

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*LEASEHOLD ENFRANCHISEMENT – COLLECTIVE ENFRANCHISEMENT
– leases conferring revocable right to use garden - respondent offering revocable
rights in lieu of acquisition of freehold of garden – competing requirements of
permanence and equivalence – s.1(4)(a) Leasehold Reform, Housing and Urban
Development Act 1993*

IN THE MATTER OF AN APPLICATION UNDER SECTION 24(1),
LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT
1993

BETWEEN:

4-6 TRINITY CHURCH SQUARE FREEHOLD LIMITED

Applicant

and

THE CORPORATION OF THE TRINITY HOUSE OF DEPTFORD STROND

Respondent

Re: 4-6 Trinity Church Square,
London SE1

Martin Rodger QC, Deputy Chamber President
Andrew Trott FRICS, Member

Royal Courts of Justice

on

24 October 2016

Piers Harrison, instructed by Ashley Wilson Solicitors LLP, for the applicant
Anthony Radevsky, instructed by Forsters LLP, for the respondent

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The following cases are referred to in this decision:

Fluss v Queensbridge Terrace Residents Limited [2011] UKUT 285 (LC)

Snowball Assets v Huntsmore House (Freehold) Ltd [2015] UKUT 0338 (LC)

Shortdean Place (Eastbourne) Residents' Association Ltd v Lynari Properties Ltd [2003]
3 EGLR 147

Gilchrist v RCC [2015] 1 Ch 183

Dorset Healthcare NHS Trust v MH [2009] UKUT 4 (AAC)

International Tea Stores Co v Hobbs [1903]

re Ellenborough Park [1956] 1 Ch 131

Introduction

1. Trinity Church Square is an attractive Georgian garden square a little to the south of the river Thames in the Newington district of the London Borough of Southwark. At the centre of the square stands Trinity Church, taking its name from the Corporation of Trinity House which acquired the freehold of the Newington estate in 1660 and has devoted the rents and other income of the estate to charitable purposes for more than 450 years.

2. In these proceedings the applicant, Trinity Church Square Freehold Limited, is the nominee purchaser entitled to acquire the freehold interest in three adjoining town houses (now converted into flats) at 4-6 Trinity Church Square from the Corporation under Chapter I of Part I of the Leasehold Reform, Housing and Urban Development Act 1993.

3. On 7 March 2016 the nominee purchaser applied to the First-tier Tribunal (Property Chamber) under section 24(1) of the Act for the determination of certain terms of the proposed acquisition which the parties were unable to agree. Such applications are normally determined by the First-tier Tribunal but the application in this case was transferred to the Upper Tribunal under rule 25 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules because it raises an issue of principle on which the First-tier Tribunal is bound by a decision of this Tribunal which the respondents wish to argue was wrongly decided.

4. At the rear of 4-6 Trinity Church Square is a garden which the lessees of flats in the building are entitled to use under a licence contained in their leases. It is an express term of the licence that it may be revoked by the Corporation at any time. It is agreed that on the transfer to the nominee purchaser of the freehold in the building the Corporation will retain the freehold of the garden, subject to the right of the lessees to continue to use it. The main issue now separating the parties is whether the rights to be granted over the garden are to continue to be revocable, as the Corporation proposes, or are to become irrevocable, as the nominee purchaser seeks. There are also some other small issues on the detailed terms of the transfer, including whether the Corporation should continue to have the power to make regulations concerning the use of the garden.

5. The main issue arises because section 1(4)(a) of the Act entitles the Corporation to retain the freehold of the garden if it offers in lieu such “permanent rights as will ensure that thereafter the occupier of the flat ... has as nearly as may be the same rights” as those enjoyed when the process of acquisition commenced.

6. In *Fluss v Queensbridge Terrace Residents Limited* [2011] UKUT 285 (LC) the Tribunal (Judge Huskinson) considered that rights of a revocable nature could not satisfy the requirement of section 1(4) to confer “permanent rights”. In *Snowball Assets v Huntsmore House (Freehold) Ltd* [2015] UKUT 0338 (LC) Judge Huskinson was asked to reconsider the decision in *Fluss*; in view of his decision on other aspects

of the appeal it was unnecessary for him to do so, but he undertook the exercise of reconsideration nevertheless and adhered to his previous view.

7. In this application Mr Anthony Radevsky, who appears for the Corporation, has invited the Tribunal not to follow its decision in *Fluss*. Mr Piers Harrison, who represents the nominee purchaser, has argued that *Fluss* was correctly decided and should be followed.

The statutory scheme

8. Chapter I of Part I of the 1993 Act confers on the qualifying tenants of flats in premises to which the provisions apply the right to have the freehold of those premises acquired on their behalf by a nominee at a price determined in accordance with the Chapter. This right is designated the right of collective enfranchisement by section 1(1) of the Act. The premises to which the right applies consist of a self-contained building or part of a building satisfying a more detailed description in section 3.

9. Where the right of collective enfranchisement is exercised in relation to such premises (referred to as “the relevant premises”), section 1(2)(a) provides that the qualifying tenants shall additionally be entitled to have acquired on their behalf “the freehold of any property which is not comprised in the relevant premises but to which this paragraph applies by virtue of subsection (3).” Section 1(3) then identifies two types of property to which the right of collective enfranchisement also extends, as follows:

“(3) Subsection (2)(a) applies to any property if at the relevant date either—

- (a) it is appurtenant property which is demised by the lease held by a qualifying tenant of a flat contained in the relevant premises; or
- (b) it is property which any such tenant is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises (whether those premises are contained in the relevant premises or not).”

10. The property described in section 1(3)(b) is property which is not demised by the lease held by any qualifying tenant, but over which the lease confers rights exercisable by the tenant in common with others. The right to acquire the freehold of property of that type is qualified by section 1(4), which is the focus of these proceedings. It provides:

“(4) The right of acquisition in respect of the freehold of any such property as is mentioned in subsection (3)(b) shall, however, be taken to be satisfied with respect to that property if, on the acquisition of the relevant premises in pursuance of this Chapter, either—

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

11. At this stage we note four points about section 1(4).

12. The first is that it entitles the freeholder to offer, in lieu of the acquisition of the freehold of certain land, alternative rights which are to be taken to satisfy that right of acquisition. The land in respect of which this right of substitution is available to the freeholder is land over which at least one qualifying tenant enjoys rights under the lease of their flat, in common with the occupiers of other property. There is no such right of substitution in relation to the appurtenant property referred to in section 1(3)(a), which is property demised to a qualifying tenant.

13. Secondly, the right to acquire the freehold is only taken to be satisfied where the freeholder of the property over which rights were enjoyed at the relevant date grants “such permanent rights” as will ensure that thereafter the occupier of the flat has “as nearly as may be the same rights as those enjoyed” on the relevant date. The substitute rights need not be rights over the same property as the rights conferred by the qualifying tenant’s lease, nor need they be identical rights; they must be “as nearly as may be the same”. That slightly awkward expression suggests a requirement of equivalence, so that the new right must be as close to being identical to the original right as it is possible to achieve. Yet the rights are also referred to as “permanent”. These characteristics of permanence and equivalence are in apparent opposition where, as in this case, the rights originally enjoyed by the qualifying tenant were revocable at the will of the landlord.

14. Thirdly, there appears to be no requirement that the rights must be granted to the nominee purchaser, although they must come into existence on the acquisition of the relevant premises by the nominee purchaser. Section 1(4) specifies the grantor of the rights (the owner of the freehold of the property over which they are to be granted) but not the grantee, who is identified only inferentially through the description of the consequences of the grant; it is to be such a grant as will ensure that “thereafter the occupier of the flat” has as nearly as may be the same rights as those enjoyed by the qualifying tenant on the relevant date. If there was no qualifying tenant of a particular flat on the relevant date there is no need for any grant to enable equivalent rights to be enjoyed permanently after the acquisition of the freehold of the building. If there was a qualifying tenant then permanent rights enabling the occupier of the same flat to

enjoy rights equivalent to those in the lease must be granted if the freehold is not to be transferred. By implication the grant is to be to each qualifying tenant whose lease confers rights over the land to be retained, rather than to the nominee purchaser, although in this case the parties have agreed that rights granted to the nominee will be sufficient.

15. Finally, it was common ground between the parties in this case, as was decided by the Lands Tribunal (Mr Peter Clarke FRICS) in *Shortdean Place (Eastbourne) Residents' Association Ltd v Lynari Properties Ltd* [2003] 3 EGLR 147, at [63], that if the permanent rights offered by the freeholder satisfy the requirements of section 1(4)(a), the appropriate tribunal has no discretion to determine that the freehold should be transferred to the nominee purchaser.

16. "The relevant date" referred to in section 1(4)(a) and elsewhere in Chapter I is defined in section 1(7) as the date on which the initial notice claiming to exercise the right of collective enfranchisement was given under section 13 of the Act. Such a notice is required to specify the premises of which the freehold is proposed to be acquired and other information including the proposed purchase price. On receipt of the initial notice the reversioner is required by section 21 to give a counter-notice stating whether or not the right is admitted and, if it is, stating any counter-proposals including (by section 21(3)(b)) any proposals relating to the grant of rights in pursuance of section 1(4).

17. Any terms of acquisition which cannot be agreed are to be determined by the appropriate tribunal on an application made under section 24.

18. Section 34 of the 1993 Act provides for the terms to be included in a conveyance to the nominee purchaser. Except to the extent that any variation is agreed by the parties section 34(9) requires that the conveyance conform to the provisions of Schedule 7. Paragraphs 3 and 4 of Schedule 7 make provision in relation to easements to be granted and reserved on the transfer of the relevant premises. Paragraph 3 provides for the conveyance to include (so far as the freeholder can grant them) such easements of support or light, or for the passage of utilities, over other property "as are necessary to secure as nearly as may be for the benefit of the relevant premises the same rights as exist for the benefit of those premises immediately before the appropriate time." Paragraph 4 provides for the inclusion of rights of way necessary for the reasonable enjoyment of the relevant premises.

The facts

19. Numbers 4, 5 and 6 Trinity Church Square are three converted townhouses now containing ten flats. At the front of the building is a courtyard area below street level, beyond which are vaults beneath the pavement. A central entrance gives access to a communal hallway at the end of which is a door leading to the rear garden. The garden is enclosed and is currently available only to the occupiers of flats in the building. At the back of the garden is a wall through which a door provides an emergency escape route in the event of fire via a passageway to the adjoining Swan

Street. Beyond the wall are gardens or rear yards of other buildings in Swan Street which are also part of the Corporation's estate.

20. Each of the ten flats is let on a long lease in substantially the same terms and includes a plan on which the premises are identified. The expression "the Building" used in the leases is defined in clause 1 in such a way as to include the garden.

21. The maintenance of the garden by the Corporation is a service charge expense. The lessees are granted rights over the garden by clause 7 of the lease as follows:

"The Lessee shall be entitled as Licensee only to use in common with others the garden shown for the purposes of identification only coloured green on the said plan annexed hereto and marked "Plan A" upon the following conditions:

(i) The garden shall be used for recreational purposes and then only provided that no nuisance or annoyance is thereby caused to the other lessees of the flats in the Building

(ii) The Licence hereby granted may be revoked in writing by the Lessor at any time."

22. In each lease paragraph 1 of the First Schedule grants the tenant the following qualified rights in common with others:

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

It is agreed that apart from the power implicitly reserved out of this right, there is no other power enabling the Corporation to make regulations affecting the use of the garden. No regulations regarding the security of the building have yet been made, and none were in force when the tenants' initial notice claiming to exercise the right of collective enfranchisement was given.

23. On 3rd July 2015 the tenants of six of the flats in the building gave an initial notice to the Corporation under section 13 of the Act informing it that they proposed that the nominee purchaser should acquire the freehold of the building (referred to as "the specified premises"), together with the freehold of the garden, the front courtyard, the steps and the vaults ("the additional freeholds"). The notice also sought various rights in connection with the acquisition of the specified premises including a right of way through the gate in the rear wall of the garden and over the passageway leading to Swan Street.

24. By a counter-notice given on 17 September 2015 the Corporation admitted the entitlement of the participating tenants to acquire the freehold of the specified premises but challenged their right to the freehold of the garden. The counter-notice proposed that if they were found to be entitled to acquire the garden, the nominee purchaser should instead be granted such rights as would ensure that thereafter the occupier of each flat would have as nearly as may be the same rights over the garden as they had on the day the initial notice was given, subject to a positive covenant to contribute towards its upkeep. The draft transfer which accompanied the counter-notice proposed a formulation of the necessary rights, but the notice made it clear that the Corporation was prepared to offer whatever rights were necessary to satisfy the requirements of section 1(4)(a) of the Act.

25. Despite the differences apparent in the initial notice and the counter-notice, the parties have been able to reach agreement that the nominee purchaser is entitled to acquire the freehold interest in the vaults, entrances, front areas and the specified premises. It is agreed that the nominee purchaser would also be entitled to the freehold of the garden, but that the Corporation will retain it and will grant in lieu such rights over the garden as the Tribunal determines are required to satisfy section 1(4)(a) of the Act.

26. The parties have also agreed that a purchase price of £440,000 will be payable for the interest to be acquired, including the licence to use the garden, whether that licence is revocable or not and irrespective of the conclusion reached by the Tribunal on the small points of disagreement over the terms of the transfer. We did not investigate in any detail why the extent of the rights to be granted over the garden makes no difference in this case, but we are satisfied that, in principle, the statutory criteria for determining the premium payable by the nominee purchaser in Schedule 6 would be capable of reflecting any difference in value which did exist.

Issues

27. As a result of the agreements reached by the parties the only issues are:

1. Whether the right to acquire the garden should be taken to be satisfied by the revocable licence offered by the Corporation under section 1(4)(a), or whether only an irrevocable right will suffice for that purpose.
2. The precise terms of the transfer concerning the entitlement of the Corporation to make regulations regarding the use of the garden, and one or two other small points.

Issue 1: the construction of section 1(4)(a)

28. This is a convenient point at which to mention the decision of Judge Huskinson, given in this Tribunal in *Fluss*, which is relied on by the nominee purchaser. *Fluss* concerned the sufficiency, for the purpose of section 1(4)(a), of a proposed grant of the right to use amenity land in common with all other persons to whom the

freeholder might subsequently grant the like right, and subject also to regulations made from time to time by the freeholder (no such regulations having been made by the relevant date). Although these limitations on the use of the amenity land were contained in the leases of the flats held by the qualifying tenants, the Tribunal held that their continuation was incompatible with the requirement of section 1(4)(a). The Tribunal reached that conclusion after asking whether, when considering what were the rights enjoyed in relation to the property on the relevant date by the qualifying tenants under the terms of their leases, one should look only at the rights which the tenants actually enjoyed on that date, or additionally at “the frailties of those rights and the ability of other persons to cut down those rights by the exercise of a power in the future” (paragraph 29).

29. At paragraph 36 Judge Huskinson gave the following answer to that question:

“I also am unable to accept [counsel for the freeholder] Mr Webb’s argument that, when analysing the rights enjoyed in relation to the Amenity Land on the relevant date by the qualifying tenants under the terms of their leases, it is necessary to have regard not merely to the rights those tenants actually enjoyed on that date but also to the potential lesser or more restrictive rights that they might in the future (by the exercise of some power against them) be restricted to enjoying. The statute in my view requires an enquiry as at the relevant date (i.e. the date of service of the section 13 notice) of what were the rights enjoyed by the qualifying tenants under their leases on that date. The fact that at some future date they might have enjoyed lesser rights is not relevant. The purpose of section 1(4) is to give to the qualifying tenants rights in substitution for the acquisition of the freehold of the Amenity Land. Also they must be “permanent rights” which will “ensure that thereafter” the qualifying tenants have as nearly as may be “the same rights as those enjoyed in relation to that property on the relevant date”. It is true that under the terms of the flat lease the landlord had the right to lay down regulations for the use of inter alia, the Amenity Land. The landlord had not done so by the relevant date and accordingly as at the relevant date the tenants had the right to use the Amenity Land without being restricted by regulations. Mr Webb’s argument that the rights should be taken with all their potential future frailties does not in my judgment give effect to the express wording of the statutory provision.”

30. Having decided that the critical question was the extent of the tenant’s rights on the relevant date, Judge Huskinson proceeded (in the same paragraph) to test the argument by postulating a case indistinguishable from this one, and reached a clear conclusion:

“Also the matter can be tested in this way. Suppose that at the relevant date tenants enjoyed certain rights but that there was a power at some future date to terminate those rights or greatly to curtail them. It is my view clear that the grant of rights needed to satisfy section 1(4) could not include the reservation of the right to the grantor to exercise these powers of termination or curtailment, because if such powers were included then the rights granted by the freeholder would fail to be “permanent rights” and would fail to “ensure

that thereafter” the qualifying tenants enjoyed as nearly as may be the same rights as those enjoyed in relation to the Amenity Land on the relevant date.”

31. Four years later, in the *Snowball* appeal, Judge Huskinson was asked by Mr Radevsky to reconsider his decision in *Fluss* but, having done so, he concluded that his analysis had been correct. That conclusion was not necessary for the decision in *Snowball* but it adds to the persuasiveness of Judge Huskinson’s reasoning.

32. The Upper Tribunal is not bound by its own decisions, nor by decisions of the High Court: *Gilchrist v RCC* [2015] 1 Ch 183 (a decision of the Upper Tribunal (Tax and Chancery Chamber)). Nevertheless, in keeping with the practice of the High Court, and as the Tribunal explained in *Dorset Healthcare NHS Trust v MH* [2009] UKUT 4 (AAC) at [37], in the interests of judicial comity and to avoid confusion on questions of legal principle a single judge of the Tribunal normally follows the decisions of other single judges, but is not bound to do so. (*Dorset Healthcare* was heard in the Administrative Appeals Chamber where there is a regular practice of tribunals of three judges sitting to resolve issues of principle on which judges sitting alone have previously disagreed; there is no such practice in the Lands Chamber, although there is a strong expectation that a decision which expressly addresses previous conflicting decisions of the Tribunal should be followed in future).

The nominee purchaser’s submissions

33. On behalf of the nominee purchaser Mr Harrison submitted that in order to satisfy the requirements of section 1(4) the rights offered by the freeholder must be permanent rights. “Permanent” meant “continuing indefinitely without change” and was the opposite of “temporary”. A revocable licence was not a permanent right, it was temporary. The same requirement of permanence was apparent from the direction that the new arrangements must “ensure ... thereafter” the enjoyment of the rights by the occupier; this was language suggestive of a continuing state of affairs and was inconsistent with revocability. The requirement of permanent rights was in accord with the purpose of the statute which, Mr Harrison submitted, was to enfranchise, or free, tenants from the restrictions of their leasehold status. For tenants to be left only with rights which were capable of being revoked unilaterally by a former freeholder was not consistent with that purpose.

34. Mr Harrison also pointed out that the reference in section 1(4)(a) to permanent rights was not repeated in the provisions of Schedule 7 dealing with the grant and reservation of rights over or in favour of neighbouring property retained by the transferor where previously there were only leasehold easements. Under paragraph 3 of Schedule 7 the nominee purchaser would be entitled to acquire together with the freehold of the building a right to the passage of water and other utilities which would continue permanently although paragraph 3 does not use the expression “permanent rights” (only “rights”). Mr Harrison suggested that that supported the idea that the inclusion of the adjective “permanent” in section 1(4)(a) was intended to denote something more than that the rights would be of a freehold nature i.e. it was intended that they would be indefeasible as opposed to revocable.

35. The use of the phrase “as nearly as may be” recognised that in some cases the rights granted would not be identical to those previously enjoyed, but would have to be adapted to meet other requirements. The rights enjoyed by the qualifying tenants are the starting point for the formulation of the new grant, but any aspect of those rights which is inconsistent with the requirement of permanence must yield to it. In this case there was an incompatibility between the requirement of permanence and the revocability of the original licence to use the garden. Mr Harrison submitted that permanence must prevail.

36. Mr Harrison also submitted that the future use of the garden could not be subject to a power on the part of the Corporation to make regulations. No such regulations had been made by the relevant date and, in any event, on a proper construction of paragraph 1 of the First Schedule the power to make regulations was referable to the easement granted to use the entrance and other parts of the Building to gain access to the flat and had no application to the use of the garden.

The Corporation’s submissions

37. On behalf of the Corporation Mr Radevsky restated the argument which had failed, in *Snowball*, to persuade Judge Huskinson to depart from the view he had formed in *Fluss* that a revocable right could not satisfy the requirement of permanence imposed by section 1(4). He nevertheless explained that, although the Corporation’s primary position was that the grant of a revocable licence over the garden reflected what the tenants had at the relevant date under their leases, and satisfied section 1(4), if the Tribunal disagreed and found that a non-revocable right was required to satisfy the sub-section, then that right was offered.

38. Mr Radevsky submitted that the purpose of section 1(4) was clear from its wording. It was to permit the freeholder of land over which the qualifying tenants only have rights (as opposed to having additional land demised to them) to retain that land. The freeholder could do so by granting equivalent rights to those enjoyed under the flat leases. The rights granted must be permanent, but the reason for using the word ‘permanent’ was not to alter the characteristics of the rights, but was to cater for the fact that, under the flat leases, the tenants’ rights were temporary, in that they would last only for the duration of the leases themselves. Some of the flat leases in this case have unexpired terms of as little as 42 years. By acquiring the freehold through their nominee, the participating tenants would be able to grant themselves new long leases ‘without restriction as to length of term’, to use the wording in Schedule 6, paragraph 4(2)(a) of the Act. The requirement that the rights to be granted by the freeholder must be permanent was to free the tenants of that restriction and to enable them to enjoy the same rights without limit of time. But the quality of the rights granted to the qualifying tenant was to remain unaltered, so far as possible, as they were to be “as nearly as may be the same rights as those enjoyed ... under the terms of his lease”. The most important characteristic of the rights to use the garden was that they were revocable, and to convert them into irrevocable rights was to change them fundamentally.

39. Mr Radevsky described the Tribunal's decision in *Fluss* as "controversial" and pointed out, quite appropriately, that only one side had been represented in *Fluss*; it is undoubtedly the case that for an appeal to be argued on both sides reduces the risk of error. That risk was, of course, fully mitigated in *Snowball* where both sides of the argument were expertly represented.

Discussion and conclusion

40. We have not found the interpretation of section 1(4) straightforward, but on the main issue we have arrived at the same conclusion as the Tribunal in *Fluss*, although, as we shall explain, the issue was not decided in that case.

41. Section 1(4)(a) requires, on the one hand, the grant of permanent rights, and on the other, that those rights should be as nearly as may be the same rights as are enjoyed by the qualifying tenant under their lease on the relevant date. In this case those requirements are difficult to reconcile. On first considering the notion of a right which is both permanent and terminable at will it appears difficult to grasp, at best an oxymoron and at worst a nonsense. But on further reflection, although elusive, the concept of a right which is both permanent and revocable is not so different from some perfectly common legal rights as to be capable of being dismissed out of hand. A lease which includes a right of forfeiture on breach of covenant is not prevented from being a term of years certain, nor would it be incorrect to describe a twenty year lease with a break clause exercisable at the will of the landlord as a twenty year lease. In each case the term is certain and of the agreed duration but is liable to be brought to an end on the satisfaction of a condition; in the same way, on Mr Radevsky's argument, an indefinite licence to use the garden which may be revoked could be said to be a permanent right notwithstanding its liability to be terminated on satisfaction of a condition (service of notice by the Corporation). But the question remains whether section 1(4)(a) contemplates that rights of that sort will be sufficient.

42. In trying to resolve the tension between the competing requirements of permanence and equivalence we begin by noting the context in which the rights in question are to be granted. Section 1(4)(a) is an alternative to the right of acquisition of the freehold of any property which qualifying tenants are entitled under their leases to use in common with others. Section 1(4)(b) provides a second alternative in that it contemplates that the freehold of different land may be substituted for that of the property over which the rights are exercised at the relevant date. We consider the fact that the rights to be granted under section 1(4)(a) are to be taken to satisfy the default right of acquisition in respect of the freehold provides an important indication of the extent of those rights. It is also relevant that the other means of securing the acceptable continuation of equivalent rights is by the acquisition of the freehold of other property, as provided for by section 1(4)(b). Thus, in the default case where no rights are offered, and in the second alternative to it, the qualifying tenant is left with the rights of a freehold owner of the land; we therefore infer that the intention of the statute is not simply that the tenants are to enjoy the same rights as before, but that they are to enjoy them in perpetuity.

43. In *Snowball* the Tribunal accepted the submission of leading counsel on behalf of the nominee purchaser (at paragraph 49) that:

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

We agree with that submission, on which Mr Harrison also relied.

44. We accept Mr Radevsky’s general point that the requirement of permanence imposed by section 1(4)(a) is a necessary reflection of the fact that the nominee purchaser is to acquire the freehold of the relevant premises in the expectation of granting new long leases to the qualifying tenants of the flats in the building. The tenants’ existing rights, which will last only for the term of their leases, are to be exchanged for new rights of indefinite duration. Nevertheless, we do not consider that the requirement of permanence serves only that function. The rights themselves must be capable of being described as permanent and their enjoyment “thereafter” must be ensured. We are satisfied that to comply with section 1(4)(a) the rights offered must be free of any condition for termination.

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

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

47. There is a third rather technical reason why the conversion of temporary to permanent rights ought not to be regarded as inimical to the statutory scheme. Paragraph 2(1) of Schedule 7 to the Act provides that (unless the nominee purchaser consents or its exclusion is necessary to preserve any existing interest of the freeholder in tenant’s incumbrances) the conveyance of the freehold interest to the nominee purchaser shall not exclude or restrict the general words implied into conveyances under section 62 of the Law of Property Act 1925. As is well known (and fully explained in Megarry & Wade: *The Law of Real Property* (8th edition, 2012) at 28-031), section 62 operates to pass with a conveyance all rights enjoyed

with the land and to convert them into full legal rights, even where, as previously enjoyed, they were precarious rights. Thus in *International Tea Stores Co v Hobbs* [1903] 2 Ch 165, on the conveyance of freehold land without reference to any right of way over an adjoining yard in the ownership of the vendor a revocable permission to cross the yard was converted into a permanent right of way in favour of the purchaser. A right to use a garden (which is capable of being an easement, as the Court of Appeal held in *re Ellenborough Park* [1956] 1 Ch 131), even if granted to the freeholder only by revocable licence would therefore seem capable of conversion into a permanent legal right by the operation of section 62. It should not therefore be thought surprising in principle that, under section 1(4)(a), a revocable licence granted to qualifying tenants to use a garden must be replaced by an irrevocable right in order to meet the requirement of permanence.

48. We have so far not found it necessary to rely on the Tribunal's decision in *Fluss*, but it is clearly supportive. As is apparent from the passages we have cited above (at paragraphs 29 to 30), in *Fluss* the Tribunal was concerned with the question whether the rights over the amenity land were to be susceptible to a power of regulation, where no regulations had been made before the relevant date. The issue of revocation did not arise for decision, as the right to use the amenity land contained in the lease was for the duration of the term. The Tribunal's decision therefore was that, if it was to satisfy section 1(4), the right to use the amenity land could not be made subject to the landlord's power to impose regulations in the future. That decision did not turn on the requirement that the rights should be permanent, but on the need for them to be "as nearly as may be the same rights as those enjoyed ... on the relevant date". Since the rights exercised on the relevant date were not subject to any regulations, the Tribunal considered that they could not be limited by regulations in the future. For the same reason, it could not be open to the freeholder in future to add to the persons whom it might authorise to use the amenity land beyond those who had been authorised to do so by the relevant date (paragraph 37 of *Fluss*).

49. The Tribunal went on to test the argument by asking whether rights which were "subject to a power of termination or curtailment" could satisfy section 1(4). It held that they could not, because the rights granted would not be permanent and would not, as nearly as may be, be the same rights as those enjoyed on the relevant date. Although the decision in *Fluss* is not, in any event, binding on the Tribunal, we do not regard the termination example given at the end of paragraph 36 as part of Judge Huskinson's core reasoning, because the question of revocation did not arise. The decision in *Snowball* did concern supposedly precarious rights, which were said by the landlord to be capable of termination but as it found that the rights could not be terminated, the Tribunal's adherence to its reasoning in *Fluss* was similarly not part of its core reasoning. Those rather technical distinctions do not detract from the respect which is due to the decisions in both cases; they are highly persuasive and for the sake of coherence and consistency we would be strongly inclined to follow them unless we were convinced that they were wrong.

50. For our part we would distinguish between a power to regulate rights and a power to terminate them. Our reasons for finding that revocable rights are not sufficient for the purpose of section 1(4)(a) are the same as Judge Huskinson's,

namely that a revocable right is not permanent. That conclusion does not require any focus on the precise mode of enjoyment of the rights on the relevant date; all that matters is that the right conferred by the lease was one belonging to the qualifying tenant on that date. We consider that too close a focus on the relevant date should not be allowed to detract from the requirement that the rights should, as nearly as may be, be the same rights as those enjoyed under the terms of the tenant's lease. The requirement of equivalence seems to us to mean that rights conferred by the lease should continue to be enjoyed subject to the same restrictions as existed on the relevant date, and subject also to any power existing on that date to regulate the enjoyment of the rights, whether or not the power had yet been exercised. We test that proposition by putting a counter example to Judge Huskinson's. Take the case of qualifying tenants who enjoyed an irrevocable right to use a swimming pool or gym under their leases. If the swimming pool or gym happened to be closed for a day for repairs so that the tenants' rights to use them were temporarily suspended on the relevant date by regulations governing their use, could it really be the intention of the statute that an initial notice given on that day would carry no entitlement to permanent rights under section 1(4)(a)? We think not, since that would leave the tenants with no rights after the expiry of their current leases, which would not be "as nearly as may be" the same as their existing rights on the relevant date, when they had a right to resume their use of the pool and gym in future, once the repairs were completed.

51. It follows that we respectfully disagree with the Tribunal's conclusion in paragraph 36 of *Fluss* on the issue of the continuation of a previously unexercised power to make regulations, although we agree with the example given in that paragraph so far as it relates to the issue of termination. Like Judge Huskinson we also agree with the arguments advanced by leading counsel for the nominee purchaser in *Snowball* (at paragraphs 47(4) and 49 to 51, accepted at paragraph 85).

52. Our conclusion on issue 1 is, therefore, that for the Corporation to avoid the need to transfer the freehold of the garden to the nominee purchaser, the right to use the garden must be irrevocable.

Issue 2: disputed terms of the transfer

53. A number of points of detail in the draft transfer were agreed contingent on our decision on the issue of revocability and we need not refer to them. The remaining issues are very modest.

54. In paragraph 12.1.1 of the draft transfer the nominee purchaser wishes the right to use the garden to be expressed to be for the benefit of "the Transferee, *the tenant and occupiers of the flats within the Property and their successors in title* and all persons authorised by the Transferee." The Corporation wishes the words in italics to be omitted. Mr Harrison submitted that the additional italicised words better reflected the terms of section 1(4)(a), whereas Mr Radevsky pointed out that, without those words, the draft transfer was in a wholly conventional form and should be adopted. We have already noted that the nominee has agreed that the relevant rights are to be granted to it, rather than to the qualifying tenants, but we think Mr Harrison is correct

in suggesting that the conventional form does not properly reflect the requirement of section 1(4)(a). The effect of the acquisition of the relevant premises must be that the occupiers of the flats held by qualifying tenants on the relevant date should be guaranteed the same rights over the garden for the future. On the assumption that each of the flats is occupied by a qualifying tenant the italicised words suggested by the nominee purchaser are an appropriate addition to the draft.

55. The second addition to clause 12.1.1 of the transfer is to make the right to use the garden subject to the same qualification as currently appears in paragraph 1 of the First Schedule to the standard form of lease, namely that the right is without prejudice to the right of the Corporation to make such regulations as may be reasonable with regard to the security of the garden (that being the only part of the Building which will remain in the ownership of the Corporation after the completion of the transfer). For the reasons we have given in paragraph 49 above we consider that the power to make such limited regulations should continue notwithstanding that no such regulations had been made by the time the initial notice was given. We do not accept Mr Harrison's submission that the right to make regulations is restricted to regulating access through the common areas of the Building itself to reach the flat and the garden. Our reading of paragraph 1 of the First Schedule is that the right conferred is a right to use the entrances etc and the garden for all purposes incidental to the occupation and enjoyment of the flat, and that the right is subject to reasonable regulations with regard to the security of the Building (a defined expression which includes the garden).

56. The only other point in dispute was a proviso which the nominee purchaser wished to introduce into the Corporation's new covenant to maintain the garden the effect of which was that access should be through the gate in the rear wall for so long as the land beyond that gate remained within the ownership of the Corporation. The tenants current right to have the garden maintained by the Corporation is not subject to any such restriction, and both the lease and the draft transfer grant the Corporation the right at all reasonable times to enter the building for the purpose of performing its obligations. The introduction of the proposed restriction would not leave the tenants with as nearly as may be the same rights as they enjoyed on the relevant date and it should therefore be omitted from the final form of transfer.

57. The remaining terms of the transfer having been agreed between the parties our conclusions above should now enable them to complete the transaction.

Martin Rodger QC
Deputy Chamber President

A J Trott FRICS
Member Upper Tribunal (Lands
Chamber)

7 November 2016