UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – collective enfranchisement – acquisition of land and rights – acquisition of leasehold interests – interpretation – nominee purchaser with right to acquire leasehold interest - whether required to acquire totality of leasehold interest – whether entitled to chose to acquire only part of leasehold interest – appeal allowed – Leasehold Reform Housing and Urban Development Act 1993 s.2

IN THE MATTER OF APPEALS AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL OF THE LONDON RENT ASSESSMENT PANEL DATED 10TH DECEMBER 2008

AND IN THE MATTER OF THE LEASEHOLD REFORM HOUSING AND URBAN DEVELOPMENT ACT 1993

BETWEEN **HEMPHURST LIMITED** **Appellant/ Respondent**

and

DURRELS HOUSE LIMITED **Respondent/Appellant**

Re: **Durrels House, Warwick Gardens, London W14 8QB**

Before: HIS HONOUR JUDGE MOLE QC

Sitting at 43-45 Bedford Square, London, WC1
on Wednesday 15th September 2010

Mr Edwin Johnson QC appeared for the Appellant Hemphurst Ltd
Mr Philip Rainey QC appeared for the Respondent Durrels House Ltd

The following cases are referred to in this decision:

Cadogan v McGirk [1996] 4 All ER 643,
Howard de Walden Estates v Aggio [2009] 1 AC39 (HL),
Ackerman v Lay [2009] 1 EGLR 50
Nailrile v Earl Cadogan [2009] 2 EGLR 151

DECISION

Introduction

1. This is an appeal against the decision of the Leasehold Valuation Tribunal dated 10 December 2008.

2. Durrels House is a 1970s block of flats between Warwick Gardens and Warwick Road. There are garages on the ground floor and flats on the eight floors above. Around the block there is an area partly open and landscaped, partly with further garages on it, and partly oversailed by parts of the block, which has been described as the "additional premises". The block has a flat roof with structures housing ventilation shafts and machinery on it.

3. Durrels House Limited (hereafter 'DHL') is the nominee purchaser in respect of a claim for collective enfranchisement. Hemphurst Ltd (hereafter HL) is the freehold owner and reversioner of the premises in respect of which the claim is made. HL also acts on behalf of Grovehurst Properties Ltd (Grovehurst) which owns freehold and leasehold interests relevant to the issue in this case. On 29 September 2003 HL granted Grovehurst a 999 year lease of certain premises on the ground floor of the building. Then, on 14 October 2003, HL granted Grovehurst a 999 year lease of the surface and air space on the roof of the block, including the right to build a flat or flats on the roof. In 2003 planning consent was granted for the construction of a penthouse flat on the roof. The plans for this development have been reconsidered and modified and further permissions were granted in 2005 and 2007. The proposal is now for a four-bedroom flat with a substantial terrace.

4. The preliminary issue in this case concerns the exercise of the right to enfranchise so far as that roof lease is concerned. It is whether DHL may acquire, under the 1993 Act, only those parts of the roof which are not required for the implementation of the planning consent but which would be required for the proper maintenance of the rest of the block, such as the remaining parts of the roof and the ventilation shaft outlets, or whether DHL is obliged to seek to acquire the whole of the roof lease. As will be set out more fully below, the LVT decided that it was not possible, under the Act, to acquire only specific parts of premises demised by one leasehold interest. It is against that finding that DHL appeal. The LVT expressed itself in terms that suggest that it found that DHL were entitled to acquire the whole of the lease. HL appeal against that finding.

5. There were several issues argued between the parties before the LVT. On 21 July 2009 this tribunal granted permission to argue three points on appeal but those relating to the roof lease are the only ones pursued before me.

THE LVT DECISION

6. The LVT said this about the issue of the acquisition of the roof lease:

"40. On 10 October 2003 Hemphurst Ltd granted to Grovehurst Ltd a 999 year lease of the ninth floor and airspace with a view to the development of a new flat. On 19 July 2006 Hemphurst Ltd granted a lease for 999 years to Grovehurst Ltd in respect of one riser vent on the eighth floor and two riser vents on the ninth floor.

41. Planning consent was obtained in February 2003 for the construction of a three-bedroom flat and terrace. In June 2005 planning permission was obtained for the construction of a four bedroomed flat with a terrace. In August 2007 planning permission was obtained for a four-bedroom flat and terrace with a larger footprint and improved layout.

42. Mr Rainey explained that the respondents did not seek to acquire the development envelope or to try to prevent the development. The aim of the Section 13 notice was to acquire, as a common part, only that part of the roof space lease which was not, in due course, going to form part of the demise of the flat. Because the Section 13 notice had been served before the 2007 planning consent had been acquired he accepted that some of the footprint claimed in the notice was, in fact, required to implement the 2007 planning consent but he invited the LVT to determine the extent of the roof area and airspace to be acquired.

43. Mr Johnson argued that under section 2 (4) of the Act it was not possible to claim only part of the demised premises since the severance provisions were not engaged. It could not be said that parts of the roof were common parts and parts were not. He, therefore, alleged that the claim was incompetent.

44. The Tribunal accepts the argument of Mr Johnson that, under the Act, it is possible for the respondents to acquire leasehold interests but that it is not possible for them to acquire parts of premises demised by those leasehold interests. Accordingly, they could acquire the 2003 lease but not part of the premises demised by that lease."

7. Under the heading "Conclusion" the LVT continued:

"46. No valuation is provided with this determination since no evidence has been received from the respondents concerning the value of the 2003 roof lease which the tribunal has determined must be acquired in its entirety. If, contrary to the assertions made at the hearing that were the respondents unable to acquire only the claimed area of the roof the enfranchisement would not proceed, and if the parties are unable to agree the required valuation, they have liberty to apply."

THE ACT

8. The crucial sections of the Leasehold Reform, Housing and Urban Development Act 1993 (hereafter 'the Act') are sections 1 and 2 and it will be helpful to set them out in full, so far as relevant, as follows.

Section 1 The right to collective enfranchisement.

(1) This Chapter has effect for the purpose of conferring on qualifying tenants of flats contained in premises to which this Chapter applies on the relevant date the right, exercisable subject to and in accordance with this Chapter, to have the freehold of those premises acquired on their behalf –

(a) by a person or persons appointed by them for the purpose, and
(b) at a price determined in accordance with this Chapter;

and that right is referred to in this Chapter as "the right to collective enfranchisement".

(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) section 2 has effect with respect to the acquisition of leasehold interests to which paragraph (a) or (b) of subsection (1) of that section applies.

(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.

(5) A claim by qualifying tenants to exercise the right to collective enfranchisement may be made in relation to any premises to which this Chapter applies despite the fact that those premises are less extensive than the entirety of the premises in relation to which those tenants are entitled to exercise that right.

……

(7) In this section –

"appurtenant property", in relation to a flat, means any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the flat;

"the relevant premises" means any such premises as are referred to in subsection (2).

(8) In this Chapter "the relevant date", in relation to any claim to exercise the right to collective enfranchisement, means the date on which notice of the claim is given under section 13.

Section 2 Acquisition of leasehold interests

(1) Where the right to collective enfranchisement is exercised in relation to any premises to which this Chapter applies ("the relevant premises"), then, subject to and in accordance with this Chapter –

(a) there shall be acquired on behalf of the qualifying tenants by whom the right is exercised every interest to which this paragraph applies by virtue of subsection (2); and

(b) those tenants shall be entitled to have acquired on their behalf any interest to which this paragraph applies by virtue of subsection (3);

and any interest so acquired on behalf of those tenants shall be acquired in the manner mentioned in paragraphs (a) and (b) of section 1(1).

(2) Paragraph (a) of subsection (1) above applies to the interest of the tenant under any lease which is superior to the lease held by a qualifying tenant of a flat contained in the relevant premises.

(3) Paragraph (b) of subsection (1) above applies to the interest of the tenant under any lease (not falling within subsection (2) above) under which the demised premises consist of or include –

(a) any common parts of the relevant premises, or

(b) any property falling within section 1(2)(a) which is to be acquired by virtue of that provision,

where the acquisition of that interest is reasonably necessary for the proper management or maintenance of those common parts, or (as the case may be) that property, on behalf of the tenants by whom the right to collective enfranchisement is exercised.

(4) Where the demised premises under any lease falling within subsection (2) or (3) include any premises other than –

(a) a flat contained in the relevant premises which is held by a qualifying tenant,

(b) any common parts of those premises, or

(c) any such property as is mentioned in subsection (3)(b),

the obligation or (as the case may be) right under subsection (1) above to acquire the interest of the tenant under the lease shall not extend to his interest under the lease in any such other premises.

(5) Where the qualifying tenant of a flat is a public sector landlord and the flat is let under a secure tenancy or an introductory tenancy, then if –

(a) the condition specified in subsection (6) is satisfied, and

(b) the lease of the qualifying tenant is directly derived out of a lease under which the tenant is a public sector landlord,

the interest of that public sector landlord as tenant under that lease shall not be liable to be acquired by virtue of subsection (1) to the extent that it is an interest in the flat or in any appurtenant property; and the interest of a public sector landlord as tenant under any lease out of which the qualifying tenant's lease is indirectly derived shall, to the like extent, not be liable to be so acquired (so long as the tenant under every lease intermediate between that lease and the qualifying tenant's lease is a public sector landlord).

(6) The condition referred to in subsection (5)(a) is that either –

(a) the qualifying tenant is the immediate landlord under the secure tenancy or, as the case may be, the introductory tenancy, or

(b) he is the landlord under a lease which is superior to the secure tenancy or, as the case may be, the introductory tenancy and the tenant under that lease, and the tenant under every lease (if any) intermediate between it and the secure tenancy or the introductory tenancy, is also a public sector landlord;

and in subsection (5) "appurtenant property" has the same meaning as in section 1.

(7) In this section "the relevant premises" means any such premises as are referred to in subsection (1).

9. The provisions of section 13 were discussed in some detail in argument. Mr Johnson drew attention to s. 13(3)(a) which states that the notice of claim must specify and have a plan showing the premises to be acquired but under (c) only specify the leasehold interest to be acquired. Section 21 provides for the giving of a counter notice by the reversioner. Section 21(4) is relevant:

(4) The nominee purchaser may be required to acquire on behalf of the participating tenants the interest in any property of any relevant landlord, if the property –

(a) would for all practical purposes cease to be of use and benefit to him, or

(b) would cease to be capable of being reasonably managed or maintained by him,

in the event of his interest in the specified premises or (as the case may be) in any other property being acquired by the nominee purchaser under this Chapter.

SUBMISSIONS

10. Mr Philip Rainey QC, for DHL, submitted that there was no good reason for construing the Act in a way that ruled out the acquisition of parts of premises demised by a single lease and required the acquisition of the whole of the lease, or nothing, and many good reasons for not doing so. He prefaced his submissions by referring to authorities supporting the giving of a broad construction to the 1993 Act. In particular he quoted *Cadogan v McGirk* [1996] 4 All ER 643 where Millett LJ said (at 648b)

> "It is the duty of the court to construe the Act fairly and with a view, if possible, to making it effective to confer on tenants those advantages which Parliament must have intended them to enjoy."

He also submitted that it was apparent from *Howard de Walden Estates v Aggio* [2009] 1 AC39 (HL) and *Ackerman v Lay*[2009] 1 EGLR 50 that if the proper construction of the Act required severance, that was of little significance.

11. Mr Rainey began by referring to the facts of the instant case to illustrate the sort of difficulty that would be caused if the 'all or nothing' argument were correct. It would have been, he said, perfectly possible for HL to grant Grovehurst one lease of both the ground floor and the roof. After all, both those leases were granted within a couple of weeks of each other. The ground floor lease included the porter's room, which it was plainly important for the qualifying tenants to acquire (the LVT held that it was part of the common parts and that its value was already reflected in the value of the flats). If there had been only one lease, on HL's argument, DHL would have had to acquire the whole of that lease, including the roof space with expensive potential for development, which they did not want, in order to get hold of the porters' office, which they did want. The construction of section 2 of the Act for which he was arguing would make it flexible and effective. The crucial provision is section 2 (3) (a).

12. Mr Rainey submitted that there is a significant difference in drafting between section 2 (2) and section 2 (3). Under the former provision, the nominee purchaser is obliged to acquire the relevant leasehold interests, so no question of part acquisition can arise, unless section 2(4) requires a severance. The latter provision, by contrast, confers a right but not an obligation. The tenants have the right to acquire an interest under the lease under which the demised premises include any common parts of the relevant premises but they are not obliged to do so. It is consistent with the permissive nature of that right that it should be capable of being exercised in respect of part only of a leasehold interest. He explained the reasons for the mandatory nature of section 2(2). Those reasons did not apply to section 2(3), which was, consequently, permissive. Being permissive it ought to be construed as permitting tenants to claim part of a leasehold interest as well as the whole of a leasehold interest. He described this as "elective severance". He contrasted the mandatory severance that arises under subsections 2(4) and 2(5). Subsection 2(4), in effect, excludes from the right (or obligation) to acquire the interest of the tenant under the lease any premises (such as business premises) that are neither part of a flat held by a qualifying tenant nor common parts of those premises nor held under a superior lease. That, at least, shows that there is no objection in principle to the severance of a leasehold interest. It is also a strong indication that section 2(3) allows for elective severance

of an interest under a lease. There was nothing in the language of the section that stood in the way of such a construction.

13. If there were no such right of elective severance, the tenants' ability to acquire a leasehold interest might, in practical terms, depend entirely upon how the landlord had structured the lettings. Section 2(3) clearly contemplates that there may be very different views held about what, if anything, is acquired as common parts. The acquisition of that leasehold interest has to be "reasonably necessary for the proper management or maintenance of those common parts". The common parts may form a very small part of the property included within the leasehold interest. For example, the necessary common parts may form a small portion of a much larger garden or parkland. It may be impossible to properly manage or maintain the common parts without the acquisition of 'the interest of the tenant under any lease' that includes those common parts. But section 2 (4) says that there is no right to acquire the interest of the tenant in premises other than, amongst other things, the common parts. So in that case they will be a mandatory severance. The problem arises where the common parts have an extra value that has nothing to do with being common parts. If "the interest of the tenant" is taken to mean the whole interest of the tenant instead of the necessary part of it, the acquisition cost may be completely prohibitive. That is said to be this case, where on one view the value of the rooftop development area is said to be up to £1.295 million.

14. Mr. Rainey argued that there was no insuperable practical problem in the way of such an elective severance. The LVT has jurisdiction to determine the extent of the interest, leasehold or freehold, to be acquired. The wording of section 24(8)(b) is apt to cover the determination of a severed leasehold interest, as is to be expected, given the degree of mandatory severance the Act permits. The mechanics of the service of a notice under s. 13 and the alleged difficulties created by, for example the absence of a plan, were examined in detail by him. He submitted that elective severance would cause no additional or insurmountable difficulty under the notice provisions either.

15. The 'cherry picking' argument, namely the argument advanced on behalf of the landlord that the ability to choose to require part of a leasehold rather than the whole of it was open to abuse by the qualifying tenants was conclusively answered by s. 21(4), which provides that the purchaser may be required to acquire on behalf of the tenants the interest in any property if the property would cease to be of use and benefit to him or would cease to be capable of being reasonably managed or maintained by him. Once again the Act contemplates the severance of an interest defined by the factual nature of the property, namely whether a particular portion is either incapable of beneficial use or not reasonably manageable. The acquisition might be intricate and the valuation complex, but the machinery was capable of dealing with that. (He instanced the case of *Nailrile v Earl Cadogan* [2009] 2 EGLR 151 and drew attention to Lord Neuberger's observation in *Howard de Walden Estates Ltd v Aggio* [2009] 1 AC 39, page 53 at paragraph 48, that tribunal members are "frequently faced with ticklish conveyancing and valuation problems.")

16. Mr Johnson QC, in reply, submitted that the LVT was right to determine that there was no right of 'elective severance'. If there were, the qualifying tenants in a collective

enfranchisement claim could claim as much or as little as they wanted in their notice of any leasehold interest that fell within the terms of section 2 (1) (b) of the act. That would be a bizarre result.

17. He summarised his submissions on section 2 as being that section 2 is engaged where the right to have the freehold interest in the relevant building or part of the building (the relevant premises) is exercised. The obligation or entitlement to acquire in section 2, depending upon whether paragraph (a) or paragraph (b) is engaged, is an obligation or entitlement to acquire leasehold interests in the relevant premises. Where the leasehold interest includes premises that do not fall within section 2 (4) (a), (b) or (c) those non-qualified premises are excluded and severed from the obligation or entitlement to acquire the relevant leasehold interest. He noted in particular that the obligations and rights in section 2 are framed by reference to the acquisition of leasehold interests, not premises or property, and this contrasts with the language and scheme of section 1.

18. Section 2 relates to interests. Under 2(1)(a) there 'shall' be acquired 'every interest' which is superior to the qualifying tenant's lease. That must mean not just the lease but any part of the demised premises. There can be no severance there because the whole of the interest must be acquired. Mr Rainey submits that without severance the tenant can be at the mercy of the leasehold structure imposed by the landlord, yet if that structure is in a head lease there can be no escape. If the lease of the roof had been part of the head lease in the present case there could be no argument that anything less than the whole of it could be acquired.

19. Under (1)(b) the tenants 'shall be entitled' to have acquired 'any interest' that falls within (3). The language, 'every interest' in (a) and 'any interest' in (b), is virtually the same. If there is no right of severance under (a) it is hard to see how there can be under (b). The statutory scheme is inconsistent with any right of elective severance under section 2

20. Furthermore there is no equivalent in section 2 to the option given to tenants in section 1 (5) to elect to acquire less extensive premises that the whole of the relevant building or part of the building.. There is no express provision that permits tenants to acquire a part of any leasehold interest that they are entitled to acquire under section 2 (1) (a)(b), 2(2) or 2(3). If they should scale back their claim pursuant to section 1 (5) that reduction in the relevant premises might well have the effect of causing section 2(4) to apply more widely than it otherwise would have done, but that is not the product of any independent right of elective severance. The severance provisions in section 2 are not "elective" they are compulsory. Given that the legislature did include an elective provision in section 1(5) one might have expected it to include such a provision in section 2 had it intended to do so. It did not. This suggests that it did not intend to do so.

21. Mr Johnson put considerable weight upon the provisions of section 13 governing the giving of notice of claim. Section 13 (3) (c) requires the initial notice of collective enfranchisement to specify "any leasehold interest proposed to be acquired". That section refers only to leasehold interests and not to "part leasehold interests" or "premises demised by a lease" is because claims to part leasehold interests are not permitted. There is no entitlement

to acquire part of a leasehold interest in the absence of the compulsory severance provisions. But the acquiring tenants are not required to set out how the compulsory severance will apply; they simply specify the relevant leasehold interest they claim. This also explains, argued Mr Johnson, why section 13 does not require a plan to be attached to the initial notice in order to identify the extent of leasehold premises that is because there is no need for such a plan. Again, this is in stark contrast to the way in which section 13 operates in relation to premises of which the freehold interest is claimed pursuant to section 1, when the notice is required to be accompanied by a plan. A plan is evidently necessary when premises define the right of acquisition but it is not where the right of acquisition is defined by a leasehold interest.

22. Mr Johnson went on to point to what he said were the bizarre consequences that would follow an unfettered right to cherry pick. A complicated patchwork quilt of rights could result.

23. So far as HL's appeal against the decision that DHL was entitled to acquire the roof in its entirety is concerned, Mr Johnson said that the LVT was not entitled to take that decision upon itself. DHL had never claimed to be able to acquire the 2003 roof lease in its entirety. The claim was expressly confined to part only of the roof lease, as specified in the initial notice. If any such claim had ever been made by the DHL, which it was not, it would have been resisted by HL. The LVT had no jurisdiction to decide the point.

CONSIDERATION AND CONCLUSIONS

1. DHL'S APPEAL

24. The issue is whether on the proper construction of section 2 the nominee purchaser entitled to acquire a leasehold interest must either acquire all of it or acquire none of it or whether Parliament's intention was that the nominee purchaser might acquire those parts of the leasehold interest that it needed to acquire and leave the rest.

25. Section 1 confers the right upon the nominee purchaser acting on behalf of the qualifying tenants to 'have the freehold' of the 'premises', which means basically the building that includes the qualifying tenants' flats, defined by s. 1(2) as the relevant premises. The nominee purchaser is also entitled to acquire 'the freehold of any property' which is appurtenant property (as defined in s. 1(7)) not comprised in the relevant premises or premises used in common as defined in s.1(3)(b). Each of those categories of property is capable (though not necessarily easily capable) of precise objective determination. The right is to have the freehold of those defined premises or that defined property. In the absence of any contrary indication, the language of the section could be construed as a declaration that the nominee purchaser was given the right to either acquire the totality of the defined property, or none of it. Because of that, the draughtsman makes it clear in section 1 (5) that all or part of such land may be acquired.

26. Section 2 deals with the acquisition of leasehold interests. These are, of course, only leasehold interests that relate to the premises of which the freehold is to be acquired. Section 2

(2) specifies the first category, which is any lease superior to that of the qualifying tenants. Clearly every leasehold reversion has to be eliminated in order for the scheme to work. Therefore section 2(1)(a) says that 'every' such leasehold interest must be acquired. It is clear that there can be no severance under that subsection. In the second category are leasehold interests under which the demised premises 'consist of or include' relevant premises, appurtenant property or common parts. ' Any interest' in this category may be acquired, under s. 2(1)(b), subject to the overriding condition that the acquisition of 'the interest of the tenant under any lease' is reasonably necessary for the proper management or maintenance of the property to be acquired (see s. 2(3)).

27. Mr Johnson argued that section 1 is also capable of being read either way, yet the draughtsman thought it necessary to clarify the matter in s. 1 (5). In section 2 the draughtsman did not add a provision in similar terms to section 1 (5). There is force in that argument. The draughtsman did not add the words "and the right to require the interest of the tenant under the lease shall not extend to his interest under the lease in any premises that are not so reasonably necessary" which he could have done, if that was what he meant. He could have said that interest or "that part of that interest which" is reasonably necessary. The matter could have been made clear in a number of ways and either way. The draughtsman could have made it clear beyond doubt that he did mean an 'all or nothing' approach but he did not do that either.

28. I find the language of s.2(1)(b) and (3) less supportive of the argument that the right is either to acquire the whole of the leasehold interest in question or none of it, than was the language of s.1 in relation to the right to acquire property absent s.1 (5). In my view the phrases 'any interest' or 'the interest of the tenant under any lease' are as apt to describe an interest carved from the original leasehold interest as to describe the whole of the original interest. I read nothing in s. 2(3) that is inconsistent with such an interpretation. Nor do I find any difficulty in drawing a distinction between s.2 (1)(a) and s.2 (1)(b); there is a significant difference in the language and meaning of the two subsections, read as a whole. In my judgement, that difference substantially weakens the force of Mr Johnson's argument that the lack of a similar provision to s.1 (5) in s.2 is significant.

29. The draughtsman evidently envisaged the possibility that the whole of the relevant leasehold interest might be acquired under s. 2 (3). The whole of the leasehold interest could be very extensive and might include premises nothing to do with the relevant premises, appurtenant premises, or common parts. To avoid that, s. 2(4) declares that where a leasehold interest to be acquired under s. 2(3)(b) includes any premises that are neither a qualifying tenant's flat, common parts nor appurtenant property, the right to acquire does not apply to such other premises. This provision is expressed in terms that make it plain that the section contemplates that the leasehold interest can be acquired in part. It says that the obligation or right "to acquire the interest of the tenant under the lease shall not extend to his interest under the lease in any such other premises." The parties refer to this as 'mandatory severance'. Another way of putting it is to say that the Act sets a limit to the breadth of the words "the interest of the tenant under the lease." I find some indication in the words used that the draughtsman recognised that the phrase "to acquire the interest of the tenant under the lease" is apt in a situation where less than the total leasehold interest is to be acquired.

30. Although the s. 2(4) exclusion obviously contemplates the possibility that, in its absence, the nominated purchaser might acquire parts of the leasehold interest in premises that have nothing to do with the property to be acquired, it does not follow that the draughtsman meant that, in the absence of this statutory exclusion, only the totality of the leasehold interest could be acquired. (For the sake of completeness should be noted that there is also an exclusion in some circumstances where the qualifying tenant of the flat is a public sector landlord. (Section 2 (5) and (6)) But that is neither relevant nor particularly illuminating in this case.)

31. It is perfectly possible to contemplate circumstances in which the leasehold interest includes common parts or appurtenant property, not excluded by section 2 (4), but where it is not reasonably necessary to acquire that interest for the proper management or maintenance of those common parts or appurtenant property (under 2 (3) (b)). The facts of this case illustrate the point. There is an argument, at least, that, given that it is wished to acquire the freehold of the building and its roof, the acquisition of the roof lease would be reasonably necessary for the proper management and maintenance of the roof. However, the roof lease contemplates that there will be development over much of the roof. If that development were to take place it might be sensible for the qualifying tenants below to take the view that it was not reasonably necessary to acquire any rights under that lease in those parts of the roof that were physically under the new development. Mr Rainey asks what purpose, consistent with the underlying scheme of the Act, would be served by requiring the nominee purchaser to acquire the leasehold interest in those parts of the roof that it was not reasonably necessary to have as well as in those parts that it was reasonably necessary to have. That is a fair question, in my opinion. The whole tenor of section 2 appears to be that the right to acquire leasehold rights is to be tightly limited. Section 2 does not shrink from severing those leasehold rights to achieve those limits. It is difficult to see what purpose compelling the nominee purchaser to take more of the leasehold interest than he wants or needs would serve.

32. One purpose, Mr Johnson submits, would be to prevent ‘cherry picking’ by the qualifying tenants, so far as that was felt to be unfair or undesirable. I do not find that persuasive. I agree with Mr Rainey that an answer to the point is to be found in section 21 (4). That provision enables the leaseholder to require the nominee purchaser to acquire the interest in any property that is left incapable of reasonably beneficial use or becomes unmanageable. The landlord also has the power to protect himself to a degree by counter-offering the grant of rights under s. 1(4). Generally it would appear to be in the interests of the leaseholder that no more of his interest is acquired than is necessary. To my mind it would seem strange if Parliament intended to give that protection to the landlord and yet left the tenant with the choice of all or nothing, so far as the acquisition of a leasehold interest were concerned.

33. Another purpose might be that Parliament contemplated that the "patchwork quilt" of rights would simply become unmanageable. I bear Mr Johnson's submissions about the operation of s. 13 in mind. But it does not seem to me that any insuperable difficulties would be caused by an interpretation that acknowledged ‘elective severance’; or at least none more difficult than would be created by the ‘mandatory severance’, which I must assume Parliament was content would not impose intolerable burdens on the machinery.

34. Given that I do not find the language of the Act conclusive, it does seem to me that to read s.2 as enabling the nominee purchaser to acquire as much of the leasehold interest as is needed and wanted but not insisting that all of it would be acquired, is much more consistent with the purpose of conferring on the tenants those advantages Parliament must have intended them to enjoy. Instead of a rigidity that seems to me to be pointless, such an interpretation produces a sensible flexibility, no more likely to create difficulties in practice then the interpretation of the Act that HL advances.

35. For those reasons, DHL's appeal succeeds.

2. HL'S APPEAL

36. It is possible to doubt whether the LVT actually intended to determine that the roof lease must be acquired in its entirety. When the LVT says, in paragraph 46 of its decision, " the 2003 roof lease which the tribunal has determined must be acquired in its entirety" I am left with the suspicion words such as "if at all" were accidentally omitted from the end of that phrase. The LVT may have fallen into the understandable trap of failing to distinguish between Mr Johnson's submissions, with which it agreed in paragraph 44, and what was actually before it on the application. However, Mr Johnson is right to say that whether or not the LVT actually intended to determine the point, it certainly looks as if it has done so. It seems to me that he is also quite right to say that it was not a point that was properly before the LVT and the LVT was not entitled to determine it. HL's appeal must succeed on this point.

37. Both appeals succeed and this matter must be remitted to the LVT.

Dated 5 January 2011

His Honour Judge David Mole QC
Judge of the Upper Tribunal