Neutral Citation Number: [2010] EWCA Civ 1259

Case No: A3/2010/0735

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
CHANCERY DIVISION
MR JUSTICE ROTH
CC/2009/0296

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2010

Before :

CHANCELLOR OF THE HIGH COURT
LORD JUSTICE CARNWATH
and
LORD JUSTICE HUGHES

- -

Between :

THE EARL CADOGAN & ANR	**Appellants**
- and -	
PANAGOPOULOS & ANR	**Respondents**

- -
- -

Kenneth Munro (instructed by **Pemberton Greenish**) for the **Appellants**
Andrew Walker (instructed by **Bircham Dyson Bell LLP**) for the **Respondents**

Hearing date : Tuesday 26th October, 2010

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Judgment

LORD JUSTICE CARNWATH :

Introduction

1. This is an appeal from the judgment of Roth J. The issue in short is whether a caretaker's flat was within the "common parts" of the relevant premises for the purposes of Part I of the Leasehold Reform Housing and Urban Development Act 1993 ("the 1993 Act"). Other issues, covered in detail in the judgments below, were raised by a respondents' notice, but in the event we have not needed to hear argument on them.

2. The property in question is at 51 Cadogan Square in Knightsbridge, within the Cadogan Estate. It is part of a terrace. It comprises five converted flats or maisonettes on the ground floor and upper floors, and a basement in which there is, below the rear of the main part of the building, a flat hitherto used as a caretaker's flat. The front of the basement is a storage area, with a front exit door into an open area with a staircase up to the street, and access to vaults under the pavement.

3. The statutory process began on 25 April 2006, when three of the five qualifying tenants (the lessees of flats 2, 3 and 5) served notice on the appellants (the Estate") to acquire the freehold of the property. The date on which that notice was given became "the relevant date" for the purpose of the other statutory provisions, including valuation of the freehold (s 1(8)). The notice specified the respondents as the nominee purchasers ("the purchasers"). On 30 June 2006, the Estate served a counter notice. On 13 July 2006 the tenants' notice was registered as a local land charge (the freehold title being unregistered): see section 97. On 13 October 2006, the purchasers applied to the Leasehold Valuation Tribunal to determine the terms of the acquisition.

4. On 25 March 2007 the Estate gave notice of their intention to grant a lease of the caretaker's flat to a nominee. The purchasers objected to the validity of this grant and sought to raise it as a preliminary issue before the LVT, but the tribunal decided that it had no jurisdiction to make a determination. The parties agreed terms of the acquisition on alternative bases according to whether the intended lease of the caretaker's flat was, or was not, void. On 27 March 2008 the Estate granted a lease of the caretaker's flat to a nominee for a 999 year period. (The terms of the lease are not material to the main issue before us.) The Estate applied to the Land Registry to register the lease, but following an objection by the purchasers the matter was referred to the Adjudicator to Her Majesty's Land Registry. Those proceedings were overtaken by an application by the Estate to the County Court on 11 June 2008, which led to the judgment of HH Judge Marshall. It is that judgment which was upheld by Roth J, whose judgment is now under appeal.

The statutory framework

5. The "collective enfranchisement" provisions of the 1993 Act are by now well-known, although they continue to give rise to problems of interpretation. They give "qualifying tenants" of flats in "relevant premises" the right to have the freehold of those premises acquired on their behalf by a nominee purchaser. Relevant premises must consist of "a self-contained building or part of a building", containing one or more flats and the total number of flats held by qualifying tenants must be at least

two-thirds of the total number of flats in the premises (s 3(1)). The right must be exercised by the tenants of at least one half of the flats in the building (s 13(2) (ii)).

6. The general approach to interpretation of this statute is well settled:

> "It is the duty of the court to construe the 1993 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." *Cadogan v McGirk* [1996] 4 All ER 643, 648 per Millett LJ)

It should also be borne in mind that the issues are not only of concern to the participating tenants, on the one hand, and the freeholder on the other. The interests of the other tenants (whether qualifying or not) cannot be ignored. As the law stands at present (and as it appears likely to remain), the other tenants, even if they are "qualifying", have no right to participate in the acquisition. However, they have a right to the protection of their own property interests, one aspect of which may be the need for the new freeholder to obtain the rights necessary to secure their own continued use and enjoyment of the building as they were before the transfer.

7. The right to collective enfranchisement of the "relevant premises" is conferred by section 1. There are various provisions dealing with the acquisition of other premises or interests which are related to the tenants' enjoyment of the premises. Of direct relevance to this appeal is the right to have acquired, on behalf of "the qualifying tenants by whom the right is exercised", the interest of a tenant under any lease –

> "under which the demised premises consist of or include—
>
> (a) any common parts of the relevant premises,…
>
> where the acquisition of that interest is reasonably necessary for the proper management or maintenance of those common parts,… [on behalf of the tenants by whom the right to collective enfranchisement is exercised]." (s 2(1)(b),(3)(a))

Although it is not material in this case, it is of interest to note that the words in square brackets are to be repealed from an appointed date by the Commonhold and Leasehold Reform Act 2002 (s 180 sched 14). This perhaps reflects the consideration that the enjoyment of the common parts may not be confined to the participating tenants, and that proper management by the nominee purchaser may be needed on behalf of all the tenants of the building, whether participating or not.

8. Section 19 is the foundation of the claim that the lease of the caretaker's flat was void:

> "(1) Where the initial notice has been registered in accordance with section 97(1), then so long as it continues in force—
>
> (a) any person who owns the freehold of the whole or any part of the specified premises or the freehold of any property specified in the notice under section 13(3)(a)(ii) shall not—
>
> …

> (ii) grant out of that interest any lease under which, if it had been granted before the relevant date, the interest of the tenant would to any extent have been liable on that date to acquisition by virtue of section 2(1)(a) or (b);…
>
> and any transaction shall be void to the extent that it purports to effect any such disposal or any such grant of a lease as is mentioned in paragraph (a)…"

9. Applying that to the present case, the issue is whether the lease to the nominee would, if granted before the relevant date, have been liable to acquisition under section 2(1)(b). That in turn depends on -

   i) whether the "demised premises" under the lease (that is, the caretaker's flat) consisted of or included "common parts" of the relevant premises; and, if so,

   ii) whether the acquisition of the interest was "reasonably necessary for the proper management or maintenance of those common parts" on behalf of the participating tenants.

The lease provisions

10. The relevant lease history begins with a 61 year headlease granted by the Estate on 9 October 1962 in connection with the conversion of the building into five separate flats. An area in the basement was defined as the caretaker's flat. Individual leases of the five flats were granted by the head-lessee, beginning in October 1962.

11. The treatment of the caretaker and the flat in the various leases is not wholly consistent:

   i) By the 1962 headlease the head-lessee covenanted with the Estate to

   > "To provide for the demised premises throughout the said term a full-time Caretaker… who shall reside in the Caretaker's flat on a service basis…" (clause XB)
   >
   > The Caretaker's duties were defined (for example, cleaning the entrances, staircase, and lift, refuelling the boilers etc).

   ii) The lease of flat 4, also granted in 1962, contains a reference in the recitals to "flat occupied by the caretaker hereinafter mentioned", and a covenant by the lessor:

   > "That…the Lessor will at all times during the said term provide and use his best endeavours to maintain the services of a caretaker for the performance of [the various specified duties]" (clause 3(8)).

   iii) By 1966 the obligation to provide for a resident care-taker in a particular flat had become clearer. The lease of flat 1 (1966) contains a reference in the

recitals to "the flat occupied by the caretaker hereinafter mentioned", and a covenant by the lessor:

> "That…the Lessor will at all times during the said term provide and use his best endeavours to maintain the services of a full-time caretaker resident in the caretaker's flat for the performance of [the various specified duties]" (clause 3(8)).

The lease of flat 5 (1967) was in the same terms.

iv) The leases of flats 2 and 3 are recent (1998 and 2004), having been recast in connection with the grant of 90-year extensions granted under the 1993 Act, presumably to conform with a more modern form of Estate lease. For reasons which are not clear, the reference to caretaking appears only in the provisions relating to service charges, which include the cost of employing such staff as the Estate "in its absolute discretion" deems necessary "to provide caretaking services for the building", and, "where accommodation is provided for the use occupation or residence of such person", the cost of so providing it (4th Schedule Part 3 para 3).

12. Thus, on the terms of the leases, three of the five qualifying tenants have legally enforceable rights to the services of a caretaker, and two of those have specific rights to require a resident caretaker, living in the caretaker's flat, One of the latter (Flat 5) is participating in the acquisition.

Common parts

13. "Common parts" is defined by section 101(1):

> "'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;"

14. The definition is inclusive in form, rather than exhaustive. Thus it impliedly assumes an ordinary meaning of the expression "common parts", which is extended or clarified by specific reference to, first, the structure and exterior of a building, and, secondly, any "common facilities" within the building. Nothing in this case turns on the reference to the structure or exterior. The question therefore is whether the caretaker's flat is properly regarded as either "common parts" or "common facilities".

15. Perhaps surprisingly, in view of its relative familiarity, the expression "common parts" as such does not appear in the standard dictionaries. We have been referred to a number of other statutory definitions going back to 1963, but these vary in detail, emphasis and context. They are therefore of little help in to construing the term in the present context. Nor we have been referred to any direct authority in the higher courts.

16. Some inferential help is offered by the Act in section 4(2) (to which I shall return in connection with one of the Estate's arguments) which refers to:

> "… any part of the premises (such as, for example, a garage, parking space or storage area) [which] is used, or intended for use, in conjunction with a particular dwelling contained in the

> premises (and accordingly is not comprised in any common parts of the premises)."

This suggests, unsurprisingly, that such things as garages and storage areas are "common parts" if available for shared use, but not if used in conjunction with a particular dwelling.

17. That seems to me to accord with the ordinary meaning of the word "common": that is, for shared, rather than individual, use or benefit. That hardly needs authority, but it is supported by the decision of the Inner Houser of the Court of Session in *Marfield Properties v Secretary of State for the Environment* [1996] SCLR 749. The lease contained a definition of "common parts", which, having referred to a list of particular features (such as car parks and the service yard) included "all other parts… which are common to the premises…" Lord Hope said:

> "The adjective 'common' stands on its own. This suggests that it has been used here more generally, to include anything that is shared between the premises and other parts of the development or in some other way benefits or is of concern to the occupiers of them." (p 752D)

Although the issues were quite different, that seems to me a useful authority on the ordinary meaning of the word "common" in a context such as the present.

18. The other words of the definition present no great difficulty. The word "part" in the context of a building connotes a physical division, whether a particular area within the building (such as a garage), or a particular section of its physical constituents. "Facilities" seems to be designed to extend the definition to include such things as plant or equipment (for example, a lift or boiler). That accords with the dictionary definition of "facilities" as -

> "the physical means or equipment required for doing something, or the service provided by this." (OED)

19. The OED formulation permits a reasonably broad, common sense approach, which would tie in with the guidance as to interpretation (see para 6 above). For example, the "facility" represented by a boiler is not just the physical structure, but also includes the service of hot water provided from it. If the lessees have the right to obtain hot water from a common boiler, then, whether or not they have access to the boiler-room, it can in my view properly be regarded as a "common facility", and therefore within the common parts. On the other hand, the service cannot be one which is entirely detached from the building or some physical object attached to the building. Otherwise it is hard to see how it could be said to be "included in the demised premises" under the relevant lease, so as to come within section 2.

20. Applying the same approach, I have little difficulty in agreeing with the judges below on the narrow issue raised by the appeal, at least on the facts of this case. The caretaker's flat has been identified as a distinct part of the building with a distinct function, at least since 1966. It is referred to as such in two of the current leases, which also give the lessees rights to the services of a resident care-taker. It is true that the common benefit consists principally in the services of the caretaker as a person,

rather than the use of the flat itself. However, a resident caretaker requires a flat designated for the purpose. Taken together they can reasonably be regarded as representing a "facility" within the definition.

21. I note Roth J's conclusion that the existence of a legal entitlement to the facility was not critical. He said:

> "45. Moreover, I do not think that to satisfy the definition the part must be devoted to this purpose as a matter of obligation in the residents' leases. For example, Mr Munro gave the example of a gym as something that would constitute a "common facility", and I agree. But if the freeholder has devoted, say, a large room in the basement to serve as a gym and placed exercise machinery there, to which any resident may have access, I consider that this constitutes a common facility (and thus a 'common part') even if there is no covenant in the leases to provide such a facility. The test is applied as at the 'relevant date', which is the date of the tenants' section 13 notice."

22. I see the force of this approach. It may gain some support from the wording of section 2 (see above) which refers simply to the "use, or intended use" of the area, rather than to a legal right to its use. However, the issue does not arise in this case, since there was, as I have said, a specific legal entitlement on behalf of two of the lessees, of whom one was participating.

23. For the Estate, Mr Munro's main argument turned on a relatively narrow interpretation of the statutory definition. As he put it in his skeleton:

> "It is submitted that 'common parts' of the building are parts to which the lessees have access and 'common facilities' are facilities within the building to which the lessees have access... A caretaker's flat to which tenants have no rights and over they have no access cannot be part of the common parts for the purposes of s 2 and 19."

24. As will be apparent from what I have already said, I regard this as an unjustified restriction on the natural meaning of the definition. "Access", as such, is not a necessary part of it. It is sufficient in my view that the lessees share the benefit of the caretaker's flat, by enjoying the services for the purposes of which it was provided.

25. Finally, it is necessary to refer to the last part of the definition, relating to management or maintenance. This was dealt with very shortly by Roth J. He said:

> "62. If the caretaker's flat is therefore a common part, is it reasonable necessary for the Respondents to acquire it "for the proper management or maintenance of those common parts"? In my judgment, it clearly is, since if they did not acquire the interest under the Lease they would not be able to use that flat to accommodate a caretaker. Indeed, if the Lease remained in

> force, the basement flat would not be maintained as a common part at all."

26. I agree. Mr Munro argued that statutory acquisition of the flat was not necessary for this purpose, either because the Estate had indicated a willingness to negotiate terms to make it available or because it could have been provided in another flat. I see nothing in either point. First, the willingness of the freeholders to negotiate alternative terms cannot be relevant in determining the extent of the statutory right. Secondly, once the existing caretaker's flat has been identified as "common parts" the only issue is whether acquisition of *that* part is necessary for its management. The fact that the service might be provided elsewhere is irrelevant.

Authorities

27. Finally I should mention the two authorities referred to by Roth J. He did not regard either as requiring or pointing to a different conclusion. I agree.

28. The first was *Oakwood Court (Holland Park) Ltd v Daejan Properties Ltd* [2007] 1 EGLR 121, which concerned a boiler house housed in a separate building. The issue was whether it came within section 1(3)(b): that is, property which a qualifying tenant "is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises". Judge Marshall held that it did not, because the receipt of hot water by the tenants from the boiler did not amount to their "use" of the boiler house. It seems open to argument that this may be an unnecessarily restrictive interpretation of the word "use". However, as Judge Marshall herself accepted in the present case, that reasoning has no application to the definition of "common parts", which does not in terms depend on "use".

29. The other decision, of the Lands Tribunal, is directly in point: *McGuckian v 29 Eaton Place Management Co Ltd* [2008] EWLands LRA_85_2006. It concerned a house comprising three maisonettes let under sub-leases and a caretaker's flat in the basement. Two of the three subleases contained a covenant by the lessor to employ and provide the services of a resident caretaker, and the third sublease included an obligation to contribute to the cost of a caretaker if one was provided. The LVT held that the caretaker's flat was within the "common parts":

> "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."

30. The President of the Lands Tribunal reversed that decision, having heard the lessor's appeal without the benefit of representation on the other side. Although attracted by the LVT's approach, he felt constrained by the statutory wording to hold that "flats" and "common parts" were mutually exclusive concepts. This view was based

principally on a perceived contrast between the two parts of section 2(4), which refers to:

> "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, …"

31. I agree with Roth J that the section does not support the President's conclusion. The distinction is not simply between common parts and flats, but beween common parts and flats *held by qualifying tenants*. In any event, since the purpose is to exclude both categories from the effect of the subsection, it does not matter whether they are distinct or overlapping. As will be apparent, I prefer the reasoning of the LVT.

32. Before the judge, and before us, Mr Munro sought to support the President's conclusion, but by reference principally to section 4. In particular, section 4(1) and (3) provide:

> "(1) This Chapter does not apply to premises falling within section 3(1) if—
>
> (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
>
> (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).
>
> …
>
> (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."

33. Roth J helpfully summarised the effect of those provisions:

> "52. Put in simple terms, this section serves to exclude from the right to collective enfranchisement premises where the ratio of business to residential use exceeds 1:3. It thus excludes premises where a significant part is devoted to offices or retail use. In making that calculation, the residential and common parts are aggregated, so as to arrive

> at the remaining area that is presumed devoted to such business use."

34. Like him I do not think this section supports the submission. There may be room for argument as to the details of the calculation where an area qualifies as both common parts and residential space. However, whatever the answer, it is not suggested that the exercise would become impractical or produce an absurd result. Nor is it a problem which arises in this case.

Conclusion

35. For these reasons, and in agreement with both judges below, I would dismiss the appeal.

LORD JUSTICE HUGHES :

36. I agree. For my part I confine the decision to parts which at least some tenants have a right to enjoy in common. As Carnwath LJ observes, no further decision is required of us in this case.

CHANCELLOR OF THE HIGH COURT :

37. I also agree.