Falcon Chambers

Law of Property Act 1925 – the first 100 years

Focus on Section 153: statutory enlargement of a leasehold term into a fee simple

Two fees, or not two fees, that is the question

1. Depending upon your point of view, the impact of the often overlooked section 153 of the Law of Property Act 1925 may bestow a valuable benefit upon a qualifying long leaseholder or come as something of a surprise to an unwary landlord. However, all will agree that the operation of the section continues to be one of the most controversial aspects of the 1925 Act. Notwithstanding the lapse of a century since the enactment of the Act, it still remains undecided what happens to the landlord's reversion when their tenant statutorily enlarges their leasehold term into a fee simple under section 153. Is it legally correct, as the Land Registry's present practice suggests, that post-enlargement there can exist two freehold titles in respect of a single plot of land?

The key features of section 153

2. Section 153 deserves to be better known. It provides tenants under certain long leases with the entitlement to bring their lease to an end by enlarging their lease and converting it into a freehold estate. During a set window of opportunity, the statutory right applies where:
    a. a lease was originally granted for at least 300 years;
    b. at least 200 years of the term remain unexpired;
    c. there is no trust or right of redemption affecting the term in favour of the freeholder or reversioner;
    d. no rent (including insurance rent or service charge reserved as rent), or merely a peppercorn rent or other rent without money value, was originally reserved, or the rent has become barred by lapse of time or otherwise ceased to be payable; and
    e. the lease is not liable to be determined by re-entry on breach of a condition.

3. It does not matter whether a lease is commercial or residential[1]. The power to enlarge a lease to a fee simple extends to all qualifying leases, including sub-leases, unless the head lease does not qualify for enlargement. Section 153 also applies to mortgage terms, where the right of redemption has been foreclosed or barred by lapse of time since the mortgagee took possession.

4. The process of enlargement is a straightforward and economic one. A qualifying leaseholder achieves enlargement through a unilateral administrative process with no involvement on the part of the landlord. The sole document necessary to effect the enlargement into a fee simple is a deed poll which declares that from and after the execution of the deed the term shall be enlarged into a fee simple (s. 153(6)).

5. The effect of the statutory enlargement is that "the person in whom the term [of the lease] was previously vested" acquires a fee simple instead of the term. This includes the fee simple in all mines and minerals which at the time of enlargement have not been severed in right or in fact (s. 153(7)).

6. The fee simple acquired is subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment and to all the same obligations of every kind as the term would have been subject to if it had not been enlarged (s. 153(8) and (10)).

Advice

7. A landlord who wishes to grant a new lease of over 300 years duration whilst avoiding the future prospect of enlargement should take care to reserve a rent with a monetary value. Unless the mandatory provisions of the recent Leasehold Reform (Ground Rent) Act 2022 apply to prohibit the setting of a financial ground rent, a landlord mindful of section 153 should not grant a lease in excess of 300 years at a basic peppercorn rent, for example.

[1] There are very limited exceptions, such as may be found in the Education Act 2002 Schedule 7 para. 10(1).

8. In Re Chapman and Hobbs (1885) 29 Ch. D. 1007 a rent of a silver penny was held not to be a rent which had a monetary value. In Blaiberg v Keeves [1906] 2 Ch. 175 a rent of one shilling was held to be a rent which had a monetary value.

9. By way of practical aid, section 153(4) provides that a rent not exceeding £1 per annum which has not been collected or paid for a continuous period of 20 years or more will be deemed to have ceased to be payable for these purposes.

10. Although most shorter modern leases will contain a forfeiture clause, a developer or occupational tenant who has paid a premium for the grant of a lease with a term of over 300 years duration will traditionally resist the inclusion of a proviso for re-entry. If a forfeiture clause is not included in a lease, a forfeiture clause will not be implied into the lease subsequently.

What was the rationale behind the implementation of section 153?

11. The origins of a qualifying tenant's right to enlarge a term pre-date the Law of Property Act 1925. Section 153 replaced section 65 of the Conveyancing Act 1881, as amended by section 11 of the Conveyancing Act 1882, with further subsequent amendments.

12. The rationale for the statutory right to enlarge in section 153 of the Law of Property Act 1925 is set out in Wolstenholme & Cherry's Conveyancing Statutes (12th ed., 1932, vol. 1, p. 509):

> "this s.[ection] enables the conversion into a fee simple of a long term in a case where it is practically impossible that evidence of title to the reversion in fee could exist at the expiration of the term, at least where the reversion is not vested in a corporation, and where also if such evidence did exist the value of the reversion must be infinitesimally small at the time of conversion.
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> Before the Real Property Act 1845, a tortious fee, and for all practical purposes an actual fee, could be acquired by means of a feoffment: see 1 Sand Uses , 5th ed, 30; 2 ib 14 et seq; *Weller v Stone*, 1885, 54 LJ Ch 497. But s.4 of that Act took away the tortious effect of a feoffment, and rendered impossible the acquisition of a fee in place of a term. The usual origin of a long term is a

mortgage by demise where the right of redemption has been foreclosed or has been barred by possession and lapse of time. The fact that the land is not freehold is often overlooked, complication of title arises, and the intentions of a testator are sometimes frustrated, the leasehold interest passing under a gift not intended to include it.

The power to convert into a fee is given to "any person beneficially entitled" "to possession" (see definition of "possession", s. 205 (1) (xix),). Thus a tenant for life, whether the land is "subject to any encumbrance or not," can effect the conversion. A trustee can only convert where the trust is active and he is in receipt of rent. Otherwise the beneficial owner is the person to convert. Thus all trustees for sale will be the proper persons to effect a conversion.

Save for the purposes of s.88(3), a mortgagee cannot convert, as it would be improper to allow him to change the nature of his mortgagor's estate. But the mortgagor can convert, the conversion working no injury to the mortgagee."

The effect of sub-s.(7) is to defeat the reversion in fee in the same way as on a disentail, so that the fee acquired by conversion is free from all dealings affecting the original fee."

13. It is unlikely that the original problems the section was designed to address will arise in future. However, the wording of section 153 is not constrained in its application. The only criteria for the enlargement of the leasehold term under section 153 are those set out in paragraph 2 above.

14. So far, so good.

Land Registry Practice

15. Until 2013, the Land Registry's practice was to close the landlord's freehold title after enlargement of the tenant's lease. In 2012, the Land Registry conducted an informal consultation on a proposal that on enlargement the Land Registry, while granting the former leaseholder a new freehold title, should change its practice and retain the title of the former landlord on the register. It said this proposal was made in circumstances

where the Land Registry was seeing an increasing number of applications to register enlargements of recently granted registered leases where the landlord's title was also registered.

16. Although the Land Registry did not explain why the number of applications was increasing, it seems likely that section 153 had become a fashionable device by which a vendor would grant an enlargeable long lease in an attempt to make positive covenants run with freehold land. In the transaction, the buyer would pay a premium equal to the purchase price, and the seller would grant an enlargeable lease. That could, for example, include covenants such as to repair a wall or roof for the benefit of adjoining premises also owned by the landlord. Shortly afterwards the buyer would execute a deed of enlargement. The legal argument being that by virtue of section 153(8) a successor to the former landlord could still enforce the formerly leasehold positive covenants and that successive owners of the new fee simple would not take free of them.

17. On 11 March 2013, the Land Registry published its report on the responses to the informal consultation. It concluded that it would implement its proposal not to close the landlord's freehold title following enlargement. The Land Registry said there was not "clear" authority whether and, if so, how the landlord's reversion:

    a. continues to subsist (and if so whether it is acquired by the tenant), or
    b. is extinguished following enlargement under section 153.

    And:

> "Given this uncertainty, we think it is safer to change our approach so that the registered title for the landlord's reversion is not closed. However, on completion of the application for registration of the enlargement, we would make appropriate entries on both the landlords and the tenants (newly enlarged) freehold titles so that it is clear enlargement has taken place.
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> Even if the reversion is extinguished, it seems that encumbrances on the landlord's registered title would survive enlargement, just as they do on escheat following disclaimer of a freehold estate and on disclaimer of a lease. A chargee of the reversion may therefore have valid grounds for objection to an application

for enlargement of the lease, if they are not bound by, or did not consent to the grant of, the lease."

18. The Land Registry subsequently published guidance for conveyancers. That helpful (updated) guidance remains in place today as Land Registry Practice Guide 26.

So why is section 153 a controversial section?

19. There is no debate that enlargement is effective to create a fee simple interest in the hands of the former tenant. The controversy is purely as to the status of the landlord's original reversion after enlargement of the former tenant's lease.

20. Regrettably, it is somewhat ironic that this controversy actually pre-dated the comprehensive reforms implemented under the 1925 legislation. Whilst it is unfortunate that no express statement was included in section 153 to set out the consequence of enlargement on the landlord's original reversion, one ventures to suggest this is probably because it was thought the original freehold must simply disappear on enlargement under the 1925 Act.

21. In Challis's Law of Real Property (3rd ed, 1911), Charles Sweet discussed the uncertain impact on the reversion of the operation of statutory enlargement under section 65 of the 1881 Act. In the pre-1925 Act world, Mr Sweet had also identified the use of section 65 by some conveyancers as a device to attempt to enable positive covenants to run. He said:

> "It is perhaps not clear what will become of the reversion upon the term under such circumstances. On the one hand, two fees simply cannot, by the common law, subsist at the same time in the same lands; whence might be drawn the inference, that the reversion is absolutely destroyed. On the other hand, the rule of the common law that a reversion in fee cannot be expectant upon another fee, may be suspended by force of a statute, and it has in fact been suspended by the statute De Donis. The question does not appear to have been foreseen. The answer which, by analogy of the law, it ought to receive, is doubtful; and the answer which it will in fact receive cannot be predicted with confidence. If the

> reversion is not destroyed by the enlargement, the fee simple obtained by the enlargement will subsist as a base fee. No other example can be suggested of a base fee which is a fee simple absolute. This fact might perhaps be thought to afford a sufficient reason for holding that the reversion is destroyed by the enlargement. But the case is by no means analogous to the enlargement of a base fee affected by section 39 of the Fines and Recoveries Act; because in the case of a long term it is expressly enacted by the Conveyancing Act of 1881, section 65, subsection (4), that the fee simple acquired by enlargement shall be subject to all the same covenants and provisions relating to user and enjoyment as the term would have been subject to if it had not been so enlarged. It is possible that, in the view of its framers, this provision was intended to apply only to covenants and provisions imposed upon the term subsequently to its creation; and no doubt the modes in which such long terms have commonly arisen, make it improbable that hitherto such covenants and provisions have been imposed upon them at the time of their creation. But the enactment contains nothing thus to restrict its meaning; which cannot, without gratuitously importing into it something which it does not in fact contain, be made to exclude covenants and provisions imposed upon a long term at the time of its creation. The present writer has been informed that, in reliance upon these considerations, the enactment has been used by some conveyancers as a device whereby to annex to a fee simple certain covenants which would not "run with the land" at the common law. If this view (which seems to be more than plausible) should be supported, the person formerly entitled to the reversion, and his heirs, will be entitled to the benefit of such covenants; and this might afford a reason for holding that the reversion remains still on foot, notwithstanding the enlargement of the term."

22. Today, if one accepts that section 153 is similarly ambiguous as to the fate of the landlord's reversion, there are 3 possible analyses of the consequences of enlargement. Either:
    a. the enlarging lessee takes over the existing fee simple / freehold title; or

b. the landlord's estate is extinguished and the lessee's former leasehold title, now enlarged to fee simple / freehold, is substituted for it ("substitution"); or
c. the landlord's fee simple / freehold title remains and a new subordinate fee simple / freehold title must be issued ("subordinate title" or "subinfeudation").

23. The view that the landlord's original fee simple remains and a new subordinate fee simple must be issued was explained by T.P.D Taylor in his 1957 article "The Enlargement of Leasehold to Freehold" in The Conveyancer & Property Lawyer (vol. 22 NS, 101). In Mr Taylor's view, enlargement did not appear to extinguish "everything" remaining in the original holder of the fee simple reversion; although "whatever is left, however, is less clear". If the interest left was a reversion, it was also unclear whether that could subsist at law. Nevertheless, Mr Taylor concluded that the reversion to the lease must survive enlargement by subinfeudation. The effect being to make the benefit of positive covenants which touch and concern the land enforceable against successors in title of the grantee under section 153(8).

24. A similar argument was made by Edward Nugee QC in "The Feudal System and the Land Registration Acts" (2008, Law Quarterly Review). In Mr Nugee's opinion the original landlord's fee simple remains in existence as a superior estate such that the relationship of superior and inferior tenure could still subsist between freeholders.

25. The rival argument that the new fee simple must be substituted for the prior fee simple has been powerfully advanced by Christopher Jessel of Farrer & Co. In "Concurrent fees simple and the Land Registration Act 2002" (LQR 2014 130 587), Mr Jessel set out a detailed historical response to Mr Nugee's 2008 article. Mr Jessel accepted that there are instances of concurrent fee simples known to law, for example in respect of mineral rights, under the Highways Act 1980, where land is subject to adverse possession, and under a settlement, but argued that:

> "While a mesne seignory may still exist, that is not an estate in land."

And:

> "If a lease is enlarged [under section 153] the former freehold is extinguished but substituted by a new estate."

26. Mr Jessel has identified a number of potential problems if a superior freehold is indeed left in place:

> "The existence of modern superior freeholds could have inconvenient consequences. One might be the proliferation of subordinate freeholder estates. A tenant who enlarges the lease to a fee simple under section 153 could in turn grant an enlargeable lease and the (sub) tenant could do the same. The result would be a hierarchy as involved as Maitland describes as being the case at Paxton. Correspondingly the former landlord might grant an interest in the superior freehold intermediate to the enlarged estate carrying the benefit of the covenants.
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> If the covenants preserved by section 153 are onerous (for example on a development site) then a liquidator might disclaim the land which would escheat not to the Crown but to the superior estate. Section 153 applies only to a lease which does not contain a right of re-entry and it would be anomalous for a former landlord to claim by escheat what cannot be achieved by forfeiture.
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> A new freehold created by subinfeudation would not be compulsory registrable. By contrast, where a lease has been enlarged at any time since 1881, someone who could show title as successor to the former landlord could presumably now apply to have that title registered as superior to the enlarged estate. …".

27. In "Leasehold enlargement and positive covenants" (Conv. 2017, 2, 132), Mr Jessel expressed the view that:

> "Even if the effect of s.153(8) is that positive burdens continue to bind the property, equity requires the covenants also to benefit land. In general, the benefit and burden of covenants relating to land of the covenantor or covenantee are, by the LPA 1925 ss78 and 79, deemed to be made by and with him and his successors in title but that depends on there being land belonging to those successors. That may be why practitioners have asked the Land Registry to keep the landlord's freehold title open. Instead of being tenurially superior, it would be a concurrent estate in the same piece of land, but there is little support

for the existence of such titles. In Parshall v Hackney [2013] Ch 568 at [8] Mummery LJ said

"Even someone who knows nothing about land registration would realise that concurrent registration of title to the same piece of land in the names of different people is bad news" although he was not considering s. 153."

28. To date, the only known decision of the courts reflecting on this issue is to be found in a case concerning section 19 of the Leasehold Reform, Housing and Urban Development Act 1993, Earl Cadogan v Panagopoulos [2011] Ch 177. It must be noted that the discussion there was obiter, because Roth J decided the relevant lease was not capable of enlargement under section 153. Roth J observed that if the lease had fallen within section 153, he would have regarded it as caught by section 19 since it "can be converted into a freehold at any time by the unilateral act of the lessee" and that would provide a way of achieving severance. Such a severance could only have followed if his Lordship had considered the effect of enlargement was substitution of the landlord's original fee simple by a new fee simple.

What about the Law Commission?

29. In 2016, the Law Commission invited comments on the Land Registry's current practice in respect of enlargement. This consultation formed part of the Law Commission's 2018 Report, "Updating the Land Registration Act 2002" (Law Com No. 380).

30. The Law Commission expressed the view itself that it was possible for more than one freehold estate to exist in the same piece of land. The reasoning was that the fact that the only legal freehold estate which is capable of existing at law is "an estate in fee simple absolute in possession" does not prevent multiple freehold estates. In this context, they said "in possession" means that the estate is not in reversion. They also considered there to be some support in section 153 for this view. For example, section 153 refers to the acquisition of "a fee simple", rather than the fee simple. It also provides

for the continued enforceability of leasehold covenants, "suggesting that the landlord has an estate to which the continuing rights are annexed."

31. Unfortunately, no proposals were made in the 2018 Law Commission Report for the reform of section 153. The Law Commission's project concerned only registered land, whereas section 153 applies to both registered and unregistered land. In addition, the Law Commission was (then) optimistic that its previous recommendations for the reform of the law relating to positive covenants would shortly be adopted in any event. If so, there would be no need to consider the efficacy of a transaction structured around the use of section 153.

The Way Forward

32. In summary, one cannot help but have considerable sympathy with the pragmatic view expressed by Mr Jessel in his 2014 article, that:

> "… the general rule is that there is only one legal estate in fee simple and only one registrable freehold in any piece of land and the two are the same. Where the convolutions of the law have led to a different understanding, it would be best to provide and define new rights to serve a clear modern purpose free from the obscurities of ancient law.
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> … there are good reasons for allowing a long leaseholder to enlarge where all trace of the landlord has been lost but, where a known landlord has the benefit of covenants, either the land should remain as leasehold (so that the operation of LPA 1925 section 153 should be limited to untraceable landlords) or the former landlord should have a new type of registrable incorporeal title, akin to a rentcharge, which identifies the holder of the covenants and other rights and which can be transferred or charged but there is no need for a superior freehold. If the Law Commission's proposals for enforcement of positive obligations are enacted then there may be no need for new enlargeable leases."

33. In the meantime, the vital point is that section 153 has real value to a tenant wishing to enlarge their lease. And, when it comes to the question whether it is indeed possible to

have two fees simple in respect of a single plot of land, the only safe answer is that the debate continues.

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