Case No: C3/2014/2012

Neutral Citation Number: [2015] EWCA Civ 1294
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Judge Edward Cousins
[2014] UKUT 0074 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2015

Before :

LORD JUSTICE JACKSON
LORD JUSTICE McCOMBE
and
SIR COLIN RIMER

- -

Between :

SAMANTHA TIBBER	**Appellant**
- and -	
(1) DECLAN BUCKLEY	**Respondents**
(2) MATTHEW WILLCOX	

- -
- -

Benedict Sefi (instructed by **Derrick Bridges & Co**) for the **Appellant**
Nicola Muir (instructed on a **Direct Access** basis) for the **Respondents**

Hearing date: 12 November 2015

- -

Judgment

Sir Colin Rimer :

Introduction

1. The appellant is Samantha Tibber. The respondents are Declan Buckley and Matthew Willcox. The appeal is against a decision dated 19 February 2014 by the Upper Tribunal (Lands Chamber) (Judge Edward Cousins) ('the Upper Tribunal') dismissing Ms Tibber's appeal against a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel (Professor J. Driscoll and Mrs Sarah Redmond MRICS) ('the LVT') dated 21 January 2012. Mr Buckley and Mr Willcox ('the applicants') were the applicants before the LVT and Ms Tibber the respondent.

2. The dispute concerns a residential building comprising three flats at 32 Petherton Road, London N5 ('the building'). Ms Tibber is the registered proprietor of the freehold (Title Number 299994). Mr Buckley has a long lease of Flat A and Mr Willcox a long lease of Flat B. Flat C is let by Ms Tibber on an assured shorthold tenancy. On 26 July 2010 the applicants served a notice claiming to acquire the freehold of the building under the provisions of the Leasehold Reform Housing and Urban Development Act 1993 ('the 1993 Act'). On 27 September 2010 Ms Tibber served a counter-notice admitting their right to do so (but not agreeing the proposed price), making proposals for a leaseback to her of Flat C and claiming the right to undertake the future development of Flat C, including by converting it into two units.

3. The issues for the LVT were as to the physical extent of the premises to be comprised in the leaseback to Ms Tibber; whether and, if so, to what extent the leaseback should be on terms departing from those provided for by Part IV of Schedule 9 to the Act; and the resolution of other differences between the parties as to the terms of the leaseback of Flat C. The LVT decided that the premises to be demised by the leaseback were Flat C 'as it currently exists' together with certain rights over the common parts and the front garden area and on terms following those set out in Part IV but including a covenant against the making of alterations by the lessee without the landlord's consent. The LVT rejected as unreasonable certain departures from the Part IV provisions proposed by Ms Tibber.

4. On Ms Tibber's appeal, the Upper Tribunal said that the LVT had erred in its approach to the issues and held that the correct solution to them was that the limit of Ms Tibber's entitlement by way of a leaseback was what she had claimed in her counter-notice. To the extent that she was claiming to identify the physical limits of Flat C more broadly than she had in the counter-notice, she was not entitled to do so; nor was she entitled to propose departures from the Part IV provisions when she had not specified them in her counter-notice. The Upper Tribunal dismissed Ms Tibber's appeal.

5. By her appeal Ms Tibber asserts that neither tribunal below gave proper consideration to her case. She criticised the Upper Tribunal's approach as over restrictive and wrong and criticised both tribunals for having provided insufficient reasons for their decisions. Her case is (inter alia) that (i) she is entitled to a leaseback of the true physical extent of Flat C and that it matters not that the counter-notice did not expressly identify the full limits of what she claims is such extent; (ii) that the Upper Tribunal was wrong to determine that any proposed departures from the Part IV provisions must be specified in the counter-notice; and (iii) that there was no good

reason for the tribunals below not to hold her entitled to the lease terms she claimed. The Upper Tribunal refused permission to appeal but Lewison LJ granted it on limited grounds.

6. The commercial heart of the dispute is Ms Tibber's wish, following the grant of the leaseback, to convert the two upper floors of the building (which include Flat C) into two separate flats, an exercise which would (inter alia) involve changes to the roof structure and a need for the leaseback to include a provision appurtenant to Flat C for the placing of a sufficient number of waste bins at street level in the garden area at the front of the building. Ms Tibber wants a leaseback of premises that will entitle her to carry out such a development – whether or not the applicants agree with her proposals – but subject, however, to the need to obtain their consent (as the 'nominee purchaser') to any structural changes to the building, such consent not to be unreasonably withheld. The effect of the decisions of the tribunals below is that she will not be able to carry out the development without the agreement of the applicants.

7. The appeal raises general questions as to the requirements imposed by the 1993 Act in relation to the making in a counter-notice of proposals by the freeholder for a leaseback of a flat or other unit in a building; and particular questions as to the effect of the leaseback proposals made by Ms Tibber in her counter-notice. Before coming to the issues I shall: (i) explain the structure of the building and summarise the material provisions of the existing leases; (ii) refer to the material provisions of the 1993 Act; (iii) refer to the notice and counter-notice that the parties served; (iv) summarise the decision of the LVT; and (v) summarise the decision of the Upper Tribunal.

The building and the existing leases

8. The building is a five-floor terraced house within which three flats have been constructed. Flat A is in the basement and on the ground floor and was on 30 August 1978 the subject of a 99-year lease dated 30 August 1978. Its main entrance is from the communal hall at ground floor level but it has its own separate entrance in the basement. Its gross internal area ('GIA') is about 1,200 square feet. The demised premises were described in the lease as 'the lower maisonette comprising the semi-basement and ground floor of the building … up to and including the ceiling of the ground floor and the internal and external walls up to the same level and the foundations thereof' and also 'the garden land situate at the rear of the building and the area at the front of the building …'. The front area here referred to is a basement area: it is not part of the front garden of the building, which is at street level. The rights granted to the lessee included the right of passage on foot over the common parts of the building in common with the landlord and other occupiers. By clause 3 of and paragraph 5 of the 'Schedule of Tenant's Further Covenants' to the lease, the tenant covenanted to keep the interior and exterior of the demised premises in good condition and substantial repair and also, every three years, to paint such exterior parts as ought to be painted. On 15 November 2006, Mr Buckley surrendered the 1978 lease to Ms Tibber, who granted him a new 161-year lease from 24 June 2006 on (so far as material) the same terms as the 1978 lease. The 2006 lease is registered under Title Number NGL876289.

9. Flat B is a first floor flat and is subject to a 99-year lease dated 26 September 1984. Its GIA is about 492 square feet. The demised premises were described in the lease as

'… the first floor flat of the Building … including the floor of the flat and joists upon which the floors are laid and including the materials forming the ceilings of the flat but not the joists to which such ceiling is attached and the internal and external walls between the first floor and the second floor levels …'. The rights granted by the lease include the like rights of passage on foot over the common parts as were granted to the Flat A lessee and 'the right to place and use one dustbin in the area to be provided in the front garden forming part of the building and the right to gain access to such dustbin area over such front garden.' By clause 3 of and paragraph 4 of the 'Schedule of Tenant's Further Covenants' to the lease, the tenant assumed similar obligations to repair the interior and exterior of the demised premises as I have described in relation to the lease of Flat A. Mr Willcox's lease is registered under Title No NGL516465.

10. Flat C is on the second floor of the building and an additional third floor formed in the loft space. It has dormer windows built out of the roof. Access between its two floors is by an internal staircase. Its GIA is about 1,200 square feet.

11. The 1978 lease of Flat A and the lease of Flat B were both granted by Ms Tibber's father, John Bottrill, then the freeholder, who retained Flat C. He transferred the freehold to Ms Tibber in 1999, her title as proprietor was registered on 11 January 2000 and at about the same time she moved into Flat C. Ms Tibber occupied Flat C until 2009, when she moved out, and it has since been let by her on one or more assured shorthold tenancies. It was so let at the times both of the service of the applicants' notice to acquire the freehold and her counter-notice. Ms Tibber did not produce to the tribunals below the shorthold tenancy agreement for Flat C and so they were unaware of how the premises comprising Flat C were described in it or what the letting terms were. This court is in the like position.

12. At the front of the exterior of the building, at street level, there is a small garden area which does not form part of the premises demised by either of the leases of Flat A or Flat B. It includes a planted area and a partly fenced dustbin area situated by the path entrance leading down a step to Flat A's basement entrance and by the steps leading up to the main entrance. At the rear of the interior of the building there is a communal staircase with half-landings between the floors. The mezzanine landing is a half-landing between the ground and first floors. It has a large window which allows light into the common parts. Both Flats B and C are accessed at first floor landing level. Part of the mezzanine landing has been used for storage purposes, although the evidence about this is limited. Mr Bottrill's evidence in a witness statement of 5 August 2011 is that, prior to the grant of the lease of Flat B in 1984, that part had been partitioned off from the staircase by way of a 'wooden and half glass door and lightweight wooden surround' but he said that the partition was removed when Flat B was created as a self-contained flat in 1984. The whole mezzanine landing now forms part of the common stairway, although his evidence was that at some stage after the removal of the partition a chest of drawers was placed on it and that 'Thereafter it was used by the top flat to keep bicycles and other such items and this has continued up to the present time. It has never been used by either of the other two flats'. He said that the front garden area was excluded from the leases of Flats A and B as it would be needed to provide an area for the placing of dustbins for each of Flats A, B and C. Bins for the three flats were kept there until about 2000, when Mr Buckley (the tenant of Flat A) moved them onto the front steps. Mr Buckley also created a planted area in the front garden.

13. Evidence to slightly different effect in relation to the mezzanine landing was given by Mr Buckley in his witness statement of 10 August 2011. He said that when he moved into Flat A in February 1999, the landing was not used for any storage and was an empty space, although in about 2003 the Flat B tenant used it for a short while for storing a bicycle. He accepts that from about 2004 what he called a sideboard was stored there (presumably what Mr Bottrill called a chest): it had, at his request to Ms Tibber, been removed from the entrance hall, where he considered it created a bad impression for visitors. He says it was removed from the landing in about 2009, when the Flat C tenants began to store bicycles there. Mr Buckley says that he repositioned the bins in the front garden area in about 1999. At about the same time he removed a Leyland cypress tree and a hedge from the garden area, which he says were never maintained and impaired his light. He replanted the garden area at a cost of several hundred pounds, which he said received Ms Tibber's admiration, she by then occupying Flat C.

14. It may be helpful to note at this point that, before the tribunals below, Ms Tibber was contending for a leaseback of Flat C, with its physical limits including its external walls, the roof, roof structure and its windows and also (i) that part of the mezzanine landing formerly partitioned off, and (ii) the front garden area. It is important to Ms Tibber that the leaseback should include the roof structure since her intention to divide Flat C into two flats probably cannot be achieved if it does not. If the leaseback was not to include the mezzanine area, Ms Tibber claimed in the alternative that it should include an easement appurtenant to Flat C for the storage there of bicycles and other items; and if the leaseback was not to include the garden area, she claimed it should include an easement appurtenant to Flat C for the storage there of dustbins on the part currently designated for bins and for bicycles elsewhere. It is agreed that, at least since about 1999, bins for the three flats have been kept on the front steps, with a post and bar in place to prevent them falling into the basement area.

15. Whilst the Flat A lease specified that its lessee was liable to contribute 50% of the landlord's costs of maintaining the common parts of and services to the building, and the Flat B lease provided for a 20% contribution, there has in practice been an informal arrangement under which Flat A contributes 40%, Flat B 20% and Flat C 40%. These contributions reflect the GIA of each flat. They did not also extend to the cost of the repair and maintenance of the structure and exterior of the building: the Flat A lessee was responsible in that respect for that part of the structure and exterior demised by his lease; and the Flat B lessee was similarly responsible in respect of the part of the structure and exterior demised by his lease. I presume that Ms Tibber has always assumed responsibility for the structure and exterior of Flat C: when Flat C became subject to the shorthold tenancies, she would have been so responsible under the provisions of section 11 of the Landlord and Tenant Act 1985.

The legislation

16. Chapter 1 of the 1993 Act confers on 'qualifying tenants' of 'flats' in premises to which the Act applies the right to acquire the freehold of the premises (it is known as 'the right to collective enfranchisement'). The right extends, by section 1(3), to 'appurtenant property' demised by a lease held by a qualifying tenant or to property which any such tenant is entitled under his lease to use in common with the occupiers of other premises (whether or not those premises are contained in the relevant premises); 'appurtenant property' is defined by section 1(7) as meaning 'any garage,

outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the flat.' A 'flat' is defined in section 101(1) as meaning:

> 'a separate set of premises (whether or not on the same floor) –
>
> (a) which forms part of a building, and
>
> (b) which is constructed or adapted for use for the purposes of a dwelling, and
>
> (c) either the whole or a material part of which lies above or below some other part of the building.'

17. By section 3, the 'premises' to which Chapter I applies are any premises consisting of a self-contained building or part of a building which contain two or more flats held by qualifying tenants and in which the total number of flats held by such tenants is not less than two-thirds of the total number of flats in the premises. By section 5, a person is a 'qualifying tenant' of a flat if he is a tenant of it under a long lease.

18. A claim by qualifying tenants to exercise the right of collective enfranchisement is made by giving the reversioner an 'initial notice' under section 13, which provides materially:

> '(3) 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 the specified premises or of any such property so far as falling within section 1(3)(a);
>
> (b) contain a statement of the grounds on which it is claimed that the specified premises are, on the relevant date, premises to which this Chapter applies; …
>
> (c) specify –
>
> (i) any leasehold interest proposed to be acquired under or by virtue of section 2(1)(a) or (b), and
>
> (ii) any flats or other units contained in the premises to which it is considered that any of the requirements in Part II of Schedule 9 to this Act are applicable;
>
> (d) specify the proposed purchase price for each of the following, namely –

(i) the freehold interest in the specified premises, or, if the freehold of the whole of the specified premises is not owned by the same person, each of the freehold interests in those premises

(ii) the freehold interest in any property specified under paragraph (a)(ii) …'

19. Section 21 provides for the giving by the reversioner of a counter-notice by a date specified in the initial notice. It provides materially:

'(2) The counter-notice must comply with one of the following requirements, namely –

(a) state that the reversioner admits that the participating tenants were on the relevant date entitled to exercise the right to collective enfranchisement in relation to the specified premises; …

(3) If the counter-notice complies with the requirement set out in subsection (2)(a), it must in addition –

(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, and specify –

(i) in relation to any proposal which is not so accepted, the reversioner's counter-proposal, and

(ii) any additional leaseback proposals by the reversioner; …

(7) The reference in subsection (3)(a)(ii) to additional leaseback proposals is a reference to proposals which relate to the leasing back, in accordance with section 36 and Schedule 9, of flats or other units contained in the specified premises and which are made either –

(a) in respect of flats or other units in relation to which Part II of that Schedule is applicable but which were not specified in the initial notice under section 13(3)(c)(ii), or

(b) in respect of flats or other units in relation to which Part III of that Schedule is applicable. …'

20. Section 36 ('Nominee purchaser required to grant leases back to former freeholder in certain circumstances') provides:

'(1) In connection with the acquisition by him of a freehold interest in the specified premises, the nominee purchaser shall grant to the person from whom the interest is acquired such leases of flats or other units contained in those premises as are required to be so granted by virtue of Part II or III of Schedule 9.

(2) Any such lease shall be granted so as to take effect immediately after the acquisition by the nominee purchaser of the freehold interest concerned.

(3) Where any flat or other unit demised under any such lease ("the relevant lease") is at the time of that acquisition subject to any existing lease, the relevant lease shall take effect as a lease of the freehold reversion in respect of the flat or other unit.

(4) Part IV of Schedule 9 has effect with respect to the terms of a lease granted in pursuance of Part II or III of that Schedule.'

21. Before coming to Schedule 9, I should refer to the definition of a 'unit' in section 38 (a 'unit' is referred to in the material provisions of the Schedule):

' "unit" means –

(a) a flat

(b) any other separate set of premises which is constructed or adapted for use for the purpose of a dwelling; or

(c) a separate set of premises let, or intended for letting, on a business lease.'

22. Schedule 9 comprises four parts. Part I, 'General', includes the following material provisions:

1. – (1) In this Schedule –

"the appropriate time", in relation to a flat or other unit contained in the specified premises, means the time when the freehold of the flat or other unit is acquired by the nominee purchaser;

"the demised premises", in relation to a lease granted or to be granted in pursuance of Part II or III of this Schedule, means –

(a) the flat or other unit demised or to be demised under the lease, …

"the freeholder", in relation to a flat or other unit contained in the specified premises, means the person who owns the freehold of the flat or other unit immediately before the appropriate time; …

(2) In this Schedule any reference to a flat or other unit, in the context of the grant of a lease of it, includes any yard, garden, garage, outhouses and appurtenances belonging to or usually enjoyed with it and let with it immediately before the appropriate time.'

23. Part II of Schedule 9 ('Mandatory Leaseback') does not apply to this case, but I shall refer to it. Paragraph 2 relates to cases in which, immediately before 'the appropriate time', any flat in the premises is let under a secure tenancy or an introductory tenancy and the freeholder is the tenant's immediate landlord or the freeholder is a public sector landlord and every intermediate landlord of the flat (as well as the immediate landlord under the secure tenancy) is also a public sector landlord. Paragraph 2(3) provides that 'where [paragraph 2] applies, the nominee purchaser shall grant to the freeholder a lease of the flat in accordance with section 36 and paragraph 4 below.'

Paragraph 3 applies similar provisions to the case in which the flat is let by a housing association under a tenancy other than a secure tenancy. Paragraph 4 ('Provisions as to terms of lease') provides for any lease granted to the freeholder pursuant to paragraphs 2 or 3 to conform with the provisions of Part IV of Schedule 9 save to the extent that any departure from them is agreed to by the nominee purchaser and the freeholder with the approval of a leasehold valuation tribunal. Section 13(3)(c)(ii) (see paragraph 18 above) requires the initial notice to specify 'any flats or other units contained in the specified premises in relation to which it is considered that any of the requirements in Part II of Schedule 9 … are applicable.'

24. Part III of Schedule 9 ('Right of Freeholder to Require Leaseback of Certain Units') is the relevant Part for present purposes. Paragraph 5 ('Flats without qualifying tenants and other units') provides:

> '5. –(1) Subject to paragraph (3), this paragraph applies to any unit falling within sub-paragraph (1A) which is not immediately before the appropriate time a flat let to a person who is a qualifying tenant of it.
>
> (1A) A unit falls within this sub-paragraph if –
>
> (a) the freehold of the whole of it is owned by the same person, and
>
> (b) it is contained in the specified premises.
>
> (2) Where this paragraph applies, the nominee purchaser shall, if the freeholder by notice requires him to do so, grant to the freeholder a lease of the unit in accordance with section 36 and paragraph 7 below.
>
> (3) This paragraph does not apply to a flat or unit to which paragraph 2 or 3 applies.'

25. Paragraph 6 ('Flat etc. occupied by resident landlord') is not applicable to the present case, as Flat C is not occupied by Ms Tibber as a 'qualifying tenant'. I shall, however, set out the material parts of paragraph 6:

> '6. –(1) Sub-paragraph (2) applies where, immediately before the freehold of a flat or other unit contained in the specified premises is acquired by the nominee purchaser –
>
> (a) those premises are premises with a resident landlord by virtue of the occupation of the flat or other unit by the freeholder of it, and
>
> (b) the freeholder of the flat or other unit is a qualifying tenant of it.
>
> (2) If the freeholder of the flat or other unit ("the relevant unit") by notice requires the nominee purchaser to do so, the nominee purchaser shall grant to the freeholder a lease of the relevant unit in accordance with section 36 and paragraph 7 below; and on the grant of such a lease to the freeholder, he shall be deemed to have surrendered any lease of the relevant unit held by him immediately before the appropriate time. …'

26. Paragraph 7 ('Provisions as to terms of lease') provides:

'7. – (1) Any lease granted to the freeholder in pursuance of paragraph 5 or 6, and any agreement collateral to it, shall conform with the provisions of Part IV of this Schedule except to the extent that any departure from those provisions –

(a) is agreed to by the nominee purchaser and the freeholder; or

(b) is directed by a leasehold valuation tribunal on an application made by either of those persons.

(2) A leasehold valuation tribunal shall not direct any such departure from those provisions unless it appears to the tribunal that it is reasonable in the circumstances.

(3) In determining whether any such departure is reasonable in the circumstances, the tribunal shall have particular regard to the interests of any person who will be the tenant of the flat or other unit in question under a lease inferior to the lease to be granted to the freeholder.

(4) Subject to the preceding provision of this paragraph, any such lease or agreement as is mentioned in sub-paragraph (1) may include such terms as are reasonable in the circumstances.'

27. Part IV of Schedule 9 ('Terms of Lease Granted to Freeholder') provides in paragraphs 8 to 18 inclusive for the terms, or for the general nature of the terms, of the leaseback ('the Part IV provisions'). I shall not set them all out, but shall cite the material ones and refer to others for their general effect.

28. Paragraph 8 provides that the 'The lease shall be a lease granted for a term of 999 years at a peppercorn rent'. Paragraph 9 provides that (save for an immaterial exception) 'The lease shall not exclude or restrict the general words implied under section 62 of the Law of Property Act 1925, …'. Paragraph 9A provides for the extent to which the lessor shall be required to enter into covenants for title. Paragraph 10 provides for the inclusion of rights of support, access for light and air and the passage of water etc and includes (inter alia) a provision for the inclusion in the leaseback of 'such further easements and rights (if any) as are necessary for the reasonable enjoyment of the demised premises …'. Paragraph 12 ('Common use of premises and facilities') provides that:

'The lease shall include, so far as the lessor is capable of granting them, the like rights to use in common with others any premises, facilities or services as are enjoyed immediately before the appropriate time by any tenant of the demised premises'

Paragraph 14 ('Covenants by lessor') provides for the lease to include (inter alia) covenants by the lessor 'to keep in repair the structure and exterior of the demised premises and the specified premises (including drains, gutters and external pipes) and to make good any defect affecting that structure'. Paragraph 15 requires the inclusion of a covenant by the lessee 'to ensure that the interior of the demised premises is kept in good repair (including decorative repair)'. Paragraph 16 provides for the lessee to bear a reasonable part of the costs incurred by the lessor in discharging his paragraph

14 obligations. Finally, paragraph 17 ('Assignment and sub-letting of premises') provides:

> '17. – (1) Except where the demised premises consist of or include any unit let or intended for letting on a business lease, the lease shall not include any provision prohibiting or restricting the assignment of the lease or the sub-letting of the whole or part of the demised premises.
>
> (2) Where the demised premises consist of or include any such unit as is mentioned in sub-paragraph (1), the lease shall contain a prohibition against –
>
> (a) assigning or sub-letting the whole or part of any such unit, or
>
> (b) altering the user of any such unit,
>
> without the prior written consent of the lessor (such consent not to be unreasonably withheld).'

The applicants' initial notice; and Ms Tibber's counter- notice

29. The applicants served their section 13 'initial notice' of their claim to acquire the freehold of the building on 26 July 2010. It stated (inter alia):

> '1. The Specified Premises
>
> The premises of which the freehold is proposed to be acquired by virtue of section 1(1) of the Act is shown edged in red on the accompanying plans and known as 32 Petherton Road, London N5 2RE of which [Ms Tibber] is the registered freehold proprietor registered with Title Number 299994.
>
> 2. Additional Freeholds
>
> The property of which the freehold is proposed to be acquired by virtue of section 1(2)(a) of the Act are shown edged green on the accompanying plans and known as: (i) rear garden (ii) front garden/lightwell.'

The notice identified Mr Buckley and Mr Willcox as 'the nominee purchaser' for the purposes of the acquisition. It did not identify any flat or other unit to which Part II of Schedule 9 might apply and which was required to be the subject of a leaseback: that is because there were none.

30. Ms Tibber served her section 21 counter-notice on 27 September 2010. It stated, so far as material:

> '… The reversioner admits that on the date the initial notice was given, the participating tenants were entitled to exercise the right to collective enfranchisement in relation to the specified premises.
>
> The reversioner accepts the following proposals contained in the initial notice: Save as set out in the remainder of this Counter-notice the reversioner agrees paragraphs 1, 2, 3, 4, 5, 6, 8, 9 10 and 11 of the initial notice ….

> The reversioner does not accept the following proposals contained in the initial notice: (i) The purchase price of £12,450; (ii) That the proposals contain no provision for a leaseback to the reversioner of the 2nd and 3rd floor flat at the property
>
> The reversioner makes the following counter-proposals to each of the proposals which are not accepted:
>
> (i) £21,500 for the freehold interest in the premises set out at paragraph 1 above; and
>
> (ii) £1,000 for the appurtenant property set out in paragraph 2 above
>
> (iii) A leaseback of the 2nd and 3rd floor flat in the terms of the additional leasehold proposals below.
>
> [I read the references to paragraphs 1 and 2 as references to those paragraphs in the initial notice, quoted above: there are no paragraph numbers in the counter-notice]
>
> The reversioner makes the following additional leaseback proposals:
>
> 1. A leaseback in the terms of Schedule 9 Part IV of [the 1993 Act] in respect of the second and third floors of 32 Petherton Road aforesaid shown edged red on the attached plans marked "A" and "B" (including all roofs and any windows therein) and the staircase leading thereto from the first floor on the attached plan marked "C" together with:-
>
> 2. The right to undertake future development of the upper flat including enlargement of or addition to the dormer windows and/or conversion of the property into two separate units and any consequential alteration to the roof line and
>
> The right to place a dustbin and a bicycle in the communal front garden area …'.

31. It is to be noted that, although Ms Tibber's case is that the demised premises under the leaseback should include part of the mezzanine landing and the whole of the front garden, she did not ask expressly for either in the verbal parts of her counter-notice, nor did she identify either area as part of leaseback premises on her attached plans. Her claim for a storage easement in respect of the 'communal front garden area' can also be said to have been positively inconsistent with any suggestion that she was implicitly claiming that that area should be part of the premises comprised in the leaseback. Further, although she asked specifically for the roofs and windows to be included in the leaseback, she did not also ask for the exterior walls to be included.

The decision of the LVT

32. The parties could not agree the terms of the leaseback and so the applicants applied to the LVT on 24 March 2011 to resolve the differences. The parties had in the meantime agreed a price for the Specified Premises and the Additional Freeholds. The hearing commenced on 16 August 2011, when the LVT orally determined that the premises to be comprised in the leaseback would be 'Flat C itself, and that neither the

front garden, nor the internal common parts (or any part of them) can form part of the demise'. The LVT also determined 'that it is unnecessary to include a specific easement for the internal parking of bicycles' and recorded that 'it is agreed that the leaseback of Flat C will include the right to place a rubbish bin in the bin area of the front garden of the building.' The LVT adjourned the application so as to enable the parties to attempt to agree the other terms of the leaseback, including the terms of any easements necessary for the enjoyment of Flat C.

33. In the preceding paragraph, the quoted summaries of the oral determination are taken from the LVT's Case Officer's letter to the parties of 18 August 2011. Whilst that summary of the ruling made clear that no part of the mezzanine area or the front garden area were to be included in the leaseback, it did not deal explicitly with whether the roof, roof structure, windows and external walls were to be included. Mr Sefi, for Ms Tibber, informed us that the reason for that was that there had been no dispute at the August 2011 hearing that the leaseback of Flat C *would* include the external walls, roof and roof structure. In support, he referred to a November 2011 draft lease produced by the applicants, in which the *habendum* included the internal and external walls, roof and roof structure. That draft proposed amendments to an earlier draft, and in particular proposed a deletion of Ms Tibber's proposal that the demise should include 'such of the airspace as is contiguous to the flat'.

34. On 1 November 2011, Mr Sefi provided a written response to the Case Officer's letter. It did not question the accuracy of what the letter had said. It said that a further oral hearing was unnecessary and that the LVT could decide the outstanding issues on the basis of the oral and written submissions already provided. As to the still disputed issues, Mr Sefi outlined them in a schedule. I refer here only to the ones still material.

35. The first issue was that Mr Sefi sought to re-open Ms Tibber's case (upon which the LVT had ruled against her at the August hearing) that the leaseback should include 'such of the airspace as is contiguous to the flat'. He made no point about the inclusion of the walls and roof structure: that was because his understanding was that there was no dispute about it.

36. The second issue was as to the parties' respective responsibilities for the repair of the building. Whereas the applicants were claiming that they should be responsible for the repair of the whole of the building and communal areas, with a right of recovery of the cost from each leaseholder under service charge provisions, Ms Tibber's case was that each leaseholder should be responsible for the repair of that part of the building comprised in their respective demises.

37. The third issue arose in consequence of the LVT's refusal to include the garden area in the leaseback. Whereas in that event Ms Tibber was claiming the right, appurtenant to Flat C, to place an unlimited number of dustbins in the garden area, the applicants were prepared only to accept a right for her to place one bin there. I have referred above to what the LVT regarded as having been agreed at the August hearing.

38. The fourth issue was whether (as Ms Tibber claimed) she should be liable under the leaseback to contribute only 30% of the costs of maintaining, repairing and renewing the common parts; or whether, as the applicants claimed, she should contribute 40% (those were the respective contentions as to the terms of clause 2(10) of the draft lease).

39. The final issue related to the user covenant in paragraph 1 of the Schedule of Tenant's Covenants in the proposed leaseback. The version advanced by Ms Tibber read:

> 'Not to use the Demised Premises otherwise than as *a residential flat or flats* and without prejudice to the generality of the foregoing not to carry on any trade or business except that of a solicitor or other professional occupation nor for any purpose from which a nuisance can arise to the Landlord tenants or occupiers of the other parts of the Building nor for any illegal or immoral purpose.' (My emphasis)

By contrast, the version advanced by the applicants proposed the deletion of the words 'or flats'. Ms Tibber asserts that the applicants' version would impose a potential inhibition on her ability to split Flat C into two flats. If the unit leased back may only be used (inter alia) as "a residential flat", its use as two residential flats might be a breach of covenant.

40. The parties could not agree the terms of the leaseback and the matter returned to the LVT on 16 January 2012 for a further hearing. By then, the applicants' position as regards the physical extent of the premises to be comprised in the leaseback had changed. They had produced an amended draft lease, of which the *habendum* now excluded from the leaseback premises the external walls, roof and roof structure and window frames of Flat C. These new issues fell to be decided at the renewed hearing.

41. The further hearing occupied 16 January 2012 and the LVT delivered their written decision on 21 January 2012. In paragraph 6, they described the dispute as 'the extent of the demise under the leaseback of Flat C; and proposed departures from the provisions in [Part IV of] Schedule 9 to the Act.' They explained as follows the outcome of the earlier hearing in August 2011:

> '10. We were told that the sole issue to be determined are the terms of the leaseback. In summary, the nominee purchasers submit the terms should be those specified in Part IV of Schedule 9 to the Act ("the standard terms"). However, the freeholder submits that there should be several departures from those terms. She also submitted that Flat C should include in the demise the roof and airspace of the specified premises, parts of the common parts and the front garden.
>
> 11. By the close of that hearing, we told the parties that we concluded that the demise should only include Flat C as it currently exists with rights over the common parts and the garden and front entrance of the specified premises. We expressed the hope that the parties could now agree the drafting of the terms of the leaseback of this flat in accordance with the standard terms.
>
> 12. Accordingly we adjourned the hearing of the application and we gave the parties the option of seeking a further hearing if they were unable to agree on the drafting of the terms of the leaseback. …'.

42. In paragraphs 26 and 27, the LVT explained their decision as to the premises to be comprised in the leaseback and set out their reasons for that decision. They said:

> '26. Our decisions were summarised at the beginning of this decision: the demise of Flat C is only the demise of the Flat as it currently exists with rights

over the common parts and the front garden, on the basis of the standard terms [a reference to the Part IV provisions] with a term forbidding alterations without the consent of the landlord.

27. Here we set out our reasons for these conclusions. We deal first with the demise proposed by the freeholder. To this we repeat what we told the parties at the first hearing. Flat C are separate premises which form part of a building, were constructed and adapted for use as a dwelling and where the whole lies above and below some other part of the building (see the definition of a "flat" in section 101(1) of the Act). Whilst the freeholder is clearly entitled to exercise the right to the leaseback of this Flat, as it is not held on a qualifying tenancy, she is not entitled to claim a demise larger than the current flat. In particular she is not entitled to include the roof (nor logically the airspace above it). For the sake of clarity we consider that the demise does not include any part of the front garden. Further the valuation was agreed on the basis that there would be a leaseback of Flat C so to allow a demise larger than the current flat would carry implications for valuation.'

43. The LVT turned to the terms of the leaseback of Flat C. They said the terms must include provisions allowing for the common use of the internal common parts and the front garden, including the right (as existed at present) to 'station a dustbin or two in the space in the front of the building where the bins have been stationed for several years.' I read 'a dustbin or two' as meaning that Flat C must be entitled to station 'up to two dustbins' in the relevant area. There was, however, to be no right to park a bicycle in any part of the common parts of the building, which would obstruct the use of the common parts and was anyway unnecessary as, the LVT said, 'the lessee can park a bicycle in the flat or outside the building.' The LVT did not, however, identify what it meant by 'outside the building'. If they meant the front garden, were they thereby increasing the nature of Flat C's garden easement? They did not make that expressly clear, nor did they indicate where in the garden bicycles might be left. They held that Ms Tibber was not entitled to have a statement in the leaseback of her intention to develop the flat into two separate flats: she would anyway be entitled to apply for such planning permission. They rejected her proposal that there should be no covenant against alterations, saying that landlords almost invariably reserve the right to control alterations, for example so as to prevent the leaseholder from altering the flat in such a way as might affect the structural integrity of the building. The landlord must also be entitled to control alterations to the premises as it would be responsible for their repair and upkeep.

44. The LVT rejected as unrealistic Ms Tibber's proposals for the upkeep of the building and in relation to service charges. These were to the effect that the landlord's repairing covenant should extend only to the external areas around Flats A and B, with the lessee of Flat C having the repairing obligations for the remainder of the building and paying a service charge commensurate with the assumption of those obligations. The LVT said:

'31. … we conclude that the standard covenant in paragraph 14 of Schedule 9 should apply as this will ensure that the landlord is responsible in full for the structure and the exterior of the building and for insuring it. To divide up such responsibilities in the way [Mr Sefi] suggested would be cumbersome and complex and might adversely affect the marketability and mortgageability of the

flats. As Ms Muir pointed out it was the difficulties with the current arrangements that led the nominee purchasers to claim the freehold. Mr Sefi was correct, however, (and Ms Muir agrees) that such a leaseback would be inconsistent with the current leases of Flats A and B. We address this in the next paragraph of our decision.

32. Ms Muir also told us that she is instructed to confirm that on completion by the nominee purchasers of the freehold, the lease of Flat C will immediately [be] granted and that on the surrender of the existing leases of Flats A and B new leases of 999 years at a nominal rent will be granted on the same terms as Flat C so far as the landlord and the lessee covenants are concerned and service charge proportions altered to reflect the current position.'

45. Having held that the standard covenant in paragraph 14 of the Part IV provisions in relation to the maintenance and repair of the structure and exterior of the demised premises and specified premises must apply (that imposes such obligations on the landlord), the LVT held (applying paragraph 16) that the reasonable contribution of Flat C to the landlord's costs in discharging those obligations was two-fifths. They rejected as unrealistic Ms Tibber's proposed departures from the Part IV provisions. They did not deal expressly with her case that paragraph 1 of the Schedule of Tenant's Further Covenants should include the words "or flats" (see paragraph 39 above).

The decision of the Upper Tribunal

46. Ms Tibber appealed against the LVT's determination to the Upper Tribunal. She challenged the LVT's decision as to the physical extent of the unit the subject of the leaseback and also as to certain of the leaseback terms that the LVT had determined. The LVT had refused permission to appeal, but the President of the Upper Tribunal (Lands Chamber) granted permission on 26 June 2012 for the reasons that:

> 'There is a realistic prospect of success on the ground that the LVT was in error in its determination of the extent of the "unit" for the purposes of paragraph 5 of Schedule 9 to the 1993 Act; and the contentions on the terms to be included in the demise are reasonably arguable and the appellant should be permitted to advance them.'

The President directed that the appeal was to be by way of review.

47. Ms Tibber's case on the appeal to the Upper Tribunal was that the leaseback premises should comprise: (i) Flat C, including the external walls, windows, roof, roof structure and air space contiguous with Flat C; (ii) that part of the mezzanine landing formerly partitioned off; and (iii) the front garden. The argument in relation to areas (ii) and (iii) was that they represented 'appurtenances … belonging to' Flat C immediately before 'the appropriate time': see paragraph 1(1) and (2) of Schedule 9.

48. As for the terms of the leaseback, Ms Tibber's case was that whilst she claimed that the structure and exterior of Flat C were to be included in the leaseback, the applicants as freeholders should nevertheless be responsible for their repair and maintenance although she would be liable for an appropriate proportion of the cost of such works. By contrast, the applicants' position remained what the LVT decided, namely that the

structure and exterior of Flat C should be retained by the freeholders, who should be responsible for the repair and maintenance of the whole building subject to the payment of a service charge by all lessees.

49. Ms Tibber also re-opened the question of the service charges in relation to the internal common parts of the building. Her position was that she should pay 30% of the charge because under the current leases Flat A pays 50% and Flat B pays 20%. The applicants' position was that as Flat C occupies 40% of the building it should bear 40% of the service charge, which is what the LVT had held.

50. If, contrary to her case, no part of the mezzanine landing was to be included in the leaseback, Ms Tibber wanted Flat C to have the benefit of an easement entitling her to store bicycles and other such items there. If the front garden was not to be included in the leaseback, she wanted Flat C to have the benefit of an easement entitling her to place bins and bicycles there. She also raised again the 'or flats' issue, which the LVT had not decided.

51. The hearing before the Upper Tribunal took place on 26 November 2013 and Judge Cousins handed down his reserved decision on 19 February 2014. In paragraph 6, he emphasised that his decision was limited to the grounds of appeal specified by the President, namely as to the extent of the unit the subject of the leaseback and the terms of the leaseback. He then, in paragraph 7, identified a preliminary point that required decision, namely 'whether [Ms Tibber] can rely upon the "departures" from the original terms of the Counter-notice, or whether she is constrained by its original phraseology.'

52. Judge Cousins referred to the provision in section 21(3)(a)(ii) of the Act by which a counter-notice 'must … specify … any additional leaseback proposals by the reversioner.' He said the language was mandatory and sets out what the reversioner must do. In paragraph 16, he quoted Ms Tibber's leaseback proposal in her counter-notice (see paragraph 30 above), and said:

> '17. The claim was therefore limited in scope to Flat C itself, together with the roofs and windows, and the staircase leading to it. At the stage of the Counter-Notice the claim therefore did not extend to the exterior walls of the flat, the front garden, or the area on the half-landing between the ground floor and the first floor for storage purposes (referred to as "the Mezzanine Landing"). Prior to the grant of the lease to Flat B in 1984 part of the Mezzanine Landing had been partitioned from the staircase and used for storage, but according to the evidence of Mr Bottrill it was removed probably in about 1984 in order to comply with fire regulations.

Judge Cousins noted, in paragraph 19, that the applicants' case was that as the counter-notice had not claimed a leaseback of these various areas, it was now too late for Ms Tibber to extend her claim to include them. He explained that the LVT ruled at the first hearing before it that the leaseback premises would be confined to 'Flat C itself' and would not include them.

53. After summarising the history of the proceedings in the LVT and the issues that were argued before him, Judge Cousins explained his decision in paragraphs 42 to 53. He first rejected a case made by Ms Tibber that the proceedings before the LVT had been

tainted by procedural irregularity and unfairness, a case Ms Tibber has not been permitted to re-open on this appeal.

54. Judge Cousins then dealt succinctly with the substantive issues raised by the appeal. He noted again the mandatory nature of the statutory language in section 21(3)(a)(ii) and that the Act makes no provision for the amendment of a counter-notice. The mandatory requirements include the need for the reversioner to 'specify … any additional leaseback proposals'. If the counter-notice does not contain a leaseback proposal, the opportunity to make one will be lost and cannot be exercised subsequently. He concluded his reasoning for dismissing the appeal as follows:

> '52. In the present case [Ms Tibber] did specify some leaseback proposals in the Counter-Notice, but these were limited in scope to those specified i.e. Flat C itself, together with the roofs and windows, and the staircase leading to it. Although during the hearing Counsel for the Respondents urged that as some of the proposed departures from the standard provisions were claimed after the Counter-Notice had been served, the LVT should not consider them based upon the decision of the Court of Appeal in the case of *Cawthorne v. Hamdan* [2007] EWCA Civ 6; [2007] 2 WLR 185. However, the LVT chose to consider all the departures sought by [Ms Tibber] and decided that these departures from the standard terms were not reasonable or practical in the circumstances. In paragraph 34 of the Decision the LVT came to the conclusion that it did not have to reach a conclusion on the submission made by Counsel for the Appellant [sic: must mean for the respondents, i.e. the applicants] that the proposed departures from the standard terms should not be permitted under the principles set out above.
>
> 53. In my judgment I consider that the LVT in its analysis of the effect of the terms of the Counter-Notice was incorrect in its approach. The statutory language is mandatory in its effect, and I find that [Ms Tibber] should have clearly specified in detail her leaseback proposals in the Counter-Notice. This she did not do. Subsequently during the First and Second Stages of the hearing she has attempted to rely upon a number of departures from the standard terms. In my judgment that [sic] this was too late and the opportunity was missed. Thus in this review I consider that she is in principle bound by the terms of what has been specified in the Counter-Notice and her claim is limited to the proposals therein set out.
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> 54. I therefore dismiss the appeal.'

The appeal to this court

55. With respect to the tribunals below, I do not regard either as having giving sufficient reasons for certain aspects of their decisions. First, I do not understand the reasoning that drove the LVT to hold that leaseback of Flat C could not include the roof or roof structure. In paragraph 27 of their decision, they appear to have proceeded from the premise that Flat C was a flat or unit that did not include the roof, which may have been right, but it was anyway unexplained. They misquoted section 101(1) of the 1993 Act by wrongly summarising it as defining a flat as a set of premises 'where the whole lies above *and* below some other part of the building' (my emphasis). The section in fact reads 'and either the whole or a material part of which lies above *or* below some other part of the building' (again my emphasis). If their understanding

was that the whole had to be below some other part of the building, that might explain their view that Flat C did not include the roof. But if that was not their understanding, they nowhere explain why it did or could not do so.

56. Nor do they explain why the exterior walls were not part of Flat C: and, by way of comparison, the exterior walls of Flats A and B *did* form part of the premises demised by their respective leases. The LVT gave no reasons why neither any part of the mezzanine landing nor the front garden formed part of Flat C: they may have thought the contrary proposition to be obviously wrong, but they should at least have dealt briefly with the case. Their statement in paragraph 28 that the lessee of Flat C could park a bicycle 'outside the building' is also unexplained: if they meant it could be parked in the garden area, it is unclear either whereabouts or on what basis they were so holding, (and there was also no evidence that bicycles had ever been left there).

57. Their conclusion that there was to be no right to park a bicycle on the mezzanine landing was also unreasoned: the evidence was that the Flat C tenants had kept bicycles there, which might be thought to merit brief reasoning as to why the leaseback should not enjoy a like right (perhaps by force of section 62 of the Law of Property Act 1925). The LVT did not even refer to the 'or flats' point. I consider, however, that they dealt sufficiently in their decision with the issues as to the respective upkeep and repairing obligations under the leaseback and as to the proportions (two fifths) in which the lessees should contribute to their cost.

58. In the Upper Tribunal, Judge Cousins disposed of the appeal on the narrow ground that Ms Tibber was not entitled to ask for anything for which she had not asked in her counter-notice, which also ruled out any bid to depart from the Part IV provisions. Ms Muir told us that she had not submitted to the Upper Tribunal that it was not open to Ms Tibber to argue for terms of the proposed leaseback not specified in the counter-notice, although Judge Cousins appears to have understood otherwise (see paragraph 52 of his decision, quoted above). Nor did she so submit to us, although she did say that she made no concession that a freeholder in Ms Tibber's position was entitled to argue for terms (or at any rate for departures from the Part IV provisions) not specified in the counter-notice. One of the issues, however, before the Upper Tribunal was the claim to store (inter alia) a bicycle in the front garden, which I interpret the LVT as having rejected and which *had* been claimed in the counter-notice, yet Judge Cousins did not deal with it (that was not in fact a proposed 'departure' from the Part IV provisions: it was simply a bid to give effect to paragraph 10(a)(ii) of those provisions, which provides for the inclusion of 'such further easements and rights (if any) as are necessary for the reasonable enjoyment of the demised premises'). Nor did he deal with Ms Tibber's claim that Flat C should comprise the roof and roof structure, which had also been raised in the counter-notice and was in issue before him.

59. I consider, therefore, that Ms Tibber's case did not receive the full consideration that she might reasonably have expected of the tribunals below. Before this court Mr Sefi advanced her case under several heads and I shall deal with each in turn. The first general matter I shall deal with is whether it is open to a freeholder to ask for the premises to be demised by a leaseback to include parts not specified in the counter-notice; and/or for the terms of the leaseback to depart from the Part IV provisions when such departures have not been identified in the counter-notice.

60. Mr Sefi's position was essentially that, provided that a leaseback of identifiable premises has been asked for in the counter-notice, the limits of the premises to be comprised in the leaseback should not be tied to what has been expressly so asked for. The right under section 36 and paragraph 5 of Part III of Schedule 9 is to a leaseback of a flat or unit to which the paragraph applies; and provided the counter-notice sufficiently identifies that flat or unit, the leaseback entitlement is to the whole of it, even if the counter-notice may in part misdescribe it. He also said there was no need for the counter-notice to identify any proposed departures from the Part IV provisions any more than there is a need to identify other leaseback terms that involve no such departure but which may subsequently prove to be the subject of disagreement. They are a matter for negotiation between the parties after the giving of the counter-notice, with, in default of agreement, the LVT having a jurisdiction to resolve any differences.

How far did the terms of her counter-notice tie Ms Tibber's hands?

61. I shall introduce this discussion by reference to this court's decision in *Cawthorne and others v. Hamdan* [2007] EWCA Civ 6; [2007] 2 WLR 185. In that case four out of five qualifying tenants ('the claimant tenants') served an initial notice under section 13 exercising the right of collective enfranchisement. The reversioner's counter-notice stated that there were no additional leaseback proposals. One flat in the building (like Flat C in this case) was the subject of an assured shorthold tenancy. On the eve of the subsequent hearing of the claimant tenants' appeal against the valuation decision, the reversioner purported to serve a leaseback notice in respect of this flat, claiming a right to do so under section 36 and paragraph 5 of Schedule 9.

62. The issue for the court was whether that notice was valid. The claimant tenants' case was that it was not as having been given too late: a reversioner's leaseback proposal had to be contained in the counter-notice and, if it was not, no valid such proposal could be made later. The reversioner's responsive argument was based on paragraph 5 of Schedule 9 (which applies equally to this case), which provides for a right to a leaseback in respect of 'any unit … which is not immediately before the appropriate time a flat let to a person who is a qualifying tenant of it.' Since 'the appropriate time' is defined in paragraph 1(1) of Schedule 9 as '… the time when the freehold of the flat or other unit is acquired by the nominee purchaser' the argument was that a time 'immediately before' such acquisition must post-date the counter-notice. It followed that the giving of the counter-notice cannot be the only opportunity to claim a leaseback – and notwithstanding section 21's mandatory requirements for the counter-notice to make 'any additional leaseback proposals…'.

63. Lloyd LJ, with whom Rix and Mummery LJJ agreed, rejected the reversioner's argument. He said:

> '28. I have come to the conclusion that the reference to the appropriate time, and thereby to the moment before acquisition, does not show that a leaseback notice may be served at any time up to that moment. The consequences of such a reading would be extremely inconvenient, in practical terms, and would also, in my view, be likely to be unfair to the acquiring tenants and would leave the process open to manipulation on the part of the reversioner, in a case in which the initial notice was served before 28 February 2005.

> 29. I do not regard the words of Schedule 9 as compelling a reading which would have that result. One reason for the reference to the appropriate time, as defined, is that the lease will have effect immediately after the acquisition by the nominee purchaser: see section 36(2). In those circumstances it is right that the entitlement of the reversioner to a leaseback should depend on the relevant flat not being, immediately before the acquisition, let on a tenancy under which the tenant is a qualifying tenant. Thus it seems to me that the way in which the statutory scheme works, without giving rise to unreasonable and absurd consequences, is this. If the reversioner wants a leaseback of a flat in respect of which, at the time of the counter-notice, there is not a qualifying tenant, he must say so in his counter-notice. If he does so, then he will be entitled to the leaseback, so long as there is still no qualifying tenant immediately before acquisition by the nominee purchaser. … Thus, the reference to the appropriate time does not extend to that moment the opportunity for the reversioner to serve a leaseback notice if he has not made proposals to that effect in the counter-notice. Rather it imposes a condition subsequent on the entitlement of the reversioner to a leaseback if he has said he wants one in the counter-notice, such that he cannot have it if immediately before the acquisition by the nominee purchaser the relevant flat does have a qualifying tenant.
>
> 30. In effect the sanction for failing to comply with the mandatory requirement to specify leaseback proposals in the counter-notice, at least if the landlord could then have done so, is that the landlord cannot seek a leaseback thereafter. The provision for a leaseback notice is the machinery whereby, in case of dispute, the landlord can ensure that he gets the leaseback, subject to the condition that, immediately before acquisition of the freehold by the nominee purchaser, the relevant flat does not have a qualifying tenant.'

The outcome was that the court held the leaseback notice to be invalid.

64. I did not understand Mr Sefi to argue that the principle in *Cawthorne* remains other than sound and binding, that is that a reversioner has only one chance of claiming a leaseback, namely in his counter-notice. He did, however, refer us to the prior decision of this court in *9 Cornwall Crescent Ltd v. Kensington and Chelsea Royal London Borough Council* [2005] EWCA Civ 324; [2006] 1 WLR 1186, which he said could usefully have been, but was not, cited to the court in *Cawthorne.* With respect to that suggestion, I shall not take time discussing the decision in *9 Cornwall Crescent,* which I regard as casting no relevant light on the very different issue considered in *Cawthorne.*

65. On any footing, however, this case differs from *Cawthorne,* because Ms Tibber *did* claim a leaseback of Flat C in her counter-notice. But one difficulty she faces is that it is said that not only did she not there identify the full extent of the flat she later claimed should be included within the leaseback (namely, part of the mezzanine landing and the front garden), her notice was inconsistent with any suggestion that she was then asking for their inclusion.

66. Mr Sefi's response to this challenge was that section 21(3) should not be read as requiring the reversioner to give a comprehensive description of the flat or unit that is sought to be the subject of the leaseback. If there is any inadequacy, lack of clarity or misdescription in the way the flat or unit the subject of the claimed leaseback is

identified, it must be open to the reversioner to correct the description later. It is anyway the function of the LVT to identify the true physical limits of the relevant flat or unit and so ensure that the reversioner's leaseback provides what he/she is entitled to, which is of the *whole* flat or unit falling within paragraph 5 of Schedule 9.

67. Nor, submitted Mr Sefi, and contrary to the holding of the Upper Tribunal, should section 21(3) be read as requiring the reversioner to spell out in the counter-notice either every proposed term that may depart from the Part IV provisions or any other proposed terms. If these are the requirements of a counter-notice, then in practice it would have to be accompanied either by a draft lease or at least by carefully drawn heads of terms. There is, however, said Mr Sefi, no requirement in section 21(3) to spell out the terms of the proposed leaseback. No reasonable person would so interpret its requirements, nor does the prescribed form for a counter-notice suggest that this is required. The terms (including any proposed departure from the Part IV provisions) will be negotiated in the normal way between the parties, with the LVT having jurisdiction to resolve any differences in default of agreement. Mr Sefi underlined his submission by pointing out that whilst there are provisions in paragraph 15 of Schedule 3 enabling the amendment of an initial notice in certain circumstance, there is no comparable provision enabling the amendment of a counter-notice. The reversioner thus only has one chance to get the counter-notice right, a consideration that is said to justify the adoption of a benevolent approach to its interpretation.

68. Taking first the identification in the counter-notice of the flat or other unit that the reversioner claims should be the subject of a leaseback, this should not ordinarily be a difficult exercise. The reversioner's task is simply to make clear in the counter-notice the identity of the flat or other unit that is the subject of the leaseback claim. The reversioner ought, if he can, to identify its physical limits with as much precision as he can, although this may perhaps be something of a counsel of perfection, since if the reversioner merely describes the flat or unit in more general terms (for example, in the present case, simply as, say, Flat 32C Petherton Road), or otherwise in terms that leave the nominee purchaser in no reasonable doubt as to what flat or other unit is being referred to, then in most cases I consider that that will be likely to be good enough. If in the subsequent drafting of the lease there emerge unresolvable differences between the parties as to the precise limits of the flat or unit the subject of the leaseback, that is a dispute that can be resolved by the LVT under section 91(2)(b) of the 1993 Act, which empowers it to determine any question arising, in default of agreement, as to 'the terms of any lease which is to be granted in accordance with Section 36 and Schedule 9'.

69. There will, however, be cases, in which the counter-notice may misdescribe the true extent of the flat or unit that is the subject of the claimed leaseback: its express description of the physical limits may perhaps omit part of what is in fact comprised within the flat or unit. It is idle to generalise upon the consequences of such hypothetical cases, which will be likely always to turn on their particular facts, although it appears to me that a good starting principle is (i) that section 36 imposes a mandatory obligation upon the claimant tenants to grant leasebacks of such flats or units as are required to be granted by Parts II and/or III of Schedule 9; and (ii) that the flats or units there referred to must, I consider, mean the whole of the relevant flats or units. That does, in my view, tend towards the view that an erroneous misdescription

of the extent of the relevant flat or unit in the counter-notice ought not to stand in the way of the reversioner's right nevertheless to have a leaseback of the whole flat or unit. Questions such as this arise in the present case, and I shall come to them below. But at this still general level of discussion, I consider that it will not be useful to consider hypothetical cases any further.

70. As regards the extent to which the *terms* of any leaseback (that is to say, terms other than as to the premises comprised in the leaseback) need to be specified in the counter-notice (including in particular terms involving departures from the Part IV provisions), Mr Sefi's submission was that it was unnecessary for the counter-notice to refer to any such terms. The terms which the reversioner is asking for will emerge in the subsequent negotiation of the drafting of the lease, about which there may be differences. If there are, and they cannot be resolved by agreement, they can be resolved by the LVT. It is, however, impracticable, said Mr Sefi, to expect the reversioner to detail all his proposed lease terms in the counter-notice, including any terms that may involve a proposed departure from the Part IV terms. He said the legislation cannot sensibly be interpreted as requiring the reversioner to do so.

71. On this second issue, we had no contrary argument from Ms Muir. Whilst the Upper Tribunal appears to have understood otherwise, she told us that she did not argue before it that Ms Tibber was precluded by the terms of her counter-notice from arguing for lease terms, or for departures from the Part IV provisions, that she had not advertised in her counter-notice. Ms Muir also said, however, that she made no concession that Ms Tibber was entitled so to argue: her position was simply that she was not advancing any submission to the contrary effect on this appeal.

72. The absence of contrary argument from Ms Muir on this question has presented us with some difficulty in deciding how to deal with this part of Ms Tibber's case. Ground 2 of Ms Tibber's grounds of appeal, one permitted by Lewison LJ, raises a direct challenge to the Upper Tribunal's adverse ruling on this issue and Lewison LJ presumably gave the permission he did so that this question, which is of some general importance, could be answered. In the event, it does not need to be answered in disposing of this appeal since Ms Muir has not sought to maintain the Upper Tribunal's view in her opposition to Ms Tibber's case: she is content simply to deal with the arguments about the terms on their merits. If, however, the court does not answer it, the legal position will remain as held by the Upper Tribunal. This will be likely to have the consequence that, unless and until a different view is determined upon by this court, reversioners will have to take their guidance from the Upper Tribunal as to what to include in their counter-notice.

73. Although we have not had the benefit of contrary argument, I consider that this court should answer this question of principle. My own reaction to the Upper Tribunal's strict approach is that it is wrong. That being so, I consider that this court should decide the matter with a view to clarifying the position for the benefit of reversioners claiming leasebacks in a counter-notice.

74. In my judgment, beyond identifying in the counter-notice the flat or other unit that is sought to be the subject of a leaseback, there is no need for a reversioner also to spell out in the counter-notice any of his proposed terms of the leaseback. It is to be noted first that, whilst section 13(3)(c)(ii) requires the claimant tenants' initial notice to specify 'any flats or other units contained in the specified premises in relation to

which it is considered that any of the requirements in Part II of Schedule 9' are applicable, nothing in section 13 suggests that the claimant tenants must also specify any terms of the leaseback, or any respects in which they may suggest that the terms should depart from the Part IV provisions. The leaseback will of course have to conform with the Part IV provisions, except to the extent that any departure from them is agreed and also approved by the LVT (see paragraph 4(1) of Schedule 9). But I consider that the plain inference so far from the legislation is that, once such a leaseback has been identified in the initial notice (and Part II leasebacks are mandatory), the negotiation of its terms then falls to be worked out in the usual way between the claimant tenants and the reversioner; and in default of agreement, any differences can be resolved by the LVT.

75. In my judgment, no different position applies in relation to a Part III leaseback proposal made by the reversioner in a counter-notice. It is, I accept, at least possible to interpret the reference to 'any additional leaseback proposals' in section 21(3)(a)(ii), as explained in section 21(7), as including proposals as to the terms of the leaseback, including any proposed departures from the Part IV provisions. In my view, however, that interpretation is unjustified. First, I can see no good reason why the reversioner should in this respect be under a more extensive duty than I would regard the claimant tenants to be when complying in their initial notice with section 13(3)(c)(ii). Second, why, as the Upper Tribunal apparently held, should the terms required to be specified in the counter-notice be confined to the terms involving a departure from the Part IV provisions? Part IV is not in the nature of a model or draft lease. It does no more than provide a list of headings of matters which, subject to agreed or approved departure, must be included in the leaseback. But even if there is to be no departure from the Part IV provisions, the parties will still have to seek to reach agreement on the precise implementation of many of the matters raised by them.

76. To take just two examples, there may well be a difference of view (as there was in this case) as to what provisions need to be included in the lease so as to give effect to the requirements of paragraph 10(2)(a)(ii) of Schedule 9 (that is, as to 'what further easements and rights (if any) … are necessary for the reasonable enjoyment of the demised premises'). Or there may be a difference of view (as there also was in this case) as to what is 'a reasonable part of the costs' referred to in paragraph 16 (that is, as to the lessee's contribution to the landord's costs in (inter alia) repairing and maintaining the building). The advancing by the reversioner of his case under these heads involves no 'departure' from the Part IV provisions: it is merely his case as to their proper working out; and, if agreement cannot be reached, the matter will have to be resolved by the LVT.

77. There is, in my view, therefore no logical reason for the Upper Tribunal to have identified a need for the reversioner to spell out in his counter-notice any proposed 'departures' from the Part IV provisions. Any such proposed departures may give rise to a matter of dispute; but so also may the reversioner's proposals for giving effect to those provisions. If section 21(3)(a)(ii) is to be regarded as impliedly requiring a statement of the reversioner's proposed 'departures', it might just as well be interpreted as requiring the reversioner to go the whole distance of providing a draft lease setting out all his proposals for the leaseback. In my view, there is no justification for so interpreting the requirements of section 21(3)(a)(ii).

78. For these reasons, I would respectfully disagree with the Upper Tribunal's conclusion that it was not open to Ms Tibber, subsequent to her counter-notice, to raise proposed 'departures' from the Part IV provisions that she had not advertised in her counter-notice. I would hold that it was not necessary for her to identify in the counter-notice any terms of the proposed leaseback of the subject premises. They were a matter for subsequent negotiation, agreement if possible and, in default, reference to the LVT.

79. I turn now to the specific issues raised by the appeal, under the following sub-headings.

Should the leaseback include the exterior walls, window frames, roof, roof structure and the contiguous airspace above the roof?

80. The LVT held that the leaseback premises were to be confined to the two floors comprising Flat C, but excluding the roof and roofspace and (I infer) also the exterior walls and windows frames. I have referred to what I would respectfully regard as their inadequate reasoning for that conclusion. On the basis of the exiguous material that was before the tribunals and is before this court, I would, however, arrive at the same conclusion, namely that the leaseback premises should be confined to the flat comprising the second and third floors of the building, but not including the exterior structural elements of the flat, namely the exterior walls, window frames, roof, and roof structure; or, therefore, the airspace contiguous to the roof.

81. In elaboration of that, paragraph 5 of Part III of Schedule 9 is the one of primary relevance. That entitles the reversioner to a leaseback of 'any unit falling within sub-paragraph 1A [which Flat C does] which is not immediately before the appropriate time a flat let to a person who is a qualifying tenant of it.' *Cawthorne* explains the answer to the question there raised by the words 'the appropriate time' and I shall not repeat the answer. Paragraph 5 applies both to flats that are let otherwise than to a 'qualifying tenant' – and in this case the flat was let to an assured shorthold tenant, who was therefore not a 'qualifying tenant' – and also to flats or other units that are not let at all.

82. In the case of a flat or unit that is let, the identity of its component premises will ordinarily be derived from a consideration of the tenancy agreement. In the case of a unit that is not let, its component premises for leaseback purposes will ordinarily have to be the subject of agreement by the parties. In either case, if there is a dispute as to the identity of the component premises, the differences will have to be resolved by the LVT. Compare *Howard de Walden Estates Ltd v. Aggio and others* [2009] AC 39, at paragraph 46, per Lord Neuberger of Abbotsbury.

83. In this case, therefore, the starting point for identifying the premises comprised in Flat C ought to have been the tenancy agreement with the assured shorthold tenant. That, however, is a document which Ms Tibber was either unwilling or unable to produce to the tribunals below, although I am unaware of any explanation she may have tendered as to why it was not produced. In the absence of the tenancy agreement, Mr Sefi referred us to a photograph of the front of the building, showing the four upper floors, roof and Flat C's dormer windows and said it was obvious that Flat C must comprise (inter alia) the roof, roof structure and windows. He also prayed in aid that the leases of Flats A and B each included as part of the premises respectively demised the

external walls and structure of the flats and invited the drawing of a like inference in relation to Flat C.

84. In addition, Mr Sefi referred us to the decision of this court in *Sturge v. Hackett* [1962] 3 All ER 166, to the effect that, in the absence of provisions to the contrary in a lease, a demise of a part of a building divided horizontally or vertically includes the external walls enclosing the part so demised (see ibid, at 172, in the judgment of the court delivered by Diplock LJ). The problem, however, that I have in regarding that as assisting Mr Sefi's submission is that the stated principle makes it clear that any presumption as to the inclusion within the demised premises of the external walls of a flat can be displaced by contrary provisions in the lease itself. In this case, however, the lease, or tenancy agreement, of Flat C – the one document that might rebut the presumption – has not been produced by the party invoking the presumption and who can be presumed to have it, or a copy of it, in her possession, custody or power. In those circumstances, *Sturge* takes Mr Sefi's submission nowhere.

85. Nor in my judgment, as regards external walls, does the support that Mr Sefi claims to derive from the leases of Flats A and B provide him with material assistance. The nature of the Flat C tenancy is quite different from that of those leases. Under those leases, the repairing obligations in respect of the structure and exterior of the flats were cast on the lessees. By contrast, the corresponding obligations in respect of Flat C are imposed by section 11 of the Landlord and Tenant Act 1985 upon Ms Tibber. In those circumstances, I regard it as improbable that the tenancy agreement would have included any part of the exterior structure in the premises let to the tenant.

86. I therefore conclude that Ms Tibber failed to produce any evidence to the tribunals sufficient to justify a finding by the LVT that the structure and exterior of Flat C – including the walls, window frames, roof and roof structure – were comprised in her letting of Flat C, or therefore that those parts of the building form any part of Flat C. On the contrary, on the basis of the limited material before the tribunals, the probabilities were that no parts of the structure and exterior of Flat C were including in its letting.

87. Whilst, therefore, I consider that the LVT gave inadequate reasons for their conclusion to the same effect, I am of the view that they arrived at the correct conclusion. I would reject Ms Tibber's challenge to the Upper Tribunal's upholding of that aspect of their decision.

The mezzanine landing

88. Ms Tibber's case is that part of the mezzanine landing formerly partitioned off and used for storage purposes by Flat C ought also to be regarded as part of the Flat C and so subject to the leaseback. Mr Sefi submitted that this part of the landing was an appurtenance 'belonging to' Flat C within the meaning of paragraph 1(2) of Schedule 9 and that therefore Flat C is to be taken to 'include' it so as to justify its inclusion within the leaseback premises. If that is right, there then arises a further question whether the apparent omission in the counter-notice to identify any part of the mezzanine landing as part of the leaseback premises is nevertheless fatal to its inclusion within them.

89. Mr Sefi confined his paragraph 1(2) submission to the proposition that the mezzanine landing was an appurtenance 'belonging to' Flat C. He recognised that on one interpretation of paragraph 1(2), he had also to show that the mezzanine landing was 'let with' Flat C, although there no basis for any conclusion that the mezzanine landing was so let. In Mr Sefi's submission, however, the 'let with' criterion was not fatal to his case, since he said that paragraph 1(2) must be interpreted disjunctively, with one alternative being simply 'belonging to' Flat C. I add that he disclaimed any suggestion that the words 'immediately before the appropriate date' in paragraph 1(2) meant that the position as at the date of the counter-notice was not the relevant one.

90. Ms Muir's response was that paragraph 1(2) cannot be so read, since if it is to divided up into Mr Sefi's disjunctive alternatives, there is a missing 'it' after 'belonging to' whose presence is essential if Mr Sefi's argument is to get airborne. Her submission was that it is plain that 'belonging to' and 'usually enjoyed with' are indeed alternatives but that, whichever applies, the 'and let with it' is a conjunctive requirement. As the mezzanine landing was not so let, it cannot be an 'appurtenance' and so paragraph 1(2) has no application. It follows that no part of the mezzanine landing was or is part of Flat C.

91. I agree with Ms Muir. Her proposed interpretation is the only one that gives proper sense to the uncomplicated collocation of ordinary words in paragraph 1(2). As the mezzanine landing was not 'let with' Flat C, paragraph 1(2) has no application. It is not enough that the mezzanine landing may have 'belonged to' or have been 'usually enjoyed with' Flat C. Corroborative support for this interpretation can be derived from Chapter II of Part I of the 1993, which deals with the individual right of the tenant of a flat to acquire a new lease. Section 62(2), an interpretation section for the purposes of Chapter II, reads:

> 'Subject to subsection (3), references in this Chapter to a flat, in relation to a claim by a tenant under this Chapter, include any garage, outhouse, garden, yard and appurtenances belonging to, or usually enjoyed with, the flat and let to the tenant with the flat on the relevant date …'.

The purpose of that provision is akin to that of paragraph 1(2) in Schedule 9, although the language and punctuation are slightly different. What, however, is clear is that a necessary condition of an 'appurtenance' is that it is 'let … with the flat' as well as either 'belonging to' or 'usually enjoyed with' it. I would not accept that the slightly different formulation of paragraph 1(2) of Schedule 9 was directed at achieving any materially different effect.

92. Having so concluded, it is strictly unnecessary also to consider Ms Muir's further submission, namely that the omission of the counter-notice to claim the inclusion of any part of the mezzanine landing in the claimed leaseback was fatal to its being so included. I should say that I was initially attracted by Ms Muir's submission. I agree with her that the ordinary interpretation of the counter-notice is that Ms Tibber was there making no claim that any part of the mezzanine landing should be included in the leaseback. That is because she went to some trouble in the counter-notice to identify expressly what *was* to be so included, attaching plans which provided pictorial clarification, yet included the mezzanine landing in neither her verbal nor pictorial description. *Expressio unius, exclusio alterius,* as judges were once allowed to say. Put in a more homely way, if a document goes to the trouble of spelling out

with apparent specificity what the parcels of a particular piece of land are, it is often not easy (although not necessarily impossible) to interpret it as in fact extending to other land not so specified.

93. This argument can well be made, and was made, in relation to the omission of any reference to the mezzanine landing in the counter-notice. On further consideration, however, I am not convinced that (if Ms Tibber were able to surmount her paragraph 1(2) difficulty), this shortcoming in her counter-notice would in fact be fatal to her case. There is in my view much to be said for the view that the right under section 36 and paragraph 5 of Schedule 9 is to a leaseback of a particular flat or unit – meaning, therefore, the *whole* flat or unit. If, therefore, such flat or unit is sufficiently identified in the counter-notice, can it be said that the leaseback should nevertheless only comprise that part of it that the counter-notice has described as constituting the flat, when (be it assumed) the flat in fact includes a part not so described?

94. I cannot accept, for example, that any such argument could be available in the case of the leaseback of a Part II flat whose physical limits had been misdescribed in the claimant tenants' section 13 notice: Part II deals with mandatory leasebacks, and that must mean a leaseback of the entire flat, whether or not its limits may have been so misdescribed. The right under section 36 and Part III, paragraph 5, of Schedule 9 is similarly to a leaseback of a particular flat or unit, meaning the whole of it. Why should the reversioner's right in that respect be defeated by a misdescription in the counter-notice of its full extent?

95. Having indicated what I regard as quite compelling arguments in favour of Ms Tibber on this point, I have decided that as it is unnecessary to express a final view on this issue, I shall not do so. I shall say simply that I consider that, in light of my conclusion on the section 1(2) point, no part of the mezzanine landing forms part of Flat C.

The front garden

96. As regards the claim to include any part of the front garden as part of Flat C, I need only say that Ms Tibber's claim similarly fails by reason of her inability to show that the garden is an 'appurtenance' that was 'let with' Flat C. I need say no more than that about this aspect of her case.

Should Flat C be entitled to an easement of storage on part of the mezzanine landing?

97. If no part of the mezzanine landing is to be included in the leaseback, as I would hold it should not, should Flat C nevertheless be entitled to a right to store bicycles there? If there is to be such a right, should it be extended, as is now claimed, to include the right to leave strollers and like equipment there?

98. I consider that Mr Sefi somewhat overstated the strength of the evidence in relation to the extent of the use made by the Flat C occupants of the mezzanine landings over the years. There was no cross-examination of the witnesses, but I regard their agreed evidence as at least amounting to proof that Ms Tibber's Flat C tenants have used it for the storage of bicycles, although I do not read the evidence as proving that it has been used for the storage of more than one bicycle at a time. There is no evidence that the tenants of Flat C have used it for any wider storage purpose.

99. If, as I would accept, the tenants of Flat C have been exercising a right to leave bicycles on the relevant part of the mezzanine landing, I consider that such a right can reasonably be regarded as necessary for the enjoyment of Flat C. Further, I consider that the creative powers of section 62 of the Law of Property Act 1925 (which paragraph 9 of the Part IV provisions says should not ordinarily be excluded from the leaseback) would, upon the grant of the leaseback, increase such right into an easement. The LVT, however, rejected the claim to be entitled to leave a bicycle on any part of the common parts saying it 'would obstruct the use of the common parts and it is unnecessary as the lessee can park a bicycle in the flat or outside the building'.

100. This court was shown no evidence that the continued parking of one bicycle on part of the mezzanine landing would be obstructive. There is also no evidence that bicycles have ever been left in the garden, although I also find it difficult to interpret the LVT as having held that there is to be a right to leave bicycles there: if so, I would have expected them to say so specifically and to identify whereabouts in the garden. Further, Ms Tibber argued before the Upper Tribunal for an easement for the placing of bicycles in the front garden, so she apparently also did not regard the LVT as having accepted her case in this respect.

101. In my judgment, given the evidence that the tenants of Flat C have exercised an apparent right to leave bicycles on the mezzanine landing, the LVT ought to have held that such a right should be granted under the leaseback. I would hold that it should. I would, however, confine that right to one bicycle.

The garden area

102. If, as I would hold, no part of this area is to be regarded as part of Flat C, Mr Sefi asked for general rights over it to be given to Flat C, which amounted, as I followed it, to conferring imprecise rights of enjoyment over the garden area. There is no evidence of such rights having been exercised by Flat C's tenants, and I cannot see that the LVT were wrong to decline the grant of any such rights (if that is what they were being asked to do, which I do not regard as clear). As I have said, I also do not regard the LVT as having allowed any rights to leave bicycles in the garden area. There is no evidence that bicycles ever have been left there, and in this regard also I consider that there was no error in the LVT's conclusion. I would not accept Ms Tibber's case that there should be a right for Flat C occupants to leave bicycles in the garden area.

103. The LVT accepted the right for Flat C occupants to store up to two bins in the bin storage area. Mr Sefi submitted that there should be a right to store up to four bins there. I would not accept that the LVT made an error of law in limiting the right to two bins. The number of bins was a matter for their decision and they were entitled to conclude that two is the limit of Flat C's reasonable entitlement.

Service charge contributions

104. Mr Sefi sought to re-open the question of the parties' respective liabilities for the repair and maintenance of the building and its common parts and as to Flat C's fair share to the contribution of the costs. I consider that there is no basis for re-opening this. The LVT were entitled to come to the sensible decision that the landlord of the whole building should be responsible for the repair of its structure and that a fair

contribution for Flat C to make to the landlord's costs in respect of the building should be two-fifths. There was no error of law in this respect and no scope for re-visiting the LVT's decision.

The 'or flats' dispute

105. I referred to this in paragraph 39. Neither tribunal below dealt with it, although both should have done. Even if Ms Tibber is unable to carry out her proposed development of Flat C, she may want to sub-let part of it as a separate residential unit. Paragraph 17 of the Part IV terms provides for a sub-letting of part of the premises, although only with the consent of the lessor, such consent not to be unreasonably withheld. If Ms Tibber is not allowed her proposed wording, she might in practice face real difficulty in seeking to sub-let part: consent would be refused on the ground that it would involve a breach of the user covenant and it might not be easy to challenge the reasonableness of that. Thus the applicants' favoured wording would or might adversely pre-empt any hope that Ms Tibber might have of sub-letting part. In the circumstances, I regard Ms Tibber's proposed wording of the relevant clause as reasonable and I would hold that it should be adopted.

Disposition

106. I would allow Ms Tibber's appeal to the extent of directing (i) the inclusion in the leaseback of a right for Flat C to use the relevant part of the mezzanine landing for the storage of one bicycle; and (ii) the acceptance of Ms Tibber's version of paragraph 1 of the Schedule of Tenant's Covenants of the draft lease (that is, including the words 'or flats'). Otherwise I would dismiss the appeal.

Lord Justice McCombe :

107. I agree.

Lord Justice Jackson :

108. I also agree.