UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT - collective enfranchisement – initial notice not registered against freehold title – freehold transferred by registered proprietor to his wife and subsequently transferred back to him – whether initial notice ceased to have effect – price agreed unconditionally – whether open to reversioner to resile from agreement before all other terms finally agreed or determined – ss. 13(11), 24 and 97, Leasehold Reform Housing and Urban Development Act 1993 – appeal dismissed

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

BETWEEN:

MR PAVEL L V CURZON

Appellant

and

MR M C WOLSTENHOLME AND OTHERS

Respondents

Re: 26 Warrior Square,
St Leonards-on-Sea,
East Sussex
TN37 6BS

Before Martin Rodger QC, Deputy President

Sitting at the Royal Courts of Justice, Strand, London WC2A 2LL
on
7 April 2015

Paul Letman, instructed by Rice-Jones & Smith Solicitors, for the appellant.
Stan Gallagher, instructed by Butters David Grey LLP, for the respondents

The following cases are referred to in this decision:

City of Westminster v CH 2006 Limited [2009] UKUT 174 (LC)

Curzon v Hobbs [2013] UKUT 0419 (LC)

Ellis & Dines v Logothetis (2001) LRA/3/2000

Goldeagle Properties Ltd v Thornbury Court Ltd [2008] EWCA Civ 864, [2008] 3 EGLR 69

Penman v Upavon Enterprises Ltd [2001] EWCA Civ 956, [2002] L. & T.R. 10 (CA)

Sinclair Gardens Investments Ltd v Eardley Crescent No, 75 Ltd (2006) LRA/77/2005

DECISION

Introduction

1. This appeal raises two tricky questions under the Leasehold Reform, Housing and Urban Development Act 1993:

> (1) Where an initial notice served under s. 13 of the Act has not been protected by being noted on the Land Register, can the freeholder who received the notice defeat the right of the participating tenants to acquire the freehold by collective enfranchisement by the simple expedient of transferring the freehold to his wife followed, shortly thereafter, by its transfer back to him?
>
> (2) If the price for the freehold is agreed unconditionally between the freeholder and the nominee purchaser, may either of them subsequently resile from that agreement and require that the price be determined by the appropriate tribunal?

2. The appeal is from a decision of the First-tier Tribunal (Property Chamber) ("the F-tT") dated 15 May 2014 in which it determined that an initial notice served on behalf of the respondents on the appellant remained effective, with the result that the F-tT retained jurisdiction to determine the terms of the transfer of the freehold of 26 Warrior Square, St Leonards-on-Sea. It also determined that the purchase price having been agreed by the parties, it was not now open to either of them to apply to the F-tT for reconsideration of that price.

3. Permission to appeal was refused by the F-tT but granted by the Tribunal, with some reluctance, as this relatively modest enfranchisement claim was commenced more than 10 years ago and has already been the subject of one appeal to the Tribunal (under the name *Curzon v Hobbs* [2013] UKUT 0419 (LC)).

The facts

4. 26 Warrior Square is a substantial terraced house now comprising 6 self-contained flats, with a garden and garage at the rear. The appellant is the owner of the freehold which is subject to long leasehold interests in the individual flats. The appellant's wife, Mrs Teruko Yokoyama, is the owner of a lease of the basement flat which was granted to her by her husband on 8 October 2012. On the same date the appellant granted a lease of the first floor flat (together with the roof space and garden) to himself and his wife jointly, all for a term of 999 years. The circumstances in which that lease was granted are explained in the Tribunal's previous decision of 10 September 2013 referred to above.

5. The respondents are the owners of the long leases in the remaining four flats in the building. Since 2004 they have been endeavouring, against the determined opposition of the appellant, to exercise their right under Chapter 1 of the 1993 Act to have the freehold of the premises acquired on their behalf.

6. On 17 November 2004 the respondents gave notice to the appellant under s. 13 of the 1993 Act of their intention to acquire the freehold of the building and the rear garden. They designated themselves as

their own nominee purchaser by whom they wished to complete the acquisition. The appellant gave a counter-notice admitting the respondents' right but disputing the proposed price and requiring a leaseback of the first floor flat and the garden. On 5 May 2005 the respondents applied to the leasehold valuation tribunal (the statutory predecessor of the F-tT) for it to determine the terms of acquisition. The matters in dispute were the price and the terms of the proposed leaseback.

7. The appellant and the respondents each instructed chartered surveyors to negotiate the terms of acquisition on their behalf. On 27 July 2006 the surveyors reached agreement that the premium payable by the respondents would be £6,330. That agreement was recorded in a document entitled "statement of settlement for a freehold enfranchisement" which was signed by both surveyors. The document included other agreed terms, including that the leaseback of the first floor flat would be for a term of 999 years at a nil ground rent and would include the rear garden and garage. In the event of the parties not agreeing the remaining terms, either party reserved the right to apply to the LVT for their determination, but the agreed terms of the leasehold were to remain as agreed regardless of any other terms.

8. The terms of the leaseback referred to in the agreement of 27 July 2006 remained in dispute between the parties until 16 July 2013. They were the subject of hearings in December 2008, January 2011 and on 25 March 2011 at which the LVT determined terms substantially in accordance with proposals put forward by the respondents. The LVT's decision was the subject of the previous appeal to the Tribunal which was withdrawn on 16 July 2013, the date fixed for the hearing of that appeal. As its previous decision explains, the Tribunal was informed at that time that the freehold of the building had been transferred by the appellant to his wife in January 2013, but that it had subsequently been transferred back to the appellant. In fact the transfer of the freehold by the appellant to Mrs Yokoyama was effected for a purchase price of £1 on 9 October 2012, and she was registered as proprietor on 11 October 2012. On 8 January 2013 she transferred the freehold back to the appellant by way of gift, and he became the registered proprietor once again on 28 March 2013.

9. It was not until 4 July 2013? that steps were taken by the respondents' solicitors to protect their interest by noting the initial notice against the appellant's freehold title at the Land Registry, as permitted by s. 97(1) of the 1993 Act.

10. The Tribunal recorded in paragraph 31 of its decision of 10 September 2013 that the parties were at that stage agreed that it was necessary for the respondents' application under Chapter 1 of the 1993 Act to be remitted to the F-tT for it to settle the form of the transfer of the freehold, the terms of which had not yet been agreed or determined. It was not suggested by counsel instructed by the appellant on that occasion (who was not Mr Letman) that there was any obstacle to the F-tT undertaking that task or to the final conclusion of the proceedings by the respondents acquiring the freehold.

11. It was not until 2 April 2014 that the F-tT was informed by the appellant's solicitors that its jurisdiction to continue to determine the terms of acquisition was in dispute. At the same time, and without prejudice to the jurisdictional challenge, the appellant sought to re-open the issue, which had been settled in July 2006, of the price payable for the freehold . Before considering the F-tT's decision it is first appropriate to refer to the main features of the statutory scheme.

The statutory scheme

12. Chapter 1 of Part 1 of the 1993 Act confers on the tenants of flats in a self contained building containing two or more flats held on long leases the right collectively to acquire the freehold interest in that building. Those eligible to exercise the right are referred to as "qualifying tenants", while those who choose to do so (who must comprise the tenants of at least half of the flats in the building held on long leases) are referred to as "participating tenants".

13. The enfranchisement process is commenced by the giving of an initial notice by the participating tenants to the reversioner under s. 13. The initial notice must identify the nominee purchaser whom the participating tenants wish to acquire the freehold on their behalf and must provide certain other information including the proposed purchase price and whether any leaseback is to be granted. The reversioner is required to give a counter-notice under s. 21 stating whether the right of the participating tenants to acquire the freehold is accepted and whether any of the proposed terms are disputed. The exchange of initial notice and counter-notice does not serve to identify all of the detail of the terms of acquisition proposed by either party and, in practice, the detailed terms of the contract and the transfer are proposed and, usually, agreed at a later stage.

14. The service of an initial notice does not create a statutory contract, even after the right of acquisition has been acknowledged in a counter-notice, and the parties are required to enter into a contract for the acquisition on terms which they agree or which are determined by the appropriate tribunal. Until a contract has been entered into the Act provides for the protection of the statutory rights of participating tenants in other ways. Where an initial notice has been given s. 97(1) of the 1993 Act enables the rights of the qualifying tenants to be protected by the entry on the register of a notice under the Land Registration Act 2002 as if there were an estate contract. If an initial notice has been registered in that way, s. 19(1) renders certain transactions by the freeholder void, and ss. 19(2)-(3) has the effect that a transferee of the freehold is treated as having been a recipient of the initial notice and as therefore bound to give effect to the participating tenants' right of acquisition.

15. Once an initial notice has been given, no subsequent notice which specifies the same premises can be given under s. 13 so long as the earlier notice continues in force; nor after an initial notice has been withdrawn, or is deemed to have been withdrawn, under any provision of Chapter 1 of the Act, may any subsequent notice be given specifying those premises for a period of twelve months. Once an initial notice has been given it remains in force in accordance with the terms of s.13(11). These are critical to the first issue in the appeal, and provide as follows:

> "(11) Where a notice is given in accordance with this s., then for the purposes of this Chapter the notice continues in force as from the relevant date—
>
> (a) until a binding contract is entered into in pursuance of the notice, or an order is made under s. 24(4)(a) or (b) or 25(6)(a) or (b) providing for the vesting of interests in the nominee purchaser;
>
> (b) if the notice is withdrawn or deemed to have been withdrawn under or by virtue of any provision of this Chapter or under s. 74(3), until the date of the withdrawal or deemed withdrawal, or

(c) until such other time as the notice ceases to have effect by virtue of any provision of this Chapter."

16. Any dispute over the validity of an initial notice falls to be determined by the court under s. 22, while disputes over terms of acquisition are to be determined by the appropriate tribunal under s. 24(1). In England the appropriate tribunal is now the F-tT. By s. 91 "in default of agreement" the appropriate tribunal has jurisdiction to determine any question arising in relation to the terms of acquisition.

17. The expression "terms of acquisition" which is used in s. 24 is defined in s. 24(8) in wide terms and includes all of the terms of the proposed acquisition by the nominee purchaser, whether relating to the interests to be acquired, the extent of the property, the purchase price, the apportionment of conditions or matters in connection with the severance of any reversionary interest, the provisions to be contained in any conveyance, or otherwise. Where any of those terms has not been agreed at the end of the period of two months beginning with the date on which a counter-notice acknowledging the right of acquisition was given, either the nominee purchaser or the reversioner may apply to the appropriate tribunal under s. 24(1) to determine the matters in dispute. Any such application is required by s. 24(2) to be made not later than six months after the counter-notice was given to the nominee purchaser.

18. Where all the terms of acquisition have been agreed or determined, but no contract has been entered into, either party may apply to the court under s. 24(3) for a vesting order. As ss. 24(3)-(6) are central to the second issue in this appeal it is appropriate to set them out in full:

"(3) Where –

(a) the reversioner has given the nominee purchaser such a counter-notice or further counter-notice as is mentioned in subs. (1)(a) or (b), and

(b) all of the terms of acquisition have been either agreed between the parties or determine by a leasehold valuation tribunal under subs. (1),

but a binding contract incorporating those terms has not been entered into by the end of the appropriate period specified in subs. (6), the court may, on the application of either the nominee purchaser or the reversioner, make such order under subs. (4) as it thinks fit.

(4) The court may under this subs. make an order –

(a) providing for the interests to be acquired by the nominee purchaser to be vested in him on the terms referred to in subs. (3);

(b) providing for those interests to be vested in him on those terms, but subject to such modifications as –

(i) may have been determined by a leasehold valuation tribunal on the application of either the nominee purchaser or the reversioner, to be required by reason of any change in circumstances since the time when the terms were agreed or determined as mentioned in that subs., and

(ii) are specified in the order; or

(c) providing for the initial notice to be deemed to have been withdrawn at the end of the appropriate period specified in subs. (6);

and Schedule 5 shall have effect in relation to any such order as is mentioned in paragraph (a) or (b) above.

(5) Any application for an order under subs. (4) must be made not later than the end of the period of two months beginning immediately after the end of the appropriate period specified in subs. (6).

(6) For the purposes of this s. the appropriate period is –

(a) where all of the terms of acquisition have been agreed between the parties, the period of two months beginning with the date when those terms were finally so agreed;

(b) where all or any of those terms have been determined by a leasehold valuation tribunal under subs. (1) –

(i) the period of two months beginning with the date when the decision of the tribunal under that subs. becomes final, or

(ii) such other period as may have been fixed by the tribunal when making its determination."

19. References in the Act to "agreement" in relation to any of the terms of acquisition do not import a requirement that a contractually binding agreement has been reached, as is clear from s. 24(3); that such an agreement means agreement subject to contract is confirmed by s. 38(4).

20. The consequence of a failure to apply for the determination of disputed terms or for a vesting order within the time allowed by ss. 24(2) and (5) is that the initial notice is deemed to have been withdrawn. This is spelled out in s. 29(2), which provides as follows:

"(2) Where –

(a) in a case to which subs. (1) of s. 24 applies, no application under that subs. is made within the period specified in subs. (2) of that s., or

(b) in a case to which subs. (3) of that s. applies, no application for an order under subs. (4) of that s. is made within the period specified in subs. (5) of that s.,

the initial notice shall be deemed to have been withdrawn at the end of the period referred to in paragraph (a) or (b) above (as the case may be)."

The F-tT's decision

21. Four issues were determined by the F-tT in its decision of 15 May 2014. Only two of those issues remain contentious, namely:

(1) whether the F-tT had lost jurisdiction to determine the terms of acquisition by reason of the transfer of the freehold to the appellant's wife on 9 October 2012, notwithstanding the reacquisition of the freehold by the appellant by transfer back on 8 January 2013; and

(2) whether it was open to the appellant to "un-agree" the purchase price for the freehold prior to the agreement or determination of all of the terms of acquisition, and to seek now for the price payable to be determined by the F-tT.

22. On the first issue the F-tT determined that the initial notice of 17 November 2004 remained effective as against the appellant, and that it therefore retained jurisdiction to determine the terms of the transfer which remained to be settled. It agreed that Mrs Yokoyama had not been bound by the respondents' right of acquisition during her period of ownership, because the initial notice had not been protected by notice on the land register. It nonetheless considered that the notice had never ceased to have effect as far as the appellant, as the original freeholder and recipient of the notice, was concerned and that the right of acquisition was enforceable against him following his reacquisition of the freehold. The F-tT explained its conclusion on the first issue at paragraph 28 of the decision:

> "Whereas failure to protect a notice appears to render it void in relation to a purchaser, it does not appear to destroy the notice itself. Although it could no longer be enforced against Mr Curzon during the period of his wife's ownership of the freehold, when he re-acquired the freehold in his name, there was nothing in the Act to prevent the initial notice being enforced against him at that stage; indeed that would appear to be the inevitable result of s. 13(11) continuing the notice in force until one of the specified circumstances arises."

23 As far as the effect of the 2006 agreement of the purchase price was concerned, the F-tT concluded that it was not open to either party to seek to go behind that agreement and to have the price determined by the tribunal. The F-tT was satisfied that that conclusion followed from the terms of s. 24 of the 1993 Act. Only terms which were not agreed could be determined by the appropriate tribunal. The statement of settlement signed on behalf of the parties in 2006 recorded what the parties had agreed, including the premium of £6,330, so that "the Tribunal's jurisdiction to determine the price has been ousted."

24. The F-tT settled the form of transfer; if necessary it was to be executed on behalf of the appellant by an officer of the court following an application for a vesting order under s. 24(4) of the Act.

Issue 1: Jurisdiction

25. It was common ground that the failure of the respondents' solicitors to protect the initial notice on the land register meant that Mrs Yokoyama took the freehold unencumbered by the rights of the respondents under Chapter 1 of the 1993 Act. For the appellant Mr Letman submitted that at that point the initial notice ceased to have any effect as it could neither be enforced against the appellant himself nor against the reversioner and so ought to be treated as no longer in force. In support of his contention that the freehold was returned to the appellant by his wife on 8 January 2013 free of any rights of the respondents under the Act Mr Letman developed three arguments.

26. First, Mr Letman submitted that s. 13(11) was not an exhaustive statement of the circumstances in which an initial notice continues in force. In particular it did not deal with the effect of a transfer of the freehold at a time when the initial notice has not been protected by registration, when it was common ground that the notice ceased to be enforceable against the reversioner for the time being. Nor did s. 13(11) refer to the effect on an initial notice of the dismissal of an application to the appropriate tribunal for the determination of the terms of acquisition on the grounds of a failure to comply with procedural directions. Other circumstances should therefore be recognised in which an initial notice ceased to have effect, including the circumstances of this case.

27. Alternatively, if s. 13(11) is a complete statement of the circumstances in which an initial notice will continue in force, it was necessary, Mr Letman submitted, to construe subparagraph (c) widely to include circumstances where a notice became ineffective for want of registration on a transfer of the freehold. The provisions of s. 97 of the Act were applicable to the registration of notices under Chapters 1 and 2 of Part 1 of the Act and should properly be treated as "provisions of this Chapter" for the purpose of s. 13(11)(c). If a notice ceased to be enforceable against the reversioner for want of registration it should be regarded as ceasing to have effect by virtue of the provisions of Chapter 1 since those provisions had the effect that the reversioner was not bound. Mr Letman referred to the obligation imposed on the nominee purchaser by paragraph 8 of Schedule 1 to the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993 which require that it take steps to procure the cancellation of any registration of an initial notice upon request in any case where the notice "… is withdrawn, deemed to have been withdrawn or otherwise ceases to have effect." This form of words recognised that a notice may cease to have effect in circumstances other than withdrawal or deemed withdrawal.

28. Thirdly, Mr Letman submitted that, as s. 97(1) makes clear, the rights or obligations of the tenant or landlord arising under Chapter 1 of the 1993 Act, and any right of a tenant arising from an initial notice, are not proprietary rights satisfying the requirements of paragraph 2 of schedule 3 of the Land Registration Act 2002 for the protection of the interest of occupiers of land. Nor are the rights an estate contract, since there is no binding contract in place until the parties separately enter into one. It is for that reason that s. 97(1) confers an entitlement to register an initial notice "as if it were an estate contract". Thus, Mr Letman submitted, Chapter 1 provided for rights which, by their nature, cease to have effect upon the first transfer of the reversion where the initial notice has not been protected on the register. It could therefore properly be said that such an initial notice ceases to have effect by virtue of the provisions of Chapter 1 and so no longer continued in force by virtue of s. 13(11)(c).

29. Mr Letman pointed to what he suggested were a number of absurd consequences of the interpretation of the statutory provisions which had been adopted by the F-tT. There was no apparent time limit for the continuance of an initial notice not protected by registration after a transfer of the freehold. It would be surprising if Parliament had intended that a recipient of such a notice, who transferred the freehold and subsequently re-acquired it many years later should be regarded as still bound by it. Nor was there any provision for the suspension or postponement of the procedural timetable under Chapter 1; a nominee purchaser which wished to preserve its rights to enforce the initial notice in the unlikely event that the original reversioner subsequently reacquired the freehold would therefore be required to apply to the appropriate tribunal for the determination of the terms of acquisition, and thereafter to apply to the County Court for a vesting order which it could not then enforce. Finally, and of more practical significance, Mr Letman referred to s. 54(1) of the 1993 Act which provides that a notice given by an individual tenant under s. 42 of the Act to acquire a new lease of a flat is suspended during the currency of a claim under Chapter 1 to acquire the freehold of any premises containing the tenant's flat.

By s. 54(11)(b) any such claim is current if a notice under s. 13 continues in force in accordance with s. 13(11). The effect of allowing a notice under s. 13 which had not been protected by registration to continue in force indefinitely after the transfer of the freehold would therefore be to block the rights of individual tenants to acquire new leases under Chapter 2 for an indeterminate period. Mr Letman submitted that that could not have been intended by Parliament to be the effect of s. 13(11).

30. On behalf of the respondents Mr Gallagher submitted that although an initial notice under s. 13 did not give rise to a statutory contract it conferred rights on the nominee purchaser which continued under s. 13(11) until the occurrence of one of the three events there described, namely, entry into a contract, withdrawal or deemed withdrawal of the notice, or the notice ceasing to have effect by virtue of any provision of Chapter 1. Although the F-tT had pointed out that s. 97 was not comprised in Chapter 1 of the 1993 Act, but rather in Chapter 7, there was in any event nothing in s. 97 which caused an initial notice to cease to have effect. S. 97(1) simply confirmed that the rights arising from an initial notice were not capable of falling within the general provisions of paragraph 2 of Schedule 1 to the Land Registration Act 2002 but instead provided a specific right to register such a notice as if it were an estate contract.

31. Where an initial notice had not been protected by registration the rights created by service of that notice would be unenforceable by the nominee purchaser against a transferee of the freehold, and the position would be as if the notice had not been served. Mr Gallagher submitted that that did not lead to the conclusion that the notice ceased to have effect for all purposes. The circumstances in which notice ceased to have effect were exhaustively described in s. 13(11), as to which neither paragraphs (a) or (b) applied in this case, as was common ground. Sub-paragraph (c) of s. 13(11) referred to a notice "ceasing to have effect to virtue of any provision of this Chapter." Mr Gallagher identified four provisions of Chapter 1 in which an initial notice is said to "cease to have effect". They were: s. 23(4) (where a tenant's claim is defeated by proof of an intention to redevelop on the part of the landlord); s. 22(6) (on dismissal of an application by a nominee purchaser for a declaration that the participating tenants are entitled to exercise the right to collect enfranchisement); s. 30(4) (on service of a notice to treat with a view to the compulsory acquisition of the property by an authority with appropriate powers) and finally s. 31(4) (where the premises are designated for inheritance tax purposes under s. 31(1) of the Inheritance Tax Act 1984). Apart from those specific provisions Chapter 1 of the 1993 Act did not provide for an initial notice to cease to have effect. Rather, the Act operated by imposing specific time limits within which, in default of agreement, procedural applications were required to be made and stipulated that the effects of a failure to comply with those requirements was that the initial notice was deemed to have been withdrawn. The spectre of an initial notice continuing for an indeterminate period or restricting the rights of individual tenants was inconsistent with the statutory scheme since a notice which was not actively being pursued would, within a relatively short period of time, be deemed to be withdrawn.

32. I do not accept Mr Letman's submissions. Chapter 1 of Part 1 of the 1993 Act confers rights on qualifying tenants and their nominee purchaser which, once a claim is made to exercise the rights by service of notice under s. 13(1), are enforceable against the recipient of that notice in accordance with the provisions of Chapter 1. The circumstances of this case are unusual and extreme and are unlikely to be replicated except where a group of qualifying tenants faces similar ingenious and implacable resistance to the exercise of their statutory rights. Although I am conscious of Mr Letman's warning that hard cases make bad law, I am satisfied that to treat the rights conferred by service of an initial notice as remaining exercisable against the recipient of the notice after the transfer of the reversion is in accordance with the statutory scheme. The effect of giving a notice under s. 13 is to set in motion a sequential process which, in all cases, leads to one of three destinations, namely, entry into a contract or the making of a vesting

order giving effect to the right of acquisition, an actual or deemed withdrawal of the notice at the election of the nominee purchaser, or the occurrence of circumstances outside the control of the nominee purchaser which defeat the right of acquisition and require that the initial notice cease to have effect. Each of those categories of outcome is provided for in s. 13(11) and none of them is engaged in this case.

33. None of Mr Letman's arguments is persuasive. I am satisfied that s. 13(11) is intended comprehensively to describe the circumstances in which an initial notice is to cease to have effect. Mr Letman was unable to point to any circumstance falling outside s. 13(11) in which a notice ceases to have effect. Apart from the case of an initial notice unprotected by registration (i.e. the facts of this case) Mr Letman referred only to circumstances in which an initial notice was the subject of proceedings which were dismissed for some procedural default. If such proceedings were for a declaration under s. 22(1) that the participating tenants were entitled to exercise the right to collective enfranchisement, their dismissal would cause the initial notice to cease to have effect by virtue of s. 22(6); if the proceedings were to resolve disputed terms of acquisition under s. 24(1), the tribunal seized of such an application would not be deprived of jurisdiction to resolve the dispute even after it had struck out the case of a party in default. Indeed, it would be inconsistent with the statutory scheme for such a tribunal not then to go on to determine the disputed terms of acquisition so that time would begin to run under s. 24(6). An unprotected initial notice will only cease to have effect if the circumstances bring it within one of the categories described in s. 13(11).

34. Nor do I think Mr Letman is correct in his second or third arguments which presuppose that which they seek to establish, namely that an initial notice unprotected by registration becomes unenforceable for all purposes on a transfer of the freehold. As Mr Gallagher points out, s. 97 does not provide for the cessation of rights but rather provides a mechanism by which rights initially enforceable against one freeholder may be made enforceable against a successor in title, so whether it is treated as a provision of Chapter 1 despite its location in Chapter 7 is immaterial. The ability to protect rights under the Act by registration does not require that, by implication, a failure to protect those rights necessarily results in them being lost not only against a successor in title of the recipient of the initial notice, but also against the recipient themselves. As Mr Letman's third argument sought to emphasise, the rights conferred by Chapter 1 of the Act are not proprietary rights at all. They confer a personal entitlement on the nominee purchaser to acquire all of the interest in the specified premises belonging to the recipient of the notice. They are enforceable by the giver of the notice only against the original recipient unless protected by registration. That they may in practice be defeated by a transfer to a third party if not so protected is beside the point. If circumstances occur in which the rights once again become capable of practical enforcement I can find nothing in the Act which would prevent them from being enforced.

35. On consideration of the normal time limits for the progression of an acquisition under Chapter 1 the suggested absurdities identified by Mr Letman as consequences of the continuation in effect of an unprotected initial notice all seem to me to evaporate.

36. After an initial notice is given if no counter notice is received or if the right is disputed an application must be made to the court under s. 25(1) or 22(1); if a counter-notice is received admitting the right but proposing alternative terms of acquisition, an application must be made to the appropriate tribunal under s. 24(1). In each of these cases, if the necessary application is not made within the time stipulated by the Act the initial notice will be deemed to have been withdrawn by virtue of ss. 29(1)-(3). Where the freehold reversion is transferred before any such application is made, the nominee purchaser will be faced with the

same choice as any nominee purchaser either of initiating the statutory procedures or allowing a deemed withdrawal to occur. No state of limbo will exist for longer than the periods prescribed by the Act and applicable to its normal operation.

37. Once proceedings have been commenced, either for a determination that the right of acquisition is exercisable or to determine the terms of acquisition, the court or appropriate tribunal has sufficient powers to control its own procedures to ensure that the interests of any individual tenant are not prejudiced. In an appropriate case an application may be stayed, but if that would create an obstacle to the exercise by an individual tenant of the right to a new lease under Chapter 2 of the Act the court or tribunal would be likely to require that the proceedings either be discontinued or progressed to a conclusion. If a nominee purchaser wished to proceed with an application, terms of acquisition could be determined by the appropriate tribunal without the need for the participation of the former reversioner. The nominee purchaser would then have two months from the date of the tribunal's decision within which to apply for a vesting order in accordance with s. 24(3). If no such application was made the initial notice would be deemed to have been withdrawn. If an application for a vesting order was made at a time when the freehold reversion was in the hands of a third party who had acquired their interest free of the rights of the qualifying tenants, the court might be persuaded to make a vesting order conditional on the original reversioner reacquiring the freehold, or it might decide to make an order under s. 24(4)(c) providing for the initial notice to be deemed to have been withdrawn. By one or other of these routes circumstances would occur falling within s. 13(11)(a) or (b) so that the initial notice would no longer continue in force and any suspension of the rights of an individual tenant under Chapter 2 would be lifted.

38. For these reasons, and in agreement with the F-tT, I am satisfied that the initial notice remained enforceable against the appellant after he transferred the freehold of the premises to his wife and that the F-tT retained jurisdiction to determine the disputed terms of the transfer. The appellant's wife having returned the freehold to him during the currency of the application for determination of the terms of acquisition, there is, in my judgment no obstacle to giving effect to the respondents' rights. I therefore dismiss the appeal on the first issue.

Issue 2: The effect of the agreement of the purchase price

39. The parties agreed the purchase price unconditionally on 27 July 2006. They did so notwithstanding that the terms of the leaseback (which was the only issue in dispute at that stage) had not yet been resolved. Although the respondents applied for the determination of all of the terms of acquisition other than the agreed price, the LVT directed that it would first determine the terms of the leaseback, in effect, as a preliminary issue. Once the terms of the leaseback ceased to be in issue the only matters remaining for determination concerned the terms of the transfer. It was only at that stage, almost eight years after agreement on the price, that the appellant sought to resile from that agreement. The question which arises is whether and in what circumstances a party who has reached agreement on one of the terms of acquisition may subsequently depart from that agreement and require that the matter be determined by the appropriate tribunal.

40. In *City of Westminster v CH 2006 Ltd* [2009] UKUT 174 (LC) the Tribunal (Her Honour Judge Robinson) held that once a term of acquisition was agreed unconditionally (in that case the price) it was not open to either party to depart from that agreement. Having referred to ss. 24 and 38(4) of the 1993

Act and to the need to reduce the terms agreed or determined to a binding contract in accordance with the scheme of the Act and the 1993 Regulations, the Tribunal considered the status of an agreement as to some of the terms of acquisition. It recognised the potential for unfairness whether such an agreement was treated as irrevocable or whether the parties were free to resile from it, but at paragraph 21 the Tribunal explained its conclusion that the agreement was irrevocable:

> "In my judgment the scheme of s. 24 is such that an agreement as to terms of acquisition must be binding in the sense that it can be enforced by application for a vesting order. To hold that a party could resile from an earlier agreement would result in uncertainty and potentially render the enforcement mechanism ineffective, which cannot have been intended. Further, there is no basis in s. 24 for distinguishing between the status of an agreement reached at different times in the process of negotiation, application to the LVT, determination by the LVT of matters in issue and application for vesting order. Therefore an agreement reached at any time after the statutory formalities of initial notice and counter notice have been completed for the purpose of s. 24 is binding."

41. In paragraph 23 of its decision the Tribunal considered the circumstances in which an agreement would become irrevocable:

> "In my judgment it must be clear that negotiations have been completed and final agreement has been reached, either orally or in writing, on a specific term or terms that is not in any way contingent on agreement or determination of some other term or terms. It would thus be open to the parties to express any agreement as to e.g. the price as conditional on the acceptance of other terms overcoming the potential unfairness identified in paragraph 20 above."

42. In *City of Westminster v CH 2006* the Tribunal derived support for its conclusion from a decision of the Lands Tribunal (George Bartlett QC, President) in *Ellis & Dines v Logothetis* (2001) LRA/3/2000 which concerned the date on which terms had been agreed for a new lease under Chapter 2 of the 1993 Act. The terms of s. 48 of the Act are substantially the same as those of s. 24. In paragraph 10 of the decision the Lands Tribunal considered the consequences of agreement of any of the terms:

> "So long as any of the terms of acquisition are not agreed those terms remain in dispute and it is for the LVT to determine them. Terms which are agreed cease to be in dispute. The LVT only has jurisdiction where there are terms that are not agreed, and the county court only has jurisdiction where all the terms have been agreed or determined by the LVT. Any agreement reached is necessarily reached in the context of the provisions of s. 48. Any terms agreed are "terms of acquisition" of the new lease to which the tenant is entitled under the S.. Any agreement reached which is not intended to create rights independent of the statutory provisions is thus an agreement made for the purpose of those provisions. It has to be a complete agreement in the sense that each party commits itself unconditionally to such of the terms as are agreed."

43. Mr Letman argued that the decision in *City of Westminster v CH 2006* was wrong and ought not to be followed because it was inconsistent with a trilogy of decisions, including two of the Court of Appeal, which, he submitted, demonstrated that the critical stage after which agreed terms became binding was identified in s. 24(3) of the Act as the point at which *all* of the terms of acquisition had either been agreed or determined. Up to that point, Mr Letman submitted, either party was free to re-open any term previously agreed and to seek either to renegotiate it or to have it submitted to the appropriate tribunal for determination. The right to re-open a previously agreed term might be lost by estoppel or waiver, as the

Court of Appeal had recognised, but no such argument had been advanced by the respondents in this case and the appellant had therefore been entitled to require that the price be reconsidered.

44. Mr Letman referred to s. 38(4) of the Act which stipulates that any reference in Chapter 1 to agreement in relation to the terms of acquisition is a reference to agreement subject to contract. It was of the essence of an agreement subject to contract that either party was free to depart from it at any time. Mr Letman submitted that there was no intermediate species of agreement which remained subject to contract but which was nonetheless irrevocable for the purpose of the Act.

45. Mr Gallagher relied on the Tribunal's conclusions in *City of Westminster v CH 2006* and submitted that once a matter was agreed it became incapable of determination by the appropriate tribunal which had jurisdiction only over matters which had not been agreed. The procedure contemplated by the Act was a sequential one in which issues were required to be identified and then either resolved by agreement or determined by the appropriate tribunal. It would be inconsistent with that scheme to allow issues, once agreed, to be re-opened. The Act mitigated the potential for unfairness by permitting agreed terms to be modified in the circumstances described in s. 24(4) i.e. where there had been a change of circumstances, but otherwise the orderly enforcement of rights under the Act depended on holding a party to agreed terms.

46. The authorities on which Mr Letman relied as demonstrating that the Tribunal's decision in *City of Westminster v CH 2006* was wrong were not concerned with the entitlement of a party to resile from an agreement over any of the terms of acquisition, but rather with a different question, namely, whether time for a nominee purchaser to apply to the court for a vesting order under s. 24(3) started to run when some of the terms of acquisition had been determined by the appropriate tribunal under s. 24(1) notwithstanding that other terms of acquisition remained either to be agreed or determined. They establish that the court only has jurisdiction under s. 24(4) once all of the terms of acquisition have been agreed or determined, that time does not start running under s. 24(6) until that point is reached, and that the appropriate tribunal may determine different terms at different hearings. None of those propositions is of direct relevance to this appeal.

47. In *Penman v Upavon Enterprises Ltd [2001] EWCA Civ 956* the Court of Appeal held that a vesting order could not be applied for until all of the terms of acquisition had either been agreed or determined. Referring to paragraph (b) of s. 24(3) Arden LJ said this, at [33]-[34]:

> 33. The terms of paragraph (b), in my judgment, are critical. They make it clear that before the court can make a vesting order (or indeed any other orders provided for in subs. (4)), the situation must have been reached where not just some, but all, of the terms of acquisition have either been agreed between the parties or determined by the leasehold valuation tribunal. It must therefore follow, in my judgment, that in this case the court had, as the judge held, no jurisdiction to make a vesting order when some of the terms of acquisition correctly placed before the leasehold valuation tribunal had not yet been determined by it (unless they had become the subject of some agreement between the parties).
>
> 34. With that knowledge one turns to subs. (6). It is said that subs. (6) prevents the tribunal from deciding issues sequentially because the appropriate period can be triggered by the determination by the leasehold valuation tribunal of "all or any" of the terms of acquisition.

> As to that, it seems to me that the controlling provision is subs. (3) and that it must follow that subs. (6) must be construed consistently with subs. (3) so that the scheme of the s. works coherently. Accordingly, in my judgment, Mr Fancourt must be right in saying that when subs. (6) speaks of any of those terms, it means (in a case where not all the terms are placed before the tribunal) all the terms which the leasehold valuation tribunal has to determine. Thus the opening words of that subs. will not be satisfied until all those terms have indeed been determined by it. On that basis the appropriate period would not start until that process had been completed and the "decision" for the purpose of subs. (6)(b)(i) would in effect be the last decision of the leasehold valuation tribunal in any case where it had given more than one decision.

Mr Letman stressed in particular the description of subs. (3) of s. 24 as "the controlling provision". It is important to note that the context in which subs. (3) was so described was concerned with the running of time for the making of an application for a vesting order. Neither Arden nor Tuckey LJJ considered whether terms, once agreed, could subsequently be departed from.

48. The next of Mr Letman's trilogy of cases is the decision of the Lands Tribunal (His Honour Judge Huskinson) in *Sinclair Gardens Investments Ltd v Eardley Crescent No, 75 Ltd* (2006) LRA/77/2005. In an application to the LVT the only matters identified as being in dispute were the price and costs, but once those had been determined the nominee purchaser sought to restore the application to secure the incorporation of an indemnity clause as one of the terms of the conveyance. It was held that the application could be restored as the question of the indemnity, which had been proposed in the reversioner's counter-notice, had not yet been determined. The basis of the Lands Tribunal's decision was that the application to the LVT was not required to plead precisely all of the terms of acquisition in dispute, and if, after a hearing to determine matters in dispute it emerged that further issues remained outstanding the appropriate tribunal retained jurisdiction to determine them and time would not have started to run under s. 24(6). There is nothing in this decision which considers the status of agreed terms and nothing which seems to me to advance Mr Letman's argument.

49. The same is true in my judgment of the decision of the Court of Appeal in *Goldeagle Properties Ltd v Thornbury Court Ltd* [2008] EWCA Civ 864, in which the terms of a transfer were assumed by the reversioner to be agreed because the nominee purchaser did not either explicitly accept or challenge them until after the disputed price had been determined by the LVT. The Court of Appeal rejected the submission that only one application could be made to the LVT, or that additional terms could not be determined after the price had been settled. Nothing was said about re-opening terms previously agreed and there is nothing in *Goldeagle* which is determinative of this appeal.

50. I do not accept Mr Letman's submission that the Tribunal's decision in *City of Westminster v CH 2006* is inconsistent with any of this prior authority, even in spirit. In my judgment the question whether a party may retract a previous agreement of any of the terms of acquisition must be determined having regard to the general structure and procedures laid down by the Act and by reference specifically to s. 24(1) which allows an application to be made to the appropriate tribunal for it to determine matters which remain in dispute and s. 91(1) which gives the appropriate tribunal jurisdiction to determine any of the terms of acquisition "in default of agreement". These references to matters remaining in dispute or being agreed must be read subject to the confirmation in s. 38(4) that agreement means agreement subject to contract.

51. I accept Mr Letman's general observation that an agreement made subject to contract from which a party is not free to resile is a difficult concept, at least in the context of a contractual negotiation. In the context of a negotiation for the acquisition of an interest in land, the effect of s. 2, Law of Property (Miscellaneous Provisions) Act 1989 is that no contractually binding agreement of any sort will come into existence until all of the terms have been agreed and reduced to signed writing. Yet even on Mr Letman's own argument it is acknowledged that under the procedures of the 1993 Act a stage is reached after which it is not possible for a party simply to withdraw a previously unconditional agreement. At that point (whenever it occurs) terms which have been agreed acquire the same status as terms which have been determined by the tribunal. The court's power under s. 24(4) to make a vesting order on the terms agreed or determined is qualified by the entitlement of either party to apply to the appropriate tribunal for those terms to be modified to take account of any change of circumstances since the terms were agreed *or* determined. It is therefore obvious that at least by the time an application can be made for a vesting order the *only* grounds on which terms previously agreed may be modified is to take account of a change of circumstances. If that were not so, and either party remained entitled generally to re-open matters previously agreed, no purpose would be served by making any modification subject to an application to the tribunal and a change of circumstances.

52. On any contractual analysis, terms which are capable of being the subject of an application for a vesting order will nonetheless remain subject to contract. No application could be made for specific performance of those terms, and no agreement compliant with s. 2 of the 1989 Act would exist. Thus, although the concept of a binding agreement subject to contract is a curious one, it is a concept which the Act requires to be acknowledged. The purpose of s. 38(4) is not, as Mr Letman submitted, to confirm that agreed terms are not binding, but rather is to make it clear that even though terms may have been agreed subject to contract, they are nonetheless to be treated as having been agreed for the purpose of the statutory scheme. Terms which have been agreed are not binding or irrevocable in a contractual sense: thus, a nominee purchaser may decline to proceed with the proposed acquisition if it is dissatisfied with the best terms it has been able to agree; either party may seek their modification under s. 24(4)(b); either party may seek an order under s. 24(4)(c) that despite all of the terms being agreed or determined the initial notice should be deemed to have been withdrawn. In my judgment agreed terms are only ever binding in the sense that they may be the subject of an application for a vesting order, which may or may not result in them being enforced.

53. Mr Letman locates the point at which agreed terms become binding in that sense as coinciding with the time when an application may be made for a vesting order i.e. the moment referred to in s. 24(3)(b) when all of the terms of acquisition have been either agreed or determined. He points to the reference in s. 24(4)(b)(i) to the power to modify those terms to take account of changes of circumstances "since the time when the terms were agreed or determined as mentioned in that subs." (i.e. subs. (3)) and interprets that language as limiting relevant changes of circumstances to those occurring since all terms were agreed or determined. While I accept that all terms must be agreed or determined before an application may be made for a vesting order, I think Mr Letman's argument places too great a weight on that moment in time as the point at which previously agreed terms acquire the same status as those determined by a tribunal. It cannot have been intended that a relevant change of circumstances which occurs after the determination of particular terms but before other terms were agreed or determined must be left out of account when considering whether a modification should be allowed, yet that would seem to be the consequence of Mr Letman's construction of s. 24(4)(b). Nor is it necessarily straightforward to identify when all of the terms of acquisition have been agreed or determined. Although such an agreement is necessary before a vesting order may be sought, there is nothing to stop the parties from adding additional terms after terms have

been agreed which are sufficient to form the basis of a vesting order and which are satisfactory to both parties at that point. All of the terms of acquisition will not finally be known until a binding contract is entered into or a vesting order is made, yet on Mr Letman's construction the opportunity to rely on a change of circumstances will depend on the point at which all terms have been settled.

54. The structure of the Act requires that terms of acquisition be identified and either agreed, or in default of agreement, submitted to the appropriate tribunal for determination. It would render that scheme incoherent and open to abuse if terms which had been agreed could be revisited. The purpose of s. 24(4)(b) is to protect against the possibility of injustice being caused by the fact that agreed terms are no longer in dispute and that the appropriate tribunal no longer has jurisdiction to determine them. Terms may be agreed or determined at different times and to make that safeguard effective the reference in s. 24(4)(b) to "the time when the terms were agreed or determined" should be understood as a reference to the time when a particular term which it is now sought to modify was agreed or determined, rather than to the single point in time by which all of the terms which were agreed had been agreed, and all of the terms which were determined had been determined. Any change of circumstance since the date of agreement or determination of the particular term in question may be relied on to justify a request for modification of that term. The risk of injustice is thereby controlled and the statutory limitation on the freedom to depart from an agreement which has no contractual effect is balanced. The availability of that safeguard, and the need to avoid uncertainty and the potential for abuse, seem to me to point decisively in favour of the conclusion reached by the Tribunal in *City of Westminster v CH 2006*. I am satisfied that that conclusion was correct and that the F-tT's decision that it could not modify the price, except on the basis of a change of circumstances, was unimpeachable.

55. As was common ground at the hearing of the appeal, parties who are negotiating over terms may give themselves added flexibility by stipulating that agreement on any of the terms of acquisition is conditional on agreement on them all, or that agreement on, for example, the price is conditional on agreement on other specific terms.

56. In the course of the appeal hearing Mr Letman confirmed that he was not aware of any other terms of acquisition which remained to be agreed or determined and on that basis there is no need for me either to consider them (which I would have been willing to do had there been any live issues) or remit the application to the F-tT for further consideration. Subject to any further appeal against this decision, therefore, the decision of the F-tT will become final in accordance with s. 101(9) of the Act on the expiry of time for bringing a further appeal. At that point an application for a vesting order may be made under s. 24(3).

57. Mr Letman reminded the Tribunal and the respondents that it would be open to the appellant to seek the modification of the terms of acquisition on account of changes in circumstances. As far as the purchase price is concerned, since the valuation date is a fixed date which occurred before the agreement was reached, I find it difficult to conceive how a change of circumstances since 26 July 2006 could justify a modification to that price.

58. The appeal is therefore dismissed.

Martin Rodger QC,

Deputy President

15 April 2015