

Neutral Citation Number: [2017] EWCA Civ 1098

Case No: C3/2015/2177

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
Upper Tribunal Deputy President Martin Rodger QC
LRA/80/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2017

Before :

THE RIGHT HON LORD JUSTICE GROSS
THE RIGHT HON LORD JUSTICE MOYLAN
and
THE HON MRS JUSTICE ASPLIN DBE

Between :

	MR PAVEL L V CURZON	<u>Appellant</u>
	- and -	
	MR M C WOLSTENHOLME AND OTHERS	<u>Respondents</u>

Adam Rosenthal (instructed by **Rice-Jones & Smiths**) for the **Appellant**
Stan Gallagher (instructed by **Butters David Grey LLP**) for the **Respondent**

Hearing date: 12 July 2017

Judgment Approved Mrs Justice Asplin:

1. This appeal raises two discrete issues in relation to collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993 (the “1993 Act”). They are whether:

- (i) an initial notice served under section 13 of the 1993 Act by tenants seeking to acquire the freehold by collective enfranchisement, which has not been protected by being noted on the Land Register, can be enforced against the freehold reversioner who originally received it, if the reversion is then transferred to a third party (in this case, the Appellant’s wife) and is subsequently transferred back to the original recipient of the notice (“the Notice Issue”);
and

- (ii) if the price for the freehold reversion has been agreed unconditionally between the reversioner and the nominee purchaser, either of them may resile from the agreement and require the price to be determined by the appropriate tribunal (“the Disputed Price Issue”).
- 2. On 7 April 2015, Deputy President Martin Roger QC sitting in the Upper Tribunal (Lands Chamber) (the “UT”) dismissed the Appellant’s appeal against the decision of the First-tier Tribunal (Property Chamber) (the “FTT”) dated 15 May 2014 (respectively, the “UT Decision” and the “FTT Decision”). The FTT had held that the Applicants’/ Respondents’ initial notice under section 13 of the 1993 Act dated the 17th November 2004 (the “Section 13 Notice”) remained effective against the Appellant, Mr Curzon despite the transfer of the freehold reversion without prior protection on the Land Register and its subsequent re-transfer, with the result that the FTT retained jurisdiction to determine the terms of the transfer of the freehold reversion to the participating tenants. It had also determined that the purchase price for the freehold reversion having been agreed by the parties, it was not open to either party to apply to the FTT to reconsider it.
- 3. Permission to appeal to this court was granted by Floyd LJ on 22 October 2015.

Background

- 4. The Appellant, Mr Curzon, is the freehold owner of 26 Warrior Square, St Leonards-on-Sea, East Sussex, TN37 6BS (the “Property”). It is a substantial terraced house, which is comprised of six self-contained flats, together with a garden and garage at the rear. The Respondents are each long leaseholders of four of the flats at the Property. Mr Curzon’s wife, Ms Teruko Yokoyama, has been the leaseholder of the basement flat at the Property since Mr Curzon granted her a lease on 8th October 2012. On the same day, he granted a lease of the first floor flat together with the roof space and garden to himself and his wife jointly for a term of 999 years.
- 5. On the 17th November 2004, the Respondents served the Section 13 Notice to acquire the freehold of the Property and designated themselves as their own nominee purchaser for that purpose. Mr Curzon served a counter-notice dated 19 January 2005 admitting the Respondents’ right but disputing the proposed price and requiring a leaseback of the first floor flat and the garden. On 5 May 2005, the Respondents applied to the Leasehold Valuation Tribunal (Southern Rent Assessment Panel) (the statutory predecessor of the FTT) (the “LVT”) for it to determine the terms of acquisition. The matters in dispute were the price and the terms of the proposed leaseback.
- 6. Mr Curzon and the Respondents each instructed chartered surveyors to negotiate the

terms of acquisition on their behalf and on 27 July 2006, the surveyors reached agreement that the premium payable by the Respondents in respect of the freehold reversion would be £6,330. As stated at paragraph 7 of the UT Decision, the agreement was recorded in a document entitled “statement of settlement for a freehold enfranchisement” which was signed by both surveyors. The document included other agreed terms including that the leaseback of the first floor flat, garage and garden would be for a term of 999 years at a nil ground rent. In the event of not agreeing the remaining terms, the parties reserved the right to apply to the LVT for their determination.

7. The terms of the leaseback were the subject of hearings in December 2008, January 2011 and 25 March 2011. On the latter occasion the terms were determined substantially in accordance with the Respondents’ proposals. The LVT’s decision was appealed to the UT. By a written decision dated 10 September 2013 in the appeal of *Curzon v Hobbs & Ors* [2012] UKUT 0419 (LC) LRA/67/2011 the UT remitted the matter to the FTT/LVT for it to settle the form of transfer of the freehold reversion of the Property. By a notice dated 3 March 2014, the FTT gave notice to the parties that it intended to dispose of the proceedings without a hearing by approving the draft amended transfer in the form attached to the notice. If any party objected they were required to do so in writing with reasons by 4 April 2014.
8. By a letter dated 2 April 2014, solicitors acting for Mr Curzon registered Mr Curzon’s objection to the proposed course on a number of grounds including: (i) lack of jurisdiction “because the [Section 13 Notice] dated 17 November 2004 . . . has ceased to have any effect by reason of the subsequent disposal of the freehold”; and (ii) the fact that the price substantially under-valued the freehold reversion in the Property. In relation to lack of jurisdiction, the FTT was informed that: the freehold reversion of the Property had been transferred by Mr Curzon to his wife, Ms Yokoyama for consideration of £1 on 9 October 2012; Ms Yokoyama was registered as proprietor on 11 October 2012; on 8 January 2013, the freehold reversion was re-transferred to Mr Curzon by way of gift; and he became registered proprietor once more on 28 March 2013. It was not until 5 July 2013 that the Respondents’ solicitors protected the Respondents’ interest by filing a unilateral notice in respect of the Section 13 Notice against Mr Curzon’s freehold title at the Land Registry, as envisaged in section 97(1) of the 1993 Act. It was alleged therefore, that Mr Curzon had re-acquired the freehold reversion free of the Section 13 Notice and therefore, that the FTT no longer had jurisdiction and the Respondents’ application under section 24 of the 1993 Act, to determine the matters in dispute ought to have been dismissed. In relation to the price for the freehold reversion Mr Curzon’s solicitors stated that: “Given that the terms of the acquisition have not yet all been agreed, it remains the prerogative of any party to un-agree any matter . . . and in the circumstances the respondent exercises that right as regards the said figure, and requires the price payable now to be revised and determined by this Tribunal.”
9. Those issues were considered in the FTT Decision from which permission to appeal was granted by the UT on 12 September 2014. They form the basis of this appeal, the appeal

from the FTT Decision having been dismissed by the UT.

Relevant statutory provisions

10. As the Deputy President describes at [12] of the UT Decision, Chapter 1 of Part 1 of the 1993 Act confers on the tenants of flats in a self-contained building containing two or more flats held on long leases the right collectively to acquire the freehold interest in the building. Those eligible to exercise the right are referred to as “qualifying tenants” and those who choose to do so are “participating tenants”. The process is commenced by giving the freehold reversioner of the premises an “initial notice” under section 13 of the 1993 Act. Amongst other things, the initial notice must specify the proposed purchase price for the freehold (section 13(3)(d)) and the date by which the reversioner must respond to the notice by giving a counter-notice under section 21 (section 13(3)(g)). The detailed terms of the contract and transfer are then either agreed or determined by the FTT.
11. Sub-sections 13(8) and (9) are concerned with the ability to serve subsequent notices in relation to the whole or part of the same premises. As the Deputy President of the UT pointed out at [15] of the UT Decision, once an initial notice has been given, a subsequent notice in relation to the same premises cannot be served as long as the first notice continues in force, nor for a period of twelve months after an initial notice has been withdrawn, or is deemed to have been withdrawn, under any provision of Chapter 1 of the 1993 Act.
12. Sub-section 13(11) is concerned with when a notice continues in force and is central to the submissions in this appeal. It is as follows:

“(11) Where a notice is given in accordance with this section, then for the purposes of this Chapter the notice continues in force as from the relevant date-

(a) until a binding contract is entered into in pursuance of the notice, or an order is made under section 24(4)(a) or (b) or 25(6) (a) or (b) providing for the vesting of interests in the nominee purchaser;

(b) if the notice is withdrawn or deemed to have been withdrawn under or by virtue of any provision of this Chapter or under section 74(3), until the date of the withdrawal or deemed withdrawal, or

(c) until such other time as the notice ceases to have effect by

virtue of any provision of this Chapter.”

13. Section 97(1) of the 1993 Act provides a means by which the statutory rights under an initial notice can be protected under the Land Charges Act 1972 or by the entry of a notice on the Land Register under the Land Registration Act 2002 “as if it [the initial notice] were an estate contract.” Section 19 is headed “Effect of initial notice as respects subsequent transactions by freeholder etc”. Where relevant it provides as follows:

“ . . .

(2) Where the initial notice has been registered and at any time when it continues in force –

(a) any person who owns the freehold of the whole or any part of the specified premises . . . disposes of his interest in those premises or that property,

. . .

Subsection (3) below shall apply in relation to that disposal.

(3) Where this subsection applies in relation to any such disposal as is mentioned in subsection (2)(a) or (b), all parties shall for the purposes of this Chapter be in the same position as if the person acquiring the interest under the disposal

(a) had become its owner before the initial notice was given (and was accordingly a relevant landlord in place of the person making the disposal), and

(b) had been given any notice or copy of a notice given under this Chapter to that person, and

(c) had taken all steps which that person had taken;

and, if any subsequent disposal of that interest takes place at any time when the initial notice continues in force, this subsection shall apply in relation to that disposal as if any reference to the person making the disposal included any predecessor in title of his.

...”

14. Where a counter notice has been served but any of the terms of acquisition of the freehold reversion remain in dispute at the end of the period of two months after the counter notice or a further counter-notice was given, either party may apply to the LVT/FTT for it to “determine the matters in dispute” under section 24(1) of the 1993 Act. Such an application must be made not later than six months after the counter notice is given: section 24(2). The expression “terms of acquisition” is defined very widely in section 24(8) and includes the purchase price. Sub-sections 24(3) – (7) are as follows:

“24. - Applications where terms in dispute or failure to enter contract.

...

(3) Where –

- (a) the reversioner has given the nominee purchaser such a counter-notice or further counter-notice as is mentioned in subsection (1)(a) or (b), and
- (b) all of the terms of acquisition have been either agreed between the parties or determined by [the appropriate tribunal] under subsection (1),

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

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

- (a) providing for the interests to be acquired by the nominee purchaser to be vested in him on the terms referred to in subsection (3);
- (b) providing for those interests to be vested in him on those terms, but subject to such modifications as –

(i) may have been determined by [the

appropriate tribunal], on the application of either the nominee purchaser or the reversioner, to be required by reason of any change in circumstances since the time when the terms were agreed or determined as mentioned in that subsection, and

(ii) are specified in the order; or

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

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

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

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

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

(b) where all or any of those terms have been determined by the appropriate tribunal under subsection (1) –

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

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

- (7) In this section “the parties” means the nominee purchaser and the reversioner and any relevant landlord who has given to those persons a notice for the purposes of paragraph 7(1)(a) of Schedule 1.”
15. The circumstances in which the reversioner fails to give a counter notice are dealt with in section 25. On the application of the nominee purchaser, the court may make an order determining the terms on which he is to acquire the reversion in accordance with the proposals in the initial notice: section 25(1). By virtue of section 25(4), an application must be made not later than the end of the period of six months from the date by which a counter notice was to be given. Further, the court may make an order vesting the interest in the nominee purchaser under section 25(6)(a) or (b) or providing that the initial notice is deemed to have been withdrawn under section 25(6)(c) at the end of the period specified in section 25(8) which is either two months after the making of the order under section 25(1) or such other period as the court fixed when making that order.
16. Section 28 provides for the withdrawal of an initial notice by the participating tenants before a binding contract is entered into. A notice of withdrawal must be served on the reversioner amongst others: section 28(1). The costs consequences of doing so are set out at section 28(4). Section 29 on the other hand sets out a number of specified circumstances in which an initial notice will be deemed to have been withdrawn.
17. For the purposes of Chapter I of the 1993 Act, “reversioner” is to be construed in accordance with section 9: section 38(1). Where, “in connection with any claim to exercise the right to collective enfranchisement”, the freehold of the whole of the premises is owned by the same person, that person is the “reversioner”: section 9(1). Further, section 38(4) provides that “any reference . . . to agreement in relation to all or any of the terms of acquisition is a reference to agreement subject to contract.”

The FTT and UT Decisions

18. The FTT’s conclusion in relation to the Notice Issue was set out at [28] of the FTT Decision and recorded at [22] of the UT Decision as follows:

“22. On the first issue the F-tT determined that the initial notice of 17 November 2004 remained effective as against the appellant, and that it therefore retained jurisdiction to determine the terms of the transfer which remained to be settled. It agreed that Mrs Yokoyama had not been bound by the respondents’ right of acquisition during her period of ownership, because the initial notice had not been protected by notice on the land register. It nonetheless considered that the notice had never ceased to have

effect as far as the appellant, as the original freeholder and recipient of the notice, was concerned and that the right of acquisition was enforceable against him following his reacquisition of the freehold. The F-tT explained its conclusion on the first issue at paragraph 28 of the decision:

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

The FTT had held at [24] that the answer to the question was to be found in section 13(11) of the 1993 Act. It went on to state at [27] that there are “several provisions in Chapter I of the [1993] Act where a notice “ceases to have effect” namely: sections 22(6), 23(4), 30(4) and 31(4)” and that “it is clear that Chapter I of the [1993] Act in general and section 13(11) in particular provide for a self-contained scheme with [sic] governs the validity of the initial notice, which will continue in force from the date of service until one of three circumstances in section 13(11) arise.”

19. The Deputy President set out his reasons for upholding the FTT Decision in relation to the Notice Issue at paragraphs [32] – [38] of the UT Decision. At [32] – [34] he held as follows:

“32. . . . Although I am conscious of Mr Letman’s warning that hard cases make bad law, I am satisfied that to treat the rights conferred by service of an initial notice as remaining exercisable against the recipient of the notice after the transfer of the reversion is in accordance with the statutory scheme. The effect of giving a notice under s. 13 is to set in motion a sequential process which, in all cases, leads to one of three destinations, namely, entry into a contract or the making of a vesting order giving effect to the right of acquisition, an actual or deemed withdrawal of the notice at the election of the nominee purchaser, or the occurrence of circumstances outside the control of the nominee purchaser which defeat the right of acquisition and require that the initial notice cease to have effect. Each of those categories of outcome is provided for in s. 13(11) and none of them is engaged in this case.

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

34. Nor do I think Mr Letman is correct in his second or third arguments which presuppose that which they seek to establish, namely that an initial notice unprotected by registration becomes unenforceable for all purposes on a transfer of the freehold. As Mr Gallagher points out, s. 97 does not provide for the cessation of rights but rather provides a mechanism by which rights initially enforceable against one freeholder may be made enforceable against a successor in title, so whether it is treated as a provision of Chapter 1 despite its location in Chapter 7 is immaterial. The ability to protect rights under the Act by registration does not require that, by implication, a failure to protect those rights necessarily results in them being lost not only against a successor in title of the recipient of the initial notice, but also against the recipient themselves. As Mr Letman's third argument sought to emphasise, the rights conferred by Chapter 1 of the Act are not proprietary rights at all. They confer a personal entitlement on the nominee purchaser to acquire all of the interest in the specified premises belonging to the recipient of the notice. They are enforceable by the giver of the notice only against the original recipient unless protected by registration. That they may in practice be defeated by a transfer to a third party if not so protected is beside the point. If circumstances occur in which the rights once again become capable of practical enforcement I can

find nothing in the Act which would prevent them from being enforced.”

20. He went on at [35] – [38] to conclude that the normal time limits for the progression of an acquisition under Chapter 1 of the 1993 Act were sufficient to deal with the suggested absurdities which had been identified by counsel on behalf of Mr Curzon as consequences of the continuation in effect of an unprotected initial notice against the original reversioner. At [36] and [37] he stated as follows:

“36. After an initial notice is given if no counter notice is received or if the right is disputed an application must be made to the court under s. 25(1) or 22(1); if a counter-notice is received admitting the right but proposing alternative terms of acquisition, an application must be made to the appropriate tribunal under s. 24(1). In each of these cases, if the necessary application is not made within the time stipulated by the Act the initial notice will be deemed to have been withdrawn by virtue of ss. 29(1) - (3). Where the freehold reversion is transferred before any such application is made, the nominee purchaser will be faced with the same choice as any nominee purchaser either of initiating the statutory procedures or allowing a deemed withdrawal to occur. No state of limbo will exist for longer than the periods prescribed by the Act and applicable to its normal operation.

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

the freehold, or it might decide to make an order under s. 24(4)(c) providing for the initial notice to be deemed to have been withdrawn. By one or other of these routes circumstances would occur falling within s. 13(11)(a) or (b) so that the initial notice would no longer continue in force and any suspension of the rights of an individual tenant under Chapter 2 would be lifted.”

21. The Disputed Price Issue was dealt with at [48] of the FTT Decision. It concluded that the price having been agreed it was not open to either party to apply for a redetermination and that the FTT had no jurisdiction to do so. It was satisfied that its conclusion was in accordance with section 24 of the 1993 Act. The matter is dealt with in the UT Decision at [39] – [56]. Having set out in the chronology of events which led to the attempt to resile from the agreed price some eight years after it had been “agreed” and at the stage at which the only matters remaining for determination were the terms of the transfer, the Deputy President went on to consider the authorities which had been referred to and concluded:

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

51. I accept Mr Letman’s general observation that an agreement made subject to contract from which a party is not free to resile is a difficult concept, at least in the context of a contractual negotiation. In the context of a negotiation for the acquisition of an interest in land, the effect of s. 2, Law of Property (Miscellaneous Provisions) Act 1989 is that no contractually binding agreement of any sort will come into existence until all of the terms have been agreed and reduced to signed writing. Yet even on Mr Letman’s own argument it is acknowledged that under the procedures of the 1993 Act a stage is reached after which it is not possible for a party simply to withdraw a previously unconditional agreement. At that point (whenever it occurs) terms which have been agreed acquire the same status as terms which have been determined by the tribunal.

The court's power under s. 24(4) to make a vesting order on the terms agreed or determined is qualified by the entitlement of either party to apply to the appropriate tribunal for those terms to be modified to take account of any change of circumstances since the terms were agreed *or* determined. It is therefore obvious that at least by the time an application can be made for a vesting order the *only* grounds on which terms previously agreed may be modified is to take account of a change of circumstances. If that were not so, and either party remained entitled generally to re-open matters previously agreed, no purpose would be served by making any modification subject to an application to the tribunal and a change of circumstances.

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

53. Mr Letman locates the point at which agreed terms become binding in that sense as coinciding with the time when an application may be made for a vesting order i.e. the moment referred to in s. 24(3)(b) when all of the terms of acquisition have been either agreed or determined. He points to the reference in s. 24(4)(b)(i) to the power to modify those terms to take account of changes of circumstances "since the time when the terms were agreed or determined as mentioned in that subs." (i.e. subs. (3)) and interprets that language as limiting relevant changes of

circumstances to those occurring since all terms were agreed or determined. While I accept that all terms must be agreed or determined before an application may be made for a vesting order, I think Mr Letman's argument places too great a weight on that moment in time as the point at which previously agreed terms acquire the same status as those determined by a tribunal. It cannot have been intended that a relevant change of circumstances which occurs after the determination of particular terms but before other terms were agreed or determined must be left out of account when considering whether a modification should be allowed, yet that would seem to be the consequence of Mr Letman's construction of s. 24(4)(b). Nor is it necessarily straightforward to identify when all of the terms of acquisition have been agreed or determined. Although such an agreement is necessary before a vesting order may be sought, there is nothing to stop the parties from adding additional terms after terms have been agreed which are sufficient to form the basis of a vesting order and which are satisfactory to both parties at that point. All of the terms of acquisition will not finally be known until a binding contract is entered into or a vesting order is made, yet on Mr Letman's construction the opportunity to rely on a change of circumstances will depend on the point at which all terms have been settled.

54. The structure of the Act requires that terms of acquisition be identified and either agreed, or in default of agreement, submitted to the appropriate tribunal for determination. It would render that scheme incoherent and open to abuse if terms which had been agreed could be revisited. The purpose of s. 24(4)(b) is to protect against the possibility of injustice being caused by the fact that agreed terms are no longer in dispute and that the appropriate tribunal no longer has jurisdiction to determine them. Terms may be agreed or determined at different times and to make that safeguard effective the reference in s. 24(4)(b) to "the time when the terms were agreed or determined" should be understood as a reference to the time when a particular term which it is now sought to modify was agreed or determined, rather than to the single point in time by which all of the terms which were agreed had been agreed, and all of the terms which were determined had been determined. Any change of circumstance since the date of agreement or determination of the particular term in question may be relied on to justify a request for modification of that term. The risk of injustice is thereby controlled and the statutory limitation on the freedom to depart from an agreement which has no contractual effect is balanced. The availability of that safeguard, and the

need to avoid uncertainty and the potential for abuse, seem to me to point decisively in favour of the conclusion reached by the Tribunal in *City of Westminster v CH 2006*. I am satisfied that that conclusion was correct and that the F-tT's decision that it could not modify the price, except on the basis of a change of circumstances, was unimpeachable."

Grounds of appeal

22. In relation to the Notice Issue Mr Curzon relies in essence on three grounds in support of his contention that the UT erred in law. He says that it erred in:
- (i) failing to conclude that the Section 13 Notice ceased to have effect for all purposes on the transfer of the freehold reversion by virtue of section 19 of the 1993 Act;
 - (ii) failing to conclude that the fact that the Section 13 Notice ceased to have effect on the transfer to Ms Yokoyama is sufficient for the purposes of section 13(11) to mean that it no longer continued in force and that the same was true on the re-transfer;
- and
- (iii) that it was wrong to conclude that an initial notice only ceases to have effect in the four circumstances expressly referred to in Chapter I of the 1993 Act, namely sections 22(6), 23(4), 30(4) and 31(4). Section 13(11) properly construed has a wider ambit and refers not only to the express provisions but to any instance where pursuant to the provisions of Chapter 1 a notice is deprived of effect.
23. In relation to the Disputed Price Issue, Mr Curzon also relies upon three grounds. He says that the UT erred in law in:
- (i) elevating an agreement subject to contract, as expressly prescribed in section 38(4) into a binding agreement from which neither party can resile unless there is a successful change of circumstance application;
 - (ii) failing to accept that the only point at which an agreement cannot be reversed is when "all of the terms of an acquisition have been either agreed between the parties or determined by the appropriate tribunal" pursuant to section 24(3); and
 - (iii) failing to acknowledge that the legislature is unlikely to have intended section 24 of the 1993 Act to refer to a binding agreement subject to contract.

Discussion:

(i) *The Notice Issue*

24. The appeal on this issue proceeds on the basis of a concession on behalf of the Respondents that despite the fact that the freehold reversion was transferred to Ms Yokoyama for £1 and was transferred back to Mr Curzon some months later by way of

gift, Ms Yokoyama took the freehold interest in the Property free of the rights of the participating tenants under the Section 13 Notice. There was no evidence before this court as to the circumstances in which the transfer and re-transfer came about. Although the Deputy President described the circumstances as “unusual and extreme” and stated that the tenants had faced “ingenious and implacable resistance to the exercise of their statutory rights” at [32] of the UT Determination, it also seems that there was no evidence in relation to the relevant circumstances before the UT or for that matter, before the FTT.

25. When asked whether he would like to withdraw the concession, Mr Gallagher on behalf of the Respondents made an oral application to do so on the basis that it could be inferred that Ms Yokoyama took the freehold reversion with actual knowledge of the Section 13 Notice. Mr Gallagher submitted that the position would be the same whether the consideration had been £1 or £1million. The application was opposed by Mr Rosenthal on behalf of Mr Curzon on two bases: first, that it was much too late and had the application been made earlier, his client would have had the opportunity to put in evidence as to the circumstances of the transaction; and secondly, that even if Ms Yokoyama had had actual knowledge of the Section 13 Notice, it would not have had the consequence that she was bound by it. We agreed with Mr Rosenthal that it is too late to withdraw the concession and that his client would have been deprived of the chance of filing evidence about the circumstances in which the transfer and re-transfer took place. We dismissed the application.
26. Mr Rosenthal’s submissions in relation to the Notice Issue can be summarised in the following way: the combined effect of section 97(1) and sub-sections 19(2) and (3) is such that the Section 13 Notice was incapable of binding Mr Curzon when the freehold reversion was transferred back to him by his wife; accordingly, whether by virtue of section 13(11) or independently from that section, the Section 13 Notice ceased to have effect for all purposes when the freehold reversion was transferred to Ms Yokoyama at a time when it was not noted on the Land Register; and such an interpretation of the 1993 Act avoids a number of absurd consequences which would follow if despite the fact that the Section 13 Notice was not binding upon Ms Yokoyama, it did not cease to have effect against its original recipient and was subsequently “re-activated” when the freehold reversion was re-transferred to Mr Curzon.
27. There is no dispute that although sub-sections 19(2) and (3) do not spell out the consequences of a transfer of the freehold reversion in circumstances in which the initial notice is not noted in the Land Register, unless the circumstances are such that the statutory fiction in section 19(3) applies, the transferee of the freehold reversion will not be bound. As I have already mentioned, therefore, it is conceded that Ms Yokoyama was not bound by the Section 13 Notice.
28. Mr Rosenthal submits that it is consistent with sections 97(1) and 19(3) that the initial notice ceases to have any effect in such circumstances and does not remain moribund as

against the transferor of the freehold reversion and subsequently revives if the reversion is re-transferred at a later date. He points out that immediately after the transfer, the transferor ceases to be the “reversioner” as defined in section 9(1) and therefore, is not the appropriate party against whom to proceed for the purposes of the remainder of the enfranchisement process, to serve a notice of withdrawal or to take any other steps necessary to set the statutory timetable in motion.

29. Mr Gallagher on behalf of the Respondents says that in the circumstances of this case, section 19(3) does not apply at all, and therefore, the statutory fiction it contains is not engaged. He says, therefore, that there is nothing to imply in relation to the position of the transferor of the freehold reversion and the initial notice continues to have effect against the transferor, albeit that it is not enforceable against him until the reversion is re-transferred. He also says that section 9 of the 1993 Act should be construed so that “reversioner” refers to the owner of the freehold at the time the claim by the tenants is commenced.
30. Unsurprisingly, Messrs Rosenthal and Gallagher take opposite positions in relation to section 13(11). Mr Gallagher submits that it creates an exhaustive regime which does not encompass the cessation of the Section 13 Notice in the way which Mr Rosenthal suggests. He says, therefore, that the statutory regime is such that Mr Rosenthal cannot be correct. However, Mr Rosenthal submits first that section 13(11) is not exhaustive and therefore, there is nothing to prevent the Section 13 Notice ceasing to have effect in the way in which he contends but if he is wrong about that, that the circumstances would fall within section 13(11)(c) in any event because the Section 13 Notice ceases to have effect under sections 19(2) and (3) of Chapter I of the 1993 Act.
31. In support of his argument that section 13(11) is not exhaustive, Mr Rosenthal first points to the words of the sub-section itself. He says that it is not stated expressly that the circumstances in (a) to (c) are the only circumstances in which an initial notice will cease to have effect. Secondly, he gave the example of an initial notice ceasing to have effect where proceedings are struck out by the FTT for procedural reasons. He points out that if, for example, proceedings are struck out by the FTT whilst the terms of acquisition are being determined under section 24(1), the enfranchisement process cannot be progressed nor is there an express provision which applies which causes the initial notice to cease to have effect. Mr Rosenthal submits that the Deputy President’s treatment of those circumstances at [33] of the UT Determination is wrong. He says that it is wholly unrealistic to conclude that having struck out the application, the FTT would go on to determine the terms of acquisition in order that time could start to run under section 24(6) in order to enable an order to be made under section 24(4)(c) providing that the initial notice be deemed withdrawn. He submits that there would be no application upon which a determination could be made, yet if the initial notice did not cease to have effect upon the strike out, the freehold reversioner would remain bound by a stale notice without the ability to trigger section 29(2) under which the initial notice may be deemed

withdrawn.

32. It is not disputed that when considering the interpretation of the 1993 Act, it is necessary to consider the consequences of the rival constructions and that the more absurd or inconvenient the results, the less likely it is that the interpretation reflects the intention of the legislature: *R (on the application of Edison First Power Ltd) v Secretary of State for the Environment* [2003] 2 EGLR 133 at [116]-[117], *Scottish & Newcastle Plc v Raguz* [2008] 1 WLR 2494 at [10] and *Bennion on Statutory Interpretation* (7th Edition) at §§312-314.
33. Mr Rosenthal highlighted what he says are four particular circumstances in which further serious inconvenience if not absurdity would arise if Mr Gallagher were correct and an initial notice continues in effect against the original reversioner despite an unprotected transfer to a third party.
34. The first is that as a result of section 13(8) which provides that no subsequent notice can be given in respect of the premises whilst an earlier initial notice continues in force, the tenants would have to go through the process of giving notice to withdraw their initial notice with the further attendant costs consequences of doing so and thereafter, they would be precluded from serving another notice for a further twelve months as a result of section 13(9). In this regard, he also points to the fact that it would be unclear upon whom they should serve the notice of withdrawal under section 28(2)(b) as the transferor recipient of the notice would no longer be the “reversioner” and the transferee would not be bound by it in any event. However, if his construction is correct, he says that they could begin again immediately by serving a new initial notice on the transferee reversioner and avoid any increase in the price of the freehold which might occur in a rising market or in the case of a “fag-end” lease, as a result of delay.
35. Secondly, any notice by a qualifying tenant under section 42 to acquire a new lease would remain suspended by virtue of section 54(1) until the initial notice was deemed withdrawn.
36. Thirdly, the issues considered in the UT Decision at [36] and [37] and touched on in Mr Rosenthal’s strike out example, as to proceeding with the statutory framework despite the transfer would arise. Mr Rosenthal submits that the Deputy’ President’s approach is unrealistic. He says that there would be no reversioner against whom to proceed and the FTT/Court would have to proceed with an application not just in the absence of a party but where the application/claim was not properly constituted.
37. Fourthly, in response to Mr Gallagher’s reliance upon paragraph 10(1)(d)(i) of Schedule 3 of the 1993 Act in support of his submission that section 13(11) creates an exhaustive regime, Mr Rosenthal points to paragraphs 5, 6 and 7 of that schedule. Paragraph 10(1)

(d)(i) provides that where a valid notice has been served under section 13, the “currency of the claim” is a reference to the period during which the notice continues in force in accordance with subsection 13(11). Paragraph 5 provides that various notices including a landlord’s notice under section 4 Landlord and Tenant Act 1954 are of no effect if served during the currency of the term. Paragraph 6 prevents the lease of any flat held by a participating tenant from coming to an end during the currency of the claim and for three months thereafter and paragraph 7 provides that rights of re-entry or forfeiture shall not be brought without the leave of the court. Mr Rosenthal submits that it would be absurd if all these consequences continued to apply after the reversion had been transferred.

38. However, Mr Gallagher submits that none of the consequences which arise from the construction which he advocates are absurd. He says that the inconvenience and subsequent delay for the tenants of having to apply to withdraw the initial notice, will have been brought on themselves by the failure to protect their rights on the Land Register and that for the most part, the timetable contained in the statutory framework will resolve the difficulties. He also says that the difficulty when serving a notice to withdraw under section 28(2) is easily resolved by serving both the transferor reversioner and the transferee.

Conclusion:

39. Despite what may seem to be the harshness of the result on the facts of this case, in my judgment, the UT and the FTT before it, erred in law in determining that the Section 13 Notice was enforceable against Mr Curzon once the freehold reversion was re-transferred to him.
40. First, it is not in dispute that despite the fact that there is no express reference in section 19(3), the statutory rights created by the service of an initial notice are not binding upon the transferee of the freehold reversion unless those rights are protected in accordance with section 97(1) of the 1993 Act. Usually, that would be likely to be the end of the matter. The Deputy President noted at [34] of the UT Decision that in such circumstances, the statutory rights “may in practice be defeated. . .” It is not suggested that in those circumstances, in order to be able to serve a new initial notice against the transferee of the reversion, it is necessary to make an application to withdraw the original initial notice or to enable time to run so that the initial notice is withdrawn or deemed to have been withdrawn as against the transferor, to avoid the notice continuing in force under section 13(8), albeit in a state which is unenforceable both against transferor and transferee.

41. If one considers the statutory regime as a whole, it is clear that in the simplest of cases, the relevant parties to the enfranchisement process are the “participating tenants” who act through the “nominee purchaser” and the “reversioner”. Once the freehold reversion has been transferred to a third party, the original reversioner who received the initial notice, by definition, ceases to be “the reversioner” within the meaning of section 9 and can no longer be the relevant party with whom to engage in the enfranchisement process or against whom to make an application. He is no longer the owner of the freehold reversion and would be unable to convey the freehold under the terms of the 1993 Act were a vesting order made. It seems to me that the proper analysis upon the true construction of the statutory regime can be no different if the reversion is subsequently re-transferred to the original recipient of the initial notice. It follows, therefore, that I do not consider that the definition of “reversioner” in section 9 is of assistance to Mr Gallagher. It seems to me that his argument is self-serving. He seeks to place too much weight upon the phrase “in connection with any claim to exercise the right to collective enfranchisement” as if it also contained a temporal limit which required the phrase and therefore, the definition to be construed as if it referred only to the reversioner at the time when the first or the original claim was made. In my judgment, it cannot be construed to contain such a limitation and is not a legitimate means by which to resurrect the initial notice on the re-transfer of the freehold reversion.
42. Further, in my judgment, the UT erred in concluding that sub-section 13(11) is intended comprehensively to describe all of the circumstances in which an initial notice ceases to have effect. It does not say so expressly, nor in my judgment should it be construed as if it does. I agree with Mr Rosenthal that the Deputy President’s analysis of the circumstances in which proceedings concerning such a notice are dismissed at [33], [36] and [37] of the UT Decision, is tainted, perhaps by a desire to avoid injustice in this particular case. It seems to me, for example, that it is wholly unrealistic and unworkable to suggest that the tribunal seized of a dispute: would go on to resolve it even after it had struck out the case in order to enable time to run under one of the statutory provisions and as a result, for the notice to be deemed to have been withdrawn; would stay an application in relation to the terms of acquisition in case the reversion was transferred back; or would determine terms of acquisition as against a “former” reversioner and make a “conditional” vesting order under sections 24(3) and (4) despite the fact that the “former” reversioner is not in a position to convey the freehold and the new reversioner is not bound. If there were jurisdiction to make such a “conditional vesting order”, (which it is unnecessary for me to decide) it would be necessary to seek such an order on every occasion that a reversion is transferred but is unprotected on the Land Register or under the Land Charges Act 1972, in case it might be transferred back. It seems to me therefore, that there are circumstances in which an initial notice ceases to have effect which are not referred to expressly in section 13(11).
43. If I am wrong and section 13(11) is exhaustive, in my judgment, the circumstances of this case would fall within section 13(11)(c) in any event, as a result of a combination of sections 19(2) and (3) and 97(1). Although section 97 does not fall within Chapter I of the 1993 Act, its heading refers back to Chapters I and II, relates directly to initial notices

amongst other things and supplements the provisions of those Chapters. Further, it seems to me implicit in section 19(3) that where the statutory fiction does not apply in order to put the transferee in the position as if he/she had received the initial notice, that the notice is of no effect whether or not the reversion is subsequently re-transferred.

44. My conclusion is fortified by the extremely inconvenient and impracticable results which arise if despite the unprotected transfer, the initial notice continues in force (but unenforceable) awaiting a possible re-transfer to the original recipient. I have already referred to the difficulties which would arise in terms of FTT procedure were a claim struck out. In addition, as Mr Rosenthal pointed out, even if the participating tenants were able to progress matters in order to bring about a withdrawal or deemed withdrawal of the initial notice, the serious practical inconveniences could lead to a delay of more than a year before they were able to serve a new initial notice on the new freehold reversioner. In the light of sections 54(1) and (2) and paragraphs 5, 6 and 7 of Schedule 3 of the 1993 Act which make clear that other tenants who are not concerned with the collective enfranchisement process and the new freeholder can be affected, it seems to me that such consequences cannot be characterised merely as the participating tenants' own fault as Mr Gallagher would have it and cannot have been intended.
45. It also seems to me that in any event, the complications created are not resolved by the passage of time and the statutory timetable which in some circumstances renders a notice deemed to have been withdrawn in the manner described by the Deputy President at [36] and [37] of the UT Decision. I agree with Mr Rosenthal that there would be no one against whom to proceed, the transferor having ceased to be the reversioner and that therefore, any application would not be properly constituted. It seems to me that the tribunal would not proceed in the circumstances and a stalemate could arise. In addition, I consider that the difficulty when seeking to comply with section 28(2)(b) in relation to a notice of withdrawal, were the qualifying tenants required to serve one in order to cause a dormant initial notice to cease to have effect, is not necessarily resolved in the manner suggested by Mr Gallagher. The original recipient of the initial notice is no longer the "reversioner" for the purposes of section 9 and section 28(2)(b) and in the light of the fact that the transferee is not bound by the notice in any event, there must be considerable doubt as to whether he/she is the correct recipient for a notice of withdrawal.
46. Overall, it seems to me that these consequences which verge on the absurd, cannot have been intended. In my judgment therefore, the UT and the FTT before it, erred in law in deciding that the Section 13 Notice was re-activated when the freehold reversion was re-transferred to Mr Curzon and the FTT did not have jurisdiction to determine the terms of the transfer of the freehold and should have dismissed the Respondents' application.
47. For the reasons given, I would allow the appeal in relation to this issue.

(ii) Disputed Price Issue

48. In the circumstances, this issue does not arise. However, given its importance, I will consider it in brief. It is not disputed that the price for the freehold reversion had been agreed in July 2006 some eight years before Mr Curzon sought to resile from the agreement. It is also not in dispute that the terms of the freehold transfer subject to a leaseback remained “to be finalised.”
49. Mr Rosenthal submits that the effect of section 24(1) is that unless all of the terms of acquisition are agreed between the parties the matter can be referred to the FTT for determination. He points to section 24(3)(b) which provides what he describes as the “gateway” to the next stage in the process. That gateway opens when “all of the terms of acquisition have been either agreed between the parties or determined . . . under subsection (1).” Mr Rosenthal submits therefore, that the point at which any prior agreement binds the parties is when the package of terms as a whole has either been agreed or determined by the FTT. Until that point, he says that it was open to Mr Curzon to put the price back in issue. He says that this is supported by section 38(4) which states that an agreement in relation to the terms of acquisition is a “reference to agreement subject to contract” and therefore, is not binding until a formal contract is entered into.
50. The UT followed its decision in *City of Westminster v CH2006 Limited* [2009] UKUT 174 (LC) and the Deputy President noted at [54] that “it would render that scheme incoherent and open to abuse if terms which had been agreed could be revisited.” Mr Rosenthal says that that is not the case because there comes a time under section 24(3) when all the terms are either agreed or determined and at that point the FTT ceases to have jurisdiction over any of those terms. He also says that as it is possible that terms which have not been agreed can impact upon those which have, there is scope for injustice if section 24 is construed in the way in which the Respondents contend.
51. Mr Gallagher submits that the enfranchisement process is strictly sequential and once a term is “agreed” it cannot be “un-agreed”. He points out that section 24(4)(b)(i) provides a “safety valve” to allow for re-determination if, post agreement or determination there are changes of circumstance and that the existence of that “safety valve” militates against the construction put forward by Mr Rosenthal.
52. He also pointed out that it was open to the parties to agree terms conditional upon agreeing the terms of transfer or to stipulate that nothing is finally agreed until all the terms have been finalised. Furthermore, he says that the reference to terms being “agreed subject to contract” in section 38(4) does no more than make clear that even if terms have been “agreed” subject to a vesting order no application could be made for specific performance based on those terms and no agreement compliant with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 would exist.

Conclusion:

53. Although reference is made in the UT Decision to a number of authorities, only the *City of Westminster* decision and *Burman v Mount Cook Land Ltd* [2002] Ch 256 were mentioned in written submissions and only the former in oral submissions. It seems to me that the latter which is concerned with the true construction of section 45 of the 1993 Act is not entirely in point. The issue is really one of statutory construction.
54. Had it been necessary, I would have decided that the decision of the UT and the FTT before it in relation to this issue reveals no error of law. It seems to me that just as the Deputy President decided at [51] of the UT Decision, sub-sections 24(3) and (4) read as a whole create a statutory regime in which at some stage before a binding contract is entered into, terms of acquisition whether agreed or determined by the FTT have the same status. The sub-sections contain references to terms agreed *or* determined. At that stage, the court may make any of the orders set out in section 24(4)(a) – (c) which include the power in section 24(4)(b)(i) to modify the terms as a result of an application made on the basis of a change of circumstances. As the Deputy President explained, at least at the stage at which an application can be made for a vesting order the only grounds upon which terms previously agreed may be modified is on the basis of a change of circumstances. Otherwise, if matters which had been agreed previously could be re-opened, there would be no point in section 24(4)(b)(i). As Mr Gallagher says, it seems to me that if Mr Rosenthal were right, section 24(4)(b)(i) would be otiose.
55. In addition, it seems to me that as the Deputy President found, the purpose of section 38(4) is to make clear that even though terms may have been agreed “subject to contract”, they are nonetheless to be treated as having been agreed for the purposes of the statutory regime. As he stated at [52] of the UT Decision, terms which have been “agreed” for the purposes of the enfranchisement process are not binding in a contractual sense because, for example, a nominee purchaser may decline to proceed with the acquisition and seek an order under section 24(4)(c) withdrawing from the process.
56. In my judgment, the Deputy President was entirely right to determine at [54] of the UT Decision that the structure of the 1993 Act requires the terms of acquisition to be identified and either agreed or in default of agreement determined by the FTT and that it would “render the scheme incoherent and open to abuse if terms which had been agreed could be revisited.” When coming to this conclusion I also take into account that the parties in this case could have specified that nothing was agreed until everything was agreed but did not do so.
57. Had this issue arisen, therefore, I would have dismissed the appeal in relation to this issue.

Lord Justice Moylan:

58. I agree.

Lord Justice Gross:

59. I also agree.