LRA/85/2006

LANDS TRIBUNAL ACT 1949

LEASEHOLD ENFRANCHISEMENT – collective enfranchisement – intermediate lease of four flats – caretaker's flat – whether intermediate leasehold interest in caretaker's flat to be acquired – whether included in common parts – terms of transfer – held not part of common parts and not subject to acquisition – Leasehold Reform, Housing and Urban Development Act 1993 ss 2, 24 and 34

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL OF THE LONDON RENT ASSESSMENT

APPEAL BY

(1) John B McGuckian, Pat McDonald & Tanya Reihill
(2) 29 Eaton Place Management Company Limited

Re: 29 Eaton Place
London SW1X 5BP

Before: The President

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 4 October 2007

Philip Rainey instructed by Lewis Silkin for the appellants

The following cases are referred to in this decision:

Maurice v Hollow-ware Products [2005] 2 EGLR 71
Aggio v Howard de Walden Estates Ltd [2007] 3 All ER 910
Gaingold Ltd v WHRA RTM Co Ltd [2006] 1 EGLR 81
Indiana Investments Ltd v Taylor [2004] 50 EG 86

The following further cases were referred to in argument:

Cadogan v McGirk [1996] 4 All ER 643
F R Evans (Leeds) Ltd v English Electric Co Ltd (1977) 36 P & CR 185
Sussex Gardens Freehold Co Ltd v Church Commissioners for England (LVT ref LON/ENF/1456/05, 12 December 2005)
Meadowside Freehold Ltd v Shellpoint Trustee Ltd (LVT ref LON/ENF/1177/04, 20 May 2005)
Girdler v Terrace Investments Ltd (LVT ref LON/ENF/843/03, 1 November 2003)
Hauteville Court Gardens Ltd v Nereidas Ltd (LVT ref LON/ENF/611/01, 10 December 2003)
Stourton Court Freehold Ltd v Trustees of A E Cooper Dean Charitable Foundation (LVT ref CHI/00HN/OCE/2003/0036, undated)
Burns Drive Associates Ltd v Orchidbase Ltd (LVT ref CAM/26UC/0CE/2005/0025, undated)
Marine Court (St Leonards on Sea) Freeholders Ltd v Rother District Investments Ltd (HHJ Hollis, 11 October 2007, unreported)

DECISION

1. This is an appeal against a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel on an application made to it under section 24 of the Leasehold Reform, Housing and Urban Development Act 1993 in respect of the terms of acquisition on a collective enfranchisement of the premises at 29 Eaton Place, London SW1. The respondent to the proceedings in the LVT was Frank Reihill. Mr Reihill died having given notice of appeal to this Tribunal, and his executors have been substituted as respondents. I will, however, refer throughout to Mr Reihill rather than the executors.

2. The premises consist of a 6-storey terraced house containing four flats: one on the third and fourth floors, one on the first and second floors, one on the ground floor and basement, and one in the basement occupied by a caretaker. There is a somewhat complex hierarchy of interests, as follows:

(a) The freehold, which is vested in the Trustees of the Will of the Second Duke of Westminster;

(b) The headlease, vested in Grosvenor Estate Belgravia, commencing on 25 March 1984 and expiring on 24 March 2184;

(c) The "overriding lease", of the 1st and 2nd floors only, vested in Mr Reihill, commencing on 11 May 2000 and expiring on 22 December 2124;

(d) The "extended lease", of the basement and ground floor flat only, vested in Ilona Szekeres, commencing on 13 January 2004 and expiring on 21 March 2100;

(e) The "enforcer lease", vested in Belgravia Leasehold Properties Limited commencing on 10 May 2000 and expiring on 26 March 2010;

(f) The "intermediate lease" (otherwise known as the headlease or management lease), vested in 29 Eaton Place Management Company Limited, commencing on 24 June 1947 and expiring on 24 March 2010;

(g) Underleases of three of the flats:

  (i) of the 3rd and 4th floor flat, vested in Ms Szekeres, commencing on 29 September 1959 and expiring on 26 March 2010;

  (ii) of the 1st and 2nd floor flat, vested in Mr Reihill, commencing on 25 December 1958 and expiring on 22 March 2010;

  (iii) of the basement and ground floor flat, vested in Ms Szekeres commencing on 25 March 1988 and expiring on 22 March 2010.

3. The following provisions relating to the caretaker's flat appear in the leases. In the intermediate lease (f) above) there is a requirement (clause 2(x)) that the demised premises "shall be kept and used for the following purposes – (i) As to the front rooms in the basement for the occupation of a caretaker only (ii) As to the remainder ... as not more than three private residential self-contained Maisonettes ...". In the underlease of the 1st and 2nd floor flat ((g)(ii) above), the lessee covenants at clause 2(ii) "As and when called upon so to do to pay to the Lessor a service charge to cover the cost of employing a caretaker and for all insurances and general maintenance of the building ...". In the underlease of the 3rd and 4th floors ((g)(i) above) the lessee covenants in clause 2(ii) to pay "a service charge in respect of the cost incurred by the Lessor in performing the covenants on its behalf set out in Clause 4 ... PROVIDED THAT such cost shall not include (a) the rent which would be obtainable by the Lessor in respect of any portion of the said building occupied by the Caretaker hereinafter mentioned ...", and the lessor covenants in clause 4(e):

> "To employ a resident caretaker (whose wages shall so far as possible be represented by free accommodation in the basement of the said building) to clean and keep tidy the entrance and all other parts of the said building used in common by the Lessee the Lessor its servants and agents and the lessees of other parts of the said building and to remove all refuse therefrom and from the demised premises before 9 a.m. each day and to receive parcels in the absence of the Lessee and at the request of the Lessee to assist in any small items of necessary household repair."

In the underlease of the ground floor and basement flat ((g)(iii) above) the lessor covenants in clause 5(e), "To employ a resident caretaker whose duties shall be to clean and keep tidy the entrance and to remove all refuse from the demised premises before 9 am each day."

4. The caretaker's flat is occupied under the intermediate lease, and the lessee in which the lease is vested, 29 Eaton Place Management Ltd, is a company limited by guarantee of which Mr Reihill is the director and a member. Ms Szekeres is not a member of the company. Mr Reihill bought the two leases of the 1st and 2nd floor flat ((c) and (g)(ii) above) in 2002. It appears that in about 2003 Mrs Szekeres acquired the underleases of the 3rd and 4th floor flat and the basement and ground floor flat ((g)(i) and (iii)), and the extended lease of the basement and ground floor flat (d) was granted to her on 13 January 2004, pursuant to Chapter II of Part I of the 1993 Act.

5. By notice dated 23 December 2004 Ms Szekeres, pursuing what Mr Philip Rainey for the appellants referred to as a "hostile" collective enfranchisement, made against his client's wishes and in order to realise a capital profit, gave notice under section 13 of the 1993 Act proposing the acquisition of the freehold of the premises. The notice claimed that the premises fell within Chapter I of Part I because they contained four flats which were held by qualifying tenants. It specified as the leasehold interests to be acquired under or by virtue of the Act the headlease (lease (b) above) insofar as it related to the specified premises, the intermediate lease (lease (f) above), the enforcer lease (lease (e) above) and the overriding lease of the 2nd and 3rd floors (lease (c) above). It proposed purchase prices for each of these interests. The nominee purchaser is now Alderwood Capital Ltd, a company owned by Ms Szekeres.

6. The freeholders served a counter-notice, admitting the right to enfranchise and containing counter-proposals on the purchase prices and specifying provisions that they considered should be included in any transfer or conveyance. Notices of separate representation were served on behalf of Mr Reihill and the Management Company. In the event the purchase prices were agreed, with the exception of that payable to the freeholders; and, in respect of this, it was agreed by the valuers that if Mr Reihill could prevent the caretaker's flat being used other than for that purpose the price for that was £1,132,500 but that, if he could not do so, the price was £1,142,500.

7. Ms Szekeres and the freeholders agreed the form of transfer that they sought. It included an amendment to the Grosvenor Estates' Management Scheme so that, amongst other things, it would provide that the caretaker's flat might only be used as accommodation for a resident caretaker, subject, however, to a proviso that, with the consent of the freeholders (not to be unreasonably withheld or delayed) the caretaker's flat might either be used as a private residential flat or part of it might be used as a residential flat with the remainder being incorporated into one of the other maisonettes.

8. In its decision the LVT recorded that Mr Reihill and the Management Company proposed a substantially different form of transfer. The transfer proposed by them would provide that the intermediate lease ((f) above) would not merge in any superior interest on completion. It also incorporated various covenants on the part of the Ms Szekeres, as transferee, that were intended to require her to maintain a resident caretaker in the caretaker's flat. There were detailed provisions relating to the transfer of the caretaker's contract of employment to Ms Szekeres and there was an indemnity, in favour of Mr Reihill and the Management Company, against any claims arising from the termination of that contract. There were also provisions intended to preserve Mr Reihill's claim notice relating to his proposed lease extension, which would limit both the premium to be paid for the new extended lease and Ms Szekeres' ability to refer the matter to the LVT.

9. The LVT was invited by the parties to reach its decision on the assumption that Ms Skeres, through Alderwood the nominee purchaser, would merge the superior leasehold interests in the freehold reversion or, as her counsel put it, would "collapse everything". Mr Reihill's concern was that, if this happened, Ms Skeres would dispense with the services of the resident caretaker and either sell the caretaker's flat or incorporate part of it into the basement and ground floor flat, thereby realising a significant capital gain. Mr Reihill said that he wished to preserve the benefit that a resident caretaker gave to his own flat.

10. The LVT, in a decision of thoroughness and clarity, determined, contrary to the contention advanced on behalf of Mr Reihill and the Management Company, that Ms Szekeres was entitled to acquire the interest created by the intermediate lease in the caretaker's flat; that Ms Szekeres would be obliged after enfranchisement to retain the services of a resident caretaker; and that, while it would be wholly inappropriate to include in the terms of the transfer a provision permitting Ms Szekeres with the freeholders' approval to change the use of the caretaker's flat, it would also be inappropriate to include in the transfer a positive covenant to maintain the services of a resident caretaker.

11. The LVT granted permission to appeal against its decision on the terms that should be included in the transfer, but it refused permission in relation to its conclusion that Ms Szekeres was entitled to acquire the interest created by the intermediate lease in the caretaker's flat. I granted permission, however, on this latter point. Neither Ms Szekeres nor the freeholders respond to the appeal. Thus, on what are complex and potentially controversial matters, while I have had detailed assistance from Mr Philip Rainey for the appellants, both at the hearing and in later supplementary submissions in response to questions that I raised, I have had no submissions from respondents.

12. Under Chapter I of Part I of the 1993 Act qualifying tenants of flats contained in premises to which the Chapter applies have the right to acquire the freehold of the premises. The Chapter applies (section 3(1)) to any premises if they consist of a self-contained building or part of a building; if they contain two or more flats held by qualifying tenants; and if the total number of flats held by each tenants is not less than two-thirds of the total number of flats contained in the premises. A person is a qualifying tenant if he is tenant of the flat under a lease of more than 21 years (sections 5(1) and 7(1)). A notice of claim to exercise the right to acquire the freehold must be given by a number of qualifying tenants of flats contained in the premises which is not less than half the total number of such flats (section 13(2)(b)).

13. Section 2 of the Act, so far as immediately relevant, provides as follows:

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

14. Section 101(1) provides that "common parts", in relation to any building or part of a building, includes the structure and exterior of that building or part and any common facilities within it; and that "flat" means a separate set of premises (whether or not on the same floor) – (a) which forms part of a building, and (b) which is constructed or adapted for use for the purposes of a dwelling.

15. In its decision the LVT considered the question of whether the nominee purchaser was entitled to acquire the interest in the caretaker's flat of the Third Respondent (29 EPMCL) under the intermediate lease on the basis that 29 EPCML was a qualifying tenant of the caretaker's flat. It said this:

"10. It was common ground that the Third Respondent was a qualifying tenant of the Caretaker's Flat, which it holds under the Intermediate Lease. Relying on the wording of subsection 2(2) of the Act both Mr Small and Mr Radevsky (who made common cause) advanced the argument that because the Intermediate Lease was superior to the three maisonette sub-leases the Applicant was entitled to acquire the whole of the interest demised by that lease, including the interest in the Caretaker's Flat.

11. It was not an argument that we found attractive. Subsection 2(2) of the Act does not appear to assist the Applicant because it applies only '*to the interest of the tenant under any lease which is superior to the lease held by a qualifying tenant'*. In the case of the Caretaker's Flat the Intermediate Lease was not a superior lease: rather it was the occupational lease by which the Third Respondent held that flat.

12. Mr Radevsky also suggested that as the Caretaker's Flat was held by a qualifying tenant it falls within subsection 2(4)(a) and therefore the right to acquire it was not excluded by the closing words of that subsection. At first sight there is much to commend such an interpretation. However when considered in the context of the section as a whole and in particular subsection 2(2) it seems fundamentally flawed. The subsection is exempting from the right to acquisition any premises demised by a

superior lease that is not itself subject to an inferior lease held by a qualifying tenant. In other words subsection 2(4) is intended to preserve a superior lessee's occupational interest in any property that forms part of the demise. This analysis appears to be consistent with that contained at paragraph 20-08 of the first supplement to the fourth addition of Hague with which we agreed.

13. Furthermore if one stood back and considered Section 2 of the Act as a whole (as we were repeatedly requested to do by both advocates) it was apparent that the clear intention was to exempt from the right to collective enfranchisement, the occupational interests of qualifying tenants. The proposition that Parliament had intended to permit a qualifying tenant to be deprived of such an interest appeared to us to be perverse. The draughtsman's intention was to strip away the intermediate interests so that, following enfranchisement, one would be left with the freehold interest subject only to the occupational leases of the individual flats, some of which may be created under the leaseback provisions: it was an entirely pragmatic objective although it was difficult to understand why such convoluted language had been used to achieve it."

16. Having therefore concluded that the nominee purchaser was not entitled to acquire the intermediate leasehold interest in the caretaker's flat on the basis that 29 EPCML was a qualifying tenant of the flat, the LVT turned to the question whether the caretaker's flat formed part of the common parts. It said:

"14. Consequently the Applicant could only acquire the Intermediate Leasehold interest in the Caretaker's Flat if the flat formed part of the 'common parts' for the purpose of subsection 2(3)(a). Mr Rainey did not appear to suggest that a common part held by a qualifying tenant under an occupational lease could not be acquired on an enfranchisement claim. The overriding purpose of the Act was to give tenants the right to collective enfranchisement and clearly their right to acquire the common parts must take precedence if that right was to prevail.

15. Mr Rainey drew our attention to a number of statutory definitions of the term 'common parts'. We did not find these helpful: the only relevant definition was that contained in the Act and recited above. Equally, we did not consider that other tribunal decisions, to which Mr Rainey referred, were of any great assistance: to the extent that they were admissible each had been decided on its own specific facts.

16. The thrust of Mr Rainey's argument was that the Caretaker's Flat could not be a common part because it was exclusively enjoyed by the caretaker and the sublessees of the three maisonettes had no access to it. The difficulty with Mr Rainey's argument was that he was forced to concede, in answer to our questions, that a plant room would plainly fall within the definition of common parts even though only the lessor and not the lessees would have access to it.

17. A distinction could be drawn between (a) a scheme that required a lessor to provide caretaking facilities and (b) a scheme that required a lessor to provide the services of a **resident** caretaker. In the former the lessor may, for its own convenience, decide to house the caretaker in a flat retained by it, but it would not be obliged to do so: the services could be provided by a non-resident caretaker. With such a scheme the retained flat would not amount to a common part.

> 18. However in this case the sublessees were entitled to the services of a resident caretaker. The services provided by that caretaker and enjoyed by the sublessees of the maisonettes were a common facility within the definition contained in Section 101 of the Act. The Caretaker's Flat was essential to the provision of the residential caretaking facilities. To put it another way the Nominee Purchaser would not be able to fulfil its obligations, as a lessor, under the maisonette subleases unless it acquired the Caretaker's Flat.
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> 19. For each and all of these reasons we concluded that the Caretaker's Flat was a common part and hence the Applicant was entitled to acquire the Intermediate Leasehold interest in that flat".

17. Before the LVT it was common ground between the parties that the intermediate lease fell within section 2(2). That is clearly the case because, whatever the status of the caretaker's flat, the intermediate lease is superior to the underleases of the qualifying tenants of the 3rd and 4th floor flat and the ground floor and basement flat (Ms Skeres) and the 1st and 2nd floor flat (Mr Reihill). The question, therefore, is whether the caretaker's flat is excluded from the obligation to buy under section 2(1)(a). It would be excluded unless it fell within section 2(4)(a) as "a flat contained in the relevant premises which is held by a qualifying tenant" or section 2(4)(b) as "any common parts of those premises".

18. It was also common ground before the LVT that 29 EPMCL was a qualifying tenant of the caretaker's flat under the intermediate lease. The LVT, however, did not consider that this was sufficient to bring the exclusion within section 2(4)(a) for the reasons that it set out in paragraphs 10 to 14 of its decision. The fact that the intermediate lease was of all four flats would not have prevented 29 EPMCL from being a qualifying tenant of the caretaker's flat in the light of the High Court decision in *Maurice v Hollow-ware Products* [2005] 2 EGLR 71. In that case it had been held that a head-lessee of a block of flats was held to be a qualifying tenant of each of the flats and so able to exercise the right of individual lease extension in relation to each of them under Chapter II of Part I of the 1993 Act. Since the LVT decided the present case, however, that decision has been overruled by the Court of Appeal in *Aggio v Howard de Walden Estates Ltd* [2007] 3 All ER 910. The court there held that "a qualifying tenant of a flat" referred to the tenant of a flat who was a tenant of that flat and that flat alone. Although that was a decision relating to individual lease extensions under Chapter II, Mr Rainey submitted that "a qualifying tenant of a flat" must be the same under Chapter I and Chapter II, and I see no reason to disagree with this. Accordingly 29 EPCML is not a qualifying tenant of a flat (the caretaker's flat) because under the intermediate lease it is not the tenant of that flat alone but of that flat and the three other flats. The result, therefore, though for a reason that is different from those given by the LVT, is that the exclusion in section 2(4)(a) does not apply and the applicant will not be obliged to purchase the caretaker's flat under section 2(1)(a) (and could not be entitled to purchase it under section 2(1)(b) and (3)) unless it constitutes common parts of the premises.

19. The LVT held that the caretaker's flat constituted "common parts" within the definition of that term in section 101(1) for the reasons set out in its decision at paragraphs 14 to 19. It held that under the subleases the tenants were entitled to the services of a resident caretaker and such services were therefore a "common facility" for the purposes of the definition.

Mr Rainey challenged this conclusion. He said that a caretaker's flat was not what an ordinary man or a person engaged in property management would expect to call part of the common parts; and, while the definition in section 101(1) was extended so as to include "common facilities", such a term was apt to include areas such as plant rooms and service conduits but not residential parts of the premises. The provisions, he said, drew a distinction between parts of premises that were residential and common parts. Thus section 4 provided:

> "(1) This Chapter does not apply to premises falling within section 3(1) if –
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> (a) any part or parts of the premises is or are neither –
>
> (i) occupied, or intended to be occupied, for residential purposes, nor
>
> (ii) comprised in any common parts of the premises; and
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> (b) the internal floor area of that part or of those parts (taken together) exceeds 25 per cent of the internal floor area of the premises (taken as a whole)…"

20. Mr Rainey referred to my decision in this Tribunal in *Gaingold Ltd v WHRA RTM Co Ltd* [2006] 1 EGLR 81 in support of his contention that a caretaker's flat is occupied or intended to be occupied for residential purposes and accordingly could not be comprised in any common parts of the premises. That case arose under the right to manage provisions in the Commonhold and Leasehold Reform Act 2002. Under section 72(1) of the 2002 Act the right to manage provisions in Chapter 1 of Part 2 of the 2002 Act apply to premises if –

> "(a) they consist of a self-contained building or part of a building, with or without appurtenant property,
>
> (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."

21. Subsection (6) of section 72 gives effect to Schedule 6, which specifies premises that are excluded from the right to manage. Paragraph 1, so far as material, provides.

> "(1) This Chapter does not apply to premises falling within section 72(1) if the internal floor area –
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> (a) of any non-residential part, or
>
> (b) (where there is more than one such part) of those parts (taken together), exceeds 25 per cent of the internal floor area of the premises (taken as a whole).
>
> (2) A part of premises is a non-residential part if it is neither –
>
> (a) occupied, or intended to be occupied, for residential purposes, nor
>
> (b) comprised in any common parts of the premises.

> (3) Where in the case of any such premises any part of the premises (such as, for example, a garage, parking space or storage area) is used, or intended for use, in conjunction with a particular dwelling contained in the premises (and accordingly is not comprised in the common parts of the premises), it shall be taken to be occupied, or intended to be occupied, for residential purposes..."

22. The appellants in *Gaingold* were the headlessees of premises consisting of 13 purpose-built self-contained residential apartments, a retail unit, a restaurant and a basement that contained five bed-sitting rooms, a communal kitchen, a bathroom and a room used as an office. The restaurant and the basement were let on an under-lease that contained a covenant against using the premises other than as "a licensed Victualling House...with subsidiary dwelling accommodation." The issue was whether the basement was a "non-residential part" of the premises. If it was, the non-residential parts were more than 25%, and the right to manage provisions of the Act were excluded. In paragraph 12 of that decision I concluded that the living accommodation in the basement was occupied for residential purposes and that there was no justification for treating as the sole occupier of the basement the person operating the restaurant business.

23. In *Indiana Investments Ltd v Taylor* [2004] 50 EG 86 His Honour Judge Cooke in the Central London County Court had to consider section 4 of the 1993 Act in order to apply subsection (3) of that section, which provides:

> "(3) For the purpose of determining the internal floor area of a building or of any part of a building, the floor or floors of the building or part shall be taken to extend (without interruption) throughout the whole of the interior of the building or part, except that the area of any common parts of the building or part shall be disregarded."

24. The judge held that the calculation that was required in order to apply the 25% qualification in subsection (1)(b) was to express as a percentage of the internal floor area of the building excluding the common parts the internal area of the parts that were neither residential nor common parts. Unsurprisingly, it seems to me, he regarded this as the only possible construction of the provisions. Mr Rainey relies on the decision because it shows that the residential parts of the building are distinct from the common parts. As the judge put it (at 64H): "Residential parts need to be clearly identified because they form part of one side of the ratio. Common parts need to be identified because they have to be excluded from the calculation."

25. Mr Rainey relied on these decisions as showing that the caretaker's flat must be treated as being occupied for residential purposes and that, since residential parts and common parts were distinct, it could not form part of the common parts. I accept this argument. It seems to me, moreover, that there is a clear implication in the separate provisions in section 2(4)(a) and (b) and the separate definitions in section 101(1) that flats and common parts are distinct and mutually exclusive. There is no doubt that the caretaker's flat falls clearly within the definition of flat, and it would be surprising if it nevertheless constituted in addition part of the common parts, into the definition of which it does not (to put it no higher) necessarily fit.

26. In reaching its decision the LVT was influenced by the consideration that, unless the nominee purchaser was able to acquire the caretaker's flat, it would not be able to fulfil its obligations as lessor under the subleases of the flats to provide the services of a resident caretaker. While it is understandable, and indeed commendable, for the LVT to have searched for a practical solution to what it saw as the caretaker problem, the issue is necessarily one of statutory construction, and, for the reasons I have given, I do not think that the statutory provisions in their terms permit the result that the LVT sought to achieve. In my judgment the caretaker's flat was neither a flat held by a qualifying tenant (in the light of *Aggio*), nor was it part of the common parts. Accordingly the obligation to acquire under section 2(1)(a) does not extend to the intermediate leasehold interest in the caretaker's flat, nor could there be any entitlement to acquire it under section 2(1)(b).

27. The second issue in the appeal concerns the terms of the transfer. The LVT, having concluded that the nominee purchaser was entitled to acquire the intermediate leasehold interest in the caretaker's flat and that each of the sublessees was entitled to the services of a caretaker resident in the flat, said this:

> "Turning to the form of transfer, it followed from our decision that it would be wholly inappropriate to include the proviso at Clause 7.4.1 of the applicant's draft, which permitted the Applicant, with the approval of the First Respondent, to change the use of the Caretaker's Flat…
>
> It was unnecessary for us to resolve this point because, for each of the following reasons, we considered it inappropriate to include the proposed obligation in the transfer. The obligation would not be enforceable against the Applicant's successors in title and was more a matter of contract than title. Furthermore the obligation was properly enforceable through the provisions of the maisonette subleases. To the extent that it was necessary to incorporate such a positive obligation in the documents leading to the enfranchisement, it was an obligation that would be more appropriately included in the contract between the parties, envisaged by Schedule 1 to the Leasehold Reform (Collective Enfranchisement and Lese Renewal) Regulations 1993. That contract would no doubt make provision for the transfer of the caretaker's contract of employment and would indemnify the Third Respondent from any consequential claims."

28. The LVT granted permission to appeal in relation to this part of its decision, saying that, in the absence of the reversioner's co-operation in submitting a draft contract, it might well be appropriate to include in the transfer a number of the additional provisions that had been suggested. It added that tribunals would benefit from guidance from the Lands Tribunal as to the extent of their powers to settle both the contract and the transfer in enfranchisement cases and in particular their jurisdiction to include positive obligations in the transfer.

29. In the event it is not necessary for me to determine this second issue. Mr Reihill's concerns were that the caretaker's flat should continue to be used as such and that the services of a resident caretaker should continue to be provided. He was also concerned that he should not be liable for any claim against him that the caretaker might have in the event that

Ms Skeres decided that the services of the caretaker should be dispensed with the caretaker's flat should be sold. Since the intermediate leasehold interest in the caretaker's flat will not be acquired, it will be for 29 EPMCL to continue the use of the caretaker's flat and such provision of caretaker's services as it is obliged to provide until the termination of the lease in March 2010.

30. Despite Mr Rainey's detailed submissions, I do not think it would be appropriate to express any view on particular terms or appropriateness of their conclusion, since these have now become academic. As for the general questions of what it is that an LVT has to determine and what terms can be concluded in the conveyance, I would simply say this. Firstly, under section 24(1) the LVT is to determine any of the terms of acquisition, and "terms of acquisition" are defined in subsection (8) as the terms of the proposed acquisition by the nominee purchaser whether relating to the five specific matters that are set out in the subsection "or otherwise". This implies that the LVT may determine that any terms of acquisition that are shown to be appropriate should be included. Secondly, since one of the matters specified is "(e) the provisions to be included in any conveyance" it is implicit that the LVT may determine terms that would require to be included in the contract but not the transfer. Thirdly, under section 34(9)(a) the conveyance must (in the absence of agreement to the contrary) "conform with" the provisions of Schedule 7. Schedule 7 contains some prohibitions (in paragraph 2) and it contains in paragraphs 3 to 5 some requirements as to what the conveyance must include. A conveyance would in my view conform with the provisions of Schedule 7 provided that it observed the prohibitions and included those matters that were required to be included. If it did this and contained in addition other provisions that were not inconsistent with the prohibitions and requirements, it would still conform with Schedule 7.

31. The appeal is allowed. The intermediate lease interest in the caretaker's flat is not to be acquired.

Dated 3 January 2008

George Bartlett QC, President