Neutral Citation Number: [2016] EWCA Civ 1176

Case No: C3/2015/0108

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
[2014] UKUT 0486 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 November 2016

Before :

LORD JUSTICE PATTEN
LORD JUSTICE SALES
and
LORD JUSTICE DAVID RICHARDS

- -

Between :

STELLA KATEB **Appellant**

- and -

(1) HOWARD DE WALDEN ESTATES LIMITED
(2) ACCORDWAY LIMITED **Respondents**

- -
- -

Mr James Fieldsend (instructed by **Wallace LLP**) for the **Appellant**
Mr Anthony Radevsky (instructed by **Charles Russell Speechlys LLP**) for the First Respondents

Hearing date : 8 November 2016

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Approved Judgment

Lord Justice Patten :

Introduction

1. This is an appeal by Mrs Stella Kateb against an order of the Upper Tribunal (Lands Chamber) (HH Judge Gerald) ("the UT") allowing the appeal of Howard de Walden Estates Limited ("HdW") against an earlier decision of the First-tier Tribunal Property Chamber (Residential Property) ("the FtT") dated 4 October 2013. The issue between the parties is the amount properly payable to the appellant as intermediate landlord out of a total premium of £269,000 paid for the grant of new leases of Flat 12 and Garage no. 4 at 123/125 Harley Street, London W1 and whether Mrs Kateb is bound by an agreement reached between HdW and the tenant in July 2013.

2. HdW owns the freehold of 123/125 Harley Street and was the competent landlord for the purpose of a claim by Accordway Limited ("Accordway") for the grant of the new leases pursuant to s.42 of the Leasehold Reform Housing and Urban Development Act 1993 ("the 1993 Act"). Mrs Kateb is the mesne landlord under a long lease dated 13 January 1960 and "the other landlord" for the purposes of the 1993 Act.

3. The important point of statutory construction raised by this appeal concerns the scope of the authority given to the competent landlord by s.40(2) of the 1993 Act to conduct all proceedings arising out of any notice of claim for a new lease served pursuant to s.42 of the Act. The particular issue which has arisen in this case is whether HdW was authorised to conclude a binding agreement with the applicant for a new lease during the currency of tribunal proceedings in respect of which Mrs Kateb had opted to be separately represented as permitted by paragraph 7 of Schedule 11 to the 1993 Act. Mrs Kateb contends that, in the events which happened, the agreement reached between HdW and Accordway is not binding on her and she is entitled to have the amount properly payable to her determined by the FtT or agreed with the tenant by her.

The 1993 Act

4. Part I of the 1993 Act provides for two forms of enfranchisement or acquisition in respect of leasehold premises. Chapter I of the Act contains provisions giving tenants of flats the right of collective enfranchisement in respect of the freehold of the building. This includes the acquisition of intermediate leasehold interests which are superior to those of the qualifying tenants: see s.2. Chapter II of the Act gives to individual qualifying tenants the right to acquire a new lease of their own flat. If validly exercised the tenant becomes entitled to the grant of a new lease of the premises (in substitution for the existing lease) at a peppercorn rent for a term expiring 90 years after the term date of the existing lease: see s.56(1).

5. The grant of such a term will in many cases extinguish not only the intermediate landlord's right to the ground or other rent payable under the existing underlease but also the intermediate landlord's reversion which, if significant in duration, could be valuable. The head lease is not extinguished (as in cases of collective enfranchisement) but under Schedule 11, paragraph 10(1) there is a deemed surrender and re-grant of the lease which operates as a lease of the freehold reversion subject to the newly granted underlease.

6. In respect of the loss of rent and any diminution in value of its reversion, the intermediate landlord is entitled to compensation in accordance with Schedule 13: see s.56(2). In addition, the intermediate landlord also receives part of the competent landlord's share of the marriage value created by the grant of the new underlease. The competent landlord and the tenant are each entitled to 50 per cent of this sum (see Schedule 13, paragraph 4) and the intermediate landlord is entitled to such part of the competent landlord's share as is proportionate to the amounts by which the value of their respective reversions were diminished by the grant of the new lease: see Schedule 13, paragraph 10.

7. A claim by the tenant for the grant of a new lease is initiated by the service of a notice under s.42(1) which must be served on "the landlord". "The landlord" is defined by s.40(1) (see s.62(1)) as the holder of the first superior interest (whether freehold or leasehold) which is sufficient in duration to enable the grant of a new lease in accordance with s.56(1). In the present case that is the freeholder, HdW. In Schedule 11 to the Act (which deals with the procedure to be followed consequent on the service of a s.42 notice) the landlord so defined is referred to as "the competent landlord" (s.40(3)(b)). The intermediate landlord is described as the "other landlord": see s.40(3)(c).

8. Section 40(2) and (3) provide as follows:

> "(2) Where in accordance with subsection (1) the immediate landlord under the lease of a qualifying tenant of a flat is not the landlord in relation to that lease for the purposes of this Chapter, the person who for those purposes is the landlord in relation to it shall conduct on behalf of all the other landlords all proceedings arising out of any notice given by the tenant with respect to the flat under section 42 (whether the proceedings are for resisting or giving effect to the claim in question).
>
> (3) Subsection (2) has effect subject to the provisions of Schedule 11 to this Act (which makes provision in relation to the operation of this Chapter in cases to which that subsection applies)."

9. "Proceedings" for these purposes are not confined to legal proceedings but include all stages and parts of the procedure described in Part II of Schedule 11. I shall come to those provisions shortly.

10. The tenant's notice under s.42 is required, amongst other things, to specify the premium which the tenant proposes to pay for the grant of the new lease and the amount of compensation (if any) which he proposes to pay to the intermediate landlord in accordance with Schedule 13: see s.42(3)(c). Once a notice is given in accordance with these provisions it continues in force until either the new lease is granted or the notice is withdrawn or ceases to have effect: s.42(8). If the notice is withdrawn or is deemed to have been withdrawn under the provisions of the Act then no subsequent notice can be given within the next 12 months: see s.42(7).

11. In response to the tenant's s.42 notice, the competent landlord must serve a counter-notice which complies with the provisions of s.45. Section 45(2) and (3) provide:

> "(2) The counter-notice must comply with one of the following requirements—
>
> (a) state that the landlord admits that the tenant had on the relevant date the right to acquire a new lease of his flat;
>
> (b) state that, for such reasons as are specified in the counter-notice, the landlord does not admit that the tenant had such a right on that date;
>
> (c) contain such a statement as is mentioned in paragraph (a) or (b) above but state that the landlord intends to make an application for an order under section 47(1) on the grounds that he intends to redevelop any premises in which the flat is contained.
>
> (3) If the counter-notice complies with the requirement set out in subsection (2)(a), it must in addition—
>
> (a) state which (if any) of the proposals contained in the tenant's notice are accepted by the landlord and which (if any) of those proposals are not so accepted; and
>
> (b) specify, in relation to each proposal which is not accepted, the landlord's counter-proposal."

12. Following the service of the counter-notice it will therefore be apparent whether the claim to a new lease is disputed and, if so, on what grounds; and, if the claim is admitted, whether there is agreement on the premium and compensation payable to the competent and intermediate landlords. In the formulation of the counter-notice, the competent landlord is required to make the first of several possible decisions which affect not only him but also any intermediate landlord on whose behalf he is conducting the proceedings in accordance with s.40(2).

13. A dispute about the tenant's right to claim a new lease falls to be determined by the County Court under s.46(1) (see the definition of "court" in s.101(1)). An application must be made to the court by the competent landlord within 2 months of the date of the counter-notice: see s.46(2). But in cases where the right to a new lease is admitted and the dispute is limited to the terms of acquisition including the amounts payable under Schedule 13, then either the competent landlord or the tenant may refer the matter to the FtT for determination within 6 months of the date of the counter-notice: see s.48(2). Section 48(3) provides:

> "(3) Where—
>
> (a) the landlord has given the tenant such a counter-notice or further counter-notice as is mentioned in subsection (1)(a) or (b), and

> (b) all the terms of acquisition have been either agreed between those persons or determined by [the appropriate tribunal] under subsection (1),
>
> but a new lease has not been entered into in pursuance of the tenant's notice by the end of the appropriate period specified in subsection (6), the court may, on the application of either the tenant or the landlord, make such order as it thinks fit with respect to the performance or discharge of any obligations arising out of that notice."

14. It is, I think, common ground that s.48(3) would apply not only to agreements about the terms of acquisition reached prior to any application to the FtT but also to an agreement reached while an application was pending for determination. In either case the agreement would permit either the landlord or the tenant to apply to the County Court for the grant of the new lease and the payment of what was due under Schedule 13 if that had not occurred within 2 months of the date of the agreement or the determination of the disputed matters by the FtT: s.48(6).

15. I can now turn to the provisions of Schedule 11 on which most of the appellant's argument in this appeal is based. Part II of Schedule 11 contains detailed provisions relating to the conduct of proceedings by the competent landlord on behalf of other landlords and therefore supplements the basic statutory delegation of authority contained in s.40(2). So far as material, it provides:

> "5. Any counter-notice given to the tenant by the competent landlord must specify the other landlords on whose behalf he is acting.
>
> 6.-
>
> (1) Without prejudice to the generality of section 40(2)—
>
> (a) any notice given under this Chapter by the competent landlord to the tenant,
>
> (b) any agreement for the purposes of this Chapter between that landlord and the tenant, and
>
> (c) any determination of the court or [the appropriate tribunal] under this Chapter in proceedings between that landlord and the tenant,
>
> shall be binding on the other landlords and on their interests in the property demised by the tenant's lease or any other property; but in the event of dispute the competent landlord or any of the other landlords may apply to the court for directions as to the manner in which the competent landlord should act in the dispute.
>
> (2) Subject to paragraph 7(2), the authority given to the competent landlord by section 40(2) shall extend to receiving

on behalf of any other landlord any amount payable to that person by virtue of Schedule 13.

(3) If any of the other landlords cannot be found, or his identity cannot be ascertained, the competent landlord shall apply to the court for directions and the court may make such order as it thinks proper with a view to giving effect to the rights of the tenant and protecting the interests of other persons; but, subject to any such directions, the competent landlord shall proceed as in other cases.

(4) The competent landlord, if he acts in good faith and with reasonable care and diligence, shall not be liable to any of the other landlords for any loss or damage caused by any act or omission in the exercise or intended exercise of the authority given to him by section 40(2).

7.-

(1) Notwithstanding anything in section 40(2), any of the other landlords shall, at any time after the giving by the competent landlord of a counter-notice under section 45 and on giving notice to both the competent landlord and the tenant of his intention to be so represented, be entitled to be separately represented—

(a) in any legal proceedings in which his title to any property comes in question, or

(b) in any legal proceedings relating to the determination of any amount payable to him by virtue of Schedule 13.

(2) Any of the other landlords may also, on giving notice to the competent landlord and the tenant, require that any amount payable to him by virtue of Schedule 13 shall be paid by the tenant to him, or to a person authorised by him to receive it, instead of to the competent landlord; but if, after being given proper notice of the time and method of completion with the tenant, either—

(a) he fails to notify the competent landlord of the arrangements made with the tenant to receive payment, or

(b) having notified the competent landlord of those arrangements, the arrangements are not duly implemented,

the competent landlord shall be authorised to receive the payment for him, and the competent landlord's written receipt for the amount payable shall be a complete discharge to the tenant.

> 8.-
>
> (1) It shall be the duty of each of the other landlords (subject to paragraph 7) to give the competent landlord all such information and assistance as he may reasonably require; and, if any of the other landlords fails to comply with this sub-paragraph, that landlord shall indemnify the competent landlord against any liability incurred by him in consequence of the failure.
>
> (2) Each of the other landlords shall make such contribution as shall be just to costs and expenses which are properly incurred by the competent landlord in pursuance of section 40(2) but are not recoverable or not recovered from the tenant."

The facts

16. The two underleases, which were originally granted to Hammerson Estates Limited, became vested in the same tenant (a Ms Ingram) and on 15 December 2012 she served her s.42 notice. On 18 February 2013 HdW served a counter-notice admitting the claim to new leases of the flat and garage but not accepting any of her proposals in relation to the Schedule 13 payments and the terms of the new leases. The tenant in her notice proposed the payment of a premium to HdW of £216,631 and a payment to Mrs Kateb of £2,061. In its counter-notice HdW proposed a premium of £298,000 and a Schedule 13 payment to Mrs Kateb of £1,750. On 22 February 2013 Mrs Kateb gave notice under paragraph 7(1) of Schedule 11 of her intention to be separately represented in any legal proceedings relating to the determination of the amount payable to her under Schedule 13.

17. On 19 April 2013 HdW applied to the Leasehold Valuation Tribunal pursuant to s.48(1) for the determination of the issues relating to the terms of the new leases and the amounts payable by way of premium and Schedule 13 compensation. The application gave details of Mrs Kateb's representative (Wallace LLP) following the service of the paragraph 7(1) notice. By then Accordway had acquired the leasehold interest in the flat and garage from Ms Ingram with the benefit of the s.42 notice.

18. On 5 June 2013 the terms of the new leases were agreed leaving only the dispute about the sums payable by the tenant. A hearing was fixed for 17/18 September 2013 before the FtT which took over the functions of the Leasehold Valuation Tribunal with effect from 1 July 2013. On 10 July 2013 Accordway offered HdW £269,000 for the new leases of which £3,400 was to be payable to Mrs Kateb. On 18 July HdW's solicitors wrote to Accordway's solicitors accepting the offer and the apportionment and informed the FtT that terms had been agreed. They requested that the hearing fixed for September be vacated.

19. On 25 July 2013 Mrs Kateb's solicitors informed the FtT that their client did not agree to the apportionment and would not consent to the vacation of the hearing. The FtT directed that the hearing should go ahead in order to determine whether it had jurisdiction to determine the dispute and, if so, to carry out the valuation of the Schedule 13 compensation to which she was entitled. In the meantime, the new leases of the flat and garage were granted.

20. The FtT hearing took place on 17 September 2013 and in a decision released on 4 October 2013 it held that the agreement reached between HdW and Accordway was not binding on Mrs Kateb and it therefore remained open for the FtT to determine in the proceedings the amount of Schedule 13 compensation payable to her. The FtT held that the authority conferred on the competent landlord by s.40(2) was not absolute but was qualified by Part II of Schedule 11 and, in particular, by paragraphs 6 and 7. Under paragraph 6(1) the intermediate landlord can seek directions from the County Court as to how the competent landlord should proceed and could be separately represented (under paragraph 7) in legal proceedings before the FtT to determine the amount of the Schedule 13 compensation:

> "33. Again, it must have been the intention of Parliament that the intermediate landlord be afforded a further opportunity to protect its commercial interests in the event of a disagreement with the competent landlord as to the terms of acquisition by being represented in legal proceedings whether before the Tribunal or perhaps in proceedings brought under paragraph 6(1).
>
> 34. It must follow, therefore, that the authority granted to a competent landlord under section 40(2) is qualified by paragraphs 6(1) and 7(1) of Schedule 11 of the Act. Otherwise, as Mr Fieldsend correctly submitted, the provisions of those paragraphs would be rendered utterly meaningless if the authority granted was absolute. In the absence of agreement between all parties, the competent landlord or tenant is obliged to make an application to a court for directions or to the Tribunal for a determination to be made as to the disputed terms of acquisition.
>
> 35. It cannot be right, as a matter of principle or policy, that a competent landlord can act without restraint and possibly negligently in the course of the grant of a new lease and that the only remedy available to an intermediate landlord would be to invoke the provisions of paragraph 6(4) of Schedule 11 and embark on costly and time consuming satellite litigation to recover any loss. In our judgement, this cannot be so as Parliament has clearly provided a mechanism in the Act for any disputes between the competent and intermediate landlords to be resolved."

21. There has been no challenge to the jurisdiction of the FtT to decide the issue about the effect of a paragraph 7 notice in the context of proceedings to determine the terms of acquisition in respect of the new leases: see s.91(1). But, on appeal to the UT, HdW contended and the UT held that the right to separate legal representation in the FtT proceedings did not impinge on or qualify the authority of the competent landlord to agree the amount of the Schedule 13 compensation with the tenant so as to bind the intermediate landlord even when the agreement post-dated the service of the paragraph 7 notice. Referring to Schedule 11, paragraph 6(1), Judge Gerald said:

"18. It is common ground that this paragraph specifically makes binding upon an intermediate landlord any agreement which has been reached between the competent landlord and the tenant. If there is no intervention by the intermediate landlord he is bound by whatever the competent landlord has agreed with the tenant. It is also common ground that there is a statutory duty of care owed by the competent landlord for which he will be liable for breach unless he can avail himself of the statutory defence provided by paragraph 6(4), namely, that he acts in good faith and with reasonable care and diligence.

19. Thus, whilst it is theoretically open to the competent landlord to run a rough-shod over any known observations of the intermediate landlord and reach agreement with the tenant simply ignoring those observations of the intermediate landlord, in so doing he would run the risk of liability in damages. In those circumstances it would be very difficult for him to claim that he had acted in good faith or with reasonable care and diligence. However the fact that the competent landlord has reached agreement with the tenant knowing that the intermediate landlord has raised observations or objections to for example the premium or amount payable under Schedule 13 of the 1993 Act does not necessarily mean that he will not be able to demonstrate that he has been acting in good faith or with reasonable care and diligence. For example it may be that the competent landlord properly regards the observations or objections of the intermediate landlord as immaterial or of no substance or that he has been trying to get information out of the intermediate landlord to assist him in his negotiations which has not been forthcoming. In those circumstances it is possible, depending on the facts and circumstances of the case, that he could avail himself of the statute defence notwithstanding.

20. It is also common ground that the intermediate landlord could apply to the County Court under paragraph 6(1) of Schedule 11 for directions as to the manner in which the competent landlord should act in relation to the dispute. Both counsel agreed that if the intermediate landlord did not for example like how the competent landlord was presenting the case or the terms which he was proposing or possibly intending to agree including the amount payable under Schedule 13, the intermediate landlord could intervene by applying to the County Court. One aspect of that intervention could be a request that the competent landlord be directed not to reach any agreement without the prior consent of the intermediate landlord or approval of the court. In both circumstances the reality would be that the competent landlord's authority would be curtailed by the effect of the court order. That power to intervene by application to the County Court can be exercised at any time. Indeed the competent landlord himself might

> intervene if he had a recalcitrant intermediate landlord and wished to protect himself from any allegations and to assist availment of the paragraph 6(4) defence."

22. In relation to paragraph 7(1), the UT expressed the view that it was a tightly worded provision limited to representation in legal proceedings in relation to the Schedule 13 compensation. Unlike paragraph 6, it did not in terms extend to agreements between the competent landlord and the tenant and so give the intermediate landlord a right to participate in any negotiations between them. On one view paragraph 7(1) would, it held, lay a trap for the unwary if it operated to deprive the competent landlord of the right to negotiate for all reversioners once legal proceedings had commenced.

The effect of paragraph 7(1)

23. The issue about the effect of paragraph 7(1) is purely a question of statutory interpretation having regard to the purpose of the legislation. In *Hosebay Ltd v Day* [2012] UKSC 41; [2012] 1 WLR 2884, Lord Carnwath JSC said:

> "[6] 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."

24. The issue we have to decide concerns the machinery created by the 1993 Act for giving effect to a tenant's claim initiated by the service of the s.42 notice. There is no doubt that the starting point must be s.40(2) which grants to the competent landlord a general and unqualified authority to conduct all proceedings arising out of the notice on behalf of all other landlords. It is not disputed that this includes the conduct of any application to the FtT under s.48 and the negotiation of terms in relation to the new lease and the Schedule 13 compensation whether before or after the commencement of legal proceedings. The application to the FtT can only be made by the tenant or the competent landlord.

25. Section 40(2) has effect "subject to the provisions of Schedule 11": see s.40(3). But paragraph 6 of Schedule 11 confirms rather than qualifies the scope of the competent

landlord's authority by specifically providing that the counter-notice, any agreement between the competent landlord and the tenant and any determination in the FtT proceedings will bind all other landlords. The remedy given to intermediate landlords to deal with actions by the competent landlord about which they are concerned is twofold. The other landlords can either apply to the County Court for directions about how the competent landlord should act or, if the act complained of has already taken place, they may have a cause of action against the competent landlord for the loss caused by his negligence or lack of good faith: see paragraph 6(4).

26. Although the FtT construed the word "dispute" in paragraph 6(1) as referring to a dispute between the competent and the intermediate landlord, it is, I think, referring to a dispute between the competent landlord and the tenant about the terms of the extended lease and any Schedule 13 payments. This seems to me to follow from the reference at the end of the paragraph to the court giving directions as to how the competent landlord should act in the dispute. But nothing much really turns on this. What matters is that the intermediate landlord is given a right to seek the intervention of the court in advance of any action by the competent landlord and a subsequent right of action for loss caused. Neither of these remedies seems to me to be consistent with a limitation as such in the power of the competent landlord under s.40(2) to bind other landlords by its actions.

27. Absent a direction from the court, the competent landlord retains full authority under the 1993 Act to negotiate or litigate about the terms of the new lease. But the exercise of that power is not free from any legal restrictions. As agent of the other landlords, the competent landlord owes the equivalent of a fiduciary duty to act in good faith as paragraph 6(4) recognises. He must also exercise due skill and care. Mr Fieldsend submitted that a difficulty about the right of the intermediate landlord to seek directions under paragraph 6(1) is that he may not become aware of what the competent landlord proposes to do until after the decision or action in dispute has been taken. I accept that may be a problem in some cases. But it explains why Parliament has given the other landlords the right of action contemplated by paragraph 6(4) and the existence of such potential liability is likely in practice to encourage openness between the competent landlord and the other landlords about the progress of the proceedings and to act as a deterrent against action by the competent landlord designed to further its own interests at the expense of those of the other landlords.

28. What matters, however, for present purposes is that the remedial nature of these elements of paragraph 6 points strongly, in my view, away from any limitation by paragraph 6 itself on the authority conferred upon the competent landlord by s.40(2). Mr Fieldsend, I think, accepts that had his client not given notice under paragraph 7, the agreement made between HdW and Accordway made during the course of the FtT proceedings would have been binding on her. The case therefore turns on whether, by giving to the other landlords the right to be separately represented in the legal proceedings, Parliament intended that the competent landlord should lose the authority granted by s.40(2) and, more importantly, paragraph 6(1)(b) to reach an agreement with the tenant that is binding on all parties in the event that a paragraph 7 notice is served.

29. The provisions of paragraph 7 clearly do qualify the authority conferred on the competent landlord by s.40(2) as the opening words of paragraph 7(1) make clear.

But the derogation is limited to separate representation (paragraph 7(1)) and the right to receive directly the Schedule 13 compensation (paragraph 7(2)). Paragraph 7(1) does not in terms limit the power of the competent landlord to reach enforceable agreements with the tenant which are binding on the other landlords and its sphere of operation is confined to legal proceedings rather than proceedings more generally arising out of the service of the s.42 notice. Mr Fieldsend's argument therefore depends upon reading into paragraph 7 (and, in particular, its references to the other landlords being separately represented) a limitation on the power of the competent landlord to compromise the issues in the FtT proceedings on behalf of the other landlords.

30. The reasons for construing paragraph 7 in this way can be summarised quite shortly. It is said that the right to be separately represented would be robbed of any real value to an intermediate landlord if it did not carry with it the necessity to be party to any compromise of the issues in dispute. A determination of the issues by the FtT would obviously be binding on the other landlords but for the competent landlord to be able to reach an agreement on any of those issues binding on (and perhaps without reference to) the other landlords who are separately represented in the proceedings would effectively undermine the purpose of that separate representation. The other landlords would be entitled to put their own arguments on the matters in dispute to the FtT but would be powerless to prevent a settlement of the dispute even if the negotiated deal took no account of those views. In statutory terms, separate legal representation should be understood as carrying with it the right to participate in (and, if necessary, veto) any settlement negotiations and agreement, thus preserving a right for the other landlords to have the dispute resolved by the FtT absent an agreement in which they concur.

31. As formulated, this is a powerful argument but some of the underlying assumptions require to be examined.

32. The right to be separately represented clearly (and most obviously) provides the other landlord in question with a right of audience before the FtT. Whether the other landlord becomes a party to the proceedings is less clear but it may not matter. The other landlord can put his arguments on Schedule 13 compensation directly to the FtT and, if necessary, call his own valuation evidence to support the figures. But in a case, for example, where only one of several intermediate landlords chooses to take that course the competent landlord will retain the authority to negotiate for himself and those interests and may be faced with a dispute between reversioners as to the compensation payable to each of them.

33. Absent paragraph 7, it was clearly contemplated that disputes of that kind would be resolved as between the competent landlord and the tenant. The competent landlord must act in good faith and with reasonable care having regard to all the interests he represents. But, subject to that, Parliament has vested in him the authority to agree terms with the tenant which will require an exercise of judgment by the competent landlord when the other landlords are not in agreement as to what should be the resolution of the negotiations with the tenant.

34. If, contrary to Mr Fieldsend's submissions, paragraph 7 gives the other landlord in question no more than a right to be heard he still retains the protection of paragraph 6(4) available to the other landlord but the tenant is not burdened with having to

resolve disputes between the various landlords in order to avoid the expense and delay involved in contested proceedings. He retains the competent landlord as the sole party to any negotiated settlement and disputes between the landlords as to the terms of the new lease or the amount of compensation which should be paid need not concern him. It therefore seems to me possible to identify in s.40(2) a policy objective in favour of facilitating the acquisition by the tenant of a new extended lease which is recognised by Schedule 11. The scheme of paragraphs 6 and 7 is to preserve the measure of authority granted by s.40(2) (see paragraph 6(1)) but to build in protections designed to mitigate the possible adverse effects which this may have on other landlords. They can seek directions from the County Court as to how the competent landlord conducts the proceedings and (if appropriate) recover compensation for negligence and bad faith. But the ability of the competent landlord to provide the tenant with an agreement binding on all other landlords remains unaffected.

35. Consistently with this policy, I find it difficult to accept that paragraph 7 was intended to free other landlords from the agency of the competent landlord. That seems a particularly odd result for the draftsman to have intended given that paragraph 6(1) already contains provisions which enable the other landlords to obtain a court direction as to how the competent landlord should handle the dispute with the tenant. Consistently with this scheme, the correct approach would be to construe paragraph 7 as giving the other landlords a right to be represented and heard in the FtT proceedings but nothing more.

36. Any lingering doubts about the effect of paragraph 7 are, I think, resolved by looking at the comparable provisions of the 1993 Act which deal with collective enfranchisement. As Mr Radevsky points out, s.9(3) and Schedule 1 contain parallel provisions to s.40(2) and Schedule 11 giving to the reversioner the conduct of all proceedings arising out of a s.13 notice on behalf of all the relevant landlords as defined. So far as material, Schedule 1 provides:

> "6. (1) Without prejudice to the generality of section 9(3)—
>
> (a) any notice given by or to the reversioner under this Chapter or section 74(3) following the giving of the initial notice shall be given or received by him on behalf of all the relevant landlords; and
>
> (b) the reversioner may on behalf and in the name of all or (as the case may be) any of those landlords—
>
> (i) deduce, evidence or verify the title to any property;
>
> (ii) negotiate and agree with the nominee purchaser the terms of acquisition;
>
> (iii) execute any conveyance for the purpose of transferring any interest to the nominee purchaser;
>
> (iv) receive the price payable for the acquisition of any interest;

> (v) take or defend any legal proceedings under this Chapter in respect of matters arising out of the initial notice.
>
> (2) Subject to paragraph 7—
>
> (a) the reversioner's acts in relation to matters within the authority conferred on him by section 9(3), and
>
> (b) any determination of the court or a leasehold valuation tribunal under this Chapter in proceedings between the reversioner and the nominee purchaser,
>
> shall be binding on the other relevant landlords and on their interests in the specified premises or any other property; but in the event of dispute the reversioner or any of the other relevant landlords may apply to the court for directions as to the manner in which the reversioner should act in the dispute.
>
> …..
>
> (4) The reversioner, if he acts in good faith and with reasonable care and diligence, shall not be liable to any of the other relevant landlords for any loss or damage caused by any act or omission in the exercise or intended exercise of the authority conferred on him by section 9(3).
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> 7. (1) Notwithstanding anything in section 9(3) or paragraph 6, any of the other relevant landlords shall, at any time after the giving by the reversioner of a counter-notice under section 21 and on giving notice of his intention to do so to both the reversioner and the nominee purchaser, be entitled—
>
> (a) to deal directly with the nominee purchaser in connection with any of the matters mentioned in sub-paragraphs (i) to (iii) of paragraph 6(1)(b) so far as relating to the acquisition of any interest of his;
>
> (b) to be separately represented in any legal proceedings in which his title to any property comes in question, or in any legal proceedings relating to the terms of acquisition so far as relating to the acquisition of any interest of his."

37. In this part of the legislation the reversioner's authority to act for and bind other relevant landlords in relation, for example, to the agreement of the terms of acquisition (paragraph 6(1)(b)(ii)) is also made subject to a right for the other landlords to seek directions from the court. But paragraph 7 is expressed to qualify not only s.9(3) but also paragraph 6 and, more important, includes an express right in paragraph 7(1)(a) to deal directly with the nominee purchaser in respect of the negotiation and agreement of the terms of acquisition or the other matters mentioned in sub-paragraphs (i) to (iii) of paragraph 6(1)(b). This is confirmed by s.24(3) (the

equivalent of s.48(3) in Chapter II) which refers in sub-paragraph (b) to all the terms of acquisition having been agreed between the parties. "The parties" is defined by s.24(7) as meaning the nominee and the reversioner and any relevant landlord who has given a notice under paragraph 7(1)(a) of Schedule 1.

38. It is clear that in a Schedule 1 case the intermediate landlords (relevant landlords) only acquire a right to be parties to an agreement about the terms if they serve a paragraph 7(1)(a) rather than a paragraph 7(1)(b) notice: see s.24(3). The absence of any comparable provision in paragraph 7 of Schedule 11 and s.48(3) confirms, to my mind, that Parliament did not intend that a Schedule 11, paragraph 7 notice should remove the competent landlord's authority to agree terms binding on all the other landlords. In that way it is no different from a notice served under paragraph 7(1)(b) of Schedule 1.

39. It therefore becomes necessary to consider Mr Fieldsend's alternative argument which is that the legislation should be given a Convention-compliant construction that gives effect to the appellant's rights under Article 6 and Article 1, Protocol 1 ("A1P1").

Article 6

40. Article 6 is said to be engaged in a case where a paragraph 7 notice is given and FtT proceedings have commenced. For the purposes of this appeal Mr Fieldsend does not seek to challenge the wider scheme of representation contained within s.40(2) and paragraph 6. He relies on the basic principles that a right of access to the court is fundamental to the right to a fair hearing (see *Golder v UK* (1979-80) 1 EHRR 524 at [45]) and that any limitation on that right of access must not restrict it to the extent that the essence of the right is impaired. There is also the need to demonstrate proportionality between the means adopted and the aim sought to be achieved: *Ashingdane v United Kingdom* (1985) 7 EHRR 528 at [57].

41. None of this is controversial but the correct application of these principles to the present case is. Mr Fieldsend submitted that if the competent landlord can reach an agreement with the tenant on an issue in the FtT proceedings which is binding on all parties then the legislation has the effect of depriving his client of the opportunity to have her compensation determined by an independent and impartial tribunal. He referred to the decision in *Philis v Greece* (1991) 13 EHRR 741 which concerned a claim by a consultant engineer to recover the fees due from two public corporations and an individual in respect of design work he had carried out. He asked the Technical Chamber of Greece ("the T.E.E.") to institute proceedings for the recovery of his fees because under a Royal Decree 30/1956 it alone had the capacity to institute such proceedings on behalf of engineers. The T.E.E. brought some proceedings but there were delays due to the demand for the pre-payment by Mr Philis of legal fees and due to various procedural and other difficulties encountered during the course of the proceedings. As a result, some of the claims became statute-barred. More than 10 years after the commencement of the proceedings by the T.E.E. the claimant had still to recover any part of his fees.

42. The complaint based on Article 6 was that the domestic law which required the claimant to bring any proceedings through the T.E.E. violated his right of access to a court. The ECtHR accepted that there had been a violation because although the right of access was not absolute and could be regulated by the State, any limitations on it

"must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired": see [59]. It went on to say:

> "61. There are indeed advantages flowing from the system in question: by representing engineers in the courts, the T.E.E. provides them, in return for a small percentage, with the services of experienced counsel and it bears in addition the legal costs and the lawyers' fees, which less well-off engineers would sometimes find it difficult to pay. The wording used in paragraphs 4 and 5 of Article 2 is however ambivalent, with the result that there has been disagreement among academic writers and in the case-law as to their implications. Read literally, Royal Decree no. 30/1956 confers on the T.E.E. the exclusive capacity to bring proceedings on behalf of engineers. Existing practice is consistent with this interpretation.
>
> …..
>
> 65. In conclusion, since the applicant was not able to institute proceedings, directly and independently, to seek the payment from his clients - even to the T.E.E. in the first instance - of fees which were owed to him, the very essence of his "right to a court" was impaired, and this could not be redressed by any remedy available under Greek law.
>
> There has therefore been on this point a violation of Article 6(1)."

43. There are obvious differences between the claim in *Philis* and the position of an intermediate landlord under the 1993 Act. Mr Philis had a contractual right to the payment of his fees which would ordinarily have been enforceable by a personal action in his own name. The decree which deprived him of a direct right of action and assigned the conduct of his claim to the T.E.E. involved therefore the exclusion of an otherwise existing right of access. Under the 1993 Act the intermediate landlords (whose leases are not acquired as part of the tenant's claim) are given compensation under Schedule 13 which is to be determined either by negotiation or in proceedings between the tenant and the competent landlord. The statute which granted the intermediate landlord this right of compensation does not include a direct right of access to the court beyond the right to be separately represented in any proceedings in the FtT which the tenant or the competent landlord choose to initiate. Otherwise the intermediate landlord must accept the result of the negotiations between the tenant and the competent landlord subject to the protection provided by paragraph 6(4).

44. It is therefore difficult to characterise the provisions of s.40(2) and Schedule 11 as the removal of a right of access to the court of the kind that was under consideration in *Philis*. The position seems to me much closer to a scheme for statutory compensation following the compulsory acquisition of assets such as was under consideration in *Lithgow v United Kingdom* (1986) 8 EHRR 329 where the ECtHR accepted that the representation of the shareholders in a nationalised company through a nominated representative and the limitation it imposed on a direct right of access for each shareholder to the Arbitration Tribunal assessing compensation pursued a legitimate

claim in avoiding a multiplicity of claims and proceedings. I see no reason to take a different view about the effect of the legislation in this case. It strikes a reasonable balance between protecting the interests of intermediate landlords and facilitating the grant of the extended lease which is proportionate having regard to the purpose of the legislation and the rights of the affected parties.

A1P1

45. The effect of the exercise of the tenant's right to obtain an extended lease is to deprive the intermediate landlords of the ground rents. It is common ground that this is a possession for the purposes of A1P1 but in return the other landlords receive the compensation payable under Schedule 13. Mrs Kateb does not therefore contend that the replacement of the ground rents with statutory compensation is in itself violation of her rights under A1P1. A challenge to the right of enfranchisement under the Leasehold Reform Act 1967 failed in *James v United Kingdom* (1986) 8 EHRR 123. In *Earl Cadogan v Sportelli* [2008] UKHL 71 Lord Walker at [48] said:

> "It is for Parliament as the national legislature to decide on policies to remedy social injustice, with a wide margin of appreciation. Parliament's conclusions on social policy will be accepted by the Strasbourg court unless manifestly unreasonable. It is true that the scope of leasehold enfranchisement and associated rights has increased greatly since the 1967 Act, especially with the removal of the requirement for occupation by the tenant. But Parliament concluded that that requirement created difficulties in the enfranchisement of large blocks of flats where there was a rapid turnover of some of the flats. Against that the landlord does under section 9(1D) of the 1967 Act and Schedule 13 of the 1993 Act receive half of the marriage value, a provision which cannot be attacked as lacking a reasonable relationship of proportionality (see paras 49 to 54 of the judgment in *James*)."

46. In the case of applications under s.42, as I have already mentioned, we are not even concerned with the loss of the intermediate term but only with the ground rents and the benefit of possession under any reversion expectant on the existing lease.

47. A challenge to the amount of compensation payable under Schedule 13 as a violation of A1P1 would have no prospect of success. A1P1 does not guarantee a right to full compensation and the margin of appreciation afforded to a State in devising the statutory scheme will ordinarily render it immune to attack on A1P1 grounds unless, as Lord Nicholls observed in *Wilson v First County Trust Limited (No. 2)* [2004] 1 AC 816 at [70], it is apparent that the legislation has attached insufficient importance to the Convention right. Challenges to enfranchisement and the grant of extended leases under A1P1 have consistently failed since *James v United Kingdom* as appears from the decision of the UT in *Trustees of Cooper-Dean Charitable Foundation v Greensleeves Owners Limited* [2013] UKUT 320 (LC) at [89] where Lindblom J. conveniently summarises the relevant authorities.

48. The complaint under A1P1 in this case is therefore limited to a challenge to the method of determining the Schedule 13 compensation which is said to be arbitrary

having regard to the ability of the competent landlord to override the objections of the intermediate landlords and to reach a compromise of FtT proceedings without the consent of the other landlords.

49. In my view it fails for the same reasons. The policy of allowing the amount of the Schedule 13 compensation to be determined in negotiations between the tenant and the competent landlord or where necessary by the FtT pursues a legitimate aim and falls well within the margin of appreciation that must apply in a case such as this. The contrary argument also considerably undervalues in my view the protections which the other landlords are given under paragraphs 6 and 7. In most cases (although not all) the interests of the other landlords are likely to be limited in value compared to the ultimate reversion and their valuation not difficult to ascertain. I am not persuaded that the procedural model which Parliament has adopted for determining the Schedule 13 liabilities of the tenant can be said to be disproportionate or to have been formulated without regard to the protection of the relevant Convention rights. On the contrary, it represents a considered attempt to balance out the respective interests of the parties whilst ensuring that the purpose of the legislation is achieved. It is not a case like *Papachelas v Greece* (1999) 30 EHRR 923 where the rules governing the calculation of the statutory measure of compensation were themselves fundamentally unfair.

50. For these reasons, I would dismiss the appeal.

Lord Justice David Richards :

51. I agree.

Lord Justice Sales :

52. I also agree.