Neutral Citation Number: [2019] EWHC 2203 (Ch) Case No: PT-2018-000320

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)
PROPERTY TRUSTS AND PROBATE LIST

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: 15/08/2019

Before :

THE HONOURABLE MR JUSTICE ZACAROLI

- -

Between :

YORK HOUSE (CHELSEA) LIMITED Claimant

- and –

(1) EDWARD ALLEN VICTOR THOMPSON Defendants
(2) DOMITILA THOMPSON

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Thomas Jefferies and Kimberley Ziya (instructed by **Forsters LLP**) for the **Claimant**
Stephen Jourdan QC and Anthony Radevsky (instructed by **Brethertons LLP**) for the **Defendants**

Hearing dates: 16, 17, 18 and 19 July 2019

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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.

Mr Justice Zacaroli:

A. Introduction

1. York House is a purpose-built block of 42 flats in Chelsea close to Sloane Square. Built in the 1930s, after a period of time when it was used for military purposes, it reverted to being used as flats occupied as private residences. Built in a T shape and surrounded by a courtyard at the back and sides, it comprises a basement, ground floor and eight upper floors.

2. The first defendant, Mr Thompson, acquired the freehold of York House in August 2010. He subsequently transferred the freehold into the joint names of himself and the second defendant, Mrs Thompson, in June 2012. They were registered as proprietors of the freehold on 9 October 2012.

3. Of the 42 flats, one is occupied by a caretaker and the other 41 are demised on long leases. In 2013 the defendants sold Flat 23 on the fourth floor and purchased Flat 38 on the eighth floor.

4. In 2017 the defendants became aware that some of the other lessees of York House were planning on claiming the freehold under the Leasehold Reform, Housing and Urban Development Act 1993 (the "1993 Act"). They were concerned that the price payable under the 1993 Act would not properly reflect a number of development opportunities in relation to York House. Accordingly, in June 2017 they granted 14 leases of various parts of York House and its surrounding area to one or other of themselves (the "Leases").

5. I will consider the details of what was demised by each Lease in section E4 of this judgment. Some of them (such as Lease 1 and Lease 8) demised discrete parts of the existing building. Leases 2 to 6 demised various external areas including parts of the courtyard and/or subsoil and/or parts of the airspace, with the intention of enabling the tenant to build a new structure in those areas. Those Leases were for a period of 20 years and gave rights to build on the premises, with an option for a 999-year lease of the completed structure. Leases 9 to 14 were of discrete parts of the internal corridors, being in each case a part of the corridor that led solely to the front door of one or other individual flat.

6. There was no premium payable under any of the Leases, and the rent reserved was in each case a peppercorn.

7. Prior to the grant of the Leases, the defendants did not serve notices pursuant to s.5 of the Landlord and Tenant Act 1987 (the "1987 Act") on the qualifying tenants of York House.

8. On 12 July 2017 a notice ("the s.13 Notice") was given under s.13 of the 1993 Act by 28 qualifying tenants to claim the freehold of York House. Since, at that time, the Leases had not been registered and the qualifying participating tenants were unaware that they had been granted, the s.13 Notice did not propose the acquisition of any of the Leases. No application was subsequently made to amend it to claim any of them.

9. On 14 September 2017 the defendants served a counter-notice admitting the claim for the freehold but disputing the proposed terms of acquisition.

10. Under cover of letters dated 31 January 2018, Forsters LLP, the solicitors acting for a requisite majority of the qualifying tenants in York House, served notices pursuant to s.12B of the 1987 Act on each of the defendants requiring them to dispose of the interests which were the subject matter of the disposals to the claimant. The claimant is the person nominated for the purposes of s.12B of the Act by the requisite majority of qualifying tenants in York House. The defendants failed to comply with these notices.

11. Default notices were served on the defendants pursuant to s.19(2) of the 1987 Act under cover of letters from Forsters dated 8 February 2018 and 29 March 2018. The defendants did not make good the default.

12. This claim was issued on 25 April 2018. It seeks an order under s.19 of the 1987 Act that the defendants transfer the Leases to the claimant.

B. The Statutory Framework

13. By s.1(1) of the 1987 Act, a landlord (defined by s.2(1)(a) as the immediate landlord of the qualifying tenants) shall not make a "relevant disposal affecting any premises to which at the time of the disposal this Part applies" unless it has previously served notice in accordance with s.5 on "the qualifying tenants of the flats contained in those premises" and the disposal is made in accordance with the requirements of ss.6 to 10.

14. The premises to which the 1987 Act applies are defined by s.1(2):

> "Subject to subsections (3) and (4), this Part applies to premises if— (a) they consist of the whole or part of a building; and (b) they contain two or more flats held by qualifying tenants; and (c) the number of flats held by such tenants exceeds 50 per cent. of the total number of flats contained in the premises."

15. "Qualifying tenants" are defined by s.3 as a tenant of the flat save under certain excluded types of tenancy, none of which is relevant here.

16. A "relevant disposal affecting premises" is defined by s.4(1) of the 1987 Act:

> "In this Part references to a relevant disposal affecting any premises to which this Part applies are references to the disposal by the landlord of any estate or interest (whether legal or equitable) in any such premises, including the disposal of any such estate or interest in any common parts of any such premises but excluding— (a) the grant of any tenancy under which the demised premises consist of a single flat (whether with or without any appurtenant premises); and (b) any of the disposals falling within subsection (2)."

17. "Common parts", by s.60(1) of the 1987 Act "…in relation to any building or part of a building, includes the structure and exterior of that building or part and any common facilities within it".

18. Subsection (2) of s.4 sets out the types of disposal which are excluded. These include a number of involuntary disposals, such as to a trustee in bankruptcy or liquidator or one made under various provisions relating to matrimonial proceedings.

19. Of direct relevance to this case are the exclusions provided for by sub-paragraph (e):

> "a disposal by way of gift to a member of the landlord's family or to a charity";

and sub-paragraph (h),

> "a disposal consisting of a transfer by two or more persons who are members of the same family either – (i) to fewer of their number, or (ii) to a different combination of members of the family (but one that includes at least one of the transferors)"

20. Section 4(3) defines "disposal" as

> "a disposal whether by the creation or the transfer of an estate or interest and (a) includes the surrender of any tenancy and the grant of an option or right of pre-emption, but (b) excludes a disposal under the terms of a will or under the law relating to intestacy".

21. The precise nature of the notice to be served by the landlord under s.5 depends on the nature of the disposal (for example, whether it consists of a contract, to be completed by conveyance, or is a sale at auction). In this case, the relevant form of notice is that referred to in s.5D. The notice must contain particulars of the principal terms of the proposed disposal by the landlord, including the property to which it relates and the consideration required by the landlord for making the disposal. The notice must also state that it constitutes an offer by the landlord to dispose of the property on those terms, which may be accepted by the requisite majority of qualifying tenants of the constituent flats.

22. Sections 6 to 10 set out the procedure to be followed for disposals following service of a s.5 notice. They provide time limits for acceptance of the offer, and preclude the landlord from otherwise disposing of the relevant interest in the meantime. By s.8 and s.9B, upon acceptance of the offer, the landlord has the choice to abandon the proposed disposal altogether or to proceed to effect the disposal to the person nominated by the qualifying tenants.

23. By section 10A, failure by a landlord to comply with Part 1 of the 1987 Act is an offence.

24. By s.11 and s.12B, where a landlord has made a relevant disposal without serving notice under s.5, or has done so in contravention of ss.6 to 10, the requisite majority of qualifying tenants may compel a purchaser from the landlord to dispose of the

relevant estate or interest, on the terms it was made, to a person or persons nominated for that purpose.

25. The court may, on an application pursuant to s.19 of any person interested, make an order requiring any person who has defaulted in complying with any duty imposed by Part 1 of the 1987 Act to make good that default.

C. The Issues

26. It is common ground that the requirements of s.1(2) of the 1987 Act apply to York House: it consists of the whole of a building which contains more than two flats held by qualifying tenants, and the number of such flats exceeds 50% of the total number of flats contained in York House. It is also common ground that the premises do not fall within the exclusions in s.1(3) or s.1(4) of the 1987 Act.

27. The first issue is whether the disposals effected by the Leases fall within one or other of the exclusions in s.4(2)(e) or (h). The defendants contend that they do. This is addressed in section D below.

28. The second issue, which arises for determination only if the defendants are wrong on the first issue, is whether each of the Leases was a disposal which affects any premises to which the 1987 Act applies. The defendants contend that (save in respect of Lease 7, which they accept is subject to the Act, and save partially in respect of Lease 1 and Lease 2) none of the Leases affected premises to which the 1987 Act applies. This is addressed in section E below.

29. Where a disposal is, in part, of premises to which the 1987 Act applies and, in part, of other premises, then by s.12B(4) of the 1987 Act it is for the First-tier Tribunal (Property Chamber) (the "FTT") to determine the extent to which (and the terms on which) the claimant is entitled to acquire the demised premises.

D. Were the disposals effected by the Leases within one or other of the exclusions in s.4(2)(e) or (h)?

D1. Gift to a member of the landlord's family

30. By s.4(1)(b) and s.4(2)(e) a "disposal by way of gift to a member of the landlord's family or a charity" is not a relevant disposal.

31. The claimant contends that the disposals by the defendants fall outside s.4(2)(e) for two reasons: first, because the creation of the Leases involved consideration (in the form of covenants provided by the tenants in the Leases) which precluded the disposals being "by way of gift"; and second, because a disposal by the two defendants as joint owners of the freehold interest, to one or other of them, is not a gift to a member of the landlord's family.

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 & Customs Comrs* [2013] 1 WLR 3785, per Lewison LJ at [24]. 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."

33. At [26] Lewison LJ cited with approval the words of Lord Reid in *Luke v Inland Revenue Comrs* [1963] AC 557:

> "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 Estates*), 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 p.359):

> "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 LBC* [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.

37. Mr Jourdan QC submitted, and I accept, that *Greenweb* is an example of the (extreme) case referred to by Lord Reid in *Luke v Inland Revenue Comrs* where the words were "absolutely incapable" of a construction which would accord with the apparent intention of the provision.

The purpose of s.4(2)

38. The purpose of the 1987 Act as a whole was described by Browne-Wilkinson LJ, in *Denetower Ltd v Toop* [1991] 1 WLR 945, as being "to give leaseholders of residential flats in a block of flats improved rights to control the upkeep and maintenance of the block as a whole", by conferring on tenants a "right of first refusal when the landlord is proposing to dispose of his reversion."

39. In *Belvedere Court Management Ltd v Frogmore Developments Ltd* [1997] QB 858 Sir Thomas Bingham MR, at p.875, quoted from the report prepared in 1985 by a committee chaired by Mr E.G. Nugee QC entitled "Report of the Committee of Inquiry on the Management of Privately Owned Blocks of Flats" (the "Nugee Report").

40. At paragraph 6.18 of the Nugee Report, the committee reported:

> "Acquisition of the reversion: under the general law the landlord is free to dispose of his interest in the block without reference to the wishes of the tenants; and we had evidence of cases in which the ownership of the freehold passed through several hands in quick succession, leaving the tenants uncertain who their landlord was and unable to take any effective action. The majority of us do not consider that it would be right to give tenants a right to buy the interest of a landlord who wishes to continue to own and manage his own property, even if it could be shown that the management of the block might be improved if it were under the control of the tenants. However where the landlord wishes to dispose of his interest, we consider that the presumption against expropriatory legislation no longer applies with the same force, and that the tenants should have an opportunity to purchase the reversion themselves."

41. At p.876A, Sir Thomas Bingham MR, in reliance on this and two other passages from the report, concluded that:

> "It seems clear that the committee intended occupying tenants to have a right to acquire the reversion to their leases when their landlord proposed to part with it, and that the ultimate objective was to give the tenants in a block where the majority wanted it a power to manage the block themselves and so to have a greater say in their own affairs."

42. The function of s.4(2) is to identify the type of disposal that will not trigger a right of first refusal in favour of qualifying tenants. As is evident from the Nugee Report, the framers of the 1987 Act were concerned not to offend the presumption against expropriatory legislation, and concluded that this no longer applied with the same force where a landlord wished to dispose of his interest. The exemption of a wide variety of involuntary disposals is to be understood in light of this concern. Where the landlord has not chosen to dispose of its interest, but it is transferable by operation of law to another, then there remains a concern as to expropriation of the property, in the sense that the policy of the law underlying such involuntary transfers might be frustrated.

43. Of greater relevance to the present case, the concern expressed in the Nugee Report also explains the exemptions of what might be termed "intra-family" disposals, namely sub-paragraphs (e) and (h), in the case of individuals, or sub-paragraph (l), in the case of disposals within the same corporate group.

44. Where a landlord has chosen to dispose of its interest on commercial terms, he she or it is unlikely to have any interest in the identity of the acquiring entity. In that case, there is little force in the complaint that its property is being expropriated if, instead of the person to whom it chose to dispose of its interest, qualifying tenants are given that right, on the same terms, instead.

45. That is not so, however, in the case of the "intra-family" disposals contemplated by paragraphs (e), (h) and (l). A father or mother who chooses to dispose of the freehold by way of gift to a child or other close relative undoubtedly has an interest in the identity of the person to whom the disposal is made. The same is true of a landlord who disposes of the freehold to a charity. Similarly, a company making a disposal retains an interest in the identity of the acquiring entity, if it is an intra-group disposal. The position in relation to sub-paragraph (h) is self-evident, since it contemplates that at least one of the original landlords must remain as landlord.

"Disposal by way of gift"

46. The starting point in construing s.4(2)(e) is the language used. It is important to note that "disposal" is a defined term, by s.4(3). If the wording in the definition is incorporated into the provision it reads: "a disposal whether by the creation or transfer of an estate or interest … by way of gift…" This provides a strong indication that "gift" was intended to encompass both a transaction by way of creation of an estate and a transaction by way of transfer of an estate.

47. Having regard to the purpose of s.4(2), I can see no relevant distinction between a transfer of (say) a husband's interest in the freehold by way of transfer for no value to his wife, and the grant of a long lease by him to his wife for no value. In each case the husband has the same legitimate interest in the identity of the person acquiring the interest.

48. Mr Jefferies was unable to point to any policy reason for such a distinction. The most he could suggest was that Parliament did not contemplate the possibility that transactions such as those in this case would be undertaken and, in reliance on *Greenweb* (above), the wording is clear and must be applied according to its literal meaning. As I have indicated, however, the language of the sub-paragraph is not only consistent with the conclusion that "gift" includes the creation of a lease but, by incorporation of the defined term "disposal", it positively points in favour of that conclusion.

49. Accordingly, my starting point is that both the wording and the purpose of the provision indicate that it is broad enough to include the grant of a lease.

50. The claimant contends, however, that it is conceptually impossible for the creation of a new tenancy to constitute a "gift", because the grant of a lease necessarily entails the tenant incurring contractual obligations towards the landlord, sufficient to constitute consideration, which prevents the grant of the lease from constituting a gift. Even where a lease contains no express tenant's covenants, at least some will be implied.

51. The claimant says that this will be so, even if there is neither a premium nor rent payable by the tenant and the express or implied covenants have no value. In the alternative, it contends that the tenants' covenants in the Leases were valuable to the landlord. It is common ground that the Leases themselves had a measurable value.

52. I can deal shortly with the question of value since, although both sides called expert evidence as to the value of the tenants' covenants in the Leases, the experts were in agreement that:

    i) although the tenants' covenants were of benefit to the landlord in three ways (first, because if at some point in the future the tenant wished to act in contravention of the covenants then there was the possibility of the landlord being able to demand compensation for release or variation of the covenants; second, because the covenants assist the landlord with the general management of the building; and third, because they provide the landlord with protection against claims from other tenants);

    ii) they had no value in monetary terms, whether in the sense that anyone would have been willing to pay for the benefit of the covenants or in the sense that they increased the value of the freehold.

53. The difference between 'benefit' and 'value' to the landlord in this context can be illustrated by two examples. First, the tenant's covenant not to make structural alterations to or to damage any part of the building. This benefits the landlord in the sense that it protects the fabric of the building. Since, however, the landlord is entitled to call on all of the tenants in the building to pay, via the service charge, for any work needed to be done on the fabric of the building, there is no monetary value to the

landlord in the covenant. Second, while the covenant to pay a service charge can itself have a monetary value to the landlord (since it indemnifies the landlord against part of the cost of the upkeep and repair of the building) in the case of York House, 100% of the entire service charge was divided between the existing flats. Accordingly, the defendants were already fully indemnified against the cost of the upkeep and repair of the building, so service charge payable under the Leases did not confer any additional monetary benefit on them.

54. Accordingly, in considering the claimant's arguments it is important to bear in mind that the creation of the Leases involved the acquisition by the tenant (either Mr or Mrs Thompson, as the case may be) of something of value, without anything of value being received in return by the landlord (Mr and Mrs Thompson jointly).

55. The claimant contends that the ordinary meaning of "gift" is "a voluntary transfer of property made without consideration": *Berry v Warnett* (Inspector of Taxes) [1980] 3 All ER 798, at pp. 808 and 811. It relies on the traditional definition of consideration as "some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other" (*Currie v Misa* (1875) LR 10 Ex 153, 162), which includes mutual promises (Chitty on Contracts at 4-008), and on the fact that a covenant to pay a peppercorn rent is good consideration, relying on *Chappell & Co Ltd v Nestle & Co Ltd* [1960] AC 87, per Lord Somervell at p.114: "a peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn."

56. In light of the decision of the Court of Appeal in *Mansukhani v Sharkey* (1992) 24 HLR 600, however, the claimant accepts that its broad proposition that a gift is incompatible with *any* consideration is wrong. In that case, the question was whether the plaintiff had "purchased" a property within the meaning of Case 9 of Schedule 15 to the Rent Act 1977 ("where the dwelling-house is reasonably required by the landlord for occupation as a residence for … (a) himself, … and the landlord did not become the landlord by purchasing the dwelling-house or any interest therein after [a certain date]"). The plaintiff's parents had originally purchased the property with the assistance of a mortgage, and then transferred it to the plaintiff "in consideration of mutual love and affection and of the covenant hereinafter contained", the covenant being to the effect that the plaintiff would take on the responsibility for paying the mortgage.

57. The Court of Appeal held that the word "purchase" was to be given its ordinary meaning, not the technical meaning a conveyancer might give to it, and that understood in that sense the transfer was not by way of purchase but by way of gift, notwithstanding the covenant to assume the responsibility to pay the mortgage. At p.603, after noting that there was no evidence that the parties negotiated the transfer as a sale in consideration of the covenants, Fox LJ said:

> "The covenants are perfectly consistent with a gift of mortgaged property. The crucial matter is the nature of the property disposed of. Because it was mortgaged, some arrangement had to be come to as to who was to bear the burden of the obligation under the mortgage. The arrangement was that the plaintiff should. But that only means that the parents said, in effect: "We will give you the flat but you must

> take the burdens as well as the benefit." That, in my view, is in no way inconsistent with a gift of mortgaged property. It merely follows from the nature of the property given.
>
> I should add that the fact that the donee of land enters into some indemnity covenant with the donor in the deed of gift does not by itself indicate a sale. For example, if the property is subject to restrictive covenants, the donee would commonly give a covenant of indemnity against breaches. That again merely results from the nature of the property given."

58. Accordingly, the existence of the covenant did not prevent the transaction being by way of gift, notwithstanding that (1) the covenant was expressed to be part of the consideration for the transfer, (2) the covenant involved the discharge of an existing obligation of the parents (and was the economic equivalent of a payment from the son to his parents of a sum sufficient to repay the mortgage) and (3) the benefit to the parents was measurable in money terms.

59. The present case is, if anything, a stronger case (in favour of the conclusion that the transaction is a gift) than *Mansukhani*, since the tenants' covenants do not involve the discharge of an existing obligation of the landlords, and do not confer anything of value on the landlord.

60. The claimant contends, however, that there is a fundamental difference between a transfer of existing property, subject to burdens (e.g. a mortgage liability) attaching to it, and the entry into a contract such as a lease, which consists of mutual covenants. The latter, it says, can never constitute a gift.

61. I do not accept this contention. Although the grant of a lease involves entering into mutual covenants, it is also results in the carving out, and vesting in the tenant, of a new estate in the land. In my judgment, in agreement with the defendants, the better analysis is that the mutual covenants in a lease (certainly those apart from the covenant to pay rent) are part and parcel of the property (the estate in land) created by the lease. In other words, the creation of the lease involves the vesting of an estate in the land in the lessee which is subject to, and has the benefit of, the mutual covenants contained in the lease.

62. There is some, albeit limited, support for this conclusion in the decision of the Court of Appeal in *Hood v Revenue and Customs Commissioners* [2018] STC 2355. In that case, Lady Hood held a long lease at a ground rent for a term expiring in 2076. In 1997 she granted a sublease to her sons for a term commencing in 2012 and expiring in 2076. There was no premium, but Lady Hood and her sons mutually covenanted to perform the covenants in the 1979 lease. It was common ground that the grant of the sub-lease constituted a gift for the purposes of s.102(1) of the Finance Act 1986 ("…this section applies where … an individual disposes of any property by way of gift and either … (b) at any time in the relevant period the property is not enjoyed to the entire exclusion, or virtually the entire exclusion, of the donor and of any benefit to him by contract or otherwise").

63. The court's decision was that, although the grant of the sub-lease was a gift, the tenants' covenants were nevertheless a benefit to Lady Hood "by contract or

otherwise", so as to prevent the gift from falling within s.102(1)(b) of the Act. At [59] Henderson LJ accepted the submission that the first step was to identify the true subject matter of the gift. He said:

> "I would also agree with Mr Taube that the "property" which Lady Hood gave to her sons can only be identified as the sub-lease of the Property, which has to be regarded as a whole. I do not think that any sensible distinction can be drawn, at this preliminary stage, between the legal estate in land which she created by the sub-demise, on the one hand, and the mutual covenants into which the parties entered in the sub-lease, on the other hand. Both the estate in land and the covenants formed part of a single transaction, and it would be artificial to distinguish between them because neither would have come into existence without the other. *Put another way, the gift made by Lady Hood was a gift of an interest in land subject to, and with the benefit of, the obligations which the parties agreed to undertake in the sub-lease.*" (emphasis added).

64. At [62], Henderson LJ noted that the covenants contained in the lease had no existence prior to the creation of the lease, and that this left "…little, if any, room for an argument that the benefit was something retained by the donor, or otherwise separate from the gift which she made. Rather, the benefit was an inherent part of the gift itself."

65. While the case is only of limited assistance, since it was common ground that the creation of the sub-lease was a gift, Henderson LJ's description of the creation of the sub-lease as a gift of an interest in land subject to and with the benefit of the mutual covenants contained within it supports the defendants' analysis in this case.

66. There is further support for this conclusion (as the defendants submitted) in the fact that s.5E and s.8C of the 1987 Act require that, in cases where the consideration for a disposal is partly money and partly non-money consideration, the qualifying tenants be given an election to treat "so much of the consideration for the original disposal as did not consist of money … as such amount in money as was equivalent to its value in the hands of the landlord." If the claimant's construction were correct, this would require, in every case where a disposal was effected by a grant of a lease, that the qualifying tenants be given the option of taking the lease *without* the obligation of the covenants contained in it, and instead paying an amount equal to the value of the covenants in the hands of the landlord. The absurdity of that consequence is a powerful indication that covenants contained within a lease should not be regarded as consideration for the grant of the lease.

67. I conclude, therefore, that it is conceptually possible to describe the grant of a tenancy as the making of a gift. Since, as I have noted above, the words of the relevant provision within which "gift" has to be construed indicate that the term is to include a disposal both by way of grant, as well as transfer, of an interest in land, I consider that to be the correct interpretation.

68. The claimant also contends that the grant of the Leases cannot, in this case, constitute gifts, because it is the essence of a gift that the donor is motivated by bounty whereas

the defendants were motivated by the desire to *retain* the benefit of the property demised under the Leases, which the claimant characterised as 'selfish' reasons. Mr Thompson's evidence was indeed that he and his wife effected the disposals because "we wished to retain the development value in the building". I agree with the defendants, however, that while in some cases (for example where the question is whether a purported gift was in fact a loan or a sale) the intention of the parties is a relevant determinant, the motive for entering into the transaction is not itself relevant.

69. The case primarily relied on by the claimant, *Meisels v Lichtman* [2008] EWHC 661 (QB), concerned whether payments to a charity were gifts or loans, and the observations relied upon to the effect that, in order for there to be a gift, the donor must have the intention that he transaction had effect as a gift must be seen in that light. I do not find the case of assistance in the context of this case.

70. A person's motivation for making a gift may be for legitimate (or illegitimate) tax reasons, or may be for the purpose of putting assets beyond the reach of creditors, but in neither case does the motivation preclude the transaction being a gift. Similarly the fact that a transfer from husband to wife (or vice versa) is motivated by a desire to keep the gifted property within the family unit, so as to preserve its development potential for both husband and wife, is irrelevant in my judgment to the question whether the transfer is, for the purposes of s.4(2)(e) of the 1987 Act, a gift. While the disposals here were not plain vanilla gifts from one person to another, they fall squarely within the purpose of the exception in s.4(2)(e) given the landlord's undoubted interest in the identity of the acquiring party.

71. Each of the claimant and the defendants relied on cases concerned with the interpretation of "gift", "voluntary contribution" or "voluntary settlement" in the context of various taxing statutes. Given the very different statutory context with which those cases are concerned, I do not find them of assistance in construing "gift" in s.4(2)(e). Similarly, in light of the different context, I do not find two further cases relied on by the defendants, where a lease was described as a gift (*Harris v Tremenheere* (1808) 15 Ves. Jun 34, and *Re Brocklehurst's Estate* [1978] 1 Ch 14) of assistance.

72. For the above reasons, I conclude that the grant of each Lease constituted the vesting of a valuable legal estate in the relevant tenant otherwise than in exchange for anything of value and that this, on the proper construction of s.4(2)(e), is a gift.

Gift "to a member of the landlord's family"

73. The claimant contends that the disposals did not constitute a gift "to a member of the landlord's family", because: (1) the landlord consists of Mr and Mrs Thompson as joint tenants; (2) a transfer by them is only covered by the sub-paragraph if it is made to another person; and (3) a disposal to, say, Mrs Thompson, is not a disposal to a member of their family, because Mrs Thompson cannot be a member of her own family.

74. I reject this submission for reasons similar to the reasons underlying my conclusion that the disposals were by way of "gift".

75. First, it involves no damage to the language of the provision to describe Mrs Thompson as a member of Mr and Mrs Thompson's family. Even accepting the claimant's submission that in some contexts it might be odd to refer to a person as being a member of that person's own family, I consider such a reading is nevertheless perfectly permissible.

76. Second, I can discern no legislative purpose in excluding from the ambit of Part 1 of the 1987 Act a gift from husband to wife, but not a gift from husband and wife to the wife alone. In neither case is the purpose of s.4(2) engaged because, in both cases, the landlord has the same continuing interest in the identity of the disponee. Moreover, as Mr Jourdan submitted, the substance and reality (taking the example of a Lease from Mr and Mrs Thompson as landlord to Mrs Thompson alone) is that Mr Thompson has transferred his co-ownership interest in the whole of the property to Mrs Thompson.

77. The claimant contends that since sub-paragraph (h) specifically contemplates a transfer from two or more family members to fewer of their number, then sub-paragraph (e) should be read as excluding such possibility, and the defendants' argument should be rejected as an attempt to re-write sub-paragraph (h). The two-sub-paragraphs are, however, addressing different situations, one is concerned only with gifts, the other with commercial transactions between family members. Accordingly, I do not regard the fact that the possibility of a transfer from two family members jointly to fewer of their number has been specifically identified in sub-paragraph (h) as a reason for concluding that such a transaction could not constitute a gift by a landlord to a member of the landlord's family within sub-paragraph (e).

D2. Disposal by way of transfer by two or more persons who are members of the same family to fewer of their number.

78. The other exclusion relied on by the defendants is that contained in s.4(2)(h): "a disposal consisting of a transfer by two or more persons who are members of the same family … to fewer of their number."

79. In light of my conclusion in relation to sub-paragraph (e) it is not strictly necessary to address this issue, but I will state my conclusion and the reasons for it briefly.

80. The claimant contends that this provision is inapplicable because it is limited to disposals "consisting of a transfer" and therefore does not include a disposal consisting of the creation of an estate such as a lease. While this argument has more traction in light of the use of the words "by way of transfer", I do not think it is right.

81. As with sub-paragraph (e) it is impossible to discern any legislative purpose in excluding a grant of a lease from some to fewer family members. Moreover, again as with sub-paragraph (e), the legislation makes use of the defined term "disposal", which includes the creation as well as transfer of an estate. The question is whether by following the defined term immediately by the word "transfer" it was intended to cut down the scope of the *types* of disposal permitted by the defined term. Given the lack of any sensible purpose in so doing, I consider that the better reading of the provision is that "transfer" is used solely for the purposes of identifying *between whom* the disposal is to take place, and not in order to limit the *types* of disposal (creation/transfer) otherwise permitted by the defined term.

82. I also accept the defendants' contention that this conclusion is supported by the fact that the grant of a lease by A and B to B alone does involve a transfer of sorts, namely a transfer of the right to possession, formerly held by A and B jointly, to B alone.

D3. Post-script: the Human Rights Act and the criminal sanction contained in the 1987 Act

83. The defendants contended that, if I was unable to construe the 1987 Act in their favour, then I should nevertheless do so, by reference to the Human Rights Act, since the 1987 Act constituted a measure which controlled their use of their property and was thus within the ambit of Article 1 of the First Protocol to the European Convention on Human Rights. They also contended that I should take account of the fact that there is a criminal sanction for a landlord that fails, without reasonable excuse, to comply with the requirements of the 1987 Act. In view of the conclusions I have reached above, it is unnecessary for me to express any view on these points.

E. Are the disposals relevant disposals affecting premises to which Part 1 of the Act applies?

84. My conclusion that the disposals were exempt under s.4(1) and (2) is sufficient to dispose of this case. In case the matter goes further, however, and because I have heard full argument on the points, I turn to deal with the question whether the disposals were relevant disposals affecting premises to which Part 1 of the Act applies.

85. This raises a number of discrete issues concerning each of the Leases. Before considering the Leases in detail, there are two generic issues of law, the determination of which will resolve a number of matters that apply to various of the Leases. The first relates to the scope of the premises that constitute a relevant disposal within ss.1 and 4 of the 1987 Act, and the second relates to the meaning of "appurtenances". In addition, in relation to various of the Leases there is a dispute as to whether they encompass "common parts", and it will be helpful to identify the meaning of that term before delving into the detail of the individual Leases.

E1. The scope of premises within ss.1 and 4

86. The claimant contends that where the disposal is of any part of the building comprising York House then it is necessarily a "relevant disposal" within s.1(1) of the 1987 Act. The defendants, on the other hand, contend that s.1 and s.4(1) of the 1987 Act apply only to a part of the building which is common parts or is subject to rights held by two or more qualifying tenants.

87. This issue was considered, and determined, by Warren J in *Dartmouth Court Blackheath Ltd v Berisworth Ltd* [2008] L&TR 12. He there succinctly expressed the question by reference to the following simple example: a building contains three floors, with three flats on each floor; those on the ground and first floor are let to qualifying tenants, but those on the second floor are not; the landlord wishes to dispose of his reversionary interest in the second floor alone. The question is whether this is a disposal affecting premises to which the Act applied. The landlord argued that it was not, because the focus of s.1 and s.4 was on the premises *in which the*

interest of the landlord is disposing subsists and a disposal of a part of the building which was not let to qualifying tenants did not "affect" the part that was let to qualifying tenants. The tenant argued that it was a disposal affecting premises to which the Act applied, because the Act required, as a first step, that the relevant premises be identified on an objective basis without regard to the subject matter of the disposal.

88. Warren J agreed with the tenant. The parties are agreed that this is a decision I should follow unless convinced it is wrong (*Gilchrist v HMRC* [2015] Ch 183, at [87ff]). The defendants contend, however, that it is clearly wrong and that I should so find.

89. Looking first at the provisions of the 1987 Act, by s.1(1) a landlord shall not, without first serving a notice under s.5, make a relevant disposal "affecting any premises" to which the Act applies.

90. S.4(1) defines "a relevant disposal affecting any premises" as "the disposal by the landlord of any estate or interest … in any such premises". It expressly includes a disposal of any common parts of the building, but excludes the grant of a tenancy under which the demised premises consist of a single flat (whether with or without appurtenances).

91. S.1(2) determines whether Part 1 of the 1987 Act applies by imposing three conditions in respect of the "premises": that they consist of the whole or part of a building; that they contain two or more flats held by qualifying tenants; and that the number of flats held by qualifying tenants exceeds 50 per cent of the total number of flats contained in the premises.

92. In my judgment, this statutory language clearly supports Warren J's conclusion: s.1(2) equates the "premises" with something that consists of more than (but which must include the requisite percentage of) flats let to qualifying tenants; provided that the conditions laid down by s.1(2) are satisfied, they are premises to which the Act applies; and by s.4(1) a disposal of "any estate or interest" in those premises is a relevant disposal affecting the premises.

93. The defendants advance, however, a different argument to that made to Warren J. They contend that the reference in s.4(1) to the disposal by the "landlord" of any estate or interest in such premises is solely to the landlord in his capacity as holder of the reversionary interest in that part of the premises let to qualifying tenants or of the common parts.

94. They rely on s.2(1) which defines "landlord" as "the immediate landlord of the qualifying tenants of the flats contained in those premises." That provision, however, is concerned with the degree of separation between the qualifying tenants and the holder of the relevant interest being disposed of. It excludes anyone more remote than the holder of the immediate reversionary interest. As Mr Jourdan accepted, his interpretation of s.4(1) would fail to make sense of the word "including", in the phrase "including the disposal of any such estate or interest in any common parts". Such a disposal would necessarily be additional to, and not included within, a disposal by a landlord solely in his capacity of holder of the reversionary interest in a flat let to a qualifying tenant. His interpretation would require it to be replaced with the word "and".

95. Moreover, it would render the exclusion of the grant of a tenancy under which the demised premises consist of a single flat in s.4(1) otiose. If the premises are confined to the reversionary interest in that part of the building let to qualifying tenants (and common parts) then (as held by Warren J in *Berisworth*), since by reason of s.1(2)(b) Part 1 of the Act could never apply to a single flat, there would be no purpose in s.4(1)(a).

96. Mr Jourdan suggested the answer to this was that even though the landlord was disposing of a single flat (Flat A), Flat A might be subject to rights of other tenants (for example to access pipes or services passing through Flat A). Such a disposal would, but for s.4(1)(a), be within Part 1, because it was the disposal of parts of the building over which multiple tenants had rights (although not a common part). I do not accept this submission, which I consider requires a highly unlikely intention to be imputed to the drafter of the Act. Nor do I accept the submission that "flat" in s.1(2) should be read as including any easements granted by the lease of a flat held by a qualifying tenant. The only purpose of that sub-section is to provide for a calculation of the number of flats held by qualifying tenants as a proportion of the whole. There is no reason to give "flat" anything other than its ordinary meaning in that context.

97. The defendants further contend that the Court of Appeal in *Belvedere Court Management Ltd v Frogmore Developments Ltd* [1997] QB 858 held (as part of the ratio of that case) that the Act applies only to a disposal by the landlord of the reversionary interest in flats held by qualifying tenants (or common parts). They rely on the following passages from the judgment of Sir Thomas Bingham MR. First, at p.876A: "It seems clear that the committee intended occupying tenants to have a right to acquire the reversion to their leases when their landlord proposed to part with it…". Second, at p.877F: "…I regard it as critical (1) that Part 1 of the Act is triggered when the immediate landlord of qualifying tenants proposes to (or does) part with the reversion of the tenants' leases…". It is important to note, however, that in *Belvedere* the relevant disposal was of the landlord's interest over, physically, the whole of the premises. It was not a case such as the present, where a disposal was made of various discrete parts of the building. Since the point was not in issue, I do not regard the fact that the Court of Appeal described the operation of the Act in terms of the right of tenants to acquire the reversion to "their leases" as intended to limit the operation of the Act to disposals of that part of the physical building encompassed within the reversion of the qualifying tenant's lease.

98. Of greater relevance, in my judgment, are the expressions of the purpose of the 1987 Act in *Belvedere* (at p.876A) and in *Denetower* (at p.948A), namely to give leaseholders of residential flats in a block of flats improved rights to control the upkeep and maintenance of the block as a whole. That purpose would typically be frustrated if a relevant disposal is confined to a disposal of the reversion only of the part of the building comprised within the reversion of the qualifying tenants' leases together with the common parts.

99. The defendants contend that the conclusion reached by Warren J is wrong for the further reason that it leads to an absurd result in the case of mixed residential and commercial premises and the landlord disposes of its reversionary interest in part of the commercial premises, for example a shop. That argument was made to, and rejected by Warren J. In *Tenants' Right of First Refusal*, 3rd ed., at paragraphs 3.12 to 3.13, arguments for and against the conclusion that the disposal of the commercial

element only of a building was intended to be caught by the Act are set out. The point does not arise directly for decision in this case. If it did, such arguments would need to be fully explored. Even assuming in the defendants' favour – putting their submission at its highest – that there is no discernible legislative purpose in qualifying tenants being able to demand the transfer to them of the landlord's reversionary interest of that part of the building used as shop premises, I nevertheless do not consider that would provide a reason for rejecting Warren J's conclusion (in a case where the commercial premises point does not arise for decision) that having regard to the legislative purpose that he *did* find, a disposal of the landlord's reversionary interest in any part of the building was one to which the Act applied.

100. Finally, the defendants contend that, since a criminal sanction is imposed for non-compliance by a landlord with the provisions of s.5 of the Act, the provisions of the Act should be strictly construed, citing *R v M Najib & Sons Ltd* [2018] 1 WLR 5041. Both parties have cited previous judicial comments to the effect that the 1987 Act was poorly drafted: see, for example, *Denetower* (above) per Browne-Wilkinson LJ at p.952G. The task of the court is to construe the provisions of the 1987 Act in light of their purpose. Where, as I have found, that purposive approach leads to the clear conclusion as to the definition of the premises to which the Act applies, then I do not think that the conclusion is to be shaken by reason of the fact that, in another case and a different context, there might be a criminal sanction imposed on a landlord for failing to comply with the requirements of the 1987 Act without reasonable excuse.

101. Accordingly, notwithstanding that the argument advanced by the defendants in this case is different to that made to Warren J, in my judgment the decision in *Berisworth* is one that I should follow. Far from concluding that it was clearly wrong, I consider it was rightly decided.

E2. The meaning of "appurtenance"

102. In *Denetower* the Court of Appeal concluded that "building" in s.1(2) includes appurtenances to it. Having regard to the purpose of the 1987 Act (as referred to above), Browne-Wilkinson LJ said, at p.952D:

> "it would be to attribute to Parliament an entirely capricious intention if we were to hold that the tenants' right to purchase did not extend to the gardens and other appurtenances of the flats which are expressly or impliedly included in the demises of the flats to the tenants. In my judgment we are not forced to adopt such an unreasonable construction since it is a perfectly legitimate meaning of the word "building" that it includes the appurtenances of the building."

103. There is, however, a dispute between the parties as to the meaning of appurtenances. The claimant contends that it includes any premises which are enjoyed with or required for the building, irrespective of whether the qualifying tenants have rights over them. The defendants contend, in contrast, that premises outside the building itself can only be an appurtenance if either (i) they are demised by a lease held by a qualifying tenant; or (ii) they are subject to rights granted in a lease of more than one qualifying tenant.

104. In the present case, the dispute between the parties relates to such parts of the premises as the courtyard to the back and sides of the building, the subsoil and the airspace above various parts of the building and the courtyard.

105. Mr Jourdan QC felt constrained to accept, rightly in my view, that if the landlord is obliged by covenants in the qualifying tenants' leases to perform a service (such as repairing the building), for which the tenants are obliged to pay through the service charge, and in order to perform that service the landlord must use a certain part of the land, then that part of the land qualifies as an appurtenance.

106. The landlord's covenants, in the leases to the qualifying tenants, include a covenant to clean, decorate, maintain repair and renew the Reserved Property (except for the lifts and their moving or mechanical parts, and the hot water and central heating systems).

107. The Reserved Property includes the grounds and forecourts forming part of the Property, the halls, staircases, lift wells of the building and the main structural parts of the building including the roofs, foundations, the main and supporting walls, the external parts of the walls (excluding glass in the windows of flats) and all cisterns, tanks, sewers, drains, pipes, wires, ducts and conduits not used solely for the purposes of one flat. The "Property" is defined as "all that freehold land with the building or buildings erected thereon known as York House".

108. In light of these obligations on the landlord in the leases to qualifying tenants, in my judgment the logic of Mr Jourdan's acceptance noted above at [105] is that every part of the surrounding courtyards and outbuildings is, to the extent that it is not actually a part of the building, an appurtenance within the extended meaning of the building according to *Denetower*.

109. Aside from that observation, I in any event prefer the claimant's interpretation of the meaning of an appurtenance for the purposes of the 1987 Act. First, as a matter of principle, I consider that the purpose of the Act (being to enable leaseholders better to manage the whole block of which their flat forms a part) is better promoted by an interpretation which includes those parts of the premises which are enjoyed with, or are needed for, the upkeep of the building. Second, that interpretation is consistent with the weight of authority.

110. In *Denetower* itself, while Browne-Wilkinson LJ did not formulate a definition of appurtenance, his conclusion that a piece of unused land was *not* an appurtenance because the tenants enjoyed no rights over it, nor was it "used in conjunction with the flats" suggests a meaning that is broader than simply land over which tenants are granted rights.

111. In *Berisworth*, at [53], Warren J noted that what is, and is not, appurtenant is very much a matter of fact and degree. Moreover, the approach he adopted, he said (at [54]), reflected the meaning given to appurtenance in s.4(4) of the 1987 Act, namely "any yard, garden, outhouse or appurtenance … which belongs to, or is usually enjoyed with, the flat." He held that a piece of land over which each tenant had a right to pass and repass was appurtenant to the building, "since the tenants have significant rights over it, rights which they enjoy by virtue of their tenancies." He also held that the airspace above the roof, at least up to the height of the chimneys, was appurtenant to the building, notwithstanding that the tenants had no right of

access to the roof. He reached this conclusion on the basis that the landlord required access to the roof in order to comply with his obligations to keep the structure of the main building (including the roofs and chimney stacks) in repair: "…the airspace, at least the height of the chimneys … is an essential part of the space over which any owner of the main building with repairing obligations would need to have adequate rights of access."

112. I note that in determining that separate garages were not appurtenant to the building, Warren J noted that the tenants did not, in their capacities as tenants, contribute through the service charge to the maintenance of the garage block.

113. On the basis of these cases, I conclude – broadly in agreement with the claimant – that appurtenances include areas over which the tenants have rights under their leases and areas which are usually enjoyed with the building, including those to which access is required by the landlord for the purposes of complying with its obligations (owed to the tenants) to repair and maintain the building.

E3. The meaning of "common parts"

114. A disposal of common parts is specifically identified as a relevant disposal: s.4(1) of the 1987 Act.

115. Common parts are defined by s.60(1) of the 1987 Act as including "the structure and exterior of that building or part and any common facilities within it."

116. In *Panagopoulos v Earl Cadogan* [2011] Ch 177, Roth J (at [43]-[45]) held that the same statutory definition found in s.101(1) of the 1993 Act was intended to include "those parts of the building that either may be used by or serve the benefit of the residents in common (using that expression in a non-technical sense), as opposed to those parts of the building that are for the exclusive use of only one or a limited number of the residents or for none at all." He found, accordingly, that it covered a boiler room or a room housing lift machinery, even though such rooms were locked and no resident ever went into them. There was no requirement that the part must actually be used by all the residents (nothing that a lift is a common part despite it not being used by those on the ground floor). Nor was there any requirement that the relevant part must be devoted to a common purpose as a matter of obligation in the residents' leases; it was sufficient that it was in fact used for that purpose at the relevant date (which in that case was the issue of the tenants' notice under s.13 of the 1993 Act).

117. Applying the test there set out, Roth J (at [53]) held that a caretaker's flat was a common part. The services provided by the caretaker were a common facility and the caretaker's flat was essential to the provision of the residential caretaking facilities. This was so irrespective of whether the obligation in the residents' leases to provide a caretaker required that caretaker to be resident.

118. The Court of Appeal upheld the decision of Roth J. At [20], Carnwath LJ said, of the caretaker's flat, that while it was true that the common benefit consists principally in the services of the caretaker as a person, rather than the use of the flat itself, nevertheless "a resident caretaker requires a flat designated for the purpose. Taken together they can reasonably be regarded as representing a 'facility' within the

definition." At [24], Carnwath LJ said: "it is sufficient in my view that the lessees share the benefit of the caretaker's flat, by enjoying the services for the purposes of which it was provided." Given that the same definition of "common parts" appears in both the 1987 Act and the 1993 Act, I consider it should carry the same meaning for the purposes of each Act. I reject the submission that because the 1987 Act imposes a criminal penalty in some circumstances, the term should carry a different meaning under that Act.

E4. The 14 Leases

119. I turn to the application of the above principles to each of the 14 Leases.

Lease 1

120. Lease 1 demises two rooms in the basement of York House on either side of the stairwell and lift, namely a WC and a room housing electricity meters and switchgear.

121. It is common ground that the Lease, insofar as it demised the meter room, affects premises to which the 1987 Act applies (because it is accepted that the meter room is a common part). The defendants accept therefore that (if my conclusion in relation to s.4(2) is wrong) they should have served a notice under s.5 of the 1987 Act in relation to this Lease.

122. The remaining dispute is whether the Lease *only* affected premises to which the Act applies or whether, as the defendants contend, the WC is not premises to which the 1987 Act applies. If they are right, then it would be for the FTT to determine the extent to which the claimant is entitled to acquire the demised premises and the applicable terms under s.12B(4) of the 1987 Act.

123. The WC is clearly part of the building. Accordingly, in light of my conclusion that the decision in *Berisworth* was correct, the disposal of it is one to which the 1987 Act applies for this reason alone.

124. If my decision to follow *Berisworth* in this respect is wrong, then the claimant contends that the WC constitutes a common part, because (1) pipes carrying mains services (which are acknowledged to be common parts) pass through it; (2) it was formerly used by those visiting those parts of the basement which constitute common parts; and (3) it is part of the basement and the basement as a whole should be considered a common part.

125. I reject these contentions. First, while a part of the building which houses common facilities such as a boiler or electricity meters is itself a common part, since access to it is necessary in order to service the common facilities, I do not think that a part of the building through which mains pipes run is for that reason alone a common part. That is demonstrated by the fact that such pipes also run through the private flats. It makes no difference, in my view, that the pipes are enclosed, when they run through private flats, but are exposed when running through the WC.

126. Second, the uncontroverted evidence of the defendants is that the WC is now not used by anyone. I accept that when it was used by those visiting the basement (for example those coming to service the common facilities there) it would have been a

common part. It is not necessary, for something to constitute a common part, that it is devoted to that purpose as a matter of obligation in the tenants' leases (see *Panagopoulos v Earl Cadogan* (above) at [45]). In my judgment, however, if usage is the only basis upon which the part is said to be common, and the part has ceased to be used for that purpose at the date of the disposal, then as at that date it is not a common part for the purposes of the 1987 Act.

127. The third way the claimant justifies the WC being a common part is based on *L.M. Homes Ltd v Queen Court Freehold Company Limited* [2018] UKUT 367, a decision of Martin Rodger QC, deputy President of the Upper Tribunal, Lands Chamber. At [48] the deputy President found that the whole of the basement in that case was one of the common parts of the building, because: "the installations are not confined to one part of the basement, but are arranged around the perimeter of the rooms, with various substantial pipes and conduits rising up the walls and across the ceiling." He derived some assistance from *Westbrook Dolphin Square Limited v Friends Life Limited* [2014] L&TR 28, at [284], in which Mann J held that a corridor running between a boiler room and lift motor room (themselves common parts) was a common part. I do not find those cases of assistance in the present case, where the facts are materially different. The basement of York House is divided into separate sections, including at least one separate dwelling (the caretaker's flat). The WC is a separate room, in which there are no installations, and which is clearly distinguishable from a corridor providing access to other common parts.

128. Accordingly, I conclude that the WC is not a common part.

Lease 2

129. Lease 2 demises the roof space on the ninth floor of the building, everything constructed above the floor level (but excluding "Roof Installations", being such things as the roof lights, motor and tank rooms, water tanks and pipes), 30 meters of the airspace above the roof, the interior surfaces of the mansard parapet walls, and the interior faces of the walls of the stairwell between the eighth floor and the roof.

130. The defendants accept that parts of Lease 2 are subject to the 1987 Act. The claimant accepts that the disposal of the airspace between the height of the chimneys and 30 meters, is not subject to the 1987 Act. It is common ground, therefore, that it is for the FTT to determine to what extent the claimant is entitled to acquire the premises demised by Lease 2.

131. The parties nevertheless ask me to determine whether the disposal of the airspace above the roof, to the height of the chimneys, is one to which the Act applies. As noted above, in *Berisworth*, Warren J held that such airspace was appurtenant to the building, or failing that it comprised part of the exterior of the building and was thus a common part.

132. The defendants contend that Warren J was clearly wrong, and that I should decline to follow his decision in this respect. On the contrary, however, I consider that Warren J's decision that the airspace was appurtenant to the building was correct. It is accepted that the landlord has an obligation to the tenants to repair and maintain the roof, and the various structures on it. The landlord demonstrably requires access to the airspace immediately above the roof to comply with that obligation. It is

consistent with the purpose of the Act, being to enable qualifying tenants better to manage the building as a whole, that a disposal of the airspace to the height of the chimneys is thus something to which the 1987 Act applies. (In light of this I do not need to consider Warren J's alternative conclusion that the airspace was part of the exterior of the building.)

133. The defendants point out that access to the airspace to the side of York House would equally be required in order to carry out maintenance and repairs to the walls, but that such airspace belongs to the neighbouring property. I do not see this is as militating against my conclusion in respect of the airspace above the roof. If the airspace to the side is not owned by the freeholder, and the freeholder has no right of access over the neighbour's land, then (in contrast to the airspace above the roof) there is simply nothing which could form the subject matter of any disposal by the landlord.

Lease 3

134. Lease 3 demises three areas: (1) a single storey corridor, adjacent to York House, together with its subsoil to a depth of six metres and the airspace above to a height of six metres; (2) all the subsoil beneath the ground floor flat adjacent to the corridor; and (3) a courtyard behind York House, at ground floor level, together with its subsoil and the airspace above to a height of six meters.

The corridor

135. The corridor originally gave access to property behind York House. By 1995, however, the rear end of the corridor had been bricked up. The corridor is accessible only from the street at the front of York House. The doorway to it is kept locked. While tenants formerly had access for storage purposes, that was not the case at the relevant date.

136. The defendants accept that the corridor is a part of the building. Accordingly, applying *Berisworth*, its disposal is one to which the 1987 Act applies.

137. If that is wrong, however, I conclude that the disposal of the corridor would not be one to which the Act applies. I reject the claimant's contention that since the corridor was formerly used for storage by tenants it should be considered to be common parts, for reasons similar to those set out under Lease 1 above. Its designation as a common part was due solely to its use as such, and once that use ceased, it was no longer a common part.

The subsoil

138. In my judgment, on the basis of the definition of appurtenance which I have adopted above at [113] above, the subsoil is properly to be regarded as appurtenant to the building. The landlord is under an obligation to the tenants to maintain the foundations of the building. It necessarily requires access to the subsoil in order to access the foundations for the purposes of complying with that obligation. That includes the subsoil under the corridor, given that the foundations extend beyond the floorspace of the main building.

139. For reasons similar to those of Warren J in concluding that the airspace immediately above the roof is appurtenant to the building, therefore, I consider that the subsoil is similarly appurtenant to the building.

140. I note that in *L.M. Homes* (above), at [56] to [70], it was held that subsoil is a part of the "exterior" of the building and was to be considered a common part, because it "has the essential attribute of 'common parts' namely the provision of some shared use or benefit" (relying in part on Warren J's judgment in *Berisworth*, at [71], where he concluded, in the alternative, that airspace was part of the exterior of the building and thus a common part). Given my conclusion as the subsoil constituting an appurtenance (which was not a question raised in the *L.M. Homes* case) I need not decide whether it is also part of the exterior of the building.

The courtyard

141. The claimant contends that the courtyard lying to the rear of York House is either part of the exterior of the building, and hence part of its common parts, or is an appurtenance to the building.

142. I reject the contention that the courtyard is part of the exterior of the building (for similar reasons to those in *Edwards v Kumarasamy* [2016] AC 1334). In my judgment, however, the courtyard is appurtenant to the building, for the following reasons. First, it is (itself) part of the Reserved Property which the landlord is obliged to maintain and repair, and for which it is reimbursed through the service charge. Second, access is required by the tenants, in order to comply with their covenants to repair the windows, their casements and frames, and by the landlords, in order to comply with their obligations to maintain and repair the outside walls of the building, including the drainpipes and other pipes on the exterior of the wall. The defendants contend that access is needed only to the area extending a few feet from the building, on which scaffolding would actually be erected. I do not accept this. The installation and removal of scaffolding, and other equipment, necessarily requires more than the very limited space within which it ends up being erected. The claimant relies on photographs taken on an occasion when scaffolding was put up behind the building, which appear to show areas of the courtyard behind the building to the other side being used to lay out parts of the scaffolding (but not that area comprised within Lease 3). The fact, however, that on the occasion when the photographs were taken it was only one side of the building that was being used for that purpose does not mean that the other side of the building cannot be used. The entire courtyard is a relatively small area and I do not see a reason for excluding any part or parts of it from that over which builders are permitted to carry or erect scaffolding.

143. In light of this conclusion I do not find it necessary to decide whether the tenants enjoyed a right to (or the amenity of) light in respect of part of the airspace demised by Lease 3, such that it was an appurtenance for this additional reason.

Lease 4

144. Lease 4 demises a further part of the courtyard area behind York House, together with, at basement level, two oil tank storerooms which store fuel for a communal hot water and heating system, and a WC, together with the subsoil to a depth of six metres and the airspace above, to a height of six metres.

145. The claimant contends that, since the premises demised by Lease 4 are attached to the main building, they form part of the building. I agree: the WC is attached to the exterior wall of the basement, and the storerooms are a continuation of the same structure. Accordingly, applying *Berisworth*, they are premises to which the 1987 Act applies for this reason alone.

146. If that is wrong, then I consider that each of the parts of the premises demised by Lease 4 is in any event either a common part (to the extent that it forms part of the building) or otherwise appurtenant to the building for the following reasons.

147. Each part is within the definition of Reserved Property and, for the reasons set out above, is for that reason an appurtenance. The oil tank storage rooms are clearly common parts (to the extent that they form part of the building), as they house a common facility. If not part of the building then they are appurtenant to it, as they house an amenity (the oil tanks) used by all the tenants. The tenants are not granted access to the WC. Although it was Mr Thompson's evidence that none of the lessees, nor *their* workmen, used the WC, it was not suggested that the WC is never used, for example by the landlords' workmen attending to maintain the exterior of the building or service the oil tanks. In the absence of evidence that no-one was permitted to use it, I conclude that it was a common facility available for use by persons attending the premises, so was a common part (if part of the building at all) or an appurtenance (if separate from the building). The courtyard is appurtenant to the building for the same reasons I have set out in relation to Lease 3.

148. According to the plan attached to Lease 4, the demised area includes part of the staircase between the basement area and the ground floor. This forms part of the escape route for those leaving the building by the fire escape. The defendants contend that the staircase is not within the demise, but is subject to a right of way as part of the "Accessway" as defined in the Lease. In my judgment, the fact that the staircase is included (without distinction) as being part of the Accessway is not sufficient to exclude it from the demised premises, given the clear definition of the demised property by reference to the area shown edged red on the plan. Accordingly, the stairway is also for this additional reason an appurtenance to the building.

Lease 5

149. Lease 5 demises a ground floor rear patio area, forming that part of the courtyard surrounding the rear of York House which is adjacent to Flat 5, together with the subsoil to a depth of six metres and the airspace above to a height of 40 metres.

150. The lease of Flat 5 grants the tenant the right to use this patio, subject to the rights of the "Lessor and the Owners of other Flats of the Property at all times to pass and repass unimpeded" through it. There is no evidence that other tenants have been granted any right to pass through the patio, but it is essential that the landlords have access to enable them to get to the courtyard forming part of Lease 3, and to comply with their repairing covenants in respect of the external wall of the building above Flat 5. For this reason, and because the landlord is responsible for the maintenance of this courtyard area (and is reimbursed for doing so via the service charge levied against all tenants), I conclude that it is an appurtenance to the building. For similar reasons, that part of the airspace above the courtyard up to the full height of the building which would be necessary for the purposes of erecting scaffolding so as to

enable the landlord to comply with its obligations to maintain and repair the rear wall is also an appurtenance.

Lease 6

151. This Lease demises the airspace above the sixth floor adjacent to Flat 32.

152. That airspace is required in order to carry out maintenance and repair to the roof, as well as to the exterior wall of York House above it. For the same reasons as set out under Lease 2 and Lease 5 above, I conclude that (1) that part of the airspace above the whole of the roof to a height necessary to maintain the roof and (2) such part above that height within which scaffolding may be erected to repair the external wall is an appurtenance.

Lease 7

153. Lease 7 demises a chimney flue running through several floors of the building. The parties agree that it constitutes a lease of common parts and as such is a relevant disposal under the 1987 Act.

Lease 8

154. This Lease demises to Mrs Thompson Flat 38 and a basement storeroom. On the same date as the grant of Lease 8 (2 June 2017) Mrs Thompson granted an underlease of the premises demised by it to both defendants for a term of 999 years.

155. The first question is whether the basement storeroom is appurtenant to Flat 38, so that Lease 8 constitutes an exempt disposal within s.4(1)(a) of the 1987 Act (the grant of a tenancy consisting of a single flat, whether with or without appurtenances).

156. The parties are agreed that the basement storeroom is an appurtenance of Flat 38 if it is "usually enjoyed with the flat": see s.4(4) of the 1987 Act.

157. It is common ground that, although for many years the storeroom was used by a variety of tenants for storage, it has since 2013 (when the defendants purchased Flat 38) been used solely by the defendants. The difference between the parties boils down to this: are the defendants enjoying the use of the storeroom because they are tenants of Flat 38, or because they are the freeholders? Mr Thompson accepted that they (along with others) were using the basement when they were tenants of Flat 23 and that the reason they had access to it was because they were the freeholders, but that since 2014, they have been making use of it because they brought back furniture and other items from a Spanish property which they have sold, and which they have no room to store in Flat 38.

158. Mr Jourdan submits (correctly, in my judgment) that s.4(4) focuses not on title, but on enjoyment: in other words, it is irrelevant that the defendants have title to the storeroom as freeholders if they are enjoying the use of the storeroom as tenants of Flat 38. I find that although the reason why the defendants were able to store their belongings in the basement was because they owned the freehold, their enjoyment of it was linked to the fact that they were the occupants of Flat 38. Accordingly, the basement store is appurtenant to Flat 38.

159. The second question is whether the storeroom was a common part (which would preclude it from qualifying as an appurtenance within s.4(4) of the 1987 Act).

160. The claimant contends that it is a common part because the whole of the basement is a common part, and because there are exposed pipes carrying common services through it. These arguments mirror those advanced in relation to the basement WC in Lease 1. The storeroom is a separate room at one end of the basement. There is no need to enter it in order to access any of the common facilities contained in the basement. Unlike in *L.M. Homes* it does not lead from or to any other part of the basement containing common facilities. The mere fact that pipes, carrying common facilities, pass through it is not enough to constitute it a common part (see [125] above). The fact that it was once *used* as a common part is insufficient to render it a common part at the relevant time (see [126] above). Accordingly, for reasons similar to those relating to the WC in Lease 1, I conclude that the basement storeroom is not a common part.

161. For the above reasons, I conclude that Lease 8 was an exempt disposal. Accordingly, the claimant's further argument (if I had found that Lease 8 was a relevant disposal), that the Court should exercise its discretion pursuant to s.12B(5) of the 1987 Act by ordering that the disposal should be free from the sub-underlease granted by Mrs Thompson to both defendants insofar as it affected the storeroom in the basement, does not arise.

Leases 9-14

162. Each of these Leases, in identical form, demises a part of internal corridor space which leads only to the front door of one flat.

163. The claimant contends that in each case, the demise is of common parts.

164. The defendants contend that the current leases grant the qualifying tenants rights in respect of the "common passages, landings and staircases" only to the extent required for access. Since the part of the corridor demised by each of Leases 9-14 provides access to only one flat, only the tenant occupying that flat would have the right to use this part of the corridor. Accordingly, it cannot be a common part.

165. I reject this contention, and conclude that the corridors demised by Leases 9 to 14 are common parts for four reasons. First, as was apparent from my inspection of those floors in York House where the relevant bit of corridor has already been disposed of, while the expansion of a flat to fill the relevant space leaves it perfectly possible to enter and exit the flat immediately adjacent to it, it undoubtedly reduces the corridor space outside the front door of each such flat. Depending on what each tenant chooses to place on either side (inside) of their front door, the loss of "turning space" to one side outside the front door might make it more difficult to manoeuvre large or long items into or out of the flat.

166. Second, the relevant parts of the corridor satisfy the definition of common parts adopted by Roth J in *Panagopoulos* ("those parts of the building that either may be used by or serve the benefit of the residents in common"). It is clear that each such part "may be used by" any resident of York House or their visitors. There is nothing to indicate otherwise.

167. Third, the carpets, lighting, walls and decoration of the internal corridors continue, without break or distinction, into each relevant part demised by Leases 9 to 13. The landlord's repairing and maintenance obligations extend to all such parts, and the cost is charged to all tenants. Passage along all parts of the corridors is required by the landlords' agents for the purposes of cleaning, repairing and maintaining them.

168. Fourth, the logic of the defendants' argument is that where parts of the internal corridors provide access for only two tenants, or only a limited group of tenants, then they are not common parts. This would, for example, mean that the corridors on each floor, which provide access only to the flats on that floor, would not be a common part. That cannot be right, and reinforces the conclusion that when it comes to the internal corridors of the building, there is no distinction to be drawn based on the particular flat, or flats, to which the corridor leads. I note that in *Panagopoulos* (above), Roth J noted (at [43]) that the fact that residents on the ground floor never used the lift did not prevent it from being a common part.

169. In agreement with the claimant, therefore I find that the parts of the corridors demised by Leases 9 to 14 are common parts of the building.

Conclusion

170. For the reasons set out in part D of this judgment, I conclude that none of the Leases was a relevant disposal. Each of them falls within s.4(2)(e), alternatively s.4(2)(h), of the 1987 Act. Accordingly, I dismiss the claimant's claim.