UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – Collective Enfranchisement – Leasehold Reform, Housing and Urban Development Act 1993 section 1(4) – landlord's counternotice offering grant of rights over additional land – counternotice also reserving rights to develop the additional land – construction of the leases regarding extent of lessees' existing rights and lessor's existing reservations over additional land – whether section 1(4) satisfied – if not, whether First-tier Tribunal entitled to determine that terms of acquisition should include acquisition by nominee purchaser of the additional land.

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

BETWEEN:

SNOWBALL ASSETS LIMITED

Appellant

and

HUNTSMORE HOUSE (FREEHOLD) LIMITED

Respondent

Re: Huntsmore House,
35 Pembroke Road,
London,
W8 6LZ.

Before: His Honour Judge Nicholas Huskinson

Sitting at: Upper Tribunal (Lands Chamber), Royal Court of Justice, Strand, London WC2A 2LL
on
9-10 June 2015

Anthony Radevsky and *Christopher Heather*, instructed by Cripps LLP, on behalf of the appellant
Edwin Johnson QC, instructed by Russell-Cooke LLP, on behalf of the respondent

The following cases are referred to in this decision:

Ulterra v Glenbarr (RTE) Co Ltd [2008]1 EGLR 103

Fluss v Queensbridge Terrace Residents Ltd [2011] UKUT 285 (LC)

St Edmundsbury and Ipswich Diocesan Board of Finance v Clark [1975] 1 WLR 468

9 Cornwall Crescent London Ltd v Kensington and Chelsea Royal London Borough Council [2005] EWCA Civ 324

Cutter v Pry [2014] UKUT 0215 (LC)

Shortdean Place (Eastbourne) Residents' Association Ltd v Lynari Properties Ltd [2003] 3 EGLR 147

Bolton v Godwin-Austen [2014] EWCA Civ 27

Durrels House Ltd v Hemphurst Ltd (LRA/25/2009)

The following case was referred to in argument:

Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2014] AC 160, [2013] UKSC 46

DECISION

Introduction

1. This is an appeal, with permission, from the decision of the First-tier Tribunal Property Chamber (Residential Property) (hereafter "the F-tT") dated 15 August 2014 whereby the F-tT decided that, upon a collective enfranchisement of premises under the Leasehold Reform, Housing and Urban Development Act 1993 by the respondent as nominee purchaser from the appellant as freeholder, the terms of acquisition should include a term whereby the freehold of some additional premises was also to be acquired, rather than the matter being dealt with under section 1(4) of the Act by the grant of rights over the additional premises and with the freehold thereof being retained by the freeholder. I shall hereafter refer to the appellant as the freeholder and the respondent as the nominee purchaser.

2. Huntsmore House is located on the south side of Pembroke Road, London W8 in the Royal Borough of Kensington and Chelsea. The building is a purpose-built block of flats, forming roughly a C-shape around the central courtyard, landscaped gardens and a leisure complex. It was constructed in about 1989. Altogether there are 81 flats in the building.

3. This building constitutes premises to which the collective enfranchisement provisions of the 1993 Act apply. The building constitutes the relevant premises for the purposes of section 1. The nominee purchaser claimed the right to acquire the freehold of the building by a notice under section 13 of the Act dated 20 March 2013. This notice claimed the right to purchase the freehold interest in the building and also claimed the right to purchase the freehold interest in the gardens, driveway, parking spaces and leisure complex appurtenant to the building ("the additional premises"). The additional premises are described in the F-tT's decision in the following terms:

> "8. The additional premises are an amenity area of the building which comprises a courtyard/walkway area, landscaped gardens, parking spaces and a leisure facility. A large part of the amenity area is enclosed by the building on three sides. The leisure facility comprises a building on the eastern side of the additional premises and includes a swimming pool, sauna, a gym and male and female changing rooms.
>
> 9. At the southern end of the gardens there are two parking spaces immediately adjacent to the south eastern side of the building, and a driveway which leads around the southern and western sides of the building to Pembroke Road. The entrance to the basement car park is located off this driveway. There are four further parking spaces immediately adjacent to the southern side of the building. There is a gravel walk which runs through the landscaped gardens which until recently was flanked on each side by trees."

4. By a counter-notice dated 24 May 2013 the freeholder admitted the right of collective enfranchisement in respect of the building but it put in issue certain matters including the price payable and the right for the nominee purchaser to acquire the freehold of the additional premises.

5. In summary the substance of the dispute, in so far as is relevant to the present appeal, is as follows. The freeholder had certain development proposals which it wished to pursue, if it were able

to obtain a suitable planning permission, which involved the demolition of the leisure complex within the additional premises; the construction upon the former footprint of the leisure complex of some additional residential units; and the construction of a replacement subterranean swimming pool under the existing garden area. It was the freeholder's case that pursuant to the terms of the existing leases the freeholder had the right to carry out such a development and in consequence it was entitled to retain the freehold of the additional premises and merely to grant to the lessees, in satisfaction of section 1(4) of the Act, rights over the additional premises – being rights which were not so extensive as to prevent the freeholder from carrying out the proposed development.

6. The F-tT in summary decided that the freeholder did not have the development rights claimed; that section 1(4) would not be satisfied by a grant of rights as contemplated by the freeholder; and that in consequence the nominee purchaser was entitled as part of the enfranchisement to acquire the freehold of the additional premises from the freeholder. The F-tT also considered valuation evidence and planning evidence regarding the prospect of a development as proposed by the freeholder ever being permitted to proceed and regarding the value of such development if it did proceed. The F-tT's decision on these points is not (save for one point) before the Upper Tribunal for consideration as part of this appeal. The one point is that the F-tT came to two alternative valuations, namely that the price to be paid for additional premises should be £100,000 if the freeholder was entitled as against the lessees to carry out the proposed development and should be merely £10,000 of the freeholder was not so entitled. Having held that the freeholder was not so entitled the F-tT decided the price to be paid for the additional premises was only £10,000.

7. In the present appeal the freeholder contends that the F-tT was in error in concluding that, having regard to section 1(4), the nominee purchaser was entitled to acquire the freehold of the additional premises. The freeholder contends that the proper conclusion which the F-tT should have reached was that the freeholder was entitled to retain the freehold of the additional premises (such that no question arose as to fixing a price for its purchase). As a subsidiary argument the freeholder also says that if, contrary to its main argument, the nominee purchaser is entitled to acquire the freehold of the additional premises then the price payable should be £100,000 (on the basis that the freeholder does enjoy against the lessees rights to carry out the proposed development) rather than merely the £10,000 fixed by the F-tT.

The title structure and the leases

8. The freeholder's freehold interest extends to both the building and the additional premises. The flats are all let on long leases which it was agreed could be treated as in effectively the same terms as the specimen lease in the bundle, namely the lease of Flat 48 to Mr Tardy, who continues to hold the flat pursuant to that lease and who gave evidence before the F-tT. The parties to the flat leases were the original freeholder (the predecessor in title of the freeholder) and the original lessee and a management company namely Huntsmore House Management Limited which was defined in the lease of the flat as "the Company". A management lease of the Reserved Property (see paragraph 9(3) below) dated 22 October 1992 was granted by the then freeholder to the Company for a term of 125 years from 25 December 1987. Each of the flat owners owns a share in the management company. In 2006 a Right to Manage Company took over the management of the property, but it was not suggested that anything turns on that for the purposes of the present appeal.

9. By the specimen lease dated 14 August 1992 the then freeholder Toulouse Investments Limited demised flat 48 to Mr Tardy for a term of 125 years from 25 December 1987. The lease contained the following provisions:

(1) Clause 1.1.05 defined "the Development" in the following terms:

> 1.1.05 "the Development" means the Lessors development shortly known as Huntsmore House 35 Pembroke Road London W8 being the land comprised in Title Number NGL 557229 together with the buildings now erected or in course of erection thereon or which at any time hereafter are erected on the said land or on some part thereof and all lessors fixtures and fittings and plant machinery apparatus and equipment now or hereafter in or about the same and together with the Common Facilities (as hereinafter defined) in so far as they are situate or pass in upon through or over the same TOGETHER with any additional lessors fixtures and fittings added by the Lessor as herein provided with such modifications and additions as may be made by the Lessor under the provisions of this Lease and such further or Adjoining Property now or hereafter (within the Perpetuity Period) vested in the Lessor and which is developed contiguously with such land together with the buildings and works from time to time erected or standing thereon including such of the footpaths and the Access Roads (as hereinafter defined) as are situate within or upon the same.

(2) Clause 1.1.06 defined: "the Common Facilities" as meaning:

> "… each and every area and facility which are from time to time provided for common or general use by the Lessee and other lessees licensees and occupiers of the Development their employees agent servants licensees and all others authorised or entitled and without prejudice to the generality of the foregoing includes ….."

There then followed a lengthy list of items which included "swimming pool and/or other leisure facilities (if any)"; and also "gardens, recreation areas, gates, access yards, car parking areas"; and also "landscaped areas".

(3) Clause 1.1.19 defined: "the Reserved Property" as meaning the main structure etc of the buildings and also the Common Facilities within the development including the access roads and service media (but excluding any parts of the development which were actually demised in a flat lease to the lessee of a flat and also excluding the air space above the development).

(4) Clause 2.01 provided that the demise was made with certain rights in favour of the lessee. Clause 2.01.1 granted certain rights of way.

(5) Clause 2.01.5 granted to the lessee rights over such:

> "Facilities as might from time to time be allocated for the use and enjoyment of lessees for recreational or leisure purposes subject however to the terms and conditions of this Lease and to such Rules and Regulations concerning the use thereof as might be prescribed from time to time by the Lessor and/or the Company PROVIDED that nothing in the said rules and regulations shall purport to amend the terms of this Lease and in the event of any inconsistency between the terms of this Lease and any such rules and regulations the terms of this Lease shall prevail"

(6) Clause 2.03 contained certain exceptions and reservations in favour of the freeholder and the management company (and others).

(7) Clause 2.03.2 and Clause 2.03.5 and Clause 2.03.8 were in the following terms:

> "2.03.2 Full right and liberty for the Lessor the Company and their respective agents surveyors workmen and others at all times and from time to time upon not less than 48 hours prior notice (save in the case of emergency or normal planned maintenance of plant and machinery when no notice shall be required) to enter into and upon the Demised Premises for all purposes provided for in this Lease and for the purposes of inspecting examining testing repairing cleansing maintaining altering replacing relaying connecting disconnecting or renewing any Service Media and all plant and machinery and to execute works and repairs and to make erections upon or to erect rebuild or alter other premises within the Development or other adjacent subjacent adjoining or neighbouring land or premises and also for the purpose of doing anything whatsoever comprised within the Lessor's or the Company's obligations in this Lease contained or (whether or not comprised within the same) for which the Lessee is liable hereunder to make a contribution or for complying with any statutory requirements or the rules regulations or orders of any competent authority in relation to the Development or any part or parts thereof (including the right if required to erect and maintain scaffolding gantries and/or hoists)
>
> 2.03.5 The full right and liberty at any time or times to build or rebuild or alter or extend in height or otherwise any adjoining adjacent subjacent contiguous or neighbouring land or building and the Development (other than the Demised Premises) notwithstanding that the access of light or air to the Demised Premises may thereby be interfered with or diminished
>
> 2.03.8 The full right and liberty to add to extend or incorporate in the Development any adjoining adjacent or neighbouring land or premises in the absolute discretion of the Lessor and as it shall from time to time think fit and the right of any time within the Perpetuity Period for the Lessor to enlarge the Development by adding an additional storey or storeys thereto for the purpose of providing a further flat or flats or other lettable premises notwithstanding any interference or inconvenience thereby occasioned to the Lessee or the occupier for the time being of the Demised Premises or any temporary derogation from any of the terms of this Lease"

(8) Clause 2.03.6 reserved the right for the freeholder and the management company from time to time to make or add to or amend reasonable regulations for, inter alia, the control of the Common Facilities.

(9) Clause 2.03.11 reserved rights in favour of the management company over the demised premises to be contained or referred to in the management lease. This clause also provided that the grant of the lease to the lessee was subject to the several matters specified in the First Schedule to the lease which was in the following terms:

> "The easements rights exceptions reservations agreements covenants conditions provisions and other matters contained mentioned or referred to in the Management Lease and all other leases of other parts of the Estates so far as they relate to the Demised Premises"

(10) Clause 4.21.1 contained a covenant on the part of the lessee to permit the lessor (i.e. the freeholder) at any time or times during the term:

> "4.21.1 to erect or rebuild or alter any buildings or erections within the Development or adjoining thereto to any extent and in any manner the Lessor may think fit notwithstanding that the building so erected rebuilt or altered may obstruct or interfere with the access or light or air for the time being to or enjoyed with the Demised Premises or any part thereof or any building for the time being on the site thereof"

10. By the management lease the Reserved Property was demised to the management company for 125 years. Clause 2(11) was a covenant by the management company to permit the freeholder etc to enter upon the Reserved Property for the purposes of executing repairs decorations or alterations of or upon any part of the Development or upon any adjoining or neighbouring property etc. Clause 4(4)(b) provided that it should be lawful for the freeholder at any time or times during the term:

> "To alter any part of the Development (including without limitation the Reserved Property) and the layout thereof whether during the construction thereof or at any time thereafter in which event the Company shall be obliged to enter into such deed or deeds or variation as shall be requisite or required by the Lessor to evidence such alteration and on default by the Company the Lessor may as agent for the Company and as its act and deed seal and perfect any such document as the Lessor reasonably requires"

The Third Schedule paragraph 6 provided that the demise was subject to certain rights including in paragraph 6:

> "The right at any time during the Perpetuity Period for the Lessor to enlarge the Development by further building thereon or adding an additional storey or storeys thereto for the purpose of providing a further flat or flats or parking spaces notwithstanding any interference or inconvenience thereby occasioned to the Company or the occupier for the time being of the Reserved Property or any temporary derogation from any of the terms of this Lease PROVIDED ALWAYS ….

Statutory Provisions

11. Section 1(1) and (2) of the 1993 Act confer upon qualifying tenants of certain premises the right to acquire the freehold of those premises, which are referred to as the relevant premises. In the present case the relevant premises are in effect the building itself namely Huntsmore House. Section 1(2) provides that where the right to collective enfranchisement is exercised in relation to the relevant premises then the qualifying tenants are to be entitled, subject to and in accordance with the statute, to have acquired, in like manner, the freehold of any property which is not comprised in the relevant premises but to which section 1(2) applies by virtue of section 1(3).

12. Sections 1(3) and (4) are in the following terms:

> "(3) Subsection (2)(a) applies to any property if at the relevant date either –

(a) it is appurtenant property which is demised by the lease held by a qualifying tenant of a flat contained in the relevant premises; or

(b) it is property which any such tenant is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises (whether those premises are contained in the relevant premises or not).

(4) The right of acquisition in respect of the freehold of any such property as is mentioned in subsection (3)(b) shall, however, be taken to be satisfied with respect to that property if, on the acquisition of the relevant premises in pursuance of this Chapter, either –

(a) there are granted by the person who owns the freehold of that property –

(i) over that property, or

(ii) over any other property

such permanent rights as will ensure that thereafter the occupier of the flat referred to in that provision has as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenant under the terms of his lease; or

(b) there is acquired from the person who owns the freehold of that property the freehold of any other property over which any such permanent rights may be granted."

13. Section 24 of the 1993 Act provides in sub-sections (1)(3) and (8) as follows:

"24. Application where terms in dispute or failure to enter contract.

(1) Where the reversioner in respect of the specified premises has given the nominee purchaser –

(a) a counter-notice under section 21 complying with the requirement set out in subsection (2)(a) of that section, or

(b) A further counter-notice required by or by virtue of section 22(3) or section 23(5) of (6),

but any of the terms of acquisition remain in dispute at the end of the period of two months beginning with the date on which the counter-notice or further counter-notice was so given, the appropriate tribunal may, on the application of either the nominee purchaser or the reversioner, determine the matters in dispute.

(2) …

(3) Where –

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

(b) all of the terms of acquisition have been either agreed between the parties or determined by the appropriate tribunal under subsection (1), but a binding contract incorporating those terms has not been entered into by the end of the appropriate period specified in subsection (6), the court may, on the application of either the nominee purchaser or the reversioner, make such order under subsection (4) as it thinks fit.

(4) The court may under this subsection 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 subsection (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 the appropriate 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 subsection, 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 subsection (6);

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

(5) …

(6) …

(7) …

(8) In this Chapter "the terms of acquisition", in relation to a claim made under this Chapter, means the terms of the proposed acquisition by the nominee purchaser, whether relating to –

(a) the interests to be acquired;

(b) the extent of the property to which those interests relate or the rights to be granted over any property;

(c) the amounts payable as the purchase price for such interests.

(d) the apportionment of conditions or other matters in connection with the severance of any reversionary interest, or

(e) the provisions to be contained in any conveyance,

or otherwise, and includes any such terms in respect of any interest to be acquired in pursuance of section 1(4) or 21(4)."

The section 13 notice and the counter-notice

14. Section 13 provides for the qualifying tenants to exercise their right to claim collective enfranchisement by the service of a notice. It is common ground a valid notice was served claiming such right and also specifying the additional premises as being property of which the freehold was proposed to be acquired by virtue of section 1(2)(a). By the freeholder's counter-notice under section 21 dated 24 May 2013 the freeholder admitted the nominee purchaser's right to collective enfranchisement. However the freeholder gave notice that it did not agree various matters including the proposal to acquire the additional premises. In paragraph 8 of the counter-notice the freeholder (referring to itself as the Reversioner) stated as follows:

> "The Reversioner proposes that the Nominee Purchaser shall be granted the following rights over the following property:
>
> > "Pursuant to Section 1(4)(a) of the 1993 Act, the Reversioner will grant such permanent rights over the Additional Freehold Property (a) as are equivalent to the rights set out in clauses 2.1.01 and 2.1.05 of the leases in the form of the lease of Flat 27 dated 6 January 1999 and subject to the reservations set out in clauses 2.3 thereto or clauses 2.2.1 and 2.2.5 of the lease in the form of the lease of Flat 25 dated 13 December 2001 and subject to the reservations set out in clause 2.4 thereto and (b) any and all further rights as will ensure that thereafter the occupiers of the flats in the Specified Premises have as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenants in terms of their leases."
>
> The freeholder in paragraph 12 also stated that it desired under section 21(3)(d) to retain certain rights including in sub-paragraphs 5 and 9 of paragraph 12 the following rights:
>
> > "5. The right and liberty at any time or times to build or rebuild or alter or extend in height or otherwise any part of the Retained Freehold and any buildings now or from time to time on any part of it notwithstanding that the access of light or air to the Block or any part of it may thereby be interfered with or diminished. It being agreed that any light or air that the Block may currently enjoy across the Retained Freehold is with the consent of the Reversioner.
> >
> > 9. Such rights as may be required for the development of the Retained Freehold."

The F-tT's decision

15. The F-tT noted that the price payable for the building had been agreed between the parties in a particular sum on the assumption that the flat tenants would have access to the leisure facility or an alternative leisure facility.

16. The F-tT recorded the three matters remaining in dispute as being:

(a) whether the freeholder could resist the claim to the additional premises pursuant to section 1(4) of the 1993 Act;

(b) the price payable for the additional premises if the nominee purchaser is entitled to acquire the additional premises; and

(c) the terms of transfer.

17. The F-tT noted that the development was constructed in about 1989 but that building work continued until the early 1990s. It referred to the evidence regarding the marketing of the various flats and in particular the description of the common facilities (including the leisure complex) that were proposed for the use and enjoyment of the lessees. It noted that those facilities were provided to the lessees and had been provided for the past 25 years. Neither the freeholder nor its predecessor in title had taken any steps to change those facilities.

18. The F-tT gave careful consideration to the various provisions in the lease and the management lease regarding the rights granted to the lessees and the exceptions and reservations in favour of the freeholder.

19. In paragraph 37 the F-tT stated:

> "In summary the landlord's rights are: to erect, rebuild etc other premises in the development; to build or rebuild or alter or extend the development in height or otherwise; to extend the development by the incorporation of other land or premises and the right to enlarge the development by adding an additional storey or storeys. In the Tribunal's view these rights fall far short of a right to develop the additional land more generally."

20. In paragraph 40 the F-tT stated that there was therefore no general right to develop the additional premises. It acknowledged that there was a right to alter or rebuild the leisure complex, but such a right was subject to the lessees' right of access to the complex and the right to use the complex. After also considering the terms of management lease the F-tT again concluded in paragraph 44 that the freeholder had no general right to develop the additional premises. In paragraph 45 the F-tT concluded that, even if it had applied too narrow a construction as to the freeholder's rights such that the freeholder did have a right to develop the additional premises, such a right could only be exercised in a way that preserved the lessees' rights to use the common facilities.

21. The F-tT then went on to consider whether section 1(4) had been engaged in the present case so as to prevent the nominee purchaser acquiring the additional premises. The F-tT analysed this question upon two bases namely (i) on the basis that the F-tT was correct and the freeholder did not have rights to develop the additional premises and (ii) on the basis that the freeholder did have such rights.

22. The F-tT considered the terms of the freeholder's counter notice; the terms of the draft transfer proffered by the freeholder; and the respective submissions on behalf of the freeholder and the nominee purchaser as made at the hearing.

23. The F-tT concluded that the counter-notice and the draft transfer both purported to confer upon the freeholder the right to develop the additional premises; that this was a right that the freeholder did not enjoy under the terms of the existing lease; and that therefore the counter-notice and the draft transfer failed to achieve the equivalence required by section 1(4). So far as concerns the counter-notice the F-tT concluded that it should have regard to the whole of the terms of that document and that, as was the case in *Ulterra v Glenbarr (RTE) Co Ltd* [2008]1 EGLR 103, this was a document which proposed to grant rights with one hand but which took those rights back with the other (by reason of the reservation of rights to the freeholder proposed in the counter-notice). Consequently the nominee purchaser was entitled to acquire the freehold of the additional premises.

24. The F-tT further concluded that, even if the freeholder did have some development rights over the additional premises, the equivalence required by section 1(4) would only be achieved if the rights to be granted reflected the rights actually enjoyed by the lessees on the relevant date and that, applying *Fluss v Queensbridge Terrace Residents Ltd* [2011] UKUT 285 (LC), such rights must be permanent rights (in order to satisfy section 1(4)) rather than precarious rights as proposed in the counter-notice and in the draft transfer. Accordingly once again the counter-notice and the draft transfer failed to achieve the equivalence required by section 1(4) and, in consequence, the nominee purchaser was entitled to acquire the freehold of the additional premises.

The appellant's submissions

25. In summary, on behalf of the freeholder Mr Radevsky advanced the following arguments:

(1) He analysed the terms of the lease and the management lease; he referred to the rights conferred upon the lessees in relation to the Common Facilities (which he submitted were precarious rights); he referred to the rights reserved to the freeholder in these leases to carry out works (which he submitted were extensive rights); and he argued that upon the terms of the documents the freeholder did have a general right to develop the adjoining premises including a right to carry out a development such as was proposed by the freeholder involving the demolition of the leisure complex and the construction of additional dwellings in its place and the construction of a subterranean swimming pool under the garden.

(2) He analysed the counter-notice and he argued that this was in sufficiently wide terms (especially having regard to the inclusion of what he described as an omnibus clause in the last part of paragraph 8) to engage section 1(4) and to satisfy the equivalence test. It was not necessary for the counter-notice to set out the detailed drafting of the proposed rights to be granted for the purposes of section 1(4). It was only necessary for the counter notice to make clear that section 1(4) was relied upon and that adequate rights to satisfy the equivalence test would be granted.

(3) He argued that once a counter notice does sufficiently engage section 1(4) the result is that the F-tT, upon an application to it under section 24, is only concerned to determine, as part of the terms of acquisition, what are the rights to be granted under section 1(4). In these circumstances it is not properly open to the F-tT decide that the freehold of the additional premises shall be acquired by the nominee purchaser -- it is only open to the F-tT to approve the terms of the proposed grant of rights or, if it does not consider that they satisfy section 1(4), to decide what those rights should be and to rule that the terms of acquisition must include those rights.

(4) He argued that in the present case the equivalence test was satisfied because the rights enjoyed by the lessees under their existing leases were precarious, the rights enjoyed by the freeholder were extensive, and the terms proposed in the counter notice (alternatively in the counter-notice coupled with the draft transfer) sufficiently continued on a permanent basis these precarious rights.

(5) He argued that if at the relevant date the lessees only enjoyed precarious rights over the adjoining premises, then under section 1(4) they could only require the grant of rights which were no more precarious than those which they enjoyed. The lessees were not entitled to demand the grant of permanent and non-precarious rights in substitution for their previous precarious rights. The decision of the Lands Tribunal in *Fluss* is incorrect in deciding the contrary.

(6) In consequence the F-tT was wrong in concluding that the equivalence test was not satisfied by the counter-notice (or by the counter-notice coupled with the draft transfer relied upon by the freeholder). The F-tT should instead have found that the equivalence test was satisfied and that the terms of acquisition should be as proposed in the counter-notice and draft transfer alternatively should be subject to such amendments as the F-tT decided were needed. The Upper Tribunal should allow the appeal and should rule that the additional premises were not to be acquired by the nominee purchaser and that the rights to be granted were as proposed by the freeholder. If the Upper Tribunal considered the rights proposed by the freeholder were insufficient to satisfy the equivalence test then it should nonetheless allow the appeal and should rule that the nominee purchaser was not entitled to acquire the additional premises and the Upper Tribunal should either (pursuant to its powers under section 12 of the Tribunals, Courts and Enforcement Act 2007) itself decide what amendments were needed to the draft transfer to ensure that the equivalence test was satisfied alternatively should remit the matter to the F-tT to decide upon such necessary amendments.

(7) If the foregoing is wrong and the nominee purchaser is entitled to acquire the freehold of the additional premises, then the F-tT erred in deciding that the price to be paid was £10,000 rather than £100,000.

26. Mr Radevsky developed those arguments in his written submissions and oral presentation in the following ways.

27. As regards the rights granted to the lessees to enjoy the Common Facilities he drew attention to the definition in clause 1.1.05 of the lease and in particular to the qualification that the Common Facilities constitute each and every area and facility "which are from time to time provided" for common or general use by the lessees. Also the right to use facilities as granted in clause 2.01.5 is a right to use facilities "as might from time to time be allocated" for the use and enjoyment of the lessees. This makes clear that the rights enjoyed are indeed precarious. It is accepted on behalf of the freeholder that at the date of the grant of leases and at all material times thereafter the use of the leisure complex has been provided for (and allocated for) the use of the lessees. However what has been provided or allocated can be withdrawn or become unallocated. Mr Radevsky submitted that upon the true construction of the lease the freeholder enjoyed the right at any time for any reason (or without reason) to withdraw any or all of the Common Facilities, including in particular the leisure complex, subject only to there remaining an adequate right of way to and from the demised flat.

28. As regards the rights reserved to the freeholder, Mr Radevsky drew attention to the principle of construction identified in *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark* [1975] 1 WLR 468, namely that a reservation is to be construed in favour of rather than against a landlord. However he submitted that in fact this principle of construction was of no effect in the present case because the construction was clear and it was not necessary to appeal to any contra proferentem rule.

29. He referred to various clauses contemplating the expansion or alteration of the Development including in particular the following provisions:

(a) The definition of the expression "the Development" in clause 1.1.05.

(b) The reservations of rights in clauses 2.03.2; 2.03.5; 2.03.8; and 2.03.11 (and the First Schedule).

(c) The lessee's covenant with the freeholder in clause 4.21.1.

(d) Various provisions in the management lease namely clause 2(11), clause 4(4)(b) and the Third Schedule at paragraph 6.

30. He submitted that these provisions clearly reserved to the freeholder wide powers to enter and carry out building works upon the additional premises, being rights which were sufficiently wide to include the demolition of the existing leisure complex and the construction of new dwellings and a new subterranean swimming pool.

31. Taking as an example the provisions of clause 2.03.5 he submitted that the right

> "to build or rebuild or alter or extend in height or otherwise ....the Development…. notwithstanding that the access of light or air to the Demised Premises may thereby be interfered with or diminished"

was a wide right which included a general right to develop the additional premises. In response to a question as to why clause 2.03.8 was needed at all if clause 2.03.5 was truly as wide as this, Mr Radevsky pointed out that leases might be prepared by the amalgamation of various precedents and that (if I understood correctly) one should be cautious about construing a lease on the basis that the draughtsman had added a specific provision because it was necessary to deal with a matter not already fully dealt with by another clause.

32. Having made his submissions in relation to the proper construction of the leases Mr Radevsky then turned to the counter-notice. He pointed out that it is not necessary for a counter notice to go into detailed matters of drafting. He drew attention to *9 Cornwall Crescent London Ltd v Kensington and Chelsea Royal London Borough Council* [2005] EWCA Civ 324 where Auld LJ stated in paragraph 6:

> "The Act provides a mechanism for resolution of that matter and satisfaction of other requirements of exercise of the right, consisting broadly of two stages. The first is that of an exchange of notices between the tenants, or their nominee, and the landlord, which serves to identify at an early stage whether and broadly what issue or issues there are between them as to the tenants' right to exercise the power and/or as to the terms, including price, of its acquisition.

> It does not serve, as the judge appears to have considered at para 25 of his judgement, as a means of securing a final definition of, or constraint on, the issue or issues for determination by the court or a leasehold valuation tribunal, if the matter goes that far. Rather, it serves as a useful negotiating stage during which any issues may be resolved so as to avoid, if possible, recourse to the second stage, namely application to the court to determine the tenants' entitlement to enfranchisement and/or, as the case may be, to a leasehold enfranchisement tribunal to determine the price and/or other terms."

33. Mr Radevsky drew attention to paragraph 8 of the counter-notice. This expressly refers to section 1(4)(a) and is in effect in two parts, namely the opening part which states that rights will be granted as are equivalent to the rights set out in certain clauses in existing leases (but subject to certain reservations) and the second part of the paragraph, which he described as an "omnibus clause", which made clear that the freeholder's grant would include:

> "any and all further rights as will ensure that thereafter the occupiers of flats in the Specified Premises have as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenants in terms of their leases."

34. He submitted that the result of this counter-notice was as follows. The document complied with section 21(3)(b) by specifying the nature of the rights to be granted and the property over which it was proposed to grant them. The document constituted clear and sufficient reliance upon section 1(4). The rights offered in the counter-notice were themselves sufficient to satisfy the equivalence test in section 1(4). Even if they were not sufficient the terms offered could be expanded by the freeholder after the service of the counter-notice so as to become sufficient, see *Cutter v Pry* [2014] UKUT 0215 (LC).

35. The F-tT should have concluded that the terms offered in the counter-notice satisfied the equivalence test, alternatively that the terms offered in the counter-notice together with the draft transfer prepared by the freeholder for the hearing before the F-tT satisfied the equivalence test. If the F-tT concluded that the equivalence test was not satisfied on either of these bases then, rather than concluding that the freehold of the additional land should be acquired by the nominee purchaser, the F-tT should instead have decided what additional terms were required in the freeholder's grant of rights so as to satisfy the equivalence test and should have ordered that the terms of acquisition should include these additional terms.

36. He drew attention to *Shortdean Place (Eastbourne) Residents' Association Ltd v Lynari Properties Ltd* [2003] 3 EGLR 147 at paragraph 64 where the Lands Tribunal (Peter Clarke FRICS) found, as indeed was acknowledged on behalf of the nominee purchaser in that case, that the rights offered by the freeholder were permanent rights under section 1(4) and continued:

> "I find that the permanent rights offered in Lynari’s counter notices satisfy the test under section 1(4)(a)(i) for the purpose of this appeal. Any dispute as to the exact nature and scope of the rights to be granted that cannot be settled by agreement can be determined by a county court under section 24(3) and (4) of, and Schedule 5 to, the 1993 Act."

37. He also relied upon the terms in which permission to appeal from the decision of the leasehold valuation tribunal was refused by His Honour Judge Mole in the *Durrels House* case (LRA/23/2009),

which referred to *Shortdean* and confirmed that the exact scope of the rights to be granted could be decided at the contract stage and if necessary determined under section 24 of Act.

38. Mr Radevsky helpfully explained what, in his submission, was the procedure if the detailed drafting of provisions in the transfer (including in particular the nature of rights to be granted under section 1(4)) fell to be determined at the contract stage. He pointed out that where all the terms of acquisition have been agreed between the parties or determined (by the F-tT or the Upper Tribunal on appeal) but a binding contract has not been entered into by a certain date, then either party can apply to the court for an order under section 24(4). This enables the court to make a vesting order upon the terms which have been already agreed or determined (alternatively upon modified terms if there have been a change of circumstances and there is a reference back to the appropriate tribunal to amend the terms). If the matter proceeds on an application for a vesting order upon the terms already agreed or determined, then Schedule 5 applies, paragraph 2 of which provides that there shall be executed by such person as the court may designate a conveyance which:

> "(a) is in a form approved by the appropriate tribunal, and
>
> (b) contains such provisions as may be so approved for the purpose of giving effect to the relevant terms of acquisition."

39. Accordingly it is not the court which finalises the form of the transfer or the drafting of the provisions which confer the rights required by section 1(4) but it is instead the appropriate tribunal. It is possible that the detailed drafting will become actually agreed or deemed to be agreed pursuant to procedures under the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993 such that the appropriate tribunal will not need to approve the document.

40. What is important from the foregoing is the following, namely that once a freeholder has sufficiently relied upon section 1(4) then, upon an application under section 24 to determine the terms of acquisition, the end result must be a determination of terms of acquisition which satisfy the equivalence test required by section 1(4). Such an end result can be achieved, if the F-tT does not consider the terms offered by the freeholder to satisfy the equivalence test, either by the F-tT itself drafting the necessary terms to confer the necessary rights or by allowing the matter to come before itself on a further hearing, perhaps pursuant to the provisions of section 24(3) and (4) and Schedule 5, for the drafting of the necessary rights to be finalised - unless such rights have become agreed pursuant to the exchange of documentation and the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993.

41. There is a possible exception to this result, namely where a freeholder makes clear that there is effectively a red line regarding the extent of rights it is prepared to grant for the purposes of section 1(4), i.e. a red line beyond which it will not in any circumstances grant more extensive rights. In those circumstances it is permissible for the F-tT, if it concludes that the rights offered by the freeholder are insufficient to satisfy the equivalence test in section 1(4), to rule that section 1(4) is not satisfied and that the terms of acquisition are to include an acquisition by the nominee purchaser of the freehold of the additional premises. He submitted that this did not happen in the present case.

42. As regards the decision of the Lands Tribunal (His Honour Judge Reid QC) in *Ulterra v Glenbarr (RTE) Co Ltd* [2008] 1 EGLR 103, where it was held that the counter-notice did not

sufficiently engage section 1(4) such that the nominee purchaser was entitled to acquire the freehold of the additional land, he pointed out that in that case the freeholder enjoyed no right to develop the additional land (which he contrasted with the position as contended for by the freeholder in the present case) and also there was no omnibus clause of the type contained in paragraph 8 of the present counter-notice.

43. In summary therefore, and leaving aside for the moment the separate point arising under *Fluss v Queensbridge Terrace Residents Limited* [2011] UKUT 285 (LC), the F-tT erred in law in the following manners:

> (1) It wrongly construed the leases when it concluded that the freeholder did not have a general right of development over the adjoining premises.
>
> (2) It wrongly construed the leases when it concluded that the lessees had effectively permanent rather than precarious rights over the Common Facilities, including in particular the leisure complex, being rights which did not have to yield to the freeholder's right of development.
>
> (3) It wrongly concluded that the counter-notice, alternatively the counter-notice together with the draft transfer, failed to satisfy the equivalence test for the purposes of section 1(4).
>
> (4) If, contrary to the foregoing, these documents did fail to satisfy the equivalence test, the proper course was not for the F-tT to rule that the nominee purchaser should be entitled to purchase the freehold of the additional premises but was instead for the F-tT to decide upon what additional rights should be conferred so as to ensure the equivalence test was satisfied.

44. Mr Radevsky then turned to consider the Upper Tribunal decision in the case of *Fluss* (a decision of my own). In that case it had been established before the leasehold valuation tribunal that section 1(4) was engaged and that the additional land (referred to in the decision as the Amenity Land) was to be retained by the freeholder, such that the only question before the Upper Tribunal was what should be included in the terms of acquisition so far as concerns the grant of rights over the Amenity Land. There were rights in the existing leases, being rights which the freeholder had not exercised by the relevant date namely the date of the section 13 notice, permitting the freeholder to curtail the rights enjoyed by the lessees over the Amenity Land. The question arose as to whether the equivalence test in section 1(4) would be satisfied if the grant of rights over the Amenity Land contained similar provisions entitling the freeholder after the grant to curtail those rights so that the rights became less extensive than those which the lessees were in fact enjoying on relevant date. In paragraph 36 I stated:

> "36. I also am unable to accept Mr Webb's argument that, when analysing the rights enjoyed in relation to the Amenity Land on the relevant date by the qualifying tenants under the terms of their leases, it is necessary to have regard not merely to the rights those tenants actually enjoyed on that date but also to the potential lesser or more restrictive rights that they might in the future (by the exercise of some power against them) be restricted to enjoying. The statute in my view requires an enquiry as at the relevant date (i.e. the date of service of the section 13 notice) of what were the rights enjoyed by the qualifying tenants under their leases on that date. The fact that at some future date they might have enjoyed lesser rights is not relevant. The purpose of section 1(4) is to give to the qualifying tenants rights in substitution for the acquisition of the freehold of the Amenity Land. Also they must be "permanent rights" which will "ensure that thereafter" the qualifying tenants have as nearly as may be "the same

rights as those enjoyed in relation to that property on the relevant date". It is true that under the terms of the flat lease the landlord had the right to lay down regulations for the use of inter alia, the Amenity Land. The landlord had not done so by the relevant date and accordingly as at the relevant date the tenants had the right to use the Amenity Land without being restricted by regulations. Mr Webb's argument that the rights should be taken with all their potential future frailties does not in my judgment give effect to the express wording of the statutory provision. Also the matter can be tested in this way. Suppose that at the relevant date tenants enjoyed certain rights but that there was a power at some future date to terminate those rights or greatly to curtail them. It is my view clear that the grant of rights needed to satisfy section 1(4) could not include the reservation of the right to the grantor to exercise these powers of termination or curtailment, because if such powers were included then the rights granted by the freeholder would fail to be "permanent rights" and would fail to "ensure that thereafter" the qualifying tenants enjoyed as nearly as may be the same rights as those enjoyed in relation to the Amenity Land on the relevant date."

45. Mr Radevsky with all due courtesy submitted that this case was wrongly decided. He submitted that the use of the expression "permanent rights" in section 1(4) was needed because prior to the enfranchisement the lessees would only have rights for the duration of their existing leases, but after the enfranchisement they would have the ability through the nominee purchaser to grant themselves any length of term, e.g. a 999 year lease. Accordingly the rights to be granted, for the purpose of satisfying the equivalence test, were rights which would continue permanently but would continue to be rights of exactly the same nature as existed at the relevant date. Thus if at the relevant date the lessees enjoyed precarious rights which could at any time be curtailed or determined then the lessees should after the enfranchisement continue to have such rights on the basis that these rights would in principle be capable of continuing permanently, but would be subject to whatever frailties existed on the relevant date. Thus if at the relevant date a right existed which the freeholder could terminate, the necessary permanent right to be granted was a right which would continue permanently (rather than run out at the termination date of the existing lease) but which would be subject to the same right of termination as existed under the lease. The requirement that there be offered rights which are "as nearly as may be" the same rights as those enjoyed under the existing leases must mean the actual rights as they were presently enjoyed at the relevant date, namely (so far as concerns the leisure complex) the right to use the leisure complex subject to the right of the freeholder to curtail or regulate that right.

46. Therefore the F-tT erred in law in concluding that, even if the freeholder did have some development rights over the additional premises, the equivalence required by section 1(4) would only be achieved if the rights to be granted (i) reflected the rights actually enjoyed by the lessees on the relevant date (namely rights which included a right to use the leisure complex) and (ii) were permanent rights, being rights which could not be withdrawn thereafter by the freeholder. If the right to use the leisure complex as at the relevant date was a precarious right which could be terminated then section 1(4) did not require the grant of a permanent and non-precarious right which could not be terminated.

The respondent's submissions

47. In summary on behalf of the respondent (i.e. the nominee purchaser) Mr Johnson advanced the following arguments:

(1) The F-tT was correct in its construction of the leases and its analysis of the extent of the rights conferred upon the lessees and the extent of the rights reserved to the freeholder.

(2) The F-tT was also correct in its conclusion that the rights offered by the freeholder in the counter-notice (alternatively in the counter-notice coupled with the draft transfer) did not satisfy the equivalence test required by section 1(4).

(3) In consequence the F-tT correctly decided under section 24 that the terms of acquisition must include a term whereby the nominee purchaser acquired the freehold of additional premises.

(4) In any event, even if the F-tT was wrong in its conclusion regarding the extent of the rights granted to the lessees and the rights reserved to the freeholder, there is a short and separate basis upon which this appeal must fail, which is as follows. As at the relevant date the lessees did in fact enjoy rights to use the Common Facilities including in particular the leisure complex. The rights proposed to be granted (whether taken from the counter-notice or the draft transfer) were precarious rights which could be terminated by the freeholder and which therefore did not comply with the equivalence test in section 1(4) because such rights were not permanent rights and they would not ensure that thereafter the lessees would have as nearly as may be the same rights as those enjoyed on the relevant date. Reliance for this argument was placed upon the wording of the statute and the decision in *Fluss*.

(5) As regards the argument that, having regard to the terms of the counter-notice, the F-tT should have concluded (i) that it was impermissible to find that the nominee purchaser was entitled to acquire the freehold of the additional land, and (ii) that its function was merely to determine what terms of acquisition must be included in the draft transfer so as to ensure that the equivalence test in section 1(4) was satisfied (whether by drafting such provisions itself or putting such matter back for a further hearing), Mr Johnson submitted that this argument was not open to the freeholder having regard to the way the matter proceeded before the F-tT and to the fact that this was an appeal by way of review and not by way of rehearing.

48. Mr Johnson expanded upon these submissions in his skeleton argument and his oral presentation.

49. Mr Johnson drew attention to section 1(3)(b) and pointed out that it was common ground that, subject only to section 1(4), the nominee purchaser had the right to acquire the freehold of the additional premises. The freeholder is entitled to retain the freehold of the additional premises if but only if it grants rights which are a satisfactory substitute, so far as concerns the lessees, for what would otherwise have involved the acquisition of the freehold. The statutory purpose is to ensure that the lessees end up in a reasonably similar position to the position they would have been in if they had acquired the freehold of the additional premises, i.e. to use the gardens and leisure complex as they pleased effectively in perpetuity.

50. Mr Johnson examined section 1(4) and he submitted that there were five conditions to be satisfied so far as concerns the grant of rights in substitution for the acquisition of the freehold, namely:

(1) such rights must be permanent (not temporary) rights;

(2) they must "ensure" something for the benefit of the lessees;

(3) what they must ensure is that "thereafter" the lessees will have certain rights;

(4) these must be rights which are "as nearly as may be" the same rights as those enjoyed in relation to [the additional premises] on a particular date;

(5) this date is the relevant date, namely the date of service of the section 13 notice.

51. Mr Johnson submitted that a proper application of section 1(4) giving full effect to all of these requirements required a conclusion as reached in *Fluss*, which he submitted was rightly decided.

52. Section 24 confers upon the F-tT the power to determine matters in dispute regarding the terms of acquisition. The definition of this expression in section 24(8) makes clear that the F-tT is not limited to deciding merely "heads of terms", with the finalisation of the nature of these terms being left for some future consideration by the court or the F-tT. The decision in *Bolton v Godwin-Austen* [2014] EWCA Civ 27 is not a decision to the contrary. Where the terms of acquisition are in issue in a case where section 1(4) is relevant, it is necessary for the F-tT to consider whether the equivalence test is satisfied and to order, if it is not satisfied, that the terms of acquisition shall include the acquisition by the nominee purchaser of the freehold of the additional premises. The decision in *Shortdean* was to the effect that, where it is clear (as was found and indeed conceded in that case) that the rights offered do satisfy the equivalence test in section 1(4), the tribunal has no discretion to order that the nominee purchaser shall nonetheless be entitled to acquire the additional premises. The additional observations of the tribunal in *Shortdean* must not be taken as authority for the proposition that, where it is in issue whether the rights offered satisfy the equivalence test then, provided only that the freeholder relies on section 1(4), the result must be that the freeholder retains the additional land with the drafting of the necessary rights to be granted being left over to a further hearing. There is no discretion in the F-tT to allow the freeholder to have in effect repeated attempts to satisfy the equivalence test, i.e. by ruling that if the rights offered at the first hearing before the F-tT are insufficient then the parties should go away and come back with the freeholder offering more extensive rights -- this, if permitted at all, could involve repeated applications where the freeholder gradually offered more and more rights until eventually the equivalence test was satisfied. There had instead to be finality in the litigation.

53. Mr Johnson submitted (if I understood him correctly) that it was impermissible for a freeholder to adopt the following approach, namely to make clear that it would grant whatever rights were necessary to satisfy section 1(4), however extensive those rights might be, and to leave the drafting of those rights to the tribunal if the rights offered by the freeholder were insufficient. His submission was that it was not for the tribunal to have to draft the provisions for the parties but instead it was for the tribunal to rule whether the offered rights did satisfy the equivalence test, with the burden being upon the freeholder to proffer sufficient rights. If the freeholder did not do so it would find that the tribunal's order was that the equivalence test was not satisfied and that therefore the freehold of the additional premises should be conveyed.

54. However Mr Johnson submitted that, even if such an approach by a freeholder was permissible, this was not the approach adopted by the freeholder in the present case. Instead it was clear throughout the proceedings up to and including the hearing before the F-tT that it was fundamental to the freeholder's position that it must retain rights enabling it to carry out its proposed development. There

was no question of the freeholder indicating that it would grant whatever rights were necessary to satisfy the equivalence test including rights which would prevent it from developing the additional premises.

55. In deciding whether the rights offered by the freeholder satisfied the equivalence test the F-tT was not limited to looking merely at the counter-notice but was entitled to look at the draft transfer provided by the freeholder and to examine, as at the date of the hearing before the F-tT, what rights the freeholder was offering in purported satisfaction of the equivalence test under section 1(4). Mr Johnson submitted that in the present case, whether one looks at merely the counter-notice or at the counter-notice together with the draft transfer, the equivalence test was not satisfied and the only proper conclusion for the F-tT to reach was that the nominee purchaser should acquire the freehold of the additional land.

56. So far as concerns the counter-notice, in order to consider whether the equivalence test is satisfied for the purposes of section 1(4) it is necessary to look at the whole of the notice and not merely the part of the notice dealing with the rights to be conferred on the lessees, see *Ulterra v Glenbarr* where it was found that the counter notice gave rights with one hand but took them away with the other hand. Mr Johnson submitted that that was effectively exactly what was the position under the present counter-notice, which purported in paragraph 8 (which included a form of omnibus clause) to grant rights sufficient to satisfy the equivalence test, but which contained reservations in paragraph 8 itself and which then contained in paragraph 12 provisions requiring the reservation of rights to the freeholder including in paragraph 12.9 "such rights as may be required for the development of the [additional premises]". Accordingly looking merely at the counter-notice the equivalence test was not satisfied.

57. So far as concerns the draft transfer, Mr Johnson noted that it was submitted on behalf of the freeholder that this document reserved rights to the freeholder which were effectively a repetition of rights already to be found reserved to the freeholder in the leases. However he drew attention to the addition of certain words which appeared in the draft transfer but which did not appear in the leases which he submitted widened the rights of the freeholder and made clear that the freeholder would pursuant to the draft transfer be entitled to do things which it was not entitled to do under the leases, namely to carry out the proposed development of the additional premises involving the demolition of the leisure complex. He referred in particular to the addition of the words "or construct buildings on" in the middle of paragraph 2 of the Second Schedule to the draft transfer and also to the addition of the words "to develop and build on the Retained Land" in paragraph 8 thereof.

58. Mr Johnson then made submissions as to the proper construction of the lease and the management lease and as to the extent of the rights granted to the lessees and reserved to the freeholder so far as concerns, in particular, the use of Common Facilities especially the leisure complex. He agreed that the *St Edmundsbury* case did not need to be relied upon because the construction of the documents was sufficiently clear (although clear in a sense contrary to the construction advanced by Mr Radevsky). He drew attention to the evidence placed before the F-tT from two of the lessees, including Mr Tardy who was one of the original lessees taking his lease in 1992. He drew attention to the fact that Mr Tardy's evidence showed that as at the date of the grant of his lease the development was laid out with the gardens and leisure complex as part and parcel of the overall development; that the gardens and leisure complex were available for the use of the lessees;

and that the original marketing of the flats was on the basis that the lessees would enjoy the use of the gardens and leisure complex. They have been continuously so enjoyed from the beginning until now.

59. The question arose as to what is meant in clause 1.1.06, which defines the Common Facilities, by the words "which are from time to time provided" and by the similar words in clause 2.01.5 which confers the rights to use facilities "as might from time to time be allocated". Mr Johnson submitted that once a facility has been allocated or provided then, anyhow in the absence of any express right to withdraw the allocation or provision, such a facility remains allocated. The lease cannot be construed in the manner contended for by Mr Radevsky, namely so as to allow the freeholder at any time and for any reason (or for no reason) unilaterally to remove the right to use the leisure complex. This is particularly so in the light of the nature of the construction of the development, of how the development was originally marketed, and of how the leisure complex had already been allocated to and was enjoyed by the lessees at the date of the grant of the leases.

60. So far as concerns the extent of the rights reserved to the freeholder, Mr Johnson advanced the following submissions:

> (1) Clause 2.03.2 is a clause directed towards reserving rights of entry upon the demised premises (i.e. the lessee's flat) rather than dealing with any alleged general right of development over the additional premises.
>
> (2) Clause 2.03.5 is not wide enough to reserve a general right of development over the additional premises by demolishing the leisure facility which had been provided for and allocated to the lessees and which they had the right to use.
>
> (3) Clause 2.03.8 was clearly in its terms not wide enough to permit the freeholder to carry out the general development proposed -- this clause is restricted to providing one or more extra storey upon the existing built development. Also in so far as the freeholder cannot bring the proposed development within this clause 2.03.8 the freeholder cannot bring it within clause 2.03.5 because the latter is narrower in that it does not contemplate (in contrast to clause 2.03.8 which does contemplate) that the lessees may have to put up with temporary derogation from rights during the carrying out of works which are within the clause in question. Also, if clause 2.03.5 is truly as wide as the freeholder contends, there would be no need for the more specific provisions of clause 2.03.8.
>
> (4) There is nothing in the terms of the management lease to grant the freeholder any further and the wider rights to develop the additional premises.
>
> (5) Further and in any event unless there is a power to withdraw the provision and allocation of a facility (and there is no such power) such rights as are reserved to the freeholder cannot trump the rights in the lessees to enjoy the allocated and provided facility of the leisure complex -- save perhaps for a temporary derogation as contemplated in clause 2.03.8 which is not wide enough for the freeholder's purposes.

61. In summary the F-tT was correct in its conclusion that the rights offered by the freeholder did not satisfy the equivalence test required by section 1(4) and that in consequence the terms of acquisition should include the purchase by the nominee purchaser of the freehold of the additional premises.

62. Bearing in mind its conclusion that the existing terms of the lease and management lease did not permit the freeholder to carry out its proposed development, the F-tT was correct in concluding that the price to be paid for the additional land should be the lesser sum of £10,000 referred to in paragraph 122 rather than the greater sum of £100,000 referred to in paragraph 121 of its decision.

Discussion

63. I am unable to accept Mr Radevsky's arguments. My reasons for so concluding are substantially those advanced by Mr Johnson. I express them in my own terms as follows.

64. I consider first the rights granted to the lessees to use the Common Facilities including in particular the leisure complex. The proper construction of these rights must of course be obtained from a consideration of the whole of the lease (and the management lease referred to therein) including the clauses reserving rights to the freeholder. I proceed upon that basis.

65. Mr Radevsky emphasised the fact that the Common Facilities are facilities which are "from time to time" provided and he emphasised the fact that the right to use them is a right to use such facilities as might "from time to time be allocated". It is however important to bear in mind the following matters. The flat leases were granted in respect of flats in a new development which had been constructed so as to include within its curtilage (approximately within the arms of the C shape made by the building containing the flats) a garden and leisure complex. This garden and leisure complex had clearly been laid out and constructed as part of the development containing the flats and for the use of the flats. This was further confirmed by the following namely (A) as at the date of the leases of flats in general (and of Mr Tardy's lease in particular) the gardens and leisure complex had been provided for and allocated for the use of the lessees and were being so used, and (B) the then freeholder was marketing the flats on the express basis that a " swimming pool, sauna and gymnasium are provided for the exclusive use of residents" and that the residents would also be able to enjoy the garden. It is against that factual background that one must construe the grant of the right to use such facilities as "are from time to time provided" or as "might from time to time be allocated".

66. There is nothing in the lease to indicate who has the right to provide or allocate a facility and, more importantly, there is nothing in the lease to indicate who has a right to withdraw the provision or allocation of a facility. A purchaser of a lease of a flat would in my view have been astonished to be told, shortly after his purchase was completed, that the freeholder had the right forthwith and without reason permanently to withdraw the right to use the gardens and the leisure complex, subject only to allowing an adequate right of access to and egress from the demised flat. Mr Radevsky argues that the freeholder did indeed have this right. I cannot accept this. There is nothing in the lease conferring upon the freeholder the right to withdraw the provision or allocation of the leisure centre. So remarkable a right would in my view need to be conferred by clear language if it were to exist.

67. I conclude that once a facility is allocated and provided for the use of the lessees then it will thereafter remain so allocated and provided. However it will remain so allocated and provided in accordance with the terms of its allocation and provision. Accordingly if a facility is allocated and provided on a temporary basis (e.g. while some other facility is being repaired) it will only remain allocated and provided for this temporary period. If however a facility such as the leisure complex is

allocated and provided out and out and with no restriction and is so allocated and provided in circumstances where the intention is clear that lessees shall continue to enjoy such facility, then there is no right of to withdraw the provision and allocation of this facility.

68. Further, if the foregoing is wrong and if there is a right to withdraw the provision or allocation of a facility such as the leisure complex, there is nothing in the lease to indicate that this right is to belong to the freeholder rather than to the management company (in which all the lessees are shareholders). The management company has a long lease of the additional premises including the leisure complex. If anyone were to have the right to withdraw the provision or allocation of the leisure complex, such right in my judgement is vested in the management company not in the freeholder.

69. Accordingly I conclude that the lessees' right to use the Common Facilities, including the gardens and the leisure complex, is not a precarious right as contended for by the freeholder.

70. I now turn to the rights reserved to the freeholder. I consider it to be a matter of significance that there is within clause 2.03.8 a reservation which expressly contemplates the freeholder enlarging the development by the addition of further residential accommodation, which is what the freeholder wishes to do in pursuance of its development plans. However this provision reserves to the freeholder the right to enlarge the Development.

> "by adding an additional storey or storeys thereto for the purpose of providing a further flat or flats or other lettable premises notwithstanding any interference or inconvenience thereby occasioned to the Lessee or the occupier for the time being of the Demised Premises or any temporary derogation from any of the terms of this Lease"

71. What is contemplated is the adding of one or more storey upon the Development or part thereof. The Development includes the leisure complex. What is not contemplated is the complete demolition of the leisure complex and the construction of new units upon the cleared footprint of the leisure complex. Accordingly a provision in the lease expressly contemplating that the freeholder may wish to enlarge the development by adding extra residential units is insufficiently wide to permit the freeholder to carry out its proposed development scheme. It would be surprising if another more general clause such as 2.03.5 conferred wider rights to add further residential premises by way of enlargement of the development, such that clause 2.03.5 covered not only the whole of the matters covered by 2.03.8 (thereby making that provision unnecessary) but also and in addition more extensive development rights. It may also be noted that the rights conferred in clause 2.03.8 are the subject of a wider provision exempting the freeholder from complaints from the lessees. Thus this clause allows works in accordance with its provisions notwithstanding interference or inconvenience etc or any temporary derogation from any of the terms of the lease, whereas clause 2.03.5 only permits the works there referred to notwithstanding access to light or air may be interfered with or diminished.

72. In paragraph 6(viii) of his skeleton argument Mr Radevsky submitted that clause 2.03.8 appeared to cover the freeholder's proposed development. In my view this clause does not cover the proposed development. If the proposed development contemplated leaving in place the existing leisure complex and adding one or more storeys thereto then this would appear to be covered, but the demolition of the leisure complex and construction in its place of new dwellings and a subterranean swimming pool under the garden is not covered.

73. Turning to the wording of clause 2.03.5, this reserves to the freeholder the full right or liberty at any time or times to do certain things in relation to the development, namely "to build or rebuild or alter or extend in height or otherwise". It must be remembered that as of the date of the lease the buildings on the development were or may still have been in the course of erection, see the statement to this effect in the definition of "the Development". The question arises as to whether the total demolition of the leisure complex and the construction on its cleared footprint of new residential units falls within these words. In my view it does not. The demolition of the leisure complex and its replacement with residential units is not permitted by the words "alter or extend in height or otherwise". Nor in my view does one "rebuild" the leisure complex by demolishing it and erecting residential units where it once was. The word "build" does not in my view assist the freeholder as this contemplates fresh building upon an otherwise unbuilt upon area. If the foregoing is correct then the lessee's covenant in clause 4.21.1 does not assist the freeholder because this is in effect (although slightly different words are used) a covenant to permit the freeholder to carry out work as contemplated within clause 2.03.5. Nor do I see, if clause 2.03.5 is not sufficiently wide for the freeholder's purposes, how the provisions of the management lease can assist. Paragraph 6 of the Third Schedule is in substantially the same terms as clause 2.03.8 which I have considered above. I do not consider that clauses 2(11) or 4(4)(b) are wide enough to carry with them the rights claimed by the freeholder.

74. It follows from the foregoing that I conclude:

> (1) the lessees enjoy permanent rather than precarious rights to use the gardens and the leisure complex -- alternatively (if the foregoing is wrong) then insofar as anyone has the right to withdraw the provision or allocation of the gardens or the leisure complex this right is not vested in the freeholder but is vested in the management company in which all the lessees are shareholders; and
>
> (2) the freeholder does not enjoy a general right of development in relation to the additional premises and, in particular, does not enjoy a right to carry out a development as proposed which involves the demolition of the existing leisure complex and the erection thereon of new residential units with a subterranean swimming pool under the garden.

75. I therefore conclude that the F-tT was correct in finding that the lessees had permanent, rather than precarious, rights to use the Common Facilities and in particular the leisure complex. The F-tT was also correct in finding that the freeholder did not enjoy a general right to develop the additional premises such as to enable the freeholder to carry out the proposed development involving the demolition of the leisure complex the erection of new dwellings and the construction of a new subterranean swimming pool.

76. Accordingly I also conclude that the F-tT was correct in finding that the terms of acquisition should include the acquisition by the nominee purchaser of the freehold of the additional premises, because the rights offered by the freeholder did not satisfy the equivalence test in section 1(4). I am unable to accept Mr Radevsky's argument that, having regard to the terms of the counter-notice, the F-tT was required only to determine what rights should be granted to the nominee purchaser so as to satisfy section 1(4), such that it was not open to the F-tT to reach a conclusion that the terms of acquisition should include a term that the freehold of the additional premises should be acquired by the nominee purchaser.

77. It may be that in certain circumstances it is made entirely clear by a counter-notice (supplemented perhaps by submissions made by a freeholder prior to or at a hearing before the F-tT) that the freeholder is proceeding on the basis that in order to retain the freehold of the additional premises it is prepared to grant whatever rights may be required, however extensive, in order fully to satisfy the equivalence test in section 1(4). In my judgement, properly understood, *Shortdean* was in effect such a case. If the matter is presented to the F-tT on this basis then at the hearing there will, presumably, merely be a contest (so far as concerns this aspect of the dispute between the parties regarding the terms of acquisition) as to the proper drafting of the rights to be granted to the lessees. The lessees, through the nominee purchaser, will presumably have put forward their draft of the proposed rights to be granted and the freeholder will have put forward its draft of these proposed rights. If a matter proceeds before an F-tT on such a basis, then I can see that it could be wrong for the F-tT to issue a decision determining that the terms of acquisition were to include a term whereby the nominee purchaser was to acquire the freehold of the additional land (unless of course the equivalence test in section 1(4) could not be satisfied on the facts of the case even with however wide a grant of rights).

78. That is not what happened in the present case. I have not overlooked paragraph 36 of the skeleton argument on behalf of the freeholder as submitted to the F-tT which was in the following terms:

> "However, if it is permissible to consider the terms of the draft transfer to decide the Section 1(4) Issue, then, as a matter of law it is open to the Tribunal to adjust the rights that R proposes by dint of the provisions to be included in any conveyance being among the terms of acquisition in s,24(8). Such approach is, however, hard to square with ***The Holt***"

79. However, it is clear to me that the way the matter proceeded before the F-tT was as described by Mr Johnson, namely that there was a contest between the nominee purchaser and the freeholder as to whether the equivalence test under section 1(4) would be satisfied if rights as contended for by the freeholder were reserved to the freeholder. The arguments advanced were to the effect that if the equivalence test would be satisfied then the freeholder could resist the claim to acquire the additional premises but that otherwise the additional premises would be acquired by the nominee purchaser. This was not a case where the freeholder made clear that whatever rights were needed to satisfy section 1(4) would be granted. It was fundamental to the freeholder's case that after the enfranchisement it must have rights sufficient to enable it to carry out its proposed development. This is clear from the terms of the counternotice itself; the terms of the draft transfer provided by the freeholder; the terms of the F-tT's decision (see paragraph 15 setting out the issues in dispute); and the terms of the grounds of appeal which do not complain that the F-tT misunderstood what the issues in the case were and which do not assert that the question of whether the additional premises should be acquired by the nominee purchaser was not an issue (or was argued by the freeholder not to be an issue). During the course of the hearing I asked Mr Radevsky whether he contended that the hearing before the F-tT proceeded on the basis that the freeholder made it clear that it would grant whatever rights were needed (including granting rights which would require the abandonment of its plans for the proposed development) in order to satisfy section 1(4). Mr Radevsky accepted that the matter was not put like that by the freeholder to the F-tT.

80. Mr Radevsky emphasised the terms of the counter-notice and in particular the wording in paragraph 8 including the omnibus clause. He submitted that the presence of the omnibus clause made

it clear that sufficient rights to satisfy section 1(4) would in any event be granted, such that the F-tT was only concerned with the drafting of the rights to be granted -- with it no longer being an issue that the freeholder was to retain the freehold of the additional premises. However I accept Mr Johnson's argument that the counter-notice must be considered as a whole and that, when so considered, the counter-notice does indeed offer rights with one hand (by clause 8 including the omnibus clause) and take them away with the other hand, namely by the provisions making clear that rights to develop the additional premises (being rights which did not exist under the terms of the leases) were to be reserved. I respectfully agree with and adopt the reasoning of the Upper Tribunal in *Ulterra v Glenbarr* which seems to me to be equally applicable in the present case.

81. Mr Radevsky relied upon the decision of the Lands Tribunal to refuse permission upon a particular ground (although permission to appeal was granted upon other grounds not presently relevant) in the case of *Durrels House Ltd*. I agree with Mr Johnson that a decision which is merely one made upon the papers upon an application for permission to appeal is a decision which should be treated with much caution before it is relied upon as any kind of an authority. However I see nothing to disagree with in the decision refusing permission to appeal in that case upon the section 1(4) point. In that case the leasehold valuation tribunal had decided that the rights offered in the counter-notice for the purposes of section 1(4) were sufficient to satisfy the test of equivalence and that any objection to their exact scope could be decided subsequently under section 24. The Lands Tribunal decided that the leasehold valuation tribunal was entitled so to decide and that permission to appeal should be refused. This decision cannot be taken as authority for the proposition that, when some form of an omnibus clause is used in the counter-notice in order to offer rights over the relevant adjoining land, then the only permissible result is one involving the freeholder retaining the adjoining land and the parties (and the tribunal) concentrating merely upon the drafting of the relevant rights. In the present case the rights offered by the counter-notice were of the type described in paragraph 80 above. This was not a case where the F-tT was able to decide that the rights offered were sufficiently wide to satisfy section 1(4) with the detailed drafting, if not agreed, being left for a future application under section 24.

82. The terms of acquisition were before the F-tT for determination pursuant to section 24. One of the issues for the F-tT was whether the freeholder (which was insisting on its right to carry out the proposed development) was offering rights which satisfied the equivalence test in section 1(4). If the freeholder had been offering such rights then it would have been for the F-tT to decide that the terms of acquisition should involve the grant of such rights and the retention by the freeholder of the additional premises. However the F-tT concluded (correctly) that the freeholder was not offering such rights and that the proposal that, after the enfranchisement, the freeholder should enjoy development rights was inconsistent with the rights to which the lessees were entitled under section 1(4). Accordingly the F-tT correctly decided that the terms of acquisition should include the acquisition by the nominee purchaser of the freehold of the additional premises.

83. It is not open to the freeholder upon this appeal, which is an appeal by way of a review, now to seek to change its position and to offer such wider rights as are needed to satisfy the equivalence test in section 1(4) and to invite the Upper Tribunal to draft such rights or to remit the matter back to the F-tT for such drafting to be performed. The case was fought before the F-tT on the basis (i) that the freeholder could satisfy the equivalence test while at the same time enjoying development rights over the additional premises and (ii) that if this was not so then the nominee purchaser should acquire the freehold of the additional premises as part of the terms of acquisition. Had it been otherwise it is difficult to see why the parties adduced (and required the F-tT to consider) substantial planning and

valuation evidence directed towards the price to be paid for the additional premises if they were to be acquired by the nominee purchaser.

84. I therefore conclude that, quite apart from the analysis of section 1(4) in the case of *Fluss*, the rights offered by the freeholder did not satisfy the equivalence test. The lessees enjoyed permanent (not precarious) rights to enjoy the use of the leisure complex and the freeholder was only prepared to grant rights which were precarious (not permanent) rights which were subject to reservations to the freeholder to carry out its proposed development and to demolish the leisure complex.

85. I have however considered further my decision in *Fluss* in accordance with Mr Radevsky's courteous invitation to do so. I remain of the view that my decision was correct for the reasons there stated. The submissions by Mr Johnson in support of the decision in *Fluss*, being the submissions as summarised in paragraphs 49 to 51 above, confirm my conclusion that the analysis in paragraph 36 of *Fluss* is correct. In consequence I conclude that Mr Johnson is also correct in his short and separate submission based upon *Fluss* as recorded in paragraph 47(4) above.

86. My decision that the freeholder does not enjoy under the terms of the existing lease and management lease the right to carry out the proposed development also means that the F-tT's decision was correct when it decided that the price payable for the acquisition of the additional premises was £10,000.

Conclusion

87. For the reasons set out above I conclude that the F-tT was correct in its decision. The appeal by freeholder is dismissed.

His Honour Judge Nicholas Huskinson

25 June 2015