Enfranchisement Update

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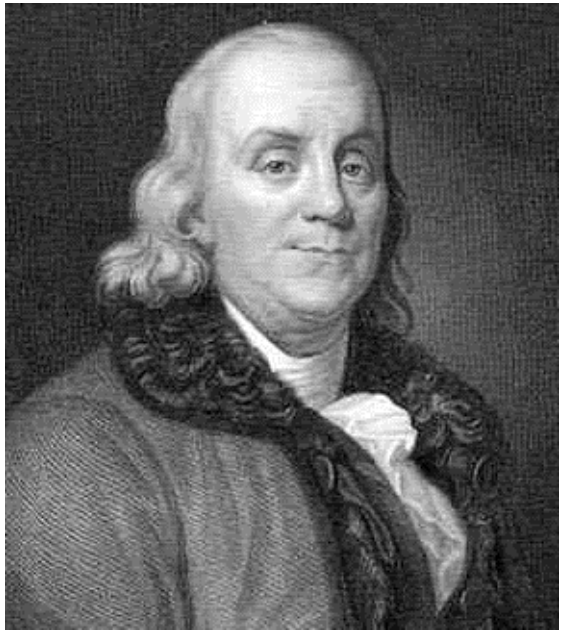
FORSTERS

Enfranchisement Update

"In this world, nothing can be said to be certain, except death and taxes"

…..and that, just when you think you have heard every possible argument that could be made in relation to leasehold enfranchisement, someone will come along with a new one."

Jonathan Harvey, 2010



Benjamin Franklin, 1789

Smith & Anr v Jafton Properties Limited 2011

10-14 Newbury Street

The Facts

- 99 year lease expiring 23 June 2023
- The lease contained no prohibition against assignment
- City Apartments Ltd acquired lease Oct 2004 after the lease had fallen below 21 years
- The tenants renovated building and created four flats 1-4

The Facts

The Transfers

Flats 1 and 2 and Storage	→	**Mr Smith (Rent apportioned £34)**
Flats 3 and 4 and Storage	→	Mr Dennis (rent apportioned £34)
Common Parts	→	Mr Smith and Mr Dennis (rent apportioned £17)

The Claim

- Mr Smith and Mr Dennis served a S13 notice claiming freehold
- Landlord served Counter-notice disputing the claim for three reasons.
- The first reason was that Mr Smith and Mr Dennis were not “qualifying tenants” of the flats in the property.
- This issue was tried as a preliminary issue
- County Court found in favour of the landlord and the tenants appealed

Statutory Framework

Section 3 of the 1993 Act

The right to enfranchisement applies to any premises if:

a) *They consist of a self contained building or part of a building*

b) *They contain two or more flats held by qualifying tenants*

c) *The total number of flats held by such tenants is not less than 2/3 of total flats in the premises*

Statutory Framework

Section 5 of the 1993 Act

(1) a person is a qualifying tenant of a flat if he is the tenant of the flat under a long lease

(3) no flat shall have more than one qualifying tenant at any one time

(4) if tenants are joint tenants of any flat they are to be regarded together as a single tenant of that flat

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

Statutory Framework

Section 101 of the 1993 Act

"Lease" and "tenancy" have the same meaning and can be used interchangeably

The Preliminary Issue

Flats 1 and 2 → A

Flats 2 and 3 → B

Is A the tenant of his two flats and B the tenant of his two flats or

Are A and B tenants of all four flats and therefore qualifying tenants of none of them?

Landlord's Submissions

- Lease comprised a "house" and farming land
- Deed of Partition
- House transferred to Mr and Mrs Lester
- Farming Land transferred to son
- Mr and Mrs Lester claim freehold of "house" under 1967 Act.

Lester v Ridd 1990

Lester v Ridd 1990

- Section 1 Agricultural Holdings Act 1986
- *(1) In this Act "agricultural holding" means the aggregate of the land (whether agricultural land or not) comprised in the contract of tenancy which is a contract for an agricultural tenancy*
- Judge concluded that there was one agricultural holding which was, therefore, excluded from enfranchisement

The Tenants' Appeal

- The Judge had misunderstood and misapplied *Lester v Ridd 1990*
- Agricultural Holdings Act 1986 looks at what the whole of the land under the tenancy is being used for
- 1993 Act uses concept of "flat" and who is the tenant under a long lease of the flat
- *City of London Corporation v Fell 1994*
- The assignment of part of the demised premises vests the legal estate in that part and therefore the right to exclusive possession of that part in the assignee

The Court of Appeal Decision

- At common law an estate in land can be transferred independently of the contract which created it
- It is possible to sever obligations in an original tenancy and apportion them between parts of the property comprised in the tenancy
- An assignee only has privity of estate as regards that part of the leased property of which he is assignee
- It follows that if a person holds only part of the land he is only a tenant of that part.

The Court of Appeal Decision

- In *Lester v Ridd* the statutory focus of attention was on the contract of tenancy rather than the estate in land or status of the holder of the estate.
- The 1993 Act uses "lease" and "tenancy" interchangeably and does not focus on the contract in the way the Agricultural holdings Act 1986 does
- Anomalies caused by this interpretation do not justify an implied restriction

Calladine-Smith v Saveorder Ltd 2011

- Lease extension Claim under 1993 Act
- Tenant served Section 42 notice
- Landlord prepared counter-notice accepting claim and proposing higher premium
- CN sent to correct address, franked and posted
- CN was not received by Tenant
- Tenant claimed no CN in time and entitled to lease upon terms in his initial notice including the premium (S49 1993 Act)

Section 7 - Interpretation Act 1978

- "Where an Act authorises or requires any document to be served by post then unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, **unless the contrary is proved,** to have been effected at the time at which the letter would be delivered in the ordinary course of the post"

Calledine-Smith v Saveorder Ltd 2011

- The tenant's appeal was allowed
- The words "unless the contrary is proved" in Section 7 go with the second part of that section and not the first
- Since it was clear from evidence CN not received within time limit the contrary of the deemed service was proved
- Tenant entitled to a new lease upon the terms of his Section 42 notice.

- “If you want a thing done, go – if not, send”

Benjamin Franklin, 1789

Can we enfranchise??

Lucy Barber

FORSTERS

Craftrule Ltd v 41-60 Albert Palace Mansions (Freehold) Limited 2011

- *Collective enfranchisement*
- *Leasehold Reform Housing and Urban Development Act 1993 (as amended)*
  - *2/3 of flats held by qualifying tenants*
  - *Qualifying tenant – long leaseholder*
  - *50% of flats in the building need to participate*
  - *At least 75% of the floor area must be residential*
  - *Building must be self contained*

Self Contained?

- Section 3 of the LRHUDA 1993
- Structurally detached
- Not structurally detached but forms part of a larger building (small part)
  - Can be vertically divided from remainder
  - Redeveloped independently from remainder
  - Services are separate from remainder

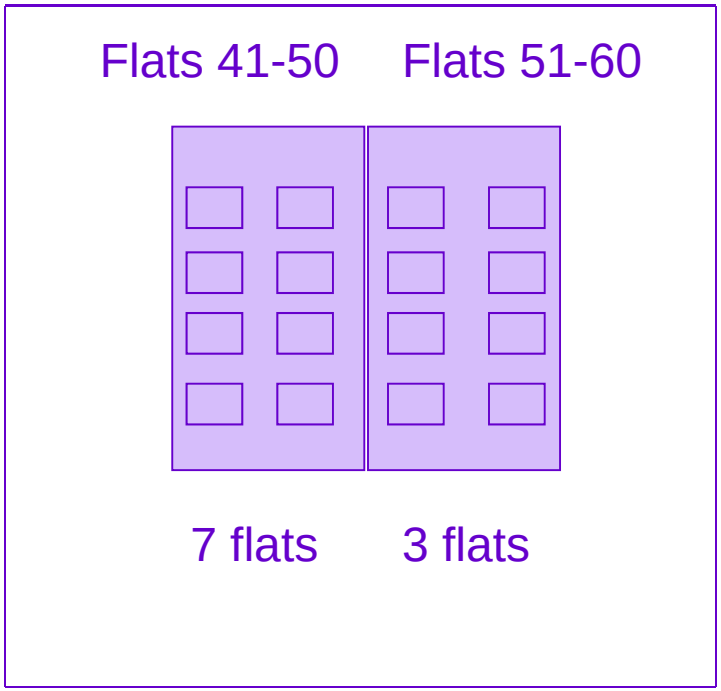
  (test B)

Craftrule Ltd v 41-60 Albert Palace Mansions (Freehold) Limited 2011

- 160 flats
- 16 terraces of 10 flats
- 8 pairs of 20 flats
- Service charges split between 20 flat
- Each terrace could be divided vertically
- Had own services
- Could be independently redeveloped

Initial Notice

•10 Flats participating



Landlords:-

Notice invalid as 2 notices should have been served

Tenants:-

The building to which the notice applied was self contained for the purposes of section 3

Appeal

Landlords' View:-

- Section 3 is ambiguous
- Section 3 meant the "smallest part" of a building
- 2 notices should have been served

Tenants' View:-

- A single notice can be given in respect of more than 1 self contained part of a building
- section 3 is clear and unambiguous
- Section 3 did not mean "the smallest part" of a building
- Section 13(8)(9) and (10) of the 1993 Act supported this view

Section 13

- 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 is 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 which was the subject of the first notice for a further 12 months
- subsection (10) provides that reference to the “whole or part” in ss(8) and (9) includes reference to a notice served which specifies any premises which contains the whole or part of the premises

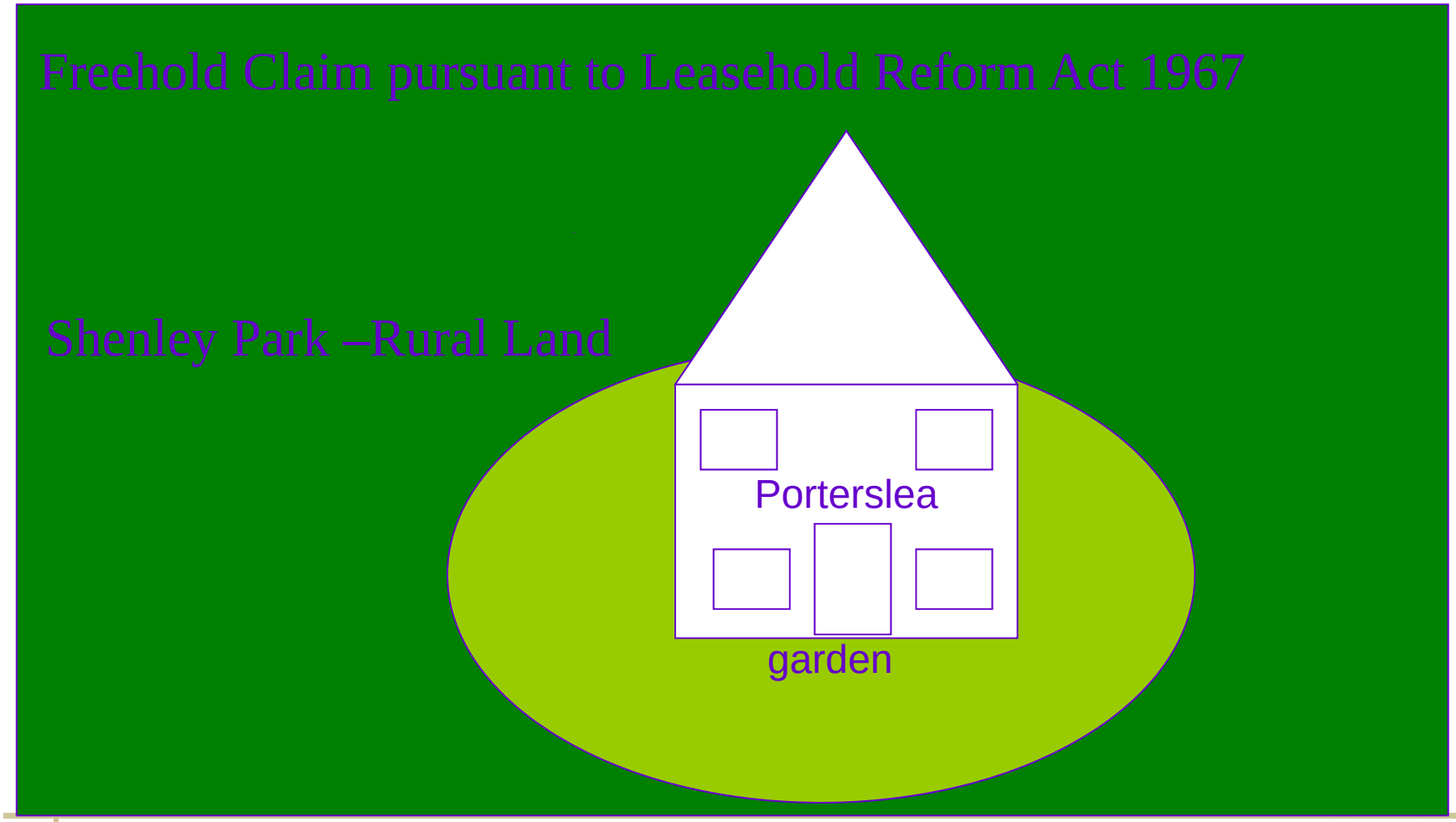
Court of Appeal Held:-

- Section 3 is clear and unambiguous
- The Literal Construction of “self contained” must be applied
- They accepted arguments of tenants regarding section 13 of 1993 Act
- A notice can be served in respect of a larger self-contained part of a building even if it contains a smaller self contained part

Conclusion

- Tenants Choice
- Tenants can choose which parts of their building to enfranchise will be governed by number of participants
- If there are not enough participants in your building you can join together with a neighbouring building and claim the freehold

Hertsmere Borough Council v Caroline Anne Lovat (2011)



Leasehold Reform Act 1967

- Surrounded by Shenley Park
- Rural Area – Housing (Right to Acquire or Enfranchise) (Designated Rural Areas in the East) Order 1997
- Lease for 125 years dated 28 July 1995
- Not a “low rent”
- Granted before Housing Act 1996
- Inserted section 1AA –

  where a tenancy does not fulfil the low rent test a tenant can still enfranchise provided that a is not an “excluded tenancy

Excluded Tenancy - Section 1AA (3)

- a) the house in a “Rural Area”
- b) the freehold of the *house* is owned together with *adjoining land* which is not occupied for residential purposes and has been owned together with such land since 1 April 1997
- c) the tenancy either –
  - was granted on or before that date, or
  - was granted after that date, but on or before the coming into force of section 141 of the Commonhold and Leasehold Reform Act 2002 (26/7/02), for a term of years certain not exceeding thirty-five years”

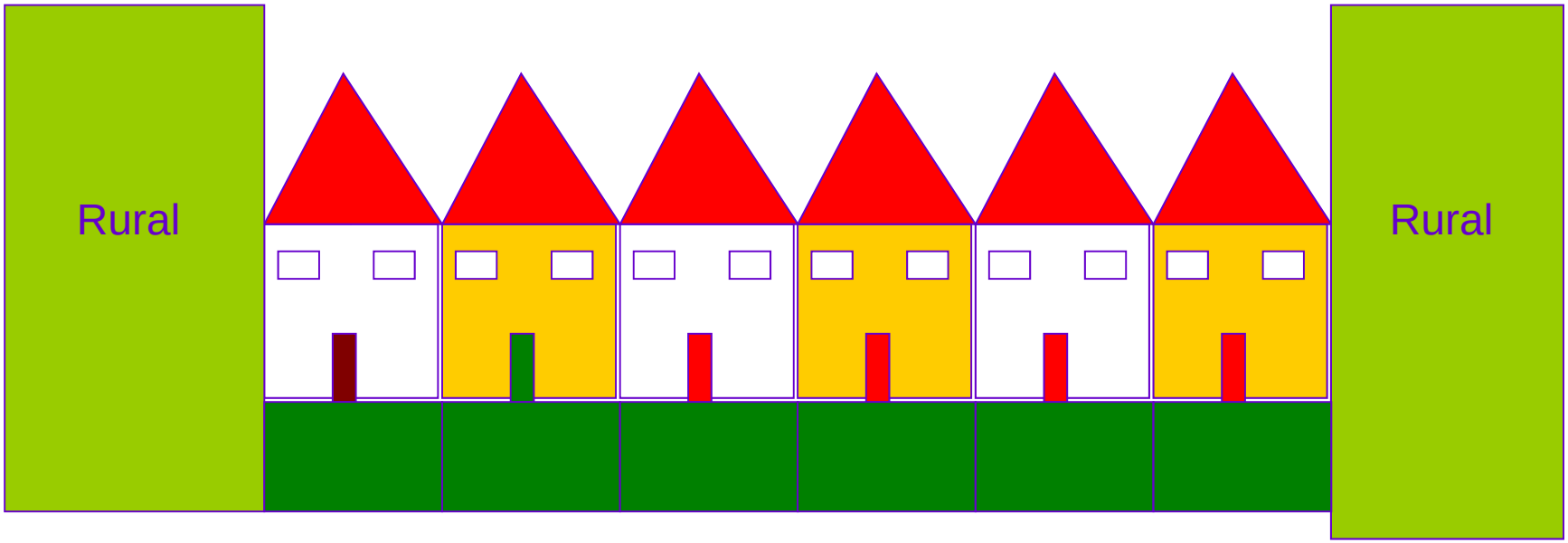
What is a “house”? What is “adjoining Land”?

Tenant’s view:-

- A house means “house”
- Adjoining Land means land “touching” the house
- Porterslea House and garden is used for residential purposes
- Tenancy not excluded

Appeal - Landlord's View

- Parliament made a mistake
- "House" means "house and premises"
- Otherwise it would only apply in too few circumstances
- Creates anomolies


Rural
Rural

Tenants View

What is “adjoining land”

Tenant’s view:-

- Adjoining land means “touching”

Landlord’s view:-

- Adjoining land means “neighbouring”
- A house will in most cases be surrounded by a garden

Adjoining Land

Cave and Another v Horsell (1912) 3KB 533

- A row of 5 shops on the Lime Estate
- Let No 4
- “not let any of the adjoining shops belonging to him on the Limes Estate” of the purposes of a cabinet makers
- Let no 6 which was not next to No 4 to a cabinet maker
- Held - Adjoining in the *context* of the covenant applied to all the shops

Court of Appeal Held - Porterslea

House:-

- Nothing to conclude Parliament made a mistake
- “house” is a defined term in section 1(2) of the 67 Act
- Even if “house and premises” rather than just “house” still results in oddities
- “House” just means house

Court of Appeal Held

Adjoining Land:-

- If house means house could not interpret “adjoining land” as meaning “touching” leads to absurdities
- “the presumption is that Parliament does not intend to enact legislation whose application results in absurdities”
- The exercise of interpretation requires these words to be interpreted in the *context* in which it is used.

Conclusion

- Adjoining land in this context means "neighbouring land"
- The Rural Land "neighbours" Porterslea house
- Therefore the lease of Porterslea house is an excluded tenancy

Summary

- If a lease or more than 21 years and
- Is granted before 1 April 1997 and
- In a Rural Area

or

- A lease of more than 21 years but less than 35 years
- Is granted before 26 July 2002
- In a Rural Area
- Consider - Is it an excluded tenancy? If yes can not enfranchise

- Not to be confused with Agricultural Holding exclusion!

Can we Enfranchise??

Maybe!!

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