Neutral Citation Number: [2018] EWCA Civ 764

Case No: C3/2016/4746/LATRF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/04/2018

Before :

LORD JUSTICE McCOMBE
LORD JUSTICE MOYLAN
and
LADY JUSTICE ASPLIN

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Between:

THE CORPORATION OF TRINITY HOUSE OF DEPTFORD STROND	**Appellant**
- and –	
4 – 6 TRINITY CHURCH SQUARE FREEHOLD LTD	**Respondent**

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- -

(**Anthony Radevsky** instructed by **Forsters LLP)** for the **Appellant**
(**Piers Harrison** instructed by **Ashley Wilson Solicitors LLP**) for the **Respondent**

Hearing date: 27th March 2018

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Judgment Approved

Lady Justice Asplin:

1. This is an appeal from the decision of Martin Rodger QC, Deputy Chamber President and Andrew Trott FRICS sitting in the Upper Tribunal (Lands Chamber) dated 7 November 2016 (the "Decision"). It is concerned with the proper construction of section 1(4) Leasehold Reform, Housing and Urban Development Act 1993 (the "Act"). It arises out of a dispute about the nature of the rights which must be granted over a garden at the rear of 4 – 6 Trinity Church Square (the "Garden").

2. Trinity Church Square is a garden square in the London Borough of Southwark. At 4 - 6 Trinity Church Square there are three adjoining townhouses which have been converted into flats, (the "Building") the freehold of which is owned by the Appellant, the Corporation of Trinity House of Deptford Strond ("the Corporation"). The tenants of the flats within the Building who are "qualifying tenants" have the right to collective enfranchisement in relation to the freehold of the Building pursuant to section 1(1) of the Act. The Respondent, 4-6 Trinity Church Square Freehold Limited ("Freehold Ltd") is the nominee purchaser appointed by a number of those qualifying tenants to acquire the freehold on their behalf.

3. Each of the tenants of the flats in the Building are entitled to use the Garden, in common with others, under a licence contained in their respective leases. It is an express term of the licence that it may be revoked in writing by the Corporation at any time. The licence had not been revoked at the "relevant date" for the purposes of section 1 of the Act, being the date of the initial notice to exercise the right to collective enfranchisement served pursuant to section 13 of the Act, although it was so revoked subsequently.

4. All of the terms in relation to the acquisition of the freehold of the Building have been agreed. It has also been agreed that upon the transfer of the freehold of the Building to Freehold Limited, the Corporation will retain the freehold of the Garden. The only remaining issue is the nature of the rights over the Garden which must be granted in order to satisfy the requirements of section 1(4) of the Act.

The Act

5. As Messrs Rodger and Trott explained at [8] and [9] of the Decision, Chapter I of Part I of the Act confers on the qualifying tenants of flats in premises to which the provisions apply, the right to have the freehold of those premises acquired on their behalf by a nominee at a price determined under that Chapter. Where the right to collective enfranchisement is exercised, pursuant to section 1(2)(a) the qualifying tenants are also entitled to have acquired on their behalf "the freehold of any property which is not comprised in the relevant premises but to which this paragraph applies by virtue of subsection (3)." The relevant part of Section 1(3) is as follows:

> "(3) Subsection (2)(a) applies to a property if at the relevant date either –
> . . .
> (b) it is property which any such tenant is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises (whether those premises are contained in the relevant premises or not)."

6. The right to acquire the freehold of property described in section 1(3)(b), (in this case, the Garden) may be satisfied by the fulfilment of one of the alternatives in section 1(4). It provides:

> "The right of acquisition in respect of the freehold of any such property as is mentioned in subsection 3(b) shall, however, be taken to be satisfied with respect to that property if, on the

> acquisition of the relevant premises in pursuance of this Chapter, either-
> (a) there are granted by the person who owns the freehold of that property –
> (i) over that property, or
> (ii) over any other property,
>
> such permanent rights as will ensure that thereafter the occupier of the flat referred to in that provision has as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenant under the terms of his lease; or
>
> (b) there is acquired from the person who owns the freehold of that property the freehold of any other property over which any such permanent rights may be granted."

As I have already mentioned, the "relevant date" for the purposes of section 1(3) is defined as the date on which the notice of the claim for collective enfranchisement is given under section 13 of the Act: see section 1(8). In this case, therefore, the relevant date was 3 July 2015 which was before the licence to use the Garden was revoked. Any terms of acquisition which cannot be agreed are to be determined by the appropriate tribunal on an application made under section 24.

The Leases

7. The licence to use the Garden is contained in clause 7 of the leases. It is as follows:

> "The Lessee shall be entitled as Licensee only to use in common with others the garden shown for the purposes of identification only coloured green on the said plan annexed hereto and marked "Plan A" upon the following conditions:
> (i) The garden shall be used for recreational purposes and then only provided that no nuisance or annoyance is thereby caused to the other lessees of the flats in the Building
> (ii) The Licence hereby granted may be revoked in writing by the Lessor at any time."

Further in each lease, by paragraph 1 of the First Schedule the tenant is granted the following qualified rights in common with others:

> ". . . for all purposes incidental to the occupation and enjoyment of the Flat (but not further or otherwise and without prejudice to the right of the Lessor to make such regulations as may be reasonable with regard to the security of the Building) to use on foot only the entrance halls . . . and passages leading to the Flat and (during the currency of the Licence granted by Clause 7 of this lease) the garden hereinbefore referred to."

Submissions and Upper Tribunal reasoning in outline

8. Mr Radevsky on behalf of the Corporation submits that the meaning of "such permanent rights" should be taken from its context in section 1(4)(a). He says that it is used to cater for the fact that prior to the enfranchisement process, the lessees only have rights granted for the duration of their leases whereas once the freehold of the main premises, in this case, the Building, has been acquired they will be able to grant themselves new long leases without restriction as to the length of term. The rights will no longer be co-terminus with the term of the leases and must be capable of lasting as long as any new long lease which may be granted in this case by Freehold Ltd. He also says that the same phrase "such permanent rights" used in section 1(4)(b) should be construed in exactly the same way in that sub-section, a conclusion which Mr Harrison on behalf of Freehold Ltd accepted.

9. Furthermore, Mr Radevsky says that "permanent" is a relative term. In this regard he referred us to *Henriksen v Grafton Hotel Ltd* [1942] 2 KB 184 which was concerned with whether tenants of a licensed premises were entitled when computing their profits for income tax purposes to deduct the monopoly value fixed by the licensing justices when granting licences of three years duration, the monopoly value being paid by annual instalments. The question was whether the sums payable were in the nature of revenue expenditure or a capital outlay. In that context, Lord Greene MR noted at 192 that: "[t]he thing that is paid for is of a permanent quality although its permanence,

being conditioned by the length of the term, is short-lived." Having referred to two Scottish cases in which the relevant question had been formulated by reference to whether the sums were expenditure necessary for the acquisition of rights of a "permanent character", Du Parcq LJ, pointed out at 196 that phrases such as "of a permanent character" were introduced only for the purpose of making it clear that the asset or right had enough durability to justify treating it as a capital asset. He added: ""Permanent" is indeed a relative term and is not synonymous with "everlasting"".

10. Furthermore, Mr Radevsky says that there is nothing in the wording of section 1(4)(a) to warrant a change in the quality of the rights granted under the leases. He says that the express provision in the sub-section that the rights granted must be ". . . as nearly as may be the same rights as those enjoyed . . . under the terms of [the] lease" creates sufficient latitude to enable rights expressed in the lease to be translated into the freehold context but is not wide enough to allow or require revocable rights to be converted into irrevocable ones. Mr Radevsky submits therefore, that the Upper Tribunal was wrong to find as it did at [42] – [47] of the Decision and in particular, to reach the conclusion succinctly expressed at [45] as follows:

> "45. Where the rights originally enjoyed by a qualifying tenant under the lease of the flat were revocable, the requirement of permanence therefore means that they must become irrevocable on the completion of the transfer. Section 1(4)(a) contemplates that the rights to be enjoyed may not be identical in every respect to the original rights, but must be "as nearly as may be the same". The possibility of modification is necessary because the replacement rights may be granted over different property, but also because of the overriding requirement of permanence which may be inconsistent with the original formulation of the rights. "

11. Mr Radevsky also criticises the Upper Tribunal's approach to two other Upper Tribunal decisions in relation to section 1(4), which it found to be supportive of its reasoning. They were both decisions of HHJ Huskinson. The first is *Fluss v Queensbridge Terrace Residents Ltd* [2011] UKUT 285 (LC) in which only the Appellant appeared and was represented. Under the leases, the landlord was entitled to make regulations in relation to the use of "Amenity Land" but had not done so by the relevant date. The right was for the duration of the term and therefore, the issue of revocation did not arise. The Upper Tribunal held that the right to use the amenity land under section 1(4)(a) could not be made subject to the landlord's power to impose regulations in the future. In particular, at [36] it was held that the "argument that the rights should be taken with all their potential future frailties" in the sense that regulations could be made in the future, did not give effect to the express wording of the statutory provision. The Upper Tribunal in this case noted at [48] that the *Fluss* decision ". . . did not turn on the requirement that the rights should be permanent, but on the need for them to be "as nearly as may be the same rights as those enjoyed ... on the relevant date". It went on at [49] to observe that the Upper Tribunal in *Fluss* had gone on to ". . . test the argument by asking whether rights which were "subject to a power of termination or curtailment" could satisfy section 1(4)" and had held ". . . that they could not, because the rights granted would not be permanent and would not, as nearly as may be, be the same rights as those enjoyed on the relevant date."

12. The second decision which was considered was *Snowball Assets Ltd v Hunstmore House (Freehold) Ltd* [2015] UKUT 0338 (LC). At [43] of the Decision the Upper Tribunal had agreed with the submission of leading counsel on behalf of the nominee purchaser in the *Snowball* case that:

> "The statutory purpose is to ensure that the lessees end up in a reasonably similar position to the position they would have been in if they had acquired the freehold of the additional premises; i.e. to use the gardens and leisure complex as they pleased effectively in perpetuity."

In the *Snowball* case, the Upper Tribunal held that the FTT had been correct in deciding that the nominee purchaser was entitled to acquire the freehold of the additional premises which comprised a garden and leisure complex because the rights offered by the freeholder under section 1(4)(a) did not satisfy the "equivalence test" and that in any event, the lessees enjoyed permanent rights over the additional premises but if that was wrong, insofar as anyone had a right to withdraw the provision of the garden or the leisure complex it was the management company in which all the lessees were shareholders: [74], [76] and [84]. At [85] HHJ Huskinson went on to confirm that he considered his reasoning in the *Fluss* case to have been correct. The Upper Tribunal in this case referred to the *Snowball* decision at [49] and noted that it did not concern precarious rights and that the Tribunal's adherence to its reasoning in *Fluss* had not been part of its core reasoning. It went on as follows:

> "50. For our part we would distinguish between a power to regulate rights and a power to terminate them. Our reasons for finding that revocable rights are not sufficient for the purpose of section 1(4)(a) are the same as Judge Huskinson's, namely that a revocable right is not permanent. That conclusion does not require any focus on the precise mode of enjoyment of the rights on the relevant date; all that matters is that the right conferred by the lease was one belonging to the qualifying tenant on that date. We consider that too close a focus on the relevant date should not be allowed to detract from the requirement that the rights should, as nearly as may be, be the same rights as those enjoyed under the terms of the tenant's lease. The requirement of equivalence seems to us to mean that rights conferred by the lease should continue to be enjoyed subject to the same restrictions as existed on the relevant date, and subject also to any power existing on that date to regulate the enjoyment of the rights, whether or not the power had yet been exercised. We test that proposition by putting a counter example to Judge

> Huskinson's. Take the case of qualifying tenants who enjoyed an irrevocable right to use a swimming pool or gym under their leases. If the swimming pool or gym happened to be closed for a day for repairs so that the tenants' rights to use them were temporarily suspended on the relevant date by regulations governing their use, could it really be the intention of the statute that an initial notice given on that day would carry no entitlement to permanent rights under section 1(4)(a)? We think not, since that would leave the tenants with no rights after the expiry of their current leases, which would not be "as nearly as may be" the same as their existing rights on the relevant date, when they had a right to resume their use of the pool and gym in future, once the repairs were completed.
>
> 51. It follows that we respectfully disagree with the Tribunal's conclusion in paragraph 36 of *Fluss* on the issue of the continuation of a previously unexercised power to make regulations, although we agree with the example given in that paragraph so far as it relates to the issue of termination. Like Judge Huskinson we also agree with the arguments advanced by leading counsel for the nominee purchaser in *Snowball* (at paragraphs 47(4) and 49 to 51, accepted at paragraph 85)."

13. Mr Radevsky submits that the Upper Tribunal in this case was wrong at [51] to agree with the obiter dicta in the *Fluss* case as to a right to terminate a licence, having disagreed with the reasoning in relation to the making of regulations. He says that it followed that a power of termination contained in the lease ought also to be contained in the "permanent rights" which are "as nearly as may be the same rights as those enjoyed . . . on the relevant date . . . under the terms of [the] lease." Mr Radevsky says that the effect of the Upper Tribunal decision is to equate a terminable licence which is what the lessees had over the Garden with a full easement granted under a lease and in doing so, no meaning has been given to the expression "as nearly as may be the same rights as those enjoyed . . . under the terms of [the] lease", in section 1(4)(a).

14. Lastly, in this regard, Mr Radevsky says that the Upper Tribunal should not have gained support from section 62 Law of Property Act 1925 for the conversion of temporary

rights into permanent ones, in the way it did at [47] of the Decision. The Upper Tribunal pointed out that "section 62 operates to pass with a conveyance all rights enjoyed with the land and to convey them into full legal rights, even where, as previously enjoyed, they were precarious rights." He points to what he describes as the numerous expressions of dissatisfaction with section 62 including the Law Commission's Report: Making Land Work: Easements, Covenants and Profits a Prendre (2011) Law Com No. 327 at para 3.59 and its recommendation that section 62 should no longer have that effect, which was embodied in a Bill included in the 2016 Queen's Speech.

15. Mr Harrison on behalf of Freehold Ltd on the other hand, emphasizes that the relevant statutory context for section 1(4) is the collective enfranchisement process itself, at the end of which, the participating tenants will have the ability to grant themselves leases of indefinite duration. He also points out that pursuant to section 1(2)(a) of the Act, subject to the other provisions of Chapter I, the qualifying tenants are entitled to have acquired the freehold of the additional property used in common with others, referred to in section 1(3) and that it is only if a counter notice is served that the possibilities of the alternatives in section 1(4) arise. In addition, those alternatives also include the acquisition of the freehold of other property by the nominee purchaser under section 1(4)(b). He submits therefore, that the statutory purpose of section 1(4) was correctly identified in the *Snowball* case at [49], adopted by the Upper Tribunal in this case at [43] and set out at [12] above.

16. Furthermore, Mr Harrison says that the Upper Tribunal was right to note as it did at [46] of the Decision:

> "That formerly temporary rights should be replaced, on enfranchisement, by perpetual rights should not be regarded as an improbable result. First, because the whole purpose of the enfranchisement code is to replace the limited leasehold rights enjoyed by qualifying tenants with permanent rights; and secondly because the Act provides for landlords whose interests are diminished in value, or who sustain damage in respect of land other than the specified premises, to be compensated in the form of the premium payable by the tenants under Schedule 6."

17. He also points to the use of the words "ensure . . . thereafter" in section 1(4)(a) and to "as nearly as maybe". He says that the first phrase is indicative of a continuing state of affairs and that in the second it is implicitly recognized that in some circumstances the requirements that the right should be the same must give way to the other requirements. He submits therefore, that the need for equivalence of rights gives way where necessary to the requirement of permanence which is reflected in the use of the phrase "permanent rights", "thereafter" and "ensure" in section 1(4)(a). He says therefore, that the Upper Tribunal were right to conclude as it did at [45] of the Upper Tribunal Decision.

18. He also submits that Mr Radevsky's explanation of the use of "permanent" in section 1(4)(a) makes little sense because it is obvious that as a result of the process which is envisaged, leasehold easements and rights will be translated into easements and rights included in the transfer of the freehold of the Building. As to the terms of the conveyance of the Building he referred us to section 34(9) and Schedule 7 paragraphs 2 and 3 of the Act. Express reference is made at paragraph 2(1) to the fact that the conveyance shall not exclude or restrict the general words implied in conveyances by section 62 Law of Property Act 1925 and at paragraph 3(2)(a)(i) to the inclusion in the conveyance of all rights of support and the like including "such easements and rights over other property as are necessary to secure as nearly as may be for the benefit of the

relevant premises the same rights as exist for the benefit of those premises immediately before the appropriate time".

Conclusion

19. As both Mr Radevsky and Mr Harrison pointed out, section 1(4)(a) should be construed in the light of Chapter 1 of the Act and section 1 as a whole. The Chapter is headed "Collective Enfranchisement in Case of Tenants of Flats" and is concerned with the enfranchisement process which involves the conveyance of the freehold of the main premises to the nominee purchaser on behalf of those of the qualifying tenants who are "participating tenants". As a result of sections 1(2)(a) and (3)(b), the primary position in relation to any additional land over which the qualifying tenants exercise rights in common with others, is that the participating tenants are entitled to have the freehold of that land acquired for them. That entitlement is only "taken to be satisfied" if one of the other alternatives in section 1(4) is provided by the landlord/freeholder. It is important, therefore, to construe the alternatives set out in section 1(4)(a)(i), (a)(ii) and (b) as just that. They are alternatives to the "right of acquisition" which would otherwise apply and are to be interpreted against the backdrop of the right to collective enfranchisement in relation to the main premises.

20. It is also important to interpret each of the alternatives contained in section 1(4)(a) and (b) in the light of the others. As Mr Harrison pointed out, the alternative set out in section 1(4)(b), itself involves the acquisition by the nominee of a freehold, in that case, of "other property" over which "such permanent rights may be granted." As the Upper Tribunal put it at [46] of the Decision, in the light of that statutory context it would not

be surprising if the purpose and proper construction of section 1(4)(a) of the Act were that revocable rights should be converted into irrevocable ones.

21. Against that background, if "such permanent rights" is read with "thereafter" and "ensure" in section 1(4)(a), it seems to me that they are indicative of a continuing, or perpetual state of affairs and the creation of rights which are irrevocable. They require more than the continuation of the same revocable rights for a period co-terminus with any new long lease which may be granted. When interpreted in context, there is nothing to suggest that "such permanent rights" means less than it naturally suggests. Du Parcq LJ's statement in the *Henriksen* case that "permanent" is a relative term was made in the very different context of the incidence of income tax and is of no assistance here.

22. If Mr Radevsky's construction were correct, the outcome in this case under section 1(4)(a) would be entirely different from the primary position under section 1(2) which it is intended to be taken to satisfy. It would also be entirely different from the alternative to it contained in section 1(4)(b). The original freeholder would be in no different position in relation to the Garden than it had been before the enfranchisement process commenced, save that on the face of it, the licence would continue for a period which would be longer than the terms of the original leases. However, just as before, the freeholder would be able to revoke the licence to use the Garden granted in the transfer of the freehold in relation to the Building. In fact, it would be able to do so immediately after the transfer had taken place. This is in stark contrast to the right to have the freehold in the Garden acquired under section 1(2). It seems to me that such an interpretation gives no real meaning to either "permanent" or "permanent rights" at all.

23. In fact, as Moylan LJ pointed out in the course of argument, if Mr Radevsky were correct, there would be no need to have included "permanent" in section 1(4)(a). Rights

could be granted which extended beyond the length of the original leases, potentially for the length of any term of 999 years granted by Freehold Ltd to a lessee, if section 1(4)(a) merely referred to "rights" which would "ensure that . . . the occupier of a flat . . . has as nearly as may be the same rights as those enjoyed . . . under the terms of his lease".

24. I agree, therefore, with the Upper Tribunal's conclusion at [45] of the Decision. The requirement of permanence requires the revocable right to use the Garden to be converted into an irrevocable right on the completion of the transfer of the freehold of the Building. Section 1(4)(a) contemplates that the rights to be enjoyed may not be identical to those under the leases but must be "as nearly as may be the same". This is what Mr Harrison referred to as the "equivalence" requirement. It seems to me that the Upper Tribunal was right to note that the possibility that the rights will not be identical arises not only from the fact that the rights may be granted over different property altogether, under section 1(4)(a)(ii) and therefore, may need modification, but also because of the requirement that the rights be "permanent" which may be inconsistent with the original formulation. There is nothing to suggest that the phrase "as nearly as may be the same" must be restricted in order to prevent the conversion of a revocable right into an irrevocable one or is not capable of such an interpretation. On the contrary, it seems to me that read in context, it is necessary that it should be interpreted in order to enable such a modification to be made.

25. Such a construction is also consistent with the use of the phrase "such permanent rights" in section 1(4)(b). It seems to me that the phrase is used in that sub-section by way of description of the other property of which the freehold is to be acquired. It must

be property "over which such permanent rights" which are "as nearly as may be the same rights as those enjoyed in relation to [the original] property . . . under the terms of [the] lease" may be granted. It is not sufficient therefore, for the other property in section 1(4)(b) to be of a character or size which would prevent the grant of "such permanent rights." If, for example, for his own convenience, the landlord/freeholder wishes to substitute a different piece of land for use as a bin store, for the area which the lessees have used in the past and in relation to which they have rights under their leases, and to transfer the freehold of the substitute, such a substitution can only be taken to have satisfied the right of acquisition of the original bin store, if the substituted land is capable of having such permanent rights granted over it. If it were half the size or contaminated in some way, it would not be "property over which any such permanent rights may be granted."

26. Furthermore, it seems to me that the Upper Tribunal was right to distinguish the power to make regulations in relation to the exercise of rights from a power to revoke or terminate them, in the way it did at [50] of the Decision. The power to revoke a right altogether is inconsistent with the requirement of permanence in section 1(4)(a) of the Act whereas a right under the lease to make regulations as long as it is not sufficiently wide to contravene the requirement of permanence, should be replicated in the transfer as a result of the equivalence provision in section 1(4)(a), even if it has not been exercised on the relevant date. It is a part of the basket of rights and obligations contained in the lease. In this case, the scope of the power to make regulations was very narrow. It was a right only to make "such regulations as may be reasonable" relating to the security of the Garden.

27. Lastly, it seems to me that as further support for its conclusion, the Upper Tribunal was entitled to note that the conversion of temporary to permanent rights is not inimical to the statutory scheme under the Act as a whole and that therefore, it should not be regarded as surprising, in principle, that under section 1(4)(a), a revocable licence to use the Garden must be replaced by an irrevocable right, by reference to Schedule 7 paragraph 2(1): see [47] of the Decision. Both Section 62 Law of Property Act 1925 and Schedule 7 paragraph 2(1) remain the law. Except where the nominee purchaser consents or its exclusion is necessary to preserve any existing interest of the freeholder in tenant's incumbrances, a conveyance of the relevant premises does not exclude or restrict the general words implied in conveyances by section 62 Law of Property Act 1925. Accordingly, on the completion of the enfranchisement process in relation to the main premises, the transfer would be deemed to pass with it all rights enjoyed with those premises and have the effect of converting them into irrevocable rights. Had the licence to use the Garden not been revoked, therefore, the transfer of the freehold of the Building would have been deemed to pass with it all the rights enjoyed with the Building, including the rights over the Garden and had the effect of converting them into irrevocable rights.

28. For all the reasons set out above, I would dismiss the appeal.

Lord Justice Moylan:

29. I agree.

Lord Justice McCombe:

30. I also agree.