UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2015] UKUT 320 (LC)
UTLC Case Number: LRX/139/2013

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

Leasehold Enfranchisement – Flat – two-stage enfranchisement – Leasehold Reform, Housing and Urban Development Act 1993 – paragraph 14 of Schedule 6 – paragraph 5 of Schedule 13 – paragraph 5 of Schedule 6 – section 3 of the Human Rights Act 1998 – article 1 of the First Protocol to the European Convention on Human Rights

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER) RESIDENTIAL PROPERTY

BETWEEN

THE TRUSTEES OF THE ALICE ELLEN COOPER-DEAN CHARITABLE FOUNDATION

Appellants

AND

GREENSLEEVES OWNERS LIMITED

Respondent

Re: Greensleeves
9 Milner Road
Bournemouth

Before: The President, Sir Keith Lindblom

Sitting at: Upper Tribunal (Lands Chamber), Royal Courts of Justice, Strand London WC2A 2LL
on 22 and 23 January 2015

Mr Philip Rainey Q.C., instructed by Preston Redman LLP, for the appellants
Mr James Fieldsend, instructed by Coles Miller Solicitors LLP, for the respondent

The following cases are referred to in this decision:

Nailrile Ltd. v Cadogan [2009] 2 E.G.L.R. 15

Money v Cadogan Holdings Ltd. [2013] UKUT 0211 (LC)
Cadogan v Sportelli [2008] UKHL 71
James v United Kingdom (1986) 8 E.H.R.R. 123
Papachelas v Greece (2000) 30 E.H.R.R. 923
Lindheim v Norway [2012] ECHR 985
Jones v Wentworth Securities Ltd. [1980] A.C. 74
R. (on the application of Fuller) v Chief Constable of Dorset [2003] Q.B. 480
Hosebay Ltd. v Day [2012] 1 W.L.R. 2884
Oliver Ashworth (Holdings) Ltd. v Ballard (Kent) Ltd. [2000] Ch. 12
Salvesen v Riddell [2013] H.R.L.R. 23
Kanala v Slovakia [2007] E.C.H.R. 575
R. (on the application of Kelsall) v Secretary of State for the Environment, Food and Rural Affairs [2003] EWHC 459 (Admin)
Holy Monasteries v Greece (1995) 20 E.H.R.R. 1
R. (on the application of Hammond) v Secretary of State for the Home Department [2006] 1 All E.R. 219
Thomas v Bridgend County Borough Council [2012] Q.B. 512
Cadogan v Trumann Holdings, 20 February 2012, unreported
Cadogan v McGirk [1996] 4 All E.R. 643
Cusack v London Borough of Harrow Council [2013] 1 W.L.R. 2022
Mosley v Hickman (1986) 18 H.L.R. 292
Kammins Ballrooms Co. Ltd. v Zenith Investments (Torquay) Ltd. [1971] A.C. 850
McHale v Cadogan [2011] 1 P. & C.R. 14
Pepper v Hart [1993] A.C. 593
Wilson v First County Trust (No.2) [2004] 1 A.C. 816
Ghaidan v Godin-Mendoza [2004] UKHL 30
Mellacher v Austria (1990) 12 E.H.R.R. 391
Lithgow v United Kingdom (1986) 8 E.H.R.R. 329
Marcic v Thames Water Utilities Ltd. [2004] 2 A.C. 42

DECISION

Introduction

1. In this case the Tribunal must consider whether, in a claim for collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993, the negative value of a head-lease held by a party unconnected to the freeholder should be deducted from the value of the freeholder's interest in the premises, and whether in those circumstances the freeholder is entitled to compensation for the loss he suffers as a result of the acquisition of the freehold.

2. The appellants, the Trustees of the Alice Ellen Cooper-Dean Charitable Foundation ("the Trustees"), appeal against the decision of the First-tier Tribunal, dated 30 August 2013, on the claim made by the respondent, Greensleeves Owners Limited ("GOL"), under Chapter I of Part I of the 1993 Act, to exercise the right to collective enfranchisement of a building known as "Greensleeves", at 9 Milner Road, Bournemouth ("the building"). Permission to appeal was granted by the First-tier Tribunal.

3. The Trustees own the freehold of the building. There is a head-lease, which is held by Greensleeves (Bournemouth) Management Ltd. ("the management company"). The building contains eight flats, each of which is let on a long lease. GOL is the nominee purchaser appointed to acquire the freehold on behalf of the participating tenants, who are the lessees of six of the eight flats – flats B, D, E, F, G and H. The participating tenants are also shareholders of the management company.

4. In the appeal, as before the First-tier Tribunal, the Trustees have been represented by Mr Philip Rainey Q.C., GOL by Mr James Fieldsend.

The issues in the appeal

5. In paragraph 5 of their "Statement of Agreed Facts and Issues", dated 9 January 2015, the parties have agreed that there are three main issues in the appeal. These are:

(1) whether, on its true construction (applying the common law principles of construction of statutes and section 3 of the Human Rights Act 1998) and in the circumstances of this case, paragraph 14(2) of Schedule 6 to the 1993 Act operates to reduce the price payable for the Trustees' interest in the building from £166,770 to nil;

(2) if so, whether the Trustees are entitled to additional compensation under paragraph 5 of Schedule 6 to the 1993 Act in an amount equivalent to the lost value of £166,770; and therefore

(3) what the premium should be.

6. There are several related and subsidiary questions, which I shall consider in discussing those three main issues.

Collective enfranchisement under the 1993 Act

7. The right to collective enfranchisement is provided in Part I of the 1993 Act. Under section 1 "qualifying tenants" of flats in "relevant premises" are given the right to have the freehold of those premises acquired on their behalf by a "nominee purchaser", at a price to be determined. The qualifying tenants are required by section 2 to acquire certain leasehold interests, including certain intermediate leasehold interests, and entitled to acquire others. They are obliged to acquire the interest of the tenant under any lease which is superior to the lease held by a qualifying tenant of a flat in the relevant premises. Section 13 provides for an "initial notice" to be served on the reversioner by the tenants of at least half of the flats in the specified premises, identifying the nominee purchaser, setting out the proposed purchase price for the freehold interest and for the leasehold interests, and specifying a date for the reversioner's counter-notice not less than two months from the date of the initial notice. Section 21 requires the reversioner to give a counter-notice by the specified date, either admitting or denying the right to collective enfranchisement, and, if the right is admitted, stating which proposals are accepted and which are not, and the reversioner's counter-proposals. Under section 24, if, after a further period of two months from the service of the counter-notice, agreement has not been reached as to the terms of acquisition, either side may, within six months of the service of the counter-notice, apply to the First-tier Tribunal to determine the matters in dispute.

Schedule 6

8. The value of the freeholder's interest is to be ascertained by applying the provisions of Part II of Schedule 6, and the value of any intermediate leasehold interest by applying the provisions of Part III. Paragraph 2 in Part II of Schedule 6 provides for the price payable for the freehold of the specified premises:

> "(1) Subject to the provisions of this paragraph, where the freehold of the whole of the specified premises is owned by the same person the price payable by the nominee purchaser for the freehold of those premises shall be the aggregate of –
>
> (a) the value of the freeholder's interest in the premises as determined in accordance with paragraph 3,
>
> (b) the freeholder's share of the marriage value as determined in accordance with paragraph 4, and
>
> (c) any amount of compensation payable to the freeholder under paragraph 5.
>
> …".

Paragraph 3 of Schedule 6

9. Under paragraph 3(1) of Schedule 6 the value of the freeholder's interest is "the amount which at the relevant date that interest might be expected to realise if sold on the open market by a willing seller …", on certain assumptions, which are set out. The "relevant date" is the date on which the initial notice is given under section 13 (section 1(8)). Paragraph 3(5) states:

> "The value of the freeholder's interest in the specified premises shall not be increased by reason of –
>
> (a) any transaction which –

(i) is entered into on or after the date of the passing of this Act (otherwise than in pursuance of a contract entered into before that date), and
(ii) involves the creation or transfer of an interest superior to (whether or not preceding) any interest held by a qualifying tenant of a flat contained in the specified premises; or

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

Paragraph 3(6) states:

> "Sub-paragraph (5) shall not have the effect of preventing an increase in value of the freeholder's interest in the specified premises in a case where the increase is attributable to any such leasehold interest with a negative value as is mentioned in paragraph 14(2)."

Paragraph 5 of Schedule 6

10. Under the heading "Compensation for loss resulting from enfranchisement", paragraph 5 in Part II of Schedule 6 provides:

> **"**(1) Where the freeholder will suffer any loss or damage to which this paragraph applies, there shall be payable to him such amount as is reasonable to compensate him for that loss or damage.
>
> (2) This paragraph applies to –
> (a) any diminution in value of any interest of the freeholder in other property resulting from the acquisition of his interest in the specified premises; and
> (b) any other loss or damage which results therefrom to the extent that it is referable to his ownership of any interest in other property.
>
> (3) Without prejudice to the generality of paragraph (b) of sub-paragraph (2), the kinds of loss falling within that paragraph include loss of development value in relation to the specified premises to the extent that it is referable as mentioned in that paragraph.
>
> …".

11. When the freehold and any intermediate interests have been valued under the provisions of Parts II and III of Schedule 6, any negative value is dealt with under Part V.

Paragraph 14 of Schedule 6

12. Paragraph 1(2) of Schedule 6 provides that "Parts II to IV of this Schedule have effect subject to the provisions of Parts V and VI (which relate to interests with negative values)".

13. Paragraph 14 in Part V of Schedule 6 provides for the "Valuation of freehold and intermediate leasehold interests":

> "(1) Where –

(a) the value of a freeholder's interest in the specified premises (as determined for the relevant purposes), or

(b) the value of any intermediate leasehold interest (as determined for the relevant purposes),

is a negative amount, the value of the interest for those purposes shall be nil.

(2) Where sub-paragraph (1) applies to any intermediate leasehold interest whose value is a negative amount ("the negative interest"), then for the relevant purposes any interests in the specified premises superior to the negative interest and having a positive value shall be reduced in value –

(a) beginning with the interest which is immediately superior to the negative interest and continuing (if necessary) with any such other superior interests in order of proximity to the negative interest;

(b) until the aggregate amount of the reduction is equal to the negative amount in question; and

(c) without reducing the value of any interest to less than nil.

(3) In a case where sub-paragraph (1) applies to two or more intermediate leasehold interests whose values are negative amounts, sub-paragraph (2) shall apply separately in relation to each of those interests –

(a) beginning with the interest which is inferior to every other of those interests and then in order of proximity to that interest; and

(b) with any reduction in the value of any interest for the relevant purposes by virtue of any prior application of sub-paragraph (2) being taken into account.

(3A) Where sub-paragraph (2) applies –

(a) for the purposes of paragraph 5A(2)(a), and

(b) in relation to an intermediate leasehold interest in relation to which there is more than one immediately superior interest,

any reduction in value made under that sub-paragraph shall be apportioned between the immediately superior interests.

(4) For the purposes of sub-paragraph (2) an interest has a positive value if (apart from that sub-paragraph) its value for the relevant purposes is a positive amount.

(5) In this Part of this Schedule "the relevant purposes" –

(a) as respects a freeholder's interest in the specified premises, means the purposes of paragraph 2(1)(a) or, as the case may be, 5A(2)(a); and

(b) as respects any intermediate leasehold interest, means the purposes of paragraph 6(1)(b)(i)."

Paragraph 5 of Schedule 13

14. Chapter II of Part I of the 1993 Act also provides a right for the tenant of a flat to acquire a new lease of that flat on payment of a price to be determined under Schedule 13. Paragraph 5 in Part II of Schedule 13 provides for "Compensation for loss arising out of grant of new lease":

"(1) Where the landlord will suffer any loss or damage to which this paragraph applies, there shall be payable to him such amount as is reasonable to compensate him for that loss or damage.

(2) This paragraph applies to –

(a) any diminution in value of any interest of the landlord in any property other than the tenant's flat which results from the grant to the tenant of the new lease; and

(b) any other loss or damage which results therefrom to the extent that it is referable to the landlord's ownership of any such interest.

(3) Without prejudice to the generality of paragraph (b) of sub-paragraph (2), the kinds of loss falling within that paragraph include loss of development value in relation to the tenant's flat to the extent that it is referable as mentioned in that paragraph.

(4) In sub-paragraph (3) "development value", in relation to the tenant's flat, means any increase in the value of the landlord's interest in the flat which is attributable to the possibility of demolishing, reconstructing, or carrying out substantial works of construction affecting, the flat (whether together with any other premises or otherwise)."

The facts

15. The essential facts are agreed.

16. In April and May 2012 the participating tenants were granted lease extensions under Chapter II of Part I of the 1993 Act. In the lease extension claims the management company received a premium of £19,945 for each flat, a total of £119,670, to compensate it for the continuing liability in rent to the Trustees under the head-lease, and the Trustees received £2,612 for each flat.

17. On 2 July 2012, by a notice under section 13 of the 1993 Act, GOL claimed to exercise the right to collective enfranchisement of the building. It proposed a premium of £1 for the freehold, £1 for the garages, garden and amenity ground, and £1 for the head-lease. In its counter-notice under section 21 of the 1993 Act, dated 7 September 2012, the Trustees proposed a premium of £375,000 for the freehold and also made counter-proposals for the garages, garden and amenity ground, and for the head-lease. On 28 February 2013, by an application under section 24 of the 1993 Act, GOL referred the dispute to the First-tier Tribunal.

18. The parties' "Statement of Agreed Facts and Issues" for this appeal refers to the schedule of the agreed matters prepared in April 2013 by the parties' valuers – Ms Jennifer Ellis F.R.I.C.S. of Langley-Taylor for GOL and Mr Geoffrey Bevans F.R.I.C.S., a director of GB Valuers Limited, for the Trustees. In that schedule the valuers acknowledged that "there [may be] or is a legal dispute between the parties as to how the prices for the interests to be acquired should be computed[,] including the application of paragraph 14 … of Schedule 6 [to the 1993 Act]", and made it plain that "[as] a result[,] no final agreement on the price payable can be reached".

19. Section 2 of the schedule of agreed matters recorded several matters of fact relating to the leases. The head-lease was granted on 8 December 1995. The demise was of the building, with its garages, gardens and grounds. The head-lease would expire on 28 September 2094. The ground rent was currently £2,400 a year. There were to be rent increases on 29 September 2015 and every 20 years, to 0.5% of the "Open Market Value" at the review date, defined as "the aggregate

premiums at which the individual flats comprised in [the building] might reasonably be [sold] on the open market …" for a term of 99 years at a rent of £1 a year throughout the term. The participating tenants' under-leases would expire on 18 September 2184. The ground rent under those leases was a peppercorn. The non-participating tenants' under-leases would expire on 18 September 2094. The ground rent under those leases was currently £300 a year. There would be rent increases on 29 September 2015, to 12.5% of the rent payable under the head-lease.

20. In section 3, "Valuation agreements", the valuers agreed that the valuation date was 2 July 2012, when there was an unexpired term under the head-lease of "82.24 years", an unexpired term under the participating tenants' leases of "172.21 years", and an unexpired term under the non-participating tenants' leases of "82.21 years". The "rents on review in 2015 [were] based on the values of the flats held on 99 year leases". If the management company's interest under the head-lease was to be "valued solely on the basis of the capitalised negative rents, … the value of the interest should be taken to be £201,900" – which, as the "Statement of Agreed Facts and Issues" confirms, should have been stated as "a minus figure". The value of the Trustee's interest "should be taken to be £166,770".

21. The "[remaining] issue" between the parties was defined in section 4 as being "[whether] the freeholder makes a claim under paragraph 5 of Schedule 6 and[,] if so[,] the amount and basis of the claim".

22. The "Statement of Agreed Facts and Issues" for the Trustees' appeal says that the content of the valuers' schedule of agreed matters "remains agreed[,] save for section 4[,] which does not accurately state the issues to be decided on this appeal".

23. On 5 July 2013 Mr Bevans made a witness statement, in which he gave evidence about the claims for new leases of flats B, D, E, F, G and H in 2011. He said he believed this evidence was "common ground" between the parties (paragraph 1). The price paid to the Trustees had "reflected only the value of the reversion". There was "no marriage value as the qualifying leases had more than 80 years unexpired at the date of the [claim]" (paragraph 4). The price paid to the Trustees "did not include any compensation under paragraph 5 of Schedule 11" to the 1993 Act. The claimant lessees "were never asked to pay any such compensation". The "sums [counter-proposed] for the freehold interest in the [counter-notices] were simply accepted; there was no negotiation about this" (paragraph 5). Mr Bevans went on to say this (in paragraph 6):

> "I do not believe that the reason why Schedule 11[,] paragraph 5 compensation was not sought is likely to be relevant to the issue which the tribunal has to decide; but in case it is thought relevant I would state that I was unaware of the potential effect on price in a subsequent collective claim of the negative value which the new leases at a peppercorn rent would create in the intermediate lessee company. I did not appreciate that [the Tribunal (Mr George Bartlett Q.C., President, and Mr A. J. Trott F.R.I.C.S.) in *Nailrile Ltd. v Cadogan* [2009] 2 E.G.L.R. 15] held that Schedule 11[,] paragraph 5 compensation could be sought in these circumstances. It was not a situation which I had previously experienced."

24. The hearing before the First-tier Tribunal took place on 31 July 2013. Mr Bevans gave evidence on behalf of the Trustees. Counsel made submissions on the main contentious issues: whether paragraph 14(2) of Schedule 6 to the 1993 Act had the effect of netting-off the negative value of the interest under the head-lease – the agreed figure of minus £201,900 – against the positive value of the freehold interest – the agreed figure of £166,700 – with the result that the sum

payable to the Trustees as freeholders was nil; and whether the Trustees were entitled to compensation under paragraph 5 of Schedule 6 to reflect the effect of paragraph 14(2).

The decision of the First-tier Tribunal

25. As the First-tier Tribunal said in paragraph 18 of its decision "[the] lease extensions and this claim are a "two-stage enfranchisement" (as described in [*Nailrile*])". The tenants first obtained new, longer leases of their flats, individually, under Chapter II of Part I of the 1993 Act, before collectively acquiring the freehold of the building under Chapter I.

26. In paragraph 19 the First-tier Tribunal noted that the freehold reversion of the building had been valued at £166,770, but the effect of paragraph 14(2) of Schedule 6 to the 1993 Act "would, if strictly applied, reduce that value to nil because the negative value of the intermediate interest exceeds the value of the freehold".

27. Summarizing the evidence given by Mr Bevans, the First-tier Tribunal said he had accepted in cross-examination that "he was aware of the [*Nailrile*] decision[,] but not in this respect", and that "had he been aware, he would have considered advising a claim for compensation at Stage 1 and it is likely that a claim would have been made by [the Trustees]" (paragraph 26).

28. Having set out the submissions made on either side (Mr Rainey's in paragraphs 27 to 47, Mr Fieldsend's in paragraphs 48 to 66), the First-tier Tribunal went on to discuss the issues arising from those submissions and to explain its decision (in paragraphs 67 to 74). In paragraph 67 it said the case presented it with "an important and difficult issue to resolve". It went on to say this, in paragraph 68:

> "It is undoubtedly correct, as Mr Rainey for the Respondent demonstrated, that the Respondent finds itself in a situation where, as a result of the legislation, it has been deprived of a valuable asset (the freehold of the property) without being compensated for that loss. The situation seems doubly unfair when it is realised that this result has been achieved through no action on the part of the Respondent, but by the sub-tenants who created a negative value in the intermediate lease when they extended their leases under the Act, thus reducing their ground rent to a peppercorn. However, as was put to Mr Rainey at the hearing by the Tribunal, the unfairness to the Respondent is significantly reduced, if not eliminated, by the fact that the legislation does provide a mechanism for the Respondent to claim compensation for this loss albeit at the lease extension stage and not at the subsequent collective enfranchisement stage."

29. In paragraph 69 the First-tier Tribunal referred to the shortcomings it saw in the 1993 Act:

> "The Tribunal recognises that it would have been preferable if the legislation had provided for the possibility of claiming compensation at either the first or second stage of the two-stage enfranchisement process. The Tribunal, therefore, first of all considered whether the compensation provision in paragraph 5 of Schedule 6 could be construed as applying to the loss of the right to receive the headrent as Mr Rainey suggested. The Tribunal's view of Paragraph 5(2)(a) and (b) is that "other property" must mean property other than that being acquired and that being acquired is the freehold of the subject premises which includes the right to receive the headrent. This is an incidence of ownership of the freehold. The Tribunal

does not see, therefore, how the right to receive the headrent can be "other property" in this context."

30. In paragraph 70 the First-tier Tribunal dealt with Mr Rainey's submission that this was a case in which it would be right to resort to section 3 of the Human Rights Act:

"The Tribunal considered that, due to the availability of compensation at Stage 1 of the two-stage enfranchisement process there is here no need to read words into the legislation nor to have recourse to Section 3 [of the Human Rights Act] as the 1993 Act is consistent with the Respondent's rights under Article 1 of Protocol 1 to the Convention. The Tribunal respectfully concurs with that view already reached by the Upper Tribunal, Supreme Court and European Court of Human Rights in [*Money v Cadogan Holdings Ltd.* [2013] UKUT 0211 (LC), *Cadogan v Sportelli* [2008] UKHL 71, and *James v United Kingdom* (1986) 8 E.H.R.R. 123]. The Tribunal recognises that the precise question arising in this case is not one which has been the subject of consideration by those higher tribunals, but reaches the same view after careful consideration."

31. In paragraphs 71 to 74 the First-tier Tribunal considered the scope for compensation being awarded at the first stage of a two-stage enfranchisement:

"71. Compensation being awarded at Stage 1 may be problematical because at this point there may be a number of imponderables, such as whether there will ever be a collective enfranchisement, and sub-leases may be extended piecemeal. The Tribunal accepts that Respondents in the same position as the Respondent in this case may or may not obtain full value by claiming compensation at stage 1 of the process under Paragraph 5 of Schedule 13, but as a mechanism for obtaining compensation is provided by the Act the Tribunal does not see how the Act can be said to be non-compliant with the European Convention or the Human Rights legislation. The compensation does not necessarily have to be full compensation. ([*Papachelas v Greece* (2000) 30 E.H.R.R. 923 and *Lindheim v Norway* [2012] ECHR 985]).

72. The principles of compensation under paragraph 5 of Schedule 13 have still to be worked out because [*Nailrile*] did go on [sic] to lay these down, the case having been settled before the Lands Tribunal was asked to do so. There is no reason why, in this particular case, the likely chance of a collective enfranchisement could not have been decided by the Tribunal, in the absence of agreement, at the lease extension stage, and reasonable compensation awarded accordingly. This Tribunal was conscious that it was making a decision relating solely to the circumstances of this case and was not required to be concerned with other circumstances which may arise in other cases. Here leases were extended simultaneously and there was an intermediate lease whose value became negative at the extension of the sub-leases; there was a strong likelihood that collective enfranchisement would follow because there would be no cost to the lessees over and above the costs of the lease extension. There is no reason why the Respondents could not have required the sub-lessees at the extension stage to state whether they had intentions to seek collective enfranchisement. It was clearly a very strong possibility. In this way, the unsatisfactoriness of having to claim compensation at stage 1 rather than stage 2 could be addressed.

73. The amount of compensation being dependent upon the future intentions of a party is not unknown. The Tribunal had in mind, for example, the situation where a claim for terminal dilapidations is made by a landlord. The tenant will want to know the landlord's intentions for

the building because damages will not be payable for items in disrepair if the landlord intends to alter the premises and so render the repairs nugatory. The Tribunal did not accept, therefore, Mr Rainey's submission that the cut off for claiming compensation at the first stage placed a disproportionate burden on the freeholder. This is not the only situation whereby a guillotine is imposed on the ability to claim compensation. Here the Tribunal thinks for example of the Limitation Acts.

74. Whilst the Tribunal accepts that legislation does pose a trap for the unwary, this is an area of law where specialist lawyers and valuers can be expected to be involved in advising the parties because, irrespective of the issues involved in this case, lease extensions and enfranchisements under the Act are very technical and complicated matters. … This is not, therefore, a situation to which the profession had not been alerted and the Tribunal feels compelled to conclude that the legislation itself does not impose a disproportionate burden on the freeholder."

32. In its "Conclusion", in paragraph 75, the First-tier Tribunal therefore determined that the price to be paid by GOL for the freehold interest in the building was nil, and that no compensation was payable to the Trustees under paragraph 5 of Schedule 6 to the 1993 Act.

33. On 12 October 2013 the First-tier Tribunal granted permission to appeal against its decision, observing as it did so that, as it had recognized in its decision, the case raises "an important and difficult issue to resolve", and that "the point of law in issue is one of general importance in some collective enfranchisement cases".

Issue (1) – the construction and effect of paragraph 14(2) of Schedule 6 to the 1993 Act

34. Mr Rainey argued that paragraph 14(2) of Schedule 6 should be construed as applying where the creation of the negative value in the intermediate interest has increased the value of the freehold. This proposition, he said, results from an ordinary approach to construction. But it would also result from the approach to interpretation provided by section 3 of the Human Rights Act. Paragraph 14(2) is, Mr Rainey submitted, an "anti-avoidance" provision, whose purpose is to avoid injustice to tenants. It should not be construed and applied to cause injustice to landlords, which in many cases it could. Parliament's intention here was to prevent landlords from inflating the freehold value and the enfranchisement price by creating artificial intermediate leasehold interests which they control. It was not to deal with the situation in which there is an existing head-lease, the tenants have themselves generated a "negative rental flow", and the landlord does not control the intermediate lessee. The "compulsory acquisition" of the freehold interest in the building without any compensation was an obvious breach of the Trustees' rights under article 1 of the First Protocol to the European Convention on Human Rights. Interpreted and applied as it was by the First-tier Tribunal in this case, paragraph 14(2) reduces, in a wholly arbitrary way, the compensation which would otherwise be available to the Trustees under Part II of Schedule 6.

35. Elaborating that argument, Mr Rainey acknowledged that the part of the valuation exercise in which the value of the freehold interest is valued under paragraphs 3 to 5 in Part II, and leasehold interests under Part III, complies with the Convention (see the decision of the House of Lords in *Cadogan v Sportelli*, in particular paragraph 31 of the speech of Lord Walker of Gestingthorpe, applying *James v United Kingdom*). But in this case the First-tier Tribunal concluded, in effect, that paragraph 14(2) operated to reduce the fair compensation under paragraph 3 to take account of

the negative value of another interest, which had itself been artificially increased, with the result that the freehold value was reduced to nil. Thus the Trustees received no compensation for the deprivation of their interest, despite the fact that the agreed value of that interest was £166,770.

36. It is clear, Mr Rainey submitted, that paragraph 14 is directed at a particular kind of mischief – the mischief that arises when a landlord grants an intermediate lease at a higher rent, thus increasing the value of the "term" element of the "term and reversion" valuation of the superior interest (see *Jones v Wentworth Securities Ltd.* [1980] A.C. 74). The draftsman seems not to have appreciated that the intermediate interest might be owned by tenants, or that a negative value could be created by claims for lease extensions under Chapter II of the 1993 Act. Paragraph 14 is not simply a "netting-off" provision whose purpose is to ensure that the tenants do not pay too much for the aggregate value of the superior interests they acquire. In a case such as this the tenants already own one of the interests through an intermediate landlord company. They are not, in truth, "acquiring" it. Their ownership of it is an essential step in a two-stage enfranchisement (see the decision of the Tribunal in *Nailrile*, at paragraph 56). The point to grasp here is that, on the First-tier Tribunal's analysis, compensation for an interest owned by the freeholder, which has not increased in value, is precluded because somebody else has been relieved of a liability. In principle, that cannot be right. The compulsory acquisition of a freehold interest without compensation will always be wrong, and plainly so. Collective enfranchisement is a right, voluntarily exercisable at a price. Underlying the provisions of Schedule 6 to the 1993 Act is the principle that lessees will pay the value of what they acquire. The "grain" of these provisions, said Mr Rainey, is "compensation based on value".

37. The approach to the interpretation of paragraph 14 contended for by Mr Rainey was, as he put it in his skeleton argument, "the usual approach of construing the provisions in accordance with the ordinary canons of construction and if that does not allow for a Convention-compliant construction, to turn to section 3 [of the Human Rights Act]" (see the judgment of Stanley Burnton J., as he then was, in *R. (on the application of Fuller) v Chief Constable of Dorset* [2003] Q.B. 480, at paragraph 39). Construed "purposively", paragraph 14 does not apply where the creation of the negative value in the intermediate interest has not raised the value of the freehold. This construction would avoid "an arbitrary and unfair" result (see the speech of Lord Neuberger of Abbotsbury in *Cadogan v Sportelli*, at paragraph 98). The First-tier Tribunal's decision in this case is patently unfair. It presented the lessees with a windfall. A construction which produces such a result should not be adopted unless it has to be (see paragraph 6 of the judgment of Lord Carnwath of Notting Hill in *Hosebay Ltd. v Day* [2012] 1 W.L.R. 2884, with which Lord Walker, Lord Mance, Lord Clarke of Stone-cum-Ebony, Lord Wilson, Lord Sumption and Lord Phillips of Worth Matravers all agreed). If interpreted and applied as it was in this case, paragraph 14(2) will always cause injustice, except where the superior landlord happens to own the inferior interest with a negative value. The case for a purposive construction is even stronger here than it was in *Jones v Wentworth Securities*. The mischief is clear. Parliament cannot have intended paragraph 14(2) to apply when the value of the freehold has not been increased and the negative value in the inferior interest has been generated by tenants exercising Chapter II rights.

38. Mr Rainey submitted that paragraph 14 must not be read in isolation. It must be read together with paragraph 3(5) and paragraph 3(6). These three provisions work together. The context within which paragraph 14 must be construed and applied is to be found in paragraph 3(5) and paragraph 3(6). All three of these provisions belong to a "suite of anti-avoidance measures". Paragraph 14 deals with the situation foreseen in paragraph 3(5) and paragraph 3(6). It is clear from paragraph 3(5) and paragraph 3(6) that paragraph 14(2) was not intended to apply where the value of the freeholder's interest has not been increased. Mr Rainey relied on the observations on statutory

construction made by Laws L.J. in *Oliver Ashworth (Holdings) Ltd. v Ballard (Kent) Ltd.* [2000] Ch. 12 (at p.34D-G) and, in particular, what Laws L.J. said about the approach to be taken where there is, or may be, "contextual ambiguity" (at pp.36 to 38). The correct approach to construction where anti-avoidance provisions are concerned may be drawn from the decision of the House of Lords in *Cadogan v Sportelli* (see, in particular, the speech of Lord Hoffmann, at paragraph 25; the speech of Lord Walker, at paragraphs 32 to 35; and the speech of Lord Neuberger, at paragraphs 103 to 105, 111 and 112).

39. The other strand of Mr Rainey's argument was this. Section 3 of the Human Rights Act requires a construction consistent with the European Convention on Human Rights so long as it does not go against the grain of the provision in question. It also allows more latitude of interpretation in reading down the provision in question. If paragraph 14 of Schedule 6 really does operate as the First-tier Tribunal concluded it does, the arbitrary reduction of the compensation under paragraph 3 to nil places a "disproportionate burden" on the Trustees, and thus offends article 1 of the First Protocol (see the judgments of the European Court of Human Rights in *James v United Kingdom*, at paragraphs 37 and 50, and the judgment of Lord Hope of Craighead in *Salvesen v Riddell* [2013] H.R.L.R. 23, at paragraphs 34 to 36, and 39 to 45). The adequacy of compensation is an important factor in judging whether an interference with the peaceful enjoyment of possessions is proportionate, and whether article 1 of the First Protocol is breached because the dispossessed party bears an excessive burden. If compensation is inadequate in one respect this may be enough to give rise to a breach of the Convention right (see the judgment of the European Court of Human Rights in *Kanala v Slovakia* [2007] E.C.H.R. 575, at paragraphs 51 to 53, 55 and 61). Arbitrary and inflexible rules for reducing compensation cannot be reconciled with the Convention right (see the judgment of the European Court of Human Rights in *Papachelas v Greece*, at paragraphs 23, 24 and 51 to 55; and the judgment of Stanley Burnton J. in *R. (on the application of Kelsall) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWHC 459 (Admin), at paragraphs 62 and 63). A total lack of compensation can only be justified in exceptional circumstances (see the judgment of the European Court of Human Rights in *Holy Monasteries v Greece* (1995) 20 E.H.R.R. 1, at paragraphs 70 and 71). The legislative aim in this part of the statutory scheme for collective enfranchisement was plainly to prevent landlords inflating values by artificial leasehold schemes – the mischief indentified in *Jones v Wentworth Securities*. Parliament does not appear to have foreseen a two-stage enfranchisement, an artificial situation created by tenants. If the compensation available to the freeholder can be reduced to nil in this way there is a clear breach of article 1 of the First Protocol. The breach is all the more egregious in this case because the participating tenants themselves own the management company and the head-lease. The Trustees, as freeholder, have seen none of the compensation paid to the management company for its continuing rental liability. In the light of the decisions of the House of Lords in *R. (on the application of Hammond) v Secretary of State for the Home Department* [2006] 1 All E.R. 219 and the Court of Appeal in *Thomas v Bridgend County Borough Council* [2012] Q.B. 512, Mr Rainey submitted that section 3 of the Human Rights Act enables a flexible construction of paragraph 14 which does not prevent fair compensation being paid to the freeholder for the expropriation of his property in circumstances such as these.

40. Mr Rainey submitted that the First-tier Tribunal was wrong to base its conclusions on what the Tribunal said in *Nailrile* about the effect of a negative value in a head-lease. *Nailrile* was, at least in this respect, an unsatisfactory decision. The Tribunal did not consider in any depth the operation of paragraph 14(2) of Schedule 6, or whether the second stage of a two-stage enfranchisement actually worked, or whether its operation at that second stage might offend Convention rights. In *Nailrile* it suited both sides to assume that a two-stage enfranchisement did

work. But that assumption was incorrect, because the construction of paragraph 14 on which the two-stage enfranchisement depends would be in breach of article 1 of the First Protocol. The argument based on the Human Rights Act which the Tribunal rejected in *Nailrile* was that the head-rent must be taken to be commuted under paragraph 10 of Schedule 11 (see paragraphs 79 to 81 of the Tribunal's decision). That question is irrelevant here.

41. Finally on this issue, Mr Rainey submitted that the availability of compensation under paragraph 5 of Schedule 13 is no answer to his argument. If the Tribunal's decision in *Nailrile* suggests otherwise, it is unsound. The appropriate level of compensation was never considered in that case. One cannot say that it would have been adequate (see paragraphs 71 and 72 of the Tribunal's decision). This will always depend on the view that is taken about the prospect and timing of a two-stage enfranchisement (see paragraphs 60 and 65 of its decision). But the freeholder will inevitably receive less than the actual value as determined under paragraph 3 of Schedule 6 (see, for example, the decision of the Leasehold Valuation Tribunal in *Cadogan v Trumann Holdings*, 20 February 2012, unreported, at paragraph 57). Compensation as unpredictable and precarious as this does not satisfy article 1 of the First Protocol.

42. Mr Rainey described the approach adopted by the Tribunal in *Nailrile* as "grossly unsatisfactory". It envisages that as part of the premium for lease extensions tenants first pay compensation to an intermediate landlord for the creation of a negative interest, on the basis that the head-lessee has a continuing liability to pay head rent with no ground rent to cover it, and then pay the freeholder on the exactly opposite basis that the rental stream will not in fact be paid and that the negative value of the head-lease is such that the freeholder will lose its valuable interest for nothing. In that scenario the tenants will pay twice over, on mutually exclusive bases. And if GOL's argument is right, paragraph 14(2) would apply in a situation where the negative value had been created other than through lease extension claims. In such a situation there would be no first stage at which compensation could have been sought.

43. Those submissions were resisted by Mr Fieldsend. His argument was simple. The First-tier Tribunal was correct to hold that the price to be paid for the freehold was nil. Its understanding of paragraph 14(2) of Schedule 6 was correct. It was right to reject the Trustees' attempt to dissuade it from the obvious meaning of that provision. Paragraphs 3(5), 3(6) and 14 of Schedule 6 should not be seen as a group of provisions aimed solely at avoiding the mischief identified in *Jones v Wentworth Securities*. Paragraph 3(5) achieves that. Paragraph 14 ensures that the participating tenants pay a price that reflects the aggregate value of the interests they are required to acquire. The words used in this provision show that Parliament intended a "netting-off". It must be construed to give effect to that intention.

44. Mr Fieldsend submitted that the Tribunal ought not to be persuaded to depart from a straightforward, literal construction of paragraph 14 by the consequences to which it has led here. The conventional principles of construction do not allow for the strained interpretation urged by Mr Rainey. Section 3 of the Human Rights Act does not require a different construction.

45. In this case, said Mr Fieldsend, as in any case where the value of a superior interest is positive and the value of an intermediate leasehold interest negative, the positive value of the superior interest will be reduced until the reduction is equal to the negative amount of the intermediate leasehold interest, but without reducing the value of any interest to less than nil. The result of that exercise in this case was that the sum payable to the Trustees for the freehold of the building was reduced from £166,770 to nil. This was an indirect consequence of the claim for collective

enfranchisement being preceded by the six participating tenants' claims for new leases. Although the participating tenants had benefited from this two-stage enfranchisement, they had not sought to achieve this by any contractual arrangement designed to thwart the operation of the 1993 Act. All they had done was to avail themselves of statutory provisions under which they were entitled to pay no compensation for the freehold interest in the building. The unfairness of which the Trustees complain is illusory. Compensation was available at the time of the lease extension claims, under paragraph 5 of Schedule 13 – as the Tribunal's decision in *Nailrile* confirms (see, in particular, paragraphs 57 to 65). In this case, as the First-tier Tribunal found (at paragraph 72 of its decision), it was obvious that the tenants were intent upon a two-stage enfranchisement. There were simultaneous claims for lease extensions. There was an intermediate leasehold interest held by the tenants. The value of that intermediate leasehold interest became negative when the leases were extended. And the freehold could then be acquired for no cost beyond that of the lease extensions. In cases such as this the first-tier Tribunal will generally be able to assess how likely it is that a two-stage enfranchisement is under way when dealing with a claim for compensation under paragraph 5 of Schedule 13 (see, for example, *Cadogan v Trumann Holdings*).

46. It follows, Mr Fieldsend submitted, that the First-tier Tribunal's approach to valuation in this case does not offend article 1 of the First Protocol. In a two-stage enfranchisement such as this the assessment of compensation payable under paragraph 5 of Schedule 13 is neither arbitrary nor unfair. It does not matter that there might be hypothetical circumstances in which one might conceive of some breach of the Convention because such compensation is, or may be, unavailable. On the facts of this case there is no breach. The First-tier Tribunal was right to conclude that there is not (at paragraph 71 of its decision). When the statutory valuation scheme in the present case is considered as a whole, taking into account both stages of the two-stage enfranchisement, it cannot be said that the relevant provisions for compensation lack a reasonable foundation.

47. I cannot accept Mr Rainey's submissions on this issue. Mr Fieldsend's are, I believe, correct.

48. In my view, on a straightforward construction of paragraph 14(2) of Schedule 6 to the 1993 Act, that provision has the effect contended for by Mr Fieldsend in his submissions before the First-tier Tribunal and now in this appeal. In this case, as the First-tier Tribunal held, it requires the negative value of the interest under the head-lease – the minus figure of £201,900 – to be set against the positive value of the freehold interest – £166,700 – with the result that the sum payable to the Trustees as freeholders is nil. Such a result is not contrary to the statutory scheme as it stands. It is an outcome which the 1993 Act allows in circumstances such as these.

49. In construing paragraph 14(2) of Schedule 6, the Tribunal must strive, so far as it can, to ensure that the participating tenants are not denied any of the advantages Parliament intended to confer upon them, but must also avoid, so far as it can, adopting an interpretation of this provision which would generate rights more generous than that. As Lord Carnwath said in *Hosebay v Day*, in paragraph 6 of his judgment, "[although] the [Leasehold Reform Act 1967] like the 1993 Act is in a sense expropriatory, in that it confers rights on lessees to acquire rights compulsorily from their lessors, this has been held not to give rise to any interpretative presumption in favour of the latter". Lord Carnwath cited the well-known passage of the judgment of Millett L.J., as he then was, in *Cadogan v McGirk* [1996] 4 All E.R. 643, at p.648a-c:

> "It would, in my opinion, be wrong to disregard the fact that, while the 1993 Act may to some extent be regarded as expropriatory of the landlord's interest, nevertheless it was passed for the benefit of tenants. 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."

Lord Carnwath then added:

> "By the same token, the court should avoid as far as possible an interpretation which has the effect of conferring rights going beyond those which Parliament intended."

None of those principles are controversial in this appeal, nor could they be. I have them in mind, as I must, as I come to the task of statutory construction involved in the issue before me.

50. As Mr Fieldsend submitted, the correct approach to construction here is the conventional one. The Tribunal must do what any court or tribunal would have to do when faced with this task. It must focus on the words Parliament has chosen to use, in their particular statutory context, construe those words in accordance with their natural meaning, and in this way determine what Parliament intended. This is an entirely objective exercise. Its purpose is to achieve clarity and certainty. As Lord Neuberger emphasized in paragraph 58 of his judgment in *Cusack v London Borough of Harrow Council* [2013] 1 W.L.R. 2022, with which Lord Sumption and Lord Hughes agreed, the intention of Parliament is to be discerned "by reference to the precise words used", in their particular context. Lord Neuberger went on (in paragraph 60) to refer to the "canons of construction". Some of these, he said, are of relatively general application, "such as the so-called golden rule (that words are prima facie to be given their ordinary meaning) …". The fact that the canons embody logic or common sense is, he said, "scarcely a reason for discarding them …".

51. When the conventional approach to statutory construction is applied to paragraph 14(2), I do not think there is any difficulty in grasping what that provision means. The statutory language here is plain. There can be no doubt or dispute as to what it means.

52. In my view, as Mr Fieldsend submitted, this is not a case of "contextual ambiguity", and Mr Rainey's argument gains nothing from the decision of the Court of Appeal in *Oliver Ashworth v Ballard*. In his judgment in that case Laws L.J. said (at p.37B):

> "… The question always is what is the scope of the right? Where the enacting words express the scope intended, so as to leave no doubt upon the question, that will be the end of the matter; there is no "ambiguity" in the second sense I have described and no appeal to preambles will avail to deny the right. But where the enacting words, though not internally ambiguous (that is, ambiguous in the first sense), do not define the scope intended, then it falls to be ascertained by the court by reference to the purpose for which the right is granted. …".

I see no ambiguity in either sense here. The statutory words are not "internally ambiguous", nor is the "scope intended" obscure. And if one seeks to ascertain the "true scope" of paragraph 14(2) "from the statute as a whole" – as Laws L.J. put it in *Oliver Ashworth v Ballard* (at p.37H) – including the provisions of paragraph 3(5) and paragraph 3(6), there is nothing to suggest an interpretation which departs from the words that are used.

53. Paragraph 14(2) is in clear and simple terms. It applies to the situation arising under sub-paragraph (1)(b). That sub-paragraph is also in clear and simple terms. The relevant situation arises when "the value of any intermediate leasehold interest (as determined for the relevant purposes [defined in paragraph 6(1)(b)(i)])" is "a negative amount", so that the value of that interest is

deemed, for those purposes, to be "nil". In that situation sub-paragraph 14(2) is engaged. Sub-paragraph 14(2) describes the required arithmetic – the subtraction of negative value from positive, leaving none of the negative value out of account but without producing a net value which is less than nil. Mr Rainey did not suggest that there is anything ambiguous or obscure in the language used. Nor could he.

54. Two things are clear straight away when one looks at this component of the statutory scheme. First, it envisages the possibility of an intermediate leasehold interest having a negative rather than positive value. That was so in this case. Secondly, it envisages the possibility of the negative value in an intermediate leasehold interest, or the aggregate negative value of two or more intermediate leasehold interests, operating to reduce the price payable for the freehold to nothing. That too was so in this case.

55. I see no reason to deviate from the natural construction of paragraph 14(2) in an effort to avoid the consequences of that provision for the value of a freehold such as the Trustees' in this case when the negative value of intermediate leasehold interests exceeds the positive value of that freehold. Those consequences are not alien to the statutory regime for leasehold enfranchisement; they are inherent in it. They are predictable, consistent and certain. They are nothing more and nothing less than the result of an uncomplicated valuation, faithful to the requirements Parliament has enacted. The enfranchisement legislation should be construed as it is, not as it might have been or might yet become. That has been the guiding principle in the jurisprudence, adhered to even when the consequences of doing so may show the need for the legislation to be changed. This is well illustrated in the House of Lords' decision in *Jones v Wentworth Securities* and the decision of the Court of Appeal in *Mosley v Hickman* (1986) 18 H.L.R. 292. In both of those cases a straightforward reading of the statutory provisions prevailed over complaints of unfairness.

56. As Mr Fieldsend submitted, the circumstances of this case are comparable with those in *Mosley v Hickman*. In that case the tenants of three houses successfully claimed extensions to their leases under section 14 of the 1967 Act, and then served notice under section 8 of the same Act seeking to acquire the freehold interests, which the landlords accepted. The tenants' contention that each property was to be valued subject to the extended lease, which the landlords disputed, was upheld by the Lands Tribunal and, on appeal, by the Court of Appeal. The crucial question arose from section 9(1A)(a) of the 1967 Act, which provided the assumption "… that the vendor was selling for an estate in fee simple, subject to the tenancy, but on the assumption that this Part of this Act conferred no right to acquire the freehold …". Did "the tenancy" in that provision mean the original tenancy, as the landlord submitted – or did it mean the existing tenancy, as the tenants submitted? Fox L.J., with whom Mustill and Stocker L.JJ. agreed, said (at p.253) that "as a matter of the ordinary use of the English language, the words "the tenancy" refer to the existing tenancy and … there is no context which compels any different conclusion". It was submitted for the landlords that if "the tenancy" were read as "the existing tenancy" an unacceptable anomaly would arise, in that the tenant who chose to take an extended lease before making his request for the freehold would pay a substantially lower price than the tenant who had failed to do so. Fox L.J. rejected that submission. He said (at p.254):

> "But that anomaly does not, in my view, justify the Court in departing from the clear language of the statute. The practical [result] of which the landlords complain is really the consequence not so much of section 9(1A), but of the fact that Parliament chose to confer on the tenants of those houses a right to extend their leases for a substantial period at ground rents, and without premiums."

If the landlords' construction were to be accepted, the court would be introducing another anomaly – "that Parliament having conferred on a tenant the right to extend the tenancy (which is obviously a valuable right) should, when it comes to a valuation of the reversion, disregard the exercise of that right by language which is quite inappropriate to such a course". Fox L.J. then said:

> "Any anomalies which result from the construction which I have adopted of the words "the tenancy" can, I think, only be corrected by Parliament."

Section 9(1A) had to be construed in the light of the 1967 Act read as a whole, but a reading of the Act as a whole did not reveal "any compelling indications" in support of the landlords' case. Though it had been inserted as an amendment to address a different type of property from that originally dealt with by the 1967 Act, it had to be construed "according to its actual language". The landlords were seeking a substantial re-writing of the statutory words, which would displace their ordinary meaning in their statutory context. They were arguing, in effect, that for the words "the tenancy" one should substitute the words "the tenancy or, if it is an extended tenancy the previous tenancy". That was not possible.

57. I think the circumstances of that case, though the statutory context was different, are analogous to the circumstances here. Both cases concern a two-stage process, made possible by the relevant statutory provisions, in which tenants were able to acquire the freeholder's interest at a valuation materially lower than it would have been had they proceeded to their claim for enfranchisement in a single step. In *Mosley v Hickman* the Court of Appeal acknowledged that there might be occasions when the outcome of the enfranchisement process could be seen as anomalous – because the value of the freeholder's interest had been reduced merely by the extension of a lease. But if this is so, it is for Parliament to decide whether the legislation ought to be changed.

58. In fact, Parliament did amend the legislation. The Court of Appeal's judgment in *Mosley v Hickman* was given on 4 March 1986. In the Housing and Planning Act 1986, which came into force about eight months later, on 7 November 1986, an amendment was made to section 9(1A) of the 1967 Act, effective for claims made after 5 March 1986. Section 23(1) of the 1986 Act provided that section 9(1A)(a) was to be amended by inserting, after the words "no right to acquire the freehold", the words "or an extended lease and, where the tenancy has been extended under this Part of this Act, that the tenancy will terminate on the original term date".

59. I do not accept that paragraph 14 of Schedule 6 belongs to a group of provisions in the 1993 Act which were all required to prevent the mischief recognized by the House of Lords in *Jones v Wentworth Securities*. As Mr Fieldsend submitted, that mischief was removed in the first place by section 1 of the Leasehold Reform Act 1979, which amended the 1967 Act. The corresponding provision in the 1993 Act is paragraph 3(5) of Schedule 6.

60. In *Jones v Wentworth Securities* the freeholder of an estate on which 100 houses had been built, all of which had been let for 87 years to their tenant occupiers, later granted concurrent leases for 300 years to a property company associated with it, subject to the existing leases and at a peppercorn rent until the expiry of the tenants' leases, and after that on a rack rent. This transaction was admittedly a device to discourage the tenants from exercising their rights under the 1967 Act to acquire the freehold interests in the houses in which they lived. The freeholder and the property

company had entered into it two days before the tenant's notice was served. The market price for the freehold of her home would otherwise have been £300. The transaction had sent it up to £4,000.

61. The House of Lords allowed the freeholder's appeal against the decision of the Court of Appeal reversing the decision of the Lands Tribunal that the tenant should pay the freeholder £4,000 for the freehold interest. In his speech (at p.113D-E) Lord Russell of Killowen said that it was "irrelevantly pejorative" to describe what had been done as an "ingenious device". Equally, he gave "minimal if any force" to the freeholder's argument that the 1967 Act was "expropriatory of the freeholder … and this should affect the construction to be attributed to the statutory language". He had regard only to the statutory provisions themselves. Lord Salmon said (at p.106H to p.107B) he had no doubt that if it had ever occurred to the legislature that a transaction such as this might have been devised and put into operation, clear words would have been introduced into the Act, which would prevent it from affecting the market price which the tenant would have to pay for the freehold of his home. But he went on to say this:

> "As it is, no such words appear in the Act; and accordingly it contains a gap. It is well settled, however, that the courts have no power to fill in any gap in an Act, even if it is satisfied that, had the legislature been aware of the gap, it would have filled it in …".

Lord Diplock said (at p.105E to p.106D) that he was "not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act". But the court's task was still one of construction. Unless it was possible "to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law", any attempt to repair the omission would cross "the boundary between construction and legislation". It was in his view impossible to be certain as to the particular words Parliament would have inserted into the Act to fill the gap now revealed by the intermediate lease granted by the freeholder to the property company. What Parliament would have done was, he said, "a matter of pure speculation" (see also the decision of the House of Lords in *Kammins Ballrooms Co. Ltd. v Zenith Investments (Torquay) Ltd.* [1971] A.C. 850).

62. The long title to the 1979 Act refers to it as "[an] Act to provide further protection, for a tenant in possession claiming to acquire the freehold under the Leasehold Reform Act 1967, against artificial inflation of the price he has to pay". Under the heading "Price to tenant on enfranchisement", section 1(1) provides:

> "As against a tenant in possession claiming under section 8 of the Leasehold Reform Act 1967, the price payable on a conveyance for giving effect to that section cannot be made less favourable by reference to a transaction since 15th February 1979 involving the creation or transfer of an interest superior to (whether or not preceding) his own, or an alteration since that date of the terms on which such an interest is held. …".

63. Paragraph 3(5) of Schedule 6 to the 1993 Act is not in precisely the same terms as section 1 of the 1979 Act, but in substance it is not significantly different. This provision is framed in terms of the "value of the freeholder's interest" not being "increased" by a relevant "transaction" involving "the creation or transfer of an interest superior to (whether or not preceding)" an interest held by a qualifying tenant in the specified premises, or "any alteration on or after that date of the terms on which any such superior interest is held". Paragraph 3(6) of Schedule 6 qualifies the applicability of

paragraph 3(5) by excluding increases in value of the freeholder's interest in cases where the increase is attributable to "any such leasehold interest with a negative value as is mentioned in paragraph 14(2)".

64. As Mr Fieldsend submitted, section 1 of the 1979 Act had the effect of reversing the decision in *Jones v Wentworth Securities*. That was its purpose. Parliament obviously regarded it as sufficient to achieve that purpose. And this remained so when, in substance, a corresponding provision was included in Schedule 6 to the 1993 Act, in paragraph 3(5).

65. The relevant sequence of events in the history of the legislation seems to bear this out. The 1967 Act came into force on 27 October 1967. The House of Lords gave its decision in *Jones v Wentworth Securities* on 13 December 1978. The 1979 Act came into force on 4 April 1979, with effect from 15 February 1979. The Housing and Urban Development Bill, including paragraph 3(5) of Schedule 5, which later became Schedule 6 of the 1993 Act, was introduced into the House of Commons on 22 October 1992. On 8 March 1993 several amendments were made to the Bill, introducing paragraph 1(2), paragraph 3(6) and paragraph 14 of Schedule 5 (now Schedule 6). These were duly incorporated into the 1993 Act, which reached the statute book on 20 July 1993.

66. In the light of that history, and in particular the fact that paragraph 3(5) of Schedule 6 appeared in the original drafting of the Housing and Urban Development Bill, whereas paragraphs 3(6) and 14(2) did not, Mr Fieldsend submitted that the draftsman must have had in mind section 1 of the 1979 Act when he formulated paragraph 3(5) and saw no need to elaborate upon it as a means of preventing the mischief in *Jones v Wentworth Securities*. I agree.

67. Mr Fieldsend also submitted, and again I agree, that if paragraph 3(5) was seen as sufficient to prevent the mischief in *Jones v Wentworth Securities*, it must follow that paragraphs 3(6) and 14(2) of Schedule 6 were introduced for a different reason.

68. That prompts the question: why was it necessary for those provisions to be included in the 1993 Act?

69. Mr Fieldsend's answer to that question, which I believe is correct, was this. Under section 2 of the 1993 Act, participating tenants in a claim for leasehold enfranchisement are compelled to acquire, as well as the freehold interest, any intermediate leasehold interest in the specified premises. Paragraph 14(2) of Schedule 6 reflects that imperative, and ensures that it does not produce unintended consequences for landlords. It does so in two ways: first, by making sure that the valuation of the freehold and of any intermediate leasehold interests does not result in the tenants paying less than the aggregate value of the interests they are acquiring; and secondly, by preventing a situation in which, when the net value is a negative figure, the landlord would have to pay a reverse premium upon enfranchisement. As Mr Fieldsend pointed out, negative values can and do exist. But the idea of landlords having to make payments to their tenants when a claim for collective enfranchisement succeeds is unattractive. Paragraph 14 makes this impossible. It protects landlords in that way. And the results of its application are predictable, certain and consistent (see the judgment of Arden L.J. in *McHale v Cadogan* [2011] 1 P. & C.R. 14, at paragraphs 29 to 36).

70. Paragraph 3(6) is also a provision that works to the freeholder's advantage. It recognizes the potential effect on the value of the freeholder's interest of a leasehold interest with a negative value, such as is mentioned in paragraph 14(2). It adjusts the operation of paragraph 3(5) by making it impossible for that sub-paragraph to prevent an increase – though not any decrease – in the value of the freeholder's interest in the specified premises where such an increase would come about as a

result of the negative value in an intermediate leasehold interest. It removes the risk of the freeholder being denied additional value arising in this way. But that is not the mischief identified by the House of Lords in *Jones v Wentworth Securities*. It is a different mischief altogether.

71. I do not accept that paragraph 3(5), paragraph 3(6) and paragraph 14 of Schedule 6 were all needed to overcome the mischief in *Jones v Wentworth Securities*. Paragraph 3(5) reflects the corresponding provision in the 1979 Act – section 1 – and achieves that objective. It is of course true that those three provisions – sub-paragraphs (5) and (6) of paragraph 3 and sub-paragraph (2) of paragraph 14 – are connected to each other through paragraph 3(6). But it is paragraph 3(5), subject to the adjustment of its effect by paragraph 3(6), which replicates the effect of section 1 of the 1979 Act and attends to the mischief in *Jones v Wentworth Securities*. Paragraph 14(2) does not do that. Its effect is simply to net negative value in intermediate leasehold interests against positive value in superior interests, but not beyond a value of nil for any of the interests concerned. Paragraph 3(5) does not depend for its effect on paragraph 14(2). Nor does paragraph 14(2) depend on paragraph 3(5). Those two provisions operate independently of each other, except in the situation provided for in paragraph 3(6).

72. I therefore reject the suggestion that paragraph 14(2) operates unfairly or in an arbitrary way. In view of the court's decisions in *Moseley v Hickman* and *Jones v Wentworth Securities* I can see no need to construe this provision otherwise than in accordance with its natural meaning. As the First-tier Tribunal clearly accepted, its meaning is entirely unambiguous and clear. In the light of the decision of the House of Lords in *Pepper v Hart* [1993] A.C. 593, I therefore see no justification here for resorting to Hansard as an aid to construction (see the speech of Lord Hope in *Wilson v First County Trust (No.2)* [2004] 1 A.C. 816, at paragraphs 110 to 118). The consequences of paragraph 14(2) being applied in the way that its language requires are certain and predictable. Properly understood, paragraph 14(2) serves to ensure that participating tenants pay a price which represents the aggregate value of the interests they have to acquire. In my view, it can only be construed and applied exactly as it was formulated by Parliament.

73. In reality, the "unfairness" of which the Trustees complain is inherent in a statutory scheme which is designed to avoid the lessees overpaying for the interests they acquire. In this case it could have been, but was not, mitigated by a claim for compensation under paragraph 5 of Schedule 13 when the claims for new leases were made.

74. This conclusion is strengthened by the Tribunal's observations on paragraph 5 of Schedule 13 in *Nailrile*. It was argued in that case that since the effect of the grant of the new lease of the flat with the head-rent remaining the same was to create a negative value in the intermediate interest, the prospect of a collective enfranchisement, in which the negative value would be deducted from the price, would damage the value of the reversion. If the landlord sought to sell the reversion, it was said, a purchaser would see the prospect of a collective claim at the reduced price, and would pay less for it. It was contended that such loss could properly be the subject of an award of compensation under paragraph 5 of Schedule 13 (paragraph 58 of the Tribunal's decision).

75. The Tribunal rejected the argument (1) that paragraph 5(2) of Schedule 13 applies only where the diminution in value or the loss or damage relates to "any interest of the landlord in any property other than the tenant's flat"; (2) that the suggested disadvantage to the landlord related to its interest in the flat, and not to its interest in any other part of the building; (3) that the landlord could therefore have no claim to compensation under paragraph 5; (4) that even if the landlord had a theoretical claim, any assessment of compensation would have to assume that collective

enfranchisement would certainly take place immediately after the valuation date; but (5) that in fact the collective enfranchisement might never happen, so the landlord will have received compensation for a loss that it had not suffered (paragraph 59). The Tribunal concluded that these submissions were "erroneous" (paragraph 60). It noted that the basis of the claim for compensation in those circumstances would be that on a collective enfranchisement after the grant of the new lease the price payable to the landlord would be less, by a greater amount than the price payable for a lease extension, than it would be had the new lease not been granted. To the extent that the prospect of a reduced price was reflected in a diminution in the present value of its interest in the flats after the grant of the new lease, there would be a loss for which compensation would be payable under paragraph 5. Insofar as that diminution in value was a diminution in value of its interests in the other flats, it would be a loss under paragraph 5(2)(a). In so far as it was a diminution in value in the interest of the flat in question, it would be a loss under paragraph 5(2)(b) – because (1) it would not be a diminution in the value of the landlord's interest in any property other than the tenant's flat; (2) it would result from the grant to the tenant of the new lease; and (3) it would be referable to the landlord's ownership of its interest in the other flats (paragraphs 60 to 62).

76. The loss would not fall within paragraph 2(a) and paragraph 3 because of the assumption in paragraph 3(2)(b) that Chapter 1 confers no right to acquire any interest in premises containing the tenant's flat. The Tribunal could see no reason why a loss consisting in a diminution in value of the landlord's interest in the tenant's flat, though excluded as an element of the premium payable under paragraph 2(a), should not be included as an element of the premium payable under paragraph 2(c) where it satisfies the requirements of paragraph 5(2)(b). In the circumstances of that case, said the Tribunal, it was paragraph 5(2)(b) "that constitutes the corrective for the unfairness that would result from the two-stage enfranchisement process" (paragraph 63).

77. The Tribunal saw nothing in the submission that collective enfranchisement might never occur. It observed that the present value of an interest in land may well depend on the view taken by the market as to the possibility of a future event occurring. Assessing the loss for which paragraph 5 of Schedule 13 provides for an award of compensation will depend on the degree of likelihood that the tenants of the premises will proceed to a collective enfranchisement. If that probability were low, the diminution in value of the landlord's interest by reason of the prospect of such collective enfranchisement would likely be small. If, as in that case, there was evidence of a firm proposal on the part of the tenants to proceed to a collective enfranchisement, and each of the tenants had given notice seeking a lease extension, the prospect of collective enfranchisement would be clear. In other cases, where the facts were different, the probability of collective enfranchisement occurring would have to be assessed in the light of the circumstances as they were (paragraph 65).

78. Mr Rainey sought to criticize that analysis. In my view, however, it is sound.

79. In this case, as the First-tier Tribunal said in paragraph 72 of its decision, "[there] is no reason why … the likely chance of a collective enfranchisement could not have been decided by [the Leasehold Valuation Tribunal or the First-tier Tribunal], in the absence of agreement, at the lease extension stage, and reasonable compensation awarded accordingly". The First-tier Tribunal also found (ibid.) that "[there] is no reason why [the Trustees] could not have required the sub-lessees at the extension stage to state whether they had intentions to seek collective enfranchisement"; and that this "was clearly a very strong possibility". Thus "the unsatisfactoriness at having to claim compensation at stage 1 rather than stage 2 could be addressed". I think that conclusion was correct, as were the conclusions in paragraphs 73 and 74 of the decision.

80. Even if it was not perfectly clear when the claims for new leases were made that a two-stage enfranchisement was what the tenants intended, there was at least a risk of loss to the Trustees as landlord in the event of this happening in the future. The creation of such a risk in itself immediately devalues the freeholder's interest. Compensation for that reduction in value could have been sought. The availability of such compensation does not, of course, depend on a claim for collective enfranchisement being both imminent and obvious. Sometimes it will be both imminent and obvious. In other cases this may not be so, and difficult issues may arise in the assessment of an appropriate level of compensation. In this case, however, I do not think there could have been very much doubt that a two-stage enfranchisement was exactly what the tenants had in mind. There had been simultaneous claims for new leases. The intermediate leasehold interest was held by the tenants. That intermediate leasehold interest was likely to have a negative value when the new leases were granted. As Mr Fieldsend submitted, the Trustees could have been advised at the time when the claims for new leases were made in April and May 2012 that it was open to them to make a claim for compensation under paragraph 5 of Schedule 13, in reliance on the Tribunal's decision in *Nailrile*. Unfortunately for the Trustees, no such claim was made. Mr Bevans candidly accepted in his evidence to the First-tier Tribunal that he did not know the Trustees could have made such a claim. He also accepted that if he had known this he would have advised them to make a claim, and that it was likely they would have done so (see paragraph 26 of the First-tier Tribunal's decision).

81. I turn now to the submissions which Mr Rainey sought to base on the European Convention on Human Rights.

82. The First-tier Tribunal rejected those submissions. In my view it was right to do so.

83. Section 3(1) of the Human Rights Act provides:

> "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.
> …".

84. Article 1 of the First Protocol, under the heading "Protection of Property", states:

> "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."

85. I come back to the Tribunal's decision in *Nailrile*. In that case too the landlord sought to rely on section 3 of the Human Rights Act and article 1 of the First Protocol. It was submitted to the Tribunal, in reliance on the decision of the House of Lords in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, that there were two questions to be considered: (1) whether the provisions of the 1993 Act comply with the Convention; and (2), if they do not, whether the interpretation of paragraph 10(1) of Schedule 11 to the 1993 Act contended for was "possible" for the purposes of section 3 of the Human Rights Act, or whether it was contrary to the "underlying thrust" of the 1993 Act (paragraph 79). The Tribunal said (at paragraph 80) that paragraph 10(1) had not been inserted in

Schedule 11 to prescribe the terms of the existing intermediate lease that was deemed to be re-granted. The scheme of the 1993 Act was that the intermediate lease continued, subject to the new lease. The Tribunal referred (at paragraph 81) to the observation of Lord Nicholls of Birkenhead in *Ghaidan* (in paragraph 33 of his speech) that "the meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed". The Tribunal went on to say (at paragraph 82) that section 3 of the Human Rights Act could not be invoked to change the effect of paragraph 10(1). To import the words contended for into paragraph 10 "would constitute a substantial amendment inconsistent with the scheme of the provisions".

86. I accept Mr Fieldsend's submission that a similar approach should be taken here.

87. It cannot be said that the 1993 Act fails to provide for some compensation to be paid to the landlord in a two-stage enfranchisement. Compensation is available to it at the first stage, under paragraph 5 of Schedule 13. Paragraph 5 enables reasonable compensation to be paid to the freeholder for the risk, immediately created by the granting of new leases to tenants, that at the second stage of a two-stage enfranchisement the value of its interest will be adversely affected, or eliminated, by the negative value of an intermediate lease. I readily accept, of course, that compensation for a risk of future loss is not the same, or at least not necessarily the same, as compensation for a loss once it has actually occurred. Against that, a freeholder may receive compensation for a loss which may never come about.

88. But can it be said that the amount of compensation which may be awarded at the first stage of a two-stage enfranchisement falls short of what is required to avoid offending article 1 of the First Protocol? In my view it cannot.

89. The relevant principles are well established. In *James v United Kingdom* the European Court of Human Rights referred (at paragraph 54 of its judgment) to the question of "whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants". It went on to say (ibid.) that article 1 of the First Protocol "does not … guarantee a right to full compensation in all circumstances". It stressed (at paragraph 46) that, in considering whether the leasehold reform legislation complied with the "public interest" test, the national authorities "enjoy a certain margin of appreciation", and that "the margin of appreciation available to the legislature in implementing social and economic policies should be … wide …". The possibility that the legislature might have produced some other statutory scheme for compensation is immaterial, so long as it does not exceed its margin of appreciation. It is not for the court to judge whether the legislation it is considering is the best solution for dealing with the problem at hand (see, for example the judgment of the European Court of Human Rights in *Mellacher v Austria* (1990) 12 E.H.R.R. 391 at paragraph 53). In *Wilson v First County Trust Ltd. (No.2),* Lord Nicholls said (at paragraph 70 of his speech) that the court would reach a different conclusion from the legislature "only when it is apparent that the legislature has attached insufficient importance to a person's Convention right", and that "[the] more the legislation concerns matters of broad social policy, the less ready will be a court to intervene". In *Lithgow v United Kingdom* (1986) 8 E.H.R.R. 329 the European Court of Human Rights accepted (at paragraph 121 of its judgment) that compensation can satisfy the requirements of article 1 of the First Protocol even if it does not represent market value. The court emphasized (at paragraph 122) that decisions concerning compensation fall within the margin of appreciation, and that the legislature's judgment on such decisions will be respected unless it can be shown that that judgment was exercised without reasonable foundation. I recognize, as Mr Rainey submitted, that the relevant case law of the European Court of Human Rights demonstrates,

as the court said in *Lindheim v Norway* (at paragraph 135), "jurisprudential developments in the direction of a stronger protection under [article 1 of the First Protocol]". But the evolution of the Strasbourg jurisprudence has not undermined Lord Walker's conclusion in *Cadogan v Sportelli* (at paragraph 48 of his speech) – that, in the context of the modern regime for leasehold enfranchisement, an argument relying on section 3 of the Human Rights Act faced an "insuperable obstacle" in the decision in *James v United Kingdom*.

90. With these general principles in mind, given the availability of compensation under paragraph 5 of Schedule 13 to the 1993 Act at the first of the two stages of a two-stage enfranchisement, I do not accept that paragraph 14(2) of Schedule 6 offends the right in article 1 of the First Protocol in the circumstances with which I am concerned here. The First-tier Tribunal saw no force in the Trustees' protestations to the contrary. Neither can I.

91. If, as I believe, the Tribunal's analysis in *Nailrile* of the essential principles governing awards of compensation under paragraph 5 of Schedule 13, in paragraphs 57 to 65 of its decision, was well founded, it does not seem to me to matter that the Tribunal did not in that case describe the basis for the assessment of compensation at the first stage of a two-stage enfranchisement. Nor is it necessary to speculate about the likelihood of the facts and circumstances of this case arising in a large number of others. The crucial point is this. In a case where the granting of new leases to tenants creates, or contributes to the risk of, a negative value being generated in the freeholder's interest in a subsequent enfranchisement of the freehold, compensation is in principle available to the freeholder under the statutory scheme. Such compensation will be determined by the First-tier Tribunal if the parties fail to agree. This seems entirely congruent with relevant European and domestic jurisprudence on article 1 of the First Protocol. I do not accept the submission that the assessment of compensation at the first stage of a two-stage enfranchisement is liable to produce an unfair or arbitrary outcome such as to offend the Convention right. The First-tier Tribunal (at paragraph 73 of its decision) rejected Mr Rainey's submission that the need to claim compensation at the first stage imposes a disproportionate burden on the freeholder. In my view it was right to do so. The circumstances of this case do not, in truth, give rise to any inconsistency with the Trustees' rights under article 1 of the First Protocol.

92. Nor do I think it appropriate to explore other possible situations in which it might be found that paragraph 14(2) of Schedule 6 offends article 1 of the First Protocol, because, for whatever reason, compensation under paragraph 5 of Schedule 13 could not be claimed. As Carnwath L.J. (as he then was) said in *Thomas v Bridgend County Borough Council* (at paragraph 68 of his judgment), a court – or a tribunal – considering an alleged breach of article 1 of the First Protocol is not obliged "to solve all the problems which [the statute] may create in other factual situations". If an available statutory remedy is not pursued in a particular case, the statutory scheme in question may still be found to comply with the Convention (see the speech of Lord Nicholls in *Marcic v Thames Water Utilities Ltd.* [2004] 2 A.C. 42, at paragraphs 37 to 43).

93. In my view, therefore, the Trustees' rights under article 1 of the First Protocol are not offended in this case. I reject the contention that section 3 of the Human Rights Act can and should be deployed here in the interpretation of paragraph 14 of Schedule 6. There is nothing in the circumstances here which requires that provision to be read otherwise than in a wholly literal way for it to be compatible with the Trustees' Convention rights.

94. This part of the Trustees' appeal therefore fails.

Issue (2) – compensation under paragraph 5 of Schedule 6 to the 1993 Act

95. Mr Rainey's alternative argument was that on its true construction, or when read down under section 3 of the Human Rights Act, paragraph 5 of Schedule 6 allows for the "missing" value to be awarded by way of additional compensation.

96. Mr Rainey submitted that the Trustees ought to have been awarded equivalent compensation under paragraph 5 of Schedule 6. This provision should be construed flexibly. Parliament's obvious intention here was to provide for compensation to be paid for additional "loss or damage" not reflected in the valuation of the freeholder's interest in the "specified premises". The concept of "loss or damage" encompasses any genuine loss of whatever kind, so long as it is "referable" to the freeholder's "ownership of any interest in other property". The concept of "other property" is not defined. Contrary to the conclusion of the First-tier Tribunal in paragraph 69 of its decision, it is not limited to land and buildings other than the premises being acquired. It should be given its widest possible sense.

97. Mr Rainey contended that the scope of paragraph 5(2) includes, for example, the right to draw on the compensation paid to an intermediate landlord at the first stage of a two-stage enfranchisement. Such compensation would provide a fund, which could be used to discharge the future liability to head-rent during the residue of the term of the head-lease (see paragraph 140 of the Tribunal's decision in *Nailrile*). The effect of completing the acquisition of the freehold at the second stage of a two-stage enfranchisement is to extinguish the ability of the superior landlord to draw on that fund and to remove the liability of the intermediate landlord which the fund was created to cover. The intermediate landlord would then be able, indeed required, to dispose of the intermediate lease while keeping the fund for its own use. In this case, therefore, the fund of compensation represented a "loss" to the Trustees of £166,770. And compensation for this "loss" is provided for under paragraph 5, because the fund could never be reflected in the freehold value itself.

98. Mr Rainey suggested another way in which compensation could properly be paid under paragraph 5 of Schedule 6 in a case such as this. The assumption underpinning Schedule 6 is that fair compensation will be paid. That assumption requires a wide meaning to be given to paragraph 5. On a broad and purposive construction of that provision, "other property" includes the right to receive the head-rent. A head-rental income stream is capable of assignment separately from the head-lease itself. But the right to do so is lost on completion of the claim. That is a "loss" within the ambit of paragraph 5. The appellants are entitled to compensation for their loss, being the sum, which, but for paragraph 14, would have been payable to them.

99. Failing all of that, Mr Rainey submitted, section 3 of the Human Rights Act requires the Tribunal to "write into" paragraph 5 words which would permit compensation to be paid in a case such as this, where the 1993 Act does not otherwise provide for adequate compensation. This would align the relevant provisions of Schedule 6 with the Convention, and remove the injustice to which freeholders are exposed in a two-stage enfranchisement. Paragraph 5 already provides for the facts of a particular case to be considered, which accords with the decision of the European Court of Human Rights in *Papachelas v Greece*. What is required is a mechanism which ensures for fair compensation to be paid in all cases.

100. Those submissions lack nothing in ingenuity, but in my view they are mistaken.

101. The construction of "other property" suggested by Mr Rainey is, I think, untenable. In my view the First-tier Tribunal was right in paragraph 69 of its decision to construe paragraphs 5(2)(a) and (b) of Schedule 6 in the way that it did. As Mr Fieldsend submitted, it is clear that in paragraph 5(2) provision is made specifically for two kinds of loss. The first kind, in paragraph 5(2)(a), is the diminution in value of any "interest" held by the freeholder in "other property" which results from the acquisition of his "interest" in "the specified premises". The concept of the "other property", though not defined, is in contradistinction to the statutory concept of "the specified premises", as defined in section 13. In his submissions Mr Fieldsend equated the concept of "property" here to "bricks and mortar". I would prefer to describe it as "real property". And it is property in which the freeholder has an "interest". The second kind of loss, in paragraph 5(2)(b), is "any other loss or damage which results therefrom", limited to the "the extent that it is referable to" the freeholder's "interest" in "other property". Plainly, therefore, paragraph 5 permits a claim for compensation only where it concerns "other property". And this means "property" other than the "property" being acquired in the claim for collective enfranchisement.

102. I see several difficulties for Mr Rainey's argument here.

103. The first is that the nature of the "property" he first suggested as the potential subject-matter of an award of compensation under paragraph 5, namely the "fund" which is derived from, and in fact represents, the compensation awarded at the first stage of the two-stage enfranchisement, seems alien to the kind of "property" contemplated in paragraph 5(2). In its statutory context, as I have said, this would appear to be real property, comparable to the "specified premises" in which the freeholder owns his interest. This view is, I think, supported by the discussion of this provision in paragraph 27-25 of Hague on "Leasehold Enfranchisement" (sixth edition). Secondly, in any event, the "other property" in both sub-paragraph (2)(a) and sub-paragraph (2)(b) is property in which the freeholder has an "interest", and I cannot see how it can be said that the Trustees had any kind of interest in the fund of compensation created at the first stage of the two-stage enfranchisement. The third difficulty is that the other form of "property" upon which Mr Rainey relied, which was the right to receive the head-rent, is, as the First-tier Tribunal observed in paragraph 69 of its decision, "an incidence of ownership of the freehold", and cannot therefore be "other property" in the necessary sense of its being property other than the freeholder's "interest in the specified premises". The Trustees have, in truth, suffered no diminution in value of any interest of theirs in "other property" as a result of the acquisition of their interest in the building, and no other "loss or damage" resulting from that acquisition which is in any way "referable to" their "ownership" of any "interest" in "other property". Mr Rainey's argument does not succeed in showing that they have.

104. Lastly, for essentially the same reasons as I have already given in rejecting Mr Rainey's argument that section 3 of the Human Rights Act requires a modified interpretation of paragraph 14 of Schedule 6, I reject the equivalent argument here. There is, in my view, no need, or justification, for anything other than a straightforward, literal construction of paragraph 5 to ensure its compatibility with article 1 of the First Protocol. Section 3 of the Human Rights Act does not require the court to "write in" any words to add to those that Parliament has chosen to use.

105. This part of the Trustees' appeal therefore also fails.

Issue (3) – the premium

106. It follows from my conclusions on the previous two issues that the First-tier Tribunal was right to determine the price payable to the Trustees for the freehold interest as nil.

107. I can well see that this might be considered a highly unsatisfactory result for the Trustees, and on the face of it unfair. But as I have said, a freeholder is not left without recourse to compensation at the first stage of a two-stage enfranchisement. The relevant parts of the statutory scheme, including paragraph 14 of Schedule 6 to the 1993 Act, are framed in unequivocal terms. There is nothing unclear about them. In a case such as this the consequences of their being applied may be unfortunate for a landlord, even if, at the first stage of a two-stage enfranchisement, it has done what it can to prevent the outcome which the Trustees have been left with here. As Mr Rainey's submissions have shown, in the way it has worked in this case the statutory scheme may be defective and perhaps ought to be changed. But the responsibility for that lies with Parliament.

Conclusion

108. For the reasons I have given this appeal is dismissed.

Dated: 12 June 2015

Sir Keith Lindblom, President