Comments by Peter Williams 17 May 2014

There is a third judge - see Page 198

CRAFTRULE LTD v 41–60 ALBERT PALACE MANSIONS (FREEHOLD) LTD

COURT OF APPEAL (CIVIL DIVISION)

Smith and Black L.JJ.: February 24, 2011

[2011] EWCA Civ 185; [2011] L. & T.R. 13

H1 *Leasehold property—Collective enfranchisement—Notice by qualifying tenants—Requirement that premises must consist of a self-contained building or part of a building—Whether building or part of building still qualifies if it can be further sub-divided—Statutory construction—Leasehold Reform, Housing and Urban Development Act 1993, s.3.*

Summary of decision

H2 On the ordinary natural meaning of the words, the expression "self-contained part of a building" in s.3 of the Leasehold Reform, Housing and Urban Development Act 1993 includes a self-contained part of a building ~~which~~ that is itself capable of being divided into smaller self-contained parts of a building. There is no justification for putting a gloss on the clear statutory words so as to require that a self-contained part must be the smallest possible self-contained part.

Parties

H3

Appellant (defendant below):	Craftrule Limited (C).
Respondent (claimant below):	41–60 Albert Palace Mansions (Freehold) Ltd (A).

Facts

H4 A was a limited company set up as the nominee purchaser to acquire the freehold of 41–60 Albert Palace Mansions ("the premises") pursuant to the enfranchisement provisions of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"). C owned the freehold reversionary interest in the premises. Section 13(1) of the 1993 Act provides that a claim for collective enfranchisement is made by the giving of notice of the claim by a group of long lease-holding tenants holding not fewer than half of the flats within the premises ("the initial notice"). Such a notice was served in March 2008, specifying that the premises consisted of 20 flats (numbers 41–60).

H5 Section 3 of the 1993 Act requires the premises stated in the notice to be a self-contained building or part of a building. Section 3(2) defines a building as a self-contained building if it is structurally detached; part of a building is self-contained if (among other things) it constitutes a vertical division of the building

and the structure of the building would mean that that part could be redeveloped independently of the remainder of the building. It was common ground between the parties that flats 41–60 satisfied most of the requirements of s.3 but one matter remained in dispute.

H6 The premises were part of a terraced building comprising 160 flats. The building consisted of eight "handed pairs". Each "pair" comprised 20 flats, arranged on five floors. The premises were one such pair. Each half of the pair (41–50 and 51–60) had a separate entrance leading to separate common parts and staircases. It was agreed by the parties that each half of the pair (41–50 and 51–60) would independently satisfy all the requirements of s.3. Seven of the participating tenants lived in the half comprising flats 51–60 ~~half~~ and three lived in the half comprising flats 41–50.

H7 C submitted that flats 41–60 were not "a vertical division of the building", but two vertical divisions, due to the layout of the pairs. It argued that the right to enfranchisement attaches only to the smallest possible self-contained part of a building: as each half of the pair was a self-contained part of a building, each half had to be the subject of a separate claim. Proceedings were commenced by A seeking a declaration pursuant to s.25 of the 1993 Act that the notice served was valid and it was entitled to acquire the freehold on the terms proposed. At first instance, the claim succeeded. C's appeal to the High Court was dismissed. C appealed to the Court of Appeal.

H8 **Held:**

H9 (1) Sections 4(3A) and 13(8), (9) and (10) of the 1993 Act taken together are conclusive of the true construction of the expression "self-contained part of a building" within s.3(1) of the 1993 Act. There is no justification for putting a gloss on the clear statutory words so as to require that a self-contained part of a building must be the smallest possible self-contained part. On the ordinary natural meaning of the words, the expression "self-contained part of a building" in s.3 of the 1993 Act includes a self-contained part of a building that is itself capable of being divided into smaller self-contained parts of a building.

H10 (2) The phrase "self-contained part of a building" is neither ambiguous nor obscure. The court was therefore not entitled to have regard to the speech of Lord Strathclyde during a debate in Committee in the House of Lords on March 9, 1993, as Hansard should only be used as an aid to construction if the legislation is either ambiguous or obscure or leads to an absurdity: *Pepper v Hart* [1993] A.C. 593. It is clear that Parliament thought that there were real advantages to tenants if they were able to enfranchise and that those advantages should not be lost merely because there were some unwilling tenants.

H11 **Legislation referred to:**

Leasehold Reform, Housing and Urban Development Act 1993 ss.1, 3, 4, 4(3A), 13, 21

Commonhold and Leasehold Reform Act 2002

Landlord and Tenant Act 1987

H12 **Cases referred to:**

Attorney General v Lamplough (1877-78) L.R. 3 Ex. D. 214 CA

Denetower Ltd v Toop [1991] 1 W.L.R. 945; [1991] 3 All E.R. 661; (1991) 23 H.L.R. 362 CA (Civ Div)

Holding and Management (Solitaire) Ltd, Re [2008] L. & T.R. 16; [2008] 1 E.G.L.R. 107; [2008] 2 E.G. 152 Lands Tr
Kay Green v Twinsectra Ltd (No.1) [1996] 1 W.L.R. 1587; [1996] 4 All E.R. 546; (1997) 29 H.L.R. 327 CA (Civ Div)
Long Acre Securities Ltd v Karet [2004] EWHC 442 (Ch); [2005] Ch. 61; [2004] L. & T.R. 30
Majorstake Ltd v Curtis [2008] UKHL 10; [2008] 1 A.C. 787; [2008] L. & T.R. 17
Oakwood Court (Holland Park) Ltd v Daejan Properties Ltd [2007] 1 E.G.L.R. 121 CC (Central London)
Pepper v Hart [1993] A.C. 593; [1992] 3 W.L.R. 1032; [1993] 1 All E.R. 42 HL

H13 For further details of the law in this area see *Woodfall's Law of Landlord and Tenant* Vol.4, para.29.009: "Premises to which Chapter 1 applies".

H14 *Kenneth Munro* (instructed by Olswang LLP) for the appellant.
Philip Rainey QC (instructed by Butcher Burns) for the respondent.

JUDGMENT

SMITH L.J.:

Introduction

1 This is an appeal from the order of Henderson J. made on May 27, 2010 dismissing the appeal of Craftrule Ltd against the order of H.H. Judge Madge sitting in the Central London County Court. It is therefore a second appeal. It raises a point of statutory construction as to the meaning of the words "a self-contained part of a building" in ss.3 and 4 of the Leasehold Reform, Housing and Urban Development Act 1993 (the 1993 Act). Rimer L.J. gave permission to appeal as he considered that the issue raised an important point of principle which this court ought to consider.

2 The appellant, Craftrule Ltd, is the owner of the freehold reversionary interest in the premises known as 41–60 Albert Palace Mansions, Lurline Gardens, London, SW11 4DQ (the property). The respondent is a limited company set up for the purpose of purchasing the freehold of the property pursuant to the enfranchisement provisions within the 1993 Act. It is controlled by the leasehold tenants of the flats comprising the property and is their nominee purchaser for the purpose of their claim for enfranchisement.

3 Part 1 Ch.1 of the 1993 Act provides for the collective enfranchisement of flats by qualifying tenants. For the purposes of this appeal, the essentials are that, pursuant to s.13 of the Act, a group of long lease-holding tenants holding not less than half the flats within the premises concerned may serve a notice on the landlord seeking to acquire the freehold. The premises concerned must be a self-contained building or part of a building, as defined in s.3 of the Act. Section 3 is headed "Premises to which this Chapter applies" and provides:

> "(1) Subject to s.4, this Chapter applies to any premises if:
> (a) they consist of a self-contained building or part of a building ...
> (b) they contain two or more flats held by qualifying tenants; and

(c) the total number of flats held by such tenants is not less than two thirds of the total number of flats contained in the premises.

(2) For the purposes of this section a building is a self- contained building if it is structurally detached, and a part of a building is a self-contained part of a building if:

(a) it constitutes a vertical division of the building and the structure of the building is such that that part could be redeveloped independently of the remainder of the building; and

(b) the relevant services provided for occupiers of that part either:

(i) are provided independently of the relevant services provided for occupiers of the remainder of the building, or

(ii) could be so provided without involving the carrying out of any works likely to result in a significant interruption in the provision of any such services for occupiers of the remainder of the building."

4 Section 4 of the Act provides for certain exclusions from the right to enfranchisement but it is common ground that none of them applies in the present case.

5 The property forms part of a terraced building comprising 160 flats, built in the late 19th or early 20th century. The building consists of eight "handed pairs". Each "pair" comprises 20 flats, arranged on five floors. The property comprises one such pair consisting of 20 flats, numbers 41–60, situated roughly in the middle of the terrace. Each half of the pair has a separate entrance leading to separate common parts and staircases. There is a dividing wall between each half (and the adjacent parts of the building) which is vertically continuous from the footings to roof level. Each half has its own drainage system, mains water riser, electricity supply and entry phone. Telephone and cable TV services are provided to individual flats although the cables are bundled together. There are no other communal services. Each half of the pair could be redeveloped independently of the other half of the pair and/or of the rest of the building. All the flats in the property save for numbers 41 and 50 are demised under long residential leases for a term of more than 21 years. The service charge provisions in the leases are defined by reference to the whole property (flats 41–60).

6 Save in one respect, it is not disputed that the whole property (flats 41–60) satisfies all the requirements of s.3 as set out above. The only issue which the appellant raises is that the property is not "a vertical division of the building". It contends that it is two vertical divisions of the building. However, it is agreed that each half of the pair (41–50 and 51–60) would independently satisfy all the requirements of s.3. I interpose to say that, in my view, the expression "vertical division" is rather odd. A division is a line of no thickness. It seems to me that what s.3(2)(a) means is that the premises must be a vertical slice of the building.

7 Section 13(1) of the 1993 Act provides that a claim for enfranchisement is to be made by the giving of a notice to the landlord. By s.13(2) the notice must be given by the qualifying tenants (viz tenants with long leases) of not less than half of the total number of flats within the relevant premises. In March 2008, a group of ten long leasehold tenants (the participating tenants) gave notice pursuant to s.13 claiming the right to acquire the freehold reversionary interest in the whole property (flats 41–60). Seven of "the participating tenants" lived in the 51–60 half and only

three lived in the 41–50 half. The landlord failed to issue a counter-notice as it could have done pursuant to s.21 of the 1993 Act. The result was that, unless the notice were to be declared invalid, "the participating tenants", through their nominee purchaser, would be entitled to purchase the freehold on the terms set out in the notice.

The proceedings below

8 A dispute arose between the parties as to the validity of the notice and the tenants commenced proceedings in the Central London County Court seeking a declaration pursuant to s.25 of the Act that their notice was valid and that they were entitled to acquire the freehold on the terms proposed. It was common ground that the notice was valid subject to the one issue which remains for determination on this appeal. The landlord contended that it was not open to the tenants to seek to enfranchise the whole property, that is, all 20 flats, by the issue of one notice. It argued that the right to enfranchisement attaches only to the smallest possible self-contained part of a building. As each half of the pair is a self-contained part of a building, each half must be the subject of a separate claim and notice must be given by qualifying tenants of at least half the flats in that half of the pair.

9 H.H. Judge Madge rejected that submission and held that the notice in respect of the whole property was valid. The same arguments were deployed before Henderson J. on the first appeal. He dismissed the appeal, taking the same view for much the same reasons as those given by Judge Madge.

10 The basis of Henderson J.'s decision was that the statutory language of s.3 was clear and unambiguous. It permitted the enfranchisement of any self-contained part of a building (subject to the exclusions in s.4 which did not apply). There was nothing within the section which suggested that the right attached only to the smallest possible self-contained part. If Parliament had intended to oblige tenants to claim the smallest part of the building to satisfy the requirements of s.3(2) it would have said so. He was satisfied that this construction was consistent with the statutory purpose of the scheme, as identified in *Majorstake Ltd v Curtis* [2008] 1 A.C. 787 at [21] and [23]. Moreover, this construction of s.3 derived support from other provisions of the Act, in particular subss.13(8), (9) and (10) and s.4(3A). He rejected the submission advanced by Mr Kenneth Munro for the landlord that there was authority, which although not directly in point, was of assistance. The judge regarded those cases as irrelevant. Further he rejected Mr Munro's invitation to have regard to certain passages from the speeches of Lord Strathclyde taken from Hansard. The judge said that there was no ambiguity in the statutory words to justify such a course. In any event, having read the passages *de bene esse*, the judge did not think that they were capable of resolving any supposed ambiguity.

11 Rimer L.J. gave permission for this second appeal because the issue is of some general importance on which there is no direct authority.

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The appeal to this court—submissions

12 In outline, Mr Kenneth Munro (counsel for the landlord in this court and below) submitted that Henderson J. had erred in several respects. He had been wrong to reject the authorities cited as irrelevant. He should not have refused to have regard to the Hansard extracts. He had failed to deal with the submissions advanced as to the implications of the decision. Mr Munro submitted that the construction accepted

by the judge would have a most undesirable effect. It would enable a group of tenants to enfranchise a part of a building in which they had no financial interest against the wishes of the tenants in that part.

13 Mr Philip Rainey QC (counsel for the tenants here and below) submitted that the judge had been right in all respects for the reasons he gave. In particular, he had been right to rely on subss.(8), (9) and (10) of s.13 and s.4(3A).

Discussion

14 I will begin by considering subss.(8), (9) and (10) of s.13. These provide:

> "(8) Where any premises have been specified in a notice under this section, no subsequent notice which specifies the whole or part of those premises may be given under this section so long as the earlier notice continues in force.
>
> (9) Where any premises have been specified in a notice under this section and:
>
> (a) that notice has been withdrawn ...; or
>
> (b) ...
>
> no subsequent notice which specifies the whole or part of those premises may be given under this section within the period of twelve months beginning with the date of withdrawal or ...
>
> (10) In subsections (8) and (9) any reference to a notice which specifies the whole or part of any premises includes a reference to a notice which specifies any premises which contain the whole or part of the premises; and in those subsections "specifies" means specifies under subsection (3)(a)(i)."

15 These provisions appear to envisage that a notice which specifies a self-contained part of the building (the whole of the relevant premises which I will call X) may be later replaced by a notice which specifies a different self-contained part of the building (which I will call Y) where Y is only a part of X. In that event, Y is necessarily a smaller part of the building than X. Therefore if notices in respect of both X and Y are potentially valid, it follows that a self-contained part of a building (for the purposes of s.3) cannot be limited to the smallest possible self-contained part.

16 Mr Munro argued in response that the expression "part of those premises" in s.13(8) is intended to relate to a part of the premises such as appurtenant garages or walkways which may have been included in the "larger" self-contained part of the building but which may be hived off and excluded from the specified premises in a later notice. This, he said, is intended to give tenants the choice whether they enfranchise just the flats themselves or whether they include associated premises such as garages and walkways. The power of choice appears to derive from s.1(5) of the 1993 Act which provides that qualifying tenants may exercise their right of enfranchisement in relation to any premises despite the fact that those premises are less extensive than the entirety of the premises in relation to which those tenants are entitled to exercise the right.

17 I would accept that that subsection gives the tenants the choice to which Mr Munro refers. But it also enables them to choose whether to specify a larger or smaller self-contained part of a building, provided that they would be entitled to

seek enfranchisement of either. The smaller part must be self-contained if it is to support a claim but the provisions plainly envisage that the claim may be made in respect of a larger self-contained part of the building, provided that there are enough qualifying tenants who agree to participate. In my judgment, Mr Munro's submission, while not incorrect in itself, does not take the argument any further. It appears to me that ss.13(8),(9) and (10) provide powerful support for Mr Rainey's argument.

18 The other statutory provision upon which Henderson J. relied is s.4(3A) which was introduced into the 1993 Act by amendment in 1996. Prior to the amendment, s.3(1)(a) contained an additional requirement that the freehold of the whole of the building or self-contained part of the building should be owned by the same person. It was found that some landlords were avoiding enfranchisement by hiving off the freehold of small parts of the premises to another landlord, usually an associated company. So, in 1996, that additional requirement was repealed and a new exclusion clause was inserted in s.4 as follows:

> **"4 Premises excluded from right**
>
> ...
>
> (3A) Where different persons own the freehold of different parts of the premises within subsection (1) of section 3, this Chapter does not apply to the premises if any of those parts is a self-contained part of a building for the purposes of that section."

19 Mr Rainey's submission in respect of this subsection was that this additional exclusion would have been wholly unnecessary if a valid notice could only be served in respect of an indivisible self-contained part of the building. The freehold of that indivisible self-contained part would inevitably be held by one landlord. The implication of this provision is that a self-contained part of a building may well contain two or more self-contained parts.

20 Mr Munro made two submissions on this point. First, he submitted that it was not permissible to have regard to this amended provision in construing the words of the original statutes: see *Attorney General v Lamplough* (1877-78) L.R. 3 Ex. D. 214. Second, if that is wrong, s.4(3A) does no more than show that Parliament wanted to clarify the position in relation to blocks of flats where the freehold is split between owners and says nothing about the position where (as here) the freehold of the relevant premises is in single ownership. In my view, it is permissible to have regard to this amendment which became necessary once the additional requirement (which had been abused) was removed from s.3 in order that it could be made clear that enfranchisement was available only in respect of a self-contained part of a building the freehold of which was in single ownership. I share the view of Henderson J. that this provision provides support for the tenants' contention.

21 In my judgment, ss.4(3A) and 13(8), (9) and (10) taken together are conclusive of the true construction of the expression "self-contained part of a building" within s.3(1). I can see no justification for putting a gloss on the clear statutory words so as to require that a self-contained part must be the smallest possible self-contained part.

22 I can deal with Mr Munro's other arguments quite briefly. I reject his submission that assistance is to be derived from *Oakwood Court (Holland Park) Ltd v Daejan Properties Ltd* [2007] 1 E.G.L.R. 121. There a claim for enfranchisement of several flats (being part of a building) failed; the part was not self-contained because it

shared the services of a boiler-house with the other flats. The case was not concerned with the divisibility of a self-contained part of a building and said nothing of assistance to the present issue. Similarly, *Holding Management (Solitaire) Ltd v Finland Street 1-16 RTN Co Ltd* [2008] 1 E.G.L.R. 107 is of no assistance. It concerned the right of tenants to manage part of a building in which their flats were located pursuant to the Commonhold and Leasehold Reform Act 2002. The statutory provisions are similar to those of the 1993 Act and the question arose as to whether the part of the building in question complied with the requirement of the equivalent of s.3(2)(a) of the 1993 Act. The problem was that the dividing line between the premises and the rest of the building was not vertical the whole way down; part of the dividing line was lateral. The case was not concerned, as we are, with the divisibility of a self-contained part where the verticality of the division is not in issue.

23 Mr Munro also sought to rely on *Denetower Ltd v Toop* [1991] 1 W.L.R. 945, *Kay Green and Others v Twinsectra Ltd* [1996] 1 W.L.R. 1587 and *Long Acre Securities Ltd v Karet* [2004] EWHC 442 (Ch); [2005] Ch. 61. These were all cases under the Landlord and Tenant Act 1987 relating to a tenant's right of first refusal to purchase the freehold which the landlord wished to sell. The statutory provisions are similar but not identical to those of the 1993 Act but in any event the issues decided in those cases bore no relation to the issue in the present case.

24 I would also reject Mr Munro's submission that the construction favoured by the judge would have wide implications including undesirable and unintended consequences. His complaint is that, if a self-contained part of a building can include two or more smaller self-contained parts, the right to enfranchisement will or might be exercisable by tenants who do not have any financial interest in the other part. Take for example the situation in the present property and a proposal to claim enfranchisement of the whole property comprising 20 flats. If all the tenants of flats 51–60 were in favour of the proposal and all those in 41–50 were against it, those in favour could impose their will on the others, even though they had no financial interest in flats 41–50. Even worse, says Mr Mr Munro, if the whole building of 160 flats had but one freehold owner (which in fact it does not), it would be possible for the tenants of flats 1–80 to impose their will on those in flats 81–160 even though all the latter were opposed. I must say that these circumstances seem unlikely to occur but I accept that hypothetically they are possible. I cannot see any reason why such a situation should be regarded as so undesirable that one should infer that Parliament cannot have intended it to occur. It is obvious that Parliament envisaged that 50 per cent of the tenants within any self-contained part of the building might be unwilling to join in the enfranchisement. That could be so, even if Mr Munro is correct that the right of enfranchisement attaches only to the smallest possible self-contained part of the building. I cannot see that there is anything more undesirable in imposing a new landlord on ten unwilling tenants out of 20 than there is in imposing it on five tenants out of ten. In my view, it is clear that Parliament thought that there were real advantages to tenants if they were able to enfranchise and that those advantages should not be lost merely because there were some unwilling tenants. Those advantages are explained in the passage from *Majorstake* to which Henderson J. referred.

25 I come finally to Mr Munro's submission that the expression "a self-contained part of a building" is ambiguous and that we should resolve the ambiguity by reference to the speech of Lord Strathclyde during a debate in Committee in the

House of Lords on March 9, 1993. We are entitled to look at Hansard as an aid to construction only if the legislation is either ambiguous or obscure or leads to an absurdity: see *Pepper v Hart* [1993] A.C. 593. In my judgment, on the ordinary natural meaning of the words, the expression "self-contained part of a building" in s.3 includes a self-contained part of a building which is itself capable of being divided into smaller self-contained parts of a building. The words are neither ambiguous nor obscure. Nor does such a meaning lead to absurdity. I would hold that we are not entitled to have regard to Lord Strathclyde's speech.

26 In the course of argument, we examined, *de bene esse*, the extract from Hansard on which Mr Munro sought to rely. I do not propose to quote it. It does not appear to me that these passages would resolve the ambiguity if one existed.

27 Lord Strathclyde was responding to three quite technical amendments. Amendment 13 proposed that the criterion for establishing viability in respect of the provision of services should be changed. In the bill, a self-contained part of a building could be enfranchised only if it were possible to separate services from the remainder of the block without *significant disruption* to the rest of the block. The amendment proposed would prevent separate parts of the building being enfranchised unless separation of services could be achieved without *significant costs*. In explaining why the Government would not wish to adopt that amendment, Lord Strathclyde said that it was intended that enfranchisement should be exercisable over the smallest viable unit. He feared that the proposed amendment might make this more difficult because it might mean that a larger unit had to be purchased. He said nothing to suggest that tenants who chose to enfranchise a larger unit would not be permitted to do so, provided of course that there were enough of them within that unit who wished to do so.

28 In respect of amendments 14 and 15, the concern raised appears to have been for the position of those tenants who were left outside the enfranchised part of the building, although this is not entirely clear. Lord Strathclyde again said that the bill provided that the smallest viable unit could be enfranchised. He said that this would ensure that that leaseholders could only enfranchise the property in which they had an immediate financial interest. He did not say that only the smallest viable unit could be enfranchised. I do not find it at all easy to understand exactly what he meant by saying that allowing the enfranchisement of the smallest viable unit would ensure that leaseholders could only enfranchise the property in which they had an immediate financial interest. The requirement that there should be a certain proportion of tenants participating in the purchase must be enough to ensure that they have an immediate financial interest, whether the unit under consideration is the smallest viable unit or two or more self-contained viable units which, taken together, are also a viable self-contained unit. Accordingly, I do not think that the passages relied on by Mr Munro would resolve any ambiguity, if there were one.

29 For those reasons, I would dismiss this appeal and uphold the declaration made by H.H. Judge Madge.

BLACK L.J.:

30 I agree.

THE CHANCELLOR OF THE HIGH COURT:

31 I also agree.

Appeal dismissed

DAEJAN INVESTMENTS LTD v BENSON

COURT OF APPEAL (CIVIL DIVISION)

Sedley, Pitchford and Gross L.JJ.: January 28, 2011

[2011] EWCA Civ 38; [2011] L. & T.R. 14

H1 *Service charges—Landlord and Tenant Act 1985, s.20 and s.20ZA—Qualifying works—Prescribed consultation requirements—Landlord's failure to comply—Failure to provide summary of observations received during first consultation period and responses—Failure to state place and hours at which the estimates could be inspected—Landlord indicating selection of contractor before end of consultation period—Whether significant prejudice caused to lessees—Whether requirements should be dispensed with—Whether LVT correct to refuse to take into account financial effect of granting or refusing the application—Whether status of landlord is relevant.*

Summary of decision

H2 Where a landlord had curtailed the consultation period prescribed in the Service Charges (Consultation Requirements) (England) Regulations 2003, the tenants suffered significant prejudice by losing the opportunity to make further representations and to have them considered. On an application under s.20ZA(1) of the Landlord and Tenant Act 1985 to dispense with the prescribed consultation requirements, the financial effects on the parties of granting or refusing dispensation are irrelevant.

Parties

H3

Appellant (applicant below):	Daejan Investments Ltd ("the landlord")
Respondents (respondents below):	Jack Benson; David Lapes; Paul Wallder; Aldenspring Ltd; Alastair Gray ("the tenants").

Facts

H4 Section 20 of the Landlord and Tenant Act 1985 potentially limits the amount of service charges recoverable by a landlord from a tenant of a dwelling if the charge relates to qualifying works. Only £250 can be recovered from a tenant in respect of the cost of such works unless either the landlord has complied with the consultation requirements prescribed in the Service Charges (Consultation Requirements) (England) Regulations 2003, or a leasehold valuation tribunal (LVT) determines to dispense with all or any of the consultation requirements on the ground that it is reasonable to do so. The consultation requirements fall into three stages: (1) Notice of intention to carry out qualifying works and inviting

observations; (2) Statement of estimates and notice giving details for inspection and inviting observations and (3) Notification of reasons for the selection of a contractor. The stage 2 procedure requires the landlord to seek estimates in accordance with detailed rules and serve on the tenant a statement ("the paragraph (b) statement") setting out the estimated cost from at least two of the estimates (including at least one from a person nominated by the tenant) and a summary of the observations received during the stage 1 consultation period with his responses to them. The statement must be sent out with a notice detailing where and when all of the estimates may be inspected and inviting each leaseholder and any recognised tenants' association (RTA) to make written observations, specifying an address where they should be sent, the consultation period (30 days from the notice) and the end date. The landlord must have regard to written observations received within the second consultation period.

H5 The landlord was the freehold owner of a block of shops and seven flats in Muswell Hill, London. Five of the flats were held by the tenants under long leases under which service charges were payable. They were all members of an RTA, of which M was the chairman. The landlord sought to recover approximately £270,000 in respect of major qualifying works at the property and the tenants applied to the LVT in respect of the costs of those works. The LVT found that the landlord had failed to comply with the stage 2 consultation requirements in that: (i) the landlord's paragraph (b) notice did not contain a summary of observations received from the tenants in the first consultation period and the landlord's responses; (ii) the estimates were not available for inspection at a place, during the hours and for the period specified in the notice; and (iii) the landlord cut short the 30 day period before the leaseholders were provided with copies of all the estimates and had had an opportunity to make observations.

H6 The LVT dismissed the landlord's application to dispense with the consultation requirements on the ground that the tenants had been prejudiced by the landlord's failure to comply, holding that the financial effect on the parties of granting or refusing the application were not to be taken into account and that the landlord's offer of a £50,000 "discount" from the price of the works was not a ground on which to order dispensation. The landlord appealed to the Upper Tribunal (Lands Chamber) (the LT), which concluded that the LVT in the exercise of its discretion had not erred in principle and that its decision was not clearly wrong. The landlord appealed to the Court of Appeal pursuant to s.13 of the Tribunals, Courts and Enforcement Act 2007, contending that the LT had been wrong to hold that: (i) the financial effects of granting or refusing dispensation were irrelevant; (ii) the nature of the landlord was relevant; and (iii) the tenants had suffered prejudice as a result of the landlord's failure to comply with the Consultation Regulations.

H7 **Held,** dismissing the appeal:

H8 (1) As a matter both of context and the wording of the statute, the financial effect on the parties of the grant or refusal of dispensation is an irrelevant consideration when exercising the discretion under s.20ZA(1). The landlord's contention that only the amount of the service charge was relevant avoided the need for a burdensome enquiry by the LVT into the means of the parties but had the unacceptable result that the higher the service charge, the more readily dispensation should be granted. The focus of the language of s.20ZA(1) is on the consultation requirements, not the consequences of non-compliance, and Parliament had not enacted a provision for granting relief from sanctions. The fact that non-compliance

with the consultation requirements may involve significant financial loss is, by itself, no more than an intrinsic part of the scheme. Dispensation would readily be granted in certain situations but none of the identified examples had the effect of undermining the integrity or importance of the consultation process. This approach did not fail to give effect to the width of the dispensatory discretion: following the amendment of the Act (by Pt 2 of the Commonhold and Leasehold Reform Act 2002) the reasonableness of the landlord's conduct is no longer a condition precedent for an order for dispensation, but it does not at all follow that the financial effects of a refusal of dispensation are or ought to be a relevant consideration to the exercise of the statutory discretion. The approach of the Lands Tribunal in *Camden LBC v The Leaseholders of 37 Flats at 30–40 Grafton Way* and of the tribunals in this case was therefore correct.

H9 (2) The LT had not treated the landlord more rigorously as a corporate landlord than if it had been owned or controlled by the lessees. If it had, cases could be envisaged where a less rigorous approach may be justified in respect of lessee owned/controlled landlords: the consultation requirements have to be considered against the background that they are spending their own money and that there may be a greater likelihood of canvassing the relevant information by way of informal or extra-statutory consultation. Even if the LT was in error in contemplating a less rigorous approach in such cases: (i) it did not follow that it had been wrong to hold that the consultation requirements were to be applied according to their terms in the case of a corporate (or local authority) landlord; (ii) there was no suggestion that the LT had applied a more rigorous standard than that provided for in the statute; and (iii) in any event, there was no such error in the approach that the LVT had taken.

H10 (3) The main consideration in exercising the dispensatory discretion under s.20ZA(1) is significant prejudice to the tenants. The LT and the LVT were right to treat the curtailment of the consultation process as a serious failing by the landlord that caused the tenants to suffer significant prejudice by losing the opportunity to make further representations and to have them considered.

H11 (4) The landlord's offer of a £50,000 discount from the price of the works was not a ground for the grant of dispensation. The statutory scheme does not provide for such an alternative and, if it does, the amount offered was not enough.

H12 (5) Accordingly, the LVT had been amply justified in refusing dispensation and its conclusion betrayed neither any error of law nor perversity.

H13 **Legislation referred to:**

Tribunals, Courts and Enforcement Act 2007 s.13

Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987

Landlord and Tenant Act 1985 ss.20 and 20ZA

H14 **Cases referred to:**

Camden LBC v The Leaseholders of 37 Flats at 30–40 Grafton Way Unreported LRX/185/2006 Lands Trib.

Eltham Properties Limited v Kenny [2008] L. & T.R. 14 Lands Trib.

Majorstake Ltd v Curtis [2008] UKHL 10; [2008] 1 A.C. 787; [2008] L. & T.R. 17

Martin v Maryland Estates Ltd (Service Charges) (2000) 32 H.L.R. 116; [1999] L. & T.R. 541; [1999] 2 E.G.L.R. 53 CA (Civ Div)
Paddington Basin Developments Ltd v West End Quay Estate Management Ltd [2010] EWHC 833 (Ch); [2010] 1 W.L.R. 2735; [2010] L. & T.R. 26

H15 For further details of the law in this area see *Woodfall's Law of Landlord and Tenant*, Vol.1, para.7.199.8: "Power of tribunal to dispense with consultation requirements" and para.7.199.1: "(e) Requirements in relation to works or agreements to which the substituted sections 20 and 20ZA apply".

H16 *N. Dowding* QC and *S. Jourdan* QC (instructed by GSC Solicitors) for the landlord.
P. Rainey QC (instructed by K&L Gates LLP) for the first to fourth tenants.
J. Fieldsend (instructed by Jaffe Porter Crossick LLP) for the fifth tenant.

JUDGMENT

GROSS L.J.:

Introduction

1 This is an appeal, brought pursuant to s.13 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), by the appellant ("Daejan"), against the decision of the Upper Tribunal (Lands Chamber), known as the Lands Tribunal (LT), dated November 27, 2009 ("the LT decision"). In that decision, the LT dismissed Daejan's appeals against two decisions of the Leasehold Valuation Tribunal (LVT), dated March 11 and August 8, 2008 (respectively, the LVT's "March" and "August" decisions). Although the LT necessarily had regard to both the LVT's March and August decisions, the principal focus of the appeal before the LT—as indeed the appeal to this Court—concerned the LVT's August decision.

2 In a nutshell:

i) By its March and August decisions, the LVT held that Daejan had failed to comply with the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987) ("the Consultation Regulations"), in respect of works to be done at Queens Mansions, Muswell Hill ("the works" and "Queens Mansions").

ii) By its August decision, the LVT declined to conclude that it was reasonable to dispense with the consultation requirements in the present case and so made no order for dispensation under s.20ZA(1) of the Landlord and Tenant Act 1985 as amended ("the Act"). The consequence is that Daejan failed in its claim to recover some £270,000 from the respondents, five long leaseholders of flats in Queens Mansions, in respect of the works. Instead, pursuant to the statutory scheme (of which more below), Daejan's recovery from the respondents was "capped" at £250 each. In reaching this conclusion, the LVT held that the financial effects of the grant or refusal of the application for dispensation on the landlord or tenant were irrelevant and were not to be taken into account. Further, the LVT held that Daejan's failure to comply with the Consultation Regulations had caused the respondents "substantial" or "significant" prejudice.

iii) On appeal, the LT, whose constitution on this occasion included Carnwath L.J., Senior President, upheld the decision of the LVT. The LVT had been entitled both to conclude that Daejan had committed a "serious breach" and to refuse dispensation with the consultation requirements under s.20ZA(1) of the Act.

3 Before this Court, Mr Dowding QC for Daejan essentially contended as follows. First, the LT erred in holding that the financial effects of granting or refusing dispensation were irrelevant. Secondly, the LT was wrong to hold that the nature of the landlord was relevant; that Daejan was a corporate landlord was irrelevant and did not justify the LVT adopting a more rigorous approach to non-compliance with the Consultation Regulations. Thirdly, the LT had erred in law, alternatively, reached a conclusion no reasonable tribunal could have reached (*Edwards v Bairstow* [1956] A.C. 14), with regard to the question of whether the respondents had suffered prejudice flowing from Daejan's failure to comply with the Consultation Regulations; it was for the respondents to prove such prejudice; regardless of where the burden of proof lay, there was none; the only reasonable conclusion was that dispensation should have been granted.

4 The respondents' case before us, presented by Mr Rainey QC for the 1st–4th respondents and Mr Fieldsend for the 5th respondent, was, in essence, that the decisions of the LT and LVT were correct for the reasons they had given. On a proper consideration of the statutory scheme, the financial effects of granting or refusing dispensation were irrelevant. While the nature of the landlord could be relevant, in that a distinction could be drawn between lessee-owned landlords and others, there was no separate point here in this regard and there had been no error of law on the part of the LT. As to prejudice, the LT had not erred as to the burden of proof but, in any event, there had been substantial prejudice to the respondents, flowing from Daejan's failure to comply with the requisite consultation process. If need be, the 1st–4th respondents additionally relied on their respondent's Notice ("the respondent's Notice"), contending that the evidence of prejudice went beyond that found by the LT.

5 Against this background, the principal issues on the appeal to this Court can conveniently be grouped under the following headings:

i) Are the financial consequences for the landlord or tenant relevant to the grant or refusal of dispensation under s.20ZA(1) of the Act? ("Issue (I): Financial consequences").

ii) Is the nature of the landlord relevant to the grant or refusal of dispensation under s.20ZA(1) of the Act? ("Issue (II): The nature of the landlord").

iii) What is the correct approach to prejudice allegedly suffered by a tenant in consequence of the landlord's failure to comply with the Consultation Regulations? ("Issue (III): Prejudice").

I return to these Issues below and will then deal with them in turn.

The statutory scheme

6 It is next convenient to outline the statutory scheme, with which this appeal is concerned.

7 The background was helpfully explained by Mr Rainey in his skeleton argument:

> "One of the singular aspects of most long leases of flats is that the landlord covenants to repair and maintain the block but the tenants covenant to meet the cost through a service charge. Often, service charges extend beyond repair to cover improvements. How, when and by whom and at what cost the work is done is decided by the landlord, despite the fact that where leases are long, the tenants effectively own the block. (A 99 year term is usually thought to be worth ca. 99 per cent of freehold value.) The landlord decides how to spend his tenant's money and at common law there is little control or basis for complaint by the tenants. Statutory consultation under ... [the Act] ... fills this gap. Its importance must not be understated."

8 The particular position of long leaseholds merits additional emphasis. As observed by Baroness Hale of Richmond in *Majorstake Ltd v Curtis* [2008] UKHL 10; [2008] 1 A.C. 787 at [22]–[23], by the 1980s, long leaseholds had become an increasingly common form of tenure of flats. The relationship between leaseholders under such leases and the freehold owners was no longer akin to that of an ordinary landlord and tenant relationship. Long leaseholders not only faced what Baroness Hale termed "the wasting asset problem" but might also encounter poor management and high service charges.

9 Accordingly, legislative policy has sought to strengthen the position of long leaseholders by regulating service charges. How the legislature has sought to do so was summarised in *Paddington Basin Developments v West End Quay* [2010] EWHC 833 (Ch); [2010] 1 W.L.R. 2735, by Lewison J., as follows:

> "26 ... there are two separate strands to the policy underlying the regulation of service charges. Parliament gave two types of protection to tenants. First, they are protected by section 19 [of the Act] from having to pay excessive and unreasonable service charges or charges for work and services that are not carried out to a reasonable standard. Second, even if service charges are reasonable in amount, reasonably incurred and are for work and services that are provided to a reasonable standard, they will not be recoverable above the statutory maximum if they relate to qualifying works or a qualifying long term agreement and the consultation process has not been complied with or dispensed with. It follows that the consultation provisions are imposed for an additional reason; namely, to ensure a degree of transparency and accountability when a landlord decides to undertake qualifying works or enter into a qualifying long term agreement ... .
>
> 27. One other general point needs to be made. The relevant provisions of ... [the Act] ... do not prohibit a landlord from entering into whatever contract he pleases for the carrying out of works or the supply of services. They merely prevent him from passing on the cost of the works or services to the lessees unless he has satisfied the statutory requirements about price, quality and consultation ... ."

10 Turning to the detail, s.18 of the Act defines "service charge" to mean:

> "(1) ... an amount payable by a tenant of a [dwelling] as part of or in addition to the rent:
>
> (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management; and

(b) the whole or part of which varies or may vary according to the relevant costs."

11 Section 19 of the Act contains the first of the two strands of protection described by Lewison J. (above):

> **"19. Limitation of service charges: reasonableness**
> (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period:
> (a) only to the extent that they are reasonably incurred; and
> (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
> and the amount payable shall be limited accordingly."

12 Sections 20 and 20ZA of the Act deal with the second strand of protection spoken of by Lewison J. and with which this litigation is concerned—namely, consultation requirements.

> **"20. Limitation of service charges: consultation requirements**
> (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contribution of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either:
> (a) complied with in relation to the works or agreement; or
> (b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.
> **20ZA. Consultation requirements: supplementary**
> (1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

13 Section 27A of the Act makes provision for applications to a leasehold valuation tribunal (inter alia) to determine the amount of a service charge which is payable; such determinations may be sought either in advance of the costs being incurred or subsequently thereto. Paragraph 6 of the Consultation Regulations, read with s.20 of the Act, provides that the limit of the amount which can be passed on by a landlord to a tenant if the consultation requirements have neither been complied with nor dispensed with is £250.

14 Pausing here, it may be noted that the terms of ss.20 and 20ZA of the Act, differ from the predecessor statutory provisions. So, prior to amendment, s.20 of the Act had provided as follows:

> **"20. Limitation of service charges: estimates and consultation**
> (1) Where relevant costs incurred on the carrying out of any qualifying works exceed the limit specified in subsection (3), the excess shall not be taken into account in determining the amount of a service charge unless the relevant requirements have been either:
> (a) complied with; or
> (b) dispensed with by the court in accordance with subsection (9);
> and the amount payable shall be limited accordingly.

(9) In proceedings related to a service charge the court may, if satisfied that the landlord acted reasonably, dispense with all or any of the relevant requirements."

It will be apparent that under these predecessor provisions, dispensation from the relevant requirements could only be granted if the landlord had acted reasonably: see too, *Martin v Maryland Estates Ltd* [1999] 2 E.G.L.R. 53 at 56, per Robert Walker L.J., as he then was. The current statutory provisions contain no such limitation; dispensation from the consultation requirements may be granted whether or not the landlord has acted reasonably.

15 Coming next to the relevant consultation requirements, these are set out in Pt 2 of Sch.4 of the Consultation Regulations. With respect, I cannot improve on the summary contained in the LT decision in this case, itself drawing on a previous LT decision in *Camden LBC v The Leaseholders of 37 Flats at 30-40 Grafton Way* Unreported LRX/185/2006 (Lands Trib.) (*"Grafton"*). As the LT observed (at [4]), the "layout and drafting of the regulations leave something to be desired in terms of clarity". The LT, (above) then followed the division of the requirements into "stages" adopted in *Grafton*:

"Stage 1

(1) **Notice of intention** Notice of intention to carry out qualifying works is given to each leaseholder and any recognised tenants' association ('RTA'). The notice must describe in general terms the proposed works, or specify a place and hours where the description may be inspected. The notice must state the reasons for the works, and invite written observations, specifying where they should be sent, over what period (30 days from the notice), and the end date. Further, the notice must contain an invitation for nominations of persons from whom the manager should obtain estimates. The landlord must have regard to written observations received during the consultation period.

Stage 2

(2) **Estimates** The landlord must seek estimates. (There are detailed rules as to seeking estimates from nominees of the tenants or RTA).

(3) **The paragraph (b) statement** The landlord then issues a statement (free of charge) setting out the estimated cost from at least two of the estimates and a summary of the observations received during the stage 1 consultation period, and his responses to them. The statement is issued with a notice (see below). If any estimates have been received from the leaseholders' nominees, they must be included in the statement. (The term 'paragraph (b) statement' is used by the regulations themselves, by reference to sub-paragraph (5)(b) in which this requirement is found).

(4) **Notice accompanying paragraph (b) statement** The statement must be sent out with a notice ..., detailing where and when all of the estimates may be inspected and inviting each leaseholder and any RTA to make written observations on any of the estimates, specifying an address where they should be sent, the consultation period (30 days from the notice) and the end date.

(5) **Regard to observations** The landlord must have regard to written observations received within this second 30-day consultation period.

Stage 3

(6) **Notification of reasons** Unless the chosen contractor is a leaseholder's or RTA nominee or submitted the lowest estimate, the landlord must give

notice within 21 days of entering into the contract to each leaseholder and any RTA, stating his reasons for the selection, or specifying a place and hours for inspection of such a statement ... ."

16 Matching these Stages with the relevant paragraphs of Sch.4, Pt 2 of the Consultation Regulations, Stage 1 corresponds with paras 1–3; Stage 2 with paras 4–5; and Stage 3 with paras 6 et seq. As the LT observed, at [6]:

> "The issues in the present case turn on the requirements of Stage 2: steps (3), (4) and (5) in the above sequence. They relate principally to the following paragraphs in Schedule 4 Part 2 of the Regulations: step (3) paras 4(5)(b) and 4(9); step (4) para 4(10); step (5) para 5."

The nature of the hearing before this court

17 As already noted, this appeal comes to this Court pursuant to s.13(1) of the 2007 Act, which grants a right to appeal "on any point of law arising from a decision made by the Upper Tribunal". Section 14 of the 2007 Act goes on to provide as follows:

> "(1) Subsection (2) applies if the relevant appellate court, in deciding an appeal under section 13, finds that the making of the decision concerned involved the making of an error on a point of law.
> (2) The relevant appellate court:
> (a) may (but need not) set aside the decision of the Upper Tribunal, and
> (b) if it does, must either:
> (i) remit the case to the Upper Tribunal or, where the decision of the Upper Tribunal was on an appeal ... from another tribunal ..., to the Upper Tribunal or that other tribunal ...; or
> (ii) re-make the decision."

18 For reasons upon which it is unnecessary to elaborate (and which may be of limited duration), it is common ground that this is not a "second appeal" to which CPR r.52.13 and other related provisions apply.

19 A question which is in dispute, relates to the true nature of this appeal. Daejan contends that the decision which is reviewed pursuant to CPR r.52.11 is that of the LVT. Weight may be given to the views of the LT if and to the extent that this Court agrees with those views; special weight may be given to those views if and insofar as they reflect any special expertise of members of the LT—though it is also Daejan's contention that there was no relevant special expertise. Essentially, therefore, this Court is concerned with the August decision of the LVT rather than the decision of the LT.

20 By contrast, the respondents place much greater weight on the decision of the LT, submitting that, in the light of the failed first appeal, this appeal can only succeed "if the review by the ... [LT] ... can be vitiated on the usual grounds ..."—namely, erroneous construction of the statutory provisions in question, failing to take account of a relevant factor and so on. The respondents further submit that, however the matter is approached, the appeal can only succeed if this Court is satisfied that the LT was wrong in law. It would seem to follow on the respondents' approach that even if this Court was of the view that the LVT had erred in law, the

appeal must be dismissed if the LT had reached a decision to which it was entitled to come.

21 In my judgment, the correct position lies somewhere in between the submissions of the parties; both the August decision of the LVT and the LT's decision fall to be considered as follows:

i) In the light of ss.13 and 14 of the 2007 Act, this appeal cannot succeed unless this Court is satisfied that the decision of the LT involved the making of an error on a point of law.

ii) That said, the starting point on this appeal is the August decision of the LVT. It is the LVT—not the LT—which is entrusted by statute with determining whether there has been compliance with the Consultation Regulations and, if not, whether dispensation should be granted; the LT's function is appellate only. I am thus unable to accept that this is an appeal where this Court's consideration is effectively confined to a "review" of the decision of the LT—so that provided only the LT reached a decision it was entitled to reach, the appeal must be dismissed regardless of any flaws in the decision of the LVT. This Court must instead explore whether the LVT erred in law; but, in conducting that inquiry, it seems to me right that such weight as is appropriate should be given to the views of the LT as the designated and specialist appellate tribunal in this area. What weight is to be given to the LT's views must depend on the issue under consideration and all the circumstances of the individual case; this Court cannot be prescriptive in that regard.

22 On reflection there may be less in this particular dispute than first meets the eye; or, put another way, the theory may suggest more complexity than will be encountered in practice. The examples which follow suggest why this is so:

i) If this Court is of the view that there was no error of law in the LVT's August decision, that would be an end of the matter, having regard to the dismissal of Daejan's appeal to the LT.

ii) If, conversely, this Court, having given such weight as it thought appropriate to the views of the LT, was nonetheless satisfied that the LVT had erred in law in its August decision, then it would seem to me very difficult to resist the conclusion that the LT had itself erred in law in deciding otherwise.

iii) Should the situation arise where this Court was of the view that a range of decisions was properly open to the LVT, then this Court would need to consider whether the decision to which the LVT had come was within the permissible ambit of that range. Once again, in considering that question, this Court would no doubt pause before rejecting the views of the LT on a "discretionary" decision of that nature.

LVT

The facts and the key conclusions of the LVT and LT

23 *(1) Factual introduction:* A very brief mention of the facts (largely taken from the "statement of agreed facts and issues" before the LT) is helpful to an understanding of the key conclusions of the LVT and the LT.

24 Queens Mansions is a block of shops and flats in Muswell Hill. There are seven flats on the ground and upper floors. Five of the flats, Nos 1, 3, 4, 5 and 6 are held

under long leases which provide for the payment of service charges. Daejan is the freehold owner of the building and the landlord under those long leases. The respondents are the lessees of those flats. For completeness as to the other two flats, at all material times one was vacant and the other was occupied by a tenant under a statutory tenancy protected by the Rent Act 1977; no more need be said of them.

25 The respondents are all members of the Queens Mansions Residents Association (the QMRA), which is a recognised tenants' association under s.29 of the Act. Ms Marks was the chairman of the QMRA.

26 The property was managed for Daejan by Freshwater Property Management ("Freshwater"), the trading name of Highdorn Co Ltd.

27 By the start of 2005, it was clear that major works were needed to the property. The Stage 1 notice of intention was sent on July 6, 2005. By December 2005, four priced tenders had been received by Freshwater. On the face of it, two contractors, "Rosewood" and "Mitre" appeared to be the most competitive; as an indication of the scale of the works, all the tenders were priced in excess of £400,000. The respondents were, however, concerned that only Mitre's priced specification had been provided to them; in 2006, Ms Marks pressed Daejan for the opportunity to inspect all the priced tenders. By June 2006, this concern had not yet been addressed but Freshwater, through a Mr Shevlin were indicating a preference for instructing Mitre to proceed with the works. Mr Shevlin attempted to serve Stage 2 notices from June 2006 but unhappiness as to the unavailability of the priced estimates to the respondents continued to simmer. A further Stage 2 notice was purportedly served on the July 28. Daejan accepted before the LVT that the priced specifications were not made available to those of the respondents who wished to see them until the August 11, 2006.

28 However, as the LVT recorded in its August decision:

> "56. ... by 11th August 2006, the leaseholders had already been informed that the contract had in effect been awarded to Mitre, and the statutory consultation process was for all practical purposes ended.
> 57. It was not disputed that at the pre-trial review hearing in early August 2006, it was stated by the legal representative of Daejan, that Mitre Construction had been awarded the contract. This was confirmed in a letter from Mr Shevlin to Ms Marks dated 10th August 2006. In his oral evidence Mr Shevlin said that this was a mistake, but it had never been corrected."

29 As already foreshadowed, the dispute centred on Stage 2 and, in particular, on the events of June–August 2006.

30 *(2) The LVT:* In its March decision, the LVT determined that Daejan had failed to comply with the provisions of Sch.4, Pt 2 of the Consultation Regulations. Subsequently, the August decision both clarified the LVT's findings "in respect of the nature and extent of the landlord's non-compliance" and addressed the issue of dispensation.

31 At [24] of the August decision, the LVT set out its conclusions on Daejan's non-compliance with the Consultation Regulations in the following terms: (*Note:* Paragraph numbers have been amended to conform to the version used by the LT)

> "Having considered the evidence as a whole, the Tribunal considers that Daejan:

1] failed to comply with the requirements of paragraph 4(5)(b)(ii);
A summary of the observations received and the landlord's responses thereto, were not properly include.

2] failed to comply with paragraph 4(5)(c), 4(9), 4(10) and 4(11);
All the estimates were not available for inspection at a place, during the hours and for the period specified in the notice. The relevant period of thirty days was cut short as it was indicated to the leaseholders that the contractor for the major works had been decided by the landlord. As a result they concluded that further representations were futile. The consultation process was for all practical purposes curtailed, and the invitation to inspect the estimates and make observations was rendered ineffective at that point.

3] failed to comply with paragraph 5;
The relevant period of thirty days was cut short before the leaseholders were provided with copies of all the estimates and had had an opportunity to make observations. The landlord did not have regard to the observations in respect of the estimates which the leaseholders may have made, had they had the opportunity to do so within the relevant period."

32 At [84] et seq, the LVT set out its conclusions overall. The LVT found that the failure by Daejan to comply with the statutory consultation requirements had caused substantial prejudice to the respondents. The LVT underlined that it had been a matter of great concern to the respondents that Daejan had not provided copies of all the estimates for their consideration. At [90], the LVT said this:

> "The Tribunal considers that the cutting short of the consultation period, by indicating to the leaseholders that the decision had been made to award the contract to Mitre, both at the pre-trial review and in Mr Shevlin's letter dated 10th August 2006, removed from the leaseholders the opportunity to make observations on the estimates to which [the] landlord was obliged to have regard. This opportunity to make informed comment on these matters was central to the consultation process. It had been stressed in correspondence how important this was to the leaseholders."

33 The LVT acknowledged that there had been "extra-statutory" consultation carried out, notably through a Mr Harris, a surveyor originally engaged by QMRA to advise the respondents and at their suggestion appointed by the appellant as contract administrator. The LVT did not, however, consider that this made good Dajean's failure to provide the estimates and an opportunity to make observations.

34 Drawing on the *Grafton* decision (to which reference has already been made), the LVT then addressed the submission advanced by counsel for Daejan, that Mr Lapes (one of the respondents) had been unable to identify the comments he would have made had he seen the Rosewood priced tender earlier. In the LVT's view (at [98]):

> "... it is a matter of speculation what comments may or may not have been made by Ms Marks, Mr Lapes and the other leaseholders and how this may have influenced the carrying out of the major works, had they had the opportunity to comment having seen all the estimates. The overall result of the landlord's failure to consult the leaseholders was that the respondents lost

> the opportunity to make observations in respect of the estimates provided by contractors for the major works to Queens Mansions for which they would be contractually obliged to contribute substantial amounts of money ... .The Tribunal considers that the fact that they did not have this opportunity amounts to significant prejudice."

35 The LVT next considered and rejected an offer on the part of Daejan to deduct £50,000 from the cost of the works; in the LVT's judgment, this offer did not alter "the existence of substantial prejudice suffered by the leaseholders".

36 Counsel for Daejan submitted that it was not proportionate in all the circumstances for the LVT to refuse to make an order for dispensation; such refusal would result in Daejan having to bear all but £1,250 (£250 per long leaseholder) of the cost of the works. Once again guided by *Grafton*, the LVT held that:

> "104 ... the financial effects of the grant or refusal of the application for dispensation on the landlord or tenant are not to be taken into account."

The LVT thus concluded that it did not consider it reasonable to dispense with the consultation requirements in this case and declined to make an order for dispensation under s.20ZA of the Act.

37 *(3) The decision in Grafton:* Before the LT in this case, the decision in *Grafton* (above) loomed large and must now be summarised, given its importance to the LT's reasoning.

38 In *Grafton*, the landlord was the housing authority; there were 40 leaseholders of whom 21 had formed a committee to represent them in discussions with the landlord. The dispute was concerned with Stage 2 which, in *Grafton*, had been omitted altogether through an administrative error. In these circumstances, the LT in *Grafton* had upheld the LVT's decision not to dispense with compliance.

39 The central reasoning of *Grafton* appears from the following passages:

> "32. Any process of consultation consists of giving information, inviting observations and taking those observations into account, and this is what paragraphs 1 to 6 make provision for. Information has to be given to tenants at three stages—when there is an intention to carry out works, when estimates have been obtained and when a contract has been entered into. Observations from tenants are to be invited at the first two stages. Those observations must be taken into account and the landlord's response to them must be given. This is the scheme of the provisions, which are designed to protect the interests of tenants; and whether it is reasonable to dispense with any particular requirements in an individual case must be considered in relation to the scheme of the provisions and their purpose.
>
> 33. The principal consideration for the purpose of any decision on retrospective dispensation must ... be whether any significant prejudice has been suffered by a tenant as a consequence of the landlord's failure to comply with the requirement or requirements in question. An omission may not prejudice a tenant if it is small, or if, through material made available in another context and the opportunity to comment upon it, it is rendered insignificant. Whether an omission does cause significant prejudice needs to be considered in all the circumstances. If significant prejudice has been caused we cannot see that it could ever be appropriate to grant dispensation.

> 34. It was urged on us by Miss Holland that the consequences, for LBC and their tenants, was a material consideration, and indeed an important one. Also material, she suggested, was the unjustified benefit that the leaseholders here would receive in the event that dispensation was not granted. We can accept that the general nature of the provisions, with the £250 limit imposed as the consequence of section 20(1) and section 20ZA, forms part of the background to the consideration of reasonableness. We cannot accept, however, that the particular effects on the landlord or the tenant in the case in question are properly to be taken into account. It is in the very nature of the provisions that the landlord will suffer financially and the tenant will gain financially in the event that dispensation is not given. If it were material to take into account the degree to which the landlord might suffer or the tenant might gain, this would mean that a failure might achieve dispensation if the contract was a very large one but might not do so if the contract was small. We do not think that this could be the effect of the provisions. There would in any event be real practical difficulties for an LVT in dealing with a contention relating to the consequences for the landlord or other persons affected since the evidence relevant to these could be very far-reaching, time-consuming and costly to pursue and potentially inconclusive.
>
> 35. The requirements relating to estimates are clearly fundamental in the scheme of requirements. The landlord must obtain estimates (in the plural), must include in the paragraph (b) statement the overall estimate of at least two of them and must make all of the estimates available for inspection. The purpose is to provide the tenants with the opportunity to see both the overall amount specified in two or more estimates and all the estimates themselves and to make on them observations, which the landlord is then required to take into account. In the present case stage 2 was completely omitted. It was a gross error, which manifestly prejudiced the leaseholders in a fundamental way."

40 *(4) The LT:* In the present case and after a review of the facts, the LT turned its attention to *Grafton*. The LT underlined that it was not bound by *Grafton* but would "naturally treat it as persuasive". Having considered the matter, the LT saw no reason to depart from the approach taken in *Grafton*, supported, in the LT's view by the statutory language. As the LT put it:

> "40. ... The power given to the LVT is to dispense with the consultation requirements, not with the statutory consequences of non-compliance. The principal focus, therefore, must be on the scheme and purpose of the regulations themselves. If Parliament had intended to give a power to remove or mitigate the financial consequences, it could easily have done so ... The potential effects—draconian on one side and windfall on the other—are an intrinsic part of the legislative scheme. It is not open to the tribunal to rewrite it ... ."

For the same reasons, the LT was not attracted to Daejan's alternative submission—or offer—of allowing a deduction from the charge rather than refusing dispensation in its entirety.

41 The LT went on (at [41]) to express agreement with *Grafton*, that the potential consequences for the parties "are relevant as part of the context in which the matter

is to be considered". It was neither helpful nor accurate to describe the provisions as "penal":

> "... the tribunal should keep in mind that their purpose is to encourage practical co-operation between the parties on matters of substance, not to create an obstacle race. If the non-compliance has not detracted significantly from the purpose of the regulations and has caused no significant prejudice, there will normally be no reason to refuse dispensation ... ."

Tribunals should use their own common sense to examine submissions as to the significance of non-compliance, given the parties' financial interests in playing such significance up or down as the case may be.

42 The LT added this:

> "43. Finally, we emphasise the need to consider these issues having regard to the particular facts of each case, including the nature of the parties and their relationship. For example, the tribunal may reasonably take a more rigorous approach to non-compliance by a local authority or commercial landlord, than to a case where the landlord is simply a group of lessees in another form ... ."

43 Thereafter, the LT sought to apply these principles to the facts of the present case. It began with this observation:

> "44. ... We have no doubt that the LVT was correct to find failures of compliance at Stage 2, but it is equally clear to us that for the most part these failures were minor and did not cause any significant prejudice to the lessees ... ."

44 The LT held that although Daejan's notice had not contained the requisite "summary of observations", it was "quite unable to see what prejudice was caused by the absence of such a summary". As to the Stage 2 notices, these had not in terms specified the "place and hours" at which the estimates could be inspected and the estimates were not available for inspection at the time they were sent (whether on the June 14 or the July 18); moreover, the notices had failed in terms to "invite" the making of written observations. The LT was, however, of the view that none of these failures to comply with the Consultation Regulations caused the respondents any prejudice:

> "50. ... provided that, once they received the estimates, they had an appropriate opportunity to consider them and to raise any significant points that might emerge from them, and that they were taken into account before a final decision was made."

45 The question of consultation being curtailed was different; this was the issue which had most concerned the LT. In its view, the LVT's conclusion that consultation had been curtailed was "difficult to criticise"; the LVT had been entitled to conclude that by the August 10, 2006, Daejan had "effectively closed its mind to any new observations on the choice of contractors, and that the lessees had reasonably formed the view that this was so".

46 It remained for the LT to consider whether the respondents had been prejudiced by the curtailing of consultation:

> "57. ... in particular whether the estimates did in fact disclose any new material, and whether the lessees would have had anything new to say."

The LT remarked on the LVT dismissing this inquiry as speculative, echoing the language used in *Grafton*. The LT, however, underlined that the circumstances in *Grafton* were different: there were many more lessees, not all represented by the main group and it could not be said that all the same information had been made available in another form.

47 After a somewhat critical review of the evidence and submissions as to prejudice, the LT expressed its own conclusions as follows:

> "61. We have not found this an easy case. Although the LVT was entitled to find a material breach of the regulations, the evidence of actual prejudice is weak. However, we remind ourselves that we are reviewing their decision, not substituting our own judgment. It is common ground that we can only interfere if the LVT has gone wrong in principle, or left material factors out of account, or its balancing of the material factors led it to a result which was clearly wrong. The LVT was in our view entitled to regard this as a serious breach, rather than a technical or excusable oversight. It involved a failure by a corporate landlord to ensure that those responsible in their office for the stage 2 consultation properly understood its requirements and its significance. The result was that the lessees' statutory right at stage 2, to make further representations following examination of the estimates, was nullified.
> 62. As to prejudice, the tribunal was entitled to start from the position that, given the seriousness of the breach, it was not for the lessees to prove specific lack of prejudice. It was enough that there was a realistic possibility that further representations might have influenced the decision. We bear in mind that, as is clear from the tender report, Mr Harris' decision to recommend Mitre in preference to Rosewood was a very close one. Although the issue was raised in Ms Marks' letter of 14 July, she made clear that it was an interim comment, pending access to full information. The lessees were entitled to proceed on the basis that they would have a further opportunity to present their case in its strongest terms and in the light of the full information; and that, given the marginal difference between the two tenders, they might be able to persuade the landlord to change its mind. In these circumstances, we are unable to say that [the] LVT has erred in principle, or that its decision was clearly wrong. The financial consequence may be thought disproportionately damaging to the landlord, and disproportionately advantageous to the lessees, but, as we have said, that is the effect of the legislation."

Issue (I): financial consequences

48 *(1) The rival cases:* For *Daejan*, Mr Dowding submitted that both the LT in *Grafton* and the LT (and LVT) in this case had fallen into error in treating the financial consequences of the grant or refusal of dispensation as irrelevant. The "strict" approach adopted in these cases resulted in "draconian consequences". The purpose of the dispensing power in s.20ZA(1) was to ensure that the landlord did not suffer the penalty imposed by s.20 except where it was reasonable that it should do so.

49 Mr Dowding emphasised that the discretion to grant dispensation under the Act as amended was broader than under the predecessor provisions. Dispensation could now be granted even if the landlord had conducted itself unreasonably. The statute conferred a broad dispensing power and it was not for the Court to restrict it. The consequence of doing so was that each tenant obtained the benefit of all the work done for his benefit in excess of £250 for nothing; yet service charges were the mirror images of the landlord's obligation to repair.

50 Importantly, Mr Dowding said this: it would be impractical to have regard to the circumstances of the individual landlord and tenants; his submissions did not require it. Instead, he contended that the size of the sum itself (here hundreds of thousands of pounds) should be taken into account.

51 The exercise of the discretion (namely, whether it was reasonable to grant dispensation) required a balancing act. As a matter of fairness and principle, substantial financial consequences, albeit not decisive, had to be relevant and should be weighed in the scale. The weight to be given to those consequences depended on the circumstances of each case. As Mr Dowding put it:

> "There is clearly a difference between a case where there is a modest degree of prejudice to the tenants and a huge financial loss to the landlord, and one where there is a modest degree of prejudice to the tenants and a modest financial loss."

52 For completeness, Mr Dowding did not quibble with the outcome in *Grafton*. The complete failure to follow Stage 2 in that case outweighed all other considerations.

53 In the upshot, the LT and LVT had misdirected themselves in law by treating the financial consequences of the refusal of dispensation as irrelevant and this Court should now itself exercise the s.20ZA(1) discretion.

54 For *the respondents*, Mr Rainey's submissions (supported by Mr Fieldsend) proceeded as follows. The LT and the LVT had rightly treated the financial consequences of the refusal of dispensation as irrelevant; there had been no error of law or misdirection. Daejan had approached the consultation requirements as "an annoying and artificial set of legal hoops to be jumped through prior to getting on with doing whatever works that a landlord had decided to do"; these submissions betrayed a misconception. Statutory consultation was a substantive right of a tenant; the reason was that X (the tenant) was being asked to pay for expenditure decided upon by Y (the landlord); hence the legislative scheme. The landlord could do what it liked but if it wished to be reimbursed by the tenants, then it was obliged to comply with the consultation requirements. That did not mean that the landlord was obliged to follow the views expressed by the tenants; but it did mean that the landlord had to pay due regard to the consultation. The consultation was an end in itself and the landlord's failure (if significant) to comply with the consultation requirements, by itself gave rise to prejudice to the tenants. When, as here, consultation was curtailed, the tenants lost the opportunity to consider making representations and to have those considered by the landlord.

55 As to where the line was to be drawn, Mr Rainey submitted that *circumstances* rather than *consequences* were relevant to the decision whether to grant or refuse dispensation. Thus, the circumstances going to the integrity of the consultation process were relevant; by contrast, the consequences flowing from the decision to grant or refuse dispensation were not. It was common ground that the test for

dispensation under the Act as amended was wider than the previous test and the respondents were not seeking to circumscribe it; but they did seek to identify what was relevant and irrelevant.

56 Mr Rainey suggested the following as examples of when dispensation with the consultation requirements might be granted: (1) the need to react to an emergency; (2) a situation where (realistically) only one contractor could undertake repairs to (say) a particular type of boiler or lift. In such circumstances, compliance with the consultation requirements would not be practical.

57 There was nothing in the point that if dispensation was refused the excess of the cost of the works over £250 per tenant would fall to be borne by the landlord; the obverse was that if dispensation was granted the tenants would be liable for that amount. Such consequences were simply what the legislative scheme provided.

58 If wrong in these submissions, then the respondents invited the Court to remit the matter to the LVT, rather than seeking to exercise the s.20ZA(1) discretion afresh.

59 *(2) Discussion:* Having introduced this Issue at some length, my conclusions can be relatively briefly stated. With respect to Mr Dowding's forcefully presented submissions, I have a clear preference for those of the respondents. The Issue is one of statutory construction. In my judgment, as a matter both of context and the wording of the statute, the financial effect of the grant or refusal of dispensation is an irrelevant consideration when exercising the discretion under s.20ZA(1). My reasons follow.

60 First, it is instructive to identify the answer for which Daejan contends. It might have been expected that the attraction of the argument for weighing financial consequences in the balance lay in their impact on the individual parties—but that is not Daejan's case. Indeed, it is noteworthy that Mr Dowding drew back from contending that the financial impact of the grant or refusal of dispensation on the individual landlord and tenants should be considered. As a matter of practicality, Mr Dowding was right to hold back—even though, in logic, his submissions pointed to such an inquiry. The burden imposed on LVTs undertaking an inquiry into the financial circumstances of any particular landlord would be considerable. All the more so, in that any such inquiry would necessitate a similarly burdensome exploration of the financial circumstances of the tenants in question. However, Mr Dowding's pragmatic restraint means that he is left with the argument that the size of the sum is, by itself, relevant to the grant or refusal of dispensation. I am wholly unable to accept that submission, entailing, as it does, taking account of the sum involved but not the effect on the parties. The submission must contemplate that the higher the service charge, the more readily dispensation should be granted. Whether or not Mr Rainey was right to characterise such an outcome as "perverse" it would, on any view, be a curious outcome—and not one which I would be inclined to spell out of s.20ZA(1) unless driven to such a conclusion. With rather more plausibility, it could be argued that the higher the sum involved, the more necessary it is for consultation requirements to be observed.

61 Secondly, regard must be had to the statutory language. Here, I respectfully agree with and adopt the LT's observations at [40] (set out above). Section 20ZA(1) gives the LVT power to "dispense with ... the consultation requirements", not, as the LT put it, "with the statutory consequences of non-compliance". Here too, the respondents' submission had force; the legislature did not employ the well-known drafting technique of granting relief from sanctions. Accordingly and, as it seemed

to me, plainly, the focus of the statute is on the consultation requirements not the consequences of non-compliance. At least generally (it would be unwise to be unduly rigid), the distinction drawn by the respondents—between the relevance of circumstances going to the integrity of the consultation process and the irrelevance of the consequences flowing from the grant or refusal of dispensation—seems well-founded.

62 Thirdly, if perhaps a matter arising both under this Issue and Issue (III) (Prejudice), the legislative focus on the consultation requirements serves to highlight that a proper consultation process comprises the substance of the scheme. Prima facie therefore, curtailment of consultation (at least unless de minimis) involves substantial non-compliance with the consultation requirements. That is not to elevate *process* above *substance*—something I would be most reluctant to do—and against which the LT properly cautioned at [41]. This is not, as the LT remarked, about creating "an obstacle race". It is instead to identify and from the outset, the true nature of the statutory purpose and substantive considerations in this area. Once again, this suggests that (other than as part of the context in which the matter is to be considered) the financial consequences of the grant or refusal of dispensation are unlikely to be relevant to the exercise of the discretion under s.20ZA(1); in any event, that non-compliance with the consultation requirements may involve significant financial loss is, by itself, no more than an intrinsic part of the statutory scheme.

63 Fourthly, some examples of when dispensation might be granted can readily be postulated. They are, it should be emphasised, no more than examples; there is no closed list. So, all other things being equal, the following situations might commend the grant of dispensation:

i) The need to undertake emergency works;
ii) The availability, realistically, of only a single specialist contractor;
iii) A minor breach of procedure, causing no prejudice to the tenants.

It may be noted that none of these examples undermines the integrity or importance of the consultation process.

64 Fifthly, I do not see this approach as in any way failing to give effect to the width of the dispensatory discretion conferred by the Act as amended. For instance, under the current (amended) statutory provisions, the landlord may obtain dispensation in any of the examples given in the preceding paragraph, even if it has not "acted reasonably". But, granting that the reasonableness of the landlord's conduct is no longer a condition precedent for an order for dispensation, it does not at all follow that the financial effects of a refusal of dispensation are or ought to be a relevant consideration to the exercise of the statutory discretion.

65 For all these reasons, I am amply satisfied that the LT in *Grafton*, the LVT and the LT in this case did not err in law or misdirect themselves in treating the financial consequences of the grant or refusal of dispensation as irrelevant to the exercise of the discretion under s.20ZA(1). To the contrary, I would uphold their approach to this Issue.

Issue (II): the nature of the landlord

66 Upon reflection, this Issue can be taken extremely briefly. In its decision, the LT referred to this question at [43] and touched upon it at [61]. Rather seizing on

these two mentions, Mr Dowding submitted that the nature of the landlord was irrelevant; there was no warrant for treating a corporate (or local authority) landlord more rigorously than a lessee owned or controlled landlord. On the footing that the legislative provisions were not penal and the focus was on the prejudice caused to tenants by the landlord's non-compliance with the consultation requirements, there was no basis for any such distinction, turning on the nature of the landlord. The LT had accordingly erred in law and/or misdirected itself.

67 With respect, I cannot agree.

i) For my part, I do not think that the LT was saying more than (as Sedley L.J. observed in argument) "context is everything"; that is certainly the impression created by the opening sentence of [43]. If so, the observations are unexceptionable and this Issue simply falls away.

ii) If it is necessary to go further, then cases can be envisaged where a less rigorous approach may be justified in respect of lessee owned/controlled landlords. So, where the lessees are their own landlord, the consultation requirements have to be considered against the background that they are spending their own money; it may no longer be the case of X spending Y's money. Furthermore, in such a situation, there may be a greater likelihood of canvassing the relevant information by way of informal or extra-statutory consultation.

iii) Even, however, if the LT was in error in contemplating a less rigorous approach in (some) cases where the tenants are their own landlord, the point does not go anywhere. It does not follow that the LT erred in holding that the consultation requirements were to be applied according to their terms in the case of a corporate (or local authority) landlord. There is certainly no suggestion in its decision that the LT applied a *more* rigorous standard than that provided for in the statute.

iv) Finally, if error there was in this regard, it was an error on the part of the LT – there is no hint of any such "error" in the August decision of the LVT. For this reason too, as it seems to me, the point goes nowhere as a self standing ground of appeal.

Issue (III): prejudice

68 *(1) The rival cases:* I focus here on the curtailing of consultation, the issue which most concerned the LT.

69 For *Daejan*, Mr Dowding drew attention to the differences between this case and *Grafton*. In *Grafton*, Stage 2 had been omitted altogether; here it had not been. Moreover, in *Grafton* there had been a much larger number of tenants, so (as the LT itself observed) there could be no question of all the information having been made available in another form. In those circumstances, Mr Dowding, as before, did not quarrel with the outcome in *Grafton*.

70 In the present case, however, Mr Dowding contended that there was nothing further to be said or considered; in a letter dated July 14, 2006, Ms Marks had said all that could be said based on the information in Mr Harris's tender report. There was no basis for supposing that if the consultation had not been curtailed it would have made any difference. There were only five respondents. Accordingly, Mr Dowding submitted that the LVT (and LT) should have answered the "what if"

question. If that question had been posed, it could not have been answered as the LT did at [62] (a conclusion in any event unsupported by any fact finding of the LVT). The only conclusion which could reasonably have been reached was that the respondents had not proved any prejudice flowing from Daejan's non-compliance with the consultation requirements. It was, however, for the respondents not simply to assert but to prove prejudice: see, the decision of the LT in *Eltham Properties Limited v Kenny* [2008] L. & T.R. 14 at [29]–[30], together with the observations of LT in this case at [42]. In any event and whatever the incidence of the burden of proof, there had been no prejudice. If right thus far, then there was no proper basis for the LVT or LT refusing to grant dispensation; their decisions to refuse dispensation were either perverse (within the meaning of Edwards v Bairstow, above) or disclosed an error of law.

71 For *the respondents*, Mr Rainey submitted that if this Issue turned on the burden of proof, then as Daejan was seeking dispensation, it was for Daejan to prove that its non-compliance had not cause any prejudice so that it was reasonable for dispensation to be granted; it was not for the respondents to prove specific prejudice flowing from Daejan's non-compliance with the consultation requirements. In any event, the curtailment of the consultation process amounted to substantial prejudice; the respondents had been deprived of the opportunity to make representations and to have them considered. It was unnecessary to speculate as to the outcome of such further consultation had it taken place; a landlord could always say that nothing further said by the tenants would have made any difference. So far as concerned other communications between Daejan and the respondents (even assuming that they were capable of curing the position), these could not save the day for Daejan as the full facts had not been available until too late.

72 *(2) Discussion:* For my part, I readily accept Mr Dowding's submission, as far as it goes, that significant prejudice to the tenants is a consideration of the first importance in exercising the dispensatory discretion under s.20ZA(1). I respectfully and entirely agree with the observations to this effect in *Eltham* (above), at [29]–[30], *Grafton*, at [33] and the LT in this case, at [41]–[42].

73 I part company, however, with the Daejan case when it comes to determining whether the respondents did suffer significant prejudice in consequence of Daejan's non-compliance with the consultation requirements. In my judgment, Daejan's non-compliance in curtailing consultation constituted a serious failing and did cause the respondents serious prejudice.

i) As already emphasised, a proper consultation process is of the essence of this statutory scheme, devised as it is to protect the interests of tenants such as the respondents.

ii) In my judgment, the LT and the LVT were entirely right to treat the curtailment of the consultation process as a serious failing. It is striking that the observation of the Daejan legal representative at the LVT hearing in early August 2006, that Mitre had already been awarded the contract for the works, was never corrected; to the contrary, it was confirmed in Mr Shevlin's letter of the August 10, 2006. Even assuming this failing to be the result of a lack of understanding or ineptitude rather than a flouting of the consultation requirements, it is impossible to view it as a technical, minor or excusable oversight.

iii) Against this background, I can detect no error of law or misdirection in the LVT's refusal to speculate (at [98] of its August decision) as to what might have been the outcome had the consultation been allowed to run its proper course. Indeed, given the seriousness of non-compliance in this case, I would endorse the LVT's approach of treating the respondents' loss of opportunity (to make further representations and have them considered) as itself amounting to significant prejudice. On any view, as it seems to me, that was a conclusion to which the LVT was entitled to come.

iv) This view is reinforced by reflection on the rival contention advanced by Daejan. In many cases, a landlord could readily assert that further consultation would have made no difference. Disproving such assertions would inevitably give rise to an invidious exercise in speculation, quite apart from difficulties of proof (if and insofar as a burden rests on the tenants in this regard—see below). While there will no doubt be some instances where a landlord may demonstrate that a failure to comply with the consultation requirements was, on the facts, such as to make no difference and to give rise to no prejudice to the tenants, arguments of this nature need careful scrutiny; there would otherwise be a risk of undermining the purpose of the statutory scheme or, as Pitchford L.J. remarked in argument, a "premium on recalcitrance". Suffice to say that on the facts of this case, involving a serious failing on Daejan's part, I am not at all attracted to the argument.

v) With respect to Mr Dowding's argument, I do not see a tension between the LVT's conclusion (that the curtailment of the consultation itself amounted to significant prejudice) and the observations of the LT, already referred to, as to the importance of prejudice to the tenants, in *Eltham*, *Grafton* and in this case. The conclusion of the LVT involves a finding that there has been significant prejudice. Moreover, given that the LVT found as a fact that the extra-statutory consultation had not made good Daejan's failure to comply with the Consultation Regulations, nothing turns on the difference between the number of tenants in this case as compared with the much larger number in *Grafton*.

vi) Accordingly, the LVT was amply justified in refusing dispensation in this case. Its conclusion betrays neither any error of law nor perversity.

74 Having reached this view (which is sufficient to decide Issue (III)), it is strictly unnecessary to decide whether the LT was correct to say (at [62]) that further representations might have influenced the Daejan decision as to the award of the contract for the works. For the avoidance of doubt, however, I am not at all persuaded that the LT fell into error. I acknowledge the difficulty of pointing in terms to a finding of fact by the LVT supporting the LT's observation. That said, I am satisfied that the LT's conclusion involved no more than the drawing of a permissible inference from the LVT's findings.

75 Accordingly and whether by the route followed by the LVT or that taken by the LT at [62] (if and insofar as it differed), I entertain no doubt of the correctness of the LT's conclusion—namely that it was unable to say that the LVT had erred in principle on the question of prejudice, or that its decision was clearly wrong.

76 For completeness, it remains simply to mention a number of additional matters:

i) First, in agreement with both the LT (at [40]) and the LVT (at [101]), I do not think that Daejan's offer of a £50,000 "discount" off the price of the works, provides a ground for the grant of dispensation. I incline to the view that, as the LT reasoned, the statutory scheme does not provide for such an alternative; however, even if it was open to Daejan to avert the refusal of dispensation by making a suitable offer of this nature, I agree with the LVT that the only offer on the table did not suffice.

ii) Secondly, there was some debate as to the burden of proof with regard to prejudice suffered by the respondents. As will be apparent, it did not seem to me that the outcome in this appeal turned on the incidence of the burden of proof. Insofar as it rested on the respondents and as already discussed, they have satisfied the burden. I am accordingly reluctant to express a concluded view on a point, not without complexity, which does not require resolution in this case.

iii) Thirdly, in the light of the decision to which I have come on the curtailment of consultation, it is unnecessary to say anything of the additional points canvassed in the respondent's Notice.

Overall conclusion

77 For the reasons set out, Daejan's case fails on each of the principal Issues. I would dismiss this appeal.

PITCHFORD L.J.:

78 I agree with the judgments of both Gross L.J. and Sedley L.J. and would dismiss this appeal.

SEDLEY L.J.:

79 I agree with the reasoning and conclusions of Lord Justice Gross and, like him, would dismiss this appeal.

80 At [19]–[22] Gross L.J. considers the arguments about the precise role of the appellate bodies below this one. On the face of them the successive roles of the LT (that is to say the Lands Tribunal, now reincarnated as the Upper Tribunal) and this court are identical: each is concerned with whether the LVT made an error of law, and there is no apparent reason why either appellate tier should defer to the view of the law reached by the tribunal below it.

81 But these are early days in the new tribunal system. For reasons touched on in *R (Cart) v Upper Tribunal* [2010] EWCA Civ 859 (where the Upper Tribunal had resolved an issue of natural justice by asking simply whether substantial prejudice had resulted), it is distinctly possible that a body of administrative law will develop which is not entirely lawyer's law: see *Cart* at [42]–[44]. It will always, I hope, be bounded by principles of legality and fairness of which the High Court is the custodian, but within that perimeter individual chambers may develop their own understanding of the law and practice which are peculiar to their jurisdiction.

82 This is why I would endorse the way Gross L.J. resolves the argument at [21](ii) in relation to the view reached by the Tribunal. It may follow that the Lands Tribunal needed at [44] of their decision to explain why their view that most of the stage 2 shortcomings "were minor and did not cause any significant prejudice to the lessees" was not their own re-evaluation of the facts found by the LVT. On

the other hand, their conclusion at [61] (see [47] above) seems to me a model of how the Tribunal's appellate function is to be carried out.

83 Turning to the substantive questions of law, I would emphasise (what must have been well to the forefront of the minds of the successive tribunals) that the tenants of a block of long-leasehold flats like Queens Mansions have a real interest not only in the cost but in the quality of major maintenance works. As the sign in the Fleet Street shirtmaker's window used to say, there is nothing that someone else cannot do a little cheaper and a little worse. This is why it was no answer to say that Daejan, albeit prematurely, had accepted the lowest tender. Like Gross L.J. (see [73] above), I would uphold the finding that cutting the tenants out of the consultation was a serious and a prejudicial failure.

84 Lastly, it is relevant to examine the consequences of Daejan's casuistic submission that the magnitude of the sum involved should alone be the determinant of whether it is reasonable to dispense with compliance. Daejan, as it happens, is part of a large and prosperous group of property companies which would have difficulty in pleading poverty; but Mr Dowding would not be thanked by a small and struggling lessor if he were to succeed in this aspect of his argument.

85 Beyond this, divorcing the cost from the means of the paying party would leave the LVT with the task, plainly outside the statutory intent, of setting a cash tariff. If it were to hold here, for example, that because the contract price was over £250,000 consultation should be dispensed with, it would have in fairness to do the same in all other cases. By parity of reasoning, a cut-off point would come, somewhere down the monetary scale, at which the LVT declined to grant dispensation, again necessarily in all cases. What would then happen to cases falling in the gap between the two? The answer, happily, is that this adjudicator's nightmare has no foundation in legal reality. What may make dispensation reasonable, as Gross L.J. has explained and as the tribunals below correctly understood, has to do with the circumstances in which the omission has occurred and its impact on the purposes of the consultation process.

86 Lastly, I would add a word to what Gross L.J. says in [76](ii) about the burden of proof. It is common for advocates to resort to this when the factual case is finely balanced; but it is increasingly rare in modern litigation for the burden of proof to be critical. Much more commonly the task of the tribunal of fact begins and ends with its evaluation of as much of the evidence, whatever its source, as helps to answer the material questions of law. In nine cases out of ten this is sufficient to resolve the contest. It is only rarely that the tribunal will need to resort to the adversarial notion of the burden of proof in order to decide whether an argument has been made out, and tribunals ought in my view not to be astute to do so: the burden of proof is a last, not a first, resort.

Appeal dismissed

EASTERN POWER

~~EDF ENERGY~~ NETWORKS (EPN) PLC v BOH LTD

COURT OF APPEAL (CIVIL DIVISION)

Sedley, Rimer and Black L.JJ.: January 26, 2011

[2011] EWCA Civ 19; [2011] L. & T.R. 15

H1 *Merger—Acquisition by tenant of freehold of part of land demised by tenancy—Whether intention to merge interests to be presumed—Whether interests of co-reversioners relevant to presumption—Landlord and Tenant Act, Pt II—Notice to terminate tenancy given under s.25—Definition of "landlord" in s.44(1A)—Construction—Human Rights Act 1998—Article 1 of the First Protocol to the Convention—Whether s.44(1A) to be read as excluding a reversioner who is also the tenant.*

Summary of decision

H2 Where a tenant acquires the reversionary interest of part of the land let under the tenancy and there was no evidence as to whether a merger of the freehold and leasehold interests was intended, a merger will not be presumed if it is not in the tenant's interests, even if that was or might have been contrary to the interests of the tenant's co-reversioners. The tenant's claim in the alternative that s.3 of the Human Rights Act 1998 required that the tenant be excluded from the definition of "landlord" in s.44(1A) of the Landlord and Tenant Act 1954 for the purposes of giving a notice to terminate the tenancy under s.25 of that Act could not apply to a notice given at a time when the tenant was not also a reversioner, or to notices that did not extend to all of the land held under the tenancy.

Parties

H3

Appellants (defendants below):	BOH Ltd (BOH) and Layhawk Consultants Ltd (LC).
Respondent (claimant below):	Eastern Power Networks Plc (formerly EDF Energy Networks (EPN) Plc) (EDF).

Facts

H4 By a lease dated February 20, 1953, property comprising plots 31, 2 and 26 at the Wembley Stadium Trading Estate, North London, was let to the predecessor of EDF for a term of 42 years, expiring on June 23, 1994. The tenant built and operated an electricity sub-station on plot 2. The demised premises were separated from the public highway by plot 20 but the lease conferred rights of way over plot 20 and also to lay cables under the highway and plot 20, such cables passing under plot 26 to the sub-station on plot 2. Part of the demised property was occupied by the tenant for the purposes of a business carried on by it and Pt II of the Landlord

and Tenant Act 1954 applied so that the tenancy would only expire if terminated in accordance with that Act. By 1988, title to the freehold interest in the plots had become divided, so that plot 2 was owned by D, plot 26 was owned by E and plot 31 (together with plot 20, which was not demised by the lease but was subject to the appurtenant rights it created) was owned by F. On August 27, 1993, D purported to serve a notice under s.25 of the 1954 Act terminating the tenancy on June 24, 1994, although it was uncertain if the notice related just to plot 2 or to all of the land demised by the lease. EDF served a counter-notice indicating that it was not willing to give up possession but did not apply to the court for an order for the grant of a new tenancy. EDF and D negotiated and on December 23, 1993, D transferred the freehold interest in plot 2 to EDF. In June 2002, the freehold of plots 20 and 31 was acquired by BOH and in January 2004, LC acquired the freehold of plot 26. BOH and PC disputed that EDF continued to have rights under and over plots 26 and 20 and EDF commenced proceedings for a declaration. It was agreed that EDF's rights arose only under the lease and were not rights appurtenant to the freehold of plot 2. BOH and LC claimed that the lease had been terminated by the s.25 notice served by D in 1993, or that EDF was estopped by the service of its counter-notice from disputing the validity of the notice, or that the tenancy had merged in respect of plot 2 on the acquisition of the freehold by EDF in 1993. The trial judge held that the s.25 notice must be given by all reversioners upon the lease, (as had since 2004 been made clear by s.44(1A) of the 1954 Act, which has been in force since June 2004); rejected the merger and other claims and made a declaration in favour of EDF. BOH and LC appealed to the Court of Appeal against the rejection of their merger claim and also sought to rely on a new claim that, if there was no merger, s.3 of the Human Rights Act 1998 required s.44(1A) of the 1954 Act to be read as excluding from the definition of "landlord" any person who was also the tenant. The court reserved judgment and, after the hearing, an unidentified person informed the court by email on behalf of BOH and LC that three further notices had been given in 2002 but those notices had not extended to plot 2.

H5 **Held,** dismissing the appeal:

H6 (1) The rule at law was that if a lease and its reversion became held by the same person in the same right the lease would merge with the freehold and would be extinguished. The rule in equity (which, by s.185 of the Law of Property Act 1925, now prevails) is that it is open to that person to form an intention, and declare accordingly, that the interests would not merge. Where the intention was not expressly evinced, and where there was no other evidence of such an intention, equity presumed against any intention for a merger if it would be against the person's interest.

H7 (2) BOH and LC argued that where the tenant was one of a number of reversioners on the lease, it should be presumed to have intended a merger if that was in the interests of the co-reversioners, even if its own interest would be directly against it. That argument was contrary to principle and authority was, therefore, wrong. The trial judge had been correct to consider first, whether there was any evidence of any intention on the part of EDF as to a merger and, if there was none, second, whether it was or was not in EDF's interests that there should be a merger and, if it was not, to conclude that he should presume that no merger was intended. That the absence of a merger was or might have been contrary to the interests of

the co-reversioners is irrelevant: *Ingle v Vaughan Jenkins* [1900] 2 Ch. 368 and *Capital and Counties Bank Ltd v Rhodes* [1903] 1 Ch. 631 applied.

H8 (3) BOH and LC's argument under the Human Rights Act was that if EDF was a necessary party to a notice to terminate the lease under s.25 of the 1954 Act, the Act must be read so as to exclude EDF from the definition of "landlord" in s.44(1A) so as not to impair the rights of BOH and LC to the peaceful enjoyment of their possessions under art.1 of the First Protocol to the Convention. But the only s.25 notice in issue at the trial had been given by D in 1993 when EDF was not one of the reversioners. BOH and LC had not appealed against the trial judge's decision that D's notice had been invalid and the Human Rights argument could not apply to that notice.

H9 (4) BOH and LC had conceded at the hearing that a s.25 notice must extend to all of the land held under the tenancy and the notices forwarded to the court after the hearing were therefore irrelevant.

H10 **Legislation referred to:**
Landlord and Tenant Act 1954 s.44(1A)
Human Rights Act 1998 s.3
Law of Property Act 1925 s.185

H11 **Cases referred to:**
Capital & Counties Bank Ltd v Rhodes [1903] 1 Ch. 631 CA
Dodson Bull Carpet Co Ltd v City of London Corp [1975] 1 W.L.R. 781; [1975] 2 All E.R. 497; (1975) 29 P. & C.R. 311 Ch D
Ingle v Vaughan Jenkins [1900] 2 Ch. 368 Ch D
Jelly v Buckman [1974] Q.B. 488; [1973] 3 W.L.R. 585; [1973] 3 All E.R. 853 CA (Civ Div)
Nevill Long & Co (Boards) Ltd v Firmenich & Co (1984) 47 P. & C.R. 59; (1983) 268 E.G. 572 CA (Civ Div)
Southport Old Link Ltd v Naylor [1985] 1 E.G.L.R. 66; (1985) 273 E.G. 767
Thorne v Cann [1895] A.C. 11 HL

H12 For further details of the law in this area see *Woodfall's Law of Landlord and Tenant*, Vol.1, para.17.049:0 "Merger".

H13 *M. Warwick* (instructed by Colman Coyle LLP) for BOH and LC.
C. Stoner QC (instructed by Forsters LLP) for EDF.

JUDGMENT

RIMER L.J.:

Introduction

1 This appeal, brought with the permission of Mummery L.J., is against an order dated December 4, 2009 made by Mr Edward Bartley Jones QC sitting as a Deputy High Court Judge in the Chancery Division. The appellants (defendants to the claim) are BOH Ltd (BOH) and Layhawk Consultants Ltd ("Layhawk"). The respondent (the claimant) is Eastern Power Networks Plc, the public utility supplier. It was formerly known, and sued, as EDF Energy Networks (EPN) Plc and, like

counsel in argument, I will call it EDF. Mr Warwick represented the appellants before us but not before the judge. Mr Stoner QC represented EDF both before us and below. The neutral citation number for the judge's judgment is [2009] EWHC 3193 (Ch) and it is reported at [2010] L. & T.R. 14.

2 The case concerns an approximately rectangular area of land bounded on the south by Fourth Way, a public highway, on the Wembley Stadium Trading Estate. Each party owns the freehold of part of the land. EDF owns plot 2, upon which it operates an electricity sub-station. Plot 26 (owned by Layhawk) and plot 20 (by BOH) lie between plot 2 and Fourth Way. The issue in the claim was whether EDF has: (i) rights of access and egress between plot 2 and Fourth Way over plots 20 and 26; and (ii) a right to maintain in position in plot 20 various underground cables that pass through plot 26 to the plot 2 sub-station. BOH and Layhawk deny that EDF has any such rights and claim, by virtue of their ownership of plots 20 and 26 respectively, to be entitled to prevent EDF's claim to exercise such rights. The reality is that they wish to exploit their plots as ransom strips.

3 If EDF does have such rights, it is only by virtue of its title as the tenant of plot 2 under a 1953 lease that created a 42-year tenancy of plots 2, 26 and 31. The critical question before the judge was whether EDF's tenancy of plot 2 was continuing in existence under the provisions of Pt II of the Landlord and Tenant Act 1954. That depended on whether or not, as BOH and Layhawk asserted, EDF's plot 2 tenancy had merged in the freehold of plot 2 that EDF acquired in 1993 and had so become extinguished. The judge accepted EDF's submission that it had not and that, as tenant of plot 2, it continued to enjoy the appurtenant rights over plot 20 conferred by the 1953 lease, as well as its rights as tenant of plot 26. He granted a declaration accordingly. By their first ground of appeal, BOH and Layhawk challenge that conclusion.

4 By their second ground of appeal, BOH and Layhawk (which have changed their solicitors and counsel since the trial) have raised a new fallback argument not argued below. It arises under the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It is said that, if there has been no merger resulting in the extinguishment of EDF's plot 2 tenancy, the effect of the ordinary interpretation of s.44(1A) of the Landlord and Tenant Act 1954 is potentially to disadvantage the appellants in a manner likely to impair their right to the peaceful enjoyment of their possessions under art.1 of the First Protocol to the Convention. By this ground of appeal the appellants assert that s.3 of the Human Rights Act 1998 requires s.44(1A) so to be read as to avoid any such impairment.

The facts

5 A fuller account of the facts is as follows. An understanding of them requires the reader to imagine an approximately rectangular area of land comprising four approximately horizontal plots each extending its full width. The northernmost plot is plot 31, a thin strip of just a few feet in depth. Plot 31 abuts plot 2, by far the largest plot and to its immediate south. Plot 2 abuts plot 26 (a strip of about 13ft in depth), which is to its south and which in turn abuts plot 20, a strip of rhomboid shape. Plot 20 abuts Fourth Way.

6 By a lease dated February 20, 1953 ("the lease") the British Transport Commission (the BTC) leased plots 31, 2 and 26 (not plot 20) to the Eastern Electricity Board (the EEB, the predecessor of EDF) for a term of 42 years from

June 24, 1952 and thus expiring on June 23, 1994. The rent was £25 a year, payable quarterly on the usual quarter days. Clause 2(7) restricted the use of the demised premises to that of an electricity sub-station in connection with the EEB's undertaking. Clause 2(6) prohibited the erection of anything other than an electricity sub-station on the demised premises and required the EEB to fence off the demised premises from the adjoining land. The EEB built an electricity sub-station on plot 2. Once built, the sub-station was enclosed by fencing around plot 2, with plots 31 and 26 remaining outside it (this is not what cl.2(6) required but nothing turns on it). The demised premises were separated from the public highway by plot 20. The lease, however, conferred rights of way over plot 20 and also to lay cables etc. under the highway and plot 20 (as they were), such cables passing under plot 26 to the plot 2 sub-station. The cables remain in position to this day. The BTC was the freehold owner of a substantial area of land, including Plot 20 and what is now Fourth Way, and so was able to grant such rights.

7 The sub-station is an important one. Without it there would be no power for a radius of about three miles. It serves as a back-up supplier to Wembley Stadium, but EDF's future plans are that the Stadium should be fully supplied from it, a proposal which will involve the installation of more cables to the sub-station and a need for EDF to have a right of immediate access to it.

8 The title to the lease is and has been since 1953 a registered one (MX 269363). Subject to the exclusion from it in 2003 of a small, approximately square section in the north-eastern corner of plot 2 (referred to in the judgment below and in this one as the "X" land), EDF has been at all material times, and remains, the registered proprietor with a good leasehold title. The story relating to the "X" land is immaterial to the issues before us.

9 In March 1984 Fastiron Ltd acquired from the British Railways Board (the BTC's successor): (i) the freehold reversion expectant upon the determination of the lease; and (ii) the freehold of plot 20. Fastiron thus became EDF's landlord, although it did not remain so for long.

10 In November 1985 Fastiron transferred its freehold estate in plot 2 to Racal Properties Ltd, and Racal became registered as proprietor with title absolute (NGL 541578). On August 11, 1987 Racal transferred that estate to Leonard Dormer, who became the registered proprietor.

11 Also in November 1985 Fastiron transferred to Racal its freehold estate in plot 26, and Racal became the registered proprietor with title absolute (NGL 541577). In March 1988, following two further transactions, Electrical Distributing Company Ltd (EDC) became the registered proprietor.

12 The position by the spring of 1988 was therefore that the title to the freehold reversion expectant upon the determination of the lease was as follows: (i) Fastiron owned plot 31 (and plot 20, which was not demised by the lease but was subject to the appurtenant rights it created); (ii) Mr Dormer owned plot 2; and (iii) EDC owned plot 26. EDF remained the tenant.

13 The property comprised in the tenancy created by the lease was or included premises occupied by EDF for the purposes of a business carried on by it. The tenancy was therefore one to which Pt II of the Landlord and Tenant Act 1954 Act applied (s.23). Although the tenancy was, by its terms, due to expire by effluxion of time on June 23, 1994, the effect of s.24(1) was that (subject to s.24(2)) it would not then come to an end but would only do so if terminated in accordance with Pt II.

14 In 1992 EDF commenced negotiations with Mr Dormer for a consensual renewal of the tenancy (or perhaps of just that part of it comprising plot 2: the explanatory material is not before us and the position was not explained). On August 27, 1993 he served a notice on EDF purportedly under s.25 of the Act. It related to "BEE Primary Substation and land" (the judge perhaps regarded it as uncertain whether it purported to relate just to plot 2 or also to plots 31 and 26: see [50] of his judgment) and it purported to terminate the tenancy on June 24, 1994. It notified EDF that any application by it to the court for the grant of a new tenancy would be opposed on the grounds specified in s.30(1)(f) and (g) of the Act. EDF gave Mr Dormer a counter-notice on September 3, 1993 that, upon the termination of the tenancy, it was not willing to give up possession of the premises referred to in the s.25 notice.

15 The negotiations between EDF and Mr Dormer continued, resulting on December 23, 1993 in the purchase by EDF for £237,500, and the transfer to it by Mr Dormer, of his freehold estate in plot 2. EDF became, and has since remained, the registered proprietor of that estate (save, since 2003, for the "X" land). Thus, as from December 23, 1993, the freehold reversion immediately expectant upon the determination of the tenancy created by the lease was split between: (i) Fastiron, which owned plot 31 (and also plot 20); (ii) EDF, which owned plot 2; and (iii) EDC, which owned plot 26. EDF was therefore in the relatively unusual position of having become the freehold owner of part of the land—plot 2—of which it was also the tenant under the lease. June 23, 1994—the date specified in the lease for the termination of the tenancy—came and went. EDF had in the meantime made no application to the court for the grant of a new tenancy.

16 Further dealings with the freehold title followed. In March 1999 Containerised Storage Company Ltd ("Containerised Storage") acquired plots 20 and 31 from Fastiron and became registered as proprietor of both plots (NGL 770835). On June 30, 2002 it transferred that interest to BOH, which on December 24, 2002 became the registered proprietor under a new title number, NGL 816821), having paid £750 for its acquisition.

17 As for plot 26, in March 2002 EDC transferred it to Commercial Rental Ltd ("Commercial Rentals"), which became registered as proprietor on March 24, 2002 (NGL 514577). Plot 26 was then transferred to Layhawk, which on January 19, 2005 became its registered proprietor.

18 In [29] of his judgment, the judge described how trouble started for EDF with the March 1999 sale, with a Mr Todd engaging in increasingly aggressive correspondence. He was the sole witness at the trial for BOH and Layhawk. As I explain in [52] below, he is said to have been an agent for Containerised Storage and Commercial Rentals; and they, BOH and Layhawk were or are apparently all connected in one way or another. In [30] the judge explained the plot 31 story, which resulted in Mr Avanzato also being joined as a defendant. He is not concerned with the issues before this court and was not represented before us. In [31] the judge explained the position with regard to the "X" land.

The issues before the judge

19 The judge had before him more issues than we do. It was common ground at the trial that none of the rights of access or of cabling that EDF requires over and in respect of plots 26 and 20 is appurtenant to its *freehold* estate in plot 2. The only

case that EDF sought to make was that, despite its acquisition in 1993 of the freehold of plot 2, its *tenancy* of (at least) plots 2 and 26 created by the lease was still continuing under s.24 in Pt II of the 1954 Act: that was because it had never been terminated in accordance with Pt II. If that was correct, EDF would continue to enjoy the like appurtenant rights in respect of plot 2 as it had always done. As the judge explained, it did not matter to EDF whether its tenancy also continued in respect of plot 31; and leading counsel who appeared at the trial for BOH and Layhawk concentrated in particular on his submission that the tenancy in respect of plot 2 had terminated, to which end he argued that the s.25 notice that Mr Dormer had served in August 1993 had brought the tenancy of plot 2 to an end on June 24, 1994. That was the date specified in it for the termination of the tenancy and EDF had made no application to the court for the grant of a new tenancy. If the argument was right, it would hole EDF's case below the waterline.

20 The judge, however, rejected it. He explained that the severance into three separate ownerships of the reversion did not create three separate tenancies: despite such severance, there remained but one tenancy (*Jelly v Buckman* [1974] 1 Q.B. 488; *Nevill Long & Co (Boards) Ltd v Firmenich & Co* (1984) 47 P. & C.R. 59). He explained further that, in order to be valid, a s.25 notice had to be given in respect of the whole of the property comprised in the tenancy (*Dodson Bull Carpet Co Ltd v City of London Corporation* [1975] 1 W.L.R. 781; *Southport Old Link Ltd v Naylor* [1985] 1 E.G.L.R. 66). Yet further, he pointed out that the conventional view had always been that, in the case of a split reversion, *all* the reversioners must join in the giving of a s.25 notice if it is to be valid, a principle now expressly affirmed with effect from June 1, 2004 by s.44(1A) of the 1954 Act. In this case, however, the notice had been given by Mr Dormer alone. The judge's conclusion, in [47], was that the s.25 notice he had served was invalid because: (i) it related only to plot 2, and not also to plots 31 and 26; and (ii) it was given by only one of the three separate reversioners. There is no appeal against those conclusions. (They were alternative conclusions, each fatal, and I have mentioned that in [50] the judge perhaps evinced some uncertainty as to the extent of the land to which the notice purported to relate).

21 It was next argued that, as EDF had served a counter-notice in response to the s.25 notice indicating that it was not willing to give up possession of the premises referred to in the notice, it became estopped, by representation or convention, from denying the validity of the s.25 notice. The judge dealt with that submission between [48] and [61] and rejected it. There is no appeal against his decision in that respect either.

22 The next issue argued before the judge was that upon EDF's acquisition in 1993 of the freehold estate in plot 2, its tenancy in respect of plot 2 (although not in respect of plots 31 and 26) must be regarded as having merged in the freehold estate and so have come to an end. If so, even though its leasehold estate in plot 26 may have continued, EDF would not, as the freehold owner of plot 2, have continued to enjoy the rights over plot 20 that were formerly appurtenant to its tenancy interest in plot 2; nor could it use its rights as a tenant in respect of plot 26 to gain access to plot 2.

23 As to that argument, the judge rejected EDF's submission that a merger as to merely a part of a leasehold estate was not possible as a matter of law, and held that it was possible, including in a case where, as here, the reversion had become severed. As to the merits of the argument, he explained that at common law a

merger occurred automatically, reflecting the principle that one person cannot be both landlord and tenant of the same premises, whereas in equity (which, by s.185 of the Law of Property Act 1925, now prevails) the position was different. In equity regard must be had to the intention of the parties. The judge referred to Cozens-Hardy L.J.'s observations in *Capital and Counties Bank Ltd v Rhodes* [1903] 1 Ch. 631 at 652, that the courts of equity mitigated the rigours of the common law and:

> "... had regard to the intention of the parties, and, in the absence of any direct evidence of intention, they presumed that merger was not intended, if it was to the interest of the party, or only consistent with the duty of the party that merger should not take place."

24 The judge's conclusion was that there had been no merger. As that conclusion is challenged by the first ground of appeal, I will set out his reasoning. Having held that there was in principle no reason why there could not be a merger in respect of part of the premises comprised in a lease, he continued:

> "66. Out of this submission developed, however, a more sophisticated argument. Is it possible to merge as to part where the reversion is severed? The Lease might contain covenants which benefit ('touch and concern') other parts of the land comprised within the Lease. A lease may be granted of Plots 1, 2 and 3 (all of which are dwellinghouses) and contain a covenant, say, against keeping pigs on any part of the demised premises. The reversion then becomes severed so that there are individual reversions to Plots 1, 2 and 3. Following acquisition of the freehold reversion on Plot 1 by the tenant of Plot 1, the freehold reversioners to Plots 2 and 3 might well be concerned by merger on Plot 1 for, thereby, Plot 1 would be freed from the restraint against keeping pigs (to the detriment of the reversions on Plots 2 and 3). Equally the right to distrain for rent might be adversely affected. Thus, and taking the above example, if there be merger as to part in respect of Plot 1 the right of the severed reversioners of Plots 2 and 3 to distrain over Plot 1 would appear to be lost on merger in respect of Plot 1. And rent, (absent formal apportionment on severance of the reversion) issues out of each and every part of the demised land. Ultimately, however, I could detect no rule of law or rule of equity that the existence of a severed reversion *of itself* prevents merger as to part. Rather it seems to me that if the other severed reversioners do have a genuine interest in the issue of merger then their interest has to be taken into account in ascertaining whether the equitable presumption against merger is rebutted. It may, perhaps, be that in an appropriate case the absence of the actual consent of the other severed reversioners to the merger as to part will be sufficient so as to conclusively prevent rebuttal of the presumption against merger. In other cases, perhaps, the absence of such consent may (because the interest of the other severed reversioners in opposing merger is, effectively, de minimis) not inform at all the issue as to whether the presumption against merger is rebutted. That there should be no absolute rule of law or equity that absence of the express or implied consent of the other severed reversioners prevents merger as to part seems to me to be in accord with the equitable principles which apply to merger (namely that the same is a matter of intent).

67. I must at this stage comment on surrender as to part where there is [a] severed reversion. Can surrender as to part occur without the consent (express or implied) of all the severed reversioners? And does the answer to this question inform the issues which arise on merger as to part where there is a severed reversion? If, as EDF contend, the Lease has continued under Part II there has been a surrender of the 'X' land without the consent of the severed reversioners. By such surrender the severed reversioners lost the right to distrain upon the 'X' land and, perhaps more importantly, to enforce as to the 'X' land the user restriction contained in clause 2(7) of the Lease. Although this issue was raised in submissions, no authority was cited to me which would assist on this question. As far as I am aware it is not considered in any textbook, indeed it may never have been considered at all. It may have no practical relevance on the facts of this case. Masterdent Ltd has the benefit of being registered under Title Number NGL 8273728 as Proprietor with Title Absolute of the freehold estate in the 'X' land (entirely free of the Lease). It is difficult to see how the user covenant in clause 2(7) of the Lease confers any meaningful benefit on either Plot 31 or 26. The annual rent due under the Lease which should be apportionable to Plots 31 and 26 cannot be a matter of, at the most, a few pence or pounds and, in any event, the sub-station offers the ideal subject matter for distraint. But I do incline to the view that where there is a severed reversion a surrender as to part requires the consent (express or implied) of all the severed reversioners (save, perhaps, in a case where there has both been a formal apportionment of the rent *and* none of the covenants in the lease 'touch and concern' the reversion of the other severed reversioners). To this extent, therefore, there may be a subtle difference between the principles applying on merger (as I have analysed them above) and surrender.

68. Against this background I turn to consider whether, in respect of Plot 2, the presumption against merger is rebutted. I do not intend to deal with this matter simply on the basis of the location of the burden of proof but it does seem to me that the burden of proof on this point is borne by [leading counsel for BOH and Layhawk]. Were it relevant I would have held that BOH and Layhawk had failed to discharge that burden (since, quite understandably, they were unable to advance any evidence whatsoever of any positive intent on the part of EDF to effect merger).

69. There is no direct evidence (either way) of the intent of EDF (or of the other two severed reversioners) in respect of merger following the acquisition of the freehold of Plot 2 by EDF on 23 December 1993. The reality, on the balance of probabilities, is that neither EDF (nor the other two severed reversioners who in all probability knew nothing whatsoever about the acquisition of the freehold of Plot 2) ever directed their minds to the question of merger. Whilst it is true that following the acquisition of the freehold of Plot 2 EDF stopped paying any of the rent due under the Lease I do not think that this evidences any intent to merge. On the contrary, it seems to me to be entirely neutral since EDF (absent any formal apportionment of the rent due under the Lease following initial severance of the reversion) could have paid the whole £25 rent as reserved by the Lease to itself (a pointless circular transaction). But if any evidence of intent to merge could be derived from the non-payment of rent this is more than balanced out by the fact that no

application to merge was made by EDF when it became registered as proprietor of the freehold land comprised in Title Number NGL 541578. Thus Title Number MX 269363 continued in existence (without Plot 2 being taken out). This could not have occurred if there had been an express application for merger to HM Land Registry. On 6 November 2000 HM Land Registry wrote to EDF's solicitors indicating that, having inspected their files, HM Land Registry could not find any clear evidence as to merger one way or the other. This would clearly indicate that these files do not disclose any express application by EDF for merger. Over and above this, there is no further evidence on the issue of merger but merger was clearly to EDF's detriment granted the fact that the freehold carried no easements over Plot 20 whatsoever and that merger in respect of Plot 2 would give rise to the Harris v. Flower problem over Plot 26 (so far as use of Plot 26 for access to Plot 2 was concerned). That of itself, on the authorities, is sufficient to support the presumption against merger. Indeed it seems astounding, objectively analysed, that EDF should have paid £237,500 to Mr Dormer to acquire the freehold of Plot 2 if, thereby, it was going to lose its access and cabling rights over Plot 26 and Plot 20. To impute such an intention (absent direct evidence of intention) to EDF is absurd. When there is added into the equation the fact that the other severed reversioners in all probability knew nothing about what had occurred and, most certainly, did not give express or implied consent to merger the presumption against merger is only strengthened.

70. I can, therefore, find nothing which rebuts the presumption against merger and, so, merger did not occur."

25 Given that conclusion, the judge held that the tenancy created by the lease was statutorily continued by Pt II of the 1954 Act after the termination date of June 23, 1994 provided by the lease, which continuation applied equally to that part of the demised premises comprising plot 2. He rejected an argument that the lease had been forfeited so far as it related to plots 26 or 31. He also rejected an argument that the lease in respect of plot 26 had been surrendered, although he accepted that it had been surrendered in respect of plot 31. The result of that holding was that the lease was continuing solely in respect of plots 2 and 26. That conclusion was and is sufficient for EDF's purposes.

The first ground of appeal

26 The judge held that in a case in which the reversion becomes split between more than one reversioner, with the tenant becoming one such reversioner in respect of part of the premises, there can in principle be a merger (and consequential extinguishment) in his reversionary estate of his tenancy in that part. There is no cross-appeal by EDF against that conclusion. Mr Warwick's submission for the appellants was that where the judge fell into error was in finding on the facts that there had been no merger.

27 For the purposes of this argument, Mr Warwick accepted, indeed asserted, that in the case of a split reversion of a business tenancy protected by Pt II of the 1954 Act it will be necessary for *all* the reversioners to join in the giving of a s.25 notice directed at terminating the business tenancy in respect of the entirety of the tenanted premises; and that the refusal of any of the reversioners to co-operate in giving such a notice will prevent its being given. The need for all reversioners to join in

the giving of a s.25 notice is apparent from s.44(1A) of the 1954 Act, which has been in force since June 1, 2004 and which further explains the definition of "the landlord" in s.44(1). Section 44(1A) provides:

> "The reference in subsection (1) above to a person who is the owner of an interest such as is mentioned in that subsection is to be construed, where different persons own such interests in different parts of the property, as a reference to all those persons collectively."

28 In a case, however, in which there are, say, three reversioners of different parts of the demised premises, say R, S and T, with T also being the tenant of the whole, it is obvious that R's and S's commercial interests in giving a notice under s.25 may not be shared by T. The tenancy may, for example, be continuing under s.24 at a rent below the market rent, with the only prospect of the achieving of an increased rent being by the giving of a s.25 notice terminating the tenancy. If T then wishes to preserve his security of tenure, he will have to apply to the court for the grant of a new tenancy at a market rent. T will or may, however, have no incentive to join in the giving of a s.25 notice that will bring his advantageous status to an end. He will, in practice, be able to block its giving and thereby protect himself from ordinary market forces. Whilst it is the purpose of Pt II to confer security of tenure on business tenants, it is not its purpose to provide them with protection of that nature.

29 The issue raised by this first ground of appeal turns, therefore, on whether the potential for tension between the respective interests of, in my example, R and S on the one hand and T on the other provides a basis for a conclusion that: (i) upon the acquisition by T of his separate reversionary estate in respect of part of the demised premises; and (ii) in the absence of any evidence of an *intention* on T's part to effect a merger, there is; (iii) a presumption of a merger in T's reversionary estate of his tenancy in the relevant part. If yes, it would follow that the tenancy of that part would determine and that R and S would become the sole remaining landlords in respect of T's tenancy of the other two parts and could alone combine in giving a s.25 notice in respect of such parts. They might of course then find that the market rent for such parts was no more, or less, than it had been for the whole. They might also wish to avoid the grant of a new tenancy of those parts by relying on one or more of the grounds in s.30(1). They may of course anyway have divergent views as to the steps to be taken with regard to the tenancy: the possibility of conflict is not exclusively the preserve of situations in which one of the reversioners is also the tenant.

30 In order to assess this issue it is necessary to consider the principles as to when a merger of a lesser interest in a greater one will take place. Where the lesser interest is a tenancy, the greater interest is the reversion immediately expectant upon its determination and both estates become vested in the same person, the judge observed that at common law a merger would be regarded as occurring automatically. That is, I consider, correct, at any rate in cases in which the two estates become vested in the same person in the same right. The approach of the common law does not, however, provide a solution to the present case because a different principle applies in equity and the equitable rule now prevails. The rule in equity was that there would only be a merger if the party in whom the two estates vested *intended* a merger. Section 185 of the Law of Property Act 1925, headed

"Merger", (and substantially re-enacting s.25(4) of the Judicature Act 1873) provides that:

> "There is no merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity."

It is, therefore, upon the equitable principles relating to merger that attention must be focussed. Mr Warwick's submissions raised an issue as to the equitable solution that the court should apply to the facts of the present case in circumstances in which there was (as the judge found) no evidence as to EDF's intention in relation to merger when the two estates became vested in it.

31 We were referred to just two authorities on merger. The first was *Ingle v Vaughan Jenkins* [1900] 2 Ch. 368, a decision of Farwell J. The point there was whether an equitable lease created by an uncompleted agreement for the grant of a lease became merged in the legal estate in the land that the equitable lessee later acquired; or whether it remained unmerged so as to be enforceable by his executor. Farwell J. held that there was no merger. He described the applicable principles thus at 370:

> "Whatever might have been the case at common law, as to which it is unnecessary that I should express an opinion, it is, in my opinion, clear that it was not merged or extinguished in equity. I think the proposition in Lewin on Trusts, 10th ed. P.889, is correct—namely, that 'The principle by which the Court is guided is the *intention;* and in the absence of express intention, either in the instrument or by parol, the Court looks to *the benefit of the person in whom the two estates become vested.*' The author goes on to point out that the chief importance of the doctrine of merger is with reference to charges, and the cases he cites are confined to charges.
>
> The defendants contended that a different principle applied in the case of a lease, but I am unable to follow that distinction. The principle being that the Court looks to the benefit of the person in whom the interests coalesce, I cannot see why there should be any distinction in this respect between a beneficial lease and a term to secure a charge. In either case the term is taken as an equivalent for money expended. Nor do I think it makes any difference whether the coalescence of the interests is brought about by operation of law or the acts of the parties. The principle of *Grice v. Shaw* 10 Hare 76 is applicable to the present case. The head-note is as follows: "Where the tenant in fee or in tail of an estate becomes entitled to a charge upon the same estate, the general rule is, that the charge merges, unless it be kept alive by the party entitled to it; and where the merger of the charge would have let in other charges in priority, thereby rendering it the interest of the owner of the estate to keep alive his charge, the Court presumed that such was his intention, notwithstanding the absence of any other indication of such intention." (Emphasis as in the original)

32 Farwell J. cited from Turner V.C.'s judgment in *Grice*. That showed that, in that case, there was no evidence of any express intention to keep the charge alive and that the question was what intention should be *presumed* with regard to it. As it was in the chargee's interest to keep it alive, the court presumed that that was his intention. Farwell J. applied that principle to the case before him.

33 The second authority was *Capital and Counties Bank, Ltd v. Rhodes* [1903] 1 Ch. 631, a decision of this court. It is necessary to understand the material facts.

In 1871 L granted T a 99-year lease of Whiteacre at an annual rent of £100. By May 1897 the first defendant, Rhodes, had acquired the lease. In that month, by way of mortgage to secure the payment of £16,700, he granted Flower & Sons (the third defendant) a sub-lease of Whiteacre for the residue of the lease less one day, such sub-lease not reserving any rent. The mortgage empowered Flower to dispose of the residue of the 1871 lease if it became necessary to enforce the security. In June 1899 Rhodes agreed to buy the freehold of Whiteacre for £3,650, the sale particulars describing it as a freehold ground rent of £100 and making clear that the sale was subject to and with the benefit of the 1871 lease. In seeking to obtain, as he did, a mortgage loan of £3,000 from the plaintiff bank in order to assist his purchase, Rhodes presented the sale particulars to the bank. Rhodes's purchase and subsequent mortgage to the bank were completed by successive instruments executed on the same day in July 1899: first, a conveyance of the freehold to Rhodes subject to and with the benefit of the 1871 lease; second, an instrument (by way of mortgage) conveying the freehold to the bank and also demising to it the unexpired residue of the 1871 lease less the last day. Those instruments made no reference to the prior 1897 mortgage to Flower although the bank had actual knowledge of it. In April 1901 Rhodes executed a deed of arrangement transferring all his property to Mason (the second defendant) in trust for his creditors. The bank, to which the whole £3,000 was due, was not a party to the deed. By June 1901 Flower had taken possession of Whiteacre and contended that the 1871 lease had merged in the freehold upon Rhodes's acquisition of it in 1899 so that it was entitled to remain in possession under its mortgage security without paying any rent. By its claim, the bank challenged that there had been a merger and claimed to be entitled to take possession of Whiteacre under the proviso for re-entry in the 1871 lease following the non-payment of rent. Kekewich J. doubted, without deciding, that there had been a merger but held that, if there had, the bank's mortgage interest would not take priority over Flower's and dismissed the claim against Flower. The bank appealed.

34 Sir Richard Henn Collins M.R. summarised the issue succinctly, at 646:

> "The principal question is whether on the purchase by Rhodes of the fee his term was merged in the reversion, the result of which would be that [Flower] would hold directly under the owner of the fee ... without any obligation to pay rent, while, the term held by Rhodes being extinguished, the rent of £100 a year would be no longer payable, and the security held by the bank would be land subject to a term not expiring until 1968, during which no rent could be received."

Collins M.R. observed, at 647, that it seemed to him "quite clear that, if the intention of the parties is that which determines this question, they certainly did not intend that a merger should take place." He regarded "the parties" as being Rhodes and the bank, his point being that it was the essence of Rhodes's wish to borrow from the bank on mortgage that he should be able to offer it the security of a freehold yielding a ground rent of £100 a year. He referred to that as supported by the July 1899 documents and said, at 648, that:

> "... the transaction could not have been carried out at all unless the term was kept alive, and it was clearly for the benefit of both parties to the transaction that it should be kept alive."

He rejected the argument that "the rule of equity that the question of merger must be decided by the intention of the parties was limited to the question of the merger of charges only, and did not apply to the merger of estates", and referred to Farwell J.'s decision in *Ingle* as deciding the contrary. He then held that there had been no merger, saying at 651:

> "It remains to consider whether the evidence of intention, as well as of benefit to Rhodes and the bank if the term were kept in existence, is not such as to prevent a merger as the law now stands. The law to be deduced from the previous authorities was summed up by Lord Macnaghten in the well-known passage in *Thorne v. Cann* [1895] AC 18, 19, and was applied to the case of leases by Fry J and Farwell J in the cases which I have already mentioned. I think those authorities clearly establish that in the present case, neither on the sale to Rhodes or on the mortgage by him to the bank, would "the beneficial interest in" the term have been "deemed to be merged or extinguished in equity," and that therefore the transaction falls within [what is now section 185 of the Law of Property Act 1925], and there is no merger at law."

35 Romer L.J. agreed both with Collins M.R.'s judgment and that of Cozens-Hardy L.J., and did not add a substantive judgment of his own. Cozens-Hardy L.J. explained that the first issue in the appeal was whether the 1871 lease had merged in the freehold. He said, at 652, that the rigid rule at common law was that if a term and its freehold reversion vested in the same person in his own right, the term merged in the freehold "whatever may have been the intention of the parties to the transaction which resulted in the union". He continued:

> "The Courts of Equity, on the other hand, in many cases treated the interest which merged at law as being still subsisting in equity. They had regard to the intention of the parties, and, in the absence of any direct evidence of intention, they presumed that merger was not intended, if it was to the interest of the party, or only consistent with the duty of the party, that the merger should not take place."

He explained that the commonest application of the principle had been in relation to cases where a life tenant paid off a charge upon the inheritance, but said that the principles applied equally to the merger of estates in land as to merger of charges on land. He said, at 653:

> "It was well established that, according to the strict rules of the common law, there would be merger, notwithstanding that one of the two estates might be held in trust, and the other beneficially, by the same person, or one might be held on one set of trusts and the other on another set of trusts. But it was equally well established that equity would interfere, and would, if necessary, decree the execution of such deeds as would replace the parties in their proper position: see Saunders v. Bournford (1679) Finchm 424, where Lord Nottingham LC decreed that, notwithstanding the merger of a term, the plaintiff should hold possession of the premises during the remainder of the term, and that the defendant should make a further assurance of the remainder of the term. The merger was treated as an accident prejudicial to the real beneficial interests of the parties: see also *Attorney-General v. Kerr* (1840) 2 Beav. 420, a remarkable instance of the application of the equitable doctrine. I think the

decision of Farwell J, or rather his dictum to this effect, in *Ingle v. Vaughan Jenkins* [1900] 2 Ch 368 is consistent with principle and is supported by authority. A Court of Equity had regard to the intention of the parties, to the duty of the parties, and to the contract of the parties, in determining whether a term was to be treated as merged in the freehold."

36 He explained, at 654, that it was obvious that it was the parties' intention that the bank should have a security on the freehold ground rent of Whiteacre so that no merger which would destroy that ground rent ought to be allowed. "The intention of the parties was clear that there should not be a merger." He too plainly regarded "the parties" as being Rhodes and the bank.

37 Mr Warwick, in his submissions in opening and reply, adopted a perhaps slightly inconsistent stance in relation to *Rhodes*. I understood him in his opening to disavow the suggestion that it established a principle providing direct support for the appellants' argument that there was a merger in the present case. His point was rather that *Rhodes* was not a case in which the court was concerned to take into account any third party interests comparable to those of EDF's co-reversioners in the present case and so it was not directly in point by way of guidance for its disposition. He said that EDF's claim that there had been no merger was one that was aimed at putting itself in a position to be able to abuse the legislative scheme of Pt II of the 1954 Act, a position directly injurious to the interests of the co-reversioners. He said it would be contrary to the latters' interests that EDF should maintain an unmerged interest in a tenancy interest of plot 2 because that would prevent the co-reversioners from serving a s.25 notice in respect of the demised premises without the co-operation of EDF, whereas in all likelihood EDF's interests would be against giving such a notice. The possible consequence of that would or might be that the tenancy could continue indefinitely. It followed that it could not therefore have been the intention of the co-reversioners that EDF's tenancy interest in plot 2 should survive unmerged. Had they been consulted as to whether there should or should not be a merger upon EDF's acquisition of the freehold of plot 2, they would have responded with a resounding yes, since that would enable them to bypass any reference to EDF when considering their interests as landlords.

38 Mr Warwick's further submission was that a court of equity faced with this type of situation ought, therefore, to invoke its traditional flexibility and meet the potential for injustice by finding that the competing "pro-merger" interests of the co-reversioners must trump (his word) the different "no-merger" interest of EDF. The essence of his submission was that the present case involved circumstances quite different from any that had arisen in the reported authorities and that the court should therefore not feel constrained in developing the "merger" principles so as to meet such circumstances.

39 In his reply, Mr Warwick focussed on the last sentence of the passage from Cozens-Hardy L.J.'s judgment cited in [35] above, which he described as the ratio of the decision, and said that it supported the approach he was urging. He sought to apply it to this case by submitting that here "the contract" is the 1953 lease; and that by 1993, when EDF acquired the freehold reversion in respect of plot 2, it had an obligation to consider the interests of its two co-reversioners as to the other two parts of such premises, plots 26 and 31. Mr Warwick submitted that in [66] of his judgment, the judge had directed himself correctly as to the need, in considering

the merger argument, to take account of the interests of the co-reversioners. By [69], however, the judge had, he said, forgotten such self-direction and had decided the question by applying the principle that, absent any evidence pointing to a different intention, it should be presumed that EDF intended no merger if, as he found, it was contrary to its interest that there should be a merger.

40 With respect to Mr Warwick's careful submissions, both in opening and reply, I regard them as mistaken at every point and would not accept them. The starting point is that whereas the ordinary rule at law was that the coalescence of a lease and its reversion in the same person ("A") in the same right would result in a merger and extinguishment of the lease, in equity it was open to A to form an intention, and declare accordingly, that there should be no such merger and extinguishment. Equity further developed the principle that in any case in which A did *not* expressly evince such an intention, or in which there was no other evidence of such an intention on his part, there was a presumption against any intention for a merger if such would be against his interest. In a case in which there was no express declaration or other evidence as to A's intentions, the focus of equity's inquiry was therefore exclusively on his interests: and if a merger would be against his interests, he is presumed to have intended against any merger. That is the principle that was applied in *Ingle* and this court in *Rhodes* made it clear that it regarded *Ingle* as having been correctly decided. The equitable principles now prevail over the principles applicable at law.

41 This court in *Rhodes* explained the principles but I would not regard it as having developed them. *Rhodes* differed in kind from *Ingle* in that it was not a case in which the court had to consider whether there was any *presumption* that Rhodes did not intend a merger. On the contrary, it was one in which the court considered that there was clear evidence as to what Rhodes (and the bank) intended as regards a merger or otherwise; and the evidence showed that neither of them can have intended a merger. Both Rhodes and the bank were closely bound up in Rhodes's acquisition of the freehold. Rhodes needed the bank's loan in order to finance the acquisition, and the documents showed that his deal with the bank was that its security was intended to be the freehold with the benefit of the rent yielded by the 1871 lease. It is those considerations that explain the references by Collins M.R. and Cozens-Hardy L.J. to "the intention of the parties" and they pointed solidly against there having been any intention on the part of Rhodes to merge and extinguish the lease. It is perhaps worth citing the passage from the speech of Lord Macnaghten in *Thorne v Cann* [1895] A.C. 11, at 18/19, to which Collins M.R. referred ([1903] 1 Ch. 631, at 651: see [34] above) as summing up the applicable law. Lord Macnaghten said:

> "Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or not for his benefit that the charge should be kept on foot. Here, I think, the intention appears plainly on the face of the deed by which Miss Arnold purported to transfer her mortgage."

Ingle was a case in which the court presumed an intention that there should be no merger because that would have been against interest. *Rhodes* was a case in which the court found positive evidence of an intention that there should be no merger.

42 I disagree with Mr Warwick that the 1953 lease can or should be regarded as an example of the type of "contract" to which Cozens-Hardy L.J. was referring in the last sentence of the passage quoted in [35] above. It is not. In making that reference, I presume that Cozens-Hardy L.J. had in mind the mortgage contract between Rhodes and the bank, a transaction which made it self-evident that no merger was intended since otherwise the security that Rhodes purported to give would have been substantially worthless. The present case is miles away from *Rhodes*. The 1953 lease did not constitute a contract between the three co-reversioners who were in existence by December 1993. It imposed no contractual obligations or other duties upon any reversioner towards his co-reversioners. When EDF acquired the freehold reversion in plot 2 it was under no obligation to do other than consider its own interests.

43 Mr Warwick's submission amounted ultimately to the proposition that, because a merger is said to have been in the interests of the co-reversioners, EDF should be presumed to have intended a merger even though its own interest would be directly against it. That way of putting the case is not to invite a development of the principles that have so far been established by the courts of equity. It is to invite a departure from them and the adoption of quite contrary principles: namely, that in the absence of evidence proving an intention one way or the other (and the judge found there was none, as to which there is no challenge), the court should presume an intention by EDF to merge when to do so would be directly adverse to its interests but would or may be of advantage to third parties with whom it is in no commercial relationship and to whom it owes no duties. For the court so to presume in such circumstances appears to me to be contrary to the principles explained in the authorities and wrong. Mr Warwick did not go the further distance of submitting that, had EDF (as it might have done) made an express declaration of merger, the co-reversioners could have asked the court to set it aside, and any such submission would, I consider, have been hopeless. It is only, apparently, in the circumstance in which there is no evidence as to EDF's intention that the interests of the co-reversioners must be held to prevail. The argument appears to me to be an unprincipled one.

44 In my judgment the task for the judge in relation to this issue was to consider whether there was any evidence of any intention on the part of EDF as to whether there should be a merger. He found, in [69], that there was none. Having so found, he had next to consider whether it was or was not in EDF's interests that there should be a merger. He found that it was not and that finding led him, correctly in my judgment, to the conclusion that he should presume that no merger was intended. That was the approach that *Ingle* (endorsed by *Rhodes*) required him to adopt and he was correct to do so. That it may perhaps have been, or might turn out to be, contrary to the interests of the co-reversioners that there should be no merger is irrelevant.

45 I would dismiss the appellant's first ground of appeal.

The second ground of appeal

46 This is a new ground of appeal that was not advanced to the judge. It is a fallback argument that arises only if the "merger" ground of appeal were to fail, as in my view it should. The essence of the point as originally advanced in the grounds of appeal was that, on the footing: (i) that plot 2 remains part of the premises demised by the 1953 lease and that the tenancy thereby created is continuing in respect of (inter alia) plot 2; and (ii) that EDF is a necessary party, together with BOH and Layhawk, to (for example) the giving of a s.25 notice in respect of the demised premises; then (iii) "the 1954 Act must be read so that the "tenancy" held by EDF to which the 1954 Act applies does not include Plot 2."

47 The claim that the 1954 Act should be so read was said to be required by s.3 of the Human Rights Act 1998, namely that:

> "So far as it is possible to do so primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

The need for a compatible reading of the 1954 Act was advanced on the basis that otherwise BOH's and Layhawk's enjoyment of their freehold interests in plots 31 and 26 respectively would be interfered with in a manner contrary to their rights under art.1 of the First Protocol to the Convention, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

48 In his written and oral argument Mr Warwick materially qualified and refined this ground of appeal by confining the focus of his argument to the proposition that s.44(1A) of the 1954 Act should be read as excluding from such definition any person who is also the tenant of the relevant tenancy. Thus, applied to this case, a s.25 notice in respect of plots 2, 26 and 31 (and ignoring the judge's finding that the tenancy of plot 31 had been surrendered) could validly be given by the freehold owners of just plots 26 and 31. Such notice would, however, have to be given not just in respect of plots 26 and 31, but also in respect of plot 2.

49 Mr Warwick fully developed this argument at the hearing but the court did not at that stage call upon Mr Stoner to answer it. That was because it was provisionally unconvinced that it ought to entertain this ground of appeal at all. In forming that view, the court had not overlooked that Mummery L.J. had given permission for this ground of appeal to be argued as well as the merger ground. He expressed the view, when giving permission, that the "proposed appeal against [the judge's order] has a real prospect of success on the basis of the grounds of appeal and the skeleton argument ... ." Mummery L.J. may, however, have overlooked that success on this ground of appeal could not justify any reversal or variation of the judge's order, as EDF pointed out in its skeleton argument and as Mr Warwick expressly conceded.

50 The reason for that is simple. The statements of case before the judge put in issue the validity of the s.25 notice purportedly given by Mr Dormer in August 1993. That was apparently the only such notice in issue at the trial. At the time it was given, there were three separate co-reversioners, none of whom or which was also the tenant of the demised premises. The judge held the notice to be invalid and the appellants do not challenge that decision. The point that they now want to make is not merely a point that was not advanced before the judge; it was one in respect of which no factual case was or, so far as I am aware, could have been made. It is a point that comes before this court entirely afresh and unsupported by any factual basis. Mr Warwick accepted that no s.25 notice had been served that purported to raise the issue. The court is therefore being asked to answer a question, and presumably to make some form of declaration, based on a hypothetical set of circumstances. In my judgment, this court should not do that. The point raised by this ground of appeal is potentially of some general importance. If it is ever to be considered by this court it should only be after a concrete set of facts raising it as a real issue has first been considered by a trial judge who has then made findings on the facts and on the law applicable to them.

51 The court reserved its judgment at the conclusion of the hearing. The following day it received an email purporting to have been composed by BOH and Layhawk. The identity of the human agent who was in fact its author was not disclosed but the inference is that he was present in court at the hearing. He referred to the court's expressed unwillingness to deal with this ground of appeal in default of any s.25 notice having been served that could be said to have raised the issue. He continued:

> "The Respondents [i.e. EDF] failed to bring the attention of the Court the fact that they had indeed been served with Section 25 Notices. The Section 25 Notices were served by the appellants predecessors to the title, the appellants were given vacant possession and accepted the same in reliance on the said Section 25 notices and there was no requirement to provide the Respondents with a further opportunity as regards the Section 25 Notices.
>
> We do feel that the three Lord Justices would have wanted to have their attention drawn to the three Section 25 Notices in order to provide clarity. The Judgment has yet to be delivered and we would therefore ask that you put the three attached notices before their lordships and Lady Black to enable them to address the issues.
>
> The Respondent has been notified of our concerns regarding their decision to permit those representing the appellants, and the Court, to proceed without reference to these matters where the Court has decided there is a Human Rights element to the same. It remains open to the appellants to serve further Section 25 Notices but given these facts and matters the Court would wish to consider the same.
>
> The three notices were acknowledged by the Respondent."

52 The first attached notice was one on which the typed date of April 2, 2002 was changed in manuscript to April 29, 2002. It was from Commercial Rentals Ltd, as landlord, to the EEB, as tenant (see [17] above). Paul Todd was described in it as the landlord's agent. The notice purported to terminate the tenancy on November 11, 2002. It was expressed as relating to:

> "Any part of the land included in freehold title NGL541577 in respect of which the Tenant asserts the registered title MX269363 should be included excluding any part of MX269363 where the Tenant has given up the protection of the Act and the landlord relied upon. [sic] of which you the tenant."

The second notice had the same manuscript date change and was from The Containerised Storage Company Ltd, as landlord, to the EEB (see [16] above). Mr Todd was again described as the landlord's agent. That notice was also expressed to terminate on November 11, 2002. It was expressed as relating to:

> "Any part of the land included in freehold title NGL770835 in respect of which the Tenant asserts the registered title MX269363 should be included excluding any part of MX269363 where the Tenant has given up the protection of the Act and the Landlord relied upon. [sic] of which you are the tenant."

The third notice was dated April 29, 2002. It was given jointly by Commercial Rentals and Containerised Storage as landlords, with Mr Todd being again named as the agent. It was addressed to the EEB and purported to terminate its tenancy on November 11, 2002. It was expressed as relating to:

> "Any parts of the land included in freehold title NGL541577 and NGL770835 in respect of which the Tenant asserts the registered leasehold title MX269363 should be included excluding that part of MX269363 in respect of which the Tenant is estopped by conduct and or merger and or the failure to commence proceedings after the service of a Section 25 notice dated 27th August 1993 and acceptance of the validity thereof by a Counternotice dated 3rd September 1993 which exchange and correspondence the Landlord has acted upon to its prejudice. [sic] of which you are the tenant."

53 I interpret the notice separately given by Commercial Rentals as directed exclusively to (at most) plot 26 (the title to which was registered under Title No. NGL 541577); and the notice separately given by Containerised Storage as directed exclusively to (at most) plot 31 (Title No. NGL 770835 comprising plots 20 and 31). As neither notice appears to be directed to Plot 2, I do not understand how they can severally or collectively satisfy the interpretation of s.44(1A) for which Mr Warwick argued. The notice served jointly by Commercial Rentals and Containerised Storage suffers from the same flaw.

54 My view is, therefore, that these notices are irrelevant. They do not satisfy Mr Warwick's submission as to what s.44(1A) requires if read in the way he suggests would be compatible with the appellants' Convention rights. Even if my interpretation of them in this respect is incorrect, they were not pleaded in the statements of case before the judge, nor were they apparently the subject of any argument before him, let alone any findings by him. Had they been the subject of argument, it is inconceivable that he would not have dealt with them in the course of what was, if I may say so, a judgment of conspicuous meticulousness. It is not surprising that Mr Warwick did not refer us to them; and the suggestion by the email's author that it was Mr Stoner's duty to do so is astonishing. It is BOH and Layhawk who are the appellants and it was up to them to consider whether they wished to draw the court's attention to any new evidence that might be thought to assist their appeal and, if so, to seek (as would be necessary) permission to rely on it, explaining why permission ought to be given. Since the author was apparently

present in court during Mr Warwick's submissions, it is surprising that he did not adopt the conventional course of instructing Mr Warwick about the notices at a convenient moment during the hearing. As it is, and having decided to assume the mantle of advocate on the appellants' behalf, he has provided no explanation as to why this court—whose function is to sit as a court of appeal, not as a court of first instance—should have regard to material which appears to have played no part at the trial, whereas had the appellants chosen to deploy it there they could have done so. I would disregard the representations made by the email.

Disposition

55 For reasons given, I would decline to express any view on the correctness or otherwise of the point argued under the second ground of appeal. As I would dismiss the first ground of appeal, it follows that I would dismiss the appeal.

BLACK L.J.:

56 I agree.

SEDLEY L.J.:

57 I also agree.

Appeal dismissed.

HEMPHURST LTD v DURRELS HOUSE LTD

UPPER TRIBUNAL (LANDS CHAMBER)

H.H. Judge Mole QC: September 15, 2010

[2011] UKUT 6 (LC); [2011] L. & T.R. 16

H1 *Collective enfranchisement—Leasehold Reform, Housing and Urban Development Act 1993—Block of flats with planning permission to construct penthouse on roof—Lease of roof area—Notice by qualifying tenants—Whether nominee purchaser entitled to acquire lease in respect of part only of roof area—Whether nominee purchaser required to acquire entire lease or nothing—Whether LVT correct in holding that nominee purchaser entitled to acquire entire lease.*

Summary of decision

H2 Section 2 of the Leasehold Reform, Housing and Urban Development Act 1993 does not require the nominee purchaser to acquire the whole of a leasehold interest of relevant premises, appurtenant property or common parts if he wishes to acquire only part.

Parties

H3	*Appellant/Respondent (applicant below):*	Durrels House Ltd ("the nominee purchaser").
	Respondent / Appellant (respondent below):	Hemphurst Ltd ("the landlord").

Facts

H4 The landlord owned the freehold of a block of flats in London with a flat roof which had on it structures housing ventilation shafts and machinery. On October 14, 2003, the landlord granted G a 999 year lease of the surface and air space on the roof of the block, including the right to build a flat or flats on the roof. In 2003, planning consent was granted for the construction of a penthouse flat on the roof. Further permissions were granted in 2005 and 2007 and the current proposal was for a four-bedroom flat with a substantial terrace. The nominee purchaser was appointed in a claim for collective enfranchisement of the block under the Leasehold Reform, Housing and Urban Development Act 1993, including those parts of the roof that were not required for the implementation of the planning consent, but that would be required for the proper maintenance of the rest of the block, such as the ventilation shaft outlets. The LVT held that it was not possible under the 1993 Act to acquire only specific parts of premises demised by a leasehold interest and the nominee purchaser appealed to the Upper Tribunal (Lands Chamber). The LVT

also stated the view that the nominee purchaser was entitled to acquire the whole of that lease and the landlord appealed.

H5 **Held,** allowing both appeals:

H6 (1) The draftsman of s.1 of the 1993 Act had made clear in relation to acquiring the freehold of the premises, or of appurtenant or common property, that all or part of such land may be acquired (s.1(5)) but no similar provision had been made under s.2 in respect of the acquisition of leaseholds relating to the premises of which the freehold is to be acquired. Section 2(1)(a) provides that every lease that is superior to that of the qualifying tenants must be acquired and s.2(1)(b) provides that any leasehold interests under which the demised premises "consist of or include" relevant premises, appurtenant property or common parts may be acquired, provided that the acquisition of "the interest of the tenant under any lease" is reasonably necessary for the proper management or maintenance of the property to be acquired (s.2(3)). The language of s.2(1)(b) and (3) is as apt to describe an interest carved from the original leasehold interest as it is to describe the whole of the original interest and therefore less supportive of the argument that the right is either to acquire the whole of the leasehold interest or none of it. Further, s.2(4) contemplates that the leasehold interest can be acquired in part by providing that where a leasehold interest to be acquired under s.2(3)(b) includes any premises that are neither a qualifying tenant's flat, common parts nor appurtenant property, the right to acquire does not apply to such other premises. There is no indication that, in the absence of this statutory exclusion, only the totality of the leasehold interest could be acquired.

H7 (2) The tenor of s.2 is that the right to acquire leasehold rights is to be tightly limited and those leasehold rights will be severed to achieve those limits. It is difficult to see what purpose compelling the nominee purchaser to take more of the leasehold interest than he wants or needs would serve. The qualifying tenants could be prevented from unfair "cherry picking" by the landlord's right under s.21(4) to require the nominee purchaser to acquire the interest in any property that is left incapable of reasonably beneficial use or becomes unmanageable. It would be strange if Parliament intended to give that protection to the landlord and yet left the tenant with the choice of all or nothing in acquiring a leasehold interest. An interpretation that acknowledged that the tenant could elect to sever the leasehold interest would not cause insuperable difficulties or any greater difficulties than would be caused by severance imposed by s.2(4) and would be consistent with the purpose of conferring on the tenants those advantages Parliament must have intended them to enjoy. The nominee purchaser's appeal accordingly succeeded.

H8 (3) It was open to doubt whether the LVT actually intended to determine that the roof lease must be acquired in its entirety but it appeared that it had determined the issue. The landlord was correct in contending that it was not a point that was properly in issue before the LVT and the LVT was not entitled to determine it. The landlord's appeal therefore succeeded.

H9 **Legislation referred to:**

Leasehold Reform, Housing and Urban Development Act 1993 ss.1, 2 and 21.

H10 **Cases referred to:**

Ackerman v Lay [2008] EWCA Civ 1428; [2009] L. & T.R. 9; [2009] 1 E.G.L.R. 50

Cadogan v McGirk [1996] 4 All E.R. 643; (1997) 29 H.L.R. 294; [1996] 2 E.G.L.R. 75 CA (Civ Div)
Howard de Walden Estates v Aggio [2008] UKHL 44; [2009] 1 A.C. 39; [2008] L. & T.R. 25
Nailrile Ltd v Earl Cadogan [2009] 2 E.G.L.R. 151; [2009] R.V.R. 95 Lands trib.

H11 For further details of the law in this area see *Woodfall's Law of Landlord and Tenant*, Vol.4, para.29.013: "Intermediate leasehold interests and common parts".

H12 *E. Johnson* QC (instructed by **??? WITH TRACKING TEAM, WILL BE AVALIABLE BEFORE PUBLICATION**) for the landlord.
P. Rainey QC (instructed by **??? WITH TRACKING TEAM, WILL BE AVALIABLE BEFORE PUBLICATION**) for the nominee purchaser.

JUDGMENT:

Introduction

1 This is an appeal against the decision of the Leasehold Valuation Tribunal dated December 10, 2008.

2 Durrels House is a 1970s block of flats between Warwick Gardens and Warwick Road. There are garages on the ground floor and flats on the eight floors above. Around the block there is an area partly open and landscaped, partly with further garages on it, and partly oversailed by parts of the block, which has been described as the "additional premises". The block has a flat roof with structures housing ventilation shafts and machinery on it.

3 Durrels House Limited (hereafter DHL) is the nominee purchaser in respect of a claim for collective enfranchisement. Hemphurst Ltd (hereafter HL) is the freehold owner and reversioner of the premises in respect of which the claim is made. HL also acts on behalf of Grovehurst Properties Ltd (Grovehurst) which owns freehold and leasehold interests relevant to the issue in this case. On September 29, 2003 HL granted Grovehurst a 999 year lease of certain premises on the ground floor of the building. Then, on October 14, 2003, HL granted Grovehurst a 999 year lease of the surface and air space on the roof of the block, including the right to build a flat or flats on the roof. In 2003 planning consent was granted for the construction of a penthouse flat on the roof. The plans for this development have been reconsidered and modified and further permissions were granted in 2005 and 2007. The proposal is now for a four-bedroom flat with a substantial terrace.

4 The preliminary issue in this case concerns the exercise of the right to enfranchise so far as that roof lease is concerned. It is whether DHL may acquire, under the 1993 Act, only those parts of the roof which are not required for the implementation of the planning consent but which would be required for the proper maintenance of the rest of the block, such as the remaining parts of the roof and the ventilation shaft outlets, or whether DHL is obliged to seek to acquire the whole of the roof lease. As will be set out more fully below, the LVT decided that it was not possible, under the Act, to acquire only specific parts of premises demised by one leasehold interest. It is against that finding that DHL appeal. The LVT expressed itself in terms that suggest that it found that DHL were entitled to acquire the whole of the lease. HL appeal against that finding.

5 There were several issues argued between the parties before the LVT. On July 21, 2009 this tribunal granted permission to argue three points on appeal but those relating to the roof lease are the only ones pursued before me.

The LVT decision

6 The LVT said this about the issue of the acquisition of the roof lease:

> "40. On 10 October 2003 Hemphurst Ltd granted to Grovehurst Ltd a 999 year lease of the ninth floor and airspace with a view to the development of a new flat. On 19 July 2006 Hemphurst Ltd granted a lease for 999 years to Grovehurst Ltd in respect of one riser vent on the eighth floor and two riser vents on the ninth floor.
> 41. Planning consent was obtained in February 2003 for the construction of a three-bedroom flat and terrace. In June 2005 planning permission was obtained for the construction of a four bedroomed flat with a terrace. In August 2007 planning permission was obtained for a four-bedroom flat and terrace with a larger footprint and improved layout.
> 42. Mr Rainey explained that the respondents did not seek to acquire the development envelope or to try to prevent the development. The aim of the Section 13 notice was to acquire, as a common part, only that part of the roof space lease which was not, in due course, going to form part of the demise of the flat. Because the Section 13 notice had been served before the 2007 planning consent had been acquired he accepted that some of the footprint claimed in the notice was, in fact, required to implement the 2007 planning consent but he invited the LVT to determine the extent of the roof area and airspace to be acquired.
> 43. Mr Johnson argued that under section 2 (4) of the Act it was not possible to claim only part of the demised premises since the severance provisions were not engaged. It could not be said that parts of the roof were common parts and parts were not. He, therefore, alleged that the claim was incompetent.
> 44. The Tribunal accepts the argument of Mr Johnson that, under the Act, it is possible for the respondents to acquire leasehold interests but that it is not possible for them to acquire parts of premises demised by those leasehold interests. Accordingly, they could acquire the 2003 lease but not part of the premises demised by that lease."

7 Under the heading "Conclusion" the LVT continued:

> "46. No valuation is provided with this determination since no evidence has been received from the respondents concerning the value of the 2003 roof lease which the tribunal has determined must be acquired in its entirety. If, contrary to the assertions made at the hearing that were the respondents unable to acquire only the claimed area of the roof the enfranchisement would not proceed, and if the parties are unable to agree the required valuation, they have liberty to apply."

The act

8 The crucial sections of the Leasehold Reform, Housing and Urban Development Act 1993 (hereafter "the Act") are ss.1 and 2 and it will be helpful to set them out in full, so far as relevant, as follows:

> **"Section 1 The right to collective enfranchisement.**
> (1) This Chapter has effect for the purpose of conferring on qualifying tenants of flats contained in premises to which this Chapter applies on the relevant date the right, exercisable subject to and in accordance with this Chapter, to have the freehold of those premises acquired on their behalf:
> (a) by a person or persons appointed by them for the purpose; and
> (b) at a price determined in accordance with this Chapter;
> and that right is referred to in this Chapter as 'the right to collective enfranchisement'.
> (2) Where the right to collective enfranchisement is exercised in relation to any such premises ('the relevant premises'):
> (a) the qualifying tenants by whom the right is exercised shall be entitled, subject to and in accordance with this Chapter, to have acquired, in like manner, the freehold of any property which is not comprised in the relevant premises but to which this paragraph applies by virtue of subsection (3); and
> (b) section 2 has effect with respect to the acquisition of leasehold interests to which paragraph (a) or (b) of subsection (1) of that section applies.
> (3) Subsection (2)(a) applies to any property if ... at the relevant date either:
> (a) it is appurtenant property which is demised by the lease held by a qualifying tenant of a flat contained in the relevant premises; or
> (b) it is property which any such tenant is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises (whether those premises are contained in the relevant premises or not).
> (4) The right of acquisition in respect of the freehold of any such property as is mentioned in subsection (3)(b) shall, however, be taken to be satisfied with respect to that property if, on the acquisition of the relevant premises in pursuance of this Chapter, either:
> (a) there are granted by the person who owns the freehold of that property:
> (i) over that property; or
> (ii) over any other property;
> such permanent rights as will ensure that thereafter the occupier of the flat referred to in that provision has as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenant under the terms of his lease; or
> (b) there is acquired from the person who owns the freehold of that property the freehold of any other property over which any such permanent rights may be granted.
> (5) A claim by qualifying tenants to exercise the right to collective enfranchisement may be made in relation to any premises to which this Chapter applies despite the fact that those premises are less extensive than the entirety of the premises in relation to which those tenants are entitled to exercise that right.
> ...

(7) In this section:

'appurtenant property', in relation to a flat, means any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the flat;

'the relevant premises' means any such premises as are referred to in subsection (2).

(8) In this Chapter 'the relevant date', in relation to any claim to exercise the right to collective enfranchisement, means the date on which notice of the claim is given under section 13.

Section 2 Acquisition of leasehold interests

(1) Where the right to collective enfranchisement is exercised in relation to any premises to which this Chapter applies ('the relevant premises'), then, subject to and in accordance with this Chapter:

(a) there shall be acquired on behalf of the qualifying tenants by whom the right is exercised every interest to which this paragraph applies by virtue of subsection (2); and

(b) those tenants shall be entitled to have acquired on their behalf any interest to which this paragraph applies by virtue of subsection (3);

and any interest so acquired on behalf of those tenants shall be acquired in the manner mentioned in paragraphs (a) and (b) of section 1(1).

(2) Paragraph (a) of subsection (1) above applies to the interest of the tenant under any lease which is superior to the lease held by a qualifying tenant of a flat contained in the relevant premises.

(3) Paragraph (b) of subsection (1) above applies to the interest of the tenant under any lease (not falling within subsection (2) above) under which the demised premises consist of or include:

(a) any common parts of the relevant premises; or

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

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

(4) Where the demised premises under any lease falling within subsection (2) or (3) include any premises other than:

(a) a flat contained in the relevant premises which is held by a qualifying tenant;

(b) any common parts of those premises; or

(c) any such property as is mentioned in subsection (3)(b);

the obligation or (as the case may be) right under subsection (1) above to acquire the interest of the tenant under the lease shall not extend to his interest under the lease in any such other premises.

(5) Where the qualifying tenant of a flat is a public sector landlord and the flat is let under a secure tenancy or an introductory tenancy, then if:

(a) the condition specified in subsection (6) is satisfied; and

(b) the lease of the qualifying tenant is directly derived out of a lease under which the tenant is a public sector landlord;

the interest of that public sector landlord as tenant under that lease shall not be liable to be acquired by virtue of subsection (1) to the extent that it is an

interest in the flat or in any appurtenant property; and the interest of a public sector landlord as tenant under any lease out of which the qualifying tenant's lease is indirectly derived shall, to the like extent, not be liable to be so acquired (so long as the tenant under every lease intermediate between that lease and the qualifying tenant's lease is a public sector landlord).

(6) The condition referred to in subsection (5)(a) is that either:

(a) the qualifying tenant is the immediate landlord under the secure tenancy or, as the case may be, the introductory tenancy; or

(b) he is the landlord under a lease which is superior to the secure tenancy or, as the case may be, the introductory tenancy and the tenant under that lease, and the tenant under every lease (if any) intermediate between it and the secure tenancy or the introductory tenancy, is also a public sector landlord;

and in subsection (5) 'appurtenant property' has the same meaning as in section 1.

(7) In this section 'the relevant premises' means any such premises as are referred to in subsection (1)."

9 The provisions of s.13 were discussed in some detail in argument. Mr Johnson drew attention to s.13(3)(a) which states that the notice of claim must specify and have a plan showing the premises to be acquired but under (c) only specify the leasehold interest to be acquired. Section 21 provides for the giving of a counter notice by the reversioner. Section 21(4) is relevant: The provisions of s.13 were discussed in

(4) "The nominee purchaser may be required to acquire on behalf of the participating tenants the interest in any property of any relevant landlord, if the property:

(a) would for all practical purposes cease to be of use and benefit to him; or

(b) would cease to be capable of being reasonably managed or maintained by him,

in the event of his interest in the specified premises or (as the case may be) in any other property being acquired by the nominee purchaser under this Chapter."

Submissions

10 Mr Philip Rainey QC, for DHL, submitted that there was no good reason for construing the Act in a way that ruled out the acquisition of parts of premises demised by a single lease and required the acquisition of the whole of the lease, or nothing, and many good reasons for not doing so. He prefaced his submissions by referring to authorities supporting the giving of a broad construction to the 1993 Act. In particular he quoted *Cadogan v McGirk* [1996] 4 All E.R. 643 where Millett L.J. said (at 648b)

"It is the duty of the court to construe the Act fairly and with a view, if possible, to making it effective to confer on tenants those advantages which Parliament must have intended them to enjoy."

He also submitted that it was apparent from *Howard de Walden Estates v Aggio* [2009] 1 A.C. 39 (HL) and *Ackerman v Lay* [2009] 1 E.G.L.R. 50 that if the proper construction of the Act required severance, that was of little significance.

11 Mr Rainey began by referring to the facts of the instant case to illustrate the sort of difficulty that would be caused if the "all or nothing" argument were correct. It would have been, he said, perfectly possible for HL to grant Grovehurst one lease of both the ground floor and the roof. After all, both those leases were granted within a couple of weeks of each other. The ground floor lease included the porter's room, which it was plainly important for the qualifying tenants to acquire (the LVT held that it was part of the common parts and that its value was already reflected in the value of the flats). If there had been only one lease, on HL's argument, DHL would have had to acquire the whole of that lease, including the roof space with expensive potential for development, which they did not want, in order to get hold of the porters' office, which they did want. The construction of s.2 of the Act for which he was arguing would make it flexible and effective. The crucial provision is s.2(3)(a).

12 Mr Rainey submitted that there is a significant difference in drafting between s.2(2) and s.2(3). Under the former provision, the nominee purchaser is obliged to acquire the relevant leasehold interests, so no question of part acquisition can arise, unless s.2(4) requires a severance. The latter provision, by contrast, confers a right but not an obligation. The tenants have the right to acquire an interest under the lease under which the demised premises include any common parts of the relevant premises but they are not obliged to do so. It is consistent with the permissive nature of that right that it should be capable of being exercised in respect of part only of a leasehold interest. He explained the reasons for the mandatory nature of s.2(2). Those reasons did not apply to s.2(3), which was, consequently, permissive. Being permissive it ought to be construed as permitting tenants to claim part of a leasehold interest as well as the whole of a leasehold interest. He described this as "elective severance". He contrasted the mandatory severance that arises under subss.2(4) and 2(5). Subsection 2(4), in effect, excludes from the right (or obligation) to acquire the interest of the tenant under the lease any premises (such as business premises) that are neither part of a flat held by a qualifying tenant nor common parts of those premises nor held under a superior lease. That, at least, shows that there is no objection in principle to the severance of a leasehold interest. It is also a strong indication that s.2(3) allows for elective severance of an interest under a lease. There was nothing in the language of the section that stood in the way of such a construction.

13 If there were no such right of elective severance, the tenants' ability to acquire a leasehold interest might, in practical terms, depend entirely upon how the landlord had structured the lettings. Section 2(3) clearly contemplates that there may be very different views held about what, if anything, is acquired as common parts. The acquisition of that leasehold interest has to be "reasonably necessary for the proper management or maintenance of those common parts". The common parts may form a very small part of the property included within the leasehold interest. For example, the necessary common parts may form a small portion of a much larger garden or parkland. It may be impossible to properly manage or maintain the common parts without the acquisition of "the interest of the tenant under any lease" that includes those common parts. But s.2 (4) says that there is no right to acquire the interest of the tenant in premises other than, amongst other things, the

common parts. So in that case they will be a mandatory severance. The problem arises where the common parts have an extra value that has nothing to do with being common parts. If "the interest of the tenant" is taken to mean the whole interest of the tenant instead of the necessary part of it, the acquisition cost may be completely prohibitive. That is said to be this case, where on one view the value of the rooftop development area is said to be up to £1.295 million.

14 Mr Rainey argued that there was no insuperable practical problem in the way of such an elective severance. The LVT has jurisdiction to determine the extent of the interest, leasehold or freehold, to be acquired. The wording of s.24(8)(b) is apt to cover the determination of a severed leasehold interest, as is to be expected, given the degree of mandatory severance the Act permits. The mechanics of the service of a notice under s.13 and the alleged difficulties created by, for example the absence of a plan, were examined in detail by him. He submitted that elective severance would cause no additional or insurmountable difficulty under the notice provisions either.

15 The "cherry picking" argument, namely the argument advanced on behalf of the landlord that the ability to choose to require part of a leasehold rather than the whole of it was open to abuse by the qualifying tenants was conclusively answered by s.21(4), which provides that the purchaser may be required to acquire on behalf of the tenants the interest in any property if the property would cease to be of use and benefit to him or would cease to be capable of being reasonably managed or maintained by him. Once again the Act contemplates the severance of an interest defined by the factual nature of the property, namely whether a particular portion is either incapable of beneficial use or not reasonably manageable. The acquisition might be intricate and the valuation complex, but the machinery was capable of dealing with that. (He instanced the case of *Nailrile v Earl Cadogan* [2009] 2 E.G.L.R. 151 and drew attention to Lord Neuberger's observation in *Howard de Walden Estates Ltd v Aggio* [2009] 1 A.C. 39, p.53 at [48], that tribunal members are "frequently faced with ticklish conveyancing and valuation problems.")

16 Mr Johnson QC, in reply, submitted that the LVT was right to determine that there was no right of "elective severance". If there were, the qualifying tenants in a collective enfranchisement claim could claim as much or as little as they wanted in their notice of any leasehold interest that fell within the terms of s.2 (1) (b) of the act. That would be a bizarre result.

17 He summarised his submissions on s.2 as being that s.2 is engaged where the right to have the freehold interest in the relevant building or part of the building (the relevant premises) is exercised. The obligation or entitlement to acquire in s.2, depending upon whether para.(a) or para.(b) is engaged, is an obligation or entitlement to acquire leasehold interests in the relevant premises. Where the leasehold interest includes premises that do not fall within s.2(4)(a), (b) or (c) those non-qualified premises are excluded and severed from the obligation or entitlement to acquire the relevant leasehold interest. He noted in particular that the obligations and rights in s.2 are framed by reference to the acquisition of leasehold interests, not premises or property, and this contrasts with the language and scheme of s.1.

18 Section 2 relates to interests. Under 2(1)(a) there "shall" be acquired "every interest" which is superior to the qualifying tenant's lease. That must mean not just the lease but any part of the demised premises. There can be no severance there because the whole of the interest must be acquired. Mr Rainey submits that without severance the tenant can be at the mercy of the leasehold structure imposed

by the landlord, yet if that structure is in a head lease there can be no escape. If the lease of the roof had been part of the head lease in the present case there could be no argument that anything less than the whole of it could be acquired.

19 Under (1)(b) the tenants "shall be entitled" to have acquired "any interest" that falls within (3). The language, "every interest" in (a) and "any interest" in (b), is virtually the same. If there is no right of severance under (a) it is hard to see how there can be under (b). The statutory scheme is inconsistent with any right of elective severance under s.2

20 Furthermore there is no equivalent in s.2 to the option given to tenants in s.1(5) to elect to acquire less extensive premises that the whole of the relevant building or part of the building. There is no express provision that permits tenants to acquire a part of any leasehold interest that they are entitled to acquire under s.2 (1)(a)(b), 2(2) or 2(3). If they should scale back their claim pursuant to s.1(5) that reduction in the relevant premises might well have the effect of causing s.2(4) to apply more widely than it otherwise would have done, but that is not the product of any independent right of elective severance. The severance provisions in s.2 are not "elective" they are compulsory. Given that the legislature did include an elective provision in s.1(5) one might have expected it to include such a provision in s.2 had it intended to do so. It did not. This suggests that it did not intend to do so.

21 Mr Johnson put considerable weight upon the provisions of s.13 governing the giving of notice of claim. Section 13(3)(c) requires the initial notice of collective enfranchisement to specify "any leasehold interest proposed to be acquired". That section refers only to leasehold interests and not to "part leasehold interests" or "premises demised by a lease" is because claims to part leasehold interests are not permitted. There is no entitlement to acquire part of a leasehold interest in the absence of the compulsory severance provisions. But the acquiring tenants are not required to set out how the compulsory severance will apply; they simply specify the relevant leasehold interest they claim. This also explains, argued Mr Johnson, why s.13 does not require a plan to be attached to the initial notice in order to identify the extent of leasehold premises that is because there is no need for such a plan. Again, this is in stark contrast to the way in which s.13 operates in relation to premises of which the freehold interest is claimed pursuant to s.1, when the notice is required to be accompanied by a plan. A plan is evidently necessary when premises define the right of acquisition but it is not where the right of acquisition is defined by a leasehold interest.

22 Mr Johnson went on to point to what he said were the bizarre consequences that would follow an unfettered right to cherry pick. A complicated patchwork quilt of rights could result.

23 So far as HL's appeal against the decision that DHL was entitled to acquire the roof in its entirety is concerned, Mr Johnson said that the LVT was not entitled to take that decision upon itself. DHL had never claimed to be able to acquire the 2003 roof lease in its entirety. The claim was expressly confined to part only of the roof lease, as specified in the initial notice. If any such claim had ever been made by the DHL, which it was not, it would have been resisted by HL. The LVT had no jurisdiction to decide the point.

Consideration and conclusions

1. DHL's appeal

24 The issue is whether on the proper construction of s.2 the nominee purchaser entitled to acquire a leasehold interest must either acquire all of it or acquire none of it or whether Parliament's intention was that the nominee purchaser might acquire those parts of the leasehold interest that it needed to acquire and leave the rest.

25 Section 1 confers the right upon the nominee purchaser acting on behalf of the qualifying tenants to "have the freehold" of the "premises", which means basically the building that includes the qualifying tenants' flats, defined by s.1(2) as the relevant premises. The nominee purchaser is also entitled to acquire "the freehold of any property" which is appurtenant property (as defined in s.1(7)) not comprised in the relevant premises or premises used in common as defined in s.1(3)(b). Each of those categories of property is capable (though not necessarily easily capable) of precise objective determination. The right is to have the freehold of those defined premises or that defined property. In the absence of any contrary indication, the language of the section could be construed as a declaration that the nominee purchaser was given the right to either acquire the totality of the defined property, or none of it. Because of that, the draughtsman makes it clear in s.1(5) that all *or part* of such land may be acquired.

26 Section 2 deals with the acquisition of leasehold interests. These are, of course, only leasehold interests that relate to the premises of which the freehold is to be acquired. Section 2(2) specifies the first category, which is any lease superior to that of the qualifying tenants. Clearly every leasehold reversion has to be eliminated in order for the scheme to work. Therefore s.2(1)(a) says that "every" such leasehold interest must be acquired. It is clear that there can be no severance under that subsection. In the second category are leasehold interests under which the demised premises "consist of or include" relevant premises, appurtenant property or common parts. "Any interest" in this category may be acquired, under s.2(1)(b), subject to the overriding condition that the acquisition of "the interest of the tenant under any lease" is reasonably necessary for the proper management or maintenance of the property to be acquired (see s.2(3)).

27 Mr Johnson argued that s.1 is also capable of being read either way, yet the draughtsman thought it necessary to clarify the matter in s.1(5). In s.2 the draughtsman did not add a provision in similar terms to s.1(5). There is force in that argument. The draughtsman did not add the words "and the right to require the interest of the tenant under the lease shall not extend to his interest under the lease in any premises that are not so reasonably necessary" which he could have done, if that was what he meant. He could have said that interest or "that part of that interest which" is reasonably necessary. The matter could have been made clear in a number of ways and either way. The draughtsman could have made it clear beyond doubt that he did mean an "all or nothing" approach but he did not do that either.

28 I find the language of s.2(1)(b) and (3) less supportive of the argument that the right is either to acquire the whole of the leasehold interest in question or none of it, than was the language of s.1 in relation to the right to acquire property absent s.1(5). In my view the phrases "any interest" or "the interest of the tenant under any lease" are as apt to describe an interest carved from the original leasehold

interest as to describe the whole of the original interest. I read nothing in s.2(3) that is inconsistent with such an interpretation. Nor do I find any difficulty in drawing a distinction between s.2(1)(a) and s.2(1)(b); there is a significant difference in the language and meaning of the two subsections, read as a whole. In my judgement, that difference substantially weakens the force of Mr Johnson's argument that the lack of a similar provision to s.1(5) in s.2 is significant.

29 The draughtsman evidently envisaged the possibility that the whole of the relevant leasehold interest might be acquired under s.2(3). The whole of the leasehold interest could be very extensive and might include premises nothing to do with the relevant premises, appurtenant premises, or common parts. To avoid that, s.2(4) declares that where a leasehold interest to be acquired under s.2(3)(b) includes any premises that are neither a qualifying tenant's flat, common parts nor appurtenant property, the right to acquire does not apply to such other premises. This provision is expressed in terms that make it plain that the section contemplates that the leasehold interest can be acquired in part. It says that the obligation or right "to acquire the interest of the tenant under the lease shall not extend to his interest under the lease in any such other premises." The parties refer to this as "mandatory severance". Another way of putting it is to say that the Act sets a limit to the breadth of the words "the interest of the tenant under the lease." I find some indication in the words used that the draughtsman recognised that the phrase "to acquire the interest of the tenant under the lease" is apt in a situation where less than the total leasehold interest is to be acquired.

30 Although the s.2(4) exclusion obviously contemplates the possibility that, in its absence, the nominated purchaser might acquire parts of the leasehold interest in premises that have nothing to do with the property to be acquired, it does not follow that the draughtsman meant that, in the absence of this statutory exclusion, *only* the totality of the leasehold interest could be acquired. (For the sake of completeness should be noted that there is also an exclusion in some circumstances where the qualifying tenant of the flat is a public sector landlord. (Section 2(5) and (6)) But that is neither relevant nor particularly illuminating in this case.)

31 It is perfectly possible to contemplate circumstances in which the leasehold interest includes common parts or appurtenant property, not excluded by s.2(4), but where it is not reasonably necessary to acquire that interest for the proper management or maintenance of those common parts or appurtenant property (under s.2(3)(b)). The facts of this case illustrate the point. There is an argument, at least, that, given that it is wished to acquire the freehold of the building and its roof, the acquisition of the roof lease would be reasonably necessary for the proper management and maintenance of the roof. However, the roof lease contemplates that there will be development over much of the roof. If that development were to take place it might be sensible for the qualifying tenants below to take the view that it was not reasonably necessary to acquire any rights under that lease in those parts of the roof that were physically under the new development. Mr Rainey asks what purpose, consistent with the underlying scheme of the Act, would be served by requiring the nominee purchaser to acquire the leasehold interest in those parts of the roof that it was not reasonably necessary to have as well as in those parts that it was reasonably necessary to have. That is a fair question, in my opinion. The whole tenor of s.2 appears to be that the right to acquire leasehold rights is to be tightly limited. Section 2 does not shrink from severing those leasehold rights

to achieve those limits. It is difficult to see what purpose compelling the nominee purchaser to take more of the leasehold interest than he wants or needs would serve.

32 One purpose, Mr Johnson submits, would be to prevent "cherry picking" by the qualifying tenants, so far as that was felt to be unfair or undesirable. I do not find that persuasive. I agree with Mr Rainey that an answer to the point is to be found in s.21(4). That provision enables the leaseholder to require the nominee purchaser to acquire the interest in any property that is left incapable of reasonably beneficial use or becomes unmanageable. The landlord also has the power to protect himself to a degree by counter-offering the grant of rights under s.1(4). Generally it would appear to be in the interests of the leaseholder that no more of his interest is acquired than is necessary. To my mind it would seem strange if Parliament intended to give that protection to the landlord and yet left the tenant with the choice of all or nothing, so far as the acquisition of a leasehold interest were concerned.

33 Another purpose might be that Parliament contemplated that the "patchwork quilt" of rights would simply become unmanageable. I bear Mr Johnson's submissions about the operation of s.13 in mind. But it does not seem to me that any insuperable difficulties would be caused by an interpretation that acknowledged "elective severance"; or at least none more difficult than would be created by the "mandatory severance", which I must assume Parliament was content would not impose intolerable burdens on the machinery.

34 Given that I do not find the language of the Act conclusive, it does seem to me that to read s.2 as enabling the nominee purchaser to acquire as much of the leasehold interest as is needed and wanted but not insisting that all of it would be acquired, is much more consistent with the purpose of conferring on the tenants those advantages Parliament must have intended them to enjoy. Instead of a rigidity that seems to me to be pointless, such an interpretation produces a sensible flexibility, no more likely to create difficulties in practice then the interpretation of the Act that HL advances.

35 For those reasons, DHL's appeal succeeds.

2. HL's appeal

36 It is possible to doubt whether the LVT actually intended to determine that the roof lease must be acquired in its entirety. When the LVT says, in [46] of its decision, "the 2003 roof lease which the tribunal has determined must be acquired in its entirety" I am left with the suspicion words such as "if at all" were accidentally omitted from the end of that phrase. The LVT may have fallen into the understandable trap of failing to distinguish between Mr Johnson's submissions, with which it agreed in [44], and what was actually before it on the application. However, Mr Johnson is right to say that whether or not the LVT actually intended to determine the point, it certainly looks as if it has done so. It seems to me that he is also quite right to say that it was not a point that was properly before the LVT and the LVT was not entitled to determine it. HL's appeal must succeed on this point.

37 Both appeals succeed and this matter must be remitted to the LVT.

Appeals allowed