When is a building self-contained?

Purchasing the freehold of a building can have added complexities when the building concerned is a mansion block. Lucy Barber looks at a case that brings hope to tenants

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'The decision in *Craftrule* has given tenants more flexibility and more opportunities to exercise their statutory rights of enfranchisement. A claim can be made by whatever group of tenants can be put together in a block to satisfy the 50% participation test.'

It is commonly the case that mansion blocks of residential flats are made up of individual terraced sections with their own entrances and common parts. For example, a mansion block may comprise 50 flats but they are made up of five separate terraced sections of ten flats, each section with their own entrance and hallways, etc. For the purposes of maintenance and repair the block will usually be treated as one building of 50 flats and the leases will provide that each tenant in the block pays a fixed percentage towards the service charge. If the tenants of the building wish to exercise their rights to purchase the freehold of the building by way of collective enfranchisement, pursuant to the Leasehold Housing and Urban Development Act 1993 (as amended), there is often a query as to whether the tenants have to enfranchise the whole building of 50 flats or whether they can simply enfranchise their own separate section.

If the tenants of any block of flats wish to enfranchise the freehold of their block, certain criteria must be satisfied:

1) at least two thirds of the total number of flats in the block must be let to qualifying tenants, ie tenants who own leases of their flats that were originally granted for a term of more than 21 years;

2) at least 50% of the total number of the flats in the block must participate in the freehold claim;

3) The internal floor area of the residential parts of the block excluding common parts must make up at least 75% of the total floor area of the block; and

4) The block must be 'self-contained'

What does 'self-contained' mean for this purpose?

Section 3 of the 1993 Act provides that a self-contained building is one that is either:

a) structurally detached (Test A); or

b) not structurally detached but forms part of a larger building (the Small Part) and:

(i) the Small Part is capable of being vertically divided from the rest of the building;

(ii) the Small Part can be structurally redeveloped independently from the rest of the building; and

(iii) the services provided to the Small Part, ie the pipes, cables and conduits serving it, are provided separately to the rest of the building or could be provided to it separately from the remainder of the building without causing 'significant interruption' to the services provided to the occupiers of the rest of the building (Test B).

An obvious example of where Test B would be applicable and satisfied is in the case of two terraced houses. They

are not structurally detached, but it is possible to draw a vertical division between them both and the structure of them is such that you could redevelop either of them independently of the other, and in most cases the services provided to one of the houses will be provided independently of the other.

A more problematic scenario, however, is the example given above where there are five terraced sections of ten flats all contributing to the service charge of the building as a whole. Let us assume for this purpose that the block of 50 flats is all let to qualifying tenants, that the freehold of the building is registered at the Land Registry under one title and 100% of the tenants wish to participate. In this scenario which building or part thereof fulfils the criteria under s3? The building of 50 flats fulfils the s3(a) test as it is structurally detached. Each block of ten flats fulfils the self-contained requirement in s3(b). Should one notice be served in respect of the whole building or alternatively should five notices be served, ie one notice in respect of each of the five terraces?

One possible way around this is to serve five separate notices claiming the freehold of each section and then a further notice without prejudice to the five notices, claiming the freehold of the whole of the building and inviting the landlord to accept the claim of the whole of the building and deny the claim in the five separate notices; administratively and from a cost perspective it is a lot more straight forward to have one claim rather than five.

The service of two notices is a rather laborious task, and assumes that in each terraced section at least 50% of the tenants wish to participate. It also assumes that each of the five terraces have a sufficient number of qualifying tenants, which may not be the case.

Is there an easier way?

This problematic issue has now been resolved by the Court of Appeal in *Craftrule Ltd v 41-60 Albert Palace Mansions (Freehold) Ltd* [2011].

The facts

The property

Albert Palace Mansions is a building of 160 flats made up of eight 'handed pairs', each 'pair' comprising 20 flats. There are therefore 16 terraced sections of ten flats and each terrace has their own entrance and common parts (the sections). Each of the terraces can be divided vertically from the roof down to the foundations and each flat has its own mains services supply: gas, electricity and drainage, etc. There was no communal hot water system and the flats all have their own cable television and telephone lines. The sections therefore individually fulfil test B as each section could be developed independently of the other terraces and the relevant services could be provided independently of the services provided to the occupiers of the rest of Albert Palace Mansions.

The 'handed pair' of adjoining terraces concerned in this case are 41-50 Albert Palace Mansions and 51-60 Albert Palace Mansions; 41-60 Albert Palace Mansions will hereinafter be referred to as 'the property'. The property is not structurally detached, being in the middle of the terraced sections of Albert Palace Mansions, and therefore did not fulfil the Test A.

In the leases of the flats of the property, the service charge was defined by reference to all 20 flats in the property.

The initial notice

Ten flats in the Property served an initial notice, pursuant to the 1993 Act, upon the landlord, Craftrule Limited, claiming the freehold of the Property.

Those ten flats were not equally divided between 41-50 and 51-60. Three of the flats were in 41-50, and seven of the flats were in 51-60. They could not therefore serve two separate notices of claim for each of the 41-50 and 51-60 as there were not at least 50% of the tenants in 41-50 willing to participate being only three out of ten. Craftrule argued that two notices should have been served, ie one in respect of 41-50 and one in respect of 51-60. The tenants argued that simply because a lesser part of the building satisfied test B was irrelevant, the property also fulfilled Test B.

The county court found in favour of the tenants. The landlords appealed to the High Court who reaffirmed the county court's decision. The landlord then appealed to the Court of Appeal.

On appeal

The landlord's arguments

The landlord's arguments on appeal can be summarised as follows:

1) The language of s3 is ambiguous and it was therefore necessary to have regard to Hansard in order to assist in its construction.

2) Section 3 only permitted the enfranchisement of the smallest possible part of a building and therefore two notices should have been served.

3) If s3 was not interpreted in accordance with 2) above, it would permit the majority of tenants in one section of a building, who do not wish to enfranchise, to be subjected to enfranchisement in any event because the minority of tenants who do wish to, can join together with the tenants in another part of an adjoining building, and can then enfranchise both parts.

The Court of Appeal did not agree with the landlord's argument that it was undesirable that a group of tenants could enfranchise a building in which they had no financial interest.

A group of tenants would therefore be able to enfranchise a part of a building against the wishes of the majority of the tenants in part of that part.

The tenants' arguments

The arguments made on behalf of the tenants can be summarised as follows:

- The language of s3 is clear and unambiguous. There is no suggestion that the effect of s3 was

that only the smallest self-contained part of a building could be enfranchised.

- This interpretation of s3 above was further enforced by ss(8), (9) and (10) of s13 of the 1993 Act, and s4(3A) of the 1993 Act, which was a provision inserted into the 1993 Act by the Housing Act 1996.

This is because:

- Subsection (8) provides that once an initial notice has been served a second initial notice may not be served in respect of 'whole or part' of the property, which is the subject of the first notice so long as it remains in force.

- Subsection (9) provides that where an initial notice has been served and then withdrawn, a second initial notice may not be served, which relates to 'the whole or part' of the property specified in the previous initial notice, for 12 months.

- Subsection 10 provides that 'reference to whole or part' in ss(8) and (9) includes 'reference to a notice served which specifies any premises which contain the whole or part of the premises'.

- Section 4(3A) provides that where the freehold of different parts of a building is owned by different persons the right to collective enfranchisement will not apply where 'any of those parts is a self-contained part of a building' for the purposes of s3.

Therefore, ss(8) (9) and (10) make it clear that there may be a scenario where a second initial notice could be served claiming the freehold of 'the whole of part' of property that was specified in a previous initial notice. Also s4(3A) implies that a self-contained part of a building may contain two or more self-contained parts, and the inclusion of this clause would have been an unnecessary amendment to the 1993 Act if it was the case that an initial notice may only be served in respect of an indivisible self-contained part of a building.

The effect of s3 is therefore that a single notice can be given in respect of more than one self-contained part of a building

The decision

The Court of Appeal held as follows:

1) Section 3 could and should be interpreted using the 'literal construction'; the language of the section is clear and unambiguous. It permits the enfranchisement of any self-contained part of a building. There was no need to refer to Hansard in order to interpret s3; the expression 'a self-contained part of a building' is not ambiguous and therefore the court was not entitled to look at Hansard as this can only be used to assist in the construction of legislation where there is ambiguity or the legislation is so obscure it leads to an absurdity. A 'natural meaning' could be given to the words 'self-contained part of a building' so that a self-contained part of a building could include a smaller self-contained part.

Section 3 does not take effect as allowing only the smallest possible self-contained part of a building to be enfranchised.

2) The arguments put forward on the part of the tenants that s4(3A) and ss(8), (9) and (10) of s13 all provided support for the argument that an initial notice may be served in respect of a larger self-contained part of the building, notwithstanding that it contains a smaller self-contained part, which would on its own would also satisfy s3.

These three subsections of s13 clearly envisaged the situation where a second initial notice could be served in place of a previous initial notice, and such second notice could claim the freehold of a different part of the self-contained building to that claimed in the first notice, with both notices being potentially valid. Therefore, s3 does not take effect as allowing only the smallest possible self-contained part of a building to be enfranchised

3) The tenants had a choice under s3 as to which part of a self-contained building they wished to enfranchise.

The Court of Appeal did not agree with the landlord's argument that it was undesirable that a group of tenants could enfranchise a building in which they had no financial interest, eg if all the tenant of flats 51-60 in Albert Palace participated they could also enfranchise 41-50 as part of their claim even if, for example, no tenants in 41-50 wished to enfranchise. It was considered that as Parliament had provided that only 50% of the tenants of a self-contained part of a building needed to participate in order to enfranchise, there could be a situation where 50% of the tenants in a building may be subjected to an enfranchisement even though they are opposed to it. It was said that:

> Parliament thought that there were real advantages to tenants if they were able to enfranchise and those advantages should not be lost merely because there were some unwilling tenants.

Conclusion

The decision in *Craftrule* has given tenants more flexibility and more opportunities to exercise their statutory rights of enfranchisement. A claim can be made by whatever group of tenants can be put together in a block to satisfy the 50% participation test. This will open the way for more enfranchisement claims by tenants of blocks of flats, as they can put together a qualifying number of participants from various part or parts of what was previously thought to be only one building, as long as the necessary qualifying criteria apply. Similarly, tenants can look at separate parts of a building and see if they are able to make a claim for that separate part alone. ■

Craftrule Ltd v 41-60 Albert Palace Mansions (Freehold) Ltd
[2011] EWCA Civ 185