A question of contract or estate?

Natasha Rees examines a case that considers the status of a tenant where the lease is assigned in parts without the knowledge of the landlord

Natasha Rees is a partner at Forsters

On 2 November 2011, the Court of Appeal gave judgment in *Smith & Anr v Jafton Properties Limited* [2011]. The judgment relates to a legal issue arising out of a collective enfranchisement claim under the Leasehold Reform Housing & Urban Development Act 1993. Although it is primarily concerned with qualification under the 1993 Act it considers in some detail the status of a tenant where a lease is assigned in part and contains a useful analysis of the common law position relating to privity of estate.

The facts

The appeal concerns a building situated in the City of London comprising four flats, a lower ground storage area and some common parts. In 1926 the then-freeholder granted a lease of the whole property for a term of 99 years. The lease was in a fairly standard form but contained no express covenants against assignment or underletting.

In October 2004, a company called City Apartments Ltd acquired the lease. At that time, the building was in a dilapidated state and the directors of City Apartments, Mr Smith and Mr Dennis, set about renovating the building and creating four flats, one on each floor. Once the works had been completed they executed three transfers of separate parts of the building. Flats 1 and 2 together with some storage space were transferred to Mr Smith. Flats 3 and 4 together with some storage space were transferred to Mr Dennis. The remainder of the building, that mainly comprised common parts, was transferred to them jointly.

The transfers apportioned the yearly rent payable under the lease so that individually the tenants each paid £34 in respect of their two flats and jointly they paid £17 in respect of the common parts. The landlord did not consent to the transfers and refused to accept separate payments in respect of the rent. Mr Smith and Mr Dennis were registered at HM Land Registry as proprietors of their respective leasehold interests. At entry two of the property register, there is a note that states 'the lease includes other land'. At entry four there is reference to the transfers and a statement that the rent was thereby 'informally apportioned'.

In July 2009, Mr Smith and Mr Dennis made a collective claim for the freehold of the building by serving an initial notice under s13 of the 1993 Act. The landlord served a counternotice disputing the claim for three reasons. The first of these reasons was that Mr Smith and Mr Dennis were not 'qualifying tenants' under the 1993 Act. The county court heard this issue as a preliminary issue and decided it in the landlord's favour. The issue then came before the Master of the Rolls, Lewison LJ and Aikens LJ in the Court of Appeal.

The issue

The landlord claimed that Mr Smith and Mr Dennis were joint tenants of all four flats and, since they were tenants of more than four flats, they were qualifying tenants of none of them. Mr Smith and Mr Dennis claimed that they were sole tenants of two flats each and thus had a sufficient number of flats to qualify for a collective claim.

The landlord's submissions

Counsel for the landlord relied heavily on a Court of Appeal decision *Lester v Ridd* [1990] and the judge at first instance accepted his arguments. This case concerned the Leasehold Reform Act 1967, and a house that was

'An assignment of part of the leased property by which the property is physically severed has the effect that the holder of each severed part has privity of estate with the landlord in respect of that part.'

originally let with agricultural land. Under the 1967 Act it is not possible to acquire the freehold of a house that is comprised in an agricultural holding. The definition of an agricultural holding is contained in s1 of the Agricultural Holdings Act 1986 that provides:

> (1) In this Act 'agricultural holding' means the aggregate of the land (whether agricultural land or not) comprised in a contract of tenancy which is a contract for an agricultural tenancy.

The Act specifically refers to the fact that it relates to the whole of the land comprised in the contract.

The lease in that case had been assigned in part without the knowledge or consent of the landlord. The house and five acres of non-farming land were transferred to the Mr and Mrs Lester and the remaining 18 acres of farming land to their son. Mr and Mrs Lester then served a claim for the freehold under the 1967 Act. The judge in that case decided that the deed of partition that had been used to transfer separate parts of the land did not have the effect of imposing on the landlord two agricultural holdings with separate tenants of each holding. He concluded that there was one agricultural holding which was, therefore, excluded from enfranchisement.

An estate in land could be transferred independently of the contract that it created and it is also possible to sever obligations in an original tenancy and apportion them between parts of the property comprised in the tenancy.

The landlord's counsel stated that the facts in that case were very similar to the situation in this appeal. The lease in that case also contained no prohibition on assignment and the landlord was unaware of the partition until it had taken place. He stated that it was the lack of the landlord's concurrence in the assignment that was fatal to the tenants' arguments in that case.

The tenants' submissions

Stephen Jourdan QC on behalf of the tenants submitted that the judge had misunderstood and misapplied *Lester v Ridd* [1990]. Under the Agricultural Holdings Act 1986 when defining an agricultural holding it is necessary to look at what the whole of the land under the tenancy is being used for. The 1993 Act does not use the concept of a 'holding' defined by reference to what the whole of the land is being used for. It uses the concept of a 'flat' and requires consideration of who is a tenant under a long lease.

The tenants' counsel referred to the case of *City of London Corporation v Fell* [1994]. He stated that there were two

aspects to a lease which created both a legal estate and a contract. The essence of a legal estate is that it confers the right of exclusive possession against the whole world. The assignment of part of the demised premises vests the legal estate in respect of that part and therefore the right to exclusive possession of that part in the assignee. As a result of this, following the assignment, the legal estate (or the right to exclusive possession during the term) in flats one and two was vested in Mr Smith and not Mr Dennis and vice-versa in respect of flats three and four.

Analysis of the common law

Lewison LJ, who gave the leading judgment, considered in some depth the position at common law where a lease is assigned in part. He referred to the case that the tenants' counsel had raised of *City of London Corporation v Fell* [1994] and compared the contractual lease or tenancy with the relationship of landlord and tenant that it created. At common law he felt it was clear that an estate in land could be transferred independently of the contract that it created and that it was also possible to sever obligations in an original tenancy and apportion them between parts of the property comprised in the tenancy. He concluded that an assignee only has privity of estate as regards the parts of the leased property of which he is assignee. As a result of this, it followed that the estate itself has been severed.

Lester v Ridd

Lewison LJ distinguished this case on the grounds that the statutory focus of attention was on the contract of tenancy rather than on the estate in land or the status of the holder of the estate. The question that had to be answered in *Lester v Ridd* was whether two contracts of tenancy had been created. Since no contract of tenancy could have been created without the landlord being a party to the contract it followed that there remained only one contract of tenancy.

He concluded that an assignment of part of the leased property by which the property is physically severed has the effect that the holder of each severed part has privity of estate with the landlord in respect of that part. This meant that at the date of the claim Mr Smith was the tenant of two flats and Mr Dennis was the tenant of two flats.

The 1993 Act

At the end of his judgment, Lewison LJ returned to the wording of the 1993 Act and considered whether it altered the common law position. He referred to s101(1) of the 1993 Act which confirms that 'lease' and 'tenancy' can be used interchangeably.

He felt that this meant the 1993 Act (unlike the Agricultural holdings Act 1986) was concerned with tenure (or status) rather than contract. As a result, references in s101(3) of the 1993 Act to 'a lease held by him under which the demised premises consist of or include a flat' referred to an estate in land consisting of or including a flat.

The landlord's counsel had also pointed out that there were some operational difficulties that would arise if Mr Smith was regarded as the tenant of flats 1 and 2 and Mr Dennis the tenant of flats 3 and 4. Lewison LJ, however, felt that these anomalies were not sufficiently compelling to amount to an implied restriction.

Since he could not find anything in the definitions in the 1993 Act that displaced his conclusion at common law he allowed the appeal and determined that Mr Smith and Mr Dennis were qualifying tenants of the two flats that they owned.

Conclusion

The case does turn to a large extent upon its own facts. It is unusual for a head lease of a large building to contain no covenants against assignment or under letting. The tenants also acquired the lease when it had less than 21 years left to run so it was not possible to grant Mr Smith or Mr Dennis a sub-lease that would have qualified under the 1993 Act. However, although the facts were unusual, the decision will provide tenants with a wider opportunity to enfranchise. Where a tenant holds a lease of a building that was originally granted for more than 21 years but that has fallen below this threshold, it may be possible, subject to any restrictions in the lease, to assign parts of the lease relating to different flats to different owners and then to make a collective claim for the freehold. ■

City of London Corporation v Fell
[1994] 1 AC 458
Lester v Ridd
[1990] 2 QB 430
Smith & Anr v Jafton Properties Limited
[2011] EWCA Civ 1251

The statutory framework

The relevant provisions are set out in ss3, 5 and 101 of the 1993 Act.

Section 3
Section 3 of the 1993 Act provides that the right to enfranchisement 'applies to any premises if:

- they consist of a self contained building or part of a building;
- they contain two or more flats held by qualifying tenants; and
- the total number of flats held by such tenants is not less than two thirds of the total number of flats contained in the premises'.

Section 5
Section 5(1) provides that a person 'is a qualifying tenant of a flat if he is a tenant of the flat under a long lease'.

Section 5(3) provides that 'no flat shall have more than one qualifying tenant at any one time'.

Section 5(4) states that 'where a flat, for the time being, is let to joint tenants, the joint tenants shall be regarded as jointly constituting the qualifying tenant of the flat'. This means that if the claimants are joint tenants of any flat, they are to be regarded together as a single tenant of that flat.

Section 5(5) provides that where a person is a tenant of more than two flats he will be a qualifying tenant of none of them.

Section 101
Section 101 was also considered to be relevant because it contains a provision that states that 'lease' and 'tenancy' have the same meaning and can be used interchangeably.