

# Further insights

*The decision in Ackerman has clarified the position of head lessees making a claim for a lease extension, as Lucy Barber finds out*



Lucy Barber is a solicitor in the leasehold enfranchisement department at Forsters LLP

**'It would seem to be the accepted position that when headlessees exercise their right to claim lease extensions of the flats they own, and are qualifying tenants for the purposes of the 1993 Act, that when they make any such claim they will effectively be severing their headlease.'**

In *Howard de Walden Estates Ltd v Aggio & ors* and *Earl Cadogan & anor v 26 Cadogan Square Ltd* [2008] the House of Lords decided that a lessee who holds a lease of property that comprises more than one individual flat (ordinarily a headlease of a building) can make a lease-extension claim of a single flat they own by way of such lease. The decision also provides that when such a claim is made, there is a part surrender of the head lease in so far as it relates to that flat.

In another recent case, *Ackerman & anor v Lay & ors* [2008], which was decided after the *Aggio* case, the Court of Appeal confirmed that a lease extension claim of a flat made by way of a headlease has the effect of severing the headlease.

While *Aggio* is regarded as favouring the tenants' position, as against freeholders, *Ackerman* shows that *Aggio* may, in some circumstances, actually benefit freeholders who are keen to hold on to their ownership of their property.

### The relevant legislation

#### Leasehold Reform Housing and Urban Development Act 1993 (the 1993 Act)

Section 39 of the 1993 Act gives tenants the right to claim a new lease on their flat and provides:

- (1) This chapter has effect for the purpose of conferring on a tenant of a flat, in the circumstances mentioned in subsection (2), the right, exercisable subject to and in accordance with this chapter, to acquire a new lease of the flat on payment of a premium

determined in accordance with this chapter.

- (2) Those circumstances are that on the relevant date for the purposes of this chapter:
  - (a) the tenant has for the last two years been a qualifying tenant of the flat...
- (4) For the purpose of this chapter a person can be (or among those constituting) the qualifying tenant of each of two or more flats at the same time, whether he is tenant of those flats under one lease or under two or more separate leases.

A tenant will be a qualifying tenant for the purposes of this section if the lease they own of the flat was granted for a term of at least 21 years.

If a tenant wants to exercise this right to claim a lease extension of their flat they must serve a notice upon the landlord pursuant to s42 of the 1993 Act in a prescribed form. If the claim is successful the tenant will be granted a new lease of their flat pursuant to s56 of the 1993 Act, which provides as follows:

- (1) Where a qualifying tenant of a flat has under this chapter a right to acquire a new lease of the flat and gives notice of his claim in accordance with section 42, then except as provided for under this chapter the landlord shall be bound to grant to the tenant, and the tenant shall be bound to accept:

- (a) in substitution for the existing lease; and
- (b) on payment of the premium payable under schedule 13 in respect of the grant;

a new lease of the flat at a peppercorn rent for a term expiring 90 years after the term date of the existing lease.

The new lease is therefore granted so that the tenant only has to pay a peppercorn rent from the date of the new lease and the lease granted is for a term equating to their existing lease term plus an additional term of 90 years.

The new lease is granted to the tenant by their competent landlord,

so for two years, a right to make a claim against their landlord to purchase the freehold of their house. A long lease in this instance is a lease for a term of over 21 years (save for some exceptions where the lease is a business lease) and a house for this purpose is defined in the 1967 Act as:

2(1) ... any building designed or adapted for living in and reasonably so called, notwithstanding that the building is not structurally detached, or was or is not solely designed or adapted for living in, or is divided horizontally into flats or maisonettes; and

- (a) where a building is divided horizontally, the flats or other

pursuant to paragraph 5(1) of Schedule 12 to the 1993 Act.

Paragraph 5(1) of Schedule 12 to the 1993 Act (paragraph 5) provides that while a claim pursuant to s42 of the 1993 Act is ongoing, the lease of the flat which is the subject of the claim may not be terminated before three months after the expiry of the claim by:

- (a) effluxion of time;
- (b) in pursuance of a notice to quit given by the immediate landlord of the tenant; or
- (c) by termination of the superior lease.

However, if the claim is not effective for any reason and the lease would have terminated at some point before those three months, the lease is deemed to terminate at the end of those three months.

**Ackerman**

The appellants owned a lease of a building containing five flats (the property). The lease granted a term of 50 years expiring on 29 September 2001. On 24 September 2001, five days before the expiry of the term of the lease, the appellants served a notice (the 1993 notice) for a lease extension of Flat 3 in the property on the respondents who owned the freehold of the property pursuant to s42 of the Leasehold Reform, Housing and Urban Development Act 1993. The respondents rejected the claim on the basis that they wished to redevelop the property pursuant to s61A of the 1993 Act.

On 18 April 2002 (and after the term-expiry date of the headlease) the appellants served a notice pursuant to s8 of the Leasehold Reform Act 1967 (the 1967 notice), claiming the freehold of the property.

The respondents claimed that the appellants were not entitled to exercise their rights under the 1967 Act because:

- at the time of the service of the 1967 notice there was no lease of the property to which the 1967 Act applied, as the lease had expired by effluxion of time on 28 September 2001; and
- the property was not a 'house' for the purposes of the 1967 Act.

*While Aggio is regarded as favouring the tenants' position, as against freeholders, Ackerman shows that Aggio may in some circumstances, actually benefit freeholders who are keen to hold on to their ownership of their property.*

being the landlord who holds at least a 90 year reversion to the tenant's lease. Where there is an intermediate landlord it is quite often the case that they only have a reversion of one or two days to the undertenant's lease so that the competent landlord is the freeholder. It is only the freeholder who can therefore grant the undertenant their new lease. Ordinarily, the intermediate landlord would need to be a party to any new lease being granted to the undertenant. The 1993 Act, however, makes provision in paragraph 10 of Schedule 11 to the 1993 Act for the intermediate lease to be surrendered and then regranted immediately after the new lease has been granted to the undertenant by operation of law. This alleviates the requirement for the intermediate landlord to be a party to the new lease.

**Leasehold Reform Act 1967 (the 1967 Act)**

The 1967 Act gives a tenant who owns a long lease of a house, and has done

units into which it is so divided are not separate 'houses', though the building as a whole may be; and

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

The landlord may object to a lease extension claim on the basis that they wish to redevelop a substantial part of any premises in which the flat is situated and they cannot reasonably do so without obtaining possession of the flat. If the landlord objects to the claim on this basis they have to pay compensation to the tenant for the loss of the flat. Section 61A of the 1993 Act provides, however, that if a lease extension claim is made within the last two years of the term of the lease then the tenant is liable to pay compensation to the landlord if the claim is not effective and the lease which is the subject of the claim is continued

The appellants argued that the lease had not expired by effluxion of time due to paragraph 5 of the 1993 Act. This was on the basis that they contended that paragraph 5 acted in such a way as to keep the lease of the whole building in existence for the duration of the claim, as it was that lease which was the subject of the claim. The lease had not therefore expired by effluxion of time and they were able to validly serve the 1967 notice.

The respondents argued that paragraph 5 only provided for the continuation of the lease in so far as it related to Flat 3, so the lease was in effect severed and only remained in existence in relation to Flat 3 and had expired in so far as it related to the rest of the property.

### Judgment

The Court of Appeal found in favour of the respondents and agreed that the headlease had effectively been severed by the 1993 notice so that, after the expiry date of the lease, the lease only remained in so far as it related to Flat 3 of the property.

The appellants could not rely on paragraph 5 to keep their lease of the property in existence in so far as it related to the property as a whole. Sir William Aldous in his judgment said:

... there is no need to continue the lease in so far as it demises other flats pending determination on one claim for a new lease. In fact to do so could give rise to inequity.

It was also considered that to decide otherwise would mean that the landlord could be kept out of possession of the other flats in the building for several years, which would seem contrary to Article 1 of the first protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The appellants 1967 Act notice was therefore held to be invalid as there was no qualifying lease at the time the notice was served.

### Aggio

In the *Aggio* decision in the House of Lords, Lord Neuberger considered whether or not there was a part surrender of the headlease when a new

lease was granted pursuant to s56 of the 1993 Act. He said that:

Although section 56(1)(a) refers to 'substitution' and does not specifically state that there is a surrender of the head lease in so far as it relates to the flat, it seems to me that, as a matter of property law, there must be. The word 'substitution' in section 56(1)(a) is a simple way of describing in one word the surrender of the head lease in so far as it relates to the flat, and it is not inconsistent with the notion that there is a surrender of the old lease, at least as in so far as it relates to the flat.

It is worth noting that in spite of the House of Lords' decision in *Aggio* still

as opposed to the headlease of the whole building.

Ordinarily, when a tenant makes a lease-extension claim pursuant to the 1993 Act, if there is an intermediate lease and the intermediate landlord is not the competent landlord for the purposes of the 1993 Act, paragraph 10(1) of Part II of Schedule 11 to the 1993 Act provides that there is a surrender and immediate regrant of the headlease. This allows the freeholder to grant the new lease directly to the tenant of the flat, without the intermediate landlord being a party to it. Schedule 11 will not, however, be applicable where a headlessee makes a lease-extension claim of a flat they own by way of the headlease, because the headlease is

*Sir William Aldous in Ackerman said 'there is no need to continue the lease in so far as it demises other flats pending determination on one claim for a new lease. In fact to do so could give rise to inequity.'*

being outstanding when *Ackerman* was heard in the Court of Appeal, there was no suggestion in the *Ackerman* judgment that the respondents could object to the lease-extension claim on the grounds that the appellants, as headlessees, were not able to make a lease-extension claim.

The respondents in *Ackerman* did, however, use *Aggio* to support their contention that the headlease had been, and could be, deemed to be severed as a result of the 1993 notice, and therefore that the lease of the remainder of the property had expired.

### Conclusion

It would therefore seem to be the accepted position that when headlessees exercise their right to claim lease extensions of the flats they own, and are qualifying tenants for the purposes of the 1993 Act, that when they make any such claim they will effectively be severing their headlease. The 1993 Act will then apply to the headlease of the flat only,

instead regarded as severed in so far as it relates to the flat.

If there is any doubt as to whether a claim should be made under the 1993 Act or the 1967 Act and the expiry date of the lease which will be the subject of the claim is looming, then, to protect the tenant's position, notices should be served pursuant to both statutes without prejudice to one another. You will not be able to rely on paragraph 5 to keep your lease in existence for the purposes of making a freehold claim pursuant to the 1967 Act. Section 61A of the 1993 Act should also be borne in mind when making a lease extension claim in these circumstances. ■

*Howard de Walden Estates Ltd v Aggio & ors;*  
*Earl Cadogan & ors v 26 Cadogan Square Ltd*  
[2008] UKHL 44  
*Ackerman & anor v Lay & ors*  
[2008] EWCA Civ 1428