LRA/45-8/2002

LANDS TRIBUNAL ACT 1949

LEASEHOLD ENFRANCHISEMENT – collective enfranchisement – land and rights – whether land over which tenants have common rights should be transferred to nominee purchaser or permanent rights granted – power of LVT to order transfer of land where permanent rights offered by landlords – price – whether addition should be made for prospective value of additional parking – appeal successful in part on first ground and dismissed on second ground – Leasehold Reform, Housing and Urban Development Act 1993, ss1(1) (2) (3) (4) & (7), 3, 13(1) (3)& (12), 21 (1) (3) (4) & (8), 91 (1)(2) & (3), Schedules 5 & 6 paras 5, 10 & 11.

IN THE MATTER of NOTICES of APPEAL against a DECISION of the SOUTHERN LEASEHOLD VALUATION TRIBUNAL

BETWEEN **LYNARI PROPERTIES LIMITED** **Appellants**

and

SHORTDEAN PLACE (EASTBOURNE) RESIDENTS ASSOCIATION LIMITED **Respondents**

Re: Shortdean Place
Eastbourne
Sussex

Before P H Clarke FRICS

Sitting at 48/49 Chancery Lane, London WC2A 1JR on 29 May 2003

The following case is referred to in this decision:

Wellcome Trust Limited v Romines [1999] 3 EGLR 229

Mr Anthony Radevsky instructed by Dean Wilson Laing, solicitors, for the appellants.
Mr Alex Hall Taylor instructed by Mayo Perkins, solicitors, for the respondents.

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DECISION OF LANDS TRIBUNAL

1. These are appeals by the landlords of four adjoining blocks of flats in Eastbourne against the decision of an LVT determining the extent of the land to be acquired and the price to be paid on collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993.

2. Mr Anthony Radevsky of counsel appeared for the appellants and called Mr Andrew John Pridell FRICS and, by agreement, lodged a witness statement by Mr Kenneth John Wilson. Mr Alex Hall Taylor of counsel appeared for the respondents and called Mr John Neil Cleverton FRICS and, by agreement, lodged witness statements by Mr Philip Myers and Mr Anthony Jordan.

3. I have made an inspection of Shortdean Place and the surrounding area accompanied by representatives of the parties.

FACTS

4. From the evidence and agreed plans I find the following facts.

5. The subject land, Shortdean Place, comprises four blocks of flats in grounds which form one property with an access road situated in a residential area in the north-western part of Eastbourne close to the Old Town.

6. The subject land is an irregular oblong shaped site behind houses in Milton Road with access from that road via Shortdean Place, a cul-de-sac, part of which has been adopted by the local authority. The other party of this road, leading to the garages on the land, has not been adopted. The land is bounded by the playing fields of Motcombe County Infants School on the north, a cemetery on the east and the rear gardens of the houses in Milton Road to the south and west. It may briefly be described as a backland development of flats with a connecting road.

7. On the subject land are four two-storey blocks of flats of brick construction with tile roofs, built in 1976. Block A (flats 1-4) comprises four flats each with bedroom, living room, kitchen and bathroom. Block B (flats 5-12) comprises eight flats each with two bedrooms, living room, kitchen, bathroom and balcony; one of the flats has a separate garage. Block C (flats 12A-16) comprises four flats each with two bedrooms, living room, kitchen, bathroom and balcony; one flat has a separate garage. Block D (flats 17-22) comprises six flats each with two bedrooms, living room, kitchen and bathroom; two flats have a balcony; three of the flats have a separate garage. Around the flats are attractive mature gardens, mainly lawn, with footpaths leading from the access road to each block. At the southern end of the site are eight lock-up garages in three blocks. There are ten open concrete parking bays on the land; these are not allocated to individual flats. Where the access road from Milton Road joins the rear land containing the flats are two small parcels of land, either side of the road, referred to

as the quadrants. The north quadrant is garden; the south quadrant is part garden and part refuse area with access from the road.

8. Lynari own or are purchasing two plots of land which are contiguous with the south-western corner of the subject land, adjoining the access road and garages. This adjoining land comprises the rear of 73 Milton Road (formerly part of the rear garden of this house) and 71 Milton Road an oblong parcel of land with frontage to Milton Road, occupied by an electricity sub-station, which may no longer be in use. These two parcels form one plot of land.

9. The freehold of Shortdean Place is held by the appellants subject to long leases of the flats, each granted for 99 years from 24 June 1976 at ground rents of £30 for the first 33 years rising to £45 per annum for the next 33 years and to £60 per annum for the final term of the lease. The leases of flats 7, 15, 19, 20 and 22 each include a garage (nos. 5, 4, 6, 2 (to be exchanged for 8) and 3 respectively).

10. I have been provided with copies of the leases of flats 2, 3 and 5. The parties to each lease are the landlords (Lynari Properties Limited), the tenant and the respondents (Shortdean Place (Eastbourne) Residents Association Limited), stated to be incorporated with the object of providing certain services to and for the tenants and otherwise managing the flats. Their obligations are set out in clause 5 of the lease. Certain rights granted to the tenants are material to these appeals. These are set out in clause 2(2) (right to use the gardens and lawns coloured green on the plan attached to the lease), 2(3) (right to use for access and egress the parking areas and forecourt and access driveway and paths cross-hatched coloured orange in respect of the footpaths and hatched and coloured brown in respect of service or access road and the entrances, staircases and landings of the flats) and 2(6) (right to deposit refuse in the area marked R and coloured yellow).

11. Four initial tenants' notices of collective enfranchisement under section 13 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") were served on the appellants by the qualifying tenants of Shortdean Place. Three notices are dated 4 June 2001, the other is undated. The intention of the four notices is to enfranchise the whole site, including the roadway. In each case the respondents are the nominee purchaser. On 17 August 2001 four reversioners' counter-notices under section 21 of the 1993 Act were served by the appellants admitting the right to collective enfranchisement but not accepting the proposed extent of land to be acquired and retained and the purchase price.

12. Four applications were made on 21 November 2001 by the respondents to the Southern Leasehold Valuation Tribunal to determine the land to be transferred and the price. Following a hearing on 8 August 2002 the tribunal gave a decision on 15 August determining the enfranchisement price (£54,060) and the land to be transferred to the nominee purchaser and associated rights.

13. On 6 September 2002 Lynari appealed to this Tribunal. The respondents gave four notices of intention to respond, each dated 7 October 2002. The appeal and responses were

treated as four appeals. On 14 April 2003 the four appeals were ordered to be heard together. I shall treat them as one appeal in this decision. On 16 May 2003 I gave leave for the appellants to lodge further expert evidence out of time and for the amendment of their statement of case on terms of costs and the admission of rebuttal evidence.

ISSUES

14. There are two issues in this appeal: the extent of the land to be transferred and rights to be granted to the nominee purchaser and the price on collective enfranchisement.

15. The first issue (land and rights) requires further consideration of the procedure which led up to this appeal and hearing in order that it may be accurately formulated. The tenants' initial notices all proposed that the whole of the subject land should be transferred to the nominee purchaser. Each notice states that it is important "that the residents of Shortdean Place (as a whole) gain control of their entire site, including the roadway which serves Shortdean Place only." The landlords' counter-notices, however, dispute the extent of the land to be acquired and make the counter-proposal in each case that the parcels of land edged orange on plan no.2 attached to the counter-notices should be retained by the freeholders and sufficient permanent rights granted to the nominee purchaser to satisfy section 1(4) of the 1993 Act. The four parcels of land edged orange are: garage 7 and adjoining land, garages 1 and 2 and adjoining land, the southern leg of the access road (not adopted) and the two quadrants of land to the north and south of the road. The orange land does not include the soil under the adopted part of the access road (Shortdean Place) but this is shown hatched orange on plan no.3 attached to the notices and is stated to be incapable of enfranchisement.

16. The LVT gave its determination by reference to the colouring on the lease plans. It determined that the land to be transferred to the nominee purchaser should comprise the areas coloured white (including the soil of all the adopted parts of the access road), green, brown and orange save for garages 1, 2 and 7 (or 1, 7 and 8) and parts of the two quadrant areas. Lynari are to have rights of way (with or without vehicles) over the access road to their retained garages and for access to the adjoining land with contributions towards maintenance but no rights of parking.

17. The notice of appeal to this Tribunal by Lynari has two grounds relating to this part of the LVT's decision. First, that "the Tribunal erred as a matter of law in determining that it had a discretion to determine the area of land to be transferred, namely the area of roadways and forecourts." Second, "in the alternative in exercising this discretion the Tribunal failed to take into account material facts affecting the control of the land to be transferred." The appellants' statement of case states that they wish to retain and grant rights over the orange land on plan no.2 attached to the counter notices, i.e. garages 1, 2 and 7 and adjoining land (coloured white on the lease plan), part of the access road (coloured brown) and the quadrant land (coloured green, yellow and orange). The tenants had no rights to use the part of the access road which is a public highway.

18. The respondents' reply to this statement of case accepts the LVT's decision and states that the soil of the adopted part of the access road, over which the tenants had rights under their leases, can be enfranchised. Subsequently, at the hearing before me, it was stated that tenants granted leases before adoption had rights over this part of the access road (the whole of the road was then coloured brown). Tenants after adoption were not granted rights over the part of the road which had been adopted, which was uncoloured on the lease plan.

19. At the hearing of the appeal, Mr Radevsky, for the appellants, confirmed that Lynari wished to retain the access road, the two parcels of quadrant land and garages 1, 2 and 7 and to grant the nominee purchaser permanent rights of access to satisfy section 1(4) of the 1993 Act. It is not in dispute that garages 1, 2 and 7 are to be retained by Lynari and that the other garages are to be transferred to the respondents.

20. In the light of this procedural background the first issue can be stated in the form of three questions. First, did the LVT have the power (or discretion) to determine that land over which the tenants had rights in common under their leases should be transferred to the nominee purchaser, notwithstanding that under Lynari's counter-notices they made counter-proposals that the four areas of land edged orange on plan no.2 attached to each counter-notice should be retained and sufficient permanent rights granted to the nominee purchaser to satisfy section 1(4) of the 1993 Act and stated that the adopted part of the access road is not capable of enfranchisement? Second, if the LVT had such power or discretion, did the tribunal wrongly exercise it by failing to take into account material facts affecting the control of the land to be transferred? Third, more specifically, should the decision of the LVT as to the extent of the land to be transferred be altered to allow Lynari to retain the access road (including the soil under the adopted part of this road) and the two parcels of quadrant land?

21. The second issue relates to the price on collective enfranchisement. The LVT determined this at £54,060 and rejected Lynari's claim that there "should be additional compensation for the loss of the ability to develop car parking on the site". Lynari challenge this part of the decision and at the hearing before me put forward an additional figure of £59,700 as the value of the right to provide further parking on the land. Mr Radevsky submitted that this additional amount falls within paragraphs 10 and 11 in Part IV of Schedule 6 to the 1993 Act (other interests to be acquired). The respondents accept the LVT's decision. The second issue is therefore whether any addition should be made to the price of £54,060 for the right or ability to provide further parking spaces on the land to be transferred to the nominee purchaser? The parties agree that the valuation date is the date of the decision by the LVT, 15 August 2002.

LAND TO BE TRANSFERRED

Appellants' case

22. Evidence was given by **Mr Wilson**, a director of Lynari, in the form of a written statement. He said that he owns land adjacent to the roadway and garages. He is acquiring land adjoining garages 1 and 2 in respect of which planning permission was granted in 1997. The local authority have given a recent positive indication for that development. He intends

to develop the adjoining land. Lynari wish to keep the land to be retained in order to have flexibility of planning. Future development is not settled and it would prejudice his position is Lynari do not retain this control. Mr Wilson produced photographs which he said show heavy on-street parking in the neighbourhood. Facilities within Shortdean Place are fully used by the tenants. It is therefore essential to have sufficient control of the retained land to provide satisfactory facilities for the proposed development while respecting the rights of the tenants. These are the reasons for wishing to retain part of the land, not ill-feeling towards the tenants. The permanent rights offered will give the tenants the same rights which they have now.

23. **Mr Radevsky** submitted that the LVT fell into fundamental error regarding the land to be transferred. They were misled by the respondents' submissions that they had a wide discretion and that it would be usual for the whole area maintained by tenants to be transferred, including the soil of an adopted highway. The tribunal did not consider the statutory provisions. The correct approach is to relate those provisions to the claim.

24. The right to collective enfranchisement is given by section 1(1) of the 1993 Act. The premises to which it applies are the four blocks of flats (section 3). In addition, the tenants are entitled to claim the freehold of other property which falls within section 1(3). There are two sorts of property within this subsection: appurtenant property demised by a qualifying tenant's lease (section 1(3)(a)) and property use in common (section 1(3)(b)). The former includes five of the eight garages. The appellants have always accepted that the nominee purchaser is entitled to have those garages. The latter comprises the land over which the tenant have rights, coloured green, brown, orange and yellow on the lease plans. By section 1(4) the right to acquire such common property shall be satisfied by the grant of permanent rights over this land. There is, however, no element of discretion under this subsection. If the landlord chooses to grant rights, rather than transfer the freehold, then *prima facie* the right to the freehold is satisfied.

25. In this case Lynari, by the counter-notices, have decided to retain four areas over which the tenants have common rights as marked in orange on plan no.2. Permanent rights are offered over this land. The policy of the 1993 Act is not to force a landlord to dispose of land which is not demised but is subject to common rights. If the landlord wishes to retain this land he may do so, provided equivalent rights are granted.

26. Accordingly, the LVT had no discretion to transfer any part of the orange land to the nominee purchaser. This is seen by the use of "shall" in section 1(4). Mr Radevsky also referred to Emmet and Farrand on Title (19th edition) para 28-03 and Leasehold Enfranchisement – The New Law by Clarke at para 3.2.3. It is not suggested that there is such a discretion in Hague on Leasehold Enfranchisement (3rd edition)at para 20-05. No works or authorities have been referred to which show a discretion in the LVT in relation to section 1(4).

27. The jurisdiction of the LVT to determine disputed "terms of acquisition" is set out in section 24(1) as defined by subsection (8) to include terms in respect of any interest to be acquired in pursuance of section 1(4). In the present case no interest is acquired under this

subsection but permanent rights are to be included in the transfer and so fall within the definition of "terms of acquisition" by virtue of section 24(8)(e). The LVT could therefore decide that the rights offered were not "permanent" or not "as nearly as may be the same" as those under the leases. But these issues do not arise in this case. There is no suggestion that the rights offered in the counter-notices do not comply with section 1(4).

28. Under ground 2 of the appeal (merits), if the LVT had a discretion, the evidence of Mr Wilson explains why Lynari wish to keep the retained land.

29. Mr Radevsky said that the LVT may have been confused by an error in the tenants' initial notices by references to a mandatory leaseback, but this is not at the discretion of the freeholder and not to be referred to in the initial notices.

30. The respondents refer to section 21(4) of the 1993 Act and section 2(5) of the Leasehold Reform Act 1967. The former has no bearing on the construction of section 1(4) and gives no support to the suggestion that, under this subsection, one should balance the interests of landlord and tenant. As to section 2(5) of the 1967 Act it has no relevance to section 1(4). On the contrary it shows that, where Parliament intends to confer a discretion, it clearly does so in terms.

31. Mr Radevsky considered the other LVT decisions on this issue referred to by Mr Hall Taylor and said that they do not assist the respondent's case. Following the hearing he lodged a contrary decision given on 5 June 2003.

32. Mr Radevsky referred to the decision of this Tribunal in *Wellcome Trust Limited v Romines* [1999] 3 EGLR 229 at 231 J-K and 232 M-233 D. He said that proceedings before the Tribunal take the form of a rehearing. The jurisdiction of the Tribunal is not limited to matters of law or valuation principle. It has a duty to allow the appeal if the decision of the lower tribunal is shown to be wrong.

33. In summary, Lynari wish to retain garages 1, 2 and 7 (not in dispute), the two parcels of quadrant land and the access road, all as indicated in their counter-notices.

Respondents' case

34. Evidence was given by **Mr Myers** in a witness statement. He is a resident of Shortdean Place. He said that Mr Wilson's statement misrepresents the parking position. Residents have no parking difficulties except for a very short period each day when children at the nearby school are delivered and collected. Mr Myers saw Mr Wilson take the photographs he produced in evidence at 3 pm on a school day. At that time five out of the seven spaces at Shortdean Place were in use, including Mr Wilson's car. Mr Myers produced photographs which he took at the same time which he said were more representative of general conditions. The parking provision at Shortdean Place is ample for the residents and their visitors. There are 15 parking spaces, namely five garages and 10 spaces, in addition to

the roadway. Only 12 residents own a car. It is unlikely that this current situation will dramatically change.

35. Evidence was given by **Mr Jordan** in a witness statement. He is also a resident of Shortdean Place. He said that several planning applications in relation to the adjoining land referred to by Mr Wilson have been unsuccessful. An appeal has been unsuccessful. The letter from the local authority attached to Mr Wilson's statement does not amount to a positive indication of the proposed development. Mr Jordan said that he did not believe that Mr Wilson will be prejudiced by the transfer of ownership of the road to the nominee purchaser. It is integral to the whole property and the respondents will grant all necessary rights to the appellants so that the development of the adjoining land is not prejudiced. The residents do not believe that the appellants would respect the residents' rights. An indication of this is the appellants' case regarding additional parking, which would be contrary to the existing leases regarding the use of the gardens and lawns. Control of the whole site should be vested in the residents.

36. With regard to parking, the residents do not consider that additional provision is necessary or desirable. The current facilities are more than adequate for the mainly older residents. They would object to any of the garden being used for parking.

37. **Mr Hall Taylor** said that the LVT had a discretion under section 24 of the 1993 Act to decide the extent of the land to be transferred to the nominee purchaser and their decision was justified on the facts. The burden is on the appellants to show that this decision was wrong. The Lands Tribunal should be slow to disturb a decision unless satisfied that it is clearly wrong. New evidence should be treated with caution.

38. The question regarding discretion is: can an LVT order the transfer of section 1(3) land where the landlord offers suitable section 1(4) rights? The answer must be 'yes'. Section 24 of the 1993 Act gives an LVT jurisdiction to determine disputed "terms of acquisition" as defined in subsection (8). This is not solely a procedural provision. The terms of acquisition include a determination as to what land is to be transferred. Other LVTs have determined the land to be transferred; Mr Hall Taylor gave three examples. (Following the hearing Mr Radevsky lodged a contrary decision of the Southern Leasehold Valuation Tribunal given on 5 June 2003). At the hearing before the LVT both parties proceeded on the basis that the tribunal had a discretion to determine the land to be enfranchised. It is usual for the whole area enjoyed by tenants to be transferred to the nominee purchaser.

39. It is possible to include the soil of an adopted highway where it is appurtenant property under section 1(3)(a) or used in common under section 1(3)(b). Here, it is not claimed that the entirety of the adopted road is to be transferred but only that part which was part of the access road over which the tenants had rights under their leases. The local authority have confirmed that they do not have title to the land under the adopted part of the road and do not intend to acquire such title.

40. A landlord can seek to rely on section 1(4) to exclude certain areas but this subsection is not absolute. The tenants can challenge an attempt to exclude those areas and this dispute can be determined by an LVT under section 24(1)(b). In Hague on Leasehold Enfranchisement at para 20-05 it is suggested that section 1(4) is intended to assist where the inclusion of land on enfranchisement would cause the landlord practical difficulties. The question therefore is whether the ability under section 1(4) to exclude land is intended to apply where (as here) a freeholder really wants to do no more than retain an involvement in the subject land and to reserve the possibility of development on adjoining land. The intention of section 1(4) is not to allow this. Some assistance can be obtained by considering the reverse situation where tenants do not wish to enfranchise all the landlord's property. In those circumstances section 21(4) allows the landlord to seek to make it a requirement of the enfranchisement that the property is purchased if it would cease to be of any use or benefit to him or would not be capable of being reasonably managed or maintained. In these circumstances tenants may be forced to take such land. Therefore, the most sensible approach is to weigh in the balance the interests of landlord and tenant in considering what land should be enfranchised. Mr Hall Taylor said that the position is analogous to that under section 2(5) of the Leasehold Reform Act 1967.

41. On this legal analysis it was submitted to the LVT that the land sought to be excluded by Lynari should form part of the enfranchisement for the following reasons: the roads, parking areas and quadrants are of greater benefit to the respondents; all management lay and continued to lie with the tenants; the nature of Lynari's motives for retaining the land; if Lynari were willing to grant the tenants sufficient rights over this land it would have to enter into a restriction on its development; and that, taking into account these matters, it cannot be said that the balance of convenience had tipped in favour of Lynari. If this appeal succeeds the tenants will be faced with considerable problems.

42. It is of value to LVTs to be able to determine disputes regarding the land to be transferred; it would appear that the statute (although poorly drafted) gives them discretion to do so.

43. With regard to the second ground of appeal on this issue (that the LVT failed to take into account material facts) the appellants have not stated the facts which the tribunal did not consider. This ground must therefore fail or costs sanctions should be imposed. The LVT did take into account proper facts when exercising its discretion. The tribunal provided for Lynari to be adequately protected by the grant of rights over the land to be transferred. On appeal Lynari have put forward at a late stage the evidence of Mr Wilson. This should be treated with caution. The LVT did consider the matters raise in his statement. The tribunal considered the potential development of the adjoining land and, in any event, Lynari's position is suitable protected by the grant of appropriate rights. The evidence of heavy on-street parking should be treated with care having regard to the rebuttal evidence of Mr Jordan and Mr Myers.

Decision

44. I look first at the decision of the LVT regarding land and rights. The important paragraph is as follows:-

> "19. As to the area of land to be transferred, the decision is that the area to be transferred is all that land coloured white (including, for the avoidance of doubt, the soil of all the adopted parts of the access road), green, brown and orange on the lease plan save for garages 1, 2 and 7 (or 1, 7 and 8) and the parts of each quadrant area described above which the Tribunal measured from the garages on the western side of each quadrant as 6.95 metres wide on the northern quadrant and 4.55 metres wide on the southern quadrant. As is mentioned above, the area on the northern quadrant to be retained by the Respondent includes a small triangular piece of the green area on the lease plan, but this is the only piece of green land to be retained."

Succeeding paragraphs provide that Lynari are to have rights of way over the access road to their retained garages and for access to their adjoining land with contributions towards maintenance but no rights of parking (paras 20-23). Mr Radevsky argued that the LVT went wrong in law and that the error is set out in paragraph 15:-

> "Mr Hall Taylor, in his skeleton, points out, rightly, that (a) the Tribunal has a wide discretion, (b) it would be usual in this sort of case for the whole area maintained by the tenants to be transferred and (c) that, contrary to what the surveyors seemed to be agreeing in their reports, it is possible to include the soil of an adopted highway in a transfer."

45. The first question under this issue is whether the LVT had the power (or discretion as it was described by Mr Hall Taylor) to make that decision, notwithstanding that the counter-notices by Lynari made counter-proposals that the four areas of land edged orange on plan no.2 attached to the notices should be retained and sufficient permanent rights granted to the nominee purchaser to satisfy section 1(4) of the 1993 Act and also stated that the adopted part of the access road is not capable of enfranchisement? The four parcels of orange land referred to are: garage 7 and adjoining land, garages 1 and 2 and adjoining land, the southern (unadopted) leg of the access road (Shortdean Place) and the two quadrants.

46. The answer to this question requires an analysis of the relevant statutory provisions. These fall into three groups: the right to enfranchise, the procedure for enfranchisement and the determination of disputes.

47. I look first at the right to enfranchise. This is contained in section 1 of the 1993 Act. Subsection (1) provides for "the right to collective enfranchisement" to be given to qualifying tenants of flats contained in premises to which Chapter 1 applies. The right is to have "the freehold of those premises acquired on their behalf" by a nominee purchaser at a price determined in accordance with the Chapter. Section 3 defines the premises to which the Chapter applies.

48. This right of collective enfranchisement under sections 1(1) and 3 applies to the buildings containing the flats ("the relevant premises"). The extent of the property to be enfranchised is, however, extended by section 1(2) and (3):-

> "(2) Where the right to collective enfranchisement is exercised in relation to any such premises ("the relevant premises") –
>
> (a) the qualifying tenants by whom the right is exercised shall be entitled, subject to and in accordance with this Chapter, to have acquired, in like manner, the freehold of any property which is not comprised in the relevant premises but to which this paragraph applies by virtue of subsection (3); and
>
> (b) ….
>
> (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)."

The term "appurtenant property" in relation to a flat is defined in section 1(7) to mean:-

> "any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the flat;"

Subsection (4) of section 1 then adds further provisions for property used in common under subsection (3)(b):-

> "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."

49. Thus, the basic right on collective enfranchisement is for the tenants to acquire the freehold of the premises in which the qualifying flats are contained, in this case, Blocks A, B, C and D (the relevant premises). In addition tenants can acquire other property or rights. Where the other property is "appurtenant property" they can acquire the freehold. In this case, the appurtenant property comprises the five garages let to the tenants. Where the other property is property used in common by the tenants four situations may arise. First, the freehold of this property may be acquired by the tenants. Second, the reversioner may grant permanent rights over it. Third, he may grant permanent rights over any other property. Fourth, the reversioner may transfer the freehold of other property over which permanent rights may be granted. The property used in common in this case comprises the gardens and lawns, the parking areas, forecourt, access driveway or road and paths and the refuse area. Of the four situations relating to property used in common this appeal is only concerned with the first and second.

50. In this appeal there is no dispute regarding the acquisition of the flats and the appurtenant property (five garages). The disagreement concerns parts of the property used in common: should the freehold be transferred (as contended by the respondents and decided by the LVT) or permanent rights be granted (as contended by the appellants). I will return later to the statutory provisions to which I have just referred, particularly section 1(4) which is relied upon by the appellants.

51. I turn now to procedure. Section 13(1) requires a claim for collective enfranchisement to be made by the giving of notice of claim (called an initial notice) to the reversioner, Lynari. Subsection (3) of this section sets out the contents of the notice including the property to be acquired and rights to be granted:-

> "The initial notice must –
>
> (a) specify and be accompanied by a plan showing –
>
> (i) the premises of which the freehold is proposed to be acquired by virtue of section 1(1),
>
> (ii) any property of which the freehold is proposed to be acquired by virtue of section 1(2)(a), and
>
> (iii) any property over which it is proposed that rights (specified in the notice) should be granted in connection with the acquisition of the freehold of specified premises or of any such property so far as falling within section 1(3)(a);"

"Specified premises" are defined in subsection (12) and are usually the premises specified in the initial notice. This notice therefore sets out the qualifying tenants' proposals for the enfranchisement.

52. The reversioner is then required to serve a counter-notice under section 21(1) of the 1993 Act. Where the counter-notice admits the right to enfranchisement then it must, under subsection (3):-

"(a) state which (if any) of the proposals contained in the initial notice are accepted by the reversioner and which (if any) of those proposals are not so accepted, …..

(b) if (in a case where any property specified in the initial notice under section 13(3)(a)(ii) is property falling within section 1(3)(b)) any such counter-proposal relates to the grant of rights or the disposal of any freehold interest in pursuance of section 1(4), specify –

(i) the nature of those rights and the property over which it is proposed to grant them, or

(ii) the property in respect of which it is proposed to dispose of any such interest,

as the case may be;

(c) …..

(d) state which rights (if any) any relevant landlord, desires to retain –

(i) over any property in which he has any interest which is included in the proposed acquisition by the nominee purchaser, …

(ii) …..

(e) ….."

53. Thus, the position in this appeal following service of the initial notices and counter-notices was that there was a dispute regarding the extent of the land to be acquired and rights granted (see paras 15 to 19 above). This leads to the third group of statutory provisions, the determination of disputes. Section 24(1) of the 1993 Act provides for the determination of disputes by an LVT:-

"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) …..

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 … was so given, a leasehold valuation tribunal may, on the application of either nominee purchaser or the reversioner, determine the matters in dispute."

The words "terms of acquisition" are defined in subsection (8) to mean:-

"… 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) …

(d) …

(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) …"

54. Section 91 of the 1993 Act deals with the jurisdiction of LVTs. I was not referred to this section and do not think it is of assistance in determining this issue. I need only note that subsections (1) (2) and (3) provide for the jurisdictions conferred on LVTs under the Act (to be exercised by a rent assessment committee, known as a leasehold valuation tribunal), include the terms of acquisition relating to any interest which is to be acquired by a nominee purchaser.

55. Section 24(3) and (4) and Schedule 5 give county courts a jurisdiction where the terms of acquisition have been agreed or determined by an LVT but a binding contract has not been entered into within the appropriate period.

56. It is against this statutory background that I consider the first question under this issue. As far as I am aware it has not been before this Tribunal or the courts. I was certainly not referred to any relevant decisions. I was, however, referred by Mr Hall Taylor to three decisions of LVTs which he said support his argument that other LVTs have considered and determined the extent of land to be transferred, and one contrary decision referred to by Mr Radevsky. These decisions are not binding on this Tribunal but they indicate that this issue is of importance. Some LVTs have been adopting a wider view of their jurisdiction than that contended for by the appellants.

57. It is common ground, looking at the tenants' initial notices and the landlords' counter-notices, that there is a dispute as to the land and rights to be transferred or granted. This is a dispute regarding "the terms of acquisition". It was referred to an LVT by the respondents. The tribunal had jurisdiction to "determine the matters in dispute" (section 24(1)).

58. From this point the parties diverge. Mr Radevsky argues that the effect of section 1(4) of the 1993 Act is that the LVT had no discretion regarding the transfer of the freehold of land used in common but were required to give effect to the counter-proposals in the landlords' counter-notices and to grant, not the freehold, but the permanent rights offered by the landlords. In effect, Mr Radevsky argues that section 1(4) is a fetter on the LVT's jurisdiction under section 24(1). Mr Hall Taylor argues that there is no such fetter. The jurisdiction of the LVT was to determine the matters in dispute, which it did having regard to the circumstances of the case. The tribunal were not bound to accept the landlord's counter-proposals for the grant of permanent rights and had a discretion to transfer the freehold to the nominee purchaser.

59. The jurisdiction given to an LVT under collective enfranchisement is contained in section 24(1) of the 1993 Act. This provides that, where a counter-notice has been given under section 21 but any of "the terms of acquisition" remain in dispute after two months, an LVT may, on the application of the nominee purchaser or the reversioner, "determine the matters in dispute." "Terms of acquisition" include "the interests to be acquired", "the extent of the property to which those interests relate or the rights to be granted over any property", "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)" (see section 24(8)(a)(b) and (e)). Thus, the jurisdiction given to an LVT by this section is wide and includes the dispute between the parties in this appeal, which arises out of the initial notices and the counter-notices. The power given to an LVT to determine matters in dispute must, however, be exercised in accordance with section 1 of the 1993 Act. It is to those provisions that I now turn.

60. The matters in dispute in this appeal solely concern property used in common under section 1(2)(a), (3)(b) and (4)(a)(i), namely the access road and the quadrants. The LVT granted the nominee purchaser the freehold of this property, subject to rights to be retained by Lynari over the road. The appellants say that the tribunal had no power to make that decision having regard to the permanent rights over the land offered by Lynari and the mandatory provisions in section 1(4) of the 1993 Act.

61. Under section 1(2)(a) the tenants of Shortdean Place are entitled to have acquired by the nominee purchaser, in addition to their flats, the freehold of any property which is not comprised in the relevant premises (the flats) but to which this paragraph applies by virtue of subsection (3). This subsection applies to two types of property, "appurtenant property" (paragraph (a)) and property used in common (paragraph (b)). Thus far, these provisions allow the LVT to determine that the freehold of property used in common shall be acquired by the nominee purchaser. Section 1(4), however, places a restriction on the grant of the freehold of property used in common. The relevant part of this subsection is as follows:-

> "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, …
>
> (ii) …,
>
> 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;"

62. Mr Radevsky argues that this subsection (particularly the word "shall") is mandatory. The landlords in the counter-notices in this case have offered permanent rights over property used in common. Those rights must be accepted by the LVT. They had no power to

determine the dispute by giving to the tenants through the nominee purchaser the freehold of property used in common over which permanent rights are offered. Mr Hall-Taylor disagrees. He says that section 24 gives the LVT jurisdiction to determine disputed "terms of acquisition", widely defined in subsection (8), and they had a discretion to order the transfer of property used in common even though Lynari had offered permanent rights.

63. I agree with Mr Radevsky although I express my decision a little differently. The LVT were required to determine the matters in dispute, that is to say the disputed terms of acquisition. The dispute concerned the effect of section 1(4)(a)(i): whether the right of acquisition in respect of the freehold of property used in common was taken to be satisfied and that was dependent upon whether the permanent rights offered by Lynari in their counter-notices were such as to ensure that the occupiers of the flats would have as nearly as may be the same rights as those enjoyed by the tenants under their leases. In my judgment, if the permanent rights offered satisfy the test under section 1(4)(a)(i) then the LVT had no power to determine that the freehold of the common use property should be transferred to the nominee purchaser. Section 1(4) is in mandatory terms: the right of acquisition of the freehold "shall, however, be taken to be satisfied" if permanent rights to satisfy the subsection are granted by the freeholder. An LVT is not bound to accept the proposals in a landlord's counter-notice with regard to property used in common. If the permanent rights offered do not satisfy the test in section 1(4)(a)(i) then the tribunal have a discretion. If, however, the rights offered do satisfy the test then section 1(4) requires that the right of acquisition of the freehold *shall* be satisfied by the grant of the permanent rights and the LVT have no power or discretion to order the transfer of the freehold of the land. They have determined the matters in dispute and the right of acquisition must be taken to be satisfied in accordance with section 1(4) of the 1993 Act.

64. Mr Hall Taylor acknowledged (rightly in my view) that he could not say that the rights offered by Lynari are not permanent rights under section 1(4). Any objection to the exact scope of the permanent rights to be granted would be decided at the contract stage. I agree. 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 which cannot be settled by agreement can be determined by a county court under section 24(3) and (4) and Schedule 5 to the 1993 Act.

65. My decision on the first question under this issue is therefore that the LVT did not have the power (or discretion) to determine that the freehold of land over which the tenants had rights in common, and in respect of which sufficient permanent rights to satisfy section 1(4)(a)(i) would be granted by Lynari, should be transferred to the nominee purchaser. I consider below the subsidiary question as to whether the part of the access road which has been adopted is capable of enfranchisement.

66. The second question (as to the exercise of any power or discretion by the LVT) does not arise except in relation to the adopted part of the access road which I consider below. I proceed to the third question: should the decision of the LVT as to the extent of the land to be transferred be altered to allow Lynari to retain the access road (including the soil under the adopted part of the road) and the two parcels of quadrant land? It is not in dispute that Lynari should retain the freehold of garages 1, 2 and 7.

67. Mr Hall Taylor acknowledged, and I have found, that the permanent rights offered by Lynari satisfy section 1(4)(a)(i) and therefore the right of acquisition of the freehold of this common use land is satisfied by the grant of those rights. The LVT were therefore in error in their decision as to the area of land to be transferred. The freehold of the southern (or unadopted) leg of the access road and the whole of the two quadrant parcels should be retained by Lynari and permanent rights granted over this land.

68. This leaves the part of the access road which has been adopted. This length of road is not edged orange on plan no.2 attached to the counter-notices (over which permanent rights are offered) but is hatched orange on plan no.3 and stated by Lynari to be incapable of enfranchisement. I heard little argument on this adopted length of road. No authorities were cited or reasons given by Mr Radevsky to support his contention that this land is incapable of enfranchisement. I find the position to be as follows.

69. The whole of the access road from Milton Road was constructed as part of the overall development. The part of this road from Milton Road to part of the way to the garages on the south side of the land (clearly marked on the road) was subsequently adopted by the local authority and named Shortdean Place. The remainder of the road has not been adopted. I was told that some flat leases were granted before adoption and the tenants were given rights in common over the whole of the road (coloured brown and orange on the lease plan). The remaining flat leases were granted after adoption and therefore the lease plan in these cases showed the adopted part of the road uncoloured and the remainder coloured brown and orange. The plan agreed by the parties after the hearing shows the adopted length of road coloured brown and orange. I was told by Mr Hall Taylor that the local authority have confirmed that they do not have title to the soil under the adopted part of the road and do not intend to acquire such title.

70. In my judgment, the adopted part of the access road, over which some of the qualifying tenants have been granted common rights of way, constitutes property used in common under section 1(3)(b) of the 1993 Act and is therefore capable of transfer to the nominee purchaser, subject of course to the public rights of way and the adoption of the surface by the local authority. I do not think that the adoption of this length of road has extinguished the tenants' rights of way over it and this point was not argued before me. Permanent rights over this length of road have not been offered and therefore section 1(4) does not apply.

71. In my judgment, the question is whether in the circumstances the freehold of this length of road should be transferred to the nominee purchaser or retained by Lynari? At the hearing before me Mr Wilson gave evidence in the form of a written statement that Lynari wish to retain the access road in order to have flexibility as to the planning and development of their adjoining land. The overall position on this collective enfranchisement is that it is not in dispute that the nominee purchaser is to acquire the freehold of almost the whole of the land, the only areas to be retained by Lynari being the unadopted length of the access road, three garages and the two small quadrant areas, where, due to the largely to the operation of section 1(4), Lynari are entitled to retain the freehold and grant permanent rights over the road and quadrants. This leaves the length of adopted access road from Milton Road to the flats on the rear land. In my judgment, the tenants through the nominee purchaser should have the freehold and control of as much of the site as possible. They should therefore have the

freehold of the adopted access road, subject to the public rights of way and the adoption of the surface by the local authority. I am not persuaded by Mr Wilson's evidence that Lynari or Mr Wilson will be prejudiced by this decision. They will retain the unadopted length of road leading to their garages and to the rear of their adjoining land in Milton Road and have general rights of way over the adopted length of road, which connects the unadopted part of the road to Milton Road. I cannot see any prejudice to Lynari in the planning or development of their adjoining land.

72. The appeal is allowed in part in respect of land and rights. The decision of the LVT determining that the freehold of the unadopted or southern leg of the access road and parts of each quadrant area shall be transferred to the nominee purchaser, with rights over the road retained by Lynari, is, in my judgment, wrong. Lynari are entitled to retain the freehold of these areas subject to the grant of permanent rights under section 1(4)(a)(i) of the 1993 Act.

73. In summary, the position by reference to the colouring on the agreed plan is as follows. There shall be acquired by the nominee purchaser on behalf of the tenants the freehold of the following property:-

(i) the four blocks of flats uncoloured on the plan and lettered A, B, C and D;

(ii) the five garages included in the flat leases and shown uncoloured on the plan and numbered 3, 4, 5, 6 and 8;

(iii) the gardens coloured green (except the quadrants and the strips of garden adjoining garages 2 and 7), the footpaths coloured orange and the uncoloured parking areas;

(iv) the adopted length of the access road from Milton Road (subject to public rights of way and the adoption of the surface by the local authority) and the part of the access road or concrete apron in front of garages 3-6 (inclusive) and 8, all coloured brown.

Lynari shall retain the freehold of the following property subject to the grant of sufficient permanent rights under section 1(4)(a)(i) of the 1993 Act in respect of (ii) and (iii):-

(i) garages 1, 2 and 7 and adjoining land shown uncoloured, coloured brown and coloured green;

(ii) the southern or unadopted length of the access road coloured brown;

(iii) the two parcels of quadrant land coloured green, yellow, orange and uncoloured in respect of the south quadrant and green and uncoloured in respect of the north quadrant.

The extent of the land to be retained by Lynari is shown edged orange on plan no.2 attached to each counter-notice.

PRICE

Appellants' case

74. **Mr Pridell** is joint senior partner of Clifford Dann and Partners, chartered surveyors and estate agents, of Lewes. He is responsible for residential agency. Mr Pridell said that an element of value is due to the freeholder in respect of car parking spaces. The existing parking provision is 10 spaces and five garages let with the flats: parking for only 15 of the flats. There is a lack of car parking in adjoining roads. In a property of this size it would be customary, if indeed not a planning requirement, to provide one space per unit plus parking for visitors. As originally proposed the development incorporated 40 car spaces.

75. Additional car parking could be provided at the rear of Blocks A (8 spaces) and D (6 spaces) Some of the 10 existing spaces could then be allocated to the flats and provide visitor parking. Additional parking would increase the value of the flats. Mr Pridell put this additional value at £59,700 calculated by aggregating the increase in the value of 17 flats to be given allocated spaces and the smaller increase in the remaining five flats with increased visitor parking less the cost of construction and the diminution in value of five ground flats in Blocks A and D. Mr Pridell supported his valuation by reference to comparables at Grand Mansions, Belvedere Court, The Limes, 7 Gressington Road and miscellaneous garages.

76. In answer to questions from me, Mr Pridell said that this element of value represented compensation under paragraph 5 of Schedule 6 (subsequently amended by Mr Radevsky in his closing submissions); he did not think it unusual that his valuation of the potential extra parking is greater than the value of the flats; he could not say why the additional parking has not been provided since the flats were built in 1976; planning permission has not been granted, he has spoken to a planning officer but did not get an indication that permission would be granted for this proposed parking; he agreed that this additional development would be not be risk-free.

77. **Mr Wilson's** evidence as to parking in adjoining roads is summarised above (para 22).

78. **Mr Radevsky** said that the nominee purchaser is acquiring the ability to create additional car parking spaces. The LVT dismissed this head of claim unsatisfactorily in a single paragraph. It is a valid claim and should be allowed. Parking is at a premium on the premises. This additional value arises under Part IV of Schedule 6 (paragraphs 10 and 11) to the 1993 Act: it is part of the additional value which would be paid by the tenants.

Respondents' case

79. The evidence of **Mr Myers** and **Mr Jordan**, which included references to parking, is summarised above (paras 34 and 36).

80. **Mr Cleverton** is a director of Stiles Harold Williams in their Eastbourne office. He referred to the planning permission for the development of Shortdean Place (3 September 1974) which permitted the erection of 22 flats, access road, refuse store and 34 parking spaces. Lynari carried out the development and constructed 10 spaces and eight garages. The development was not in accordance with the planning permission. Lynari have retained three garages for their own use.

81. The residents do not want, and have never wanted, additional parking areas. These would require the loss of garden contrary to the leases and now possibly to the Human Rights Act and could seriously limit the enjoyment of the flats. The proposed car parking would reduce the garden land by about 15-20%. All blocks would be adversely affected, particularly Blocks A and D. Two trees would have to be removed. Mr Cleverton referred to agents' particulars for the recent sale of 12 Shortdean Place which refer to "ample parking space." There has never been any demand for additional car parking; the provision on-site is ample. Parking problems in the neighbourhood due to the nearby school are transitory. There are no parking restrictions in adjoining roads.

82. Mr Cleverton said that the local authority have now moved away from their former policy of allocated parking spaces to one of parking on-site for the property as a whole. Owing to this change of policy, there can be no justification for an £85,000 uplift in value, as suggested by Mr Pridell, for allocated car spaces. The local authority have confirmed that 50% of flat owners in Eastbourne own a car. At Shortdean Place only 12 residents have a car on-site. Lynari have twice been refused planning permission on appeal for the development of their adjoining land (in 1977 and 2002) and the inspector commented on the harm to living conditions which would be caused by parking close to the proposed flats. Although a garage would add to the value of a flat, particularly where there is pressure on parking, an allocated parking space would not add to the value.

83. **Mr Hall Taylor** said that the decision of the LVT, not to add any value for additional parking, was justified given that there was no intention to provide it and the value of the flats would be diminished if they were provided.

84. It is now the appellant's case that, if it had retained the land, it would have been able to add further parking spaces which it could have sold for profit and/or would have added to the value of the flats. Compensation should be paid for the loss of this development potential. Part of this proposed development would be on the garden adjoining Block A and part on an area originally intended for parking close to Block D. The former area has no development potential. This would be in breach of the tenants' rights to use this garden land. The proposal is fanciful. As to the area around Block D, the evidence of Mr Myers and Mr Jordan shows a lack of demand. Mr Cleverton's evidence is that there is no longer a planning need for allocated parking. The appellants have been unable to show that this part of the LVT's decision was wrong. This ground of appeal should be dismissed.

Decision

85. The second issue is whether any addition should be made to the price of £54,060 determined by the LVT for the right or ability to provide further parking spaces on the subject land? The agreed valuation date is 15 August 2002. Mr Pridell puts the additional value at £59,700; Mr Cleverton says there is no additional value. Mr Pridell's evidence before the LVT was that the additional value was £14,000. This was also his figure before this Tribunal initially but he increased it to £63,300 in March 2003 and then reduced it to £59,700 at the hearing to reflect the agreed valuation date. It is based on a proposed development of eight car spaces on the garden adjoining Block A with a short access road

from the Shortdean Place road and six spaces partly on the garden and partly on the concrete apron in front of garages 3-6 to the south of Block D with access from the Shortdean Place road.

86. The LVT rejected this claim for additional value (or compensation) (para 27). In my judgment, the LVT were right to do so. I also reject this element of value. It is wholly speculative and wholly unsupported by any realistic evidence. My reasons are as follows.

87. First, any additional value is wholly dependent upon demand for further parking from the tenants. The demand to produce this additional value cannot come from elsewhere. There is no evidence of such demand. On the contrary, there is evidence of a lack of demand (see the evidence of Mr Myers and Mr Jordan). In the absence of any rebuttal I accept that only 12 out of the 22 flats are occupied by tenants with cars. The evidence of parking problems in nearby roads due to Motcombe School does not show that the tenants of Shortdean Place would pay for the provision of extra parking spaces. Lynari have owned Shortdean Place since it was built in 1976 and should have been able to able to show a demand for extra parking if any existed. This lack of evidence and the lack of any steps by Lynari to realise this additional value since 1976 and, on Mr Pridell's figures, to more than double the value of the freehold reversion, is clear proof of lack of demand. Therefore the value wholly dependent upon that demand does not exist. To achieve the £59,700 additional value given by Mr Pridell would need the agreement of all 22 tenants to pay for extra parking, only 12 of whom own a car. These agreements would not be forthcoming.

88. Second, the agreement of all tenants to variations of their leases in respect of common rights would be needed before the additional parking spaces could be provided at the rear of Block A. The land on which Mr Pridell says that eight spaces and the access could be provided is now garden land shown coloured green on the lease plans. All tenants have the right to use this garden. The removal of this land from the garden area would require the consent of *all* 22 tenants of Shortdean Place. There is no evidence that these consents would, or even might, be given. Refusal by only one tenant to the variation of his lease would prevent the provision of the proposed parking spaces. It is, in my view, extremely unlikely that *all* tenants would agree to this variation of their leases. It is particularly unlikely that the tenants of Block A would agree, especially those whose flats look across this attractive part of the garden to the playing fields of the school beyond the boundary fence (flats 2 and 4). It seems unlikely that they would agree to exchange this pleasant view for a car park and suffer additional noise from its use. The proposed parking area at the rear of Block D close to the garages, would not encounter this problem: it is shown uncoloured on the lease plans and was intended at one time to be a parking area. It is now part of the garden (lawn) but the green colouring in the lease plans does not appear to extend to this land. Nevertheless, whatever the tenants' rights, I am sure that they would oppose the loss of part of their garden for a car park.

89. Third, no planning permission has been granted, or even sought, for the additional parking. Mr Pridell said that he has spoken to a planning officer of Eastbourne Borough Council but received no indication as to whether planning permission would be granted. Having regard to the evidence given by Mr Cleverton regarding parking policy, and no doubt the objections of at least some of the tenants if a planning application were made, I think that

there is, at best, uncertainty as to whether planning permission would be granted for the proposed additional parking. This adds to the uncertainty, which exists for the other reasons given above, which surrounds this development and any additional value it might create.

90. For the above reasons I regard any additional value arising out of the possibility of providing additional parking to be too speculative and too remote to justify a quantifiable value. The LVT were right to reject the inclusion of any value for this element in the price. This ground of appeal fails.

CONCLUSION

91. The appeal succeeds in part on the first issue (land and rights) and fails on the second issue (price). This decision determines the substantive issues in this appeal. It will take effect as a decision when the question of costs has been determined. Rights of appeal will take effect from the date of the determination of costs. The parties are invited to make written submissions as to costs and a letter accompanies this decision setting out the procedure to be followed.

DATED 5 August 2003

(Signed: P H Clarke)

ADDENDUM

92. I have received written submissions on costs. The appellants seek 50% of their costs or such different proportion as may be awarded by the Tribunal. The respondents ask for 50% (or other proportion as may be awarded by the Tribunal) of their costs of the first issue (land to be transferred) (or no order of costs on this issue) and the whole of their costs of the second issue (price). There should be no order of costs in favour of the appellants.

93. The appellants appealed on two issues: the extent of the land to be transferred and rights to be granted to the nominee purchaser and the price on collective enfranchisement. They were partly successful on the first issue. I found that the decision of the LVT determining that the freehold of the unadopted or southern leg of the access road and parts of each quadrant area shall be transferred subject to retained rights was wrong. Lynari are entitled to retain the freehold of these areas subject to the grant of permanent rights. The appellants were wholly unsuccessful on the second issue.

94. Prima facie, the appellants should receive part of their costs of the first issue and pay part of the respondents' costs of that issue and the whole of the respondents' costs of the second issue. The respondents, however, seek to avoid any liability for costs on the first issue on the grounds that the appellants adduced further, and late, evidence on the appeal not previously put before the LVT. I was referred to *Sinclair Gardens (Investments) Limited v Franks* (1997) 76 P & CR 230; *Cadogan Estates Limited v Shahgoli* (1998) (unreported); and Hague, "Leasehold Enfranchisement" para 16-14(iv). The appellants say that this additional evidence was necessary as a defensive measure because the respondents failed to reply to correspondence concerning allegations previously made about the appellants' conduct. Furthermore, the part of the first issue relating to the adopted length of the access road was not really a live issue and failure on this point does not justify a reduction in the appellants' costs of the first issue.

95. The appeal succeeded in part only on the first issue, as a matter of interpretation of the statutory provisions and not on its merits, and failed wholly on the second issue, where the appellants' case was without merit. In my judgment, I should make no order as to costs on the first issue (where both parties achieved a limited success) and require the appellants to pay the whole of the respondents' costs of the second issue (where I have already made a wasted and additional costs order against the appellants in respect of a further and late expert report). Accordingly, I make no order as to costs of the first issue and order the appellants to pay the respondents' costs under the wasted and additional costs order dated 16 May 2003 and the respondents' remaining costs of the second issue, such costs, if not agreed, to be the subject of a detailed assessment on the standard basis by the Registrar of the Lands Tribunal.

DATED 1 October 2003

(Signed: P H Clarke)