Neutral Citation [2020] EWHC 792 (Ch)

Appeal No: 9BS0075C

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES IN BRISTOL
CHANCERY APPEALS (ChD)

On the appeal from the order of Mr Recorder Norman dated 19 July 2019 sitting at the County Court at Bristol

Bristol Civil Justice Centre
2 Redcliff Street
Redcliffe
Bristol BS1 6GR

(Court sitting remotely)

Date: Wednesday 8 April 2020

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

- -

Between:

FREEHOLD PROPERTIES 250 LIMITED

Appellant
(Defendant below)

- and -

(1) BEVERLEY ANN FIELD
(2) GRAHAM ERNEST FORD
(3) VANESSA ELIZABETH FORD
(4) HELEN GAMSA
(5) SUSAN CAROL LATHAM
(6) STEVEN PETER PURNELL
(7) SANDRA ANNE LOVELOCK
(8) VALERIE TRACEY RUTHERFORD
(9) TERENCE NEIL MELFORD
(10) CAROLYN JUNE MELFORD
(11) JOHN FRANCIS NICOLL
(12) ROWENA NICHOLL
(13) TONY MALCOLM RUDRUM
(14) GILLIAN PATRICIA RUDRUM
(15) KELLY PATRICIA SIMMONDS
(16) JOHN WARREN
(17) BERNADETTE WARREN
(18) ALAN JOHN WINSTONE

(19) SARAH LOUISE WINSTONE

Respondents
(Claimants below)

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Mr Jonathan Upton (instructed by **Stevensons Solicitors**) for the Appellant, **Freehold Properties 250 Limited**
Mr Ewan Paton and **Mr Jay Jagasia** (instructed by **Barcan & Kirby LLP**) for the Respondents, **Ms Beverley Ann Field and 18 others**

Hearing date: 27 March 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic. The Judgment was handed down remotely at 4:15pm on 8 April 2020 (the deemed time of hand-down) by emailing the parties' representatives and submitting the Judgment for publication on BAILII.

Mr Justice Marcus Smith:

A. INTRODUCTION

1. The Respondents are all long leasehold owners of 11 properties of which the Appellant is the freeholder (the **Properties**).[1] The Properties are either purpose-built terraced or semi-detached properties situated on an estate in Bradley Stoke, Bristol. The Respondents seek to acquire the freehold title to the Properties from the Appellant under the Leasehold Reform Act 1967 (as amended from time-to-time, the **1967 Act**). The Appellant contends that the Respondents have no right to acquire the freeholds pursuant to the 1967 Act.

2. Although the Appellant took a number of points against the Respondents, by the time the dispute came before the judge at first instance, Mr Recorder Norman, the only point remaining was whether the Properties and/or the leases of those Properties fell within the scope of the 1967 Act.

3. By a judgment handed down on 19 July 2019, after a trial that took place on 15 and 16 July 2019, Mr Recorder Norman determined:

   (1) That the Properties and/or the leases of those Properties fell within the scope of the 1967 Act and that the Respondents were accordingly entitled to acquire the freehold title to the Properties from the Appellant. The Appellant was given permission to appeal this holding by Mr Recorder Norman.[2]

   (2) That – if he was wrong on this point – the "avoidance" provisions contained in section 23 of the 1967 Act were <u>not</u> engaged, so that <u>if</u> (contrary to his holding at paragraph 3(1) above) the Properties and/or the leases of those Properties fell outside the scope of the 1967 Act, the Respondents were <u>not</u> entitled to acquire the freehold title to the Properties. By their Respondents' notice, the Respondents contend that the Recorder was wrong to conclude that section 23 was not engaged and that the decision of the Recorder could be upheld on this alternative basis.

4. This Judgment is structured as follows:

   (1) The appeal was conducted remotely over the internet. I explain the circumstances of and basis for this in Section B below.

   (2) In Section C below, I deal with certain procedural objections taken by the Respondents to the Appellant's appeal. The Respondents say that the Appellant (acting by counsel who did not appear below) is arguing a new legal point that was not taken before Mr Recorder Norman; that falls outside the scope of the permission to appeal given by Mr Recorder Norman; and that involves resiling from a concession made at trial by the Appellant.

[1] The identity of the Properties is immaterial for purposes of this Judgment.

[2] See paragraph 7 of the order of Mr Recorder Norman dated 19 July 2019.

(3) In Section D below, I describe the manner in which the Properties are held by the Respondents. The parties are agreed that for the purposes of the points here under consideration, the Properties are, in all material respects, identical. Accordingly, Mr Recorder Norman considered only one of the Properties for the purposes of his decision: 126 Great Meadow Road, Bradley Stoke, Bristol. I propose to follow the same course. Accordingly, Section D is confined to a description of this property, which I shall refer to as **Number 126**.

(4) In Section E below, I set out the relevant provisions of the 1967 Act and determine whether the leaseholders of Number 126 (the Seventh and Eighth Respondents, Ms Sandra Lovelock and Ms Valerie Rutherford) are entitled to acquire the freehold title to Number 126 from the Appellant. Thus, Section E deals with the point described in paragraph 3(1) above.

(5) In Section F below, I consider the point at paragraph 3(2) above, namely whether the "avoidance" provisions in section 23 of the 1967 Act are engaged. I do so on the assumption that the Seventh and Eighth Respondents are not otherwise entitled to acquire the freehold title to Number 126 from the Appellant.

(6) Finally, Section G sets out how I dispose of this appeal.

B. THE HEARING

5. This hearing took place during the COVID-19 "coronavirus" pandemic. By my order of 24 March 2020:

(1) I ordered that the hearing take place by video-conference rather than at the Bristol Civil Justice Centre.

(2) I set out how electronic documents and authorities should be delivered to me remotely.

6. The hearing was listed at the Bristol Civil Justice Centre as a remote hearing: media representatives were invited to attend in real-time by contacting my clerk to receive login details for the hearing. The hearing was video-recorded at my direction. In these circumstances, the hearing was a public hearing within the meaning of Practice Direction 51Y.

7. I am very grateful to both parties and their representatives for facilitating, at relatively short notice, this hearing. Their assistance in compiling effective and workable electronic bundles, at short notice, was greatly apprecated by me. Argument lasted for a day on 27 March 2020, and I reserved my judgment. This is that judgment.

C. PROCEDURAL ISSUES: CAN THE APPELLANT PROPERLY ADVANCE THE POINTS BEING MADE ON APPEAL?

8. The Respondents contend that the Appellant may not make the contentions that it advances in the grounds of appeal and in its written submissions. That is because the contentions advanced by the Appellant on this appeal are different to those that were made before Mr Recorder Norman.

9. The Respondents advance three objections:

(1) First, that the point taken on appeal is a new point, not argued below.

(2) Secondly, it is an attempt to resile from a concession made by the Appellant at trial.

(3) Thirdly, that Mr Recorder Norman, when giving permission to appeal, did not give permission in relation to this point.

10. I do not consider there to be anything in these three objections. It is important to note that the Appellant has simply re-framed its legal arguments, albeit, as will be seen, radically: there is no attempt by the Appellant to introduce new factual material. It is trite that whilst stringent conditions must be satisfied if a party to an appeal seeks to adduce new evidence, the same is not true when it comes to points of law. Provided no new evidence is required, an appellant is in general, and subject to certain limitations I articulate below, perfectly entitled to re-frame the argument in light of the judgment being appealed.

11. To deal more specifically with the objections advanced by the Respondents:

(1) I consider that the Appellant is perfectly entitled to take what might be regarded as a new point, provided that the Appellant is simply re-framing the legal issues and not seeking to introduce new evidence. I stress that very different rules apply where an appellant wishes to adduce new factual material, but that is not this case.

(2) The Respondents contended that this was a case where the Appellant was doing far more than "re-frame" a legal argument. Specifically:

(a) The Appellant was abandoning the legal argument run before Mr Recorder Norman, which turned on whether Number 126 fell within or without section 2(2) of the 1967 Act. Certainly, it is true that the ambit of section 2(2) formed an essential argument before Mr Recorder Norman, whereas it was accepted before me that section 2(2) could not preclude the Seventh and Eighth Respondents from seeking to enfranchise their lease.

(b) Instead, before me the Appellant relied on the wording in section 1(1) of the 1967 Act – specifically, the words "a tenant of a leasehold house", a phrase that it will be necessary to consider in detail below – to contend that Mr Recorder Norman's conclusion that the Respondents fell within the 1967 Act was wrong. Although, unsurprisingly, section 1(1) was referenced before Mr Recorder Norman, it cannot be suggested that the arguments in relation to section 1(1) that were run before me were run before Mr Recorder Norman. Mr Upton, counsel for the Appellant, did not seek to suggest otherwise.

In these circumstances, the Respondents contended, the Appellant was not re-framing the argument, but impermissibly substituting one legal argument for another.

(3) I consider that the Appellant was, even accepting the Respondents' characterisation of the change in the Appellant's position,[3] permitted to pursue this very different line of argument. It seems to me that provided: *(i)* the point is open to the Appellant on the pleadings; *(ii)* sufficiently wide permission to appeal has been given; and *(iii)* the Respondents were not taken by surprise, the Appellent's room for manoeuvre is considerable in these circumstances.

(4) The present case was a Part 8 Claim. There were no pleadings, just a Part 8 Claim Form:

(a) By this Claim Form, the Respondents sought "declarations in respect of notices served under Part I of the [1967 Act], on terms set out in the witness statement which accompanies the claim, and for the reasons set out in that statement".

(b) That witness statement – the statement of Mr Howell, the solicitor acting for the Respondents – ranged widely across the 1967 Act and I consider that the question before the court at first instance was this: "Are the Respondents entitled to enfranchise under Part I of the 1967 Act or are they (for whatever reason) not so entitled?"

(c) It was, thus, open on the pleadings for the Appellant to take any point of law to suggest that the Respondents were not so entitled under the 1967 Act – provided there was no surprise. That remained the case on appeal – subject to the question of permission, which I return to below.

(5) I do not consider that the manner in which the Appellant argued the law can in any way amount to a concession. Indeed, I consider that a court should be very slow to conclude that a party can be bound by a concession on a point of law. That is because it is the duty of a court to determine the law, and the court cannot – by an agreement between the parties – be forced to determine a point of law by concession. If a court articulates a point of law, it should be after a substantive determination. It is, of course, entirely up to the parties (or, more specifically, their legal representatives) to determine what points they take and how they argue them; and a court will always look with disfavour on attempts to take advantage by surprise. If a party says that a legal point is not in issue, then that "concession" should not be resiled from save on due notice. But I do not consider that a "concession" on a point of law is the equivalent of a concession or admission on a point of fact or on a point that is pleaded:

(a) To resile from a concession on the facts will require the permission of the court, and clear justification. In this case, the facts were agreed, and there was no possibility of such a concession being made.

[3] Inevitably, matters were not quite as clear cut. There was certainly a wide-ranging correspondence between the parties prior to the issue of proceedings, which probably was wide enough to embrace the point eventually run by the Appellant on appeal. But I do not consider that one should have recourse to the correspondence. The issues between the parties are defined by the pleadings.

(b) So too with a concession on the pleadings. Had the Appellant – by way of hypothetical example – conceded that the First Respondent (but none of the other Respondents) was entitled to enfranchise under the 1967 Act, then absent permission and clear justification, that concession would stand and bind the Appellant. Of course, there was no such concession in the present case.

As I say, I do not regard the manner in which the case was argued below to be a concession of any sort, provided the Respondents are not taken by surprise (in which case, adjournment at the cost of the party changing its position would be appropriate). In this case, the Appellant's "new" point has been clear since the filing of its Appellant's notice with grounds of appeal dated 6 August 2019, and there can be no question of taking advantage.

(6) I turn to the question of permission to appeal. It is trite that appeals are of orders, not of judgments.[4] By his order, Mr Recorder Norman declared and ordered that (amongst other things):

(a) Judgment be given for the Respondents (paragraph 1 of his order).

(b) The notices under the 1967 Act served by the Respondents were not invalid (paragraph 2 of his order).

(c) The long leasehold Properties which form the subject-matter of the claim were "houses" within the meaning of section 2(1) of the 1967 Act and were not excluded by operation of section 2(2) of the 1967 Act (paragraph 3 of his order).

In paragraph 7 of Mr Recorder Norman's order, the Appellant was given "permission to appeal the Court's substantive decision". These are wide words, and although the Respondents sought to contend that permission to appeal was only given in relation to the declaration in paragraph 3 of the order regarding the scope of sections 2(1) and 2(2), I do not consider that this can be right. By paragraph 1 of the order, judgment was given for the Respondents: clearly, Mr Recorder Norman held that the Respondents were entitled to enfranchise under Part I of the 1967 Act, and it is in relation to that holding – as well as any other, more specific, substantive holdings – that he gave permission to appeal.

(7) The Appellant's grounds of appeal articulate only the "new" point. I consider that that point now was open to the Appellant on the pleadings and that Mr Recorder Norman gave permission to appeal in relation to this point. As I have noted, there can be no question of surpise in this case: the grounds of appeal date from August 2019.

12. In these circumstances, the Appellant can properly advance the points articulated in its grounds of appeal. If I am wrong, then for essentially the same reasons, I would have given the Appellant permission to advance its grounds of appeal, as framed, at the appeal before me.

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[4] See [52.0.6] of the *White Book 2019* and the authorities there cited.

D. NUMBER 126

13. Number 126 is an end of terrace or semi-detached building. It has three external load bearing walls and one load bearing party wall with the neighbouring property. These walls sit over foundations and under a pitched roof construction. There is nothing unusual in the building itself.

14. Number 126 is demised by a tripartite lease dated 6 September 1990 (the **Lease**). The Lease is for a term of 99 years from 1 April 1990. The unexpired term of the Lease is vested in the Seventh and Eighth Respondents.

15. The parties to the Lease were:

(1) Tarmac Homes Bristol & West Limited as **Lessor**. The Lessor's interest has now passed to the Appellant.

(2) Ms Nicola Julie Boundy as **Lessee**. The Lessee's interest has now passed to the Seventh and Eighth Respondents.

(3) A company, Kestrels Green Management Company Limited (the **Company**). The Company remains a party to the Lease and performs the role of a management or service company. The role of the Company is one that I return to below.

16. The Lease contains a plan (the **Plan**) identifying the property demised by the Lessor to the Lessee, which is referred to as the **Premises**. The Premises are marked edged red on the Plan. The Premises are additionally defined in the Lease in the following way:

> ""The Premises" shall
>
> A. Include
>
> (i) The internal coverings of the load bearing walls of the dwelling and all doors and windows in such walls with their frames glass furniture and locks
>
> (ii) Any internal non load bearing walls or partitions and doors windows frames glass furniture and locks
>
> (iii) The coverings of the ceilings below the joists or structural ceiling supports and the floorboards or floor surfaces above the joists or structural floor supports
>
> (iv) All Service Media servicing exclusively the dwelling (and not being owned by statutory or other utility authorities etc)
>
> (v) All fixtures and fittings in the dwelling (except tenant's fixtures and fittings)
>
> (vi) The car parking space forming part of the Development shown edged red on the Plan
>
> B. Exclude
>
> (i) All structural parts of the Premises such as load bearing walls roofs foundations and any Service Media which do not exclusively service the dwelling"

This definition itself contains other definitions, notably **Service Media** and **Development**:

(1) Service Media "shall mean all or any of the mechanical electrical plumbing (including sewers and drains) telephone gas television reception and entryphone installations and all easements relating thereto which are necessary for the Lessee's use and enjoyment of the Premises as hereinafter defined and which may be used in common with the Lessor and/or other occupiers of the Development or the Estate".

(2) Development "shall mean the building or buildings comprising dwellings, car parking spaces and all external grounds accessways amenity areas or other appurtenances of which the Lessor is Registered Proprietor under Title Number V 174686 and shown edged green on the Plan"

17. The First Schedule to the Lease sets out various rights and easements granted in favour of the Lessee. These include, for example, a right of support and a right to enter.

18. The Fifth Schedule to the Lease sets out the Company's management duties. Essentially, these involve maintaining and repairing the Development, including the Service Media and the **Common Parts**. Common Parts means "the main structure roofs external walls and foundations and those other parts of the Development not included in any Lease or Tenancy granted by the Lessor".

E. ENTITLEMENT TO ACQUIRE FREEHOLD TITLE

(1) The relevant provisions of the 1967 Act

19. Section 1(1) of the 1967 Act provides that "[t]his Part of this Act shall have effect to confer on a tenant of a leasehold house a right to acquire on fair terms the freehold or an extended lease of the house and premises where" certain conditions – specified in section 1(1)(a) and (b) – are met. It is unnecessary to set out these conditions, as the dispute between the parties concerned not the satisfaction of these conditions, but whether Number 126 was or was not a "leasehold house" and whether the Seventh and Eighth Respondents were "tenant[s] of a leasehold house".

20. Section 2 materially provides as follows:

"(1) For the purposes of this Part of this Act, "house" includes any building designed or adapted for living in and reasonably so called, notwithstanding that the building is not structurally detached, or was or is not solely designed or adapted for living in, or is divided horizontally into flats or maisonettes; and –

(a) where a building is divided horizontally, the flats or other units into which it is so divided are not separate "houses", though the building as a whole may be; and

(b) where a building is divided vertically the building as a whole is not a "house" though any of the units into which it is divided may be.

(2) References in this Part of this Act to a house do not apply to a house which is not structurally detached and of which a material part lies above or below a part of the structure not comprised in the house."

21. Neither the term "leasehold" nor the composite term "leasehold house" is specifically defined in the 1967 Act.

(2) The parties' contentions

22. The Appellant contended that the crucial question for determination was whether the Seventh and Eighth Respondents were "tenants of a leasehold house" within the meaning of section 1(1) of the 1967 Act. The issue was not whether Number 126 fell within the scope of section 2(1) or 2(2) of the 1967 Act.

23. This, as I have indicated, is not the way the point was put to Mr Recorder Norman. Although, for the reasons given in Section C above, I consider that it is open to the Appellant to take this point, the consequence is that my approach will necessarily be different to that of Mr Recorder Norman, who (as I note) had an argument of an altogether different colour addressed to him.

24. The Appellant contended that the Seventh and Eighth Respondents were not "tenants of a leasehold house" because:[5]

> "Section 1(1) of the Act confers a right to enfranchise on "the tenant of a leasehold house". The ordinary and natural meaning of the words in section 1(1) is that the tenant must be the tenant of the *whole* of a leasehold house. The section does not confer a right on the tenant of *part* of a leasehold house. No such interpretation is permissible without very clear words."

25. The point is put more fully in the Appellant's grounds of appeal, which it is appropriate to quote in full:

> "1. In order for a tenant to be able to exercise the rights to acquire the freehold conferred by section 1(1) of the [1967 Act], he must be the tenant of the whole of a leasehold house. The learned judge erred in law by failing to identify correctly the issue that fell to be decided, namely whether the Respondents are a "tenant of a leasehold house" for the purposes of section 1(1) of the [1967 Act]. Had the learned judge asked the right question,[6] he would (or should) have held that the Respondents are a tenant of only part of a house by reason that the structural parts of the house are retained by the Appellant landlord and dismissed the claim. The "core issues" identified by the learned judge at [8] of the Judgment do not arise. In particular, section 2(2) of the [1967 Act], which relates to overlapping premises, has no application to the facts of the instant case.
>
> 2. Further and/or alternatively the learned judge was wrong to hold at [22] that the Respondents are a "tenant of a leasehold house" for the purposes of section 1(1) of the [1967 Act] notwithstanding that all structural parts are excluded from the demise. The judge identified (correctly) at [22.2] of the Judgment that the Respondents are "*tenants of a property comprising (essentially) the internal parts with easements of protections and support from the load bearing walls the foundations and the roof*". He erred in law in holding at [22.3] "*that composite makes them the tenants of a leasehold house if the*

[5] Quoting from paragraph 26 of the Appellant's written appeal submissions.

[6] I should note that this is a slightly tendentious way of putting the point, since (as I understand it) the argument before the Recorder proceeded very much along the lines that the Respondents' Properties did not fall within the scope of section 2. The Recorder is, therefore, not to be criticised for the approach he took in his judgment. However, as I have described, the Appellant is entitled to run a different legal argument on appeal, and that is what has happened here.

> *house otherwise satisfies the definition in section 2(1) and (2) as I have found that it does*". The Respondents are a tenant of only part of a house and section 2(2) of the [1967 Act] is not relevant. The [1967 Act] does not apply to the premises demised by the Respondents' leases."

26. The Respondents' contention in response was that "the "whole of a house" argument is a gloss or addition to the words of the section, which could easily have been inserted by the draftsman, but was not".[7] The Respondents' contention was, thus, the precise converse of the Appellant's: the Respondents contended that any leasehold interest – even if only of part of the "house" – was sufficient to qualify.

(3) The approach to statutory construction

27. Books have been written about statutory construction – notably *Bennion* and *Craies*. I was referred to *York House (Chelsea) Ltd v. Thompson* as containing a helpful distillation of the approach:[8]

> "32. The question in each case is one of construction of the phrases, respectively, "disposal by way of gift" and "to a member of the landlord's family". The modern approach to statutory construction is "to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose": *Pollen Estate Trustee Co Ltd v. Revenue and Customs Comrs*, [2013] 1 WLR 3785, [24], per Lewison LJ. In that case, the Court of Appeal construed the phrase "a land transaction is exempt from charge [to stamp duty land tax] if the purchaser is a charity and the following conditions are met" as if the word "if" were replaced with the phrase "to the extent that". It accepted that it was anomalous that, while no stamp duty was payable if the sole purchaser was a charity, it would be payable on the whole transaction if the purchasers included both a charity and a non-charity. At [22] Lewison LJ noted that no policy justification had been advanced for that anomalous position and approved the following conclusion by the Upper Tribunal (Tax and Chancery Chamber) in that case: "We therefore approach the question of construction of the legislation on the footing that there was no policy of any sort which would have led Parliament deliberately to exclude exemption in the cases under appeal."
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> 33. At [26], Lewison LJ cited with approval the words of Lord Reid in *Luke v. Inland Revenue Comrs*, [1963] AC 557, 577:
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> > "To apply the words literally is to defeat the obvious intention of the legislation and to produce a wholly unreasonable result. To achieve the obvious intention and produce a reasonable result we must do some violence to the words…It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result, that the words of the enactment must prevail."
>
> 34. In *Potsos v. Theodotou*, (1991) 23 HLR 356 (cited with approval at [29] of *Pollen Estate*), joint landlords of property sought possession on the statutory ground that the property was reasonably required by the landlord for occupation as a residence for himself "or any son or daughter of his". The Court of Appeal held that this provision should be read as if it said "any son or daughter of theirs, or either of them" because (per Parker LJ at 359):

[7] Quoting from paragraph 14 of the Respondents' supplemental submissions.

[8] [2019] EWHC 2203 (Ch).

> "if the construction of the section put forward…would lead to unreasonable results or results which the legislature are unlikely to have intended, we are, in my view, permitted so to construe the section that those unreasonable results are avoided if that can legitimately be done without doing violence to clear language."

35. The claimant relies on *Greenweb Ltd v. Wandsworth London Borough Council*, [2009] 1 WLR 612, in which the court was faced with a statutory provision which produced, on a literal interpretation, an outcome which Parliament could not have intended and for which no possible legislative purpose was identified. Nevertheless, the Court of Appeal refused to construe the provision otherwise than literally. At [29], Stanley Burnton LJ cited the following passage from the speech of Lord Simon of Glaisdale in *Stock v. Frank Jones (Tipton) Ltd*, [1978] 1 WLR 231, 237, explaining the limits of a purposive approach to construction:

> "a court would only be justified in departing from the plain words of the statute were it satisfied that: (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly, could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be obviated without detriment to such legislative objective; (4) the language of the statute is susceptible of the modification required to obviate the anomaly."

36. In relation to the legislation under consideration in *Greenweb*, the Court of Appeal concluded that there was no ambiguity in the language. Nor were the consequences of the application of the clear statutory language so absurd that one could see that Parliament must have made a drafting mistake."

(4) Analysis

(a) The problem stated

28. I am concerned to construe the phrase "a tenant of a leasehold house". I will obviously do so in the context of the 1967 Act as a whole. But it is best to begin with a clear articulation of what each side was contending the words to mean by inserting into this phrase the words that would make that meaning unequivocally clear. Thus, the Appellant's contention was that the phrase meant "a tenant of **the whole of** a leasehold house", whereas the Respondents contended that the phrase included this, but also meant "a tenant of **part of** a leasehold house".

29. No doubt each formulation could be framed differently – e.g. "a tenant of **substantially the whole of** a leasehold house" and "a tenant of **a material part of** a leasehold house" – so as to cater for the exceptional case, but the difference in construction is plain.

30. Continuing to look only at the phrase itself, it seems to me that this is properly a case of ambiguity. I do not consider (contrary to the submissions of both parties, who each contended that their reading of the phrase was unequivocally clear) that – looking only at the phrase itself – one meaning suggests itself more clearly than the other.

(b) The phrase in context

31. The phrase "a tenant of a leasehold house" forms part of section 1(1) of the 1967 Act, which section is the provision conferring on a tenant the right to enfranchise. Essentially, section 1 states the conditions that must be met in order for the landlord to

be obliged to to enfranchise pursuant to section 8 of the 1967 Act. Section 8(1) provides:

> "Where a tenant of a house has under this Part of this Act a right to acquire the freehold, and gives to the landlord written notice of his desire to have the freehold, then except as provided by this Part of this Act the landlord shall be bound to make to the tenant, and the tenant to accept, (at the price and on the conditions so provided) a grant of the house and premises for an estate in fee simple absolute, subject to the tenancy and to tenant's incumbrances, but otherwise free of incumbrances."

32. The phrase "a tenant of a leasehold house" is one of the conditions that must be met for the right to enfranchise to occur. It is the only condition that we are here concerned with: all parties accept that if this condition is met, then the Respondents are entitled to enfranchise.

33. The first step in construing this phrase in its context is to understand whether this phrase, or any term within it, has been given a statutory definition. That is an obvious and necessary starting point. As I have described, whilst the term "house" is defined (in section 2), the term "tenant" is not, the term "leasehold" is not, and nor is the composite term "leasehold house".

34. I turn, then, to consider that which has been defined, namely "house". Section 2 was set out in paragraph 20 above. The following points are clear from the statutory wording:

(1) A building can fall within the definition of "house" even if it is not "structurally detached" from another building or part of a building.[9]

(2) However, a very clear distinction is drawn between the horizontal division of a building and the vertical division of a building. Where the building is divided horizontally (e.g. a tower block of flats in storeys, each flat above the other) only the entire building is the "house" and not each individual flat. That, of course, is not this case.[10]

(3) By contrast, where the building is divided vertically (as in the present case; and as would be the case with a terrace of buildings), it is not the whole building that is the house, but the vertically-sliced segment.[11]

(4) This distinction appears to derive from the fact that "flying freeholds" are the exception, not the rule, in English law[12] and that to allow a general enfranchisement in the case of horizontal division would be to fly in the face of the general structure of English real property law. The point was made by Lord Wilberforce in *Parsons v. Gage (Trustees of Henry Smith's Charity)*:[13]

> "From section 2(1) it appears, and indeed it is well known, that the Act was intended to provide "enfranchisement" for dwelling houses but not for flats. Flats, as are "strata" in

[9] See the opening part of section 2(1).

[10] Section 2(1)(a).

[11] Section 2(1)(b).

[12] See Bridge, Cooke & Dixon, *Megarry & Wade: The Law of Real Property*, 9th ed (2019) at [3-011].

[13] [1974] 1 WLR 435 at 439.

> other systems, are units which arise by horizontal division of a building, and by this criterion they are excluded by paragraph (a). On the other hand, the Act evidently intended to allow enfranchisement of terrace houses and dwellings arising by vertical division. This is effected by paragraph (b). If one seeks a reason for this different treatment, it may lie in the difficulty, in relation to units arising by horizontal division, of providing, after they become freehold by enfranchisement, for the enforcement of necessary positive covenants – a difficulty which did not exist while they were leasehold. Possibly there were other reasons for the discrimination: at any rate it was clearly made in section 2(1) of the Act."

(5) Section 2(2) is also concerned with division. Section 2(2) excludes from the definition of a "house" a "house which is not structurally detached and of which a material part lies above or below a part of the structure not comprised in the house".[14] Clearly this provision is not concerned with cases of horizontal division, which are excluded from the definition of "house" by section 2(1)(a). By definition, a flat or strata is not a "house" within the meaning of the 1967 Act. In *Parsons*, Lord Wilberforce explained the purpose of this provision:[15]

> "Then it was necessary to make provision for mixed cases, where units were separated by a broken vertical line, or as it might be expressed, partly vertically and partly horizontally. This I take to be the purpose of subsection (2) and it uses as the discrimen the lying of a material part above or below a part of the structure to which the house is attached. It was necessary to confine the exemption to cases of structural attachment, in order not to include within it cases of mere projection, over or under another structure, without attachment."

Thus, section 2(2) is concerned with marginal horizontal incursions into an otherwise vertically divided structure.

35. What is significant about the definition of "house" in sections 2(1) and 2(2) of the 1967 Act is that the definition turns solely on the physical attributes of the building in question. The definition of house is not in any way qualified or affected by the nature of the interest in the house of the householder.

36. As I understand it, the substance of the argument by the Appellant before Mr Recorder Norman was that Number 126 fell within the scope of section 2(2) of the 1967 Act.[16] It is easy to see why that argument failed, once it is understood that section 2(2) does not seek to disqualify a building from constituting a "house" by reference to the manner in which it is held (i.e. by reference to the legal interests in the house). Thus, the fact that the Lease does not include in its demise the foundations or the roof of Number 126 is irrelevant to the question of whether Number 126 is or is not a "house".

37. I shall consider the significance of the definition of the term "house" in conjunction with the phrase "a tenant of a leasehold house" in due course. As an aside, I should,

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[14] Emphasis added.

[15] At 439. See, to similar effect, Lord Nicholls in *Malekshad v. Howard de Walden Estates Limited*, [2002] UKHL 49 at [3] to [5].

[16] See paragraph 8.1 of the judgment, where the Recorder described the first issue before him in the following terms: "Does the fact that the lease excludes from the premises the foundations and the roof of the property trigger the exclusion in section 2(2)?"

whilst considering the provisions of section 2 of the 1967 Act, briefly identify – if only to dismiss – two other points raised by the Appellant in connection with this section. It was suggested by the Appellant that certain phrases in section 2 – notably section 2(3): "…a house let to a tenant…"; and section 2(4): "any other premises let with the house…" – supported the Appellant's contention that the phrase meant "a tenant of **the whole of** a leasehold house". I am afraid that I do not see these particular words as resolving in any way the ambiguity that I have identified.

(c) Parliamentary intent

38. The 1967 Act makes provision for certain tenants of leasehold houses either to acquire the freehold of the house (that is, to "enfranchise") or to acquire an extended lease of the house. The 1967 Act is, in one sense, expropriatory and expropriatory legislation would generally be construed against the party acquiring the property. That is not the case here. In *Hosebay Limited v. Day*, Lord Carnwath stated:[17]

> "Although the 1967 Act like the 1993 Act is in a sense expropriatory, in that it confers rights on lessees to acquire rights compulsorily from their lessors, this has been held not to give rise to any interpretative presumption in favour of the latter. As Millett LJ said of the 1993 Act:
>
> > "It would, in my opinion, be wrong to disregard the fact that, while the Act may to some extent be regarded as expropriatory of the landlord's interest, nevertheless it was passed for the benefit of tenants. It is the duty of the court to construe the 1993 Act fairly and with a view, if possible, to making it effective to confer on tenants those advantages which Parliament must have intended them to enjoy." (*Cadogan v. McGirk* [1996] 4 All ER 643, 648.)
>
> By the same token, the court should avoid as far as possible an interpretation which has the effect of conferring rights going beyond those which Parliament intended."

39. This seems to me, if I may respectfully say so, a helpful and clear statement of the approach to be taken. One consequence of this is that the Parliamentary statements regarding the purpose of the 1967 Act, which were cited to me by the Respondents,[18] are essentially neutral on the question of construction: it is common ground that the 1967 Act was intended to rectify a perceived unfairness between certain long leaseholders and their landlords and, to that end, the 1967 Act was intended to effect a scheme of compulsory purchase. However, these statements as to the intent of the legislation say nothing as to the scope or extent of the statutory scheme. In this case I am driven to rely essentially on the words in the 1967 Act itself.

40. That is subject to one, major, proviso: the Respondents submitted that the definition of "Premises" in the Lease was – if capable of bringing Number 126 out of the regime of the 1967 Act – a "sham" or an "illusory transaction". I consider the "avoidance" provisions of the 1967 Act in Section F below, but even absent these provisions it seems to me that I should seek to construe the 1967 Act in a manner that renders it effective and not a "dead letter". I return to this point below.

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[17] [2012] UKSC 41 at [6].

[18] See paragraphs 14*ff* of the Respondents' written submissions.

(d) Consequences of the rival constructions

(i) Introduction

41. Relevant to the construction of an ambiguous phrase are the consequences each rival interpretation gives rise to. In this section, I consider in turn the implications of the Respondents' construction and then the Appellant's.

(ii) Implications of the Respondents' construction

42. Section 1 of the 1967 Act creates a right to enfranchise. A "right" does not exist in the abstract but requires the existence of two persons, the person obliged to do a thing (the **obligor**) and the person who can require the obligor to to that thing (the **rightholder** or **obligee**).

43. In this case, the obligor is the landlord: this is clear from section 8(1) of the 1967 Act, quoted in paragraph 31 above.

44. The rightholder or obligee is the tenant of a leasehold house. According to the construction of the Respondents, the point of the words "tenant" and "leasehold" is to circumscribe or limit the persons who can exercise the right to enfranchise. The right is not given to an occupier or to a licensee but only to a tenant under a lease.

45. On this basis, the extent of the demise under the lease makes no difference. The reference to a lease exists in section 1 because the 1967 Act is only intended to confer the right to enfranchise on leaseholders. There is no need to read any further qualification into the words "the tenant of a leasehold house".

46. The consequence of this construction of the 1967 Act is that a tenant having a demise that is less extensive than the freehold that would be acquired pursuant to the 1967 Act gets more by way of freehold conveyance than he or she obtains pursuant to the very lease that enfranchises that person. Thus, in the present case, the demise of Number 126 does not extend to the foundations, the roof or the load-bearing walls.[19] Yet, on the Respondents' construction of the 1967 Act, the Appellant would be obliged – pursuant to section 8 of the 1967 Act – to convey these undemised parts to the Seventh and Eighth Respondents.

47. The Respondents submitted that this was not necessarily the outcome of their construction; but that, even if it was, this consequence was not one that should cause me to reject their approach. These are two very distinct points, and it is necessary to consider them separately:

(1) The Respondents contended that this was not necessarily the outcome of their construction, because the enfranchisement created by the 1967 Act could or would be limited to the extent of the demise. In other words, if the right to enfranchise was established, then the Respondents would be entitled to a

[19] See paragraph 16 above.

conveyance of the freehold limited to the extent of the demise.[20] I regard this proposition as unarguable and to be rejected for two related reasons:

(a) First, it creates – in a potentially wide and uncontrolled sphere – flying freeholds. I accept, of course, that these can exist, and that the 1967 Act itself can create flying freeholds: but only in the exceptional case.[21] It seems to me that for a limited demise of a freehold house, whereby the landlord has reserved to him- or herself strata above or below the tenant, to create as a matter of course a flying freehold is not something that Parliament can have intended without clearer wording.

(b) Secondly, it seems to me that if a tenant qualifies for enfranchisement under the 1967 Act, then the statutory obligation to convey under section 8 is of the "house" and not of that part of the house that was demised.[22]

(2) I consider the inevitable consequence of the Respondents' construction to be that the limited demise they have over the Properties confers upon the Respondents (assuming their construction of the 1967 Act to be correct) an entitlement to have conveyed to them a freehold that is more extensive in terms of its physical scope.[23] The Respondents submitted that there was nothing odd in this outcome. The fact is that the 1967 Act is, intrinsically, expropriatory, in that it forces the landlord to convey to the tenant something he or she does not wish to convey. The Respondents' construction does not result in any under-compensation of the landlord, for the price that the tenant must pay for the freehold he or she receives is determined by the value of the "house", not any lesser part of the "house".[24]

The Appellant had more to say on this: but I consider these points in relation to the consequences of the Appellant's construction.

(iii) Implications of the Appellant's construction

48. The Appellant contends that the phrase "the tenant of a leasehold house" must be read as meaning "the tenant of **the whole** of a leasehold house", and that where (as here) the demise does not extend to the roof or the foundations the tenant cannot qualify under section 1 of the 1967 Act.

49. The construction contended for by the Appellant would provide landlords with a very straightforward way of avoiding the 1967 Act. All a landlord would have to do would be to exclude some defined strata of the freehold property from the demise. As I have described, the 1967 Act is hostile to horizontal division, and much more amenable to vertical division.[25] Vertical division is far more likely to result in two houses (or no

[20] See paragraph 22 of the Respondents' supplemental submissions.

[21] See, for instance, sections 2(5) and 2(6) of the 1967 Act.

[22] See the very clear wording of section 8 set out in paragraph [31] above.

[23] Self-evidently, the freehold will be temporally more extensive. That is, essentially, the difference between freehold and leasehold titles. One does not have a reversion, and the other does.

[24] See section 9(1): "…the price payable for a house…".

[25] See paragraph 34 above.

sensible demise at all) than horizonal division, which is likely to bring the building outside the statutory meaning of "house".

50. Thus, on the Appellant's construction, a landlord could avoid enfranchisement by excluding (as here) the foundations and the roof. Indeed, a landlord might well attempt an even more nuanced stratification, by excluding from the demise the airspace above the property or the chimney pots (to take counsel for the Respondents, Mr Paton's, example). No doubt some of the more egregious forms of evasion could be prevented by reading the phrase "a tenant of a leasehold house" as meaning "a tenant of **substantially the whole of** a leasehold house",[26] but even so I consider the scope for technical evasion of the intent of the 1967 Act on the Appellant's reading to be significant.

51. Against this, two points must be borne in mind:

(1) Investment in a tenancy falling within the scope of the 1967 Act is likely to be an economically significant one. The 1967 Act requires the tenancy to be "a long tenancy at a low rent": that combination of attributes means that the up-front cost of acquiring the lease will be relatively high, and it seems to me intrinsically unlikely that a prospective tenant would be inclined to expend significant amounts of money on a lease that employed a device to evade the 1967 Act. In this case, the Properties are all part of the Development and there is a correlation between the limits on the demise of the Properties and the role of the Company which justifies (or could be said to justify) the limits to the property demised.

(2) It is quite possible that the Respondents' construction of the 1967 Act will result in the loss, by the landlord, of economically significant property rights that he or she has tried to retain. During the course of argument, the following example was used:

Suppose a detached property, comprising ground floor, first floor and a roof space/loft. The landlord leases the ground and first floors of the property to a tenant, but reserves the roof space/loft, because the landlord wishes to retain the option to develop this as a separate flat in the future. Thus, the property is, at the time of the lease, a "house" within the meaning of the 1967 Act, but the landlord has reserved to him- or herself the potentiality of converting the roof space/loft and thus (in the future) changing what was a "house" within the meaning of the 1967 Act into something that would not be a "house".

According to the Appellant's construction, the property – whilst constituting a "house" within the meaning of the 1967 Act – would not fall within the enfranchisement regime because the tenant would not be the tenant "of **substantially the whole of** a leasehold house". On the other hand, according to the Respondents' construction, the tenant would be permitted to enfranchise as the tenant would be "a tenant of **a material part of** a leasehold house".

[26] See paragraph 29 above.

(e) The "composite" approach

52. In his judgment, Mr Recorder Norman placed some reliance on the fact that reading the (limited) extent of the demise together with the easements granted to the tenant brought the case within section 1 of the 1967 Act. This was, in argument before me, described as the "composite" point.

53. The Recorder explained the "composite" point in paragraph 22 of his judgment:

> "…one then asks the question whether the [Respondents] are the tenants of a leasehold house within section 1 so as to qualify for enfranchisement. The house itself includes the foundations and roof but the demise excludes them from the tenancy. In my judgment they are such tenants because:
>
> 22.1 The lease grants as easements the rights of support and protection for the parts of the premises included within the demise.
>
> 22.2 Therefore they are tenants of a property comprising (essentially) the internal parts with easements of protection and support from the load bearing walls, the foundations and the roof.
>
> 22.3 That composite makes them tenants of a leasehold house if the house otherwise satisfies the definition in section 2(1) and (2) as I have found that it does."

54. Mr Recorder Norman considered that the fact that the demise under the Lease conferred on the Respondents rights which were – in terms of the physical extent of those rights – less than the actual physical extent of the "house" could be narrowed or made good by the fact that the Respondents were granted other rights (in the form of easements) over those parts of the "house" that were not demised to them.

55. The Appellant's second ground of appeal contended that this approach was wrong. I agree. The statutory test in section 1(1) turns on the existence of a leasehold interest in the "house", and the issue before me turns on the question of whether the extent of that interest matters. I do not consider that the existence of other rights – even if they arise out of the lease itself – can be relevant to this statutory test. The question is whether the property is a "leasehold house", not whether the tenant has other interests in it.

(f) The law

56. The Appellant noted that the leading text-books on leasehold enfranchisement supported its contention. That is true: both *Hague on Leasehold Enfranchisement*[27] and *Leasehold Enfranchisement: Law and Practice*[28] contained passages in support of the Appellant's submissions. The problem is that both works – with one limited exception, to which I shall return – refer for their authority to section 1(1) of the 1967 Act, which I

[27] Radevsky and Greenish, *Hague: Leasehold Enfranchisement*, 6th ed (2014) at [2-01], [3-01] and [17-09].

[28] Harrison and Lonsdale, *Leasehold Enfranchisement: Law & Practice*, 1st ed (2014) at [1.1].

have found to be ambiguous.[29] Eminent though these works are, I do not consider that I can attach very much weight to what they say on this point.

57. One authority is cited by *Hague*, at [3-01]. In that paragraph, the authors refer to the "qualifying period" under section 1(1)(b) of the 1967 Act, and say:

> "His tenancy must at those times have comprised the whole of the house,[4] unless, it appears, he is already the freeholder of the remaining part."

Footnote 4, which I have included in the quotation above, refers to the decision of the Court of Appeal in *Baron v. Phillips*.[30]

58. The facts of *Baron v. Phillips* are complicated, and the decision turned on how the provisions of the Landlord and Tenant Act 1954 operated so as to continue a tenancy of the whole of the premises (which, of course, is a question that does not arise in the present case). In the course of answering this question, Geoffrey Lane LJ (with whom Orr and Stamp LJJ agreed) noted that (for purposes of the appeal) it was common ground that the building in question was a "house" within the 1967 Act.[31] Geoffrey Lane LJ then said this:[32]

> "The next issue, and the first main issue, the principal issue in this appeal, is this. On the expiry of the long lease on March 25, 1978, did the provisions of the 1954 Act, Part I, operate so as to continue the tenancy as to the whole of the building, ground-floor shop and upstairs living accommodation? If that is the case, then the appellant wins and nobody needs to examine anything any further. If that is not the case, as the judge held, and if the tenancy continues only as to the upper floor, then again it is common ground that the appellant, subject to the second main issue which I will describe in a moment,[33] fails."

59. Undoubtedly, this reading of the 1967 Act is consistent with the Appellant's contentions. However, I do not consider this statement to be a binding – as opposed to a persuasive – statement of the law. That is because the point was not argued before the Court of Appeal and was taken as being common ground. Whilst it is clearly of some significance that the appellant in this case did not take the point taken by the Respondents here, even so, given that the point was not argued before the Court of Appeal, whereas it was argued (extremely well on both sides) before me, suggests that this decision can only be of marginal assistance.

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[29] See paragraphs 28 to 30 above.

[30] (1979) 38 P&CR 91. The possible significance of this case only emerged during the course of the hearing. I invited the parties to make further written submissions, if so advised. Both parties did so, and I have taken these submissions into account.

[31] At 94. A point which, I confess, seems to me by no means straightforward on the facts of this case.

[32] At 94-95.

[33] This issue is immaterial for present purposes.

(g) Relevance of the Leasehold Reform, Housing and Urban Development Act 1993

60. In *Malekshad v. Howard de Walden Estates Limited*,[34] Lord Scott considered the extent to which the provisions of the 1967 Act dovetailed with the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 (the **1993 Act**). He noted that:

(1) It was clearly the intention of Parliament to bring about a state of affairs in which a dwelling which formed part of a building would either be a "house" under sections 2(1) and 2(2) of the 1967 Act or, if it was not, would be a "flat" as defined in section 101(1) of the 1993 Act.[35]

(2) But that "[i]t is, of course, not permissible to construe the 1967 Act by reference to a later enactment".[36]

61. Tempting though it is to see how the parties' respective contentions mesh with the 1993 Act, I eschew that temptation. Given that it is not permissible to construe the 1967 Act by reference to the 1993 Act, such an exercise would either provide a meaningless confirmation of one construction over the other (if the provisions of the two Acts meshed better on one construction than in the case of the other) or else a temptation to take into account an irrelevant consideration (if the provisions of the two Acts clashed more on one construction than in the case of the other).

(5) Conclusion

62. Although in some respects finely balanced, I have reached the clear conclusion that the construction favoured by the Appellant is correct and that a tenant does not fall within the enfranchisement regime of the 1967 Act unless he or she is the tenant of substantially the whole of a leasehold house. I have reached this conclusion for the following reasons:

(1) Although I have concluded that the phrase "a tenant of a leasehold house" is, by itself, ambiguous,[37] I consider that when the phrase is viewed in its full statutory context, its meaning becomes clearer and the ambiguity resolves itself. As I have described,[38] the only term in the phrase that receives a statutory definition is the term "house". That term is a carefully crafted one, seeking to isolate and define – within a single building – what may or may not be multiple houses. As has been seen, the distinction between a single building and the potential for multiple "houses" within that building is articulated by reference to physical characteristics having nothing to do with the legal interests in the property.[39]

(2) That being the case, the 1967 Act having as it were defined the unit to be enfranchised – the "house" – it would be curious if – without further clear

[34] [2002] UKHL 49 at [99] to [102].

[35] At [101].

[36] At [102].

[37] See paragraphs 28 to 30 above.

[38] See paragraph 34 above.

[39] See, in particular, paragraph 35 above.

statutory articulation – some legal interest less than an interest in substantially the whole of the leasehold house would suffice to qualify for enfranchisement.

(3) I am fortified in reaching this conclusion by three matters:

(a) First, the text-books and such authority as there is take this approach, almost without question.[40] Because of the conclusory nature of the reasoning, I do not place undue reliance on this material: but it does support the conclusion I have reached.

(b) Secondly, the consequence of the Respondents' contended-for construction is that a leaseholder of a material part of a leasehold house, but not substantially the whole of it,[41] is entitled to be enfranchised. Parliament was seeking to enfranchise leaseholders so as (under certain conditions) to enable a lease to be turned into a freehold, thereby extending indefinitely the "term of years" that is the defining characteristic of a lease. Parliament would not have regarded this as a surprising outcome: it was the intended outcome. I do not consider that the same can be said for expanding the physical reach of a demise, so that a lease of part of a house is converted to the freehold of the whole of it. I consider that Parliament would have regarded this as a surprising outcome.[42]

(c) Thirdly, there will be cases where a landlord quite deliberately reserves to him- or herself a part of a "house", and physically limits the extent of the tenant's demise. Whilst I of course accept the risk of avoidance of the 1967 Act that this gives rise to (as to which, see paragraph 62(4) below), there are instances where the landlord has quite legitmate reasons for reserving parts of the "house" to him- or herself, which the Respondents' contended-for construction overrides.[43] One example – perhaps a little recondite – was given in paragraph 51(2) above. Another is this case: where the "house" forms part of a larger development, and the landlord is selling not merely a leasehold title to a single property, but rights going beyond this and a common scheme for maintenance and upkeep.

(4) I have well in mind the risk of avoidance,[44] whereby a landlord is (on the construction I have found to be the correct one) given an ability to avoid the enfranchisement provisions of the 1967 Act by reserving a "strata" of what would otherwise be a "house" to him- or herself. There are two answers to this point:

(a) First, the *de minimis* point adverted to in paragraph 50 above.

(b) Secondly, the fact that a prospective purchaser of a tenancy that would otherwise qualify for enfranchisement is likely to hesitate before investing significant sums in a leasehold estate that appears to be artificially

[40] See paragraphs 56 to 59 above.

[41] See paragraph 29 above as regards this formulation.

[42] See paragraph 47 above, where I consider the question of physical extent in greater detail.

[43] Albeit with compensation by reference to the "house" the freehold of which the tenant acquires.

[44] See paragraphs 49 to 50 above.

constrained in terms of the extent of the demise being conferred: see paragraph 51(1) above.

63. For all those reasons, I prefer the Appellant's construction of the phrase "tenant of a leasehold house".

F. THE "AVOIDANCE" PROVISIONS IN SECTION 23 OF THE 1967 ACT

64. In their Respondents' notice, the Respondents contended that Mr Recorder Norman erred in holding that the provisions of section 23(1) of the 1967 Act had not been engaged by the Appellant's retention of certain structural parts of the Properties demised to the Respondents.

65. Section 23(1) of the 1967 Act provides as follows:

> "Except as provided by this section, any agreement relating to a tenancy (whether contained in the instrument creating the tenancy or not and whether made before the creation of the tenancy or not) shall be void in so far as it purports to exclude or modify any right to acquire the freehold or an extended lease or right to compensation under this Part of this Act, or provides for the termination or surrender of the tenancy in the event of a tenant acquiring or claiming any such right or for the imposition of any penalty or disability on the tenant in that event."

66. I do not consider that the provisions of the Lease can fall within the ambit of section 23(1), widely-framed though that provision is. I have reached this conclusion for the following reasons:

(1) Section 23(1) voids any agreement "in so far as it purports to exclude or modify any right to acquire the freehold or an extended lease or right to compensation under this Part of this Act". These words are insufficiently wide to embrace a limitation on a tenant's demise. A limited demise in no way affects a tenant's rights under the 1967 Act. It is simply that the property interest acquired by the tenant is insufficient to give rise to a right under the 1967 Act.

(2) Even if section 23(1) applied, it cannot serve to <u>expand</u> the Respondents' rights so as to enable them to qualify for enfranchisement under the 1967 Act. Section 23(1) causes provisions within its scope to be <u>voided</u>. It does not permit the court to insert new words or re-write the terms of the Lease. In short, as can be demonstrated by reference to the definition of "Premises" in the Lease, set out in paragraph 16 above, even if section 23(1) were applied to that definition, the rights of the Seventh and Eighth Respondents could not be expanded so as to render them tenants of substantially the whole of a leasehold house. It is simply not possible to do this without inserting at least some words. Even an aggressively applied voidance of selected words (so as to alter the sense of the definition) cannot achieve this end:

> ""The Premises" shall
>
> A. Include
>
> (i) The ~~internal coverings of the~~ load bearing walls of the dwelling and all doors and windows in such walls with their frames glass furniture and locks

(ii) Any internal non load bearing walls or partitions and doors windows frames glass furniture and locks

(iii) The ~~coverings of the~~ ceilings ~~below the joists or structural ceiling supports~~ and the floor boards or floor surfaces ~~above the joists or structural floor supports~~

(iv) All Service Media ~~servicing exclusively the dwelling (and not being owned by statutory or other utility authorities etc)~~

(v) All fixtures and fittings in the dwelling (except tenant's fixtures and fittings)

(vi) The car parking space forming part of the Development shown edged red on the Plan

~~B.~~ ~~Exclude~~

~~(i)~~ ~~All structural parts of the Premises such as load bearing walls roofs foundations and any Service Media which do not exclusively service the dwelling~~"

I should be clear that I doubt very much that such an approach is permissible under section 23(1): the aggressive deletion of individual words alters the sense of the Lease itself. But even this (impermissible) approach does not enable the Respondents to succeed.

G. DISPOSITION

67. For the reasons that I have given, the appeal must be allowed. The grounds advanced in the Appellant's notice succeed; and the grounds advanced in the Respondents' notice fail, for the reasons articulated above.

68. As I have noted, this appeal was conducted by way of remote hearing. In order to streamline the process, I suggested to the parties that this Judgment contain a *dispositif* setting out the terms of the order consequential on judgment. This Judgment was circulated in draft, and I invited the parties (as is usual) to provide a list of typographical and other corrections. However, I also invited them to comment substantively on the *dispositif* and I have taken those comments into account in this, handed-down, draft.

For the reasons given in this Judgment, it is ORDERED and DECLARED that:

(1) The appeal of the Appellant is allowed.

(2) The Respondents have no right to acquire the freehold of the Properties pursuant to section 1 of the Leasehold Reform Act 1967; and none of the Respondents are "a tenant of a leasehold house" in respect of the Property they have demised within the meaning of section 1(1) of the Leasehold Reform Act 1967.

(3) Paragraphs (1) to (5) and (8) of the order of Mr Recorder Norman dated 19 July 2019 are deleted.

(4) Paragraph (6) of the order of Mr Recorder Norman dated 19 July 2019 stands unvaried.

Note in relation to (4): The Appellant ran entirely different arguments in relation to section 2 of the 1967 Act before Mr Recorder Norman, who rightly rejected them. Although the Appellant has been successful on appeal, the costs order below should continue to stand.

(5) The Respondents are jointly and severally liable for the Appellant's costs of this appeal, summarily assessed in the amount of £14,000 (inclusive of VAT), this sum to be paid by the Respondents within 14 days of the handing down of this Judgment.

Note in relation to (5): Having regard to the Appellant's Statement of Costs (summary assessment), and taking account of travel costs not incurred due to the remote hearing, this seems to me to an appropriate sum to order.

69. An order will be made to this effect. It remains for me to express my gratitude for the exemplary manner in which this case was prepared and argued.