A *Snowball* effect?

Natasha Rees considers a case where precarious rights in leases and the test of the equivalence as set out in the 1993 Act came under the spotlight

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It is often the case in collective enfranchisement claims that issues arise about what can be included within the claim. This is particularly the case with larger developments or blocks where tenants are able to use communal areas and gardens. In a recent appeal to the Upper Tribunal an issue arose concerning communal land that was claimed as additional freehold land by the tenants, but which the landlord wanted to retain in order to redevelop. The landlord sought to retain the freehold of the land in question by offering rights over the land instead, which would allow future redevelopment. The decision, known as *Snowball Assets Ltd v Huntsmore House (Freehold) Ltd* [2015], highlights a problem concerning precarious rights and how these should be dealt with in collective enfranchisement claims.

Statutory provisions

The statutory provisions that govern what property can be acquired under a collective claim are found in s1 of the Leasehold Reform, Housing and Urban Development Act 1993. Essentially, s1(2)(a) allows the tenants to acquire property which is not included in the relevant premises where either of the two conditions in s1(3) apply. These are:

- firstly, if there is appurtenant property demised by the lease held by a qualifying tenant of a flat. Appurtenant property is defined as meaning any garage, outhouse, garden, yard or appurtenance belonging to or usually enjoyed with the flat; and
- secondly, if there is property that the tenant is entitled under its lease to use in common with the occupiers of other premises (whether those premises are contained in the relevant premises or not).

Under the 1993 Act there is no limitation on what the other property might comprise. It can include communal gardens, parking spaces or sports facilities; however, in order to qualify the tenants must have a right to use these areas in common with the occupiers of other premises.

Where acquiring the freehold of the additional premises might cause practical difficulties, s1(4) of the 1993 Act permits the freeholder two alternative methods of satisfying the tenants' right, short of conveying the freehold:

- The first, s1(4)(a), allows the freeholder to grant permanent rights to the tenants over the land in question or any other land.
- The second, s1(4)(b), allows the landlord to acquire the freehold of other property over which permanent rights can then be granted.

If the freeholder offers in the counter-notice rights which satisfy the test of equivalence in s1(4)(a), there will be no right to acquire the freehold of the additional land.

Any freeholder who wants to retain the additional freehold land must apply this two- stage process. First, it is necessary to see whether the right over the land satisfies the test in s1(3)(b), and

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if it does, the freeholder then needs to consider what equivalent rights it needs to offer to satisfy s1(4).

Recent cases

There are a number of recent cases that have clarified how the tests in ss1(3) and 1(4) are to be applied. In a case that came before the Upper Tribunal in 2011, known as *Fluss v Queensbridge Terrace Residents Ltd*, the Upper Tribunal held that in relation to s1(4) it is necessary to consider what rights the tenants have at the relevant date. The decision was very much based on the actual wording of s1(4)(a), which refers to the tenants being granted:

> ... 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 in relation to that property on the relevant date by the qualifying tenant under the terms of his lease.

In a case known as *Cutter v Pry Ltd* [2014], the Upper Tribunal made it clear that if tenants are going to claim the freehold of land they enjoy rights over, the right must be used in common with other tenants at the relevant date. In that case the tenants sought to acquire the freehold of a number of parking spaces, but since these had been allocated to individual tenants at the relevant date they were not used in common and did not satisfy s1(3)(b) of the 1993 Act.

A further question that has arisen is how to deal with precarious rights or rights enjoyed by the tenants that can be terminated or revoked in the future. It appears from these decisions that precarious rights will qualify under s1(3)(b) because it is necessary to consider the right that is enjoyed at the date of the claim, as opposed to what could happen in the future. What is less clear is how the equivalence test under s1(4) should be applied to these precarious rights. If a landlord offers equivalent rights to the tenants, do these have to be the same rights as they enjoy under their leases, or is it necessary to look at the right they enjoyed on the relevant date and offer something more permanent? This is the question that came before the Upper Tribunal in the case of *Fluss* mentioned above. In that appeal HHJ Huskinson made it clear that he felt the equivalence test fell to be made on the relevant date, and the fact that on a future date they might have enjoyed lesser rights was irrelevant. A challenge to this decision was made in the more recent case of *Snowball*.

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The facts in *Snowball*

The case concerned a large building known as Huntsmore House located in Kensington. The development had originally been built in 1990 and included, in addition to the main building, common facilities such as a garden and a leisure complex containing a swimming pool, gym and sauna. When the flats were originally marketed they included these common facilities and under their leases the tenants were granted rights over:

> ... such facilities as might from time to time be allocated for the use and enjoyment for recreational and leisure purposes.

These rights were subject to the terms of the lease and any rules and regulations that the landlord and the management company sought to impose. In addition, the leases contained various provisions that appeared to allow the landlord to redevelop the land contained within the development by altering or adding buildings or by adding additional storeys for the purpose of providing further flats or parking spaces.

In 2013 the nominee purchaser, Snowball Assets Ltd, on behalf of the tenants served notice to acquire the freehold of the building. In the notice it also sought to acquire the freehold interest in the gardens, driveway, parking spaces and leisure complex as additional premises. The freeholder's counter-notice acknowledged the claim and accepted that rights of enfranchisement should be granted in respect of the main building, Huntsmore House, but it challenged the price payable and the right for the nominee purchaser to acquire the additional premises.

The reason behind this was that the freeholder wished to redevelop. It claimed that it intended to demolish the leisure complex and construct additional residential units in its place while constructing a subterranean swimming pool under the existing garden. It argued that it was entitled under the tenants' leases to carry out such a development and was therefore entitled to grant the tenants rights over the land that would allow a future development rather than conveying the freehold in accordance with s1(4) of the 1993 Act. In the alternative, if the tenants were entitled to acquire the additional freehold, it attributed a value of £100,000 to the land to reflect the development potential as opposed to the £10,000 offered by the tenants.

First-tier Tribunal decision

The First-tier Tribunal (FTT) considered the leases in some detail and concluded that the freeholder did not have a general right to redevelop because the right to redevelop was clearly subject to the tenants' right to use the leisure complex. In accordance with a decision known as *Ulterra Ltd v Glenbarr (RTE) Company Ltd* [2008], they determined that the counter-notice granted rights but at the same time took rights away and on this basis they concluded that the rights offered did not satisfy the equivalence test in s1(4). As a result, the nominee purchaser was entitled to acquire the freehold of the additional land. The FTT further concluded that if rights were going to be offered they would only be equivalent rights if the rights granted actually reflected those enjoyed by the tenants on the date that the notice was served. They referred to the decision in *Fluss*. The freeholder appealed and the appeal was

considered by HHJ Huskinson in the Upper Tribunal.

In the Upper Tribunal

The freeholder's position

It was the freeholder's position that the rights granted to the tenants under the leases were precarious rights, and that the rights it enjoyed were extensive rights to redevelop. Their counsel, Mr Radevsky, argued that in order to engage s1(4) it was only necessary for the counter-notice to make clear that s1(4) was relied upon and that adequate rights would be granted to satisfy the equivalence test. Provided that the counter-notice sufficiently engaged s1(4), the tribunal then had jurisdiction to approve the terms of the proposed grant of rights. It was not open to the tribunal to rule that the additional freehold should be acquired by the nominee purchaser. If at the relevant date the tenants only enjoyed precarious rights then under s1(4) they could only require the grant of rights that were no more or no less precarious. He drew attention to the wording of the lease and in particular the fact that common facilities were those 'from time to time provided' and the right to use the facilities was a right 'as might from time to time be allocated'.

The tenants' position

The tenants argued that the FTT had been correct in their construction of the leases and their conclusion that the rights offered in the counter-notice did not satisfy the equivalence test, such that they should acquire the additional freehold land. Their counsel, Mr Johnson, argued that at the date of the initial notice the tenants enjoyed rights to use the leisure facilities. In accordance with the decision in *Fluss*, to satisfy the equivalence test the freeholder should have offered those rights as permanent rights in its counter-notice. He said it was not open to the freeholder to argue that the FTT did not have jurisdiction to decide whether the tenants were entitled to acquire the additional freehold as this was an appeal by way of a review rather than a re-hearing.

Upper Tribunal decision

HHJ Huskinson felt it was necessary to construe the rights under the lease by consideration of the lease as a whole against the factual background that the development had included from the outset a leisure complex specifically for the benefit of the tenants. He concluded that the tenants' right to use the gardens and leisure complex were not precarious rights and that there was nothing in the lease to indicate that there was the right for the freeholder to provide or withdraw this facility. He concluded that the FTT had been correct therefore in finding that the terms of acquisition should include the acquisition by the tenants of the additional freehold land because the rights that had been offered by the landlord did not satisfy the equivalence test in s1(4).

Although it was found in this case that the rights enjoyed by the tenants were not precarious, HHJ Huskinson made it clear that he stood by his decision in *Fluss*. The question of how to deal with precarious rights does, however, remain unsatisfactory as there are situations that can arise where the application of the test in its current form could lead to unwarranted outcomes.

One example of this is garden squares, where tenants of buildings that surround a garden hold, under their leases, a revocable licence to use the garden. A tenant's right to use the garden can be revoked or terminated at any time and regulations can be imposed. If the tenants of one building make a collective claim to the freehold of their building and also claim the garden as additional land, it would appear from *Fluss* that unless the freeholder offers the tenants permanent unfettered rights to use the garden in its counter-notice, it will not be possible to avoid losing the freehold of the garden. Tenants could therefore take advantage of these provisions to convert precarious rights to permanent rights and if the freeholder is not careful in its counter-notice, they could even acquire the freehold of the garden. This would leave the tenants of other buildings in the square either at a disadvantage or without the use of a garden completely.

A further question that has arisen is how to deal with precarious rights or rights enjoyed by the tenants that can be terminated or revoked in the future.

Conclusion

It appears from this decision that the wording of the counter-notice is crucial when considering whether the equivalence test has been satisfied. A freeholder keen to avoid losing additional freehold land must consider carefully what rights to offer in its counter-notice. To ensure that the test is satisfied the counter-notice must make it clear that the freeholder is prepared to grant whatever rights may be required – however extensive they may be – to satisfy the test. A failure to do so may mean that the tribunal will not have jurisdiction to consider what rights are appropriate and will transfer the freehold. If the counter-notice does not offer permanent rights or if it grants rights while reserving rights to the freeholder at the same time, it will fall foul of s1(4). The best way to satisfy the test appears to be to add some form of sweeper clause to the counter-notice making it clear that the freeholder will grant whatever rights are required to satisfy the test.

What is clear is that this point needs to be tested further. In the meantime, freeholders should be wary of granting their tenants rights in their leases that they may want to revoke in future. When faced with a collective claim that includes a claim to additional land, they should be equally careful in deciding what rights to offer in their counter-notice. ■

Cutter & ors v Pry Ltd
[2014] UKUT 215 (LC)
Fluss v Queensbridge Terrace Residents Ltd
[2011] UKUT 285 (LC)
Snowball Assets Ltd v Huntsmore House (Freehold) Ltd
[2015] UKUT 338 (LC)
Ulterra Ltd v Glenbarr (RTE) Company Ltd
[2008] 1 EGLR 103