What is included in a claim?

Natasha Rees reviews an Upper Tribunal decision explaining what exactly tenants can include in a claim to collective enfranchisement in addition to the specified premises

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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 which include communal areas, car parking spaces and gardens. In a recent appeal known as *Mark Cutter v Pry Ltd* [2014], the Upper Tribunal have clarified what areas can be included in the claim and also whether the freeholder can vary the terms of the rights offered in lieu of purchase at the tribunal hearing.

The facts

The appeal concerns a building known as Montague House situated in Essex. Montague House is a former period office building converted into a block of six flats. Two of the flats were later joined to become a single flat. Montague House is adjacent to another building known as Arlington House and both buildings form part of the same development. Pry Ltd owns the freehold of both blocks, which are registered under the same title number. In May 2012 three of the tenants of flats in Montague House sought to collectively enfranchise pursuant to s13 of the Leasehold Reform Housing and Urban Development Act 1993. In addition to seeking the freehold of the building they sought to acquire the freehold of the access ways, parking spaces and other land appurtenant to Montague House. In response the freeholder challenged the tenants' rights to acquire these areas and sought to restrict the transfer to the specified premises only.

Statutory provisions

The statutory provisions that govern what property can be acquired under a collective claim are found in s1 of the 1993 Act. 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, where the property is 'appurtenant property' which is demised by the lease held by the 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.

- Secondly, where it is a 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).

This case is concerned mainly with the second condition as it was accepted that the areas were not specifically demised under the leases. Under the 1993 Act there is no limitation on what the other property might comprise. They can include such things as communal gardens or even 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. In this case therefore, both the First Tier Tribunal and the Upper Tribunal had to consider whether the areas claimed fell within s1(3)(b).

Where the right to acquire the freehold of the additional premises might cause problems, 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 landlord to grant rights to the tenants over the land in question. The second, s1(4)(b), allows the landlord to convey the freehold of other property over which permanent rights can be granted.

First Tier Tribunal decision

The issue that the First Tier Tribunal had to decide was whether the tenants were entitled to acquire the freehold of three specific areas, namely the parking spaces, access ways and other land. In their decision they found in favour of the freeholder and concluded that the enfranchisement should be limited to the specified premises only.

The appeal

The tenants were granted leave to appeal on three issues. Firstly the car parking, secondly the garden and finally the issue concerning the terms offered in the counter-notice in lieu of the freehold of the roadways/access ways.

The car parking

The tenants' leases contained the following right in relation to parking:

> The right to park one private motor vehicle in such space forming part of the development as the landlord shall allocate from time to time.

When the notice was served there were six spaces allocated to the tenants of Montague House and four of these were allocated to the participating tenants. There were a further seven spaces nearer to Arlington House that had not been claimed in the notice. In the tribunal the landlord had argued that since the six spaces were specifically allocated to each tenant they were not used in common with the occupiers of other premises. As a result of this, the spaces did not fall within s1(3)(b). The First Tier Tribunal accepted this argument. On appeal the tenants argued that all of the available parking spaces in the vicinity of Montague House should be acquired by the tenants because they formed a 'common pool' from which spaces were allocated. They felt that the fact that the landlord could allocate spaces 'from time to time' reflected this. The landlord argued that there was no common pool and that each tenant had a right to park in a specifically marked and allocated space. They felt that the concept of allocated spaces was the antithesis of property that is used in common.

The Upper Tribunal agreed with the landlord that the parking spaces did not fall within s1(3)(b) of the 1993 Act because each allocated space was not used in common with the occupiers of other premises. They also rejected the contention that there was any unfairness to the tenants.

The garden

Another area claimed by the tenants was a garden area that surrounded both properties and which was described as an 'ornamental or decorative garden'. The leases contained a specific prohibition that prevented the tenants from entering upon any part of the development other than their allocated parking space and any road or pathway. Therefore it was not possible for the tenants to enter onto or use the garden.

The landlord argued simply that since it was not possible for the tenants to use the garden the area could not be used in common with occupiers of other premises, and consequently it was not an area that fell within s1(3)(b) and should be excluded from the claim. The tenants raised an interesting and rather unusual argument relating to use. They claimed that although the garden was not used physically it was used by the tenants visually. They contended that in the case of this ornamental garden there was clearly a common 'visual amenity' for which the tenants were required to pay a service charge and as such it fell within s1(3)(b).

The Upper Tribunal decided that the garden area did not fall within s1(3)(b) because there was a specific prohibition in the leases which prevented the tenants making use of the gardens in the usual meaning of the word and that the lease provisions should prevail.

The offered terms issue

In their original counter-notice the landlord had rejected the claim to the roadway leading to Montague House on the basis that it was a communal access way that could not be separated from the current freehold. At a later date the landlord offered rights in lieu of the freehold in a draft transfer. The tenants claimed that the right of way had not been offered in the counter-notice and that when the right had been offered it was not adequate because it did not contain a reasonable provision. At the hearing before the First Tier Tribunal the landlord had sought to add the word 'reasonable' to the draft wording in the transfer, which was accepted by the tribunal even though the tenants argued it was too late.

The Upper Tribunal agreed that the rights offered were adequate and that the LVT had jurisdiction to allow an amendment to the proposed wording at the hearing pursuant to its discretion under s91(2) of the 1993 Act.

Conclusion

This appeal illustrates the difficulties that can be encountered when seeking to enfranchise large developments. Tenants not only have to decide whether their building is self-contained but also what land they can acquire in addition to the specified premises. This can be complicated where two or more buildings share common facilities. In deciding what land can be acquired it is important to ensure that either it is an area demised under the tenants' leases and used and enjoyed with the flat or it must be an area that is used in common with occupiers of other premises. Tenants should also be aware that rights over the land may be offered by the landlord to prevent a transfer of the freehold.

One example of the complexities that can arise is in relation to shared boilers. It has been held that where the tenants of two separate buildings have a right to receive a supply of hot water from a shared boiler, the boiler itself does not fall within s1(3)(b). This is because it is the landlord rather than the tenant that has actual use of the boiler in fulfilling its obligations under the leases. The tenants only have a shared right to receive hot water. Whether tenants have a right to use an area or whether the area is used in common with others will depend entirely on the wording of the leases. Practitioners should ensure that they check the terms of the leases carefully before deciding what additional land can be claimed. ■

Mark Cutter & ors v Pry Ltd
[2014] UKUT 215