat 15 underlease did not include the roof either;
(b) that Sarounsa/Ventgrant (and now Rocklee) was obliged to maintain the roof, and that this supported the argument that the roof was to belong to the lessor; and
(c) that Rosebery had also built railings and a balustrade at the request of the Grosvenor Estate, which did not belong to it.

49 On behalf of Rosebery, Mr Harpum submitted:

(a) that the ownership of the roof depended on the particular circumstances relevant to it;
(b) that, since it was part of what Rosebery was to build, if the parties had intended it to be excluded from the demise they would have said so;
(c) that there was no true comparison with flat 12 since:

(i) the roof of flat 12 was part of the original structure of the block of flats when it was built, whereas this roof was part of the extension built by Rosebery;
(ii) even on the assumption (which in considering this issue is to be made) that his main argument was wrong, the roof was to be built within the vertical extent of what the supplemental flat 15 underlease demised to Rosebery (see [28] above); and
(iii) the intention as regards the ownership of the roof cannot have been changed by the encroachment, which took it outside the vertical extent of the demise, and Sarounsa/Ventgrant/Rocklee's failure to object to it;

(d) that the repairing obligations were a factor but not conclusive; and
(e) that the ownership of the balustrade and the railings was a separate question; the railings at least (and possibly the balustrade on which part of them was placed) had been requested by the Grosvenor Estate.

50 Mr Harpum also relied on the skylights as demonstrating an intention that the roof was to be included in the demise. They clearly precluded the building of an extension at seventh floor level. If it had been intended that the roof should be available as a terrace at that level, one would have expected to see some protection around the skylights in the plans, to ensure safety and privacy, especially as they opened.

51 In my view, Mr Harpum is right on this issue. The natural inference to draw, where an extension is to be built by a lessee within the space demised to him, is that the whole of it is to be within the demise unless otherwise stated. For that reason, the position differs from flat 12, where the roof was not part of what was demised. I do not think that the fact that the roof was built higher than it should have been alters this, and the points made about the skylights are persuasive. The other matters relied on by the defendants are not sufficient to compel a different conclusion.

Conclusion

52 For the reasons set out above, I hold that the extension, including its roof but not any airspace above it, was demised to Rosebery by the supplemental flat 15 underlease.

53 I hope that it is possible for the defendants to reach agreement on the consequences of this in the Pt 20 proceedings. If not, I will hear further argument on this. If the parties are able to agree on the terms of the order, there is no need for anyone to attend the handing down of the judgment. I am very grateful to all counsel for their very helpful and cogent submissions.

Judgment for the claimants